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NOTICES—General Matters—

2017 WAIRC 00386

Salary Cap for Lodging Claims of Unfair Dismissal or Denial of Contractual Benefits

An employee whose contract of employment provides for a salary greater than \$159,300.00 cannot have the Commission decide whether they have been unfairly dismissed or have been denied a benefit to which they are entitled under their contract of employment.

Section 29AA(3) and (4) of the *Industrial Relations Act 1979* provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount.

What is meant by an industrial instrument is defined in section 29AA(5) of the *Industrial Relations Act 1979* and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* [2006] WAIRC 05220; (2006) 86 WAIG 2725.

The prescribed amount of the salary is determined by Regulations 5 and 6 of the *Industrial Relations (General) Regulations 1997*. The amount is adjusted each July 1.

The figure that will apply from 1 July 2017 has been calculated by the Registrar as being \$159,300.00. The amount is a matter for the Commission to determine so this figure must be seen as a guide, until such time as the Commission may determine a different amount.

GENERAL ORDERS—

2017 WAIRC 00330

2017 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2017 WAIRC 00330
CORAM	:	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	:	THURSDAY, 18 MAY 2017 THURSDAY, 8 JUNE 2017
DELIVERED	:	WEDNESDAY, 14 JUNE 2017
FILE NO.	:	APPL 1 OF 2017
BETWEEN	:	ON THE COMMISSION'S OWN MOTION

CatchWords	:	State Wage order - Commission's own motion - Minimum wage for employees under <i>Minimum Conditions of Employment Act 1993</i> - Award rates of wage - Award minimum wage - State wage principles
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 50A, s 50A(3), s 50A(3)(f) <i>Fair Work Act 2009</i> (Cth) s 134(1)(b) <i>Minimum Conditions of Employment Act 1993</i> (WA) s 12, s 13
Result	:	2017 State Wage Order issued

Representation:

Mr B Entrekin and with him, Ms C Purcell on behalf of the Hon. Minister for Commerce and Industrial Relations

Mr P Moss and with him, Ms K Dudgeon on behalf of the Chamber of Commerce and Industry of WA (Inc)

Dr T Dymond on behalf of UnionsWA

Mr C Twomey on behalf of the Western Australian Council of Social Service Inc

Reasons for Decision

- 1 The Commission is required by s 50A of the *Industrial Relations Act 1979* (the Act) to make a General Order (the State Wage Order) before 1 July each year. That Order sets out the minimum wage applicable under s 12 of the *Minimum Conditions of Employment Act 1993* (the MCE Act) to employees 21 years of age and over, and to apprentices and trainees. The State Wage Order also adjusts rates of wages paid under awards and makes consequential changes to awards.
- 2 The State Wage Order also sets out a statement of principles to be applied and followed in relation to the exercise of jurisdiction under the Act to set wages, salaries, allowances and other remuneration of employees, or the prices to be paid in respect of their employment.

Submissions

- 3 The Commission published notices inviting submissions. Written submissions were made by the Hon. Minister for Commerce and Industrial Relations (the Minister), the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA), UnionsWA, Western Australian Council of Social Service Inc (WACOSS), the Printing Industries Association of Australia and an individual, Conny Torney.
- 4 The Commission convened on Thursday, 18 May 2017 to hear oral submissions and received the considerable benefit of a presentation by Mr David Christmas, Director of the Economics and Revenue Forecasting Division of the Western Australian Department of Treasury. His presentation dealt with the state of the Western Australian and Australian economies. We are grateful for those submissions and acknowledge the research and effort taken by those who made submissions. The Commission reconvened on Thursday, 8 June 2017 after the Fair Work Commission issued its annual review of minimum wages because s 50A(3)(f) requires the Commission to consider relevant decisions of other industrial courts and tribunals.

The Minister for Commerce and Industrial Relations

- 5 In taking account of issues the Commission is required to consider, the Minister submits that a flat dollar increase of \$19.20 ought to be applied to the State minimum wage and adult award rates of pay. This represents an increase of 2.8% to the existing rate and would result in a minimum wage of \$712.10 per week. The Minister says this is a sustainable quantum that would help improve the living standards of employees without threatening business viability. It would constitute a real wage increase, and a flat dollar adjustment would ensure that the lowest paid receive the greatest benefit.
- 6 The Minister notes that the amount of increase proposed by UnionsWA represents a 6.5% increase to the minimum wage and between 5.7% and 6.5% to award wages. In the current economic climate, this represents a considerable wage cost increase for many smaller employers.
- 7 According to the Minister, the benefit of higher disposable incomes may be realised only if employees do not suffer a loss of employment or a significant reduction in working hours. While UnionsWA's model of increases has some merit, the Minister says that a flat dollar increase provides the greatest benefit to the lowest paid. Also, a single method of increase is less complex to administer and less likely to result in calculation errors.
- 8 The Minister also opposes CCIWA's proposal to maintain the current level of the minimum wage because it is higher than the national minimum wage on the basis that it would be unfair or inequitable to impose a wage freeze on many of the lowest paid in the community. The effect would be a reduction in real wages, adversely affecting the living standards of those employees. It would be contrary to the statutory criteria the Commission is required to consider. The Minister also notes that not all minimum wage rates in the State system are higher than those in the national system. The Minister refers to the differences between the adult casual minimum wage for a State system casual of \$21.88 per hour compared with \$22.13 in the national system, and the same applies to some award-free trainees, apprentices and junior employee rates.
- 9 State system employers are not always at a comparative disadvantage with their national counterparts, according to the Minister.
- 10 The Minister acknowledges WACOSS's significant role in advocating for organisations and individuals in the community sector. The Minister agrees that elevated levels of underemployment and unemployment are of concern for minimum and award wage earners. He supports the Commission taking a considered and pragmatic approach so that there should be a real wage increase at the level that will not affect employment outcomes, which would negate the benefit it brings.

The Western Australian economy

- 11 The Department of Treasury's *Economic Outlook* provides a detailed description and analysis of the Western Australian economy. This includes Table 1 – Major Economic Aggregates, Annual Growth (%), which sets out the following significant indicators of economic activity:

	2015-16	2016-17	2017-18	2018-19	2019-20
	Actual	PFPS Revision ^(b)	Forward Estimate	Forward Estimate	Forward Estimate
State Final Demand	-3.9	-6.75	-1.25	2.25	3.5
Gross State Product	1.9	0.5	2.5	3.25	3.0
Employment	0.2	-1.5	0.25	1.5	2.25
Unemployment rate ^(a)	6.0	6.5	6.5	6.25	6.0
Consumer Price Index	1.0	1.0	1.75	2.25	2.5
Wage Price Index	1.9	1.5	1.75	2.5	3.0
Population	1.2	1.2	1.3	1.6	1.8

(a) Average rate over the year.

(b) **PFPS** means the Pre-election Financial Projections Statement issued by the Department of Treasury

- 12 This report recognises that 'Western Australia is currently experiencing challenging economic conditions. However, most indicators are projected to improve across the forward estimates, in line with a recovery of the State's domestic economy' (Minister's Submission, [13]).
- 13 Declines in business and dwelling investment have corresponded with a transition in the mining and resources industries from the construction to the production phase. Notably, business investment is forecast to fall by 32.5% in 2016-17 and a further 17% in 2017-18, before returning to positive growth in 2018-19. Dwelling investment is projected to decline by 10.25% in 2016-17, with modest growth of 1.5% predicted for 2017-18.
- 14 State Final Demand (SFD) has been affected by reduced household spending since 2012-13, which has had very modest growth in 2015-16, and 1.75% is expected in 2016-17.
- 15 Inflation is at a record low, with the Perth Consumer Price Index (CPI) being forecast to grow by 1% in annual average terms in 2016-17. The Minister says that the increase he proposes may assist with increasing household consumption given that low income earners spend a larger proportion of their disposable income and are less able to save.
- 16 The Minister advocates the use of the CPI as a whole because this is the most reliable and effective measure of cost of living changes in WA.

Labour market conditions

- 17 The Minister says that increases in total employment in the last six consecutive months suggest that employment growth is recovering from a recent trough. The decline in full-time employment and in wages growth indicate that underlying labour market conditions are soft. However, data suggests that the decline in employment in 2016-17 will not be as severe as forecast. Some award-reliant industries, including Administrative and Support Services, Accommodation and Food Services experienced increases in total employment while other award-reliant industries, including the Retail Trade, Health Care and Social Assistance and Other Services experienced declines.
- 18 Western Australia's unemployment was 6.2% over the year to March 2017 and is above the national average. Seasonally adjusted, the March 2017 rate is 6.5%. It is the highest it has been for more than a decade.
- 19 Youth unemployment has increased from 6% in March 2007 to nearly 16% in 2017.
- 20 The Minister provided additional, updated information about the regional labour market for youth in Western Australia. This information, from the Australian Bureau of Statistics (ABS), is said to be susceptible to quite high error rates due to the small sample sizes. However, it shows a very significant increase in youth unemployment in some areas. The rates in regional WA in the past 10 years have fluctuated and vary from region to region. In the Wheatbelt, youth unemployment is currently 21% for 15 to 24 year olds, 8.2% for Bunbury and 7.2% for Outback. In the greater Perth region, the unemployment rate for youth ranges from 21% in Mandurah to 8.6% in the Inner-Perth area.

Trends in wages

- 21 The State Wage Price Index (WPI) in the December quarter 2016 was 1.7%, the lowest since the series commenced, and in year-end terms was 1.4%. WPI at a national level has also grown at its slowest pace on record, increasing by 2% in annual average terms in 2016.
- 22 Average Weekly Ordinary Time Earnings (AWOTE) fell, while Average Weekly Earnings remained largely unchanged.
- 23 The Minister shares UnionsWA's concerns that minimum wage earners should not be left behind, however, the minimum wage, in terms of its relativity to AWOTE, has fallen in recent times with the passing of the mining boom. However, the Minister says that the increase he proposes would immediately raise that bite from its current 40.7% to 41.8%.

Equal remuneration for work of equal or comparable value

- 24 The Minister says the AWOTE shows a marginal reduction in the gap between actual earnings of men and women at both State and national levels.
- 25 The gender pay gap in WA declined from 24.7% to 23.9% between November 2015 and November 2016. Nationally, the gap reduced from 17.3% to 16.1% in that time. This is said to reflect female earnings growing faster than male earnings.
- 26 WA currently has the largest gender pay gap of all of the jurisdictions. The Minister says that regular increases in the minimum and award wages can play an important part in helping to reduce that gap, and the increase he proposes of \$19.20 per week can provide a direct benefit to lower paid female workers and contribute to a reduction in the gender pay gap.

Capacity of employers as a whole to bear the cost of increased wages, the likely effect of the decision on the economy and employment levels

- 27 The aggregate measures of the Gross Operating Surplus (GOS) plus Gross Mixed Income (GMI), which measure business profitability, indicate that some industries face greater challenging circumstances than others. Some industries recorded an improvement in 2015-16, but almost half recorded a decline. Across all industries, GOS plus GMI declined by 6.3% in 2015-16 following a decline of 13.8% in 2014-15.

Impact of the State Wage Order

- 28 The State Wage Order will have an impact particularly on award-reliant employees but also on others who use the awards as a guide. Award reliance has increased in Western Australia in recent years, as well as in other jurisdictions, however, it is lowest in Western Australia.
- 29 The Minister suggests, in extrapolating from research undertaken for the Fair Work Commission at a national level in 2013, that the impact of the State Wage Order may extend beyond those employees directly affected by it.

Fairness, living standards and the needs of the low paid

- 30 By comparison with employees covered by collective and individual agreements, award-reliant employees in Western Australia have the third lowest hourly earnings by reference to average hourly earnings across the country. The State Wage Order can play an integral role in not only maintaining a safety net for award-reliant employees in WA, but in improving living standards for them.

Protecting employees who are unable to bargain

- 31 The Minister says that an analysis of industrial agreements registered pursuant to s 41 of the Act in recent years indicates that they are concentrated in the following sectors:
- The WA public sector;
 - The independent schools sector;
 - Some community, health and disability support organisations;
 - Some regional local government authorities;
 - Several registered political parties; and
 - Several union/labour organisations.
- 32 Those not included are the high award-reliant industries, such as Accommodation and Food Services, Retail Trade and smaller, unincorporated businesses. They are likely to either apply or be guided by award rates of pay.
- 33 The Minister says that the increase of \$19.20 will assist in protecting the needs of those employees who are unable to bargain for an industrial agreement, both in terms of increasing the award safety net and because it is used as a guide to negotiations.
- 34 The Minister says that the Fair Work Commission's review of penalty rates should have no bearing on the State Wage Case, particularly given:
- (1) the different statutory underpinnings of the respective systems;
 - (2) it covered only a small number of national modern awards and was not a test case; and
 - (3) the decision is under challenge to the Federal Court on grounds of jurisdictional error.
- 35 The Minister opposed the reduction in penalty rates applied in the national system covering retail and hospitality workers, and says that employees who work unsociable and non-standard hours ought to be properly compensated.

Public Sector Wages Policy

- 36 The Minister notes that the State Government's new Public Sector Wages Policy, released on 12 May 2017, provides for a \$19.20 increase, which is the same amount as he proposes for the State minimum wage and award wage increases in the private sector covered by the State Wage Case.

