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## NOTICES—Application for General Order—

2017 WAIRC 00200

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

**Submissions for the 2017  
WA Minimum Wage**

The WAIRC is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of \$692.90 per week was set in June 2016 to apply from 1 July 2016.

The WAIRC invites interested persons or organisations to make a submission to the Commission on what minimum wage should be set in 2017. The Commission will hear oral submissions on Thursday, 18 and Friday 19 May 2017. The proceedings are open to the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Thursday, 4 May 2017.

Written submissions are welcomed. Any person or organisation who wishes to make a written submission should do so in writing or by email by Thursday, 4 May 2017. Please note that copies of written submissions may be made available to other persons appearing and may be displayed on the Commission's website.

Further particulars may be obtained from the Registry of the WAIRC and from the Commission's website at [www.wairc.wa.gov.au](http://www.wairc.wa.gov.au).

All correspondence should be addressed to the Registrar at the above address or by email to [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au) quoting Matter number 1 of 2017.

DATED at Perth this 3rd day of April 2017.

[L.S.]

(Sgd.) S BASTIAN,  
Registrar.

## FULL BENCH—Unions—Declarations made under Section 71—

2017 WAIRC 00179

APPLICATION FOR APPROVAL OF AN AGREEMENT PURSUANT TO SECTION 71(7)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
FULL BENCH

<b>CITATION</b>	:	2017 WAIRC 00179
<b>CORAM</b>	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS
<b>HEARD</b>	:	THURSDAY, 9 MARCH 2017
<b>DELIVERED</b>	:	MONDAY, 27 MARCH 2017
<b>FILE NO.</b>	:	FBM 5 OF 2016
<b>BETWEEN</b>	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant

CatchWords : Industrial Law (WA) - Application pursuant to s 71(7) of the *Industrial Relations Act 1979* (WA) for approval of financial agreement between State organisation and Federal body - Requirements of s 71 considered - Agreement approved

Legislation : *Industrial Relations Act 1979* (WA) s 71, s 71(6), s 71(7), s 71(8)

Result : Order made

**Representation:**

Counsel:

Applicant : Mr C Fogliani

Solicitors:

Applicant : W.G. McNally Jones Staff Lawyers

**Case(s) referred to in reasons:**

Finance Facilities Pty Ltd v Federal Commissioner of Taxation [1971] HCA 12; (1971) 127 CLR 106

Leach v The Queen [2007] HCA 3; (2007) 230 CLR 1

Mitchell v The Queen [1996] HCA 45; (1996) 184 CLR 333

Re The Western Australian Police Union of Workers [2007] WAIRC 01208; (2007) 88 WAIG 52

*Reasons for Decision*

**THE FULL BENCH:**

**Introduction**

- 1 This application was filed on 19 December 2016 and is made pursuant to s 71(7) of the *Industrial Relations Act 1979* (WA) (the Act). The application seeks the registration of an agreement between the State organisation and the Australian Rail, Tram and Bus Industry Union (the Federal body). The Federal body has a Western Australian PTA Branch which is the counterpart Federal body of the State organisation (the PTA Branch).
- 2 The PTA Branch was created by a rule change to the Federal body on 23 November 2012 ([2012] FWAD 8633). Prior to the creation of the PTA Branch, the Federal body had one Western Australian branch. Since the creation of the PTA Branch, the Federal body has two State branches.
- 3 The State organisation seeks an order that the Full Bench approve the agreement. If approved the agreement will, pursuant to s 71(8) of the Act, be registered as an alteration to the rules of the State organisation.

**Background**

- 4 On 12 May 2014, the Full Bench, pursuant to s 71 of the Act, made declarations that ([2014] WAIRC 00399; (2014) 94 WAIG 696):
  - (1) (a) The Australian Rail, Tram and Bus Industry Union, West Australian PTA Branch is the counterpart Federal body (the counterpart Federal body) of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the State Organisation).
  - (b) The rules of the State Organisation and its counterpart Federal body relating to the qualification of persons for membership are deemed to be the same.
  - (c) The rules of the counterpart Federal body prescribing the offices that exist in the counterpart Federal body are deemed to be the same as the offices that exist in the State Organisation.
- 5 On 17 December 2014, the Registrar of the Commission issued the State organisation with a certificate which declared:
  - (1) that the provisions of the *Industrial Relations Act 1979*, relating to elections for office within an organisation do not, from 25 November 2014, apply in relation to offices in The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch; and
  - (2) that from 25 November 2014, the persons holding office in The Australian Rail, Tram and Bus Industry Union, West Australian PTA Branch, an organisation registered under the provisions of the *Fair Work (Registered Organisations) Act 2009* shall for all purposes, be the officers of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.
- 6 The effect of the certificate is that it enables the offices of the State organisation and the PTA Branch to be held by the same persons without requiring separate elections.
- 7 On 21 May 2015, the State organisation and the Federal body entered into a deed of agreement in accordance with s 71(6) of the Act. Section 71(6) contemplates that an agreement made in accordance with the requirements of s 71, if approved by the Full Bench, will enable a State organisation and a Federal body to make binding administrative arrangements to manage and control the funds and property of the State organisation.

8 Section 71(6), s 71(7) and s 71(8) of the Act provide:

- (6) A State organisation to which a certificate issued under this section applies may, notwithstanding any provision in its rules to the contrary, make an agreement with the organisation of which the State organisation's counterpart Federal body is the Branch, relating to the management and control of the funds or property, or both, of the State organisation.
  - (7) Where a memorandum of an agreement referred to in subsection (6) is —
    - (a) sealed with the respective seals of the State organisation and the other organisation concerned; and
    - (b) signed on behalf of the State organisation and the other organisation by the persons authorised under their respective rules to execute such an instrument; and
    - (c) lodged with the Registrar,
 the Full Bench may, if it is satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising, approve the agreement.
  - (8) Where the Full Bench approves an agreement under subsection (7) the Registrar shall —
    - (a) register the memorandum as an alteration to the rules of the State organisation; and
    - (b) amend, where necessary, the certificate issued to the State organisation under subsection (5) by declaring that the State organisation is, from the date of registration of the memorandum, exempted from compliance with such provisions of this Act and to such an extent as the Full Bench may, having regard to the terms of the memorandum, direct; and
    - (c) notify the State organisation in writing of the matters referred to in paragraphs (a) and (b).
- 9 The agreement is made as a deed and is executed by the common seal of both the State organisation and the Federal body. The seal of the State organisation was affixed by its authorised officers in accordance with r 41.1 of its rules by the signature of its secretary, Paul Robinson, and the president, Craig Dearth. The Federal body executed the deed by affixing its seal by its authorised officers in accordance with r 81 of its rules by the signature of its national secretary, Bob Nanva, and its national president, Phil Altieri.
- 10 Although the agreement is dated 21 May 2015, Mr Paul Robinson, the secretary of the State organisation and branch secretary of the PTA Branch, gave evidence before the Full Bench that amendments were agreed to in 2016 by the parties which led to the parties re-executing the agreement. Subsequent to the hearing before the Full Bench on 9 March 2017, a supplementary affidavit affirmed by Mr Robinson on 13 March 2017 was filed. In his supplementary affidavit Mr Robinson states that:
- (a) he sent a final copy of the agreement to the Federal body by email on 8 December 2016;
  - (b) sometime during the week ending 16 December 2016:
    - (i) he received a copy of the agreement signed by Mr Nanva and Mr Altieri; and
    - (ii) after receiving the document he stamped the seal of the State organisation on page 12 of the agreement and on the same day both he and Craig Dearth signed the agreement.

### The agreement

11 The recitals and the agreed terms are as follows:

- A. The RTBU is an organisation registered pursuant to the FW(RO)A.
- B. The RTBU is divided into branches and in Western Australia has two branches one of which is the PTA Branch the other being the RTBU WA Branch.
- C. All the members of the RTBU employed in Western Australia are in accordance with the RTBU's rules assigned to either the PTA Branch or the RTBU WA Branch.
- D. ARTBIU is an organization registered in the state of Western Australia pursuant to the *Industrial Relations Act WA 1979* (IRA).
- E. The IRA provides that an organization registered pursuant to the FW(RO)A (in this recital ('the federal body') is a counterpart federal body of an organization registered pursuant to the IRA ('registered organization') if members of the registered organization are:
  1. Members, or eligible to be members, of the federal body;
  2. Engaged in the same work, in aspects of the same work, or in similar work as members of the federal body;
  3. Employed in the same or similar work by employers engaged in the same industry as members of the federal body; or
  4. Engaged in work or in industries for which there is a community of interest between the federal body and the registered organization.
- F. All members of the ARTBIU are eligible to be members of the RTBU PTA Branch.
- G. All members of the ARTBIU are employed in the same or similar work by employers engaged in the same industry as that to which eligible members of the PTA Branch are employed.

- H. All the members of the ARTBIU are engaged in the same work or in industries for which there is a community of interest between the ARTBIU and the RTBU PTA Branch.
- I. The RTBU is the counterpart federal body of the ARTBIU pursuant to the section 71(1) of the IRA.
- J. The RTBU is the federal counterpart of the ARTBIU pursuant to section 9A of the FW(RO)A.
- K. The objects of the RTBU are also substantially those of the ARTBIU.
- L. An unwritten administrative agreement exists, and has existed for many years, between the RTBU and the ARTBIU that is directed at reducing demarcation, reducing costs and enhancing efficiency in attaining the objects of the RTBU, and the ARTBIU.
- M. The parties wish to set out in writing terms of the unwritten administrative arrangement that has existed for many years between the RTBU and the ARTBIU in this Deed and to have this Deed approved by the Full Bench pursuant to section 71(7) of the IRA and subsequently have the Deed registered as an alteration to the rules of the ARTBIU by the Registrar.
- N. The parties seeks by that this Deed to, amongst other things:
1. Reduce administrative costs to members assigned to the RTBU WA and PTA branches;
  2. Reduce the replication of services to its members assigned to the RTBU WA and PTA branches;
  3. Reduce the confusion that arises in relation to the two entities providing similar services to dual members; and
  4. Enhance the efficiency and effectiveness of representation of dual members.
- O. The RTBU must employ the industrial staff required to ensure that the obligations owed by the RTBU to members of the PTA Branch are met.
- P. The RTBU intends to be bound by, and as a consequence the PTA Branch will be bound by, the terms of this Deed.
- Q. The ARTBIU intends to be bound by the terms of this Deed.

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The parties agree as follows:

**1. Definitions**

In this Deed the following words and phrases have the meanings assigned:

- (a) '**ARTBIU**' means The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch
  - (b) '**ARTBIU Branch Services**' means the facilities and services provided to the ARTBIU in accordance with clause 4;
  - (c) '**ARTBIU Rules**' means the registered rules of the ARTBIU;
  - (d) '**Commencement Date**' means the date of the execution by the last party in time to execute this Deed;
  - (e) '**Commission**' means the body continued and constituted under the IRA under the name of *The Western Australian Industrial Relations Commission*;
  - (f) '**Deed**' means this Deed inclusive of the Recitals;
  - (g) '**dual member**' means a person who is a member of both the RTBU and the ARTBIU;
  - (h) '**Full Bench**' means the Commission constituted as provided by section 15(1) IRA;
  - (i) '**FW(RO)A**' means the *FairWork (Registered Organisations) Act 2009*;
  - (j) '**IRA**' means the *Industrial Relations Act WA 1979*;
  - (k) '**PTA Branch**' means the RTBU, West Australian PTA Branch as constituted by Part XVI of the RTBU Rules;
  - (l) '**Recitals**' means the recitals at the beginning of this Deed;
  - (m) '**Registrar**' means the chief executive officer of the *Department of the Registrar Western Australian Industrial Relations Commission* as provided for in the IRA;
  - (n) '**RTBU**' means the Australian Rail, Tram and Bus Industry Union;
  - (o) '**RTBU Rules**' means the registered rules of the RTBU; and
  - (p) '**RTBU WA Branch**' means the RTBU, Western Australian Branch constituted by Part XV of the RTBU Rules;
  - (q) '**s. 71 Certificate**' means a certificate issued pursuant to section 71(5) of the IRA by the Western Australian Industrial Relations Commission as a result of application FBM 6 of 2013.
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**2. Interpretation**

In this Deed, unless the context indicates a contrary intention;

- (a) The singular includes the plural and the plural includes the singular;
- (b) A reference to a statute includes any:
  - (i) Statute amending, consolidating or replacing that statute;
  - (ii) Regulation made under the statute as that regulation as is in force from time to time;
- (c) Any expression, term, phrase or word used is to be interpreted consistently;
- (d) Headings will not be taken into account in interpretation;
- (e) A reference to a 'clause' is, unless the context clearly indicates otherwise, a reference to a clause of this Deed;
- (f) A reference to a 'sub-clause' means, unless the context clearly indicates otherwise, a sub-clause of the clause in which the reference to the sub-clause is made;
- (g) A reference to a 'part' means, unless the context clearly indicates otherwise, a part of the sub-clause in which the reference to the part is made;
- (h) A reference to a 'Recital' is a reference to as recital of this Deed;
- (i) A reference to a 'Schedule' is a reference to a schedule to this Deed, and the schedule is to be read as a part of this Deed and consistently with it;
- (j) A reference to a 'day' in this Deed is a reference to the days Monday to Friday both inclusive, public holidays in Western Australia and New South Wales excepted;
- (k) A reference to a 'month' is a reference to a calendar month;
- (l) A reference to 'business hours' in this Deed is a reference to the hours of 9.00am to 5.00pm Australian Western Standard Time;
- (m) Where any period of time, dating from a given day, act or event is prescribed or allowed for any purpose, the period, unless the contrary intention appears, is calculated exclusive of such day or the day of such act or event;
- (n) Where the last day of any period prescribed or allowed in or by this Deed for the doing of any thing falls on a Saturday or Sunday or on a day which is a public holiday in the place in the place in which the thing is to be or may be done, the thing may be done on the first following day which is not a Saturday, Sunday or a public holiday in that place.

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**3. Forbearance by the ARTBIU**

The ARTBIU agrees to not collect entrance fees or subscriptions from a dual member for the period that:

- (a) The ARTBIU Rules provide that a member of the ARTBIU will be financial if the member is a financial member of the RTBU assigned to the PTA Branch; or
- (b) The dual member maintains their financial membership of the RTBU and is assigned to the PTA Branch; or
- (c) This Deed is in effect.

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**4. Facilities and Services to ARTBIU**

- (a) The RTBU, through its PTA Branch, agrees that the RTBU will provide to the ARTBIU the following services:
  - (i) Provision of industrial services;
  - (ii) Access to legal advice;
  - (iii) Provision of WorkCover services;
  - (iv) Provision of recruiting services for new dual members;
  - (v) Provision of all services relating to the ARTBIU's compliance with the IRA and/or any other relevant Western Australian legislation;
  - (vi) Provision of financial services;
  - (vii) Provision of administrative services;
  - (viii) Provision of administrative services relating to dual members inclusive of the provision of registrars, payment systems and other systems;
  - (ix) Provision of accounting and auditing services;
  - (x) Provision of letterhead, membership forms, and any other printed or written material that the ARTBIU reasonably require to be produced;
  - (xi) Provision of journals;

- (xii) Provision of notices to members of the ARTBIU;
  - (xiii) Provision of equipment, including computing equipment, as may be necessary for the officers and/or officials and/or agents of the ARTBIU to perform their respective obligations;
  - (xiv) Provision of the necessary staff, plant equipment, vehicles and other resources to ensure that the ARTBIU meets its obligations to the members assigned to it and meet its obligations as an organisation, registered pursuant to the IRA
- (b) The RTBU will, to the extent only of the PTA Branch, meet the financial liabilities (if any) of the ARTBIU, properly and legally incurred by the ARTBIU in discharging its obligations pursuant to its rules and/or this Deed.

#### **5. Membership**

- (a) The Membership Application Form, to be used by the PTA Branch and the ARTBIU, will be a joint Membership Application Form that provides for persons who apply to join PTA Branch, also apply to join the ARTBIU and vice versa.
- (b) The RTBU will promptly inform the ARTBIU of any resignations it receives from persons who were members of the RTBU and assigned to the PTA Branch.
- (c) The ARTBIU will promptly inform the RTBU PTA Branch of any resignations it receives from persons who were members of the ARTBIU.

#### **6. Joint Expenditure and Resourcing**

- (a) The ARTBIU acknowledges, subject to clause 3, that the RTBU PTA Branch and WA Branch may jointly employ employees and jointly utilise other resources necessary to ensure that the ARTBIU's obligations to the members of the ARTBIU, pursuant to the rules of the ARTBIU, are discharged.
- (b) The parties agree that the Secretary of the RTBU PTA Branch and WA Branch will consult, as necessary, to ensure that the resources of the parties are effectively utilised, and that inconsistent instructions are not issued with respect to the use of employees and other resources, in delivering services and facilities in accordance with clause 4.
- (c) The RTBU PTA and WA Branches undertake, consistently for the undertakings set out in clause 4, that it is jointly responsible for the payment of general resources (including, but not limited to office space, utilities and other outgoings) and the payment of joint employees including all wages, all accrued entitlements and any other associated administrative expense.
- (d) The parties agree that the RTBU PTA and WA Branches will share costs for the totality of work performed and the parties each acknowledge that: whilst costs incurred for the purposes of the PTA Branch or WA Branch may vary on any given day, the costs incurred will over time balance out as between the RTBU WA Branch and PTA Branch in respect of its undertaking in clause 4.
- (e) The parties acknowledge that the RTBU PTA and WA Branches shall complete annual returns (including numbers of members) in accordance with obligations under the Fair Work (Registered Organisations) Act 2009
- (f) The parties agree that for the following year all costs expended by the RTBU in accordance with this deed shall be distributed between the WA and PTA Branches in proportion to the number of members in each branch reported in sub-clause (f) above.
- (g) For the purposes of this clause joint employees do not include:
  - (i) Elected full time officers of the RTBU PTA Branch and/or ARTBIU;
  - and
  - (ii) Elected full time officers of the RTBU WA Branch
 insofar as the RTBU or the ARTBIU are responsible, in accordance with their rules, to make payment to those officers for performing their office or position as the case may be. Payments for these full-time elected officials remain the responsibility of the individual branch.

#### **7. Further Services**

The RTBU, in relation to the PTA Branch, and the ARTBIU agree that the RTBU and the ARTBIU may, in writing, agree to the provision of further or additional facilities or services, other than those provided in clause 4.

#### **8. Geographical Provision**

The RTBU, in respect of its PTA Branch, agrees to provide the ARTBIU Branch Services throughout Western Australia.

#### **9. Commencement**

This Deed commences on the commencement date and will continue until terminated.

**10. Review**

The ARTBIU and RTBU, in respect of the PTA Branch, agree that the provision of the ARTBIU Branch Services, or of any particular facility or service, will be reviewed, as either of the parties may request, by the giving of twenty one (21) days' written notice to the other party.

**11. Dispute Resolution**

In the event of a dispute about matters arising under this Deed, the procedure to resolve the dispute will be as follows:

- (a) The RTBU National Secretary and the ARTBIU Secretary will meet and confer on the matter;
- (b) If the dispute cannot be resolved by the RTBU National Secretary and the ARTBIU Secretary pursuant to sub-clause (a), it may be referred to a mutually acceptable person for resolution by agreement;
- (c) In the absence of agreement as to a mutually acceptable person, the person will be nominated by the National Executive of the RTBU;
- (d) If a dispute is referred pursuant to sub-clause (b), the person to whom the dispute is referred may take any or all of the following actions as they consider appropriate to resolve the dispute:
  - (i) Convene a conciliation of the parties to the dispute;
  - (ii) Conciliate or make recommendations about particular aspects of a matter about which the parties are unable to reach agreement; and
  - (iii) Where a dispute cannot be resolved (including by conciliation) and both parties so request, determine the dispute.
- (e) Subject to the rights of either party to enforce any aspect of this Deed in accordance with clause 19 of this Deed, the parties will treat any determination made under sub-clause (d) as binding upon them.

**12. Termination**

The operative provisions of this Deed will remain in full force and effect only during such time as the s. 71 Certificate remains valid and effective and will terminate simultaneously with the s. 71 Certificate becoming or being held to be invalid and/or ineffective.

**13. Relationship of the Parties**

- (a) Neither the RTBU, inclusive of its PTA Branch, nor the ARTBIU has any power, right or authority to bind the other, or to assume or create any obligation or responsibility, express or implied, on behalf of the other or in the other's name.
- (b) Nothing stated in this Deed will be construed as constituting the RTBU, inclusive of its PTA Branch, and the ARTBIU as partners, or as creating the relationship of employer and employee or principal and agent between the parties.

**14. Ratification of Prior Dealings & Release from Obligations**

- (a) The parties hereby agree that in respect of their conduct in relation to their prior dealings with each other prior to the execution of this Deed they hereby ratify all acts done during the course of their dealings.
- (b) Further in consideration of the entering into this deed they each release the other from all claims for repayment of any monies paid and/or received the one from the other including all claims in respect of any related interest, costs or expenses.

**15. Return of ARTBIU's Documents**

- (a) Upon the termination of this Deed, the RTBU will deliver to the ARTBIU all of the ARTBIU's records, books and other documentation, whether in printed or in electronic form, whether prepared by the RTBU, its PTA Branch, or another person, that is in the RTBU's possession or control.

**16. Return of RTBU's Documents**

- (a) Upon the termination of this Deed, the ARTBIU will deliver to the RTBU all of the RTBU's records, books and other documentation, whether in printed or in electronic form, whether prepared by the ARTBIU, or another person, that is in the ARTBIU's possession or control.

**17. Property and Assets**

- (a) The parties agree that the preservation of assets must be safeguarded in the interests of the entire RTBU and ARTBIU membership and that no assets (including real property) shall be disposed of or otherwise dealt with without the consent of the RTBU National Executive and ARTBIU Executive.

**18. Notices**

- (a) Any notice, demand, consent or other communication (in this clause, a 'Notice') unless otherwise expressly provided for in this Deed:
  - (i) Must be in writing and signed by the sender or a person duly authorized by the sender;
  - (ii) Given on a day as that expression is defined in this Deed;

- (iii) Must be addressed and delivered to the intended recipient at the address or fax number set out below or the address or fax number last notified by the intended recipient to the sender after the date of this Deed:
- A. To the ARTBIU:  
 The Branch Secretary  
 2/10 Nash Street  
 Perth WA 6000  
 Facsimile No: 08 92256733
- B. To the RTBU:  
 The National Secretary  
 Suite 201  
 Trades Hall  
 4-10 Goulburn Street  
 SYDNEY NSW 2000  
 Facsimile No: 02 9319 2096
- (b) A Notice will be taken to be duly given or made when delivered, received or left at the fax number or address provided for in sub-clause (a), provided that if delivery or receipt occurs later than 4pm (local time) at the place of delivery, it will be taken to have been given or made at the commencement of business on the next day.

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#### 19. Governing law

This Deed will be governed and construed in accordance with the laws of the Commonwealth and the State of Western Australia and the parties will submit to the non-exclusive jurisdiction of the courts of that State in respect of any dispute of whatsoever nature arising under this Deed or its implementation or enforcement.

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#### 20. Severance

If the form, or any clause, sub-clause, paragraph, sub-paragraph or part thereof, of this Deed is held or found to be void, invalid, unenforceable, it will be deemed to be severed to the extent that it is void or voidable, invalidity or unenforceability, but the remainder of this Deed will remain in full force and effect.

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#### 21. Counterpart

- (a) This Deed may be executed in any number of counterparts and all counterparts, taken together will form one agreement.
- (b) A party may execute this Deed by executing any counterpart thereof.

#### The statutory requirements

- 12 The requirements of s 71(6) of the Act have been met in that:
- the application is made by a State organisation;
  - a certificate has been issued to the State organisation under s 71;
  - the State organisation has made an agreement with the Federal body as the organisation of which the State organisation's counterpart Federal body is the PTA Branch; and
  - the agreement relates to the management and control of the funds and property of the State organisation.
- 13 Pursuant to s 71(7) of the Act, there are four conditions that must be satisfied before the Full Bench may approve the agreement. The first three of these have clearly been met. They are:
- the agreement is sealed with the respective seals of the State organisation and the Federal body;
  - the agreement is signed on behalf of the State organisation and the Federal body by the persons authorised under their respective rules to execute such an instrument; and
  - the agreement has been lodged with the Registrar.
- 14 The fourth condition in s 71(7) is that the Full Bench is to be satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising. In *Re The Western Australian Police Union of Workers* [2007] WAIRC 01208; (2007) 88 WAIG 52, Ritter AP, with whom Scott and Harrison CC agreed, described the power in s 71(7) to approve an agreement as discretionary [16]. However, the Full Bench does not necessarily agree that the power contained in s 71(7) of the Act is discretionary.
- 15 Whilst s 71(7) confers a power on the Full Bench that could be regarded as discretionary by the use of the words 'may ... approve the agreement' the power conferred is not at large. Section 71(7) confers a power to be exercised upon the Full Bench being satisfied of the preconditions set out in s 71(6) and s 71(7). It has no power to review or assess the terms of the agreement by having regard to any other matters, other than the matters specified in s 71(6) and s 71(7). In the Full Bench's opinion, it is strongly arguable that the power conferred by s 71(7) is an obligatory provision of the same class as the provision

considered in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [1971] HCA 12; (1971) 127 CLR 106. In that matter, Windeyer J found that the power conferred on the Commissioner of Taxation which provided the Commissioner 'may allow' a rebate of taxation if satisfied of particular prescribed circumstances was not discretionary. In making this finding, Windeyer J observed the construction of the power (134 - 135):

[D]oes not depend on the abstract meaning of the word 'may' but of whether the particular context of words and circumstance make it not only an empowering word but indicate circumstances in which the power is to be exercised - so that in those events the 'may' becomes a 'must'. Illustrative cases go back to 1663: *R. v. Barlow* ((1663) Carth, 293 [90 E.R. 773]; 2 Salk. 609 [91 E.R. 516]). Today it is enough to cite *Julius v. Bishop of Oxford* ((1880) 5 App. Cas. 214); and add in this Court *Ward v. Williams* ((1955) 92 C.L.R. 496, at pp. 505-506). But I select one other reference out of a multitude: *Macdougall v. Paterson* ((1851) 11 C.B. 755 [138 E.R. 672]). There Jervis C.J. said in the course of the argument ((1851) 11 C.B., at p. 766 [138 E.R., at p. 677]) 'The word "may" is merely used to confer the authority: and the authority *must* be exercised, if the circumstances are such as to call for its exercise'. And, giving judgment, he said ((1851) 11 C.B., at p. 773 [138 E.R., at p. 679]):

'We are of opinion that the word "may" is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises.'

16 Justice Windeyer's observations were applied by the High Court in *Mitchell v The Queen* [1996] HCA 45; (1996) 184 CLR 333 and *Leach v The Queen* [2007] HCA 3; (2007) 230 CLR 1 [38]. However, as this issue was not raised in these proceedings, it is not appropriate to determine this issue in the absence of argument.

17 In any event, the Full Bench is of the opinion that, if the Full Bench is satisfied that the requirements of s 71(6) and s 71(7) are met and that the terms of the agreement are not detrimental in the manner prescribed in s 71(7) and the terms of the agreement will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising, the Full Bench should approve the agreement.

#### **The effect of terms of the agreement**

18 Prior to the hearing of this application, on 6 February 2017 a letter was sent to the State organisation by the Associate to Smith AP. The letter stated as follows:

Pursuant to s 71(7) of the *Industrial Relations Act 1979* (WA) the Full Bench is required to be satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body.

The members of the Full Bench have reviewed your application and advise that, in the absence of any explanation in the documents attached to the application or definition of 'prior dealings' in the deed, at the hearing of your application, it wishes to receive oral or written evidence on affidavit and submissions in respect of the acts carried out in prior dealings by both parties that it is contemplated are to be ratified by operation of cl 14 of the deed.

19 In response to the letter from the Commission, written submissions were filed on behalf of the State organisation on 3 March 2017 containing a table setting out the effect of the provisions of the agreement as follows:

<b>Clause</b>	<b>Effect</b>
1	Clause 1 is the definitions clause. Clause 1 is a neutral consideration in this matter.
2	Clause 2 is the interpretation clause. Clause 2 is a neutral consideration in this matter.
3	Clause 3 removes the technical requirement of a person who is a dual member of the RTBU and the Federal Union to have to pay two sets of union dues. This is an obvious benefit to dual members. The organisations have never collected two sets of subscription fees from dual members. To that extent, the clause simply enshrines a longstanding custom and practice. Clause 3 will not hinder the RTBU's ability to cover its debts and obligations. This is because the PTA Branch of the Federal Union agrees to cover the RTBU's financial liabilities in clause 4.
4	Clause 4 does two things. First, it places an obligation on the PTA Branch of the Federal Union to provide a range of services to the RTBU. That range of services is listed in clause 4. Second, it places an obligation on the PTA Branch of the Federal Union to cover the financial liabilities of the RTBU. Significantly, clause 4 will assist the RTBU in covering its debts and obligations.
5	Clause 5 provides for a single membership form to join both the RTBU and the PTA Branch of the Federal Union. Clause 5 is a neutral consideration in this matter.
6	The RTBU, the PTA Branch of the Federal Union and the WA Branch of the Federal Union share a bundle of common resources. Those shared resources include employees, offices, branding, telephones, printers and rental income. Clause 6 is designed to regulate the relationship between the PTA Branch and the WA Branch of the Federal Union. It benefits the members of the RTBU and the PTA Branch of the Federal Union as it ensures that common resources will be shared fairly. The consultative nature of the clause also promotes industrial harmony between the PTA Branch and the WA Branch. Clause 6 assists the RTBU in meeting its debts and obligations by placing an obligation on the WA Branch to share the common costs incurred by the WA Branch, PTA Branch and the RTBU.

Clause	Effect
7	Clause 7 enables the RTBU and the PTA Branch to expand on the services contained in clause 4 by agreement in writing. Clause 7 is a neutral consideration in this matter.
8	Clause 8 places an obligation on the PTA Branch to provide the services listed in clause 4 to the RTBU throughout Western Australia. Clause 8 is a neutral consideration in this matter.
9	Clause 9 sets out when the memorandum will come into effect. It is a neutral consideration in this matter.
10	Clause 10 enables the RTBU and the Federal Union to review the services listed in clause 4. This clause is a neutral consideration.
11	Clause 11 creates a mechanism to facilitate the resolution of disputes between the RTBU and the Federal Union about the application of the memorandum. This clause provides a benefit to the members of the RTBU and the PTA Branch in that it ensures that disputes between the RTBU and the Federal Union are able to be resolved amicably.
12	Clause 12 is a termination provision. It is a neutral consideration.
13	Clause 13 sets out that the RTBU and the Federal Union are unable to act as agents of each other. Clause 13 is a neutral provision.
14	Clause 14 waives any debts that the RTBU and the Federal Union may owe each other from their prior dealings since 1999. The explanation about why this provision exists is set out in the affidavit of Mr Paul Robinson dated 3 March 2017.
15-16	Clauses 15 and 16 require the RTBU and the Federal Union to return property to each other in the event that the memorandum is terminated. It is a neutral consideration in this matter.
17	Clause 17 safeguards the assets of the RTBU and the Federal Union by ensuring that neither party can dispose of an asset without the consent of both parties. This is a neutral consideration in this matter.
18-21	Clauses 18, 19, 20 and 21 are procedural provisions. They are neutral considerations in this matter.

Also in response to the letter from the Commission, an affidavit affirmed on 3 March 2017 by Mr Robinson was filed on 3 March 2017. Mr Robinson's affidavit sets out the reasons why cl 14 was included in the agreement by the parties and he states the historical facts which led to the negotiation and agreement of the terms of cl 14 were as follows:

- (a) On or around 12 March 1999, the Australian Railways Union of Workers, WA Branch and the West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers amalgamated. The product of that amalgamation was the creation of the State organisation.
- (b) From the creation of the State organisation until relatively recently, the State organisation operated as if it had a s 71 certificate and deed of arrangement with the Branch which was a single Branch. During that period:
  - (i) the State organisation did not have a s 71 certificate;
  - (ii) the State organisation did not have a deed of arrangement with the Branch;
  - (iii) the elected officials of the Branch acted as the elected officials of the State organisation;
  - (iv) the State organisation and the Branch shared a single bank account which was in the name of the Branch;
  - (v) the State organisation and the Branch treated their respective assets and expenses as joint assets and expenses (this includes ownership of, and income from, a number of properties which are in the name of the State organisation);
  - (vi) the State organisation and the Branch jointly employed a number of employees;
  - (vii) the Branch collected a single set of membership dues from the members of both organisations; and
  - (viii) the combined membership dues of the members of the State organisation and the Branch were used to cover the expenses of both organisations.
- (c) The failure of the original officials of the State organisation to obtain a s 71 certificate meant that the State organisation eventually found itself in a position where it had no elected officials and no members. That error was not discovered by the eligible members of the State organisation or the Branch until around May 2009.
- (d) On or around 1 October 2009, as a result of an order made in PRES 7 of 2009, an interim branch executive was appointed to the State organisation in order to enrol members into the State organisation and hold elections ([2009] WAIRC 00964; (2009) 89 WAIG 2108).
- (e) Despite some initial difficulties, the interim branch executive eventually enrolled members who were employed in or in connection with the Public Transport Authority of Western Australia. It also held its first proper elections in around October 2012. The State organisation has since been working towards getting its affairs in order.

- (f) In around 2000, the Western Australian Government sold off part of its rail business. It broke up the old Westrail organisation. This resulted in some of the members of the State organisation and the Branch no longer working in or in connection with, what is now known as, the Public Transport Authority of Western Australia. Because of the wording of the eligibility rule of the State organisation, that class of union member was no longer eligible to join the State organisation. That class of union member remained eligible to be a member of the Branch.
  - (g) The class of union members referred to in the previous paragraph continued to pay union dues. Those union dues were jointly used by the State organisation and the Branch to cover the costs of both organisations (including by servicing the properties of the State organisation).
  - (h) The current division of members within Western Australia is that:
    - (i) union members who work in the Public Transport Authority of Western Australia are in the State organisation and the PTA Branch of the Federal body;  
and
    - (ii) all other union members in Western Australia are in the RTBU Western Australian Branch of the Federal body.
  - (i) The deed of arrangement is the product of several years of negotiations between the State organisation and the Federal body.
  - (j) Clause 14 of the deed is intended to ratify the previous dealings between the State organisation and the Branch so as to clear any debts that may exist between the State organisation and the Federal body.
  - (k) For over a decade, the State organisation and the Branch, including the more recent time when two Branches came into existence, operated as a single entity. During that time, the membership dues of members of the Branch were used to cover some of the costs of the State organisation. The Branch also used its skill and efforts to manage and maintain the assets of the State organisation. Similarly, the members of the Branch gained benefits through the use of the State organisation's properties (including the receipt of rent).
  - (l) Because of the long practice of the State organisation and the Branch of the Federal body operating as a single entity, it would be next to impossible to work out exactly how much each organisation owed to the other. Or to put it another way, it would be too difficult and too expensive to try and unscramble the egg. On that basis, the State organisation and the Federal body have agreed to waive whatever they may owe each other to date.
- 20 Acting President Ritter observed by way of obiter in *Re The Western Australian Police Union of Workers* that whilst there is no statutory requirement on an organisation making an application under s 71(7) of the Act to provide notice to the members of the relevant organisations, on an appropriate occasion it might be something a Full Bench would require to be done before it reached the level of satisfaction required by s 71(7). In the Full Bench's opinion, it is not necessary to consider in this matter whether his Honour's observation is correct. It is, however, notable that the Full Bench is required to have regard to the interests not only of the members of the State organisation and the Branch but also persons who are eligible to be members.
- 21 In this matter, the Full Bench is satisfied that the terms of the agreement are not detrimental to the interests of persons eligible to be members of the State organisation and the PTA Branch and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising. This is because:
- (a) the terms of the agreement protect the funds and assets of the State organisation and the PTA Branch;
  - (b) clauses 3 and 4 of the agreement create specific obligations whereby the PTA Branch receives all union dues and it is required to cover the financial liabilities of the State organisation;
  - (c) the terms of the agreement provide for efficiencies, such as the sharing of staff, resources, costs of services and the provision of joint services to members of the State organisation and the PTA Branch, together with the other branch of the Federal body, the RTBU, Western Australian Branch;
  - (d) clause 11 provides for a dispute resolution procedure;
  - (e) clause 14 ratifies past acts and contains a release for both parties from all claims for repayment of monies paid and received which could arise from the past informal arrangement of sharing of resources and funds in Western Australia between the State organisation and the Federal body; and
  - (f) the terms of the agreement maintain the status quo.
- 22 In the Full Bench's opinion, a minute of proposed order should issue as follows:
- The agreement constituted by a deed between the applicant and the Australian Rail, Tram and Bus Industry Union, dated 21 May 2015 and duly executed by the parties between 8 December 2016 and 16 December 2016, is approved under s 71(7) of the *Industrial Relations Act 1979* (WA).
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2017 WAIRC 00186

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH	<b>APPLICANT</b>
<b>CORAM</b>	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS	
<b>DATE</b>	WEDNESDAY, 29 MARCH 2017	
<b>FILE NO.</b>	FBM 5 OF 2016	
<b>CITATION NO.</b>	2017 WAIRC 00186	
<b>Result</b>	Order made	
<b>Appearances</b>		
<b>Applicant</b>	Mr C Fogliani (of counsel)	

*Order*

This matter having come on for hearing before the Full Bench on 9 March 2017, and having heard Mr C Fogliani (of counsel) on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The agreement constituted by a deed between the applicant and the Australian Rail, Tram and Bus Industry Union, dated 21 May 2015 and duly executed by the parties between 8 December 2016 and 16 December 2016, is approved under s 71(7) of the *Industrial Relations Act 1979* (WA).

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

[L.S.]

## AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2017 WAIRC 00173

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>CITATION</b>	: 2017 WAIRC 00173
<b>CORAM</b>	: COMMISSIONER D J MATTHEWS
<b>HEARD</b>	: FRIDAY, 3 MARCH 2017, MONDAY, 13 MARCH 2017, THURSDAY, 16 MARCH 2017
<b>DELIVERED</b>	: FRIDAY, 24 MARCH 2017
<b>FILE NO.</b>	: APPL 3 OF 2017
<b>BETWEEN</b>	: THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Applicant AND AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH Respondent

CatchWords	:	Application for true interpretation and variation of subclause of various industrial agreements - Respondent applied for dismissal pursuant to section 27 (1)(a) <i>Industrial Relations Act 1979</i> - Respondent's application dismissed - Subclauses relate to disciplinary provisions, deadlines for actions and the ability to extend deadlines - Principles of interpretation of industrial instruments discussed and applied - Ambiguity in subclauses found - Commission takes into account evidence of surrounding circumstances - Declaration made - No variation ordered
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Industrial Relations Commission Regulations 2005</i> (WA)
Result	:	Declaration made
<b>Representation:</b>		
Counsel:		
Applicant	:	Mr D Anderson of counsel
Respondent	:	Mr K Singh as agent
Solicitors:		
Applicant	:	State Solicitor's Office
Respondent	:	Chapmans Barristers & Solicitors

**Case referred to in reasons:**

*Ambatielos v Anton Jurgens Margarine Works* [1922] 2 KB 185

**Cases also cited:**

*Ancor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241

*Barlow v Qantas Airways Ltd* (1997) 75 IR 100

*City of Wanneroo v Holmes* (1989) 30 IR 362

*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 147 CLR 337

*Director-General, Department of Education v United Voice WA* (2013) WAIG 1

*Kucks v CSR Ltd* (1996) 66 IR 182

*Re Harrison; ex parte Hames* [2015] WASC 247

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

*Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164

*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* (2015) 95 WAIG 1503

*Reasons for Decision*

- 1 By Notice of Application filed 4 January 2017 the applicant seeks, pursuant to section 46(1) *Industrial Relations Act 1979*, a declaration of the true interpretation of, and variation to, the following:
  - Clause 2.11.26 of the Public Transport Authority/ARTBIU (Transit Officers) Industrial Agreement 2015;
  - Clause 2.6.26 of the Public Transport Authority/ARTBIU (Transwa) Industrial Agreement 2016;
  - Clause 2.11.2.6 of the Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016;
  - Clause 2.8.26 of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014; and
  - Clause 2.6.26 of the Public Transport Authority Railway Employees (Network and Infrastructure) Industrial Agreement 2014
- 2 The subclauses are in relevantly identical terms (and are entirely identical I am told except for an insignificant difference in the Public Transport Authority/ARTBIU (Transwa) Industrial Agreement 2016).
- 3 Each of the subclauses appear as part of a clause in the respective agreements entitled "Discipline". The contents of each of the discipline clauses are relevantly identical.
- 4 It is convenient in these reasons for decision to refer to the Public Transport Authority/ ARTBIU (Transit Officers) Industrial Agreement 2015 as this was the agreement referred to by the parties in argument and I will refer to it in these reasons as the 2015 TO Agreement.

5 The subclause reads as follows:

The minimum periods specified in subclause 2.11 in which a notification is to be given or a determination is to be made will be extended:

- a) by reason of a delay caused by the employee or their representative, to the extent of the delay;
- b) by reason of the absence from duty of the affected employee through sickness or other authorised leave, to the extent of that absence;
- c) by reason of the suspension of the Employer's disciplinary process during an investigation of the allegation by Police or by the Corruption and Crime Commission, to the extent of the duration of that investigation; or
- d) By mutual agreement between the parties

6 Before turning to the evidence led and arguments made in relation to the matter of interpretation I note the respondent applied to have the application dismissed under section 27(1)(a) *Industrial Relations Act 1979* because, and here I quote from the Notice of Answer filed 16 January 2017:

- (a) it constitutes further proceedings which are neither necessary or desirable in the public interest; and
- (b) it is an abuse of process or a vexatious application.

7 This application, as developed in a written outline of submissions and in oral submissions on 3 March 2017, was brought on the basis that there are proceedings before the Industrial Magistrate's Court (which have not yet been heard) to enforce a subclause of the Public Transport Authority (Transit Officers) Industrial Agreement 2013 which is the equivalent of that in the 2015 TO Agreement I have been asked to interpret in this case and that I should not allow a multiplicity of proceedings and, potentially, outcomes.

8 I dismissed the application under section 27(1)(a) *Industrial Relations Act 1979* at the hearing on 3 March 2017.

9 The application under section 27(1)(a) *Industrial Relations Act 1979* was perhaps understandable given that in its Notice of Application under the heading "Facts Giving Rise to the Application" (provided in compliance with regulation 52(1)(b) *Industrial Relations Commission Regulations 2005*) the applicant recited the facts which are those relating to the matter before the Industrial Magistrate's Court.

10 However, as it turns out, those "facts" are provided to me merely as an illustration of a factual situation that, if it arose today, might give rise to dispute given the different interpretations of the parties. As actual "facts" they pre-date the commencement of the 2015 TO Agreement.

11 Accordingly, I am not, in truth, being asked to decide a matter before the Industrial Magistrate's Court. The matter before the Industrial Magistrate's Court may involve that body interpreting subclauses of the Public Transport Authority (Transit Officers) Industrial Agreement 2013 but will not involve the interpretation of any of the subclauses I am being asked to interpret here.

12 It will be for the Industrial Magistrate's Court in the proceedings before it to decide what, if any, use is made of any declaration I make in these proceedings.

13 In particular, it will be a matter for the Industrial Magistrate's Court as to whether any relevant similarities or differences between the industrial instrument it is considering and the 2015 TO Agreement are such that any declaration I make is, to use the words of section 46(3) *Industrial Relations Act 1979*, the "subject" of a matter it needs to decide.

14 The application was orally dismissed by me, and I now make an order dismissing the application, on the basis that either the Industrial Magistrate's Court will not be bound by my decision and its considerations will be unaffected by it because the proceedings relate to a different agreement, and the differences between the two are considered material, or, if I am wrong about this, the Industrial Magistrate's Court will be bound by my interpretation of the subclause which, as section 46(3) *Industrial Relations Act 1979* makes clear, is as it should be.

15 I turn then to consideration of the true interpretation of the subclause.

16 I have been greatly assisted by the authorities cited by the parties on the matter of the proper approach to the interpretation of industrial instruments, which are listed in the "cases cited" section of these reasons. Without imagining I could improve upon the opinions expressed in those decisions it seems to me, attempting to distil their theme, that a decision-maker must determine what was the "real" intention of the parties when they included the relevant text in the agreement.

17 Sometimes the text is so clear that read with the whole document, it, without more, reveals that intention. If so there is no need to go any further.

18 However, if having read the text, there is any doubt in the mind of the decision-maker as to the meaning of it then evidence of surrounding circumstances may be called for or led to assist the decision-maker to resolve those doubts and determine what the parties really intended.

19 Often then there is a threshold question as to whether text is ambiguous or not. That is ultimately a matter for the decision-maker. As Lord Sterndale MR said in *Ambatielos v Anton Jurgens Margarine Works* [1922] 2 KB 185 at 196 "it is very difficult indeed to say what is ambiguous and what is not, and I do not think any test can be applied except that of the person who is dealing with it."

20 As to whether evidence of, or information about, surrounding circumstances may be introduced to assist in determining whether text is ambiguous the preponderant view seems to caution against it but I think that the Western Australian Industrial Relations Commission dealing with an application under section 46 *Industrial Relations Act 1979* should be slow to decide that text is unambiguous if a party says that surrounding circumstances may assist in relation to that question.

21 I say this for the following reasons:

- (1) the Western Australian Industrial Relations Commission is a practical jurisdiction charged with giving practical solutions to parties and this is best done if the Western Australian Industrial Relations Commission is open to learning about surrounding circumstances that may impact on text;
  - (2) the Western Australian Industrial Relations Commission under section 46(1)(a) *Industrial Relations Act 1979* “declares” the “true interpretation” of industrial instruments which in my view is an invitation to do what is necessary to find out what the parties really meant by the text including seeking or allowing evidence on the question of whether text is ambiguous;
  - (3) the Western Australian Industrial Relations Commission has, under section 46(1)(b) *Industrial Relations Act 1979*, the power to “vary” an industrial instrument “for the purpose of remedying any defect therein or of giving fuller effect” to the industrial instrument indicating that it has the power to “get to the bottom of” the intended meaning of text. It goes without saying that a “defect” might be expressed in completely unambiguous language and it must be equally clear the Western Australian Industrial Relations Commission may seek information or allow evidence to find out what the parties really intended even in the face of clear language;
  - (4) section 46(3) *Industrial Relations Act 1979* provides that a declaration under section 46 *Industrial Relations Act 1979* is binding on all courts and all persons with respect to the matter the subject of the declaration. There must be reasons why Parliament gave the Western Australian Industrial Relations Commission an extraordinary power to bind bodies superior to it in the judicial and quasi-judicial hierarchy. Those reasons must include that Parliament considered that it is the Western Australian Industrial Relations Commission which is best able to take into account the practical considerations of, and the industrial realities affecting, the parties in deciding what an industrial instrument means and also, because the Western Australian Industrial Relations Commission may play an inquisitorial role and is not bound by the rules of evidence, it is best able to get to the bottom of the matter. If Parliament gave this responsibility to the Western Australian Industrial Relations Commission for these reasons it would be strange if the Western Australian Industrial Relations Commission then took a restrictive approach to the receipt of information or evidence that would inform its view of practical considerations and industrial realities. Again, in my view, this supports a conclusion that the Western Australian Industrial Relations Commission may seek information or allow evidence to assist it in determining whether text is actually ambiguous;
  - (5) regulation 52(1)(b) *Industrial Relations Commission Regulations 2005* requires an application under section 46 *Industrial Relations Act 1979* to have attached to it a statement of “the facts giving rise to the application.” This may have the purpose of preventing a purely academic or curious application (although I find it hard to see how the interpretation of an applicable industrial instrument could ever be academic or a matter of mere curiosity) but it has the result that the Western Australian Industrial Relations Commission, at the outset, must have before it “factual” information about practical considerations. Those “facts” with which the Western Australian Industrial Relations Commission must be provided will in all likelihood already be informing the Western Australian Industrial Relations Commission’s views on ambiguity. The Western Australian Industrial Relations Commission might understandably seek clarification of, or elaboration upon, the “facts”. Regulation 52(1)(b) *Industrial Relations Commission Regulations 2005* supports a conclusion that the Western Australian Industrial Relations Commission should not be shy about allowing evidence or seeking information to assist it in determining whether text is ambiguous.
- 22 Here I must say that the text of the relevant subclause seemed ambiguous to me, especially in light of the “facts” giving rise to the application provided in accordance with regulation 52 *Industrial Relations Commission Regulations 2005* and Mr Singh’s explanation of the facts as the respondent saw them.
- 23 Having read the text of the 2015 TO Agreement, and in light of the “facts” put to me by both parties, I was confused about what the terms “duty” and “authorised leave” meant and their application to circumstances where periods of leave surrounded what the parties referred to as “blank days” (the meaning of which is known to the parties but will emerge in any event later in these reasons).
- 24 In light of me finding the clause ambiguous I do not need to decide whether I would have otherwise allowed evidence of surrounding circumstances but I repeat that I would have been slow to cut off this avenue of assistance to me in determining the real meaning of the text.
- 25 I intend to take account of the evidence led by the parties in this matter to assist me in declaring the true interpretation of the relevant subclause.
- 26 The issue that gives rise to the application, as I now understand it having heard evidence, is this:
- (1) under the relevant disciplinary provisions of the industrial instruments under consideration some things have to be done by the employer within a certain timeframe;
  - (2) the consequences of not doing those things within the timeframe is that disciplinary action under the relevant provisions may not be taken or completed;
  - (3) accordingly, there is a “countdown clock” running down to the time within which some things have to be done by the employer;
  - (4) the deadline for the doing of those things may be extended in certain circumstances, those being the circumstances set out in subclause 2.11.26 of the 2015 TO Agreement, which finds its equivalent in the other agreements referred to in the application;

- (5) transit officers work by way of ordinary hours a 40-hour week and typically do so by way of four 10 hour shifts;
  - (6) the result of the above is that in any given seven-day period a transit officer will work on four days and have off three "blank days", as they are called;
  - (7) in the ordinary event the countdown clock does not stop for blank days;
  - (8) the countdown clock does stop for periods of authorised leave;
  - (9) sometimes periods of leave "bookend" blank days by which I mean periods of leave occur on either side of blank days;
  - (10) sometimes multiple blocks of blank days are bookended by periods of leave;
  - (11) the "facts" giving rise to the present application, as understood by me having heard both parties about them and having had regard to the first document in the bundle comprising Exhibit 1, are illustrative of this;
  - (12) those facts relate to Mr Hawkes;
  - (13) looking at the period 29 April 2015 to 25 May 2015 for Mr Hawkes the following occurred:
    - (a) from 29 April 2015 to 3 May 2015 Mr Hawkes used annual leave;
    - (b) from 4 May 2015 to 6 May 2015 were blank days for Mr Hawkes;
    - (c) from 7 May 2015 to 10 May 2015 Mr Hawkes used annual leave;
    - (d) from 11 May 2015 to 13 May 2015 were blank days for Mr Hawkes;
    - (e) from 14 May 2015 to 18 May 2015 Mr Hawkes used annual leave;
    - (f) from 19 May 2015 to 24 May 2015 were blank days for Mr Hawkes; and
    - (g) on 25 May 2015 Mr Hawkes returned to work.
- 27 In relation to the above the applicant says, with regard to subclause 2.11.26(b), that on the bookended blank days a transit officer is "absent from duty through authorised leave."
- 28 The respondent says that a transit officer is not absent from duty through authorised leave on the bookended blank days. A transit officer is not "on duty" on blank days in the ordinary event and there is no warrant for considering the person to be absent from duty on those days in the above scenario. That is, Mr Hawkes was not absent from duty on 4 to 6, 11 to 13 or 19 to 24 May 2015, because these were, or would have been in the ordinary event, blank days.
- 29 The respondent's argument continues that a transit officer is not docked a day of leave for the bookended blank days and the transit officer is, therefore, not absent from duty through authorised leave on those days.
- 30 The respondent says there is no reason to treat the bookended blank days any differently from normal blank days during which the countdown clock continues to run.
- 31 To assist me in the interpretation of the subclause I break it down according to the definitions of its key terms as found in the Macquarie Dictionary.
- 32 Doing so it may be read in this way. The countdown clock will stop for periods where:  
an employee keeps himself or herself away (ie is absent) from any actions required by his or her position (ie duty) in consequence of (ie through) duly sanctioned (ie authorised) permission to do so (ie leave).
- 33 I then turn to the evidence.
- 34 The applicant's evidence establishes to my satisfaction that for blank days bookended by periods of leave the applicant considers that its employees are basically beyond its reach and that they, employees, are entitled to act on those days without concern for contact from, or the expectation of contact from, their employer. This was the evidence of Mr Richard Farrell, the applicant's Manager Labour Relations, and was supported by Exhibit 4 which was a tabulated report of the comments of relevant operational managers on the matter.
- 35 It was also, compellingly, the evidence of witnesses called by the respondent. In fact, noting I used the word "basically" above, their evidence was that during blank days bookended by periods of leave the applicant's employees consider themselves completely and utterly beyond the reach of the applicant.
- 36 The oral evidence of Mr Joshua Dekuyer and Mr John Olding was crystal clear in this regard.
- 37 So much also emerges from the application for leave form of Mr Hawkes which formed part of Exhibit 1. Mr Hawkes nominated, for instance, 3 May 2015 to 24 May 2015 as a period of leave sought without regard to the fact that not all of the days in that period would result in reductions to his annual leave entitlement because some of them would be blank days.
- 38 Mr Hawkes gave as the reason for the period of leave that he was attending military training in Sydney.
- 39 Mr Hawkes obviously considered that he would be beyond the reach of his employer for that period of time even though it included blank days.
- 40 I also note that the employer, by approving the leave, was evidently of a similar view.
- 41 The evidence is a strong indicator of what the parties must really have meant by subclause 2.11.26(b) of the 2015 TO Agreement.
- 42 A consideration of the purpose of the subclause in its relevant context also provides a guide to the real meaning of the subclause.

- 43 The disciplinary provisions in which the subclause appears, as I noted above, set deadlines for certain events to occur and there are conclusive outcomes if those deadlines are not met.
- 44 This is a scheme which mainly benefits employees (although there is some benefit to the employer in imposing a discipline that militates against proceedings being prejudiced against it by staleness and other effects of delay).
- 45 It is only sensible that there be a provision in the clause which stops time running in certain circumstances. It is, in particular, sensible that time stop running when an employee is keeping himself or herself away from any actions required by his or her position with the approval of his or her employer.
- 46 This is sensible because it allows an employee the undeniable benefit of being able to recuperate from sickness or enjoy a break from work without the spectre of contact from employer in relation to a disciplinary process hanging over them.
- 47 It is also sensible, given that the employer has agreed to strict deadlines, that the employer is able to allow its employees to recuperate or recharge without worrying about time running against it and it also sensible that the employer is not obliged to work out a way to contact an employee who is entitled to be keeping himself or herself away from contact with the employer with its approval.
- 48 The above purposes are only achieved if time does not run during blank days bookended by leave.
- 49 Additionally, the results of time running during the blank days bookended by leave would be absurd and would not in any way reflect the industrial reality described to me by, in particular, Mr Joshua Dekuyer and Mr John Olding.
- 50 Mr Joshua Dekuyer gave evidence that he had taken a period of five weeks' leave to honeymoon in Europe. It is clearly a fair thing that such things be allowed.
- 51 It follows that an employee could be overseas enjoying an important break on blank days bookended by leave.
- 52 The passing of blank days within that period, if the respondent's interpretation is the correct, may mean that, for instance, the milestone under clause 2.11.4 of the 2015 TO Agreement could fall on one such day.
- 53 The employer would, if the respondent's interpretation is correct and it does not, which would be understandable, want to allow disciplinary provisions to be determined against it by the passage of time, have to find a way to "notify" the employee of the nature of a suspicion it has in relation to the employee. (And I add here that I have no difficulty in finding that "notify" in clause 2.11.4 means to actually inform and that my finding is unaffected by the use of the word "issue" in subclause 2.11.4(c) because it cannot derogate from the primary requirement to "notify").
- 54 Notification may or may not be possible in the above circumstance. If possible it may be highly inconvenient to the employer and highly unwelcome by the employee.
- 55 It may involve the employer compromising the important confidentiality of the process as the employer tries to hunt the employee down through family or other measures. If done it might very well ruin the employee's period of leave.
- 56 Another example would be that of an employee on a long period of personal leave for illness. If the clock started and stopped during the period when the person was sick, depending on whether a day of absence was a docked sick leave day or a blank day, the employer might very well be forced to intrude on the person's wellbeing in clearly unfortunate ways to prevent a disciplinary process being determined merely by the passage of time.
- 57 These results could not have been intended by the employer and the union when they agreed upon the inclusion of the subclause under consideration here.
- 58 I have no hesitation in finding that on blank days bookended by periods of leave employees keep themselves away from any actions required by their position in consequence of duly sanctioned permission to do so.
- 59 I think the evidence establishes that blank days bookended by periods of leave are treated by the employer, and viewed by the employees, as substantively different from blank days bookended by rostered service. This is relevant because there must be a sensible reason, if the interpretation I prefer is correct, why time runs for the latter blank days but not the former.
- 60 I think the answer is that during blank days bookended by rostered service an employee is not, once a transit officer's duties are fully understood, truly and comprehensively able to keep himself or herself away from actions required by his or her position.
- 61 A transit officer may, during that period, be requested to work an additional shift (pursuant to clause 3.2.5 of the 2015 TO Agreement) or be called out to deal with an emergency.
- 62 Also, although I do not need to decide it, a transit officer might as part of his or her duties, be obliged to respond to an order to return to work to be "notified" under clause 2.11.4 of the 2015 TO Agreement which order, depending on the circumstances, might be a reasonable and lawful one (subject to appropriate payment).
- 63 I find that on blank days bookended by leave a person is absent from duty in a way that an employee who is rendering normal service is not and that, in relation to subclause 2.1.26(b) of the 2015 TO Agreement, that makes a difference.
- 64 The respondent led some evidence about contact between the applicant and its employees during periods of leave. That evidence was intended, I think, to show that duty may intrude on leave and that accordingly the sacrosanctity of the leave is not as the applicant makes out.
- 65 The argument was, I think, that if the applicant considers that it can, for some reasons, interrupt leave by making contact with its employees it undermines its assertions that the intention of subclause 2.11.26(b) of the 2015 TO Agreement was to avoid the need to contact employees in relation to disciplinary matters during periods of authorised absence.