Skills development

- 37 Data from the Department of Training and Workforce Development shows that since 2010, apprenticeship commencements have fallen by almost 38%. There have been very significant declines in some industries in the last year, particularly in the Building and Construction Trades of 35.8%, Electrical Trades of 25.2% and Metals, Manufacturing and Services Trades of 13.5%.
- 38 Traineeship commencements have also declined, by more than 20% since 2015 and more than 40% since their peak in 2012.
- 39 The total number of apprentices and trainees currently undertaking training has declined by 9.4% and 13.4% respectively.

- 40 The likely factors influencing the take-up of apprenticeships and traineeships in WA is said to be the composition of the State's labour market, with its falling full-time employment, however, the particular causes are said to be difficult to identify. The National Centre for Vocational Education Research (NCVER) suggests that employers anticipated a more severe downturn than actually occurred. It is also suggested that limited population growth in the State's youth cohort, between 15 and 24 years of age, may be another factor.
- 41 In relation to WACOSS's proposal that the increase to adult rates be flowed on to juniors, apprentices and trainees, the Minister says that this is contrary to the statutory framework for rates of pay set out in the MCE Act.
- 42 Similarly, many State awards contain specific formulae for determining those rates, some based on percentages of the adult wage classification. To achieve the outcome WACOSS proposes, the Commission would need to vary or override award clauses.

The Chamber of Commerce and Industry of Western Australia (Inc)

Achieving a system of fair wages

- 43 CCIWA draws attention to the challenges currently faced by both employers and employees in slowing economic growth and the declining SFD; declining levels of business investment; high levels of both unemployment and underemployment; and in a contraction in the total number of jobs, with displaced workers spending longer out of work. It says that on the basis of the current circumstances, the strategies currently being used by businesses are aimed at minimising risks of job losses, with wage freezes and reductions in working hours commonly being negotiated as alternatives to redundancies.
- 44 CCIWA says there is a need for restraint when reviewing wages at both state and national level in order to help employees maintain their living standards by retaining their employment and working hours, along with reducing the barriers for job creation.
- 45 By comparison with its position before the Fair Work Commission's Annual Wage Review where it proposed a 1.2% increase, CCIWA notes that Western Australia is now in a far more challenging situation than it has been for some time, as well as by comparison with the national situation. It says that for the past decade, State award wages have increased at a faster rate than at the national level, largely due to Western Australia's previous economic fortunes. The State's economic performance at that time justified a premium on rates of pay, but this no longer holds true. CCIWA says that the interests of employees are best served through consolidating their gains by maintaining the award rates and the State minimum wage at their current levels.
- 46 CCIWA believes that this approach will alleviate the competitive disadvantage placed on small business owners who are required to pay a higher minimum wage than their incorporated competitors. It would minimise the risk to employees of loss of employment or loss of working hours that might result in the benefits of previous State Wage Case increases being 'undone'.
- 47 CCIWA says that the increases proposed by the Minister, UnionsWA and WACOSS are unsustainable in the current environment and will adversely affect employment. It says that none of those submissions provides any basis for the quanta proposed. The quantum of increase proposed by UnionsWA has no particular rationale. It merely reflects the amount sought by the Australian Council of Trade Unions (ACTU), and is clearly an ambit amount.

State of the WA economy

- 48 CCIWA notes that the WA economy continues to underperform compared to other states and territories, with WA's SFD falling by 4% in the period 2015-16 compared with a growth of 3.9% for New South Wales and 3.8% for Victoria.
- 49 The Department of Treasury predicts that SFD will 'continue to contract', that it will fall by 6.75% in 2016-17 with a further decline of 1.25% in 2017-18. CCIWA also notes that the decline in SFD is reflected in declining levels of private business investment within WA, which fell by 16.7% in 2015-16.
- 50 Business investment will fall by 32.5% for 2016-17 and dwelling investment by 10.25% over the same period. This will be only partially offset by a projected 7.5% increase in government investment for 2016-17.
- 51 The value of exports is expected to grow, allowing Gross State Product (GSP) to remain in positive territory, at 1.9% in the year to June 2016. This, however, is substantially below the 3.6% growth in the year to June 2015, and 5.8% in the year to June 2014.
- 52 CCIWA referred extensively to its March quarter *Survey of Business Expectations*. It says that this shows that confidence continues to remain subdued, with 31.5% of businesses expecting the WA economy to be weaker in the next 12 months than the last year, 39.6% expecting it to remain the same, 28.2% predicting that it will be somewhat stronger, and 0.7% expecting the economy to be much stronger. Consequently, 71.1% of businesses surveyed expect conditions to remain the same or become worse in the next 12 months. This also has negative implications for the labour market.
- 53 CCIWA says that the Minister's submission provides an overly optimistic perspective on the state of the WA economy, in stark contrast to the assessment provided by Treasury, which is more closely aligned with CCIWA's own analysis.
- 54 CCIWA says (footnotes omitted):
- WA Treasury identifies that:
- a) The WA domestic economy is expected to contract by 6.75 per cent in 2016-17, being the fourth consecutive year that domestic activity has fallen;
 - b) Inflation is subdued, increasing by an annual average of only 0.6 per cent in the March quarter 2017, being the weakest annual growth to the March quarter since 1998 and has "not been this for below the notional rate since 1992";

- c) Employment growth is expected to decline by 1.5 per cent in 2016-17 to be partially offset by a slight increase of 0.25 per cent in 2017-18;
- d) The unemployment rate is expected to remain high at 6.5 per cent for 2016-17 and 2017-18 to be accompanied by a fall in the participation rate as people leave the labour market;
- e) Accompanying the rise in unemployment has been an increase in the underemployment rate suggesting that the “*degree of spare capacity in the labour market is higher than the unemployment rate indicates*”.
- f) Wage growth in WA fell to “*a record low in 2016*” which is “*consistent with continued weakness in the State’s domestic economy and labour market*” with wage growth in WA expected to remain below national growth rates over the medium term.

CCIWA Submissions in reply, [2.14]

The impact on employment

- 55 The State’s unemployment rate continues to rise and has been consistently above the national average since March 2016, with an upward trend since June 2012. WA trend unemployment rate as at March 2017 is 6.4%, compared with the national rate of 5.9%. WA currently has the second highest unemployment rate, with only South Australia recording higher at 6.7%.
- 56 Youth unemployment is 14.7% as at March 2017. This is particularly concerning given the high proportion of young people engaged in the retail and hospitality industries.
- 57 CCIWA disputes WACOSS’s arguments regarding youth unemployment and that juniors should receive the same increase as adults. CCIWA says that passing on the full adult increase to junior employees will not assist in reducing youth unemployment.
- 58 For those who are unemployed, the period of unemployment continues to grow and the proportion of employees who return to work within 13 weeks has fallen.
- 59 The high unemployment rate and increased duration of unemployment may also negatively impact upon the participation rate as those unable to find work leave the labour market, with WA Treasury predicting that it will fall from 68.3% for 2015-16 to 66.8% for 2016-17. The oversupply of labour places low skilled workers at a comparative disadvantage as skilled workers are increasingly vying for limited employment opportunities.
- 60 CCIWA notes the age range of many in the retail and hospitality sectors, and that work in these sectors provides many young people with entry-level employment, which equips them with skills and experience to progress to more highly paid jobs.
- 61 CCIWA says that some of the reports and research on the impact of a minimum wage relied on by UnionsWA are not reflective of the labour market in Western Australia as they are based on United States of America or international papers. Their circumstances do not reflect the structural or historical circumstances, nor the levels of minimum or actual wages paid, in Western Australia.
- 62 The downturn in job vacancies in WA is in stark contrast to the situation nationally, where the number of job vacancies is rapidly increasing. This is reinforced by the low business expectations.
- 63 CCIWA is concerned that any significant increase in award wages may have a detrimental impact on the take home pay of employees given the need for many WA businesses to focus on managing their cost base in response to the State’s reduced economic performance. Businesses are focussing on reducing the cost of doing business, including reducing employment costs by reducing the number of employees through redundancy or natural attrition. However, CCIWA says that for many businesses, lower operational costs have also been achieved through strategies aimed at preserving employment by freezing wage rates or negotiating reductions in pay. 9.1% of businesses expected their total labour costs to decline in the March 2017 quarter, while 71.6% expected their labour costs to remain the same.
- 64 CCIWA disagrees with UnionsWA’s submission that a substantial increase will have a stimulatory effect on the economy. It says that the only sustainable increase comes from increased economic growth, not the other way around. It refers to the Reserve Bank of Australia’s comment to the effect that ongoing spare capacity reflected in the unemployment and underemployment rates needs to be addressed first. An arbitrary increase in wages beyond what the market can bear will not stimulate the economy, but will make employment of award-reliant employees more precarious.
- 65 CCIWA says UnionsWA’s submission does not take into account that employees do not realise the full benefit of an increase in rates of pay due to taxation of the amount of the increase and other deductions. Employers, on the other hand, have greater costs than the increase taken alone reflects, due to the impact of increases on costs such as superannuation, workers’ compensation premiums, payroll tax and penalty rates and allowances. CCIWA provided a comparison of the relative benefits to employees and costs to employers of the current situation compared with the Minister’s and UnionsWA’s proposed increases. It says that the effect of the Minister’s position is a net benefit to the employee of \$15.09 compared with a net cost to the employer of \$21.32. The effect of UnionsWA’s position is a net benefit of \$31.99 to the employee and a net cost to the employer of \$49.96. These calculations included only the actual wage increase, income tax, Medicare levy (2%), superannuation and workers’ compensation but did not include their effect on penalty rates, overtime costs, leave loading or variations to allowances.
- 66 CCIWA says that while the retail and hospitality sectors may be the primary beneficiaries of the increased spending arising from the State Wage increase, those industries would still be paying a significant premium for a relatively small proportion of the employees affected by the decision.
- 67 CCIWA also says that consumers have a propensity to pay down debt rather than spend, particularly in uncertain economic times. This is as opposed to the Minister and UnionsWA, who argue that the employees would have an increased propensity to spend any increase and thus boost the economy.

- 68 CCIWA also says that unless increased household spending is underpinned by other economic activity, it will not provide an increase in the demand for labour suggested by UnionsWA.

Public sector wages

- 69 CCIWA notes that the State Government, as an employer, has recently announced that it is seeking wage restraint within the public sector, and that the previous Public Sector Wages Policy of 1.5% was seen by the Treasurer in the current climate as being generous and that wage freezes could occur. CCIWA says that the increase proposed by the Minister represents a 2.8% increase in the State minimum wage, which appears at odds with the State Government's decision for managing its own labour costs. CCIWA refers to the current Public Sector Wages Policy, which restricts increases to public servants and government officers to a maximum of \$1,000. This represents increases ranging from 2.2% at level 1 through to 0.5% at class 4. The same level of increase in the *Metal Trades (General) Award* would result in significantly higher increases of 2.8% at C14 to 2.1% at C5.
- 70 The Public Sector Wages Policy requires that any arbitrated outcome above those prescribed amounts will have to be met from within the particular agency's approved salary budgets. Therefore, CCIWA says that the State Government seeks to reduce its own costs but proposes that the State's small business owners, directly affected by the decline in the State's economic position, should provide substantial increases in wages to their employees.

Enterprise agreements

- 71 CCIWA notes that there has been a significant decline in private sector wage growth, which fell to 1.2% in December 2016, below the national average of 1.8%. Wages growth in the private sector in WA has been declining rapidly since June 2012, and has been below the national average since March 2014. Many workplaces are reducing wages growth through freezing wage rates or negotiated reductions in pay. CCIWA cites the example of Griffin Coal Mining Company Pty Ltd, which applied to the Fair Work Commission to decrease the existing rates of pay in its enterprise agreements or terminate an enterprise agreement because the rates of pay are no longer sustainable in the current market (*The Griffin Coal Mining Company Pty Ltd* [2016] FWCA 2312 [171]).
- 72 CCIWA notes that in many workplaces, employers and employees are actively working together to address challenges arising out of the economic circumstances to protect both businesses and jobs.
- 73 CCIWA takes a different view to that of the Minister in respect of the distinction between the causes of movement away from enterprise agreements at the national level. It says that it reflects 'a number of issues, not least the increased level of prescription applied by the Fair Work Commission in applying the approval requirements prescribed by the *Fair Work Act 2009* (Cth)'. It says that the same circumstances do not apply in WA, where a relatively small percentage of the private sector businesses are covered by the State system.
- 74 CCIWA says that the need to increase the minimum wage relative to AWOTE does not have the beneficial impacts suggested by UnionsWA. This is because of the limited effect of the State minimum wage. AWOTE is also a more volatile measure than WPI. Therefore, AWOTE is a poor indicator for SWC purposes.

Cost of living and living standards

- 75 Perth CPI has grown by 1.0% in the 12 months to March 2017, significantly below the national average of 2.1% for the same period. Therefore, there has been little real change in the cost of living over the course of the past year. CCIWA says this means that purchasing power of award wages remains strong given the real wage increase granted in last year's State Wage Case decision. That decision awarded a 1.9% increase to the State minimum wage compared to the 1.0% inflation rate for 2015-16.
- 76 CCIWA also notes the effect of significantly low levels of overseas migration, negative growth in interstate migration and the effects on the housing market including reduced rental costs. Unlike the decline in rental costs for residential housing, average gross rental costs for the commercial market have not declined. This is a cost on business that has not declined.