- 66 The examples given were very much at the margins of relevance. One related to the employer contacting the employee to make sure they put in an application for leave to cover a one-day absence. That goes to making sure a period of leave is properly authorised and is not really an interruption to leave at all, much less the stressful interruption that contact in relation to a disciplinary process would be.
- 67 Other examples related to contact in relation to the giving of evidence in court proceedings. The applicant itself (through Exhibit 4) admitted this could happen.
- 68 However, this is a duty owed to the courts and the due administration of justice in the public interest as much as it is to the employer. In any event the contact about this issue merely prevents a court needing to compel the attendance of the person. It is not, either because of the rarity of it happening or because of the characterisation of the event in its proper context, an example which I consider relevant.
- 69 I have throughout my decision referred to blank days bookended by periods of leave. My references are deliberate.
- 70 The evidence, and in particular Exhibit 4, introduces an element of uncertainty in relation to the extent an employee is truly considered, or may truly consider himself or herself, out of reach of the employer on blank days bookended by, on the one side, a period of leave and, on the other side, normal rostered service.
- 71 I am not willing to make a declaration of how the relevant subclause might apply to such a situation given the state of the evidence.
- 72 I do not consider this matter is advanced by answering any of the questions posed by the applicant in its Notice of Application beyond the extent that those questions can be answered from having regard to my reasons for decision appearing above.
- 73 On the matter raised by the application, and the facts and evidence in relation to it, I declare as follows:  
that clause 2.11.26(b) of the 2015 TO Agreement and its equivalents have the effect that, in relation to the relevant deadlines, time does not run during blank days bookended by periods of leave or, put another way, time is extended by such days.
- 74 I do not consider it necessary to vary any industrial agreement in light of my reasons for decision.
- 75 I note that no argument was made that any factual scenario raised or evidential example given was amenable to solution under clause 2.11.26(a) and its equivalents and so I have not turned my mind to that issue.
- 76 I note in closing that subclause 2.11.26 and its equivalents refer to “minimum periods”. I think, although in the absence of argument I may have missed something or my thinking may simply be wrong, that “minimum” is understood by all to mean “maximum”. If I am right this is a good example of the dangers in looking only to the text to find the real meaning of clauses in industrial instruments when interpreting them under section 46 *Industrial Relations Act 1979*. In relation to it, the parties may wish to consider applying to vary the clause.
- 77 The reference to “sickness” also seems outdated in light of provisions in the industrial instruments which create “personal leave”.
- 78 If either party wishes me to act under section 46(2) *Industrial Relations Act 1979* they should inform my chambers.

2017 WAIRC 00174

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

**PARTIES****APPLICANT**

-v-

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN  
AUSTRALIAN BRANCH

**RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** FRIDAY, 24 MARCH 2017  
**FILE NO.** APPL 3 OF 2017  
**CITATION NO.** 2017 WAIRC 00174

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**Result** Order made

**Representation**

**Applicant** Mr D Anderson of counsel

**Respondent** Mr K Singh as agent

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*Order*

HAVING heard Mr D Anderson, of counsel, on behalf of the applicant and Mr K Singh, as agent, on behalf of the respondent in relation to the respondent's application pursuant to section 27(1)(a) *Industrial Relations Act 1979*; and

HAVING given reasons for decision in which I determined to make an order dismissing the respondent's application;

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

ORDER that the respondent's application pursuant to section 27(1)(a) *Industrial Relations Act 1979* is dismissed.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

2017 WAIRC 00177

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2017 WAIRC 00177  
**CORAM** : COMMISSIONER D J MATTHEWS  
**HEARD** : TUESDAY, 21 MARCH 2017  
**DELIVERED** : FRIDAY, 24 MARCH 2017  
**FILE NO.** : APPL 11 OF 2017  
**BETWEEN** : THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA  
Applicant  
AND  
AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES,  
WESTERN AUSTRALIAN BRANCH  
Respondent

CatchWords : Application for true interpretation and variation of clause of industrial agreement - Respondent applied for dismissal pursuant to section 27 (1)(a) *Industrial Relations Act 1979* - Respondent's application dismissed - Clause relates to temporary transfer allowance - Principles of interpretation of industrial instruments discussed and applied - Clause found to be unambiguous - Declaration made - No variation ordered

Legislation : *Industrial Relations Act 1979*  
*Industrial Relations Commission Regulations 2005*

Result : Declaration made

**Representation:**  
Counsel:  
Applicant : Mr D Anderson  
Respondent : Mr C Fogliani  
Solicitors:  
Applicant : State Solicitor's Office  
Respondent : W.G. McNally Jones Staff Lawyers

**Case referred to in reasons:**

*Ambatielos v Anton Jurgens Margarine Works* [1922] 2 KB 185

*Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* [2017] WAIRC 00173

**Cases also cited:**

*Amcors Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241

*Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99

*Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* (2014) 94 WAIG 787

*City of Wanneroo v Holmes* (1989) 30 IR 362

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

*Director General, Department of Education v United Voice WA* [2013] WASCA 287  
*Health Services Union of Western Australia (Union of Workers) v The Director General of Health* (2013) 93 WAIG 1  
*Kucks v CSR Ltd* (1996) 66 IR 182  
*McCourt v Cranston* [2012] WASCA 60  
*McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423  
*Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1]* (1920) 28 CLR 278  
*Osland v Secretary, Department of Justice* [2008] HCA 37  
*O'Sullivan v Farrer* (1989) 168 CLR 210  
*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451  
*Re Harrison; Ex parte Hames* [2015] WASC 247  
*Re Newton-Tighe and Department of Employment, Education and Training* (1996) 42 ALD 147  
*Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 67 WAIG 1097  
*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* (2015) 95 WAIG 1503  
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165  
*Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 CLR 492

*Reasons for Decision*

- 1 The system within the public metropolitan rail system operated by the applicant is that railcar drivers report to work at what is called their "home depot." There are three such depots being the Claisebrook Depot, the Mandurah Depot and the Nowergup Depot.
- 2 On some occasions railcar drivers are required by the applicant to begin their day's work at a depot other than their home depot. Railcar drivers might be required to report for work at a "foreign depot" for training or, in a rare case, to cover a shortfall of railcar drivers at the foreign depot.
- 3 Pursuant to clause 5.2.1(a) of the Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016, where this occurs, and the distance between the railcar driver's usual place of residence and the foreign depot is greater than the distance between the railcar driver's usual place of residence and their home depot, an allowance is payable per kilometre "in both directions calculated on the extra distance the employee is required to travel."
- 4 Under clause 5.2.1(b) of the Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016 there are two methods of calculation of the quantum available.
- 5 Clause 5.2.1(b) provides as follows:
  - b) The allowance payable per kilometre will be:
    - (i) \$1.72 where the Depot Manager of the employee's home depot is satisfied that the employee is not reasonably able to use public transport to travel to and from the other depot; and otherwise
    - (ii) Half the figure nominated in paragraph (i) of this subclause where the Depot Manager of the employee's home depot is satisfied that the employee is reasonably able to use public transport to travel to and from the other depot.
- 6 The applicant says that in the assessment required of a depot manager under clause 5.2.1(b) the location the railcar driver travels to and from should be the railcar driver's home depot.
- 7 The respondent says that in the assessment required by a depot manager under clause 5.2.1(b) the location the railcar driver travels to and from should be the railcar driver's usual place of residence.
- 8 As I understand the applicant's argument it is said that the depot manager must be able to identify a location from which to assess an employee's ability to use public transport to get to and from the foreign depot and it is convenient that that location be the home depot.
- 9 The depot manager will be familiar with the services from the home depot and will not have to undertake a detailed assessment of other public transport services that may be available to the railcar driver.
- 10 It is said to be not inconvenient to a railcar driver, and a sensible interpretation, because the railcar driver would, in the normal event, be presenting for work at the home depot anyway.
- 11 Additionally, it is said that it is the custom and practice within the applicant's operations for depot managers to assess an employee's ability to use public transport from the home depot as the most appropriate factor in the required assessment.
- 12 The applicant says that the result of the respondent's contended interpretation would be "commercially nonsensical". This submission relates to the cost it sees associated with the respondent's interpretation.
- 13 The applicant says that to avoid those nonsensical outcomes it could direct the railcar drivers to report for work at the home depot on a day when they will be required at a foreign depot and only at that stage undertake the relevant assessment (with such an assessment invariably resulting in the application of clause 5.2.1(b)(ii) rather than clause 5.2.1(b)(i)).

- 14 The interpretation for which it contends, the applicant says, will avoid the need for this.
- 15 The applicant also says that the respondent's interpretation would be absurd because it would have the effect that clause 5.2.1(b)(ii) would rarely, if ever, have work to do because public transport will not present at the door of a railcar driver's usual place of residence.
- 16 The respondent says there is no reason why the location in issue in clause 5.2.1(b) should be the railcar driver's home depot given that there is no need, when a railcar driver is reporting for work at a foreign depot, for the railcar driver to attend their home depot.
- 17 The respondent says, essentially, that, in the circumstances in which clause 5.2.1(b) will apply, it makes more sense to consider the usual place of residence to be the location. This is because the relevant circumstance is that the railcar driver is required only to travel from their usual place of residence to a foreign depot (and back) on such days and the home depot does not come into the equation. The respondent says that other than for consideration of whether clause 5.2.1 is triggered the home depot is irrelevant to clause 5.2.1 (and therefore to the operation of clause 5.2.1(b)).
- 18 The respondent draws support from clause 5.2.1(a) including as a factor in the assessment required by the subclauses a railcar driver's "usual place of residence" and that the clause is intended to be beneficial to railcar drivers.
- 19 The parties seemed to agree with each other that clause 5.2.1(b) was ambiguous and the applicant called a witness, Mr Mark Wirski (the Acting Assistant Operations Manager Transperth Train Operations Division holding the substantive position of Depot Manager, Nowergup), who was cross-examined by the respondent, and tendered some documents into evidence.
- 20 Before turning to the interpretation of clause 5.2.1(b) I need to deal with the respondent's application that I dismiss the application under sections 27(1)(a)(ii) and (iv) *Industrial Relations Act 1979* on the basis that the proceedings are not necessary or desirable in the public interest and the application is an abuse of process.
- 21 That application is made against a background that there are proceedings before the Industrial Magistrate's Court (which have not yet been heard) dealing with a dispute which is on all fours with the dispute before me, including that the "Facts Giving Rise to the Application" (which the applicant is obliged to provide under regulation 52(1)(b) *Industrial Relations Commission Regulations 2005*) are the facts that will be considered by the Industrial Magistrate's Court.
- 22 Section 46(3) *Industrial Relations Act 1979* is a complete answer to the respondent's application.
- 23 Parliament has decided that, insofar as the interpretation of awards (as defined by section 46(5) *Industrial Relations Act 1979*) is concerned, what the Western Australian Industrial Relations Commission says goes.
- 24 Some of the reasons why Parliament has so provided may be:
  - (1) the Western Australian Industrial Relations Commission is a specialist tribunal and has better knowledge of practical considerations and industrial realities affecting the parties before it than a court may do;
  - (2) the Western Australian Industrial Relations Commission is charged with declaring the "true" interpretation of awards;
  - (3) the Western Australian Industrial Relations Commission may play an inquisitorial role if it chooses to do so; and
  - (4) the Western Australian Industrial Relations Commission is not bound by the rules of evidence.
- 25 The Western Australian Industrial Relations Commission is, Parliament evidently considers, best placed to get to the bottom of what parties meant by words included in relevant industrial instruments.
- 26 It can hardly be undesirable or an abuse of process for the Western Australian Industrial Relations Commission to play the role Parliament has given it even, or perhaps especially, when it is known that its decision will impact on extant proceedings elsewhere.
- 27 I consider I am providing the assistance to the Industrial Magistrate's Court which Parliament says I might rather than inappropriately cutting across that Court's jurisdiction. Accordingly, I dismiss the respondent's application.
- 28 In relation to the matter of interpretation the first question is whether the text reveals the intention of the parties or whether the text is ambiguous and regard ought to be had to the evidence of surrounding circumstances.
- 29 In *Public Transport Authority of Western Australia v Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch* [2017] WAIRC 00173 I made various comments on this matter and I ask that those comments be incorporated when reading this decision.
- 30 I quoted a passage from *Ambatielos v Anton Jurgens Margarine Works* [1922] 2 KB 185 at 196 in that decision.
- 31 I reproduce the passage here including a further sentence as follows:

"[I]t is very difficult indeed to say what is ambiguous and what is not, and I do not think any test can be applied except that of the person who is dealing with it. If it does not seem ambiguous to him I am afraid he can only say 'It may seem ambiguous to others, but it does not to me'."
- 32 Here clause 5.2.1(b) may seem ambiguous to others, including the parties, but it does not to me.
- 33 Clause 5.2.1 only arises for consideration "when an employee is required to commence and conclude a shift at a metropolitan depot other than the home depot to which the employee is stationed."
- 34 The circumstance triggering consideration is one where a railcar driver is starting work at a foreign depot.
- 35 Unless the clause directs attention to the home depot in some way there is no need, in that circumstance, to bring the home depot into calculations; the person is not starting work there, the person is starting work at the foreign depot.

- 36 Clause 5.2.1(a) does bring the home depot into calculations but only in the limited way there provided; that is, as a factor in the calculation to assess whether an allowance is payable.
- 37 Even then the allowance is said under clause 5.2.1(a) to be calculated on “the extra distance the employee is required to travel” and whether there is an “extra distance” is to be determined by comparing the distance between the railcar driver’s usual place of residence and the home depot and the distance between railcar driver’s usual place of residence and the foreign depot.
- 38 Clause 5.2.1(a) therefore invites a comparison which assumes that there will be travel from a railcar driver’s usual place of residence to a foreign depot.
- 39 This confirms in my mind that journeys from a railcar driver’s usual place of residence to the foreign depot and back are what the clause is about and that, unless there is some contrary indication, these are the relevant locations.
- 40 When I turn to clause 5.2.1(b) I find, against the background that the railcar driver will be starting work at a foreign depot, that there is no need whatever, to understand the subclause and how it operates, to, as a matter of course, think about the home depot as a relevant location.
- 41 To the extent the reader needs to think about the home depot that is done in considering whether, under clause 5.2.1(a), any allowance is payable at all.
- 42 While the depot manager of the railcar driver’s home depot may be the person charged with the assessment under clause 5.2.1(b) that does not inform my understanding of the locations to be used in the assessment. Someone has to do the assessment and it might as well be the railcar driver’s depot manager.
- 43 I am informed in my understanding of the locations to be used in the assessment by the simple fact that where the consideration of the clause is triggered it is because the person is “commencing” and “concluding” a shift at a foreign depot.
- 44 Railcar drivers will in the expected event go from their usual place of residence to the foreign depot and back for the commencement of, and at the conclusion of, their working day.
- 45 They are the locations which are travelled to and from and accordingly it is those locations which are, in my view, evidently to be considered under clause 5.2.1(b).
- 46 Although I have not needed to refer to the evidence of surrounding circumstances because I find no ambiguity in clause 5.2.1(b), if I had done so I would only have been reinforced in my view.
- 47 At least one clear effect of Mr Wirski’s evidence was that the home depot is not always, or even as a rule of thumb, considered to be a relevant location under clause 5.2.1(b).
- 48 Mr Wirski gave evidence that if a railcar driver would have to backtrack from their usual place of residence to their home depot in terms of their journey to the foreign depot the applicant abandons use of the home depot as a relevant location for clause 5.2.1(b), even on its own interpretation of the clause.
- 49 I say nothing about the evidence other than that the applicant itself obviously does not consider that the home depot is fixed as a location for the purposes of clause 5.2.1(b).
- 50 That evidence would not mean, of course, that it necessarily follows that a railcar driver’s usual place of residence ought be fixed as a location but I find, for the reasons given above, that on an ordinary reading of clause 5.2.1(b), in light of the opening words of clause 5.2.1, it should be so fixed.
- 51 Whether an employee is reasonably able to use public transport to travel to and from his or her usual place of residence to a foreign depot will only be able to be decided on a case by case basis.
- 52 What is reasonable will depend on the circumstances. My comments following may assist but they can only be meant as rough guide with the answer depending on the circumstances of the particular case under consideration.
- 53 If a bus does not stop at the door of a railcar driver’s usual place of residence this does not mean he or she is not reasonably able to use public transport to get to and from the foreign depot. A railcar driver would, in the ordinary event, be reasonably able to use public transport where access to it is reasonably proximate to his or her usual place of residence.
- 54 Simply because a railcar driver would have to backtrack to their home depot to get to a foreign depot by train does not mean he or she is not reasonably able to use public transport to get to a foreign depot. There may be a bus stop within walking distance which takes the railcar driver to a train station from which the foreign depot may be reached before the railcar driver’s start time.
- 55 I do not think short car journeys to park and ride facilities, or a person being dropped off at public transport, necessarily rule out a finding that a person is reasonably able to use public transport, especially if this is something a railcar driver ordinarily does to attend their home depot. In ordinary language a person will say they get to work on public transport even if they have been dropped off, or driven a short distance, to access it.
- 56 To give an example I would not imagine that it would be reasonable, without more, in terms of the quantum of the allowance paid, for a railcar driver who normally drives to his or her home depot for work to drive past his or her home depot, where a train is waiting or coming which would get him or her to the foreign depot on time, on his or her way to a foreign depot.
- 57 But I do not wish to decide specific factual circumstances and do not intend to do so, they being obviously multitudinous. I do say however that the so called absurdities the applicant points to if the respondent’s interpretation is correct will not necessarily arise.
- 58 I cannot find the financial implications of my decision are so great as to render it nonsensical. Given that the financial outcomes will depend on circumstances it is hard to say what they will be. In any event it must be recognised that requiring a person to report for work at a different place to that they normally attend is evidently accepted by the industrial agreement to be a burden upon the railcar driver, although, of course, one that should be alleviated by appropriate compensation and not windfall gain.

- 59 This leaves for consideration only what “pubic transport” means in clause 5.2.1(b).
- 60 The respondent makes an argument here which relates to a particular circumstance affecting Nowergup Depot, which may be a foreign depot for the purposes of clause 5.2.1(b).
- 61 That circumstance is that only railcar drivers can embark and disembark at Nowergup Depot and other passengers, while physically able to do so, are not permitted to embark and disembark there.
- 62 Trains run through Nowergup Depot on their way to Butler Train Station.
- 63 The respondent says in its outline of submissions, at [18], that I should interpret public transport to mean “transport (such as buses and trains) which is available to the public and which travel on fixed routes” and, at [19], that given the facts (being those I have set out above) “it is not possible to use public transport to get to the Public Transport Authority’s Nowergup Depot...because there are no transport services that are available to the public that go to the Nowergup Depot.”
- 64 I find that “public transport” means “public transport” admitting that I find it difficult to improve on the term by elaboration and I find that it includes trains operated by the applicant which run through Nowergup Depot. I find that railcar drivers who use such trains to get to Nowergup Depot use public transport to do so.
- 65 For the respondent’s interpretation to succeed I would essentially have to ignore everything that has ever been decided in relation to the correct interpretation of industrial instruments and accept, as having an important role in the arena, the dark arts of sophistry.
- 66 The questions asked of me in the Notice of Application may be usefully answered by me in light of my above reasons as follows:
- (1) Not as a rule but circumstances may arise where that is appropriate depending on the facts;
  - (2) Yes.
- 67 I declare that the true interpretation of clause 5.2.1(b) is as follows:
- That in considering whether an employee is reasonably able to use public transport to travel to and from a depot other than the employee’s home depot under clause 5.2.1(b) the depot manager of the employee’s home depot shall consider as the relevant locations the employee’s usual place of residence and the other depot.
- 68 I do not consider, in light of the reasons for decision, that there is a need to vary the clause.
- 69 If either party wishes me to act under section 46(2) *Industrial Relations Act 1979* they should inform my chambers.

2017 WAIRC 00175

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	
<b>PARTIES</b>		<b>APPLICANT</b>
	-v-	
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER D J MATTHEWS	
<b>DATE</b>	FRIDAY, 24 MARCH 2017	
<b>FILE NO.</b>	APPL 11 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 00175	

<b>Result</b>	Order made
<b>Representation</b>	
<b>Applicant</b>	Mr D Anderson of counsel
<b>Respondent</b>	Mr C Fogliani of counsel

*Order*

HAVING heard Mr D Anderson, of counsel, on behalf of the applicant and Mr C Fogliani, of counsel, on behalf of the respondent in relation to the respondent’s application pursuant to section 27(1)(a) *Industrial Relations Act 1979*; and  
 HAVING given reasons for decision in which I determined to make an order dismissing the application;  
 NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby:

ORDER that the respondent’s application pursuant to section 27(1)(a) *Industrial Relations Act 1979* is dismissed.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

2017 WAIRC 00205

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	<b>APPLICANT</b>
	-v- AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER D J MATTHEWS	
<b>DATE</b>	FRIDAY, 7 APRIL 2017	
<b>FILE NO.</b>	APPL 11 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 00205	

<b>Result</b>	Declaration made
<b>Representation</b>	
<b>Applicant</b>	Mr D Anderson of counsel
<b>Respondent</b>	Mr C Fogliani of counsel

*Declaration*

HAVING heard Mr D Anderson, of counsel, on behalf of the applicant and Mr C Fogliani, of counsel, on behalf of the respondent; and

HAVING given reasons for decision in which I made a declaration; and

HAVING received a request pursuant to section 46(2) *Industrial Relations Act* to issue my declaration in the form of an order;

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

DECLARE that the true interpretation of clause 5.2.1(b) Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016 is as follows:

That in considering whether an employee is reasonably able to use public transport to travel to and from a depot other than the employee's home depot under clause 5.2.1(b) the depot manager of the employee's home depot shall consider as the relevant locations the employee's usual place of residence and the other depot.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

## CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2017 WAIRC 00164

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 7  
NOVEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2017 WAIRC 00164
<b>CORAM</b>	:	CHIEF COMMISSIONER P E SCOTT
<b>HEARD</b>	:	TUESDAY, 7 MARCH 2017
<b>DELIVERED</b>	:	TUESDAY, 21 MARCH 2017
<b>FILE NO.</b>	:	APPL 67 OF 2016
<b>BETWEEN</b>	:	SPARKS 'N' SECURITY PTY LTD AND RITZLINE PTY LTD T/A IC COOL REFRIGERATION, MECHANICAL AND ELECTRICAL SERVICES Applicant AND CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

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Catchwords	:	Review of a decision of the Construction Industry Long Service Leave Payments Board – Requirement to register as an employer under the Construction Industry Portable Paid Long Service Leave Act 1985 - Definition of construction industry – What constitutes work on site – Decision of the Construction Industry Long Service Leave Payments Board affirmed - Scope of Act extends beyond work on construction sites
Legislation	:	<i>Construction Industry Portable Paid Long Service Leave Act 1985</i> s 3, s 30(1), s 50(2) <i>Construction Industry Portable Paid Long Service Leave Regulations 1986</i> reg 2, reg 3, sch 1 div 2
Result	:	Decision of Board affirmed
<b>Representation:</b>		
Applicant	:	Mr I Curlewis of counsel
Respondent	:	Ms R Harding of counsel and with her Ms B Ridout of counsel
Solicitors:		
Applicant	:	Lavan
Respondent	:	Jackson McDonald

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*Reasons for Decision*

- 1 The applicant seeks a review of the respondent's decision requiring it to register as an employer under s 30(1) of the *Construction Industry Portable Paid Long Service Leave Act 1985* (the Act). The applicant says it is not an employer which engages persons as employees in the construction industry, nor is it required to otherwise register under the Act.
- 2 The applicant says:
- (1) It is a partnership of two companies, namely Sparks "N" Security Pty Ltd and Ritzline Pty Ltd. The primary business is the installation of reverse cycle ducted or split systems and evaporative cooling units in established residences and apartments. It also undertakes other work.
  - (2) It operates primarily in or in relation to the retail industry;
  - (3) It is not an employer as defined in the Act because:
    - (a) It does not engage persons as employees in the construction industry;
    - (b) None of its work is carried out on a construction site or on a site on which construction work is normally carried out;
    - (c) Its employees are not itinerant in that they are not employed on a project to project basis.
- 3 Therefore, the applicant says, the Act does not apply to it, and it is thus not required to be registered under s 30(1) of the Act.
- 4 The applicant called evidence from Darren Callaway, a director of Ritzline Pty Ltd. Mr Callaway says that:
- ...
- (5) The primary and predominant business of the applicant is the installation of domestic reverse cycle ducted, split systems and evaporative cooling units at established residential homes and apartments.
  - (6) The other business conducted by the applicant is the sale and servicing of domestic cooling units for residential houses and apartments and work on alarm systems, lighting, CCTV, theatre rooms, oven change overs, residual current devices and smoke alarms. All that work is carried out in residential homes and apartments.
  - (7) The applicant only carries out work in the retail trade for individual home and apartment owners.
  - (8) The applicant never works as a subcontractor for any new home builder. None of the applicant's work requires the issue of a building permit.
  - (9) At least 80% of the applicant's work is the installation of domestic reverse cycle ducted, split systems for home or apartment owners referred by Harvey Norman's Midland and Malaga shops to the applicant.
- ...
- 5 Mr Callaway gave evidence of the numbers of air conditioning units installed by the applicant by reference to referrals received from the two shops.
- 6 Mr Callaway also says:
- (11) The air conditioning units installed by the applicant are not industrial or commercial in nature. Each unit is received from Harvey Norman or other unit vendor, in a discrete large cardboard covered packaged container.
  - (12) None of the work that the applicant carries out is on or at a construction site. It is only carried out at existing residential homes and units.

- 7 As at the date of hearing, the applicant employs:
- One certified electrician. Until very recently, it also employed two other electricians.
  - One restricted fridge engineer, who is not a fitter or mechanic, having a qualification to allow him to do work installing and decommissioning air conditioners;
  - Two electrical apprentices;
  - Two office administrative staff, one of whom is also a proprietor and director.
- 8 The applicant also employs trades assistants from time to time to assist with installation and generally assisting tradespersons.
- 9 Mr Callaway holds a Refrigerator Handling Licence No L0199112 issued by the Federal Government, and he is not an employee, rather he is a director.
- 10 Mr Claude Camporale, also a director, has a restricted licence, but he also has other certifications that allow him to do installations of security cameras and other equipment.
- 11 The employees of the applicant are not itinerant and are generally employed full time.
- 12 None of the applicant's employees is covered by any prescribed Award and in particular, the applicant and its employees are not subject to the Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No 10 of 1979.
- 13 All work is performed away from the applicant's premises, and is performed at the client's residence.
- 14 In particular, the applicant says that the term "employee" in the construction industry in s 3 of the Act is ambiguous. This is because reference in the definition of "employee" to "a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification" must be read in context with the area and scope of the prescribed industrial instrument.
- 15 The respondent says that:
- (1) It is not a requirement of the Act that an employee of the applicant is covered by an award, but rather that the employee undertakes work in a classification that is a prescribed classification in a prescribed award. The prescribed awards include the Air Conditioning and Refrigeration Industry (Construction and Servicing) Award 1979. The applicant employs persons in two prescribed classifications, electricians and apprentices, which are referred to in prescribed awards.
  - (2) It is not necessary that the work be carried out on a "construction site" as such but is "on site" or "on a site", which means a place other than the business address of the employer. The applicant's employees carry out work at locations other than its business address.
  - (3) The type of work performed by the applicant's employees falls within the definition of "construction industry" as defined, in s 3(1)(a) of the Act of installation, maintenance of or repairs to:
    - “(xiii) work for the generation, supply or transmission of electric power; and
    - ...
    - (xvi) fixtures ... for the use of any buildings or works.”

(s 3(1)(a) of the Act).
- 16 The respondent says the work described by Mr Callaway is work of the nature which meets these meanings. Therefore, the applicant's employees are engaged to perform work in the construction industry.
- (4) It is not a requirement of the Act that the employees be itinerant.
- 17 Therefore, the respondent says the applicant is an employer as defined by s 3 of the Act in that:
- (a) it employs persons as employees who meet the definition of employee under the Act;
  - (b) the employees are engaged in the construction industry.

## THE ACT

- 18 Section 50(1)(b) of the Act provides that the decision by the Board to require an employer to register under the Act is a reviewable decision. A person aggrieved by a reviewable decision may refer the decision for review to the WAIRC (s 50(2)). The WAIRC is to inquire into the circumstances relevant to the decision and may affirm, vary or set aside the decision, and either substitute another decision or send the matter back to the Board for reconsideration in accordance with any directions or recommendations the WAIRC considers appropriate.
- 19 The Long Title of the Act provides that it is "An Act to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes".
- 20 It is useful, for the purpose of context, to set out the whole of the definition of 'construction industry' set out in s 3 of the Act even though a great deal of it is not relevant.

**construction industry** means the industry —

- (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —
  - (i) buildings; and
  - (ia) swimming pools and spa pools; and

- (ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and
  - (iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and
  - (iv) works for the storage or supply of water or for the irrigation of land; and
  - (v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and
  - (vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and
  - (vii) bridges, viaducts, aqueducts or tunnels; and
  - (viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and
  - (ix) pipelines; and
  - (x) navigational lights, beacons or markers; and
  - (xi) works for the drainage of land; and
  - (xii) works for the storage of liquids (other than water) or gases; and
  - (xiii) works for the generation, supply or transmission of electric power; and
  - (xiv) works for the transmission of wireless or telegraphic communications; and
  - (xv) pile driving works; and
  - (xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and
  - (xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and
  - (xviii) fences, other than fences on farms;
- (b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;
- (c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,
- but does not include —
- (d) the carrying out of any work on ships; or
  - (e) the maintenance of or repairs or minor alterations to lifts or escalators; or
  - (f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation;

21 Section 3 also defines employee, employer and apprentice as:

**employee** means —

- (a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or
- (b) an apprentice;

**employer** means —

- (a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or
- (b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (**person A**) to do work in the construction industry for another person (**person B**), even though person A is working for person B under an arrangement between the agency and person B,

but does not include a Minister, authority or local government prescribed under subsection (4)(c);

**apprentice** means —

a person who is an apprentice under a training contract that —

- (a) provides for training in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; and
- (b) is registered under the *Vocational Education and Training Act 1996* Part 7 Division 2 or an Act of another State or a Territory that corresponds to that Act;

22 Section 3 defines **industrial instrument** as:

- (a) an award, industrial agreement or order made under the *Industrial Relations Act 1979*; or

(b) an award, determination, enterprise agreement or order made under the *Fair Work Act 2009* (Commonwealth); or

(c) an award, determination or agreement given continuing effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Commonwealth),

irrespective of whether or not the instrument has, since it was made or given continuing effect, ceased to be in force;

23 Section 3 defines *prescribed* as:

*prescribed* means prescribed by regulations made under this Act;

24 Section 30 – Registration of Employers provides in subsection (1):

**30. Registration of employers**

(1) Every employer must register as an employer under this Act.

25 Section 3(4) of the Act provides for regulations to be made. It provides:

(4) The regulations may prescribe —

(a) any classification of work referred to in a prescribed industrial instrument to be a prescribed classification of work for the purposes of the definitions of *apprentice* and *employee*;

(b) any industrial instrument made with respect to employment in the construction industry to be a prescribed industrial instrument for the purposes of this Act;

(c) a Minister in the Government, an authority, whether a body corporate or not, constituted by a written law or a local government, not to be an employer, or not to be an employer in respect of prescribed employees of that Minister, authority or local government, for the purposes of the definition of *employer* in subsection (1).

26 The *Construction Industry Portable Paid Long Service Leave Regulations 1986* (the Regulations) provide the following relevant provisions:

**2. Prescribed awards**

The awards mentioned in Schedule 1 are prescribed under section 3(4)(b) of the Act.

**3. Prescribed classifications of work**

(1) Subject to subregulation (2), all classifications of work referred to in an award mentioned in Schedule 1 are prescribed under section 3(4)(a) of the Act.

Subregulation (2) relates to exceptions, conditions or limitations, and is not relevant to this matter.

27 **Schedule 1 – Prescribed awards and classifications of work, Division 2** lists the following awards arising under the *Industrial Relations Act 1979*:

(1) Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979, which includes the classifications of:

- Refrigeration Fitter; (clause 29(2)(a))
- Tradesperson; (clause 29(2)(a))
- Tradesperson’s Assistant; (clause 29(2)(a))
- Apprentice (clause 29(3)).

(2) Electrical Contracting Industry Award R 22 of 1978, which includes the classifications of:

- Electrical Fitter; (clause 5 – Definitions)
- Electrical Installer/Mechanic; (clause 5 – Definitions)
- Electrician – Special Class. (clause 5 – Definitions)

...

(4) Metal Trades (General) Award, which includes the classifications of:

- Tradesperson; (clause 13.2(1)(m))
- Tradesperson’s Assistant; (clause 13.2(1)(v))
- Apprentice; (clause 13.3))
- Electrician – Special Class; (clause 13.2(1)(g))
- Electrical Fitter; (clause 13.2(1)(h))
- Electrical Installer; (clause 13.2(1)(i))
- Fitter – Refrigeration (clause 13.2(1)(o)).

**CONSIDERATION AND CONCLUSIONS**

28 The process for the consideration of this matter must start with s 30 of the Act. It requires every employer to register under the Act.

29 According to s 3, an employer, for the purposes of this matter, is a natural person, firm or body corporate who or which engages persons as employees in the construction industry.

Does the applicant engage persons as employees in the construction industry?

30 Section 3 defines employee as:

- “(a) a person who is employed under ... a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or  
(b) an apprentice.”

31 The applicant employs a number of employees under contracts of service and as apprentices. It employs Electricians, Trades Assistants, and a Refrigeration Engineer.

32 Schedule 1 – Prescribed awards and classifications of the Regulations sets out, amongst others, three particular awards which are prescribed for the purposes of the Act. I note that the definition of employee requires that the classification be referred to in a prescribed industrial instrument *relating to the construction industry*.

33 “Construction industry” used in that context must be that construction industry defined by the Act. I think it is also reasonable to conclude that because the Schedule lists awards, that they are awards “relating to the construction industry”.

34 The awards listed in **Division 2 – Awards under the Industrial Relations Act 1979** include the Air Conditioning and Refrigeration (Construction and Servicing) Award No 10 of 1979, the Electrical Contracting Industry Award R22 of 1978 and the Metal Trades (General) Award.

35 I note that the definition of employee in s 3 of the Act does not require that the industrial instrument cover the employment, or that the employer be bound by the award (*Construction Industry Long Service Leave Payments Board v Positron Pty Ltd* (1990) 70 WAIG 3062 at 3064). It requires only that the employee is employed in a classification of work referred to in the prescribed industrial instrument.

36 So what are the classifications referred to in the awards? In the Air Conditioning and Refrigeration Award they include Tradesperson, Refrigeration Fitter and Tradesperson’s Assistant.

37 The Metal Trades (General) Award is broken up into two parts, Part 1 dealing with ‘General’ industry and Part 2 dealing with Construction Work.

38 **Part 1 – General** sets out in **clause 1.6 – Definitions and Classification Structure**, classification structure and definitions which is used to determine clusters of Wage Groups. The classification titles include, for example, Advanced Engineering Tradesperson – Levels I and II, Engineering Tradesperson Special Class – Levels I and II, Engineering Tradesperson – Level II, Engineering Tradesperson, Engineering/Production Employee – Level I, Engineering/Production Employee – Levels I - IV.

39 Each of those Wage Groups is then defined by reference to duties, training and exercise of different levels of judgment and levels of supervision. For example, the Engineering Tradesperson Level 1 includes a person who holds a Trade Certificate or a Tradesperson’s Rights Certificate as an Engineering Tradesperson (Electrical/Electronic) – Level 1, (see 1.6.7 – Wage Group C10). An Engineering Tradesperson Special Class – Level 1 includes an Engineering Tradesperson Special Class (Electrical/Electronic) – Level 1 (1.6.10 – Wage Group C8).

40 Clause 13 – Wages contains 13.2(1) Classification. This sets out classifications including Electrician – Special Class, Electrical Fitter, Electrical Installer, Tradesperson, Fitter - Refrigeration and Tradesperson’s Assistant.

41 The general Wage Groups and classifications replace the “Old definitions” set out in Appendix 2. This Appendix defines Tradesperson and sets out groups of classifications under the headings of ‘General Engineering’, ‘Electrical’, ‘Electroplating’, ‘Steel Construction’, ‘Welding’, ‘Foundry’ and ‘Industrial Instrumentation’. Under the group covered by ‘Electrical’ are Electrical Fitter, Electrical Installer, Electrician – Special Class, amongst others.

42 In **Part 2 – Construction Work**, clause 13 – Wages sets out classifications including Electrical Fitter, Electrical Installer, Tradesperson, Fitter – Refrigeration and Tradesperson’s Assistant.

43 The Electrical Contracting Industry Award R22 of 1978 has classifications of Electrical Fitter, Electrical Installer/Mechanic, Electrician - Special Class and Electrical Assistant. The Electrical Assistant is defined in Clause 5 – Definitions as “an employee directly assisting any other employee covered by this award.”

44 Therefore, the prescribed industrial instruments refer to classifications of Electrical Fitter, Electrical Installer, Electrician Special Class, Tradesperson, Tradesperson’s Assistant and Electrical Assistant (which definition is the equivalent of a Trades Assistant).

45 The applicant employs such classifications, as well as apprentices.

The area and scope of awards

46 I conclude that nothing in the definition of ‘employee’ in the Act requires consideration of the area and scope of the prescribed industrial instruments. It is merely that the employee is employed in the classification of work referred to in the award. In any event, where the award contains the definitions of the classifications in the awards, they do not refer to the industry covered by the award. They set out only the skills or qualifications required of the classification. The awards contain identical definitions of ‘construction work’, however, it is the construction industry as defined by the Act which is significant.

What is the construction industry for the purposes of the Act?

47 The definition of construction industry in s 3 includes the industry of carrying out, on a site, the installation, maintenance of or repairs to works for the generation, supply or transmission of electric power and to fixtures for the use of any building or works of a kind referred to in this section.

48 Therefore, it requires consideration of whether the work:

1. is carried out on a site;
2. is the installation, maintenance of or repairs to:
  - (a) works for the generation, supply or transmission of electric power; and
  - (b) fixtures or works for use on or for the use of any buildings.

Work 'on a site'

49 I note that the legislature could easily have included in the definition of construction industry the word 'construction' in reference to the site at which the work occurs if it had intended the work concerned to be only that on a construction site. Rather, it said 'on a site'.

50 The Macquarie Concise Dictionary, 6<sup>th</sup> edition, defines 'site' as '1. the position of a town, building, etc., especially as to its environment. 2. the area on which anything, as a building, is, has been, or is to be situated.' This definition is not helpful in this matter.

51 In examining the meaning of construction industry by reference to work 'on a site', firstly, as a matter of common sense, I think it could not be argued that all of the industry defined as the 'construction industry' in the Act is conducted on a site of the construction of a building or other works set out in the definition. That is because it includes maintenance, repairs and alterations. Maintenance and repairs in particular are usually carried out after the completion of the construction of the buildings or works.

52 Secondly, as Smith C observed in *Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board* (2001) 81 WAIG 665 at 670:

... The opening words [of s 3(1)(a)] are plainly expressed as disjunctive, so that a 'site' is to be construed as a place where any activities are carried out, that can be characterised as, construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the categories in subparagraphs (i) to (xviii) of s.3(1)(a) of the Act.

53 This means that a place where maintenance or installation, but not construction or erection, occurs can be a 'site' for the purposes of the Act.

54 In *Aust-Amec Pty Ltd t/a Metlab Mapel & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) 62 IR 412 at 423, Ipp J found that the duties of employees of Metlab Mapel were 'carried out at Metlab Mapel's premises (and not 'on a site').' While his Honour did not discuss the basis for this conclusion, it is clear that he determined that work at the employer's own premises is not work 'on a site'.

55 Therefore, where the applicant's employees perform work at the residences of clients in the installation of air conditioning, not at their employer's premises, they are performing work 'on a site'.

'Installation'

56 Install means '1. to place in position for service or use, as a system of electric lighting, etc' (Macquarie Concise Dictionary, 6<sup>th</sup> ed, 609). Installation is 'the act of installing'.

57 It is clear that the work done by the applicant's employees is installation. They place in position systems of ducting, electrical wiring and split air conditioning systems to established or newly completed houses, and to a limited extent, apartments and some small commercial premises.

'Works for the generation, supply or transmission of electrical power'

58 The applicant's Electricians and Apprentices undertake work to supply power to the air conditioning systems installed by their employer. They do so by connecting cables between the systems and the power supply to the house or a particular circuit.

'fixture or works for the use of any building'

59 The applicant's employees, the Electricians, Apprentices and Trades Assistants, fix to the buildings the air conditioning systems and the electrical systems to support them, for the use of the building in the form of cooling or heating the building.

**CONCLUSION**

60 Therefore, the applicant engages persons in the construction industry because:

- (i) the work is carried out on a site;
- (ii) it includes installation of works for the supply or transmission of electric power and fixtures for the use of buildings.

61 They are employees for the purposes of the Act because they are employed under a contract of service in classifications of work referred to in prescribed industrial instruments related to the construction industry, that are prescribed classifications.

62 I conclude that the applicant engages persons as employees in the construction industry.

63 Therefore, the applicant is an employer which is required to register under the Act. The respondent's decision to register the applicant is not in error and is to be affirmed.

Final comment

- 64 There is a misconception created by the title of the Act and some of its history. It is not limited to the construction industry or construction work as is generally understood in the community. Its scope extends significantly beyond employees who work on what people generally understand to be construction sites, who work on a series of construction projects and may, in that sense, be itinerant. It also applies to some maintenance and installation work, to the building of roads, bridges, swimming pools and other structures not normally contemplated when people think about the construction industry. It does not cover simply the building construction industry. Its coverage includes employees who work continuously for the same employer for many years.

2017 WAIRC 00165

**REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 7  
NOVEMBER 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**SPARKS 'N' SECURITY PTY LTD AND RITZLINE PTY LTD T/A IC COOL REFRIGERATION,  
MECHANICAL AND ELECTRICAL SERVICES**APPLICANT**

-v-

CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT****CORAM**

CHIEF COMMISSIONER P E SCOTT

**DATE**

TUESDAY, 21 MARCH 2017

**FILE NO/S**

APPL 67 OF 2016

**CITATION NO.**

2017 WAIRC 00165

**Result**

Decision of Board affirmed

**Representation****Applicant**

Mr I Curlewis of counsel

**Respondent**

Ms R Harding of counsel and with her Ms B Ridout of counsel

*Order*

HAVING HEARD from Mr I Curlewis of counsel on behalf of the applicant and Ms R Harding of counsel and with her Ms B Ridout of counsel on behalf of the respondent, the WAIRC, pursuant to the powers conferred under the *Construction Industry Portable Paid Long Service Leave Act 1985* and the *Industrial Relations Act 1979*, hereby orders:

THAT the decision of the Construction Industry Long Service Leave Payments Board on 7 November 2016 be affirmed.

[L.S.]

(Sgd.) P E SCOTT,  
Chief Commissioner.

**UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—**

2017 WAIRC 00185

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

GINO ANTONUCCI

**APPLICANT**

-v-

ROMAN CATHOLIC BISHOP OF GERALDTON, ST LUKE'S COLLEGE

**RESPONDENT****CORAM**

COMMISSIONER T EMMANUEL

**DATE**

WEDNESDAY, 29 MARCH 2017

**FILE NO/S**

U 176 OF 2016

**CITATION NO.**

2017 WAIRC 00185

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**Result** Order issued

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*Order*

HAVING heard the applicant on his own behalf and Mr D McKenna (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

1. THAT the applicant file and serve by email outlines of evidence for Mr M Connolly and Mr B Park by 5:00pm on 29 March 2017.
2. THAT the applicant provide to the respondent by way of discovery his telephone records and driving school appointment book for the period October 2014 to October 2016 by 12 April 2017.
3. THAT the respondent file and serve outlines of evidence and written submissions by 21 April 2017.
4. THAT the applicant, if he chooses to, file and serve a reply to the respondent's written submissions by 1 May 2017.
5. THAT this matter be listed for a 3-day hearing on 11 May 2017, 12 May 2017 and 15 May 2017.
6. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

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**2017 WAIRC 00191**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SANDRA CARLSEN

**PARTIES**

**APPLICANT**

-v-

WESTERN AUSTRALIA POLICE TRAFFIC WARDEN STATE MANAGEMENT UNIT

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER P E SCOTT

**DATE** FRIDAY, 31 MARCH 2017

**FILE NO/S** U 10 OF 2017

**CITATION NO.** 2017 WAIRC 00191

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**Result** Application dismissed

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*Order*

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

WHEREAS on Tuesday, 28 March 2017, the Commission received a *Form 14 – Notice of withdrawal or discontinuance* from the applicant.

NOW THEREFORE, 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.) P E SCOTT,  
Chief Commissioner.

[L.S.]

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2017 WAIRC 00192

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	ALAN JAMES EPIS	<b>APPLICANT</b>
	-v-	
	CHIEF EXECUTIVE OFFICER CITY OF BUNBURY	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER P E SCOTT	
<b>DATE</b>	FRIDAY, 31 MARCH 2017	
<b>FILE NO/S</b>	B 222 OF 2016	
<b>CITATION NO.</b>	2017 WAIRC 00192	
<b>Result</b>	Application dismissed	
<b>Representation</b>		
<b>Applicant</b>	Mr K Trainer as agent	
<b>Respondent</b>	Ms O Robertson	

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and  
 WHEREAS on Friday, 6 January 2017 the Commission convened a conciliation conference between the parties;  
 WHEREAS on Friday, 12 January 2017 the agent for the applicant advised that the parties had made progress towards resolution of the matter and were continuing to work through the issues;  
 WHEREAS by email of Monday 27 February 2017 the agent for the applicant was requested to provide the Commission with an update on the status of this matter and no response was received;  
 WHEREAS by letter of 20 March 2017 the agent for the applicant was again requested to provide an update on the status of the matter within seven days and that if no response was received, the matter may be dismissed;  
 WHEREAS no response has been received;  
 NOW THEREFORE, 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.

[L.S.]

(Sgd.) P E SCOTT,  
 Chief Commissioner.

2017 WAIRC 00132

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	BARRY HOPE-HUME	<b>APPLICANT</b>
	-v-	
	TRINITEQ INTERNATIONAL PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 10 MARCH 2017	
<b>FILE NO/S</b>	B 163 OF 2016	
<b>CITATION NO.</b>	2017 WAIRC 00132	

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<b>Result</b>	Application discontinued
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Mr C Higham

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*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, 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.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

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**2017 WAIRC 00189**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	DANIEL JOHNSON	<b>APPLICANT</b>
	-v-	
	VEHICLE SERVICES, COMO, BRENDAN HOLSWICH	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 31 MARCH 2017	
<b>FILE NO/S</b>	B 115 OF 2015	
<b>CITATION NO.</b>	2017 WAIRC 00189	

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<b>Result</b>	Application discontinued
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	No appearance

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*Order*

WHEREAS the applicant and the respondent reached an agreement to settle the herein claim on 11 December 2015 which the applicant now says has not been complied with by the respondent;

AND WHEREAS the Commission relisted the application for further hearing at which it was apparent the applicant's claim is beyond the Commission's jurisdiction;

NOW THEREFORE 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.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

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2017 WAIRC 00125

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	<b>APPLICANT</b>
	ROBERT WILLIAM LIEBIG	
	-v-	
	THE WELKE BROS FARMING TRUST & BRIAN E & NEVILLE G & MICHAEL A WELKE	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER S J KENNER	
<b>DATE</b>	WEDNESDAY, 8 MARCH 2017	
<b>FILE NO/S</b>	U 179 OF 2016	
<b>CITATION NO.</b>	2017 WAIRC 00125	

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<b>Result</b>	Application discontinued
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Mr S Farrell as agent

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*Order*

WHEREAS on 15 February 2017 the Commission wrote to the applicant and requested he advise within 14 days whether or not he wishes to proceed with the herein application.

AND WHEREAS the Commission informed the applicant that failure to respond to the letter may result in the herein application being discontinued by order of the Commission without further notice.

AND WHEREAS the Commission confirmed by telephone on 15 February 2017 that a failure to respond in writing within 14 days may result in the herein application being discontinued by the Commission.

AND WHEREAS no response was received by the applicant by close of business on 1 March 2017.

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

THAT this application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

2017 WAIRC 00154

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	<b>APPLICANT</b>
	ANDREW LILEY	
	-v-	
	BRENDAN CHAPLYN GIOVENCO INDUSTRIES	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER P E SCOTT	
<b>DATE</b>	THURSDAY, 16 MARCH 2017	
<b>FILE NO/S</b>	B 219 OF 2016	
<b>CITATION NO.</b>	2017 WAIRC 00154	

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<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	Mr A Liley
<b>Respondent</b>	Mr M Waring of counsel

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*Order*

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

WHEREAS on Friday, 10 February 2017, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on Thursday, 9 March 2017, the Commission received a *Form 14 – Notice of withdrawal or discontinuance* from the applicant.

NOW THEREFORE, 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.

[L.S.]

(Sgd.) P E SCOTT,  
Chief Commissioner.

**2017 WAIRC 00153**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DAVID REID	<b>APPLICANT</b>
	-v- GII JV	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER P E SCOTT	
<b>DATE</b>	THURSDAY, 16 MARCH 2017	
<b>FILE NO/S</b>	B 215 OF 2016	
<b>CITATION NO.</b>	2017 WAIRC 00153	

<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	Mr D Reid
<b>Respondent</b>	Mr M Waring of counsel

*Order*

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

WHEREAS on Friday, 10 February 2017, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on Tuesday, 28 February 2017, the Commission received a *Form 14 – Notice of withdrawal or discontinuance* from the applicant.

NOW THEREFORE, 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.

[L.S.]

(Sgd.) P E SCOTT,  
Chief Commissioner.

**2017 WAIRC 00148**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CHERIE SMITH	<b>APPLICANT</b>
	-v- MELISSA THOMPSON TEAHOUSE BOOKS	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER P E SCOTT	
<b>DATE</b>	THURSDAY, 16 MARCH 2017	
<b>FILE NO/S</b>	B 9 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 00148	

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**Result** Application dismissed

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*Order*

WHEREAS this is an application referred pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and  
 WHEREAS on 10 March 2017, the Commission convened a conference for the purpose of conciliating between the parties; and  
 WHEREAS by email on 14 March 2017, the applicant said that she did not wish to proceed with the matter.  
 NOW THEREFORE, 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.

[L.S.]

(Sgd.) P E SCOTT,  
Chief Commissioner.

**2017 WAIRC 00157**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

<b>CITATION</b>	:	2017 WAIRC 00157
<b>CORAM</b>	:	COMMISSIONER D J MATTHEWS
<b>HEARD</b>	:	MONDAY, 17 OCTOBER 2016, MONDAY, 27 FEBRUARY 2017
<b>DELIVERED</b>	:	FRIDAY, 17 MARCH 2017
<b>FILE NO.</b>	:	U 116 OF 2016
<b>BETWEEN</b>	:	DAVID NEIL ADAMS Applicant AND THE AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION Respondent

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CatchWords	:	Unfair dismissal application - Respondent a trading corporation - Western Australian Industrial Relations Commission does not have jurisdiction - Application dismissed
Legislation	:	<i>Commonwealth Constitution</i> <i>Fair Work Act (Registered Organisations) Act 2009</i> (Cth) <i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) <i>Judiciary Act 1903</i> (Cth)
Result	:	Application dismissed
<b>Representation:</b>		
Applicant	:	In person
Respondent	:	Mr J Nucifora

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**Cases referred to in reasons:**

*Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1

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

*Hardeman v Children's Medical Research Institute* (2007) 166 IR 196

*Quickenden v O'Connor* (2001) 109 FCR 243

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

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

*Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134

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

*Williams v. Hursey* (1959) 103 CLR 30

*Reasons for Decision*

- 1 On 18 July 2016 the applicant lodged an unfair dismissal application with the Western Australian Industrial Relation Commission naming “Wayne Wood, State Branch Secretary, Australian Services Union Western Australian Branch” as the respondent.
- 2 On 5 August 2016 a Notice of Answer was filed which claimed that “the Applicant was an employee of the Australian Municipal, Administrative, Clerical and Services Union” and that entity is “a National System Employer and the employment of all employees engaged by the Respondent are covered by the Fair Work Act 2009.” The Notice objected to the Western Australian Industrial Relation Commission having jurisdiction to hear and determine the application.
- 3 A hearing on the question of jurisdiction was listed for 17 October 2016.
- 4 That hearing however was adjourned after brief argument on the issue of the correct respondent to allow written submissions to be filed in relation to that matter. Submissions were received and on 18 November 2016 my Associate wrote to the parties informing them that I was satisfied that the applicant was employed by the Australian Municipal, Administrative, Clerical and Services Union. The letter asked the applicant whether he wished to apply to amend the name of the respondent.
- 5 The letter also said that I would provide my reasons for decision in relation to the correct respondent at a later time.
- 6 By email dated 21 November 2016 the applicant informed that he did wish to amend the name of the respondent. The applicant was informed that he could make an application to so amend orally at the continued hearing on jurisdiction necessitated by the respondent’s jurisdictional objection.
- 7 However, by letter dated 14 December 2016, the respondent asked that an order be made amending the name of the respondent because it was planning to comply with section 78B *Judiciary Act 1903* (Cth) in relation to its jurisdictional objection and it wished to include the correct information in the notices it was intending to send.
- 8 I thought this a sensible request and on 29 December 2016 made an order amending the name of the respondent.
- 9 Notice as required by section 78B *Judiciary Act 1903* (Cth) was subsequently given by the respondent.
- 10 The hearing in relation to the jurisdictional objection continued and concluded on 27 February 2017.
- 11 The respondent contended at that hearing that it was a constitutional corporation within the meaning of that term as used in section 51(xx) *Commonwealth Constitution* and that accordingly the *Fair Work Act 2009* (Cth) applied to the exclusion of the *Industrial Relations Act 1979*.
- 12 In particular, the respondent contended that it was a trading corporation.
- 13 My reasons for decision in relation to the two matters requiring determination are as follow.  
Correct employer
- 14 The applicant’s offer of employment dated 7 February 2014 was signed by “Wayne Wood, Branch Secretary” and commenced “further to our recent discussions, I am writing to confirm our offer of employment with the ASU WA Branch in the role of Industrial Organiser.”
- 15 The offer of employment went on to state that the applicant’s “conditions of employment will be in accordance with the Western Australian Branch Staff Conditions of Employment Agreement 2011.” I think this is an internal document as I can find no such registered or certified agreement in the State or Federal jurisdictions.
- 16 Letters sent to the applicant changing his employment from fixed term to permanent employment (28 July 2014) and confirming that employment was permanent upon the successful completion of a probation period (24 November 2014) were also signed by “Wayne Wood, State Secretary” and referenced the “West Australian Branch Staff Conditions of Employment Agreement.”
- 17 There is a West Australian Municipal, Administrative, Clerical and Services Union of Employees registered as an organisation under Division 4 Part II *Industrial Relations Act 1979* (see order of Full Bench of the Western Australian Industrial Relation Commission 2010 WAIRC 00423).
- 18 The applicant held an authority issued under section 49J *Industrial Relations Act 1979* to exercise powers in the name of the West Australian Municipal, Administrative, Clerical and Services Union of Employees.
- 19 The applicant’s payslips were headed up “ASU Western Australian Branch”.
- 20 A letter in relation to the termination of the applicant’s employment (1 July 2016), signed again by Mr Wood, stated “I am writing to confirm that your employment with the Australian Services Union Western Australian Branch was terminated on Friday, 24 June 2016” and made reference to the “ASU WA Branch Staff Conditions of Employment 2015.”
- 21 The applicant, on the basis of the above, says that he was employed by the body called the “West Australian Municipal, Administrative, Clerical Services Union of Employees” which is an organisation registered under the *Industrial Relations Act 1979* or an entity known as the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union or both.
- 22 If employed by the former the applicant says that is a “State” body as it is registered under the *Industrial Relations Act 1979*. If employed by the latter the applicant says that body is not incorporated and is not, in any event, a constitutional corporation.
- 23 It is clear from all of the material before me that Mr Adams was not employed by the West Australian Municipal, Administrative, Clerical and Services Union of Employees, that is the “State” body. All the documentation says that the applicant was employed by the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union.

- 24 The question is what is the true meaning and effect of what appears in the documentation.
- 25 The respondent maintained throughout that the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union has no separate legal entity and relied upon *Williams v Hursey* (1959) 103 CLR 30 and cases which have followed it to establish this proposition.
- 26 The respondent maintained that the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union could not employ the applicant, it not being an entity, and that if regard is had to the rules of Australian Municipal, Administrative, Clerical and Services Union, the body constituted under those rules, it is plain that body is the correct employer.
- 27 Division 5 of the rules is headed "Western Australian Branch" and Rule 4 provides that there shall be a Branch Executive Council. Rule 6j provides that "the Branch Executive Council may employ such persons for the purposes of carrying out these Rules as the Branch Executive Council thinks proper."
- 28 This seems to give the Branch a power to employ but a reading of the whole of the Rules shows that this is a power delegated to it by, or exercised by it on behalf of, the Australian Municipal, Administrative, Clerical and Services Union.
- 29 Clause 1a of the Rules establishes the Australian Municipal, Administrative, Clerical and Services Union.
- 30 Clause 10 is headed "Branches" and makes clear that the Australian Municipal, Administrative, Clerical and Services Union has organised itself as a national union which confers "powers, functions and duties" on Branches established under the Rules.
- 31 It is clear that the employment power under Division 5 Rule 6j is one conferred on the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union by the Australian Municipal, Administrative, Clerical and Services Union and is not and cannot be an original power of employment residing in a legal entity known as the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union.
- 32 There is no such legal entity under the Rules and the cases are quite clear that a branch of a national union, if it is a branch in the usual way, as the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union is, has no separate legal entity from the national union.
- 33 I have found that when Mr Wood offered employment to the applicant he was doing so on behalf of the Australian Municipal, Administrative, Clerical and Services Union and accordingly I made an order that the respondent in this matter should be the Australian Municipal, Administrative, Clerical and Services Union.

#### Jurisdiction

- 34 At the hearing on 27 February 2017 the respondent's representative argued that the Western Australian Industrial Relations Commission did not have jurisdiction because the respondent was a "national system employer" (it being a constitutional corporation as referred to in section 14(1)(a) *Fair Work Act 2009* (Cth)) and that accordingly section 26(1) *Fair Work Act 2009* (Cth) ousted the Western Australian Industrial Relations Commission's jurisdiction to hear and determine the application.
- 35 In particular, the respondent's representative argued that the respondent was a trading corporation.
- 36 The applicant contended that the Australian Municipal, Administrative, Clerical and Services Union was not incorporated and that, even if it was incorporated, it did not engage in trade such that it could be characterised as a trading corporation within the meaning of section 51(xx) *Commonwealth Constitution*.
- 37 In relation to the question of incorporation this is dealt with by the respondent's reference to section 27(a) *Fair Work (Registered Organisations) Act 2009* (Cth). This subsection provides that an organisation registered under that Act, and I find that the respondent is so registered, is a body corporate.
- 38 In relation to the issue of whether the respondent is a trading corporation the respondent led evidence and made submissions at the hearing on 27 February 2017. The applicant made no submissions about the evidence led and was content to simply rely on written submissions he had provided to the Western Australian Industrial Relations Commission. Those submissions had not gone beyond bare assertions that the respondent was not incorporated and, in any event, did not substantially engage in trading or financial activities.
- 39 Exhibit 1 was the financial report of the respondent, required under the *Fair Work (Registered Organisations) Act 2009* (Cth), for the year ending 30 June 2016.
- 40 Exhibit 2 was the respondent's "Operating Report" for 2016.
- 41 Exhibit 1 shows that the respondent earned significant revenue in the financial years 2014-2015 and 2015-2016. Around 90% of the revenue in each year was earned through subscription fees from members (received from the branches as "Capitation Fees") but there was also revenue earned from investments (including rent received from the tenants of premises it owned), fees paid to the respondent when it made its office holders available to sit on boards (such as industry superannuation fund boards), sponsorship of union events and the sale of merchandise.
- 42 The respondent's representative was at pains to make clear that subscription fees are not "fees for services" but it is clear that the respondent, pursuant to Rule 4 of its Rules, does many things that are intended to benefit members.
- 43 The respondent's representative, when asked by me, highlighted the provision of bargaining agents and representation in courts and tribunals as things the respondent does for members.
- 44 The respondent's representative told me that the respondent was a not-for-profit organisation but noted that small profits had been made in 2014-2015 and 2015-2016.
- 45 A corporation may be a trading corporation even though trading is not its predominant activity (*R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)* (1979) 143 CLR 190 at 239; *State*

*Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 303-304; *Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 at 156, 240, 293; *Quickenden v O'Connor* (2001) 109 FCR 243 at [49]–[51]; *Hardeman v Children's Medical Research Institute* (2007) 166 IR 196 at [18]) and the ends which it seeks to serve by its trading are irrelevant to its description (*R v Trade Practices Tribunal*; *Ex parte St George County Council* (1974) 130 CLR 533 at 539, 563, 569; *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 160; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304-306; *E v Australian Red Cross Society* (1991) 27 FCR 310 at 343; *Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 at 156).