Challenges for employers

- 77 CCIWA says that overall, businesses in WA are pessimistic about business conditions, even though UnionsWA refers to signs of recovery, such as the number of exploration licences. It says that this measure of confidence is uncertain, and even when it leads to business activity, it is a long-term not immediate indicator and is not a good predictor of jobs growth.
- 78 CCIWA refers to the fact that most employers covered by the State system are small businesses with owner-operators investing their own assets in the hope of establishing a viable business. The median annual income of a small business owner in Australia is significantly below the AWOTE for WA.
- 79 CCIWA notes that there has been a decline in the number of businesses still in operation since 2012, and says the lower survival rate of small business has a direct effect on the employment security of their employees.
- 80 CCIWA also refers to the 2016 State Wage Case decision where the Commission noted the evidence of Professor Barratt about employers absorbing costs and looking at measures to deal with increased costs. It also refers to the Productivity Commission's conclusions in its 2015 inquiry into *Workplace Relations Framework* that when faced with higher costs for lower skilled workers, businesses have an incentive to reduce the employment of those workers. CCIWA also notes the FWC's industry report, referred to in the 2016 State Wage Case decision, that in respect of how employers manage potential short term and long term increases in labour costs if demand for their products or services has not changed. Those methods include reducing working hours for employees, and owners taking on more hours.
- 81 CCIWA notes that the situation has deteriorated since that time, with a continual decline in the number of jobs available both due to increased unemployment and high levels of underemployment as the total number of available working hours contracts.

- 82 CCIWA also notes references in the State Wage Case decision in 2016 to the late Professor Plowman's 2006 report (Professor David Plowman, *Report Prepared for the Western Australian Industrial Relations Commission: State Minimum Wage Review, May 2006*, 30; 2016 State Wage Case [2016] WAIRC 00358 at [179]) in concluding that 'where the State does not experience economic growth, this finding suggests that the effect of the increases in the minimum wage will be greater than in times of growth'.
- 83 Reduced levels of discretionary spending and very low levels of inflation reduce the ability of employers to pass on increased costs to consumers. Consequently, these costs need to be absorbed through other means. In service-based industries, this is mostly achieved by adjusting the overall cost of labour.

Meeting the needs of the low paid

- 84 CCIWA says that paid employment is the best way for people to improve their standard of living, and that maintaining that employment is a very significant benefit over unemployment. It refers to the National Annual Wage Review submission by the Australian Government in that respect, and to the WACOSS 2016 Cost of Living report, both of which lead it to a conclusion that if an employed person earns the State minimum wage then their financial position is significantly better compared with being unemployed. This is particularly so in respect of low skilled workers whose jobs are more vulnerable to substitution through the use of existing skilled workers or technology.
- 85 CCIWA notes that in last year's decision, the Commission referred to Mr Christmas's evidence that 'a real increase in the state minimum wage by more than the WPI would improve the relative attractiveness of higher paid labour relative to low paid labour because it increases the price of labour by more than that of higher paid labour' ([2016] WAIRC 00358 at [157]). CCIWA notes the significant under-utilisation of skilled labour which can be readily substituted into lower skilled roles.
- 86 CCIWA also says that WA's WPI should be broken down for the purposes of consideration in this case because the private sector is that which is affected. The WPI for private sector employees in WA is 1.2%, which is less than half of the 2.8% increase proposed by the Minister.
- 87 CCIWA says that UnionsWA's focus on particular cost increases ignores the other areas of cost applicable to the community and to the low paid, and that it is unhelpful to disaggregate the CPI which currently reflects very low levels of inflation.
- 88 In respect of financial resilience and financial stress referred to by WACOSS, CCIWA notes that it is a subjective measure. Where WACOSS had referred to ex-FIFO workers being in financial stress, CCIWA says that FIFO workers and other beneficiaries of the resources boom now struggle, and that this is partly attributable to them having come off high levels of earnings, not because of a high reliance on a minimum safety net.
- 89 CCIWA challenges the data relating to cost of living raised by WACOSS, in particular rental affordability and says that its data is from limited sources.
- 90 CCIWA says that the circumstances affecting community sector workers referred to by WACOSS do not reflect the circumstances of most private sector businesses which are subject to changes in labour markets and economic circumstances, rather than funding arrangements.
- 91 According to CCIWA, underemployment of women is due to women undertaking a high proportion of unpaid domestic work, as well as high childcare costs. Underemployment of women workers is not a matter that can be addressed through the minimum wage setting. In any event, increases in the wages of childcare workers, in an award-reliant industry, are likely to result in higher childcare fees. Measures other than the minimum wage are better at addressing these issues.

Improving living standards

- 92 CCIWA refers to successive SWC decisions which have significantly improved the living standard of employees by providing substantial real wage growth. It says the cumulative effect of these increases means that State system employees continue to benefit from higher minimum wages compared to their national system counterparts, and that this is carried forward into a far more subdued economic environment than previously when such higher minimum wages were seen as sustainable.
- 93 In those circumstances, CCIWA says that significantly less weight should be given to improving living standards in the current circumstances, and more weight ought to be given to protecting existing jobs.

Impact of the penalty rates decision

- 94 CCIWA refers to the Fair Work Commission decision on Sunday and public holiday penalty rates for retail and hospitality sectors ([2017] FWCFB 1001). It says that once implemented, the lowered penalty rates of national system employers covered by this decision will increase the disadvantage faced by small business owners in the State system who pay higher minimum wage rates.

Encouraging skills development

- 95 CCIWA notes that apprenticeships and traineeships are particularly vulnerable to increases in minimum wages given the reduced productivity level of these employees. This reduced productivity is only partially offset by discounted wage rates. It is important to ensure that apprenticeships and traineeships are accessible to the predominantly young people seeking these opportunities by moderating wages growth.
- 96 CCIWA notes that the Minister identifies the significant reduction in the numbers of traineeships and apprenticeships being entered into in Western Australia. CCIWA submits that the factors contributing to this include that economic circumstances affect employers' willingness to take on new apprentices and trainees, and their preparedness to establish formal training arrangements.
- 97 CCIWA denies that there is a shortage of applicants seeking opportunities for apprenticeships or traineeships, particularly given the high level of youth unemployment.

- 98 CCIWA disputes UnionsWA's assertion that the low numbers of those taking up apprenticeships and traineeships is due to their lack of attractiveness to employees and says that the costs of both apprentice and trainee wages, as well as supervision and administrative costs, as reflected in the NCVER Report, play an important part in employers' decisions to take on apprentices. This report included that the wages structure for apprentices is an accurate reflection of their productivity and that 'the high cost of apprenticeships will constrain the number of employers willing to take on apprentices, especially in a downturn' (NCVER Report, 3).

Equal remuneration

- 99 CCIWA says that it actively promotes gender equity, however, increases in the minimum wage have no substantive positive impact on gender equity, the gender pay gap or equal remuneration. It says that the conclusions of the *Gender Equity Insights 2017: Inside Australia's Gender Pay Gap* Report (Rebecca Cassells, Alan Duncan, Rachel Ong, *Gender Equity Insights 2017: Inside Australia's Gender Pay Gap*, Bankwest Curtin Economics Centre, March 2017) affirms that in the case of award-reliant occupations, there is little work left for the State Wage Case in addressing the gender pay gap, and that focus is best placed on other strategies that can address this important issue.
- 100 CCIWA says that the increase proposed by the Minister will have no meaningful impact on the gender pay gap because changes in the economy and in those industries where the gender pay gap is most significant.
- 101 CCIWA notes that the gender pay gap is at its lowest or is non-existent in predominantly female industries. It reiterates the Commission's comment from last year's State Wage Case that the gender pay gap is not the same as equal remuneration.
- 102 CCIWA notes that Ms Torney's description of her circumstances suggests she is covered by the national industrial relations system where there is a modern award for her industry. This award covers many of the issues she raises. Other issues of concern to her are a matter of compliance with those conditions, rather than issues relating to the setting of minimum or award rates of pay. CCIWA disputes Ms Torney's suggestion that being on unemployment benefits is more beneficial than being employed on the minimum wage and sets out various reasons for this.
- 103 CCIWA says that the Printing Industries Association of Australia's submission reflects the economic circumstances it has described in its own submission, and highlights the need for businesses to remain internationally competitive. Some of those businesses use a range of measures to achieve this, including displacing low-skilled workers.

UnionsWA

- 104 UnionsWA says that an increase in the statutory minimum wage and award wages of \$45 per week for C14 to C10 equivalent classification levels and 5.7% for higher rates would achieve a number of the criteria the Commission is required to address. It would assist in addressing the widening gap between the low paid and the rest of the workforce in WA.
- 105 The low paid in the workforce are more likely to be in precarious employment arrangements and are more likely to be in the service industries such as retail, accommodation and food service. These groups have not benefitted from WA's recent high economic growth as demonstrated by several measures of inequality such as the gender pay gap, the disparity between the minimum wage and Average Weekly Earnings, and household income inequality.
- 106 UnionsWA refers to the statutory requirements and to comments made by the Commission in previous years to support its contention that the Commission must provide a real increase in the State minimum wage and award rates that improves living standards and addresses the growing disparity between the minimum wage and average weekly earnings. Therefore, any submissions which do not achieve those things need to be rejected.
- 107 UnionsWA also relies on various commentary to support its submission that the significant increase it seeks will assist in restoring growth to the WA economy.
- 108 UnionsWA welcomes the Minister's submission that there should be an increase above the CPI, but says that the Minister's proposed increase is too conservative given the persistent measures of inequality in WA such as the gender pay gap.
- 109 UnionsWA sees importance in ensuring that award relativities maintain their 'margin for skill' at the same time as addressing the needs of the lowest paid. The structure of the increases it proposes will address both of those things.
- 110 UnionsWA submits that the zero increase in the minimum wage urged by CCIWA is not appropriate given the Commission's comments in 2015 and 2016.
- 111 UnionsWA also notes that cost increases have a disproportionate impact on the low paid.
- 112 Relative to AWOTE, minimum wage increases that closely follow increases in the CPI are leading to a decline in real wages.

Increasing aggregate demand

- 113 UnionsWA notes that low wages growth is seen by major economic institutions as the biggest threat to the Australian economy. This can be alleviated by the increases it proposes.
- 114 The main thrust of UnionsWA's submission is that the increase in the minimum wage and award wages proposed by it will have a stimulatory effect on the WA economy. It will raise household spending and demand for goods and services in the WA economy, particularly as low-income households tend to spend any additional income. This will increase profits and employment.
- 115 UnionsWA's figure of \$45 per week below C10 results in a higher percentage for lower classifications (6.5% versus 5.7% at C10 and above) where a greater proportion of the award-dependant workforce is likely to be found. Between 21.7% and 36.2% of WA employees are in the State industrial relations system, that is between 292,000 and 488,000 employees. UnionsWA has used a midpoint, of 390,000 employees, for the purposes of calculating the impact on demand in the State. An increase of the magnitude proposed by UnionsWA is estimated to be \$2,360 per award employee. Therefore, the total increase in annual income for those employees is \$921.7 million to the benefit of the State's economy.

116 UnionsWA recognises that this increase will attract increased taxation and therefore reduce a net increase in demand in WA. However, the needs of those in the lower income groups represented by the lower award rate groups and those on the minimum wage, dictate that they tend to spend any increase rather than save it. Therefore, the increase proposed by UnionsWA would feed directly into the WA economy. Increased demand for goods and services will lead to job creation, increased overtime or increased hours for part-timers, casuals and the underemployed.

117 UnionsWA calculates the increased benefit to the economy by using a range of multipliers:

- The Commonwealth Treasury's multiplier of 0.4 leads to \$368.7 million in increased spending and an employment boost of around 6,000.
- The ACTU's multiplier of 0.7 leads to increased spending of \$645.2 million and 10,400 jobs.
- At a multiplier of 1.0, there would be \$921.7 million in spending and around 14,900 jobs.

118 These effects are similar to the effects of the Stimulus Package applied after the Global Financial Crisis (GFC). Business profits and sales revenue would both increase from the additional expenditure.

The state of the economy of Western Australia and nationally

119 In spite of the recent difficult economic times, UnionsWA points to signs of recovery. They include increased mineral exploration applications; improved business conditions and growing confidence; improvement, in particular, in transport and retail and predictions of 'further moderate growth in employment over the next couple of quarters' (Reserve Bank of Australia 'Statement on Monetary Policy', 5 May 2017).

120 However, there are concerns about household consumption due to weakened expectations for the prospects of income growth. In this context, and particularly given the high input of household consumption into SFD, UnionsWA says that a substantial increase in the WA minimum wage will constitute a stimulus to the WA economy.

121 UnionsWA notes the ABS Labour Force April 2017 data (Australian Bureau of Statistics, *6202.0 Labour Force - Australia, April 2017*, released 18 May 2017) which was released on the day of the hearing of the State Wage Case, demonstrates a positive start to 2017. WA's unemployment rate of 5.9% is below 6% for the first time since June 2016. The reduction from 6.5% in March 2017 is the largest improvement of all the states and territories.

122 UnionsWA also notes that WA was shown to have had the lowest wages growth of any state in the year to March 2017, at 1.2%, compared with 1.9% nationally (ABS Wage Price Index, March 2017). This reinforces the need for wages growth to stimulate the economy, and this can be achieved by the increases proposed by UnionsWA.

Impact of minimum wage on employment

123 UnionsWA, by reference to research and theory regarding the labour market, says that a higher minimum wage does not have a potentially negative effect on employment. It refers, amongst others, to Professor Alan Krueger's 'The Rigged Labor Market' (2017) (second quarter *The Milken Institute Review* 34, 41) and Alan Manning's 'The Elusive Employment Effect of the Minimum Wage' (Washington Centre for Equitable Growth, June 2016) papers regarding the single employer, the 'monopsony (a monopoly of a buyer rather than a seller of labour)'. It says that their research demonstrates that in a labour market that operates as a monopsony, a minimum wage will not increase unemployment but decrease it. UnionsWA says that employers in the WA labour market have some of the characteristics of monopsony.

124 It also says that the predictions and warnings of increases in wages leading to reduced employment, made year after year by employers, have not come to pass, and those warnings are based on an outdated economic theory.

125 Therefore, UnionsWA says that increases in the minimum wage of the amount that it proposes are likely to have a stimulatory and significant beneficial effect on the WA economy in excess of the actual cost to employers.

A fair system of wages and conditions

126 UnionsWA refers to the decline in the minimum wage proportion of annual full-time earnings by reference to AWOTE. In 2006, the WA minimum wage was 49% of AWOTE, and the national minimum wage was 49.9% of the national AWOTE. In 2016, that had declined to 40.79% and 44.37% respectively.

127 The Gini Coefficient of Equivalised Disposable Household Income measures the degree of inequality between households across Australia. The higher the figure, the greater the level of inequality of household incomes. In WA, this has grown from 0.307 in 2005-06 to 0.371 in 2013-14, and 0.314 to 0.333 nationally. UnionsWA says that reflects a decline in relative living standards for the low paid.

128 The gender pay gap is also a measure of inequality. UnionsWA challenges the regular attribution of the gender pay gap to high wages paid in the male-dominated industries such as mining, and that this was particularly the case during the most recent resource boom. It notes the findings of the Bankwest Curtin Economics Centre's *Gender Equity Insights 2016: Inside Australia's Gender Pay Gap* Report (Rebecca Cassells, Alan Duncan, Rachel Ong, 'Gender Equity Insights 2016: Inside Australia's Gender Pay Gap' Bankwest Curtin Economics Centre, March 2016), that male-dominated organisations have the lowest gender pay gap at base salary levels but the highest gender pay gap when comparing total remuneration.

129 It suggests that the gender pay gap is not simply due to 'men in the high paying jobs in the high paying industries', but takes account of men receiving performance pay and other additional remuneration which is less likely to occur in female-dominated organisations.

130 The Gender Equity Insights 2016 Report (at page 33) also finds that:

'In general, female-dominated organisations tend to have lower pays (both base and total remuneration) compared to male-dominated organisations. ... Female-dominated organisations include those that

primarily exist in Health Care and Social Assistance; Education and Training; and Arts and Recreation sectors.’

131 From this, UnionsWA reinforces its position that addressing the decline in the minimum wage ‘bite’ will assist in addressing the gender pay gap and other measures of inequality including the Gini Co-efficient. While significantly increasing the minimum wage is only one measure that can be taken, UnionsWA says that without it, no other policy measure is likely to succeed.

132 UnionsWA refers to Professor Peter Whiteford’s finding that the Australian system of relatively high minimum wages and targeted family benefits is both generous to families and makes work pay (Peter Whiteford, *Family Joblessness in Australia*, January 2009, pp 51 – 52). It says that the minimum wage will cease to fulfil that role if the disparity between the minimum wage and AWE continues to increase. This is why a \$45 per week increase at the lowest level is necessary.

The needs of the low paid, fair wage standards and improved living standards for employees

133 UnionsWA refers to increases in State government charges in the 2016-2017 budget which were well above CPI. It says that CPI is an incomplete measure of the financial needs of the low paid and their families. Also, focus on the CPI precludes any real improvement in the living standards of the low paid. It refers to studies of the social, health and wellbeing impact of being low paid. It identifies particular cost increases which affect the low paid including the financial and time costs of travel to work.

134 UnionsWA refers to the information provided by WACOSS regarding low-income household rental and housing costs, which result in low income households moving to the outer and fringe areas of Perth. This has a consequential travel cost or the need to take up alternative employment, also involving additional cost. UnionsWA refers back to its argument regarding the monopsony model, where a strong minimum wage increase is said to be necessary to counterbalance the power of employers.

Employees who may be unable to bargain to reach an industrial agreement

135 Based on a range of data and research, UnionsWA notes that vulnerable groups of employees are over-represented within the private sector of the State industrial relations system. They are less likely to negotiate their own agreements and more likely to be award-reliant. They are more likely to be in low-income households.

136 UnionsWA refers to research that demonstrates that, taken with other factors:

1. increases in the minimum wage are more likely to encourage than discourage bargaining, particularly in the low wage sectors;
2. there is a positive association between wage increases in enterprise agreements and the national Annual Wage Review increases;
3. the industries included in these findings include the Retail Trade and Accommodation and Food Services, the industries more likely to be in the private sector state industrial relations system;
4. increases in the minimum and award wages have a signalling effect on small businesses which will use them to determine what are acceptable wages in their individual negotiations.

137 Therefore, the minimum wage has a significant effect on protecting employees who are unable to bargain to reach an industrial agreement.

138 In response to CCIWA’s submission regarding the downwards movement in bargaining outcomes, UnionsWA notes that the reduction in income due to the Fair Work Commission decision in *Griffin Coal Company Pty Ltd* [2016] FWCA 2312, has had a devastating impact on families and households.

139 UnionsWA also says that the Fair Work Commission’s decision on penalty rates, referred to by CCIWA, ought to have no bearing on the Commission’s decision in this matter. Both the penalty rates case and agreement terminations are threats to wages growth that both the WA and the national economy both require. Further, they are inconsistent with the considerations the Commission is required to have in the State Wage Case.

Encouraging ongoing skills development

140 UnionsWA refers to the decline in the numbers of people taking up apprenticeships and traineeships. This demonstrates a real decline in skills development. Those who take up such arrangements need to survive on low wages and they pay the opportunity cost while they do so. UnionsWA also notes that substantial increases in TAFE fees have made entering into and sustaining apprenticeships even more difficult. A real and significant, full adult increase to apprentice rates would make apprenticeships more attractive, encouraging greater skills development and, at the same time, contribute to stimulating demand in the WA economy.

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

141 UnionsWA says that an increase in the minimum wage at, or below, CPI inflation will make WA’s large gender pay gap worse rather than contribute to its improvement.

142 It refers to various studies and commentary regarding the gender pay gap and its causes and to research which indicates that without increases in the minimum wage, given its application to the low paid where many women are placed, the gender pay gap would be greater.

143 It says that:

Given the continuing gender pay gaps in Western Australia, and nationally, the WA Commission needs to make a bold increase in the minimum wage.

The capacity of employers as a whole to bear costs of increased wages

144 UnionsWA says that WA's employers' monopsony position in the labour market has provided them with substantial power to hold labour costs down and that they cannot credibly argue that they are currently operating in a high labour cost environment. UnionsWA refers to the Reserve Bank of Australia's '*Statement of Monetary Policy*' observation that Australia has had historically low wage growth since 2011.

The need to ensure that the WA award framework represents a system of fair wages and conditions of employment

145 UnionsWA examined the wage relativities of the *Metal Trades (General) Award* C14 classification rate from 2014, pointing to the 'small but noticeable' compression in those relativities after the 2016 flat increase. UnionsWA says that the increases it proposes 'deliver[s] the largest proportionate increase to the lowest paid, while preserving the existing skill-based relativities for award classifications above C10'.

146 UnionsWA contends that the Printing Industries Association of Australia's submission demonstrates the extreme restraint already operating in wages growth in WA. It also says that Ms Torney's submission ought to be considered by the Commission as part of its requirements to meet the needs of the low paid.

Western Australian Council of Social Service Inc

147 WACOSS has previously made written submissions to the State Wage Case but has not previously appeared and made oral submissions. It did so this year, and provided the Commission with valuable information. We welcome its participation.

148 One of its particular concerns, as an advocate for low income and disadvantaged people, is with the adequacy of living standards and quality of life for Western Australians on low incomes.

149 WACOSS submits that the minimum wage is a vital means of protecting low income workers from poverty and contributes to the delivery of economic benefits to the wider community.

150 In the context of that particular concern, its submission focussed on the requirements within s 50A(3)(a) of the Act of the considerations of:

- (i) ensuring that Western Australians have a fair system of wages and conditions;
- (ii) meeting the needs of the low paid;
- (iii) providing fair wage standards in the context of living standards generally prevailing in the community; and
- (iv) contributing to improved living standards for employees.

151 Therefore, WACOSS submits that the State minimum wage rate and the minimum award rates should be increased by \$45 per week up to the C10 classification level and 5.7% beyond that level. It says that this is a very reasonable increase which takes account of the current economic conditions.

152 WACOSS notes that, whilst minimum wage increases in recent years have been welcomed, increases have not delivered a demonstrable *improvement* in living standards for low wage employees. The minimum wage decisions have consistently fallen short of what is necessary for low wage employees to keep up with cost of living increases and therefore their living standards have fallen further behind community expectations and standards.

153 WACOSS refers to the changing nature of work in the last two decades. Increased short term and insecure employment, increased uncertainty in hours worked and income received from week to week, and increased levels of underemployment have developed.

154 There has been a shift away from full-time to part-time employment. This is particularly so with Western Australia's female labour force where the growth in part-time work is outpacing the rest of Australia.

155 WACOSS gives a number of examples of the consequences of unemployment, underemployment and financial stress.

156 WACOSS points to the findings of the Low Pay Commission in the United Kingdom (WACOSS Submission, 8; UK Low Pay Commission, *Low Pay Commission Report Autumn 2016* (November 2016) [2.135]), that increases in the minimum wage in the last 15 years have been shown to have no significant effect on employment or hours at an aggregate level.

157 WACOSS points to the relationship between income and wealth, and the gap between State minimum wage rates and median pay levels represented by WA's AWOTE figures. In particular, it notes that '[t]he relationship between income and (largely non-discretionary) expenditure means that every extra dollar a low-wage worker earns is more than likely to end up boosting demand for goods and services, with those on the lowest incomes spending a proportionally higher amount of their earnings'.

158 It also refers to research by the International Monetary Fund showing that 'lower net inequality is robustly correlated with faster and more durable growth, for a given level of redistribution' (Jonathan Ostry, Andrew Berg, Charalambos Tsangarides, *Redistribution, Inequality, and Growth*, (April 2014) *IMF Staff Discussion Note* (SDN/14/02) at 25). It says that lower levels of inequality deliver stronger economic growth and income distribution remains 'one of the most robust and important factors associated with growth duration'.

159 WACOSS also notes that Australia is failing to meet its international commitment, reflected in the United Nations Sustainable Development Goals, with inequality increasing, with those at the bottom 40% of income earners falling further behind.

160 According to WACOSS, \$45 per week is a modest increase which would make an important contribution to mitigating further growth in the level of inequality and thus contribute to the delivery of stronger economic and social outcomes in Western Australia.

161 WACOSS gives particular focus to questions of poverty and financial resilience, referring to the Social Policy Research Centre at UNSW finding that nearly 240,000 Western Australians are in poverty (WACOSS Submission, 15; unpublished figures

produced for WACOSS by the Social Policy Research Centre at UNSW and ACOSS). It says that this is an underestimate because of a number of factors it has identified.

- 162 It also refers to research published by ACOSS and the Social Policy Research Centre that ‘across Australia almost one third of people living in poverty in 2014 were in households where wages were the main source of income’. It says poverty is a well-established social determinant of health, including psychological health.
- 163 WACOSS expresses concern for those lacking financial resilience. Financial resilience is the ability to access and draw on internal capabilities and appropriate, acceptable and accessible external resources and supports in times of financial adversity (Centre for Social Impact, *Financial Resilience in Australia* August 2016). Western Australia has the second lowest level of financial resilience within Australia.
- 164 Poor financial resilience for low income households means that one emergency or crisis can lead to severe financial shock and to becoming over-indebted. WACOSS says that those who are unable to draw upon resources and supports in a time of financial adversity have a lower capacity to weather periods of unemployment or underemployment, or to have enough financial independence to be able to effectively seek a new job.

Cost of Living in WA

- 165 WACOSS refers to the 2016-17 WA Budget, where rising household fees and charges imposed an additional \$257 or 4.76% on representative WA households. An increase in the minimum wage as proposed by WACOSS would assist in preventing those earning the minimum wage from further struggle with the cost of living and to avoid falling into financial hardship.
- 166 One of the major cost of living pressures in Western Australia is the unaffordability of the private rental market and a low supply of public and community housing relative to demand. As housing constitutes the largest percentage of household expenditure, the unaffordability of housing in WA must be a key consideration for the Commission in providing fair wage standards in the context of living standards generally prevailing in the community, and to meet the needs of the low paid. WACOSS refers to data regarding rent affordability and examines median rental rates compared with the State minimum wage.
- 167 Whilst its data shows that the proportion of overall median rent as to the State minimum wage had declined since 2013, it says that those median rental prices relate to new rental contracts rather than ongoing ones. It says that many lower income earners lack experience or confidence to negotiate their rents down and fear that attempting to do so may create further difficulties for them.
- 168 WACOSS provides comparisons of the numbers of affordable and appropriate accommodation available in greater metropolitan Perth and the South West, the Great Southern, and the North West, and says that while this data shows that there has been a clear reduction in the median price of accommodation, those on the lowest incomes are still facing very significant challenges in the rental market.