- 46 That is, it does not matter that it might be said about the respondent that its predominant activity is the representation of members and, in doing that, it might be said, has a higher purpose than the earning of revenue.
- 47 The making of a profit is not an essential prerequisite to trade. (*R v Trade Practices Tribunal*; *Ex parte St George County Council* (1974) 130 CLR 533 at 539, 563, 569; *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 at 140, 167; *R v The Judges of the Federal Court of Australia*; *Ex parte Western Australia National Football League (Inc)* (1979) 143 CLR 190 at 219; *E v Australian Red Cross Society* (1991) 27 FCR 310 at 343, 345)
- 48 In my view the respondent “goes to market” in various ways consistent with its objects under Rule 4 to attract members and thereby earn revenue. Although it does not charge members a “fee for services” it is obvious that it carries out a range of activities from day to day on behalf of workers eligible for membership to encourage workers to pay it money by way of taking up or maintaining membership. Some of those services, such as representation, are very direct, some are more indirect, but they all have as part of their aim attracting members and thereby revenue.
- 49 The respondent is successful through its endeavours in earning substantial revenue from year to year.
- 50 It also earns revenue from investments, charging fees to other corporations and selling goods.
- 51 In my view the respondent is clearly a trading corporation and thus a constitutional corporation and a national system employer.
- 52 The *Fair Work Act 2009* (Cth) excludes the jurisdiction of the Western Australian Industrial Relations Commission in relation unfair dismissal claims of the employees of such entities and the present application must be dismissed under section 27(1)(a)(iv) *Industrial Relations Act 1979*.

2016 WAIRC 00973

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	DAVID NEIL ADAMS	<b>APPLICANT</b>
	-v-	
	WAYNE WOOD	
	STATE BRANCH SECRETARY	
	AUSTRALIAN SERVICES UNION WESTERN AUSTRALIAN BRANCH	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER D J MATTHEWS	
<b>DATE</b>	THURSDAY, 29 DECEMBER 2016	
<b>FILE NO/S</b>	U 116 OF 2016	
<b>CITATION NO.</b>	2016 WAIRC 00973	

<b>Result</b>	Order Made
<b>Representation (by correspondence)</b>	
<b>Applicant</b>	Mr D Adams
<b>Respondent</b>	Mr J Nucifora

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*Order*

HAVING heard Mr D Adams on his own behalf and Mr J Nucifora for the respondent by correspondence;

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

1. That the name of the respondent in U 116 of 2016 be changed to “The Australian Municipal, Administrative, Clerical and Services Union”.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.

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2017 WAIRC 00156

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
DAVID NEIL ADAMS **APPLICANT**

**-v-**  
THE AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION **RESPONDENT**

**CORAM** COMMISSIONER D J MATTHEWS  
**DATE** FRIDAY, 17 MARCH 2017  
**FILE NO/S** U 116 OF 2016  
**CITATION NO.** 2017 WAIRC 00156

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**Result** Application dismissed  
**Representation**  
**Applicant** In person  
**Respondent** Mr J Nucifora

*Order*

HAVING heard the applicant on his own behalf and Mr J Nucifora on behalf of the respondent;  
AND HAVING given reasons for decision in which I determined to dismiss the claim for want of jurisdiction;  
NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby order:  
THE application be dismissed for want of jurisdiction.

(Sgd.) D J MATTHEWS,  
Commissioner.

[L.S.]

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2017 WAIRC 00152

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JACK PHILLIP GORDON WRIGHT **APPLICANT**

**-v-**  
GIOVENCO INDUSTRIES **RESPONDENT**

**CORAM** CHIEF COMMISSIONER P E SCOTT  
**DATE** THURSDAY, 16 MARCH 2017  
**FILE NO/S** B 212 OF 2016  
**CITATION NO.** 2017 WAIRC 00152

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**Result** Application dismissed  
**Representation**  
**Applicant** Mr J Wright  
**Respondent** Mr M Waring of counsel

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and  
WHEREAS on Wednesday, 22 February 2017, the Commission received a *Form 14 – Notice of withdrawal or discontinuance* from the applicant.  
NOW THEREFORE, 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.) P E SCOTT,  
Chief Commissioner.

[L.S.]

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## SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Alessio Zicarelli	Maruzzella Restourant	B 76/2016	Commissioner T Emmanuel	Discontinued
Emilia Scuderi	Maruzzella Restorant	B 75/2016	Commissioner T Emmanuel	Discontinued
Frank Harrison	The Hall Family Trust t/as Blueville Transport	B 210/2016	Commissioner D J Matthews	Discontinued
Malcolm Baker Smith	Broome Taxis / Transit	B 117/2016	Commissioner D J Matthews	Discontinued
Michael Fogliani	Roman Catholic Archbishop of Perth	U 140/2016	Commissioner D J Matthews	Discontinued
Nicholas Grove	John Grove and Andrew Grove trading as Indian Ocean Hotel	U 10/2016	Commissioner D J Matthews	Discontinued

## CONFERENCES—Matters arising out of—

2017 WAIRC 00162

### DISPUTE RE INVESTIGATION PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

**APPLICANT**

-v-

WA COUNTRY HEALTH SERVICE

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER P E SCOTT

**DATE**

MONDAY, 20 MARCH 2017

**FILE NO/S**

C 27 OF 2016

**CITATION NO.**

2017 WAIRC 00162

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**Result**                      Application dismissed

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### *Order*

WHEREAS this is an application made pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS on Friday, 17 March 2017, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*.

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

THAT the application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,  
Chief Commissioner.

2017 WAIRC 00178

### DISPUTE RE NON-CUMULATIVE PERSONAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

**APPLICANT**

-v-

THE MINISTER FOR CORRECTIVE SERVICES

**RESPONDENT**

**CORAM**

SENIOR COMMISSIONER S J KENNER

**DATE**

FRIDAY, 24 MARCH 2017

**FILE NO/S**

C 34 OF 2015

**CITATION NO.**

2017 WAIRC 00178

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**Result** Application discontinued  
**Representation**  
**Applicant** No appearance  
**Respondent** No appearance

---

*Order*

WHEREAS on 2 March 2017 the Commission informed the parties it would discontinue the herein application unless within 14 days either party indicated why the application should remain on foot;

AND WHEREAS neither party indicated why the application should remain on foot by close of business on 17 March 2017;

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

—  
 THAT this application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,  
 Senior Commissioner.

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### CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Department of Corrective Services	Emmanuel C	PSAC 3/2017	16/01/2017	Dispute re alleged suspected breach of discipline	Discontinued

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### PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00201

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MARIO GEORGIU

**APPELLANT**

-v-

THE COMMISSIONER OF POLICE

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER P E SCOTT  
 SENIOR COMMISSIONER S J KENNER  
 COMMISSIONER T EMMANUEL

**DATE**

WEDNESDAY, 5 APRIL 2017

**FILE NO.**

APPL 4 OF 2017

**CITATION NO.**

2017 WAIRC 00201

---

**Result** Further Direction issued  
**Representation** (by written correspondence)  
**Appellant** Mr M Georgiou  
**Respondent** Mr N John, of counsel

---

*Further Direction*

WHEREAS on 1 March 2017, the Commission issued a Direction ([2017] WAIRC 00111) granting an extension of time to 3 April 2017 for the appellant to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* (the IR Regulations); and

WHEREAS on 3 April 2017, the appellant requested an extension of time for a further four weeks in which to comply with reg 92 of the IR Regulations; and

WHEREAS on 4 April 2017, the respondent advised that he does not object to the request being granted; and

WHEREAS the Commission is of the opinion that granting the request is expedient for the expeditious and just hearing and determination of the appeal.

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

1. THAT compliance with reg 92 of the IR Regulations by the appellant be by Monday, 1 May 2017.

(Sgd.) P E SCOTT,  
Chief Commissioner,

On behalf of the Western Australian Industrial Relations Commission.

[L.S.]

**2017 WAIRC 00160**

**REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 27 JULY 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THOMAS ALFRED SMITH

**APPLICANT**

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER P E SCOTT

**DATE**

FRIDAY, 17 MARCH 2017

**FILE NO.**

APPL 70 OF 2016

**CITATION NO.**

2017 WAIRC 00160

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<b>Result</b>	Directions issued
<b>Representation</b>	(by written correspondence)
<b>Applicant</b>	Mr J Ramsay
<b>Respondent</b>	Ms R Harding of counsel and Ms B Ridout of counsel

---

*Direction*

WHEREAS this is a referral of a decision by the Construction Industry Long Service Leave Payments Board pursuant to s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985*; and

WHEREAS on 9 December 2016, following a directions hearing, the WAIRC issued an order and directions ([2016] WAIRC 00926; (2016) 96 WAIG 1640) which included a direction that ‘the applicant update the Commission on the status of the matter by close of business 13 January 2017.’

AND WHEREAS by email dated 17 January 2017, the respondent proposed that this matter be adjourned sine die because the parties were participating in mediation and the respondent had agreed to receive further information from the applicant regarding his entitlement to long service leave; and

WHEREAS by email on 18 January 2017, the respondent proposed that it update the WAIRC on the status of the matter by 27 February 2017; and

WHEREAS the WAIRC granted this request and by email on 19 January 2017, directed that the respondent update the WAIRC by 27 February 2017; and

WHEREAS by letter dated 27 February 2017, the respondent advised the WAIRC that the parties were in correspondence and that the respondent had requested the applicant provide further information in relation to his entitlement to long service leave. The respondent requested the matter be adjourned for a further four weeks to allow the parties to exchange views and assess the new information; and

WHEREAS by email on 13 March 2017, amongst other things, the applicant agreed to the respondent’s request for a further adjournment of four weeks to enable the respondent to consider new information provided by the applicant; and

WHEREAS the WAIRC is of the opinion that a further adjournment to enable the parties to exchange information is necessary for the expeditious and just hearing and determination of the matter.

NOW THEREFORE the WAIRC, pursuant to the powers conferred by the *Construction Industry Portable Paid Long Service Leave Act 1985* and the *Industrial Relations Act 1979*, hereby directs:

1. THAT the respondent update the WAIRC on the status of this matter by Monday, 27 March 2017.
2. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,  
Chief Commissioner.

**2017 WAIRC 00045**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JAKOBUS ANTON PAGEL	<b>APPLICANT</b>
	-v-	
	ANDY AND TERRY LYNCH OF HIGHWAY TILT TOWING	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER S J KENNER	
<b>DATE</b>	WEDNESDAY, 1 FEBRUARY 2017	
<b>FILE NO/S</b>	B 4 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 00045	

<b>Result</b>	Extension of time granted
<b>Representation</b>	
<b>Applicant</b>	No appearance required
<b>Respondent</b>	Mr R Ballucci as agent

*Order*

HAVING heard Mr R Ballucci as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for the filing of the notice of answer in the herein application be and is hereby extended to 3 February 2017.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

**2017 WAIRC 00140**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION HASAN ALI ZIRAKI	<b>APPLICANT</b>
	-v-	
	ALI DAYAB MOHAMMADI TRADING AS ZIRAK TILING	<b>RESPONDENT</b>
<b>CORAM</b>	SENIOR COMMISSIONER S J KENNER	
<b>DATE</b>	MONDAY, 13 MARCH 2017	
<b>FILE NO/S</b>	B 7 OF 2017	
<b>CITATION NO.</b>	2017 WAIRC 00140	

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Ms K Davis of counsel
<b>Respondent</b>	Mr J Park of counsel

*Order*

HAVING heard Ms K Davis of counsel on behalf of the applicant and Mr J Park of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the applicant be and is hereby granted leave to amend his notice of claim in the terms set out in the proposed amended notice of claim filed on 8 March 2017.
- (2) THAT the respondent be and is hereby granted leave to file and serve a reply to the applicant's amended notice of claim by no later than 24 March 2017.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.**2017 WAIRC 00203**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

YI ZHANG

**APPLICANT**

-v-

DA ZHENG

**RESPONDENT****CORAM** COMMISSIONER T EMMANUEL**DATE** THURSDAY, 6 APRIL 2017**FILE NO/S** B 24 OF 2017**CITATION NO.** 2017 WAIRC 00203**Result** Name of respondent amended**Representation****Applicant** Ms Y Zhang**Respondent** No appearance*Order*

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS at a hearing on 6 April 2017 the applicant asked the Commission to amend the name of the respondent;

AND HAVING heard the applicant's evidence, the Commission is satisfied the applicant made a mistake in naming the respondent and the name of the respondent should be amended to enable the matter in dispute to be heard and determined;

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

THAT the name of the respondent be amended to 'Enjoy Going (Australia) Pty Ltd'.

[L.S.]

(Sgd.) T EMMANUEL,  
Commissioner.**2017 WAIRC 00204**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

RONG ZHANG

**APPLICANT**

-v-

DA ZHENG

**RESPONDENT****CORAM** COMMISSIONER T EMMANUEL**DATE** THURSDAY, 6 APRIL 2017**FILE NO/S** B 25 OF 2017**CITATION NO.** 2017 WAIRC 00204

<b>Result</b>	Name of respondent amended
<b>Representation</b>	
<b>Applicant</b>	Ms R Zhang
<b>Respondent</b>	No appearance

*Order*

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS at a hearing on 6 April 2017 the applicant asked the Commission to amend the name of the respondent;

AND HAVING heard the applicant's evidence, the Commission is satisfied the applicant made a mistake in naming the respondent and the name of the respondent should be amended to enable the matter in dispute to be heard and determined;

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

THAT the name of the respondent be amended to 'Enjoy Going (Australia) Pty Ltd'.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

**2017 WAIRC 00202**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ASSOCIATE PROFESSOR DEBRA JUDGE

**APPLICANT**

-and-

UNIVERSITY OF WESTERN AUSTRALIA ACADEMIC STAFF ASSOCIATION

**RESPONDENT**

**CORAM** THE HONOURABLE J H SMITH, ACTING PRESIDENT

**DATE** THURSDAY, 6 APRIL 2017

**FILE NO.** PRES 2 OF 2017

**CITATION NO.** 2017 WAIRC 00202

<b>Result</b>	Order made
<b>Appearances</b>	
<b>Applicant</b>	Ms J C Manvell, as agent
<b>Respondent</b>	Ms J C Manvell, as agent

*Order*

WHEREAS this matter having come on for a hearing before me on 6 April 2017, and having heard Ms J C Manvell, as agent, on behalf of the applicant and Ms J C Manvell, as agent, on behalf of the respondent;

AND WHEREAS pursuant to r 11 of the rules of the respondent the conduct of every election to an office within the University of Western Australia Academic Staff Association is required to be in accordance with Schedule 2 of the rules of the respondent;

AND WHEREAS pursuant to r 10(8) of the rules of the respondent each current member of the committee of management hold office only until 30 June 2017 whereupon they are each eligible for re-election;

AND WHEREAS r 2(1) of Schedule 2 requires the returning officer:

- (a) to call upon members of the respondent desiring to be a candidate for election to the committee of management on a date not earlier than 1 March 2017 or later than 15 March 2017, by causing a notice to be emailed to members and notices and an advertisement posted in the manner prescribed by r 2(1) of Schedule 2; and
- (b) to insert an advertisement in The West Australian not later than 12.00 noon on 31 March 2017, if such a notice is required under the *Industrial Arbitration (Union Election) Regulations 1980* (WA).

AND WHEREAS r 3(3) of Schedule 2 of the rules of the respondent requires the returning officer to fix a date for the closing of the ballot for the 2017 elections by no later than noon on 30 May 2017;

AND WHEREAS the Deputy Registrar of the Western Australian Industrial Relations Commission advised the respondent that the Western Australian Electoral Commission (WAEC) was unable to conduct the respondent's 2017 elections until after the March 2017 general State election had been completed;

AND WHEREAS on 22 March 2017 the WAEC informed the Deputy Registrar that it is now in a position to conduct the respondent's 2017 elections;

AND WHEREAS without disallowance of the times prescribed in r 2(1) and r 3(3) of Schedule 2 the respondent's 2017 elections of committee of management officers cannot proceed as the elections are unable to be held in accordance with the prescribed procedures set out in Schedule 2;

NOW THEREFORE the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), by consent, hereby orders that:

1. Whilst this order remains in place:
  - (a) Rule 2(1) of Schedule 2 and r 3(3) of Schedule 2 of the rules of the respondent are disallowed;
  - (b) In place of the procedure prescribed in r 2(1) of Schedule 2 the following shall apply:
 

The returning officer shall as soon as possible call upon any member desiring to be a candidate for election to any office within the Association which shall become vacant at 30 June 2017 by causing a notice to be emailed directly to the members, a notice to be posted at the Registered Office of the Association and such other conspicuous places at the University as are considered appropriate by the returning officer, by inserting an advertisement in a regular and recognised university newspaper circulating within the area of the University and, if required under the *Industrial Arbitration (Union Election) Regulations 1980*, by inserting an advertisement in *The West Australian*, to lodge a nomination with the returning officer at a time not later than 12 noon on 21 April 2017 which in the rules of the respondent is referred to as the time when nominations close.
  - (c) In place of r 3(3) of Schedule 2 the following shall apply:
 

The returning officer shall fix a date and a time for the closing of the ballot, which date and time shall be not less than a sufficient time to enable each member desiring to vote to return the completed ballot paper to the returning officer in the ordinary course of post, provided however that the time for the closing of the ballot shall be not later than 12 noon on 15 June 2017.
2. Unless this order is revoked or varied, the order will cease to have effect on 30 June 2017, or when the results of the election of the offices of the committee of management are declared, whichever occurs first.
3. There be liberty to the parties to apply to vary the terms of the order.

(Sgd.) J H SMITH,  
Acting President.

[L.S.]

2017 WAIRC 00187

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

IAN GLEN OF MANDURAH PAINTERS AND DECORATORS

**APPLICANT**

**-and-**

THE MASTER PAINTERS, DECORATORS AND SIGNWRITERS ASSOCIATION OF  
WESTERN AUSTRALIAN (UNION OF EMPLOYERS)

**RESPONDENT**

**CORAM** THE HONOURABLE J H SMITH, ACTING PRESIDENT

**DATE** THURSDAY, 30 MARCH 2017

**FILE NO.** PRES 3 OF 2016

**CITATION NO.** 2017 WAIRC 00187

**Result** Order made

**Appearances**

**Applicant** Ms R Cutler, as agent

**Respondent** Ms R Cutler, as agent

*Order*

WHEREAS the applicant and respondent have informed the Commission that the respondent requires an extension of three months for elections to be held in accordance with s 69 of the *Industrial Relations Act 1979* (WA) for nominations for offices of the executive committee;

NOW THEREFORE the Acting President, pursuant to the powers conferred under the *Industrial Relations Act*, by consent, hereby orders that Order 3. of the order made on 21 December 2016 [2016] WAIRC 00951 be varied by deleting 31 March 2017 and substituting 30 June 2017.

[L.S.]

(Sgd.) J H SMITH,  
Acting President.**2017 WAIRC 00188**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
GEOFF KELLY OF KELLY'S HOT WATER, GAS & AIR  
**APPLICANT**

**-and-**  
THE MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA  
(UNION OF EMPLOYERS)  
**RESPONDENT**

**CORAM** THE HONOURABLE J H SMITH, ACTING PRESIDENT  
**DATE** THURSDAY, 30 MARCH 2017  
**FILE NO.** PRES 4 OF 2016  
**CITATION NO.** 2017 WAIRC 00188

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<b>Result</b>	Order made
<b>Appearances</b>	
<b>Applicant</b>	Ms R Cutler, as agent
<b>Respondent</b>	Ms R Cutler, as agent

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*Order*

WHEREAS the applicant and respondent have informed the Commission that the respondent requires an extension of three months for elections to be held in accordance with s 69 of the *Industrial Relations Act 1979* (WA) for nominations for offices of the executive committee;

NOW THEREFORE the Acting President, pursuant to the powers conferred under the *Industrial Relations Act*, by consent, hereby orders that Order 4. of the order made on 21 December 2016 [2016] WAIRC 00949 be varied by deleting 31 March 2017 and substituting 30 June 2017.

[L.S.]

(Sgd.) J H SMITH,  
Acting President.**2017 WAIRC 00217**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
KIRALY PUGLIESE  
**APPLICANT**

**-v-**  
DR TERRY PITSIKAS AND LUCY REED  
LINDISFARNE MEDICAL GROUP  
**RESPONDENT**

**CORAM** CHIEF COMMISSIONER P E SCOTT  
**DATE** THURSDAY, 13 APRIL 2017  
**FILE NO/S** U 17 OF 2017  
**CITATION NO.** 2017 WAIRC 00217

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<b>Result</b>	Name of respondent amended
<b>Representation</b>	
<b>Applicant</b>	Ms K Pugliese
<b>Respondent</b>	Ms L Reed

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*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and  
 WHEREAS by email on 12 April 2017 the respondent informed the Commission that the applicant's employer's name was Lindisfarne Nominees (WA) Pty Ltd as trustee for Lindisfarne Trust trading as Lindisfarne Medical Group; and  
 WHEREAS the Commission formed the view that it is appropriate to amend the name of the respondent;  
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the name of the respondent in the application be amended to "Lindisfarne Nominees (WA) Pty Ltd as trustee for Lindisfarne Trust trading as Lindisfarne Medical Group".

(Sgd.) P E SCOTT,  
 Chief Commissioner.

[L.S.]

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## INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Anglican Schools Commission Support Staff Enterprise Agreement 2015 AG 42/2016	03/21/2017	The Independent Education Union of Western Australia, Union of Employees The Anglican Schools Commission United Voice WA	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Waikiki Private Hospital Registered Nurses Agreement 2016 AG 48/2016	03/17/2017	The Australian Nursing Federation, Industrial Union of Workers Perth	Dr Anthony Robinson trading as Waikiki Private Hospital	Commissioner T Emmanuel	Agreement registered

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## NOTICES—Appointments—

2017 WAIRC 00207

### NOTICE OF APPOINTMENT

Pursuant to the powers conferred by sections 93 and 95 of the *Industrial Relations Act 1979*, I hereby assign the duties of a Deputy Registrar to

Peter Groves

On and from 27 March 2017



Susan Bastian  
 REGISTRAR

24 March 2017

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## 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 26/2016	N/A	N/A	Matthews C	Request for mediation	N/A	Concluded

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## PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2017 WAIRC 00211

### REFERRAL TO COMMISSION UNDER *PUBLIC SECTOR MANAGEMENT ACT 1994*

#### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2017 WAIRC 00211
<b>CORAM</b>	:	COMMISSIONER T EMMANUEL
<b>HEARD</b>	:	TUESDAY, 14 FEBRUARY 2017; MONDAY, 10 APRIL 2017
<b>DELIVERED</b>	:	WEDNESDAY, 12 APRIL 2017
<b>FILE NO.</b>	:	APPL 66 OF 2016
<b>BETWEEN</b>	:	MR LESLIE MAGYAR
		Applicant
		AND
		DEPARTMENT OF EDUCATION
		Respondent

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CatchWords	:	Practice and procedure - Discovery, inspection and production of documents - Relevant principles - Order made
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 27(1)(o)
Result	:	Applications for production of documents dismissed
<b>Representation:</b>		
Applicant	:	Mr L Magyar
Respondent	:	Ms R Hartley (of counsel)

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#### Case referred to in reasons:

*Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801

#### *Reasons for decision*

- 1 Mr Magyar has referred to the Commission the Department of Education's finding that he committed a breach of discipline when he disobeyed a direction. The direction was not to alter his classroom without consulting his line manager, which the Department says Mr Magyar did when he established a standalone computer in his classroom. Mr Magyar also disagrees with the penalty imposed, which was a reprimand and a fine of one day's pay.
- 2 I will hear Mr Magyar's referral under the *Public Sector Management Act 1994* (WA) next month.
- 3 In the meantime, Mr Magyar has made four interlocutory applications. He wants me to order the Department to produce the documents in his four applications. Mr Magyar wants a large number of documents and he requests the same documents more than once. The Department says I should not order it to produce the documents.
- 4 I must decide whether the documents Mr Magyar wants are necessary to resolve the matter in dispute. To do that, I must decide whether the documents are relevant to the four questions I will answer when deciding Mr Magyar's referral:
  1. Did the Department direct Mr Magyar not to alter his classroom without consulting his line manager?
  2. If so, was that direction a lawful order?
  3. If so, did Mr Magyar disobey the lawful order?
  4. Should there have been a lesser penalty or no penalty?

#### **What documents does Mr Magyar want?**

- 5 I understand Mr Magyar wants:
  - a. the documents Mr Magyar describes in his applications under the headings: Credit Card Misuse Allegation, Inappropriate Use of Computer System Allegation, Standards and Integrity Investigation Report (Aug 1 2016);
  - b. complaint files related to a matter referred by the Department to the Crime and Corruption Commission; and
  - c. documents Mr Currie has that relate to an allegation that Mr Magyar configured the standalone computer so his students could access the internet without the Department's restrictions.

#### **Are the documents necessary to resolve the matter in dispute?**

- 6 Mr Magyar says the documents are necessary because they provide context to his application and he needs them to prepare his outline of evidence.
- 7 Mr Magyar says the Standards and Integrity Investigation Report includes statements by Mrs Diver that impugn his character and undermine his credibility. Mr Cottrell makes similar statements. Mrs Diver and Mr Cottrell are likely to be the Department's main witnesses. He needs the documents to respond to their statements and to cross-examine them. Mr Magyar

says the allegation that he configured the standalone computer so that his students could access the internet without the Department’s restrictions is ‘what this case is all about’.

- 8 The Department says Mr Magyar does not need the documents for his outline of evidence. It will not call Mrs Diver or Mr Cottrell as witnesses. It has not made findings against Mr Magyar about credit card misuse or attempting to reconfigure the Department’s computer network. In summary, the Department says the documents are not relevant to the finding or penalty in issue.
- 9 Discovery is confined to what is in issue on the pleadings (here, the notice of referral and notice of answer). The Commission can only make an order for discovery under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) if it is just to do so and necessary for the fair disposal of the case. ‘Just’ means ‘right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right’: *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801, 1805.
- 10 Mr Magyar’s notice of referral is not particularised. It simply says that he refers to the Commission the decision or finding made on 12 October 2016 because he was denied natural justice. He seeks compensation for leave without pay taken to attend Commission hearings and ‘[t]hat [the] disciplinary findings are deemed a miscarriage of justice.’
- 11 In summary, the documents Mr Magyar wants relate to allegations that Mr Magyar misused a credit card and inappropriately used a computer system and to concerns that Mr Magyar has with the Standards and Integrity Investigation Report. Those are not findings the Department made and they are not findings Mr Magyar referred to the Commission. The documents go to matters beyond the scope of what is in issue here.
- 12 Contrary to Mr Magyar’s argument, this matter is not about whether he configured the standalone computer so that his students could access the internet without the Department’s restrictions. This matter is about the Department’s finding that Mr Magyar committed a breach of discipline when he disobeyed the direction not to alter his classroom without consulting his manager and the penalty that the Department imposed.
- 13 I am not persuaded that the documents Mr Magyar wants are necessary to resolve the matter in dispute. The documents are not necessary for Mr Magyar to prepare his outline of evidence and are not relevant to the cross-examination of any witnesses. The documents are not relevant to the four questions that I will answer when deciding Mr Magyar’s referral. It would not be just to order the Department to produce them.
- 14 Mr Magyar’s applications for the production of documents are dismissed.

2017 WAIRC 00212

**REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MR LESLIE MAGYAR

**APPLICANT**

-v-

DEPARTMENT OF EDUCATION

**RESPONDENT**

**CORAM**

COMMISSIONER T EMMANUEL

**DATE**

WEDNESDAY, 12 APRIL 2017

**FILE NO/S**

APPL 66 OF 2016

**CITATION NO.**

2017 WAIRC 00212

**Result** Applications for production of documents dismissed

**Representation**

**Applicant** Mr L Magyar

**Respondent** Ms R Hartley (of counsel)

*Order*

HAVING HEARD Mr L Magyar on his own behalf and Ms R Hartley (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), orders:

THAT the applicant’s applications for the production of documents filed on 8 December 2016, 31 January 2017, 7 February 2017 and 13 February 2017 be, and by this order are, dismissed.

(Sgd.) T EMMANUEL,  
Commissioner.

[L.S.]

## PUBLIC SECTOR MANAGEMENT ACT 1994—Notation of—

The following were matters before the Commission under the Public Sector Management Act 1994.