Transportation

- 169 Because of rental affordability pushing minimum wage earners to the outer suburbs of Perth, this requires them to take longer commutes by public transport or, in areas where there is little option other than driving, then transportation costs take a proportionally larger bite of their earnings. WACOSS notes that the 2016-17 State Budget imposed increases in motor vehicle fees and charges of \$104.13 or 14.91%. Public transport fees for those not on a concession rose by \$18.20 or 2.07%.
- 170 It also notes research that found that those on lower incomes were forced to buy cheap, older, higher fuel consumption cars and might drive rather than walk in order to take advantage of lower priced food, even when a closer but more expensive option is available.

Utilities

- 171 WACOSS notes the significant increase in electricity and gas customers seeking assistance from their energy retailer and the rise in direct debit terminations due to default.
- 172 The Economic Regulation Authority directly quoted Synergy as explaining that:
- 2015-16 was a difficult year for residential customers, with increasing demands on their disposable income due to a decline in economic conditions.
- 173 The *Energy Poverty in Western Australia: A Comparative Analysis of Drivers and Effects* Report (Antonia Cordwell et al, *Energy Poverty in Western Australia*, Bankwest Curtin Economics Centre, June 2016) reported that rental accommodation is dramatically less likely to be insulated, meaning that those on low incomes were more likely to be using more power to regulate the temperatures in their dwellings. It also notes that an average of 55 people per day applied for Hardship Utility Grant Scheme benefits over the last financial year.

- 174 Financial counselling and emergency relief sectors indicate that 99% of households in extreme financial hardship will be unable to repay their electricity debts.

The impact on specific cohorts

- 175 WACOSS refers to the particular circumstances of community services sector workers as being significantly underpaid compared to public sector employees undertaking similar work, and the increase WACOSS proposes will make a positive contribution to those employees. At the same time, it will have a stimulatory effect on the state of the Western Australia economy.
- 176 Another cohort of particular concern is women, who are overrepresented among those earning below or just above the minimum wage.

- 177 WACOSS also refers to the gender pay gap and says that its impact cannot be understated. It can depress economic growth and productivity at a macroeconomic level. At an individual level, it slows down the rate of wealth accumulation by women relative to men. That impact continues across the life course, with women more greatly exposed to poverty and disadvantage at every stage in life.
- 178 It notes that women comprise 75% of the part-time workforce in Australia and around 56% of all casual workers, and they continue to experience underemployment at a higher rate than men in Western Australia. There are also the social aspects of women providing unpaid care for the elderly, children and adults with disabilities, and grandchildren.
- 179 WACOSS disputes CCIWA's submission that employee preference is a significant factor in the rise in part-time work, underemployment and precarious employment. It says that the data on underemployment is that employees cannot secure the hours of employment they desire.
- 180 The cost of childcare is another concern for WACOSS given the steep increase since 2013.
- 181 Young people are another cohort affected by the minimum wage and of concern to WACOSS. The payment of junior rates to employees under the age of 21, rather than payment for competence regardless of age, is an anachronism. Competency, levels of education and qualifications ought to be more significant than age in setting wage rates.
- 182 It says there is no evident correlation between youth unemployment rates and minimum wage rises in Australia, and that the minimum wage has no significant impact on youth employment.
- 183 On this basis, WACOSS submits that the full rate of increase to the minimum wage should be applied to both junior and adult wage rates.

Printing Industries Association of Australia

- 184 The Printing Industries Association of Australia says that, apart from the car industry, the print and allied industries form the biggest employer in Australia's manufacturing sector. The overwhelming majority of businesses employ less than 20 employees, many of whom fall within the State jurisdiction.
- 185 The industry experienced economic difficulties in the last five years, with a decline of 2.1% in 2016, and revenue is predicted to decline further over the next five years. A high level of competition, both domestically and internationally, is driving prices and profit margins down.
- 186 The Association notes that the Western Australian economy generally is expected to grow at or below trend rates for the next 12 months.
- 187 In light of the difficulties faced by the economy generally and the printing industry specifically, the Association urges the Commission to 'show extreme restraint in its consideration of the WA State minimum wage'.

Conny Torney

- 188 Ms Torney's submission relates mostly to the Community Services and Home Care sector where she says that there are significant levels of non-compliance with minimum conditions.
- 189 Ms Torney drew attention to:
- The high proportion of employees who take part-time work because of the lack of suitable full-time work;
 - The high rate of taxation on income from second jobs;
 - Casual employees not receiving conditions applicable to permanent employees;
 - The costs borne by employees to maintain their employment, such as travel, telephone, internet, printing, uniforms and other costs.

- 190 She points out that, as an employee working in a variety of locations throughout the metropolitan area, she faces additional challenges relating to travel and moving from job to job.
- 191 Ms Torney compared the income and costs of working with being unemployed and receiving social security benefits, and says that the circumstances of the low paid in paid employment often provided a disincentive to work, as 'it doesn't make financial sense'.

The Statement of Principles

- 192 No changes to the existing Principles were suggested by any of those who made submissions, and the Commission sees no particular need for change at this stage.

Consideration

- 193 The current minimum wage in Western Australia is \$692.90. The Minister proposes that it be increased by a flat \$19.20, or by approximately 2.8%, to \$712.10. CCIWA proposes that there be no increase or, as an alternative, no more than inflation. UnionsWA and WACOSS propose a \$45.00 increase, to \$737.90, and that this increase be applied to award wages below C10, and that there be an increase of 5.7% for rates above C10 level.
- 194 The Commission is required to decide on the appropriate minimum wage by considering the matters set out in s 50A(3) of the Act:

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

- (a) the need to —
 - (i) ensure that Western Australians have a system of fair wages and conditions of employment; and
 - (ii) meet the needs of the low paid; and

- (iii) provide fair wage standards in the context of living standards generally prevailing in the community; and
 - (iv) contribute to improved living standards for employees; and
 - (v) protect employees who may be unable to reach an industrial agreement; and
 - (vi) encourage ongoing skills development; and
 - (vii) provide equal remuneration for men and women for work of equal or comparable value; and
- (b) the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and
 - (c) to the extent that it is relevant, the state of the national economy; and
 - (d) to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration; and
 - (e) for the purposes of subsection (1)(b) and (c), the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and
 - (f) relevant decisions of other industrial courts and tribunals; and
 - (g) any other matters the Commission considers relevant.
- 195 Section 50A(3)(a) contains a number of issues relating to fairness and equity in the system of wages and conditions; in wage standards by reference to community standards generally; to contribute to improved living standards; concern for the needs of the low paid and for those who are unable to reach an industrial agreement. It is to encourage ongoing skills development and look to equality of remuneration for work of equal value.
- 196 Consideration must be given to the economic circumstances prevailing in the State and nationally, with particular reference to economic indicators that relate to employment, the cost of living and productivity. The capacity of employers as a whole to bear any increase must be considered.
- 197 As the Minister notes, there is no definitive data on how many Western Australian employees rely directly on State Wage Case decisions. The Department of Commerce estimate in 2016 was that between 22% and 36% of WA employees are covered by the State system. That would need to be broken down into those covered by the minimum wage under the MCE Act and those covered by awards and industrial agreements.
- 198 Award reliance amongst WA employees is said to be around 16%, being approximately 172,500 employees, compared with around 24.5%, being 2,276,100, nationally.
- 199 There is a high degree of award reliance in the private sector industries of Accommodation and Food Services and Retail Trade.
- 200 The evidence also suggests, and we conclude, that in particular industries and industrial pay negotiations, the increases awarded through the State Wage Case are used as guides or signals for increases in rates of pay to significant numbers of employees beyond those directly covered by the State Wage Order. In many industries, the award is not merely the safety net above which actual rates of pay are negotiated, but may constitute the actual rates paid.
- 201 Therefore, a State Wage Order will have an effect on a significant number of employers and employees. Questions arise about how the effect will be felt, by the low paid, by award-reliant employees who receive wages at rates higher than the minimum wage, by apprentices, trainees and junior employees. Its effect is also on employers and their use of labour arrangements, as well as their overall capacity to bear the increase, and on the economy generally. Perhaps above all, in weighing and balancing all of those issues, is consideration of what is fair in the broad range of circumstances.
- 202 The Commission must consider the current state of the Western Australian economy and to the extent that it is relevant, the national economy.
- 203 Firstly, we note that the Western Australian economy is performing poorly in comparison to its relatively recent performance and by comparison with other states and territories and nationally. This is in stark contrast to the days where the 'two speed economy' was referred to, where Western Australia's economy was moving at a significantly faster pace than the remainder of the country. That has been reversed due to a number of causes, including the end of the construction and resources boom.
- 204 The data provided by the Minister and explained further by Mr Christmas shows that the circumstances prevailing in 2015 have not yet shown any real improvement in a number of measures. However, the forward estimates reflect a degree of improvement in the next two to three years. Western Australia's domestic economy is forecast to contract by 6.75% in 2016-17. Gross State Product was 1.9% in 2015-16 and is forecast to be 0.5% in 2016-17. It is likely to rise to 2.5% in 2017-18 and 3.25% in 2018-19.
- 205 SFD was -3.9% in 2015-16, is predicted to be -6.75% in 2016-17, -1.25% in 2017-18 and 2.25% in 2018-19.
- 206 Investment in business and dwellings has declined. Dwelling investment increased moderately in 2015-16, but to December 2016 was -13.5% compared with 7.9% nationally. Population growth at 1.1% for 2015-16 is almost half the historical average of 2%, and modest growth is forecast over the next three years. Even then, it is not expected to return to the average within that time.
- 207 The labour market for Western Australia is weak. The ABS Labour Force data for April 2017 shows WA having a seasonally adjusted unemployment rate of 5.9%. While this is a slight improvement from March when it was 6.5%, it is also slightly higher than in April 2016 at 5.8%. This compares with a national unemployment rate of 5.7% for April 2017, seasonally adjusted. The WA female unemployment rate is 6.3%, marginally down on recent months, but still higher than the 5.7% a year ago.

- 208 Western Australia's underemployment rate is 10.4% (seasonally adjusted), compared with the national rate of 8.7% (seasonally adjusted). For women in Western Australia, this was 12.9% (seasonally adjusted), compared with the national rate of 10.8% (seasonally adjusted).
- 209 The ABS April 2017 Labour Force data for employed full-time in Western Australia shows an increase from 915,400 in April 2016 to 935,000, in seasonally adjusted terms. Total employment in that period has increased from 1,348,500 to 1,357,400 in seasonally adjusted terms.
- 210 The Participation Rate has gone from 67.9% in April 2016 to 67.7% in April 2017 (seasonally adjusted) amongst a slight increase in population from 2,108,600 to 2,130,800.
- 211 CPI in Perth was 1.0% in 2015-16, and the same level of increase is expected in 2016-17. In the next three years, it is expected to grow by 1.75%, 2.25% and 2.5%. Nationally, the CPI actual rate for 2015-16 was 1.0%, but it is expected to rise by 1.75% in 2016-17 and 2.0%, 2.5% and 2.5% over coming years.
- 212 Both Western Australia's and the nation's youth unemployment rates are around the same level at approximately 12%.
- 213 The Department of Treasury expects subdued demand considerations 'to result in wage growth remaining weak in coming years'.
- 214 The Commission has, for a number of years, held the view that the WPI is the best measure of wages growth, it is to be preferred to the AWOTE as it is a less volatile measure, and we remain of that view. Western Australia's WPI increase of 1.2% from the corresponding quarter in 2016 was the lowest of all the jurisdictions. In the private sector, the WPI: Total Hourly Rates of Pay Excluding Bonuses was 1.0%, the lowest of all jurisdictions, compared with 2.1% for the public sector, which was the third lowest.
- 215 For the December Quarter 2016, in WA, it was 1.7%, the lowest recorded since the series commenced, and has slowed considerably since the end of the mining-led investment boom. It was more than 2% higher than the Perth CPI. Treasury expects the WPI to remain subdued in the near-term and to grow by an annual average of 1.5% in 2016-17 and 1.75% in 2017-18. At a national level, the WPI has also grown at its slowest pace on record at 2.0% in annual average terms for 2016.
- 216 The WPI for the March Quarter 2017 records that the public sector WPI rose by 0.6% seasonally adjusted in the December Quarter 2016 to March Quarter 2017, compared with the private sector which rose 0.5%.
- 217 Average Weekly Ordinary Time Earnings in WA fell from \$1,708.70 to \$1,703.20 in the year to November 2016. Average Weekly Earnings remained largely unchanged rising from \$1,326.80 to \$1,327.60.
- 218 The Gender Pay Gap is 23.9% in Western Australia compared with 16.1% nationally.
- 219 Business Operating Conditions in Western Australia show some industries face a more challenging trading environments than others. GOS and GMI for 2015 and 2016 shows mixed results:

Industry	GOS + GMI June 2015 (\$m)	GOS + GMI June 2016 (\$m)	Annual Increase (\$m)	Annual Increase (%)
Public administration and safety	1,256	1,398	142	11.3%
Construction	13,185	14,475	1,290	9.8%
Transport, postal and warehousing	5,669	6,120	451	8.0%
Financial and insurance services	6,067	6,399	332	5.5%
Health care and social assistance	1,510	1,571	61	4.0%
Retail trade	2,738	2,802	64	2.3%
Rental, hiring and real estate services	2,069	2,117	48	2.3%
Wholesale trade	2,501	2,542	41	1.6%
Education and training	809	819	10	1.2%
Manufacturing	4,555	4,596	41	0.9%
Other services	840	829	-11	-1.3%
Arts and recreation services	533	524	-9	-1.7%
Accommodation and food services	1,114	1,062	-52	-4.7%
Administrative and support services	395	367	-28	-7.1%
Information media and telecommunications	1,955	1,794	-161	-8.2%
Professional, scientific and technical services	2,318	2,126	-192	-8.3%
Electricity, gas, water and waste services	3,935	3,489	-446	-11.3%
Mining	50,625	42,093	-8,532	-16.9%
Agriculture, forestry and fishing	5,552	4,575	-977	-17.6%
Total all industries	125,234	117,328	-7,906	-6.3%

Minister's submissions, Table 6

- 220 The table shows two sectors which employ significant numbers of employees who are award-reliant having very different results – the Accommodation and food services, show a reduction of \$52 million or -4.7%, compared with an increase of \$64 million or 2.3% for the Retail trade sector. Taken across all industries, business profitability has declined by more than 20% in the years 2014-15 and 2015-16.
- 221 It is clear from the economic data that Western Australia’s economy is in the poorest state it has been for many years compared to the national circumstances.
- 222 Business investment is forecast to fall by 32.5% in 2016-17 and a further 17% in 2017-18, before returning to positive growth in 2018-19. This means that Western Australia will see a 50% reduction in business investment this year and next.
- 223 Household spending makes up more than 50% of SFD. Non-discretionary spending on items such as food, rent, utilities, fuel, health, vehicle operating costs, transport services and education services have grown over the last two years, whereas discretionary spending has become negative in that time. Household consumption is about half the historical average of 4%, and is expected to grow to around 3%, still below that average, by 2019-20.
- 224 Wage growth is very low but it is the same or higher than the growth of the cost of living as measured by the CPI over the forward estimates period. In the private sector covered by the State industrial relations system, growth in wages is slower than the public sector.
- 225 We maintain our view that it is not appropriate to disaggregate the CPI. We do, however, note the costs borne particularly by the low paid in low income households, who face challenging rental costs and, alternatively or additionally, travel costs to attend work or for interviews if they are seeking employment.
- 226 The Fair Work Commission in its Annual Wage Review 2016-17 ([2017] FWCFB 3500) examined in some detail the issues of the needs of the low paid, relative measures of poverty and the tax transfer system. It noted that the tax transfer system and the composition and levels of employment of households moderated inequality in household disposable income. However, the last two Commonwealth Budgets have reduced the financial assistance that is provided for low income families with children. It also notes that ‘[a] majority of low-wage workers are single without children and the many who work full-time are not assisted by the social welfare system; indeed they have their disposable incomes reduced by income tax’ ([65]).
- 227 It also made the following comments:

The level of the [National Minimum Wage] and modern award rates of pay have a significant role to play in seeking to reduce the financial stresses on families. But this role does not extend to a requirement to set the NMW at a level that ensures that a single-earner couple family with children on the NMW has an equivalent disposable income that exceeds the 60 per cent poverty line.

[2017] FWCFB 3500 at [67]

- 228 It also noted that those living in poverty are unable to meet their needs and that full-time employees can reasonably expect a living standard that exceeds poverty levels ([461]).
- 229 The *Fair Work Act* does not direct the Fair Work Commission to target poverty among those in employment, but it does direct them to consider the needs of the low paid, balanced against other considerations ([462]).
- 230 In respect of income levels in selected households compared with the 60% median income poverty line, the Fair Work Commission noted:

[464] We draw out 3 insights from the table. The first is that all categories of family type and minimum wage rate have had some small increase in their income relative to the selected measure of poverty over the period from 2011 to 2016. Table 8.6 in the Statistical report confirms that this was true also for the year to December 2016. The second is that most family types have incomes above the relative poverty line even if they are on the NMW, with the greatest margin being for a single parent with one child. The third is that the family types that have an income that is below the 60 per cent poverty line are those that have an adult who is not in the labour force (i.e., does not receive a wage or the Newstart Allowance). This applies whether or not there are children in the household. Indeed, the family with the biggest gap between their income and the poverty line is the single-earner couple with no children and one partner not in the labour force or actively seeking employment. No party contended that the NMW should be at a level which would enable a couple without dependent children to have sufficient income such that one able-bodied partner neither has to work nor seek work.

...

[467] The tax-transfer system plays a major role in raising the living standards of minimum wage families that have children. It does not, however, support them to the point where they can have an adult not in the workforce and still have an income above the 60 per cent poverty line.

...

[469] The level of minimum wages has some role to play in seeking to reduce the financial stresses on families. But this role does not extend to a requirement to set the NMW at a level that ensures that a single-earner couple family with children on the NMW has an equivalent disposable income that exceeds the 60 per cent poverty line. The 60 per cent poverty line is arbitrary, and a fair and relevant safety net must take account of the full range of statutory considerations, be fair to employers as well as to employees, and be alert to the likelihood that at some level of increase, it will probably reduce employment opportunities for lower-skilled people.

- 231 We respectfully endorse those observations.

- 232 In the circumstances before us, meeting the needs of the low paid and providing for improved living standards can be assisted by increases in the minimum wage and award wages that recognise increases in costs of living and, where the economic circumstances are favourable, to improve living standards. The issue comes back to the balancing of the competing forces and the level of the increase.
- 233 The Commission has taken the view in more prosperous economic times that an increase in the minimum wage and award wages above the increase in the cost of living is appropriate and sustainable. However, we note that the current times are far from prosperous in some sectors, as shown by GOS plus GMI.
- 234 Although Western Australia's economy is in a trough, most likely at the bottom of that trough before improvements eventuate in a range of indicia, there are some, although limited signs, which may lead to optimism toward improvement in a year or two. Minerals exploration applications and motor vehicle sales are two examples. However, minerals exploration has a long gestation period and positive results in employment is unlikely to flow for some time.
- 235 Section 50A(3)(b) requires us to consider the state of the Western Australian economy and the likely effect of this decision on that economy and, in particular, on the levels of employment, inflation and productivity. Those circumstances indicate that a moderate increase, to reflect the increase in the cost of living and to provide for some wages growth, may be appropriate. It would have the effect of providing a fair wage in the context of living standards generally prevailing in the community. It will assist in ensuring that Western Australians have a fair system of wages. It will contribute, along with other measures, to meeting the needs of the low paid.
- 236 While the submissions presented to us do not address directly the issue of increasing productivity, a modest increase in the minimum wage is likely to prompt employers to focus on measures to improve productivity. Some of those measures may have negative impacts on employment while others may have stimulatory effects, such as increasing skill levels.
- 237 CCIWA advocates for no increase to the minimum wage. The statutory requirement is that the Commission consider the need to contribute to *improved* living standards for the low paid. That is not to say that the Commission is obliged to actually contribute to improved living standards, but it is required to consider the need to do so. Whether in any given year, or in any particular circumstance, that the need can be met is a matter to be determined.
- 238 In the circumstances of the current economic environment, the needs of the low paid and the improvement in living standards need to be considered in the light of employers' likely responses to increased rates of pay.
- 239 We noted in last year's decision, at [156] – [162], Professor Barrett's evidence, Mr Christmas's comments regarding the substitution of low paid labour, the Productivity Commission's 2015 Workplace Relations Framework – Inquiry Report, Volume 1, p 185, and the Fair Work Commission's data. At that time, we commented that:
- 161 The material before us in this case suggests that employers are taking measures to reduce employees' working hours, either by reduced hours or reduced jobs. There is currently a reduction in fulltime employment by 0.9% and an increase in parttime employment of 4.5% in Western Australia.
- 162 Job vacancies are down significantly, with online vacancies in March 2016 being down 19.3%. Labour availability is at a relatively high level (CCI Survey of Business Expectations, March Quarter 2016). WA's unemployment rate is now 6%, the highest for many years.
- 163 Therefore, in considering fairness in terms of wage rates and living standards, it is essential to weigh both the increases in costs to employees and their impact on living standards and the likely impact of increasing wage rates to unsustainable levels in the current climate.
- 240 We have also considered UnionsWA's thoughtful submission about the stimulatory effect on the WA economy of a substantial wage increase for the low paid. This notes the dampening effect of slow wages growth and low household expenditure on the economy.
- 241 While that submission may have some elements to commend it, there are competing submissions that the increased cost to the employer far outweighs the money in hand received by the employee which could add to the economy. The remainder goes in tax, superannuation, workers' compensation and other costs; and the multiplier effects of any increase have broader beneficial results for the economy. There is also the impact of lesser capital available to employers for business investment, which is already at very low levels.
- 242 UnionsWA puts to us the same argument put to the Fair Work Commission by the ACTU regarding the stimulatory effect a significant increase could bring to the economy. In that regard, the Fair Work Commission said ([528]):
- We accept the submissions of [Australian Industry Group] and [Australian Business Industrial and NSW Business Chamber Ltd] that the ACTU modelling has not taken into account these offsetting effects, and that the multiplier effect of a minimum wage increase is not likely to be comparable to that of a public sector macroeconomic stimulus. Nonetheless, the ACTU submission makes the important point that increases to the NMW and award wages are likely to have some effect on consumer demand that needs to be taken into account.
- 243 This observation concurs with our view that the State minimum wage and award wage increases assist in raising household income, and as such, may have some effect on stimulating consumer demand and, consequentially, the economy. However, the effect of each dollar increase paid by the employer is discounted in the hands of the employee. The model used for the multiplier effect has some limitations, as noted by the Fair Work Commission. The effect of the increase on the economy can be beneficial. It again comes down to the level of the increase.

The monopsonist power of employers

- 244 UnionsWA also refers to the workings of the labour market and the effects of the minimum wage on employers' hiring and pay intentions. Particular reference was made to Professor Krueger's and Alan Manning's papers dealing with monopsonist employer responses.
- 245 Monopsony power refers to a situation in which there is one dominant buyer who is able to set the price to maximise profits. In the case of the labour market, it is one major employer who sets low wages as there is no competition from other employers offering higher wages. The model demonstrates that the imposition of a minimum wage does not increase unemployment but will decrease it.
- 246 UnionsWA says Western Australian employers have 'monopsonistic characteristics'. This would have the consequence of supporting a conclusion that increases in the minimum wage have very little impact on employment. However, there is very little by way of evidence which would enable us to reach the conclusion that the Western Australian employment market has those monopsonistic characteristics.
- 247 Further, Professor Krueger's article, 'The Rigged Labor Market', relates to anti-competitive practices by employers in the United States of America, mainly through collusion by agreements amongst employers not to poach each other's employees, to prevent escalation of rates of pay. It also notes other limitations on employees changing employment to obtain higher rates of pay.
- 248 In his final paragraphs, Professor Krueger's refers to President Trump addressing the 'rigged economy' by doing three things:
- (a) raising the federal minimum wage, which has remained at [US]\$7.25 an hour since 2009 and which Mr. Trump pledged to raise to \$10 an hour during the campaign;
 - (b) reining in the excessive use of noncompete clauses;
 - (c) vigorously enforcing antitrust laws to prohibit employer anticompetitive practices; and
 - (d) increasing worker bargaining power.

Professor Alan Krueger, 'The Rigged Labor Market' (2017)
second quarter *The Milken Institute Review* 34, 45.

- 249 We note the low level of the US minimum wage and that there is no evidence before us of such employer collusion.
- 250 Without a full examination and proper comparison of the US labour market and minimum wage and employment arrangements, the relevance of this article to the employment arrangements in Western Australia is difficult to determine.
- 251 We also note that Professor Krueger is referring to a labour market where there is no binding minimum wage and the effects after the introduction of a binding minimum wage. He draws conclusions about what the monopsonist firm could do in terms of filling vacancies 'provided the minimum wage wasn't set too high'.
- 252 This comes back to the same issue raised by Professor Plowman in 2006 (Professor David Plowman, *Report Prepared for the Western Australian Industrial Relations Commission: State Minimum Wage Review, May 2006*), that the effects of minimum wage increases are moderated by the State's economic growth. As we noted in last year's State Wage Case decision, 'where the State does not experience economic growth, this finding suggests that the effects of the increases in the minimum wage will be greater than in times of growth' ([175]).
- 253 Alan Manning's article, 'The Elusive Employment Effect of the Minimum Wage', relates mainly to the situation prevailing in the United States of America. However, it also contains brief paragraphs on the international evidence. In respect of Australia, it refers to the federal minimum wage but says that the situation is complicated by the system of modern awards:

... which sets minimum wages by industry, occupation, and seniority. As a result there are over 1500 different minimum wages in total, and the federal minimum wage is simply an absolute floor. But even the federal minimum is at a relatively high level relative to average earnings- around 16% of workers are currently paid the minimum wage (Plunkett and Borland, 2014). In fact, the OECD statistics suggested that in the late 1990s they were higher than those in France and [sic]. But, unlike France, the Australian labour market has not been plagued by persistently high unemployment rates (it is currently 6.1%).