Application Number	Parties		Commissioner	Matter	Dates	Result
APPL 28/2016	Kevin James Bryant	Department of Planning	Matthews C	Referral to Commission under Public Sector Management Act 1994	N/A	Discontinued

## OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2016 WAIRC 00722

### REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

**PARTIES**

PETER JOSEPH BAJADA

**APPLICANT**

-v-

TRONOX PIGMENT PLANT

**RESPONDENT**

**CORAM**

SENIOR COMMISSIONER S J KENNER

**DATE**

WEDNESDAY, 24 AUGUST 2016

**FILE NO.**

OSHT 3 OF 2016

**CITATION NO.**

2016 WAIRC 00722

**Result**

Direction issued

**Representation**

**Applicant**

In person

**Respondent**

Mr M Nazareth of counsel and with him Ms K Carter

### *Direction*

HAVING heard the applicant on his own behalf and Mr M Nazareth of counsel and with him Ms K Carter on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under The Occupational Safety and Health Act, 1984 hereby directs

- (1) THAT the applicant file and serve an amended notice of referral with full particulars of his claim by no later than 31 August 2016.
- (2) THAT the respondent file and serve a notice of answer by no later than seven days after service of the applicant's amended notice of referral.
- (3) THAT any request for production of documents by either party be by letter of request served no later than 7 September 2016.
- (4) THAT the application be listed for hearing for two days on dates to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

2016 WAIRC 00913

**REFERENCE OF DISPUTE**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

**PARTIES**

PETER JOSEPH BAJADA

**APPLICANT**

-v-

TRONOX PIGMENT PLANT

**RESPONDENT****CORAM** SENIOR COMMISSIONER S J KENNER**DATE** TUESDAY, 6 DECEMBER 2016**FILE NO.** OSH 3 OF 2016**CITATION NO.** 2016 WAIRC 00913**Result** Direction issued**Representation****Applicant** In person**Respondent** Mr B Jackson of counsel and with him Ms K Carter*Direction*

HAVING heard the applicant on his own behalf and Mr B Jackson of counsel and with him Ms K Carter on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under The Occupational Safety and Health Act, 1984 hereby directs

- (1) THAT the applicant forthwith request in writing from the respondent's solicitors any documents in the possession, power or control of the respondent relevant to his claim.
- (2) THAT the respondent file and serve a notice of answer by no later than 20 December 2016.
- (3) THAT the application be listed for hearing for two days on dates to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

2017 WAIRC 00146

**REFERENCE OF DISPUTE**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

**PARTIES**

PETER JOSEPH BAJADA

**APPLICANT**

-v-

TRONOX PIGMENT PLANT

**RESPONDENT****CORAM** SENIOR COMMISSIONER S J KENNER**DATE** WEDNESDAY, 15 MARCH 2017**FILE NO/S** OSH 3 OF 2016**CITATION NO.** 2017 WAIRC 00146**Result** Discontinued by leave**Representation****Applicant** No appearance**Respondent** Mr B Jackson of counsel

*Order*

WHEREAS the herein application was listed for hearing on 14 and 15 March 2017;

AND WHEREAS at 4:24 pm on 13 March 2017 the applicant informed my Associate and the respondent by email that he wished to discontinue the herein application and would not be appearing at the hearing;

AND WHEREAS my Associate by email in reply to the applicant at 4:52 pm on 13 March 2017 requested that he urgently confirm his intentions regarding the herein application. There was no response from the applicant;

AND WHEREAS there was no appearance by the applicant at the hearing on 14 March 2017;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* (WA) hereby orders -

THAT this application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

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## ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2016 WAIRC 00893

### DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

MELCATS TRANSPORT PTY LTD

**APPLICANT**

-v-

THE TRUSTEE FOR THE JEV TIC FAMILY TRUST T/AS COCKBURN TRANSPORT

**RESPONDENT**

**CORAM** SENIOR COMMISSIONER S J KENNER  
**DATE** FRIDAY, 25 NOVEMBER 2016  
**FILE NO/S** RFT 19 OF 2016  
**CITATION NO.** 2016 WAIRC 00893

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr A Dzieciol of counsel
<b>Respondent</b>	Mr S Jevtic

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*Consent Order*

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr S Jevtic on behalf of the respondent the Tribunal pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007*, hereby orders by consent -

THAT the respondent pay to the applicant the sum of \$1,100.00 inclusive of GST by no later than 2 December 2016.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

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2015 WAIRC 00778

**DISPUTE RE OUTSTANDING PAYMENTS**  
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES** SP & S SCOLARO T/AS SPS TRANSPORT; A R PETERS PTY.LTD.; ML & AE ROBINSON;  
SANDRA B MCNULTY & STEWART L CAMERON

**APPLICANTS**

-v-

TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A SCT  
LOGISTICS

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** THURSDAY, 6 AUGUST 2015  
**FILE NO/S** RFT 4 OF 2015, RFT 5 OF 2015, RFT 6 OF 2015, RFT 7 OF 2015  
**CITATION NO.** 2015 WAIRC 00778

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<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicants</b>	Mr J Boghossian of counsel
<b>Respondent</b>	Mr C Boyle of counsel and with him Mr M Nazareth of counsel

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*Direction*

HAVING heard Mr J Boghossian of counsel on behalf of the applicants and Mr C Boyle of counsel and with him Mr M Nazareth of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs –

- (1) THAT applications RFT 4 of 2015, RFT 5 of 2015, RFT 6 of 2015 and RFT 7 of 2015 be and are hereby joined and be heard and determined together.
- (2) THAT the issue of the Tribunal's jurisdiction is to be heard and determined on the papers.
- (3) THAT the respondent file and serve written submissions and any affidavits on which it intends to rely by 21 August 2015.
- (4) THAT the applicants file and serve written submissions and any affidavits on which they intend to rely by 4 September 2015.
- (5) THAT the parties file an agreed statement of facts by 21 August 2015.
- (6) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

2015 WAIRC 00995

**DISPUTE RE OUTSTANDING PAYMENTS**  
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**CITATION** : 2015 WAIRC 00995  
**CORAM** : COMMISSIONER S J KENNER  
**HEARD** : WEDNESDAY, 1 JULY 2015; WRITTEN SUBMISSIONS 21 AUGUST & 4  
SEPTEMBER 2015  
**DELIVERED** : TUESDAY, 10 NOVEMBER 2015  
**FILE NO.** : RFT 4 OF 2015, RFT 5 OF 2015, RFT 6 OF 2015, RFT 7 OF 2015  
**BETWEEN** : SP & S SCOLARO T/AS SPS TRANSPORT; A R PETERS PTY.LTD.; ML & AE  
ROBINSON; SANDRA B MCNULTY & STEWART L CAMERON  
Applicants  
AND  
TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A  
SCT LOGISTICS  
Respondent

Catchwords	:	<i>Owner-driver contracts - Referral of dispute - Whether claims are beyond the jurisdiction of the Tribunal - Whether matter arising in relation to the conduct of joint negotiations for an owner-driver contract - Whether referrals validly made pursuant to s 40 Owner-Drivers (Contracts and Disputes) Act 2007 - Principles applied - Not persuaded that applications fall within the prohibition in s 47(2) - Not matters arising from joint negotiations for an owner-driver contract(s) - Applicants were parties to owner-driver contracts at the time the matters were referred to the Tribunal - The Tribunal has jurisdiction to hear and determine the matters referred - Jurisdiction found</i>
Legislation	:	<i>Industrial Relations Act 1979 Owner-Drivers (Contracts and Disputes) Act 2007 Owner-Drivers (Contracts and Disputes) (Code) Regulations 2010 Interpretation Act 1984</i>
Result	:	Jurisdiction found
<b>Representation:</b>		
Counsel:		
Applicants	:	Mr J Boghossian of counsel
Respondent	:	Mr C Boyle of counsel and with him Mr M Nazareth of counsel
Solicitors:		
Applicant	:	Connect Legal
Respondent	:	Allion Legal

**Case(s) referred to in reasons:**

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27  
*Ancor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  
*Taylor v The Owners – Strata Plan No 11564 & Ors* (2014) 88 ALJR 473  
*State Government Insurance Office (Qld) v Rees* (1979) 26 ALR 341  
*Abebe v Commonwealth of Australia* (1999) 162 ALR 1  
*National Union of Workers and Another v Davids Distribution Pty Ltd* (1999) 165 ALR 595  
*R v Young* (1999) 46 NSWLR 681  
*Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150

**Case(s) also cited:**

*Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* [2012] WAIRC 00235  
*Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust t/a SCT Logistics* [2011] WAIRC 01151  
*Kingstyle Investments Pty Ltd v Mr Gene Lawson* [2013] WAIRC 00356  
*Ross v The Queen* [1979] HCA 29  
*AGL Gas Networks Limited (Application of)* [2001] NSWSC 165  
*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321

*Reasons for Decision*

- 1 These applications have some history. They are made by the applicants under the Owner-Drivers (Contracts and Disputes) Act 2007, seeking a variety of orders from the Tribunal. The applications made allege that the contracts between the applicants and the respondent were harsh and unconscionable; that they were terminated unlawfully, and orders for essentially, rectification and damages are sought.

**Agreed facts**

- 2 The history to which I have referred has been helpfully set out in a statement of agreed facts filed by the parties. They have some significance for what is to follow. Given the issues arising in these proceedings, it would be helpful to set out the statement in full, which is in the following terms:

## 1. BACKGROUND

- (a) Each of the Applicants commenced work for the Respondent as an independent contract road transport driver at different times over the period of 1995 to 2007.
- (b) The operative provisions of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) (**OD Act**) came into effect on or around July and August 2008.
- (c) At all relevant times since that date, the Applicants were 'owner-drivers' as defined in section 4 of the OD Act.
- (d) At all relevant times since that date, the Respondent had engaged the Applicants on various 'owner-driver contracts' as defined in section 5 of the OD Act.
- (e) At all relevant times since that date, the Respondent was a 'hirer' of the Applicants as defined in section 3 of the OD Act.
- (f) Prior to 20 March 2015, the Applicants have been represented by the Transport Workers' Union (**TWU**) in relation to disputes between them and the Respondent.

## 2. RATES OF PAY UNDER OWNER-DRIVER CONTRACTS

- (a) Upon their commencement as an independent owner driver, the Respondent provided, verbally, the applicable hourly rate that would remunerate the owner drivers. In or around August 2010, the Applicants, among other owner-drivers, appointed the TWU as their negotiating agent for contractual negotiations with the Respondent.
- (b) Over the period of August 2010 to September 2012, the Respondent engaged in a series of negotiations with the TWU and owner-drivers in relation to rates of pay and contractual conditions of engagement.
- (c) On 6 December 2010, the Respondent issued a letter to all relevant owner-drivers, including the Applicants, which outlined an agreement to increase driver pay rates by \$3.50 per hour that was reached with the owner-drivers on 3 December 2010.
- (d) On or around 11 January 2011, the Respondent provided all owner-drivers, including the Applicants, with a document entitled "*SCT Logistics Subcontractor Expectations Criteria*" (**Expectations Criteria**). The Expectation Criteria states that no guarantee of work is provided to the Respondent's owner-drivers. Each of the Applicants signed the Expectations Criteria in or around January 2011.
- (e) On or around 1 September 2011, the Respondent met with the TWU a group of owner-driver representatives to try and reach an agreement on rates of pay, work allocation, rosters, expectations and operations. The representative group of owner-drivers, which included Mr Scolaro (one of the Applicants), had been appointed to negotiate with the Respondent on behalf of a larger group of owner-drivers, which included the remaining Applicants.
- (f) Over the period of 21 September 2012 to 2 October 2012, a number of owner-drivers, including some of the Applicants, appointed the TWU to be their bargaining representative for negotiations with the Respondent.
- (g) Between 20 September 2012 and 9 October 2012, the Respondent issued a letter to all relevant owner-drivers, including the Applicants, which set out a proposal for rates of pay and annual increases. The Applicants signed this proposal (**2012 Agreement**).
- (h) The 2012 Agreement provided that the rate of pay for owner-drivers would be reviewed in October of each year by reference to the national minimum wage decision and the consumer price index for the transport industry in WA.
- (i) In October of 2013 and March 2015, the Respondent issued identical letters to its owner drivers, including the Applicants, outlining an increase to the rate of pay for each owner driver in accordance with the jointly negotiated 2012 Agreement. The March 2015 letter provided for a back pay calculation to 1 October 2014.
- (j) At all relevant times, the Respondent has provided monthly fuel rate reviews to its owner drivers, which are subject to the 'rise and fall' of the average diesel fuel price. These rate reviews are in addition to the annual pay rate reviews to take effect in October of each year.

## 3. ALLOCATION OF WORK TO OWNER-DRIVERS

- (a) In June 2013, the TWU commenced a dispute in the Road Freight Transport Industry Tribunal (**RFTIT**) in relation to the Respondent's allocation of work to a select group of owner-drivers (**June 2013 Dispute**). The Applicants were part of the select group of owner-drivers being represented by the TWU in this dispute.
- (b) As a means of resolving the June 2013 Dispute, the Respondent created a new method of allocating work to selected owner-drivers in September 2013 (**2013 Allocation Method**). The Applicants were party to the 2013 Allocation Method.

- (c) In February 2014, the TWU commenced a further dispute in the RFTIT in relation to the Respondent's allocation of work under the 2013 Allocation Method (**February 2014 Dispute**). The Applicants were part of the group of owner-drivers being represented by the TWU in this dispute.
- (d) In April 2014, the Respondent, the TWU and a number of the owner-drivers attended conciliation before Commissioner Kenner in the RFTIT. With the exception of Mr Peters, all Applicants were present at the conciliation.
- (e) To assist in resolving the February 2014 Dispute, the Respondent met with the TWU to negotiate the parties' operational needs and the downturn in workflow available to the owner-drivers on 7 May 2014 (**May 2014 Meeting**). The Applicants were represented by the TWU at this meeting. At the May 2014 Meeting, the TWU and Respondent discussed
  - (i) Dry operations Bogie drive Subcontractor requirements
  - (ii) Retention payments
  - (iii) Manner in which disengagement could be handled
  - (iv) Notice period and compensation
  - (v) Other matters not limited to allocation of work at other SCT Divisions and possible casual driving work.
  - (vi) On 19 May 2014, the Respondent wrote to the TWU, on behalf the owner-drivers (including the Applicants) outlining the discussion of the above mentioned matters between the parties. A copy of this letter is attached and marked Annexure A.

#### 4. **DISENGAGEMENT OF OWNER-DRIVERS**

- (a) On 13 November 2014, the TWU wrote to the Respondent, on behalf of the relevant owner-drivers (including the Applicants) outlining a myriad of issues not limited to the provision of work, engaging additional owner drivers, alleged breaches of the agreed allocation method by SCT and the financial consequences resulting from that action, reasonable notice of disengagement. A copy of this letter is **attached** and marked Annexure B.
- (b) On 19 February 2015, the Respondent, through its solicitors, wrote to the TWU, provided a detailed response to the allegations raised, the September allocation arrangement, the inducement to disengage, breach of expectation criteria and disengagement, alleged breach of the September agreement, payment in lieu of notice and breach of contract, and the preparedness of SCT to further meet and discuss the above issues. A copy of this letter is **attached** and marked Annexure C.
- (c) No agreement was reached between the Respondent and the TWU, on behalf of the relevant owner-drivers (including the Applicants), in relation to the method or terms of a disengagement.
- (d) In April 2015, the Respondent notified the relevant owner-drivers (including the Applicants) that the Respondent would disengage the owner-drivers at the end of the specified notice period.
- (e) The Respondent did not provide the Applicants any payment in lieu of notice, or redundancy/severance pay.

#### **Jurisdiction-contentions of the parties**

- 3 The respondent contends that the claims now made by the applicant are beyond the jurisdiction of the Tribunal under the OD Act. There were two limbs to that argument. The first was that given the history of these matters and the involvement of the Transport Workers Union as the then authorised representative of the owner-drivers, the previous discussions and negotiations should be characterised as "joint negotiations" at all material times. The consequence of this is that the respondent contended that the issues previously negotiated, they being rates of pay for the applicants and the terms of their disengagement as owner-drivers from the respondent, arose from the conduct of joint negotiations for an owner-driver contract. On this basis, the respondent contended that the Tribunal has no jurisdiction to determine the applicant's claims, under s 47 of the OD Act.
- 4 Secondly, the respondent further submitted that, in any event, the applicants' claims as referred to the Tribunal have not been validly referred under s 40 of the OD Act. The contention advanced by the respondent in this respect, was that for referrals of matters to be made to the Tribunal under s 40(a)(i), a person must be, at the time of the referral, a party to an extant owner-driver contract. In this case, at the time of the referrals to the Tribunal on 29 April 2015, the owner-driver contracts between the applicants and the respondent had terminated. Thus, as the argument went, none of the applicants "is a party" to an owner-driver contract, and is therefore incapable of referring a matter to the Tribunal.
- 5 Furthermore, if the referrals to the Tribunal are contended to be made under s 40(b) of the OD Act, then the respondent submitted that to be regarded as being related to a dispute under the OD Act, they could only relate to allegations of unconscionable conduct under s 30. To the extent that the matters referred could relate to the Owner-Driver Contracts Code of Conduct 2010 then the respondent submitted that it is only an alleged breach of the obligation to negotiate in good faith under reg 6 of the Code that could arise. Given this situation, as none of the applications made allege or identify with any particularity any unconscionable conduct or failure by the respondent to negotiate in good faith, they cannot be regarded as valid referrals.
- 6 In sum, the respondent submitted that the applicants' claims relate to historical disputes which have previously arisen under owner-driver contracts between the applicants and the respondent which have now terminated.

- 7 For the applicants, as to the s 47 point, it was submitted that while there was no dispute that throughout 2010 to 2013 there were joint negotiations regarding rates of pay and other matters, there was never any agreement reached in relation to notice of termination of contracts or severance pay, which is part of the applicants' claims in these proceedings. The applicants submitted that if the very broad interpretation of s 47(2) of the OD Act advanced by the respondent was to be accepted, then the effective scope of the OD Act would be dramatically narrowed. It would mean that regardless of the subject matter of joint negotiations, any other matter arising out of those negotiations, would be beyond the Tribunal's jurisdiction.
- 8 As to the second limb of the respondent's jurisdictional challenge, the applicants submitted that it too, should fail. The submission was that on the basis of the affidavit evidence before the Tribunal, there is no doubt that the applicants and the respondent had been parties to owner-driver contracts with the respondent from as early as 1995 and up until April 2015. The applicants submitted that there is no time limit on referring matters to the Tribunal. The only requirement is that a person be a party to an owner-driver contract when it is referred to the Tribunal. There was a further submission by the applicants that there is also no requirement under the OD Act that at the time a matter is referred to the Tribunal, actual work needs to be performed under an owner-driver contract, as long as the contract has been in existence in the past.
- 9 In relation to the allegation that the referrals under s 40(b) are invalid for lack of particularity, the applicants contended such a submission should be rejected. The applicants refer to the detailed claims and particulars, and the relief sought. The particulars of the claims in each case outline the allegations as to unfairness, breaches of the OD Act and/or the Code, through failure to pay appropriate guideline rates of pay and the failure to pay damages in the nature of payment in lieu of notice and for severance pay.

#### Jurisdiction-consideration

- 10 The issues of jurisdiction arising in these proceedings turns essentially on matters of statutory interpretation. The relevant principles in relation to this are well settled. It is always to be borne in mind that at its essence, statutory interpretation is a text based activity and it is to the text of the statute to which primary emphasis must be given: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 per Hayne, Heydon, Crennan and Kiefel JJ at par 47; *Amcor Ltd v CFMEU* (2005) 222 CLR 241 per Kirby J par 67. Additionally, a construction that is consistent with the purpose of a statute is to be preferred to one that is not: s 18 *Interpretation Act 1984* (WA). Furthermore, a statutory provision is to be construed in the context of the statute as a whole: *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355. Most recently, as Gageler and Keane JJ said in *Taylor v The Owners – Strata Plan No 11564* (2014) 88 ALJR 473 at par 65:

[65] Statutory construction involves attribution of legal meaning to statutory text, read in context. “Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always.”<sup>112</sup> Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation.<sup>113</sup> The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

#### Statutory scheme

- 11 The OD Act, in its long title, is “An Act to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so; and to establish the Road Freight Transport Industry Tribunal and the Road Freight Transport Industry Council, and for related purposes.” In effect, the legislation governs and regulates the relations between owner-drivers (as defined in s 4) and hirers (as defined in s 3) under an owner-driver contract (as defined in s 5).
- 12 By s 6(1) the OD Act applies to owner-drivers “who are engaged” “under an owner-driver contract” in Western Australia; who transport goods wholly within Western Australia; or who transport goods from Western Australia to elsewhere or from elsewhere to Western Australia, as long as a substantial part of the services under the owner-driver contract are performed in this State.
- 13 Part 5 deals with negotiations for owner-driver contracts and who may represent the parties in negotiations for the making, varying or termination of owner-driver contracts.
- 14 Part 6 deals with unconscionable conduct by either owner-drivers or hirers in relation to the “acquisition or possible acquisition” or the “provision or possible provision of services” under an owner-driver contract. Therefore, the legislation deals with conduct preparatory to the formation of an owner-driver contract and the acquisition of services or the provision of services under an owner-driver contract, once entered into.
- 15 By Part 7, Industrial Inspectors have powers the same as those appointed under s 98(3) of the Industrial Relations Act 1979 (WA) to ensure that the OD Act, the Code (made by the Owner-Drivers (Contracts and Disputes) (Code) Regulations 2010), or an owner-driver contract, are being complied with: s 32(1).
- 16 Part 8 provides for the right of entry of authorised persons to access premises of the hirer for the purpose of inspecting records. The obligation to maintain and make records available for inspection continues, despite an owner-driver contract no longer being in force and effect: s 34(3)(b).
- 17 The Tribunal is established by Part 9. A number of provisions of Part 9 are relevant for present purposes and it is convenient to set them out now. They are ss 37, 38, 40 and 47 which are in the following terms:

**37. Terms used in this Part**

(1) In this Part —

*Chief Commissioner* has the meaning given to that term in the IR Act section 7(1);

*Commission* has the meaning given to that term in the IR Act section 7(1);

*Commissioner* has the meaning given to that term in the IR Act section 7(1);

*dispute* means a dispute between one or more owner-drivers and one or more hirers arising under or in relation to this Act, the code of conduct or an owner-driver contract (including a payment dispute) and includes an allegation that a person has contravened this Act, the code of conductor an owner-driver contract;

*transport association* means —

- (a) the Transport Forum WA Inc.; or
- (b) the Transport Workers Union of Australia, Industrial Union of Workers Western Australian Branch.

(2) For the purposes of this Act, a *payment dispute* arises if, by the time the amount claimed in a payment claim is due to be paid under an owner-driver contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed.

**38. Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal**

(1) By this section the Commission has jurisdiction to —

- (a) hear and determine disputes that may be referred to the Commission under this Part; and
- (b) enquire into and deal with any other matter in relation to the negotiation of owner-driver contracts that may be referred to the Commission under this Part.

(2) When sitting in exercise of the jurisdiction conferred by subsection (1) or under section 46, the Commission is to be known as the Road Freight Transport Industry Tribunal (the *Tribunal*).

(3) A determination of the Tribunal on a dispute or matter mentioned in subsection (1) has effect according to its substance.

...

**40. Persons who may refer disputes and matters to the Tribunal**

A dispute or matter may be referred to the Tribunal —

- (a) in the case of a dispute arising under or in relation to an owner-driver contract, by —
  - (i) a person who is a party to the owner-driver contract; or
  - (ii) a transport association in which a party to the owner-driver contract is eligible to be enrolled as a member; or
  - (iii) an inspector; or
  - (iv) the Minister;

and

- (b) in the case of a dispute arising under or in relation to this Act or the code of conduct , or involving an allegation that a person has contravened this Act or the code of conduct , by —
  - (i) an owner-driver or hirer with a sufficient interest in the dispute; or
  - (ii) a transport association; or
  - (iii) except in a case involving an allegation that a person has contravened Part 6 — an inspector; or
  - (iv) the Minister;

and

- (c) in the case of a matter arising in relation to the conduct of joint negotiations for an owner-driver contract by —
  - (i) an owner-driver or hirer with a sufficient interest in the matter; or
  - (ii) a transport association; or
  - (iii) the Minister.

...

**47. Determination of dispute where no resolution by conciliation**

(1) If —

- (a) a dispute is referred to the Tribunal; and
- (b) the Tribunal takes action under section 44(2)(a); and

- (c) section 44(5)(b) does not apply,  
the Tribunal may hear and determine the dispute for the purposes of section 38(1)(a).
- (2) The Tribunal does not have jurisdiction to make a determination under this section in respect of a matter arising in relation to the conduct of joint negotiations for an owner-driver contract.
- (3) In making a determination mentioned in subsection (1), the Tribunal must endeavour to ensure that the matter is resolved —
- (a) taking into account any agreement reached by the parties on any particular issue; and
- (b) subject to paragraph (a), on terms that could reasonably have been agreed between the parties in the first instance or by conciliation.
- (4) In making a determination mentioned in subsection (1), the Tribunal may do one or more of the following —
- (a) order the payment of a sum of money —
- (i) found by the Tribunal to be owing by one party to another party; or
- (ii) by way of damages (including exemplary damages and damages in the nature of interest);  
or
- (iii) by way of restitution;
- (b) order the refund of any money paid under an owner-driver contract;
- (c) make an order in the nature of an order for specific performance of an owner-driver contract;
- (d) declare that a debt is, or is not, owing;
- (e) order a party to do, or to refrain from doing, something;
- (f) make any other order it considers fair, including declaring void any unjust term of an owner-driver contract.
- (5) In making an order under subsection (4), the Tribunal cannot —
- (a) insert a term into; or
- (b) subject to subsection (4)(f), otherwise vary,  
an owner-driver contract.

18 Section 38 above prescribes the jurisdiction of the Tribunal. There are two types of referrals that may be made to the Tribunal. The first is the referral of a “dispute” (as defined in s 37(1)). The second type of referral is in relation to a “matter” concerning the negotiation of owner-driver contracts. By s 37(1), a “dispute” may be between owner-drivers and hirers and may arise “under or in relation to ... an owner-driver contract”. The definition of “dispute” is wide and includes an allegation that a person has contravened an owner-driver contract. Furthermore, it is clear that for the purposes of the Tribunal’s jurisdiction under s 38 it is only disputes and any other matters “that may be referred” over which the Tribunal has jurisdiction. Therefore, the next question is who may refer such matters to the Tribunal.

19 I have set out the terms of s 40 above. As noted, persons may refer “disputes” and “matters” to the Tribunal. There are two types of “disputes” that may be referred and one type of “matter”. By s 40(a) a “dispute” arising under or in relation to an owner-driver contract may be referred to the Tribunal, relevantly for present purposes:

- (a) by a person who *is* a party to *the* owner-driver contract; or
- (b) a transport association in which *a party to the owner-driver contract* is eligible to be enrolled as a member.

(My emphasis)

20 The second type of “dispute” that may be referred is one under s 40(b), which is a dispute “arising under or in relation to this Act or the code of conduct” or a matter involving an allegation that a person has contravened those instruments. Thirdly, under s 40(c) is a different type of referral, in that a “matter” may be referred in relation to “joint negotiations for an owner-driver contract”. I say more about this provision when dealing with s 47 of the OD Act later in these reasons.

21 Once a dispute or matter has been referred to the Tribunal, the Tribunal may, under s 44, decide to attempt to resolve the issues involved in the dispute or matter, by conciliation. Arising from conciliation, the Tribunal may, under s 44(5), make a consent determination by order, which takes effect as if it were a determination made by the Tribunal for the purposes of s 38. By s 47(1), where a “dispute” (as defined in s 37(1)) has been referred to the Tribunal and the Tribunal endeavours to resolve the issues by conciliation, and no consent determination is made, then the Tribunal may hear and determine the dispute. Notably, s 47(1) does not refer to a “matter” that may be referred to the Tribunal under s 40. While such a “matter” may be referred and conciliated before the Tribunal, a matter arising in relation to the conduct of joint negotiations for an owner-driver contract may not be referred for determination by the Tribunal: s 47(2). Also, s 47(2), as with s 40(c) refers to “*joint negotiations for an owner-driver contract*.” I also pause to note that the definition of “dispute” includes what may be regarded as a “collective dispute”, that being between more than one owner-driver and one or more hirers.

**Sections 40(c) and 47(2) and joint negotiations for owner-driver contracts**

22 Having set out and referred to the relevant statutory provisions above, the question arising on the submissions of the parties is what is meant by the phrase “in respect of a matter arising in relation to the conduct of joint negotiations for an owner-driver contract”? The phrase “joint negotiations” is not defined in s 3 of the OD Act. It should be given its ordinary and natural

grammatical meaning unless the context dictates otherwise. As referred to in the respondent's written submissions, the phrase "in respect of" should be given a wide meaning. It was said by Mason J in *SGIO (Qld) v Rees* (1979) 26 ALR 341 at 351:

The expression "in respect of" denotes a relationship or connection between two things. In *State Government Insurance Office (Queensland) v Crittenden* (1966) 117 CLR 412 at 416; [1967] ALR 237 at 239, Taylor J quoted, with evident approval, the remarks of Mann CJ in *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111; [1941] ALR 105 at 106: "The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer." The same view was taken later in *Club Motor Insurance Agency Pty Ltd v Sargent* (1969) 118 CLR 658; [1969] ALR 670. But, as with other words and expressions, the meaning to be ascribed to "in respect of" depends very much on the context in which it is found.