Like France, the nature of the minimum wage variation in Australia does not lend itself to a high quality research design when it comes to investigating the impact of minimum wages on employment and the literature is small. But it is a useful counterpoint to the argument that all the countries with the highest minimum wages have a very clear unemployment problem.

Alan Manning, 'The Elusive Employment Effect of the Minimum Wage'
(2016) June *Washington Centre for Equitable Growth*, 14 – 15.

- 254 In the conclusion, Manning says that:

Much of the literature on the employment minimum wage focuses on the question of 'what is the employment effect of the minimum wage' using an empirical specification in which the effect is always negative, zero or positive, and focusing heavily on the evidence for American teens. We have reached the point of diminishing returns to this. A balanced view of the evidence on teen employment makes it clear that any evidence of a negative employment effect is not robust to reasonable variation in specification, even when the wage effect is robust. This might mean that the labor demand elasticity is very small (and this paper has discussed some reasons why that might be the case) but it might mean that the effect is not negative at all. The claim that the employment effect might not be negative continues to be met with incredulity in some quarters, or euphemistically described as 'non-conventional'. But the 'conventional' view is based on a model of the labor market in which all unemployment is voluntary leisure.

...

Of course there is some level of the minimum wage at which employment will decline significantly. The literature should re-orient itself towards trying to find that point. One cannot when the observed range of minimum wages does not include the turning-point but recent initiatives suggest we may be about to observe the impact of much higher minimum wages in the near future. Together with, hopefully, an increased use of high-quality payroll data, we may be about to learn more.

Alan Manning, *'The Elusive Employment Effect of the Minimum Wage'*
(2016) June *Washington Centre for Equitable Growth*, 15 – 16.

255 Therefore, international research, insofar as it is relevant, confirms the conclusions reached by us in previous years. The effect of modest and regular increases in the minimum wage do not result in adverse employment effects. The Fair Work Commission says, in that context, that the research suggests its previous approach to what constitutes 'modest' may have been overly cautious. We note that in more prosperous times, the minimum wage and award wages in WA have been increased by more than the increases applied to the national minimum wage. This has recognised the relative strength of the Western Australian economy in comparison to the national economy, but also in the capacity of the economy to bear additional costs to assist in improving living standards.

256 Therefore, to provide the benefits to employees, the increase in the State minimum wage and award wages must be affordable by businesses, particularly the smaller businesses covered by the State system and should act as a stimulant rather than a further burden on businesses.

257 This is particularly important given the current and predicted relatively high level of unemployment. Award reliance in WA is the lowest of all jurisdictions.

258 In protecting employees who are unable to reach an industrial agreement, the Commission notes that this is made up of three groups:

- (a) award-free employees.
- (b) those who are paid according to awards;
- (c) those for whom an agreement was previously reached but the agreement has now expired and will not be replaced, and the parties will continue to apply the rates from that expired agreement;

Our decision takes account of the needs of these groups.

Equal remuneration for men and women for work of equal value

259 In the 2016 State Wage Case decision [2016] WAIRC 00358, we dealt in some detail with this matter. We noted that the Wage Principles enable a claim to be brought where award wages do not reflect equal remuneration for work of equal value. Such claims have particular industries and callings as their focus.

260 We also noted that this issue is not the same as the gender pay gap. Having said that, we recognise the importance of the gender pay gap as a social and economic matter of equity. Its causes are historical and well documented. They will not, in our view, be addressed solely, or even substantially, by reference to wage fixing mechanisms within the industrial relations system, but require a broader focus.

261 However, we are conscious of the significant gap between the pay of men and women. The submissions and research put to us this year indicate that very little has changed except that the gender pay gap in Western Australia has reduced very marginally. It is still the greatest in Australia.

262 We reiterate our view that the Western Australian minimum wage 'assists in a limited way to lessen the gender pay gap in WA' ([2014] WAIRC 00471; (2014) 94 WAIG 641 at [98]).

263 UnionsWA also deals with pay equity and the effect of the minimum wage increase by reference to Australian literature. Under the heading of 'Broad impact of minimum wages on employment', UnionsWA quotes Assistant Governor (Economic) of the Reserve Bank of Australia, Luci Ellis ('Women in the Economy and in Economics', 20 March 2017) that:

It is common to assume that if wages are lifted by the powers of the state, rather than by the forces of supply and demand, employment of the affected group will fall. That is not what happened to women in the 1970s. As the graph above shows, female employment increased, participation increased, and a wider range of occupations opened to women.

264 However, Dr Ellis went on to note:

That outcome should be seen in the context of the substantial increase in educational attainment for both males and females in the post-war period. Much of that increase had already occurred before the equal pay decisions.

265 Dr Ellis proceeds to look at the social and educational changes which occurred particularly in respect of women now being more likely than men to have a tertiary education.

266 Therefore, while on its face, the extract quoted by UnionsWA might appear to support its general thesis about the effect of increases in the minimum wage on employment, taken in context, the paper is more about societal change than about minimum wages.

267 In considering the need to ensure that the award framework represents a system of fair wages and conditions of employment, we take account of the slight compression in relativities that has occurred over the years due to flat dollar wage increases. We are also conscious of the competing needs to ensure that the needs of the low paid are dealt with and to maintain the margins for skills. The margin for skill reflects the effort and investment employees make in their skills development and that makes their work more valuable to their employers and the economy. In that context, we are of the view that a percentage increase for the level C10 and above is appropriate.

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- 268 In accordance with s 50A(3)(f), the Commission is required to consider relevant decisions of other industrial courts and tribunals. The Fair Work Commission's Annual Wage Review 2016-17 ([2017] FWAFB 3500). This is a relevant decision for a number of reasons, not least of which is that the number of employees and employers covered by that decision is significant, many of them in Western Australia. Those employers are engaged in the same industries as those covered by the State system and their respective workforces are significantly interchangeable. Businesses are competing in the same market and will therefore have wages costs which will make a difference to their competitiveness and profitability.
- 269 The FWC decision relies on a different, though not significantly different, statutory criteria for its consideration.
- 270 The FWC took into account the circumstances applying across all jurisdictions. The FWC noted that it 'takes into account the circumstances of different regions, industries and sectors as part of its broader consideration of the national economy' ([170]). However, given its national coverage, it is the national economy which is its focus, as it ought to be.
- 271 The national minimum wage decision takes account of aggregate economic conditions, across all states and territories. The national levels of economic activity at this time are 'pulled up' by the strength of the New South Wales and Victorian economies, particularly given the size of those economies relative to the remainder. For the purposes of that decision, the circumstances in WA are thereby overshadowed by that aggregation. The more buoyant, confident and prosperous situation faced by the aggregate has resulted in the FWC concluding that it is able to award a more substantial increase than it might otherwise.
- 272 The FWC notes that at a national level, 'business conditions are at their most positive since the GFC' ([263]). It also notes that for three of the four most award-reliant industries, business entry rates of new businesses exceeded exit rates in 2016. Retail was the exception to this ([253]). The Fair Work Commission notes that the WPI for the private sector was more relevant than for the whole economy given the nature of those covered by the Annual Wage Review ([283]).
- 273 As noted in respect of a number of very important economic indicia, Western Australia's economy is not as soundly placed nor growing at the same rate as the rest of the nation.
- 274 The FWC has increased the national minimum wage by 3.3% to \$694.90 or \$18.29 for a 38 hour week.
- 275 We note the Fair Work Commission's conclusion regarding the influence of the national minimum wage increase on collective and individual bargaining. However, we note that the *Fair Work Act* s 134(1)(b) requires the Fair Work Commission to take account of 'the need to encourage collective bargaining'. That is a different focus to the consideration we are required to have in the need to protect employees who may be unable to reach an industrial agreement.
- 276 The total difference between the national minimum wage and the State minimum wage has been up to \$25 per week. That difference declined in 2016 when WA's economic circumstances were less favourable than they had been, and the difference at this point is \$20.20 per week.

Conclusion

- 277 In coming to a decision in this matter, we have taken account of and attempted to balance the various statutory components set out in s 50A(3) of the Act.
- 278 We conclude that it is appropriate to increase the State minimum wage by \$16 per week, taking it to \$708.90. The same increase will apply to award rates below the C10 classification level, and 2.3% to C10 and above. These increases are fair and equitable, and affordable in the circumstances facing Western Australian employers covered by this decision. This is in the context of the needs of both employees and employers. It is in excess of that necessary to cover the increase in the cost of living but ought to be affordable to employers as a whole. It will assist by contributing to improved living standards.
- 279 The structure of the increases focusses mostly on the low paid but also recognises the need to prevent the further but slight compression of relativities and will recognise and encourage skills development.
- 280 The increase is again less than the increase granted in the FWC's Annual Wage Review, however, it takes account of the quite significant difference in economic conditions applying in Western Australia to the aggregate national situation. It reduces the gap between the national and State minimum wage rates by a further amount, from WA having a minimum wage of \$20.20 higher than the national minimum wage to it being \$14, a reduction in that difference three years in a row. We note, however, that this is not the main consideration to be had in State Wage decisions and reject any suggestion that it ought to be our focus.
- 281 This increase it is able to be absorbed into any over-award payment and applies only to those employees who are paid the minimum wage or award wages. Any wage paid above the award wage is able to be used to offset the increase.
- 282 Percentage increases are to be applied to the junior rates, once again to maintain the attractiveness of juniors, apprentices and trainees to employers and also to encourage skills development. It is not appropriate to have junior employees, including apprentices and trainees, paid at the adult rate. For at least some of their training, apprentices and trainees need to be supervised and employers need to be encouraged to take on apprentices and trainees. This is particularly so given the significant reduction in the number of new starts to trainee and apprenticeships in recent years.
- 283 Percentage rates of the minimum wage for juniors are set out in the *Minimum Conditions of Employment Act 1993* (s 13) and are not altered by this decision.
- 284 The increase will also take into account that some employees are not able to reach industrial agreements. However, it should not deter employers from bargaining.

Minutes of proposed general order

285 A minute of proposed general order now issues. The Commission should be advised by 4.00 pm on Friday, 16 June 2017 whether or not a speaking to the minutes is required. If a speaking to the minutes is required, it will be dealt with on the papers, and written submissions should be received by 4.00 pm on Monday, 19 June 2017.

EDITOR'S NOTE:

[104] and [280] edited in accordance with *Corrigendum 19 June 2017 [2017] WAIRC 00354*)

2017 WAIRC 00354

2017 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION
CORAM CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER D J MATTHEWS
DATE MONDAY, 19 JUNE 2017
FILE NO/S APPL 1 OF 2017
CITATION NO. 2017 WAIRC 00354

Corrigendum

1. In [104], line 1 [2017] WAIRC 00330 of the Reasons for Decision dated 14 June 2017, delete 'awaUnionsWA' and insert 'UnionsWA' in lieu thereof.
2. In [280], line 5 [2017] WAIRC 00330 of the Reasons for Decision dated 14 June 2017, delete '.61'.

(Sgd.) P E SCOTT,
 Chief Commissioner,
 Commission In Court Session.

[L.S.]

2017 WAIRC 00355

2017 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION
CORAM CHIEF COMMISSIONER P E SCOTT
 SENIOR COMMISSIONER S J KENNER
 COMMISSIONER T EMMANUEL
 COMMISSIONER D J MATTHEWS
DATE MONDAY, 19 JUNE 2017
FILE NO. APPL 1 OF 2017
CITATION NO. 2017 WAIRC 00355

Result 2017 State Wage order issued

Representation

Mr B Entrekin and with him, Ms C Purcell on behalf of the Hon Minister for Commerce and Industrial Relations

Mr P Moss and with him, Ms K Dudgeon on behalf of the Chamber of Commerce and Industry of WA (Inc)

Dr T Dymond on behalf of UnionsWA

Mr C Twomey on behalf of the Western Australian Council of Social Service Inc

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2017 State Wage order and thereby orders as follows:

1. THAT the 2017 State Wage order takes effect on 1 July 2017.

2. THAT the General Order which issued in matter No. APPL 1 of 2016 ((2016) 96 WAIG 636) is to be of no force and effect on and from the commencement of the first pay period on or after 1 July 2017.
3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be \$708.90 per week on and from the commencement of the first pay period on or after 1 July 2017.

Apprentices

4. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship (“apprentice”) shall be:
- (a) In relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.
- (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices’ rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2017:

	1 July 2017
<i>Four Year Term</i>	
First year	\$340.20
Second year	\$445.60
Third year	\$607.60
Fourth year	\$712.90
<i>Three and a Half Year Term</i>	
First six months	\$340.20
Next year	\$445.60
Next year	\$607.60
Final year	\$712.90
<i>Three Year Term</i>	
First year	\$445.60
Second year	\$607.60
Third year	\$712.90

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be \$607.60 per week on and from the commencement of the first pay period on or after 1 July 2017.