- 23 I also accept, as referred to by the respondent, that "a matter arising" may, depending upon its context, be construed as referring to a justiciable controversy between parties when references are being made to particular legislation for example: *Abebe v Commonwealth of Australia* (1999) 162 ALR 1; *National Union of Workers and Another v Davids Distribution Pty Ltd* (1999) 165 ALR 595.
- 24 Sections 4 and 5 of the Code in Division 2 – Contract negotiations, contemplate two types of negotiations. First are negotiations for a single owner-driver contract between an owner-driver and a hirer. Secondly, there are joint negotiations between a hirer and a group of owner-drivers, which is essentially a form of collective bargaining. Irrespective of whether negotiations are on a single or joint basis, the parties to such negotiations are obliged to negotiate fairly and in good faith: s 6 Code.
- 25 From the relevant statutory provisions taken in context, the apparent policy of the OD Act appears to be (consistent with relevant provisions of the Explanatory Memorandum accompanying the Bill in the Parliament), that while the Tribunal may conciliate a "matter" referred under s 40(c), it may not arbitrate, by the making of a determination, in relation to the making of an owner-driver contract, the subject of such negotiations. Thus, for example, it seems that the Tribunal may not make orders prescribing the terms of owner-driver contracts, where the parties have been in joint negotiations concerning proposed terms and about which the parties have not been able to reach agreement.
- 26 The issue that arises for determination however is the breadth of the words "in respect of the matter arising in relation to the conduct of joint negotiations for an owner-driver contract". Is the prohibition as wide as that contended by the respondent? On the other hand, is 47(2), on its proper construction, more limited in scope? For example, is the limitation confined to matters before the Tribunal in relation to extant joint negotiations that may be the subject matter of a referral to the Tribunal and subsequent conciliation under s 44 of the OD Act?
- 27 The words "the conduct of joint negotiations" seem to be key words in s 47(2), in relation to which the words "in respect of" and the words "a matter arising" must be interpreted in context. The language of s 47(2) taken as a whole, in its ordinary and natural sense, in my opinion, means that it is "the conduct of joint negotiations" which is the object of s 47(2). As rightly referred to in the respondent's written submissions, the meaning of "negotiation" is something preparatory to the reaching of an agreement. The Shorter Oxford English Dictionary defines "negotiate" to include "1. To confer (*with*) another for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise. ... 2. To deal with, manage or conduct ... b. To arrange for, bring about (something) by means of negotiation". Similarly, "negotiation" is defined to include "1. A business transaction ... 2. A course of treaty with another (or others) to bring about some result ... 3. The action or business of negotiating with others".
- 28 Therefore in my view, it is matters arising from the actual process of negotiations in common, prior to the reaching of an agreement for an owner-driver contract, that are beyond the Tribunal's jurisdiction by s 47(2). Once the parties have reached an agreement arising from the process of common or joint negotiations, and have concluded an owner-driver contract, then in my opinion, from the ordinary and natural grammatical meaning of the language in s 47(2), the relevant persons are no longer "conducting joint negotiations for an owner-driver contract", because they have reached an agreement. On that construction of s 47(2), once negotiations have concluded, the Tribunal would have nothing on which to make a determination, because the parties would have settled their bargain, through joint or common negotiations, in the making of an owner-driver contract.
- 29 It seems to me that this construction is consistent with the intention of Parliament, that the Tribunal may not, in the case of collective bargaining, determine terms and conditions of owner-driver contracts or other matters that the parties themselves have not been able to collectively agree upon. In my opinion, this is what is meant by the terms of s 47(2), when read in the context of the provisions of the OD Act and construed consistently with the relevant provisions of the Code, as a whole.
- 30 This is not to say of course, that once having conducted joint negotiations for an owner-driver contract and an owner-driver contract coming into existence, there may not be further negotiations. As contemplated by s 28 of the OD Act and s 6 of the Code, the parties to an owner-driver contract may conduct joint negotiations for a variation or termination of owner-driver contracts. Such matters however, would appear not to be within the scope of referrals under s 40(c) of the OD Act. They may well however, depending upon the particular issues arising, fall within the scope of ss 40(a) or 40(b), and be able to be referred to the Tribunal on that basis, given the breadth of the meaning of "dispute" set out above. The Parliament has not inserted the words "or the variation or termination of owner-driver contracts" in ss 40(c) and 47(2), as appears elsewhere, as noted above. If it was the intention to also preclude these matters from the scope on s 47, then it would have been relatively straightforward to insert such language. The legislative scheme as a whole draws a distinction between the making of contracts on the one hand, and their variation and termination on the other. I do not consider that such words can reasonably be read into the legislation, having regard to the relevant principles referred to in pars 37 and 38 below.

- 31 Having reached that point, in the present case, on the evidence, as set out in the affidavits of Mr Scolaro on behalf of the applicants, and Mr Moore on behalf of the respondent, the applicants and the respondent have been working under owner-driver contracts brought into existence in some cases, many years ago. In Mr Scolaro's case specifically, as far back as 1998.
- 32 In considering all of the submissions and the evidence and having had regard to the relevant provisions of the legislation, construed within its context, I am not persuaded by the respondent's submission that the present applications to the Tribunal fall within the prohibition in s 47(2). The claims now made by the applicants arise under and out of their owner-driver contracts brought into existence, in some cases, many years ago. There were further negotiations between the parties and an agreement reached in late 2012 in relation to rates of pay, work allocations, expectations and operations. Another negotiation took place in 2013, resulting in revised work allocation methods being agreed from September 2013. Another dispute was brought before the Tribunal by the Transport Workers Union in February 2014 relating to work allocation and other matters. These earlier matters may have, but not necessarily, involved variations to the respective owner-driver contracts.
- 33 After conciliation under s 44 in relation to the 2014 dispute, the parties had further discussions, with no final agreement having been reached on those matters. The issues of disengagement of owner-drivers were further raised by the Union on 13 November 2014, with a response by the respondent on 19 February 2015. Those matters were not pursued further on the evidence. The parties ceased having any dealings on these issues. They were no longer conducting joint negotiations. In any event, all of these issues may be, but not necessarily, characterised as concerning the proposed variation and/or termination of the relevant owner-driver contracts, and were not matters arising from joint negotiations for an owner-driver contract(s). For the reasons I have endeavoured to set out above, these are not matters that may be referred to the Tribunal under s 40(c), but they may well be so referred under s 40(a) or s 40(b) of the OD Act.
- 34 In my opinion, it is not the case that because the parties may have conducted joint negotiations some, if not many years ago, which negotiations have long since concluded and which may have led to an agreement, that the Tribunal is forever precluded from considering any matter that may arise out of the parties' contractual relations at some point in the future. This was the net effect of the respondent's submissions. If this was the intention of Parliament, then one would expect to see very clear language in the OD Act to this effect.

#### *Section 40(a) referral of disputes*

- 35 I have set out the relevant statutory provisions above. As I have already mentioned, it seems clear enough by the terms of s 38(1)(a), that the Tribunal's jurisdiction to hear and determine "disputes" (as defined in s 37(1)) is confined to those disputes that "may be referred to the Commission under this Part". That is, the jurisdiction of the Tribunal is contingent on the relevant referral being the requisite kind of dispute, and secondly, that the referral be made by a person entitled to make it. This is notwithstanding the breadth of the meaning of "dispute".
- 36 In the case of a referral under s 40(a), whilst the opening sentence, as to the nature of the dispute that may be referred to the Tribunal, is expressed in the broadest possible terms, by sub-par (i) the person who may refer such a dispute to the Tribunal is a person "who is a party", to the relevant contract. Secondly, for the purposes of sub-par (ii), that being a referral by a transport association, the person eligible to be enrolled as a member of the association must be "a party to the owner-driver contract". In my opinion, from the plain and ordinary meaning of the language used in both s 40(a)(i) and (ii), the reference to the relevant person and party, are references to a person and party who are bound by the relevant owner-driver contract, as an extant contract, in the present tense, at the time of the referral to the Tribunal. As noted in the respondent's written submissions, Parliament has not chosen to describe the relevant referral in s 40(a)(i) as being by a person "who is or was a party" to a relevant owner-driver contract nor has it chosen to describe a referral under s 40(a)(ii) in terms of "a party or former party". This is as opposed to, for example, s 40(b), where the capacity of the person referring the matter to the Tribunal, is described as being an "owner-driver" and not a person "party to" the relevant contract.
- 37 Whether a court or tribunal should imply words into legislation has been a controversial issue in statutory interpretation. There has been considerable debate in the cases about the matter. The learned authors Pearce, D C and Geddes, R S in *Statutory Interpretation in Australia* (8th Ed, 2014) refer to the issue at pars 2.32-2.37. Circumstances which may warrant the reading of words into legislation may include where there is a clear and identifiable drafting error, and a word or words should be implied to give effect to the evident intention of the drafter of the legislation. More controversially, is the issue as to whether words should be implied into legislation not because words are obviously omitted in error, but rather, to give effect to what is said to be an underlying object or purpose of the relevant statutory provision concerned. These principles were discussed by Spigelman CJ in *R v Young* (1999) 46 NSWLR 681. Most recently in *Taylor*, referred to above, the High Court considered the approach to reading words into legislation. The majority, French CJ, Crennan and Bell JJ at pars 37-38 said:

Consistently with this Court's rejection of the adoption of rigid rules in statutory construction (*Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389 at 401 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ), it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia* ([2007] HCA 47; (2007) 232 CLR 138) the question of whether a construction 'reads up' a provision, giving it an extended operation, or 'reads down' a provision, confining its operation, may be moot (*Director of Public Prosecutions (Vic) v Leys* (2012) 296 ALR 96 at 129-130 [105]-[107]).

The question whether the court is justified in reading statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision (*Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630 per Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ; [1984] HCA 48; *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642 at 651-652 [9]

- per French CJ and Bell J). It is answered against a construction that fills 'gaps disclosed in legislation' (*Marshall v Watson* ([1972] HCA 27; (1972) 124 CLR 640 at 649 per Stephen J) or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature' (*Western Bank Ltd v Schindler* [1977] Ch 1 at 18 per Scarman LJ, cited by Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115).
- 38 In this case, there is no slip, omission or obvious drafting error evident in the language used in s 40(a)(i) and (ii). I consider that it would be a bridge too far or, in the words of the majority in *Taylor* above, "too big, or too much at variance with the language in fact used by the legislature" to read words into s 40(a)(i) by adding "or was" after the word "is", or for that matter the additional words "or former party" in s 40(a)(ii). Giving s 40(a)(i) its ordinary and natural grammatical meaning as expressed in the legislation, does not lead to any result which is absurd, capricious or irrational. Furthermore, the fact that sub-pars (i) and (ii) refer to a "party" in the present tense, suggests that the necessity for a person to be a party to an extant owner-driver contract was the evident intention of Parliament.
- 39 This interpretation may cause difficulties in that an unscrupulous hirer, who simply fails to pay an owner-driver under an owner-driver contract, and then terminates the contract, may escape any claim of enforcement brought before the Tribunal. Other genuine claims for payments due under contracts, that have terminated, will also be beyond the Tribunal's jurisdiction. While this may mean a lacuna is evident in the legislation that is ultimately a matter for Parliament to address. I am obliged to interpret the legislation as I find it, given the present challenge to the Tribunal's jurisdiction. In the words of Gageler and Keane JJ also in *Taylor*, set out above, it is not for the Tribunal "to remedy perceived legislative inattention. Construction is not speculation, and it is not repair". However, because of the potential consequences of this interpretation, the issues arising from it should be brought to the attention of the legislature.
- 40 Having considered the interpretation of s 40(a), the next question is, on the facts before the Tribunal, whether the applicants' referrals fall within the Tribunal's jurisdiction.
- 41 From the affidavit of Mr Moore at pars 11 and 12, he deposes to the fact that on or around 20 April 2015, he wrote to the applicants advising them that the respondent intended to terminate their owner-driver contracts on 30 April 2015. Mr Moore notes that no response was received from the applicants, to his letter. Accordingly, Mr Moore further says that on 30 April 2015 the applicants' contracts came to an end in accordance with his letter, a copy of which was annexed to his affidavit. In his letter, which is in standard form, it is stated:

Despite what has taken place in the past, SCT is willing, as a gesture of good faith, to provide you with an additional one month notice period to allow you to make other arrangements for your ongoing work. The notice period will run from 1 April 2015 to 30 April 2015.

This one month notice period is conditional on you providing confirmation that you are ready, willing and able to perform work for SCT now, and during that month. Consistent with the September 2013 arrangement, SCT does not provide any guarantee of work during this notice period.

#### **Moving Forward**

Please provide confirmation directly to SCT that you are ready, willing and able to work by Friday 24<sup>th</sup> April 2015. If SCT does not receive that confirmation, it will presume that you are not ready, willing and able and the September 2013 arrangement will conclude on that date.

- 42 Consistent with the statement of agreed facts, "the September 2013 arrangement", referred to by Mr Moore in his letter, was an agreement reached between the owner-drivers and the respondent in relation to the allocation of work. That was one of the issues in dispute. I pause to observe, that importantly, the September 2013 arrangement, was not the entirety of the owner-driver contract between the applicants and the respondent. On one view, it may well have represented a variation to the owner-driver contracts, or alternatively, even a separate contractual arrangement between the parties. Ultimately, it is not necessary for me to resolve that factual issue. This is because, in my opinion, Mr Moore's letter clearly indicates, in the quoted paragraph above, that the notice of termination of the owner-driver contracts would run from the month of April 2015 and conclude at the end of that month. That this was the clear intention of Mr Moore is affirmed by the content of his affidavit. The statement as to the termination date of the owner-driver contracts in his letter, that being 30 April 2015, was clear and unequivocal.
- 43 I do not consider that the reference to the "conclusion of the September 2013 arrangement" meant the termination of the contracts. This was the method of allocation of work, which in and of itself, had been the subject of ongoing dispute between the parties. Whilst it might be said that there is some ambiguity in Mr Moore's letter, Mr Moore's evidence is clear as to his intention. He said that the contracts were intended to and did terminate on 30 April 2015. Mr Scolaro understood this to be the situation, as referred at pars 30-31 of his affidavit.
- 44 The Notices of referral to the Tribunal in these proceedings were all filed in the Registry of the Commission on 29 April 2015. This was before the termination of the owner-driver contracts. I am therefore satisfied that on the evidence, the applicants were parties to owner-driver contracts at the time the present matters were referred to the Tribunal.

#### **Section 40(b) referral of disputes**

- 45 As to s 40(b), the scope of a referral to the Tribunal under this provision is broad. A referral may concern a wide class of disputes, as defined in s 37(1), concerning the OD Act and Code, including an allegation of a breach of the same. Such allegations could include for example the appointment and recognition of negotiation agents for owner-drivers or hirers; alleged unconscionable conduct by an owner-driver or hirer; matters concerning rights of entry and inspection of records; obligations imposed on parties to owner-driver contracts to negotiate in good faith; the failure by hirers to provide the requisite information to owner-drivers under the Code; allegations that penalty clauses exist in contracts; whether any deductions from payments due under owner-driver contracts are authorised; general obligations in relation to records and information to be kept

by a hirer; contingency payments; and possibly the application of the Guideline Rates and whether payments made under an owner-driver contract are made at a safe and sustainable rate.

- 46 Therefore, the breadth of the Tribunal's jurisdiction in relation to matters referred under s 40(b) not only includes allegations of a "contravention" of the OD Act and the Code, but also includes disputes "arising under or in relation to" the OD Act or Code. In this respect, I refer to the authorities noted earlier, as to the width of the expressions "in relation to" and "arising under" as applicable to s 40(b).
- 47 The matters to which s 40(b) refer, are not in my opinion, limited to those matters referred to in the respondent's written submissions. In any event, I am satisfied that the Notices of referral made by the applicants and the particulars provided in support, fall within the scope of s 40(b). The Tribunal has jurisdiction to hear and determine the matters so referred. The question of the scope of the specific powers that the Tribunal may exercise under s 47(4), when making a determination in relation to the matters referred, is a different question to the jurisdiction of the Tribunal to hear and determine the matters so referred. There is a material distinction between jurisdiction and power: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161-162 per Gibbs CJ, Stephen, Mason and Wilson JJ.
- 48 As to the relationship between ss 40(a) and 40(b) of the OD Act, raised in the respondent's submissions, I accept that both provisions of the legislation should be construed exclusively. That is, interpreted in context, it is only under s 40(a) that disputes in relation to owner-driver contracts may be referred to the Tribunal. Parliament has clearly made separate provision for the types of disputes that may be referred, as defined in s 37(1).
- 49 Accordingly, the referrals are within the Tribunal's jurisdiction. They will now be listed for conciliation.

2015 WAIRC 00996

DISPUTE RE OUTSTANDING PAYMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SP & S SCOLARO T/AS SPS TRANSPORT;  
A R PETERS PTY.LTD.;  
ML & AE ROBINSON;  
SANDRA B MCNULTY & STEWART L CAMERON

**APPLICANTS**

-v-

TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A SCT LOGISTICS;

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

TUESDAY, 10 NOVEMBER 2015

**FILE NO.**

RFT 4 OF 2015, RFT 5 OF 2015, RFT 6 OF 2015, RFT 7 OF 2015

**CITATION NO.**

2015 WAIRC 00996

**Result**

Declaration issued

**Representation**

**Applicants**

Mr J Boghossian of counsel

**Respondent**

Mr C Boyle of counsel and with him Mr M Nazareth of counsel

*Declaration*

HAVING heard Mr J Boghossian of counsel on behalf of the applicants and Mr C Boyle of counsel and with him Mr M Nazareth of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby declares –

THAT the Tribunal has jurisdiction to hear and determine the herein referrals.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

2016 WAIRC 00093

**DISPUTE RE OUTSTANDING PAYMENTS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SP & S SCOLARO T/AS SPS TRANSPORT;  
 A R PETERS PTY.LTD.;  
 ML & AE ROBINSON;  
 SANDRA B MCNULTY & STEWART L CAMERON

**APPLICANTS**

-v-

TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A SCT  
 LOGISTICS

**RESPONDENT****CORAM**

COMMISSIONER S J KENNER

**DATE**

WEDNESDAY, 17 FEBRUARY 2016

**FILE NO.**

RFT 4 OF 2015, RFT 5 OF 2015, RFT 6 OF 2015, RFT 7 OF 2015

**CITATION NO.**

2016 WAIRC 00093

**Result**

Direction issued

**Representation****Applicant**

Mr J Boghossian of counsel

**Respondent**

Mr C Boyle of counsel

*Direction*

HAVING heard Mr J Boghossian of counsel on behalf of the applicants and Mr C Boyle of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs –

- (1) THAT the applications be listed for hearing on 9 and 10 May 2016.
- (2) THAT the parties file an agreed statement of facts by no later than 21 days prior to the date of the hearing.
- (3) THAT the applicants file and serve upon the respondent any signed witness statements upon which they intend to rely by no later than 14 days prior to the date of the hearing.
- (4) THAT the respondent file and serve upon the applicants any signed witness statements upon which it intends to rely by no later than seven days prior to the date of the hearing.
- (5) THAT the applicants and respondent 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 parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
 Commissioner.

2017 WAIRC 00110

**DISPUTE RE OUTSTANDING PAYMENTS**

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

SP & S SCOLARO T/AS SPS TRANSPORT;  
 A R PETERS PTY.LTD.;  
 ML & AE ROBINSON;  
 SANDRA B MCNULTY & STEWART L CAMERON

**APPLICANTS**

-v-

TWENTIETH SUPERPACE NOMINEES P/L ATF BYRNS SMITH UNIT TRUST T/A SCT  
 LOGISTICS

**RESPONDENT****CORAM**

SENIOR COMMISSIONER S J KENNER

**DATE**

WEDNESDAY, 1 MARCH 2017

**FILE NO/S**

RFT 4 OF 2015, RFT 5 OF 2015, RFT 6 OF 2015, RFT 7 OF 2015

**CITATION NO.**

2017 WAIRC 00110

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**Result** Applications discontinued  
**Representation**  
**Applicant** Mr J Boghossian of counsel  
**Respondent** Mr C Boyle of counsel

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*Order*

WHEREAS the applicants sought and were granted leave to discontinue the applications the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the applications be and are hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Senior Commissioner.

**2017 WAIRC 00144**

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

**CITATION** : 2017 WAIRC 00144  
**CORAM** : COMMISSIONER D J MATTHEWS  
**HEARD** : TUESDAY, 23 AUGUST 2016, WEDNESDAY, 2 NOVEMBER 2016, THURSDAY, 3 NOVEMBER 2016  
WRITTEN CLOSING SUBMISSIONS TUESDAY, 17 JANUARY 2017 AND TUESDAY, 24 JANUARY 2017  
**DELIVERED** : WEDNESDAY, 15 MARCH 2017  
**FILE NO.** : RFT 5 OF 2016  
**BETWEEN** : SUMMERSANDS PTY LTD T/AS CHASE HAULIERS  
Applicant  
AND  
BGC (AUSTRALIA) PTY LTD T/AS BGC TRANSPORT  
Respondent

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**CatchWords** : Owner-driver contract - Referral of disputes - Whether party to terminated owner-driver contract is able to refer dispute to Tribunal - Jurisdiction found - Applicant's contentions - Conduct of respondent in execution of written contract was unconscionable and contract void - That the applicant did not materially breach the contract - That the respondent's conduct amounted to a repudiation of the contract which was accepted by the applicant - That the respondent's termination of the contract was not in good faith - Applicant further contended that respondent breached contract by introducing a "one truck policy" which caused the applicant compensable loss - Respondent's contentions - The respondent's conduct was not unconscionable - That the respondent did not repudiate the contract or if it did the repudiation was cured prior to applicant purporting to accept the repudiation - That applicant materially breached the contract - That introduction of the "one truck policy" was not a breach of the contract - Held respondent's conduct not unconscionable and contract not void - Held respondent withdrew alleged repudiation before applicant purported to accept the repudiation - Held no lack of good faith in termination of contract - Held "one truck policy" not in breach of contract - Claims dismissed

**Legislation** : *Interpretation Act 1984*  
*Owner-Drivers (Contracts and Disputes) Act 2007*  
*Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*

**Result** : Claims dismissed

**Representation:**

**Applicant** : Ms T Comer of counsel  
**Respondent** : Mr D Fletcher of counsel and with him Mr J Parkinson of counsel  
**Solicitors:**  
**Applicant** : Avon Legal  
**Respondent** : K&L Gates

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**Cases referred to in reasons:**

*Ciavarella v Balmer* (1983) 153 CLR 438

*Frost v Knight* (1872) LR 7 Ex 111

*Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235

*Van Dongen and Ors v Sims Metal Management* (2016) 96 WAIG 598

*SP & S Scolaro t/as SPS Transport & Ors v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust t/as SCT Logistics* [2015] WAIRC 00995

*Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* (2016) 96 WAIG 1652

**Cases also cited:**

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27

*Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501

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

*Burger King Corporation v Hungry Jacks Pty Ltd* (2001) NSWCA 187

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

*Commonwealth of Australia v. Amann Aviation Pty Ltd* (1991) 174 CLR 64

*Crawford Fitting Co v Sydney Valve and Fittings Pty Ltd* (1988) 14 NSWLR 438

*Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1

*Driver v War Services Home Commissioner* (1923) 44 ALT 130

*Heyman v Darwins Ltd* [1942] AC 356

*Louth v Diprose* (1992) 175 CLR 621

*Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268

*O'Connor v. SP Bray Ltd* (1936) 36 SR (NSW) 248

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

*Renard Constructions v Minister for Public Works* (1992) 26 NSWLR 234

*Shacam Transport v. Damien Cole [No 2]* (2014) 94 WAIG 1835

*Sherson & Associates Pty Ltd v Bailey* [2001] Aust Torts Reports 81-591

*Shevill v Builders Licensing Board* (1982) 149 CLR 620

*Supaworld Pty v LN Price Partners* (2015) 95 WAIG 649

*TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130

*Tramways Advertising v Luna Park (NSW) Ltd* [1938] 38 SR (NSW) 632

*Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* (2012) 92 WAIG 709

*Reasons for Decision*

- 1 The following facts were not in serious contest in these proceedings or emerge from uncontroverted and reliable evidence.
- 2 The applicant was an “owner-driver” for the purposes of the *Owners-Drivers (Contracts and Disputes) Act 2007* pursuant to section 4(2)(b) of that Act.
- 3 Mr Kenneth Humble was the sole director of the applicant and in his role he responds to the term “officer of the body corporate” in sections 4(2)(b)(i) and (ii) of the *Owner-Drivers (Contracts and Disputes) Act 2007*.
- 4 The applicant commenced providing services to the respondent from around 2006.
- 5 From 2006 to 1 July 2014 there was no written contract in place between the applicant and respondent.
- 6 On or around 1 July 2014 the applicant, through Mr Kenneth Humble, and the respondent, through Mr Christopher Paul Sefton, the respondent’s Logistics Manager, BGC Cement, executed a written contract (Exhibit 2 in these proceedings).
- 7 The term of Exhibit 2 was “from 1 July 2014 (Start Date) to [3 years] or any such earlier date of termination in accordance with this Contract”.
- 8 Some of the relevant provisions of Exhibit 2 were as follows:
  - (a) **Engagement** means the engagement of the Vendor by BGC for the performance of the Services as set out in the engagement letter, these Terms and any instructions given by BGC;
  - (b) **Instructions(s)** means the lawful and reasonable directions of BGC provided to the Vendor to supplement and compliment these Terms, including but not limited to, any schedules or annexures to these Terms;
  - (c) **Notice** means any written notice supplied by either party under these Terms. Such Notices are effective once sent;

- (d) The Vendor will supply to BGC the Goods and/or perform the Services in accordance with the Instructions in consideration of payment of the Price by BGC;
- (e) The Vendor warrants that the Vendor will comply with all relevant policies and procedures of BGC;
- (f) BGC or the Vendor may terminate all, or any part of, an Engagement for Services with effect from 7 days after giving the other party Notice; and
- (g) **Termination** – The Engagement and these Terms may also be terminated by BGC at any time effective immediately upon the giving of Notice if the Vendor materially breaches any Terms or the Engagement. If the Engagement or these Terms are terminated by BGC, BGC may have the Vendor’s obligations performed by another party. The Vendor will be responsible for, and will indemnify BGC against, any damages, costs (including, without limitation, legal fees on a solicitor-client basis), losses and expenses, incurred by BGC as a result of the breach.
- 9 The “engagement letter” (referred to in the definition of “Engagement”) was the covering document of Exhibit 2 and provided, among other things, that the applicant would use a prime mover to load, cart and unload cement and other powder products to customer silos and locations.
- 10 The engagement letter also contained the following passage:
- “For the purposes of BGC’s record keeping, please return this signed Contract to BGC. If you have any questions about the Contract, please contact the Operations Manager on 9442 2365. (Note: the “Guideline Rates” and the “Owner-Driver (Contracts and Disputes) Act 2007 Pamphlet” are available at <http://www.transport.wa.gov.au/freightrail/19647.asp>.”
- 11 In early 2015 the respondent decided that for each owner-driver which or who had a contract to load, cart and unload cement and other powder products, the respondent would only require from those owner-drivers such services as could be performed by one truck.
- 12 The respondent effected the change by introducing what was referred to in these proceedings, without objection, as the “one truck policy”; that is each owner-driver would have work allocated to only one truck by the respondent.
- 13 The one truck policy affected the applicant because it had, for some time, been required to provide services that required two vehicles.
- 14 A text message dated 11 February 2015 from Mr Derek Houareau, who I think at this time may have been the Acting General Manager, BGC Cement (although his written statement at [3] (Exhibit 18) states that he started in that role “on or about 1 March 2015”) to Mr Kenneth Humble said:
- Hi Ken, as discussed today & previously your 2nd truck – the Kenworth is ok to work again moving BGC Cement ONLY up until the 1st April 2015. From the 01/04/2015 we will no longer have one owner of multiple vehicles in the fleet, apart from on a casual basis & depending on the workload. If you are unable to find a buyer by 1st April 2015 your second truck will no longer be required. This msg is being sent via txt as you do not have an active email. Regards Derek.
- (Exhibit 5 – page 3)
- 15 The respondent did not require services from the applicant after 1 April 2015 that would have required the use of its second vehicle.
- 16 On 15 July 2015 Mr Kenneth Humble declared, by signing a document provided to him by the respondent, that he understood that drivers not listed in that document “must not perform any task associated with the loading/unloading or transportation of BGC Cement, including entering BGC and Customer Sites” (Exhibit 8).
- 17 The drivers listed on Exhibit 8 were “Ken Humble” and “Tim Marui”.
- 18 On 8 April 2016 Mr Kenneth Humble was present at a customer site (the premises of Cargers Concrete Services in Carnarvon) for the purpose of unloading BGC powdered cement when a person in his company who was not listed as a driver on Exhibit 8, Mr Arnel Humble, entered the customer site.
- 19 Mr Arnel Humble had previously been “banned” from entering BGC and its customers’ sites and his previous conduct was the reason for the respondent having owner-drivers sign documents in the form of Exhibit 8, facts known to Mr Kenneth Humble.
- 20 On 11 April 2016 Mr Kenneth Humble was asked by the respondent to attend its premises in Hazelmere, which he did.
- 21 At the Hazelmere premises, Mr Kenneth Humble was required to attend a meeting with Mr Sefton and Mr Houareau at which the events of 8 April 2016, set out at paragraph 18 above, were discussed. Mr Kenneth Humble had been given no prior notice of what the meeting was about.
- 22 Mr Sefton and Mr Houareau then met without Mr Kenneth Humble present and decided that they wanted to terminate contract between the applicant and respondent due to the events of 8 April 2016.
- 23 Mr Kenneth Humble then attended a second meeting with Mr Sefton and Mr at which he was informed that, because of the events of 8 April 2016, the contract was to be terminated effective three months from that date.
- 24 The statements as set out in paragraph 23 above were never reduced to writing and provided to Mr Kenneth Humble.

- 25 At 6:15:06pm on 11 July 2016 Mr Houareau sent an email to the address “khu19143@gmail.com” (the applicant’s email address) attaching a letter from Mr Houareau which contained the following paragraph:
- I confirm that BGC notified you on 11 April 2016 that the Contract would be coming to an end on 11 July 2016. BGC maintains that this was effective notice. However, on a without admission of liability basis, BGC is giving you a further 7 days written notice of termination commencing today, 11 July 2016.
- (Exhibit 9)
- 26 At 6:34:05pm on 11 July 2016 an email was sent from “khu19143@gmail.com” to “corporate@bgc.com.au” attaching a letter signed by Mr Kenneth Humble which relevantly referred to the events of 11 April 2016 as a “purported termination”, disputed that the “purported termination” was done correctly and for good reason, characterised the “purported termination” as “conduct by BGC which repudiates the Contract as a whole and evinces an intention to no longer be bound by the Contract or to fulfil it only in a manner substantially inconsistent with BGC’s obligations” and thus characterised it as a “repudiatory act” by the respondent and stated that the applicant “accepts BGC’s Repudiation and hereby terminates the Contract on the basis of BGC’s Repudiation.” (Exhibit 10).
- 27 The applicant contends that if I dig deeper into the factual matters and make appropriate findings and apply the law to them correctly I will conclude as follows:
- (1) When Mr Kenneth Humble signed Exhibit 2 on behalf of the applicant, the matter was attended by such unconscionable and unfair conduct on the part of the respondent, including a failure to comply with Schedule 1 to the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*, that I should declare the contract void or, at least, that I should declare void the provision that allowed the respondent to terminate the contract on the giving of seven days’ notice;
  - (2) That even if I do not make either of the declarations referred to in the preceding subparagraph I should find the respondent:
    - (a) made a choice to terminate the contract on 11 April 2016 in a certain way and could not later choose to terminate the contract in a different way;
    - (b) by its conduct on 11 April 2016 repudiated the contract; and
    - (c) that repudiation was accepted by the applicant with certain legal consequences flowing;
  - (3) That in any event once the full circumstances of the events on 8 April 2016 are known, the applicant did not materially breach the contract by his conduct and that for that reason, but also because of the full circumstances relating to the events on 11 April 2016, the termination of the contract, if there was a termination, was not in good faith; and
  - (4) That in any event the introduction of the one truck policy amounted to a breach of contract on the part of the respondent which caused the applicant compensable loss and damage.
- 28 To put the applicant’s claim in the context of the *Owner-Drivers (Contracts and Disputes) Act 2007*, section 38 empowers the Road Freight Transport Industry Tribunal to hear and determine “disputes” that are referred to it.
- 29 “Dispute” is defined by section 37(1) of *Owner-Drivers (Contracts and Disputes) Act 2007* to mean:
- a dispute between one or more owner-drivers and one or more hirers arising under or in relation to this Act, the code of conduct or an owner-driver contract (including a payment dispute) and includes an allegation that a person has contravened this Act, the code of conduct or an owner-driver contract.
- 30 The disputes before me are within that definition because, as will be seen, they relate to allegations that there have been contraventions on the part of the respondent of the *Owner-Drivers (Contracts and Disputes) Act 2007*, Schedule 1 to the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* and the contract which is Exhibit 2.
- 31 The respondent objects to the Tribunal hearing and determining the dispute on the basis that the Tribunal has no jurisdiction to do so. In relation to this, the respondent relies upon an argument accepted as correct by the Road Freight Transport Industry Tribunal in *SP & S Scolaro t/as SPS Transport & Ors v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust t/as SCT Logistics* [2015] WAIRC 00995.
- 32 If the Tribunal finds it has jurisdiction to hear and determine the disputes set out above, the respondent does not say that the allegations raised are not “disputes” within the meaning of that term in the *Owner-Drivers (Contracts and Disputes) Act 2007* but contends that if I dig deeper into the factual matters and make appropriate findings and apply the law correctly to them I will conclude as follows:
- (1) There was no unconscionability or unfairness attending the execution of Exhibit 2;
  - (2) The contract was ultimately terminated upon the expiry of seven days from notice of termination being given on 11 July 2016 pursuant to the clause in Exhibit 2 set out at paragraph [8](f) above;
  - (3) Related to the above, the conduct of Mr Sefton and Mr Houareau on 11 April 2016 did not amount to repudiatory conduct but, even if it had, that repudiation was not accepted by the applicant prior to it being “cured” and accordingly the contract had not been brought to an end by the applicant, and remained on foot, at the time it was terminated by the respondent by the giving of seven days’ notice;
  - (4) That, if it is relevant to decide, the conduct of the applicant on 8 April 2016 amounted to a material breach of the contract; and
  - (5) The introduction of the one truck policy did not amount to a breach of the contract on the part of the respondent.

33 There was evidence led and submissions made by both the applicant and the respondent about, in the event of a finding of unconscionable conduct or a breach of contract, what the quantum of damages should be.

34 For the sake of completeness, I note that the Tribunal has taken action under section 44(2)(a) *Owner-Drivers (Contracts and Disputes) Act 2007* and that section 44(5)(b) *Owner-Drivers (Contracts and Disputes) Act 2007* does not apply such that, pursuant to section 47(1) *Owner-Drivers (Contracts and Disputes) Act 2007*, the Tribunal may hear and determine the above disputes under section 38(1)(a) *Owner-Drivers (Contracts and Disputes) Act 2007*.

#### Jurisdiction

35 In relation to the jurisdictional objection raised by the respondent that objection was accepted in the case cited by the respondent but rejected in *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* (2016) 96 WAIG 1652.

36 I prefer the reasoning in *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* and adopt it with the result that I find the Tribunal has jurisdiction to hear and determine the disputes referred to it by the applicant.

37 I might add to the reasoning in *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* that the objection raised by the respondent is exactly the kind of objection overcome by section 8 *Interpretation Act 1984*. Even though the *Owner-Drivers (Contract and Disputes) Act 2007* uses the present tense, as the Act, pursuant to section 8 *Interpretation Act 1984*, is “always speaking” words expressed in the present tense are to 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.”

38 In my view to allow a person who **was** an owner-driver, as well as a person who **is** an owner-driver, to refer a dispute to the Tribunal is entirely within the true spirit, intent and meaning of the *Owner-Drivers (Contract and Disputes) Act 2007*.

#### Determination

39 The landscape of my decision-making changes dramatically depending on whether Exhibit 2, and in particular the provision therein allowing for termination on seven days’ notice, is valid or not and so I turn to that matter first.

40 I am content to assume that the evidence of Mr Kenneth Humble in relation to this issue is accurate for the purpose of my decision-making.

41 On that version Mr Kenneth Humble “got a message to go to the office to pick up a contract, and when he arrived at the office to get the contract there was a heap of paperwork on the table” (ts 8). He found a contract with his name on it. He says:

There was nobody there at the time when I picked up the paperwork. I looked at the paperwork and went through it, roughly. I - I - I didn’t read it, ah, I read it, but I thought it was, ah, it seemed to be all right. Ah, but then I placed it back onto the, ah, file with - with - is it the - for it to go to be approved. And other drivers were there and they - they were basically doing the same thing.

(ts 8, 9)

42 Schedule 1 to the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* was not provided with the contract.

43 More fully at ts 10 Mr Kenneth Humble says:

Well, what I did with the contract, I - I - I took it to - off the desk and I went outside, I looked at it briefly and I looked through it and I didn’t really see anything that would - if I done my job properly and everything like that, that, ah, I would just, ah, be, ah, finished just like that, without any reason - proper reason or anything like that. So I thought to myself, “Well, maybe I - I’ll go back and sign it”, and went doing that. I went back into the office and I handed it - I put it back on the, ah, the counter with the other ones that had been signed, and departed.

44 I have, against the background of that evidence, gone through the submissions made by the applicant on the questions of the conscionability and fairness in the applicant’s outline of submissions filed 17 January 2017 and responding submissions filed 24 January 2017.

45 I have also had regard to the decision of the Tribunal in *Van Dongen and Ors v Sims Metal Management* (2016) 96 WAIG 598.

46 I am unable to accept that the respondent engaged in unconscionable conduct contrary to section 30(1) *Owner-Drivers (Contracts and Disputes) Act 2007*.

47 I accept that the *Owner-Drivers (Contracts and Disputes) Act 2007* invites the Tribunal to consider whether, in an acquisition of services covered by *Owner-Drivers (Contracts and Disputes) Act 2007*, one party had, to use the colloquial, the “whip hand” and whether that party showed, flourished or used the whip in an unfair way. To that extent the *Owner-Drivers (Contracts and Disputes) Act 2007* does, as the applicant submits, offer owner-drivers a protection that the common law may not.

48 However, I see no indication in the *Owner-Drivers (Contracts and Disputes) Act 2007* that the Act is intended to protect a party from themselves.

49 If a man of Mr Kenneth Humble’s age and experience chooses to glance over a document he knows to be a contract which will govern his legal relations with a vendor and is, on the basis of that glance, content to sign the document, that is a matter entirely for him. He cannot now turn to the Tribunal seeking protection against his own ill-advised but voluntary conduct.

50 The applicant invites me to introduce into the regulation of owner-driver contracts the idea that an experienced owner-driver can voluntarily and freely sign a contract without consideration or thought and then later complain and seek redress in relation to terms that they, upon later consideration and thought, do not like. This cannot be what the *Owner-Drivers (Contracts and Disputes) Act 2007* intends.

- 51 To illustrate this, I make comment on each particular of unconscionability relied upon by the applicant, using as headings the content of the subparagraphs in section 30(2) *Owner-Drivers (Contracts and Disputes) Act 2007* referred to by the applicant in its written submissions.

Relative strengths of the negotiating position of the hirer and owner-driver

- 52 Let us assume that the respondent had the stronger negotiating position. That strength is not abused in circumstances where that party provides a contract to the other party and, without more, that other party glances over it, signs it and returns it. Any difference in the strength of the negotiating positions was not tested given the approach of Mr Kenneth Humble on behalf of the applicant.

Whether as a result of conduct engaged in by the hirer, the owner-driver was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the hirer.

- 53 It is fair to say that the written contract, insofar as it allowed the respondent to terminate the relationship upon the giving of seven days' notice, represented a significant swing in favour of the respondent's interests. I say this because it was most likely the case that before execution of the written contract the relationship, being an ongoing one not regulated by a written contract, was such that there was implied into it a term that the respondent could only terminate the relationship upon the giving of reasonable notice (absent material breach) and that period of notice would have been significantly longer than seven days.
- 54 That, however, is not to say that the respondent did not have a "legitimate interest" in defining, and perhaps reducing, the notice period. As a commercial enterprise a reduction in the lawful notice period required would certainly be in its interests and it is hard to say that such a reduction is not "legitimate" in the sense of "justifiable" or "logical".
- 55 This is especially so given the nature of the work underpinning the contract being subject to "ebbs and flows" and "peaks and troughs", propositions with which Mr Kenneth Humble agreed (ts 42).
- 56 At first blush seven days' notice seems a bit short but I simply do not have evidence before me upon which I could conclude that the ebbs and troughs accepted by Mr Kenneth Humble under cross-examination are not such that, given the way the respondent earns its revenue, it is not a justifiable or logical way for the respondent to protect its legitimate interests.
- 57 The applicant says the interest is not legitimate because it was unnecessary given that "BGC [could always simply] reduce the work allocated to the applicant" (written outline of submissions [49]).
- 58 While this could have been done, that does not mean an interest in being able to end the relationship in the event of an ebb or trough on the giving of seven days' notice is not legitimate.
- 59 Once the interest is accepted as being legitimate can it be said that the relevant clause was not "reasonably necessary" to protect it? I do not think so. The clause contained the words necessary to achieve the intended outcome; the protection of what I find to be a legitimate interest.
- 60 In any event, I find that the respondent did not "require" the applicant to comply with the relevant clause. Mr Kenneth Humble, on behalf of the applicant, agreed to be bound by it.
- 61 The outcome of this matter may have been different if Mr Kenneth Humble, on behalf of the applicant, had objected to the relevant clause in light of the significant swing away from his interests the clause effected. It is enough to note that he did not object to it; he freely and voluntarily agreed to be bound by it.

Consistency with treatment of other owner-drivers

- 62 Although this was relied upon by the applicant, there was no significant relevant evidence on the matter.

Compliance with the code of conduct

- 63 I note the failure of the respondent to provide Mr Kenneth Humble with a copy of Schedule 1 to the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*. There was no good evidence that it was not reasonably practicable to provide it. However, I do not consider, given all of the other facts I have accepted as true for the purposes of my consideration on this point, that this has the result that the respondent engaged in unconscionable conduct given Mr Kenneth Humble's experience and the reference to the document in the engagement letter.

The extent to which the hirer unreasonably failed to disclose to an owner-driver any intended conduct or risks that the hirer should have foreseen would not be apparent to the owner-driver

- 64 The respondent disclosed that it had, under the contract, the right to terminate the contract on the giving of seven days' notice. The risk for an owner-driver if the respondent exercised the right was obvious. If this is the kind of "intended conduct" contemplated by section 30(2)(h) *Owner-Drivers (Contracts and Disputes) Act 2007* it was disclosed and the respondent could not have foreseen that the risk would not be apparent to the applicant. All that had to occur was that Mr Kenneth Humble decide to read the contract.

The extent to which the hirer was willing to negotiate

- 65 Despite the valiant attempts of counsel for the applicant to produce evidence, either direct or inferential, that the respondent had no willingness to negotiate I can discern no evidence upon which I could reasonably rely for such a conclusion.
- 66 It is hardly controversial, and in my view not material, that the process the respondent adopted was to produce a standard form contract and provide it to all the drivers it wanted to sign it at or around the same time.
- 67 The respondent could have asked to have a meeting with each owner-driver to discuss the terms and conditions of a new contract and to have started from scratch as it were in such a meeting. However, to commence the process in a way it no doubt saw as efficient or convenient or even advantageous to it does not mean the respondent had no willingness to negotiate with owner-drivers after this.

- 68 In short, the issue of whether or not there was a willingness to negotiate on the part of the respondent was not tested by the evidence in these proceedings. Mr Kenneth Humble, on behalf of the applicant, did not try to negotiate with the respondent. Nor did he give evidence of a belief that he could not negotiate or that to attempt to negotiate would be pointless. Nor did the applicant point to any evidence that would allow me to conclude that such a belief, if it were held, was reasonable.
- 69 I note, both in this regard and other regards upon which it was relied by the applicant, the evidence of Mr Sefton at ts 208 and 209 that he thought there was an aspect of human nature that has people saying “yeah” to things without thinking them through and that drivers can be “haphazard” (suggesting that they are at least as, if not more prone, to this than others) and that, in fact, Mr Sefton noticed most drivers signed their contracts having just “flicked” through them and some “didn’t even look at the terms”.
- 70 Mr Sefton’s insights and observations are neither here nor there. Even if it is taken at its highest and found (although there is no basis for it) that the respondent included the relevant clause hoping or even expecting that the drivers would “fall victim” to this aspect of human nature this would not establish that it abused its position in negotiations or was not willing to negotiate. The respondent was not obliged to save owner-drivers, like Mr Kenneth Humble, from a disinclination to read important documents before signing them.
- The extent to which the hirer acted in good faith
- 71 In its written submissions the applicant largely repeated its submissions in support of other heads of unconscionability in support of this head but it also, if I have interpreted them correctly, sought to expand upon them in this context.
- 72 I note that whether a hirer has acted in “good faith” is only one matter to consider, among many others, to determine whether there has been unconscionability on the part of the hirer as it is found at subparagraph (j) of the non-exhaustive list of matters to which the Tribunal may have regard for the purpose of determining unconscionability found in section 30(2) *Owner-Drivers (Contracts and Disputes) Act 2007*.
- 73 That is, it is clear that the terms “lack of good faith” and “unconscionability” in the *Owner-Drivers (Contracts and Disputes) Act 2007* are not interchangeable, although a finding of the former may of course lead to a finding of the latter.
- 74 Turning to the matter of “good faith” I understand the applicant to be saying that the entire circumstances relating to the execution of Exhibit 2 reveal a lack of good faith on the respondent’s part, even if other heads in section 30(2) *Owner-Drivers (Contracts and Disputes) Act 2007* or other matters do not support a conclusion of unconscionable conduct.
- 75 The applicant says, as I understand it, that the respondent was the more powerful party in a long term and successful relationship and that when it wanted to affect the applicant’s rights and interests it had an obligation to treat Mr Kenneth Humble, the applicant’s embodiment, as an individual and, I think the contention runs, point out to him that the contract, if signed by him, would give the respondent the right to terminate the relationship on the giving of seven days’ notice and thereby the applicant would give up the right under the then extant contractual relationship to a period of reasonable notice which, in all likelihood, was longer than seven days.
- 76 The applicant says, I think, that to lump Mr Kenneth Humble in with all the other owner-drivers in a BGC Cement-wide roll out of new contracts without him being given a background briefing of what the new contract meant for him, given that his company had given around 10 years of good contractual service to the respondent, demonstrated a lack of good faith, whatever might be said about the circumstances more generally.
- 77 My view of such a contention is that, if I accept it, the Tribunal will move too close in this case to importing into the concept of good faith a requirement for a hirer to unrealistically discount its legitimate commercial interests in its dealings with owner-drivers.
- 78 I do not think good faith in a case such as this requires a hirer to do anything different from that which the respondent did; that is, to give Mr Kenneth Humble the contract it desired that he sign on behalf of the applicant and to await either its return or any questions Mr Kenneth Humble had about it, as per the invitation the engagement letter contained.
- 79 I do not consider that good faith required the respondent to purport to advise Mr Kenneth Humble on the contents of the contract from the point of view of what might be his potential interests. Mr Kenneth Humble was a mature and successful business owner.
- 80 Put another way there was nothing unreasonable or unfair, in the circumstances of this case, in what the respondent did or did not do.
- 81 Good faith, or its absence, may have been revealed by how the respondent responded if Mr Kenneth Humble had raised questions about the contract and, in particular, about the respondent’s right under it to terminate it by giving seven days’ notice. But this never occurred.
- 82 If there had been any evidence that the respondent knew of and relied unfairly upon some special disadvantage on the part of Mr Kenneth Humble or that there was some evidence of a murmur of dissent from him about the terms of the contract or some evidence that he wished to dissent but knew that there was no point in doing so then, depending on the evidence for the respondent, this matter may have taken on an entirely different complexion. But there was no such evidence.
- 83 The facts are that, even on his version, Mr Kenneth Humble was given a contract to consider. The covering document of the contract invited him to contact the “operations manager” if he had any questions in relation to it. Mr Kenneth Humble glanced over the document and freely and voluntarily signed it on behalf of the applicant. He was a mature and experienced driver and business owner. We do not know what would have happened if Mr Kenneth Humble had objected to signing the contract or sought amendment to it.
- 84 There is no evidence that, as the applicant submits, owner-drivers had to sign the contract in an unamended form if they wanted to continue driving with the respondent nor any evidence upon which that might be inferred.

- 85 I find that the respondent did not engage in conduct that was unconscionable in relation to the acquisition of the applicant's services and accordingly I do not find Exhibit 2 or any part of it void or invalid.
- 86 Having found that the provision in Exhibit 2 allowing either party to terminate the contract on seven days' notice to be valid, the next question is whether the contract was brought to an end by the exercise of this contractual right or in some other way.
- 87 This is ultimately a matter of fact.
- 88 The respondent says it gave notice in writing at 6:15:06 pm on 11 July 2016 when it sent Exhibit 9 to the applicant's email address "khu19143@gmail.com".
- 89 The applicant says, at [34] and [35] of its Amended Notice of Referral, that on 11 July 2016 it accepted what it claimed to have been the respondent's repudiation of the contract (related to the events of 11 April 2016) and thereby terminated the contract and that it was only on 12 July 2016 that the respondent purported to terminate the contract by the giving of seven days' notice.
- 90 Exhibit 10 was an email from "khu19143@gmail.com" to the respondent at 6:34:05 pm on 11 July 2016, attaching a letter accepting the repudiation.
- 91 At the hearing, Mr Kenneth Humble gave evidence (ts 75) that he did not see Exhibit 9 on 11 July 2016, because "it went to the office and I live in 6 Newham Way" and he only became aware of it when he received a telephone call from the respondent on 12 July 2016, that is after Exhibit 10 had been sent.
- 92 The applicant's ultimate submission on the point, as far as I can make out from the applicant's written submissions, is not that Exhibit 10 was first in time. That is, I do not discern an argument in the submissions that is the same as that at [34] and [35] of the Amended Notice of Referral nor one which relies on the evidence of Mr Kenneth Humble set out above.
- 93 Rather I see a different argument to the effect that, the respondent having chosen to terminate the contract for a material breach on 11 April 2016, it could not later terminate the contract in a different way.
- 94 It is argued, as I understand it, that Exhibit 9 could never have been effective, the respondent already having nailed its colours to the mast on 11 April 2016, and not that it was ineffective because it was not received by the applicant before he purported to terminate the contract.
- 95 There is also an argument put in the alternative for the applicant that, if the respondent did terminate the contract, the whole of the respondent's conduct relating to the termination, on and from 11 April 2016, was in breach of the term of good faith implied into contracts. The applicant further submits that quite apart from such a breach at common law there is "a higher standard to be found in the statutory Good Faith as required by the Act and in this instance, BGC sought to unfairly apply the provisions of its 'take it or leave it' standard form contract for purposes that had little to nothing to do with BGC's commercial requirements." ([93] of applicant's written outline of submissions).
- 96 As I understand what is being put in the alternative it is that, even if it was the respondent which terminated the contract by the giving of seven days' notice under Exhibit 2, rather than the applicant by acceptance of a repudiatory act, the respondent's termination of the contract should be viewed broadly as encompassing the events of 11 April 2016 and subsequent events and that, viewed broadly, the termination was not in good faith for the reasons listed at [94] of the applicant's written outline of submissions which cover what happened on 11 April 2016 and subsequently.
- 97 Clause 6 of Schedule 1 to the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* of course provides that "...in the termination of a contract, the parties have a duty to negotiate fairly and in good faith...".
- 98 I should note here that the applicant filed its Notice of Referral on 31 May 2016, that is some weeks before the documentary exchange evidenced by Exhibits 9 and 10.
- 99 The legal position applying to the facts is clear.
- 100 If a party commits a repudiatory act, determined objectively as a matter of fact, the innocent party may accept the repudiation and thus bring the contract to an end.
- 101 The contract ends only if, and when, the innocent party accepts the repudiatory act.
- 102 The repudiatory conduct may be "cured" by the party in breach prior to the acceptance of the repudiation by the other party in which case the repudiation can no longer be accepted nor can the contract brought to an end by such acceptance. (*Frost v Knight* (1872) LR 7 Ex 111 at 112 cited with approval by Taylor J in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 260-262)
- 103 Applying the law to the facts it is clear that, whether or not the events of 11 April 2016 were repudiatory in nature, those acts, or their purported effects at least, were withdrawn or "cured" by Exhibit 9.
- 104 Although the letter dated 11 July 2016, which formed part of Exhibit 9, maintained, plainly wrongly given that under the contract a notice of termination had to be in writing, that the verbal notification on 11 April 2016 was "effective notice" the letter went on to countermand that notice and instead gave the applicant notice, in writing and under the contract, that the services would be cancelled with effect on 18 July 2016.
- 105 The letter was sent to the applicant's email address on the last day that the contract was to remain on foot had the purported termination on 11 April 2016 been effective and was received prior to the letter of the applicant purporting to accept the repudiation which was sent a little while later from that same email address. In any event Exhibit 2 provided that "Notices" under the contract were effective once sent.
- 106 In short, in terms of the termination of the contract between the applicant and the respondent, the respondent's lawyers beat the applicant's lawyers to the punch.

- 107 As a matter of law, the argument that having decided to terminate the contract on 11 April 2016 the respondent could not countermand that decision and terminate on some other basis must fail. The case cited by the applicant, *Ciavarella v Balmer* (1983) 153 CLR 438, does not stand for the proposition, put at [101] of the applicant's outline of submissions, "that once a party to a contract elects a remedy it is not open to that party to then attempt to correct the remedy by pursuing an alternative one".
- 108 Absent authority to the contrary, I see no reason why, as a matter of law, this may not be done in circumstances where, as here, the contract remained on foot when the alternative path was chosen.
- 109 The applicant did not argue that it had, by any conduct other than the Exhibit 10, accepted what it says were the repudiatory acts of the respondent on 11 April 2016 and, indeed, the applicant's Notice of Referral filed 31 May 2016 sought orders that would have kept the contract on foot.
- 110 As a matter of law the position is that even if the respondent had repudiated the contract on 11 April 2016, that repudiation was cured on 11 July 2016 and the applicant's contract was brought to an end upon the giving of seven days' notice in writing in accordance with Exhibit 2.
- 111 For the above reasons, I do not need to determine whether, as a matter of law, the actions of the respondent's employees on 11 April 2016 amounted to a repudiation of the contract. Nor do I have to determine whether the applicant materially breached the contract.
- 112 The applicant argues however, I think, that, even if the Tribunal was to find that the contract was terminated by the respondent by the giving of seven days' notice, when the entire circumstances of the termination are looked at – and their factual link to the events of 8 April 2016 and the respondent's view of them as evidenced by the events of 11 April 2016 taken into account – the termination was unfair, unreasonable and lacking in good faith.
- 113 Even if I looked at the matter in a wider context and considered the events of 8 April 2016 and 11 April 2016, and subsequent events, to determine whether it was unfair or unreasonable to give the applicant seven days' notice, or whether that action lacked good faith, I would not have come to any of these conclusions.
- 114 To assess the matter I am content to accept the evidence of Mr Kenneth Humble, Mr Arnel Humble and Mr Graeme Carger in relation to the events of 8 April 2016.
- 115 Simply looking at fairness, reasonableness and good faith the respondent clearly had cause to take the events of 8 April 2016 up with Mr Kenneth Humble when it became, in general terms, aware of them.
- 116 As at 8 April 2016 Mr Kenneth Humble knew that the presence of Mr Arnel Humble on the site of a customer of the respondent was, as far as the respondent was concerned, a serious matter.
- 117 Any reasonable person in the shoes of Mr Kenneth Humble would have known that it was best, in terms of good relations between him and the respondent, to not in any way facilitate or assist the entry of Mr Arnel Humble to such a site and also to do what he reasonably could to avoid such a situation occurring.
- 118 On what was known to the respondent as at 8 April 2016, and indeed on what it learned from Mr Kenneth Humble on 11 April 2016, it had every right to think that Mr Kenneth Humble had not done enough to stop a situation arising where Mr Arnel Humble entered one of its customer sites.
- 119 Mr Kenneth Humble had clearly put himself in harm's way on 8 April 2016. The defence he put up on 11 April 2016, that the client had invited Mr Arnel Humble onto the site and that was nothing to do with him, demonstrated, if this belief were truly held, a stunning lack of insight, or, if merely tactically adopted, a terrible attitude.
- 120 Given the background, it was Mr Kenneth Humble's clear responsibility to ensure that Mr Arnel Humble was not in his company when he was organising entry to a customer's site or to do what he could to prevent Mr Arnel Humble entering such a site if Mr Arnel Humble was present at such a time. He could not expect, as at 11 April 2016 or at any time, to hide successfully behind a defence that Mr Arnel Humble's entry onto the site was entirely a matter between Mr Arnel Humble and a customer who knew nothing of the relevant background.
- 121 Even though Mr Kenneth Humble had no notice of what the meeting was about on 11 April 2016, his defence to the allegations was the same as it was before me (ts 30, 31, 69, 70, 71, 73), so it is difficult to conclude he was wrong-footed on 11 April 2016.
- 122 Further, his defence was as implausible then as it was before me.
- 123 It is little wonder in my view that Mr Sefton and Mr came to the conclusion, in light of what they heard on 11 April 2016, that the contractual relationship between the applicant and the respondent should not run its full term.
- 124 It is true that the respondent's officers, from a legal point of view, made a hash of the invocation of the respondent's rights on 11 April 2016. Not only did they come up with a concept of "summary termination on three months' notice", which was not a beast contemplated by the contract, but they failed to give the applicant notice in writing of anything.
- 125 But I have decided that the relevant legal conclusion arises out of facts from other days. From the point of view of overall fairness, reasonableness and good faith, the procedural errors committed by the respondent pale in comparison to the substantive error of Mr Kenneth Humble in being a party or accessory (in the way I have described above) to the entry of Mr Arnel Humble onto one of the respondent's customer sites.
- 126 There was no unfairness, unreasonableness or lack of good faith on the part of the respondent in purporting to end the contract on that day nor, to the extent there was a link between the effective termination of the contract and the events of 8 April 2016, any unfairness, unreasonableness or bad faith in that link.

- 127 That leaves only for consideration the question of whether the respondent breached the contract in early 2015 with the introduction of the “one truck policy”.
- 128 The applicant captures the essence of the change in [68] of its written outline of submissions. when it says that the respondent could have, under the contract, allocated work according to its commercial needs.
- 129 It must follow, given that the commercial needs relied upon by the respondent were not ultimately undermined, that the respondent could have, under the contract, allocated only such work as could be completed by one truck rather than two or more.
- 130 In that light I consider the submissions found at [68] of the applicant’s written outline of submissions that “it was wholly up to the applicant to determine whether two trucks would have sufficient work to meet its operating needs” and that the respondent breached the contract by instituting the “one truck policy” wholly unconvincing. I say this because I find that the applicant is splitting hairs in complaining about the one truck policy when what was behind the policy, the allocation of work according to the respondent’s needs, was accepted to be lawful and in accordance with the contract.
- 131 If the respondent’s commercial needs are accepted to be valid, and those needs were not undermined in these proceedings, then it must be accepted that they were only served by the change being brought into effect by instituting a “one truck policy”. Reducing the work for an owner-driver but allowing an owner-driver to carry out the work with as many trucks as he liked would have affected the commercial needs the respondent was trying to achieve, those being to address claims of lack of parity by evening out, and being seen to even out, workflow distribution between owner-drivers (as put at [72] of the respondent’s written closing submissions).
- 132 In other words, it being accepted that the respondent could, without breach of the contract, reduce the workload allocation to an owner-driver, I find this is essentially what it did. That it was cast and introduced as a “one truck policy” is ultimately beside the point.
- 133 The applicant’s claims fail and are dismissed.

2017 WAIRC 00145

## IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

SUMMERSANDS PTY LTD T/AS CHASE HAULIERS

**APPLICANT**

-v-

BGC (AUSTRALIA) PTY LTD T/AS BGC TRANSPORT

**RESPONDENT****CORAM**

COMMISSIONER D J MATTHEWS

**DATE**

WEDNESDAY, 15 MARCH 2017

**FILE NO/S**

RFT 5 OF 2016

**CITATION NO.**

2017 WAIRC 00145

**Result**

Claims dismissed

**Representation****Applicant**

Ms T Comer of counsel

**Respondent**

Mr D Fletcher of counsel and with him Mr J Parkinson of counsel

*Order*

HAVING heard Ms T Comer, of counsel, on behalf of the applicant and Mr D Fletcher, of counsel, and with him Mr J Parkinson, of counsel, on behalf of the respondent; and

HAVING received written submissions on Tuesday, 17 January 2017 and Tuesday, 24 January 2017; and

HAVING given Reasons for Decision in which I determined to dismiss the claims;

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

The applicant’s claims are dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,  
Commissioner.