Trainees

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

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2017:

School Leaver	Industry/Skill Level A		
	Year 10 \$	Year 11 \$	Year 12 \$
	245.00	291.00	359.00
Plus 1 year out of school	291.00	359.00	415.00
Plus 2 years	359.00	415.00	485.00
Plus 3 years	415.00	485.00	555.00
Plus 4 years	485.00	555.00	
Plus 5 years or more	555.00		

Industry/Skill Level B			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	245.00	291.00	350.00
Plus 1 year out of school	291.00	350.00	400.00
Plus 2 years	350.00	400.00	470.00
Plus 3 years	400.00	470.00	537.00
Plus 4 years	470.00	537.00	
Plus 5 years or more	537.00		
Industry/Skill Level C			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	245.00	291.00	347.00
Plus 1 year out of school	291.00	347.00	390.00
Plus 2 years	347.00	390.00	437.00
Plus 3 years	390.00	437.00	491.00
Plus 4 years	437.00	491.00	
Plus 5 years or more	491.00		

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

Australian Qualification Framework (AQF)

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

Part-time and School-Based Trainees

- (e) This provision shall apply to trainees who undertake a traineeship on a part-time basis, or as a school-based trainee, by working less than full-time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.
- (i) School-based trainees will receive the following minimum hourly rates of pay, as for school leavers:
- | Wage levels | Current year of schooling | |
|-------------|---------------------------|---------|
| | Year 11 | Year 12 |
| A | \$7.66 | \$9.45 |
| B | \$7.66 | \$9.21 |
| C | \$7.66 | \$9.13 |
- (ii) The minimum hourly rate of pay for part-time trainees shall be calculated by taking the full-time rates expressed in Clause 6(b) Table 1 and dividing that rate by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993* (WA).
- (iii) As per the requirement under 60E(1)(iv) of the *Vocational Education and Training Act 1996* (WA), any time spent by a trainee in performing his or her obligations under the training contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer.
- (f) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force.
- (g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is entered into and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:

On and from the commencement of the first pay period on or after 1 July 2017:

Industry/Skill Level A	\$555.00 per week
Industry/Skill Level B	\$537.00 per week
Industry/Skill Level C	\$491.00 per week

7. THAT

- (a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b).
- (i) AWU National Training Wage (Agriculture) Award 1994;

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

Award Rates of Pay

8. THAT rates of pay for adults in the awards, other than those set out in Schedule 1, be increased on the following basis;
- (a) a \$16.00 per week increase in award rates up to but not including \$791.90 per week, and
 - (b) a 2.3% increase to the award rates of \$791.90 per week and above.
- Where wages are expressed as an hourly, fortnightly, annualised or other amount, that rate shall be increased by a relevant amount having regard to the \$16.00 per week or 2.3% increase in pay for full time employees pursuant to the relevant award.
- These increases shall be payable from the beginning of the first pay period commencing on or after 1 July 2017 and shall be subject to absorption in the same terms as previous State Wage Decisions.
9. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of \$16.00 per week or the 2.3% increase to the adult award wage, whichever is applicable, on and from the commencement of the first pay period on or after 1 July 2017.
10. THAT increases under previous State Wage Case decisions prior to 1 July 2017, except those resulting from enterprise agreements, are not to be used to offset the State Wage order increases herein.
11. THAT on and from 1 July 2017 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:
- (a) Deleting the words "\$692.90 per week payable on and from the first pay period on or after 1 July 2016" and inserting in lieu the words "\$708.90 per week payable on and from the commencement of the first pay period on or after 1 July 2017".
 - (b) Deleting the words "\$593.90 per week on and from the commencement of the first pay period on or after 1 July 2016" in the Adult Apprentices section and inserting in lieu the words "\$607.60 per week on and from the commencement of the first pay period on or after 1 July 2017".
 - (c) Deleting the date "1 July 2016" wherever it appears and inserting in lieu the date "1 July 2017".
 - (d) Deleting the words "2016 State Wage order decision" wherever they appear and inserting in lieu the words "2017 State Wage order decision".

Statement of Principles

12. THAT the Statement of Principles – July 2016 under the General Order in matter No. Appl 1 of 2016 be replaced by the Statement of Principles – July 2017 in Schedule 2.

Publication

13. THAT the Registrar publish in the Western Australian Industrial Gazette and on the Commission's website the clauses of the awards varied by Clauses 8 - 10 of this State Wage order incorporating the amendments made.

(Sgd.) P E SCOTT,
Chief Commissioner,
Commission In Court Session.

ATTACHMENT A

INDUSTRY / SKILL LIST (2017)

SKILL LEVEL A		
CODE*	TRAINING PACKAGE TITLE	AQF CERTIFICATE LEVEL
AVI	Aviation	II, III
BSB	Business Services	II, III, IV, Diploma
CHC	Community Services	II, III, IV, Diploma
CPC	Construction, Plumbing and Services	II, III, IV, Diploma
CSC	Correctional Services	III, IV
CUL	Library, Information and Cultural Services	II, III, IV
FDF	Food Processing	III, IV
FNS	Financial Services	II, III, IV
FPP	Pulp and Paper Manufacturing Industry	III
PPM	Pulp and Paper Manufacturing Industry	III
ICT	Information and Communications Technology	II, III, IV
ICT10	Integrated Telecommunications	II, III, IV
LGA	Local Government (other than Operational Works Certificate II)	II, III, IV
LMT	Textiles, Clothing and Footwear	III, IV
MST	Textiles, Clothing and Footwear	III, IV
MAR	Maritime	II, III
MEA	Aeroskills	II, Diploma
MEM	Metal and Engineering (Technical)	II, III, IV, Diploma, Advanced Diploma
MSA	Manufacturing	II, III, IV, Diploma, Advanced Diploma
MSM	Manufacturing	II, III, IV, Diploma, Advanced Diploma
MSL	Laboratory Operations	II, III, IV, Diploma, Advanced Diploma
MSS	Sustainability	III, IV, Diploma
NWP	National Water	III, IV
PMA	Chemical, Hydrocarbons and Refining	II, III, IV, Diploma
PMB	Plastics, Rubber and Cablemaking	III, IV
PMC	Manufactured Mineral Products	III, IV
PSP	Public Sector	II, III, IV, Diploma, Advanced Diploma
PUA	Public Safety	III, Diploma
RII	Resources and Infrastructure Industry	II, III, IV, Diploma, Advanced Diploma
SFL	Floristry	III, IV
SHB	Hairdressing and Beauty Services	III, IV
SIB	Beauty	III, IV
SIR	Retail Services (including wholesale and Community Pharmacy)	III, IV
SIT	Tourism, Travel and Hospitality	II, III, IV, Diploma
TLI	Transport and Logistics	III, IV, Diploma
UEE	Electrotechnology	II, III, IV, Diploma, Advanced Diploma
UEG	Gas Industry	III, IV, Diploma, Advanced Diploma
UEP	Electricity Supply Industry - Generation Sector	II, III, IV, Diploma
UET	Transmission, Distribution and Rail Sector	II, III, IV, Diploma, Advanced Diploma
SKILL LEVEL B		
CODE*	TRAINING PACKAGE	AQF CERTIFICATE LEVEL
ACM	Animal Care and Management	II, III, IV
AUM	Automotive Manufacturing	II, III

SKILL LEVEL B		
CODE*	TRAINING PACKAGE	AQF CERTIFICATE LEVEL
AUR	Automotive Retail, Service and Repair	II, III, IV, Diploma
CPP	Property Services	II, III, IV, Diploma
CUA	Creative Arts and Culture	II, III, IV
CUF	Screen and Media	II, III, IV
CUV	Visual Arts, Craft and Design	II, III
FDF	Food Processing	II
FPI	Forest and Forest Products	II, III, IV, Diploma
FWP	Forest and Wood Products	II, III, IV, Diploma
FPP	Pulp and Paper Manufacturing Industry	II
PPM	Pulp and Paper Manufacturing Industry	II
HLT	Health	II, III, IV, Diploma
ICP	Printing and Graphic Arts	II, III
LGA	Local Government (Operational Works)	II
LMT	Textiles, Clothing and Footwear	II
MST	Textiles, Clothing and Footwear	II
MEM	Metal and Engineering (Production)	II, III, IV, Diploma, Advanced Diploma
MSF	Furnishing	II, III, IV
MTM	Australian Meat Industry	II, III, IV, Diploma
AMP	Australian Meat Processing	II, III, IV, Diploma
NWP	National Water	II
PMB	Plastics, Rubber and Cablemaking	II
PMC	Manufactured Mineral Products	II
PUA	Public Safety	II
RII	Resources and Infrastructure Industry	I
SFL	Floristry	II
SHB	Hairdressing and Beauty	II
SIB	Beauty	II
SIH	Hairdressing	II
SIR	Retail Services	II
SIS	Sport, Fitness and Recreation	II, III, IV
SUG	Sugar Milling	II, III
TLI	Transport and Logistics	II
UEG	Gas Industry	II
SKILL LEVEL C		
CODE*	TRAINING PACKAGE	AQF CERTIFICATE LEVEL
AHC	Agriculture, Horticulture and Conservation and Land Management	II, III, IV
CUS	Music	II, III, IV
RGR	Racing	II, III, IV
SFI	Seafood Industry	II, III, IV
SIF	Funeral Services	III, IV

Schedule 1

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

- Alcoa Long Service Leave Conditions Award, 1980
- Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991
- Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987
- The Contract Cleaning (F.M.W.U.) Superannuation Award 1988
- Health Care Industry (Private) Superannuation Award 1987
- Miscellaneous Government Conditions and Allowances Award No A 4 of 1992
- Miscellaneous Workers' (Security Industry) Superannuation Award, 1987
- Ngala Superannuation Award, 1989
- Printing Industry Superannuation Award 1991

Public Service Allowances (Fisheries and Wildlife Officers) Award 1990
 Supported Employees Industry Award
 The Swan Brewery Company Limited (Superannuation) Award 1987
 West Australian Petroleum Pty Ltd Long Service Leave Conditions Award 1991
 Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984
 Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

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

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

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

Schedule 2

STATEMENT OF PRINCIPLES – July 2017

1. Application of the Statement of Principles

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

2. (deleted)

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

- 3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:
 - 3.1.1 To include previous State Wage Case increases in accordance with Principle 4.
 - 3.1.2 To incorporate test case standards in accordance with Principle 5.
 - 3.1.3 To adjust allowances and service increments in accordance with Principle 6.
 - 3.1.4 To adjust wages pursuant to work value changes in accordance with Principle 7.
 - 3.1.5 To adjust wages for total minimum adjustments in accordance with Principle 8.
 - 3.1.6 To vary an award to include the minimum wage in accordance with Principle 9.

4. Previous State Wage Case Increases

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

5. Test Case Standards

- 5.1 Test Case Standards in respect of wages established and/or revised by the Commission may be incorporated in an award. Where disagreement exists as to whether a claim involves a test case standard, those asserting that it

does, must make an application and justify its referral. The Chief Commissioner will decide whether the claim should be dealt with by a Commission in Court Session.

6. Adjustment of Allowances and Service Increments

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

7. Work Value Changes

- 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
- 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
- 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
- 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
- 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
- 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. Total Minimum Rate Adjustments

- 8.1 Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and State Wage order adjustments to be combined so that the award specifies only the total minimum rate for each classification.
- 8.2 By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates or weekly rates. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.
- 8.3 The State Wage order arising from this decision is:
- (a) \$16.00 per week increase in award rates up to \$791.90 per week; and
 - (b) 2.3% increase in award rates of \$791.90 and above.

9. Minimum Adult Award Wage

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

MINIMUM ADULT AWARD WAGE

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

The minimum adult award wage for full-time employees aged 21 or more is \$708.90 per week payable on and from the commencement of the first pay period on or after 1 July 2017.

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

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

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

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

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

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

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

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2017 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Adult Apprentices

Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than \$607.60 per week on and from the commencement of the first pay period on or after 1 July 2017.

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

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

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

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

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

- 10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.
- 10.3 All claims made under this Principle will be referred to the Chief Commissioner for her to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.
- 11. New Awards (including interim Awards) and Extensions to an Existing Award**
- 11.1 The following shall apply to the making of wages in a new award (including an interim award) and an extension to an existing award:
- 11.1.1 In the making of wages in an interim award the Commission shall apply the matters set out in section 36A of the Act.
- 11.1.2 A new award (including an interim award) shall have a clause providing for the minimum award wage [see Principle 9] included in its terms.
- 11.1.3 In the extension of wages in an existing award to new work or to award-free work the wages applicable to such work shall ensure that any award or order made:
- (1) meets the need to facilitate the efficient organisation and performance of work according to the needs of an industry and or enterprises within it, balanced with fairness to the employees in the industry or enterprises; and
 - (2) sets fair wages.
- 12. Economic Incapacity**
- 12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application. It will then be a matter for the Chief Commissioner to decide whether it should be dealt with by a Commission in Court Session.
- 13. Duration**
- 13.1 This Statement of Principles will operate until reviewed under s 50A(1)(d) of the Act.

FULL BENCH—Procedural Directions and Orders—

2017 WAIRC 00357

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARTIN FEDEC	APPELLANT
	-and- THE MINISTER FOR CORRECTIVE SERVICES	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	MONDAY, 19 JUNE 2017	
FILE NO.	FBA 6 OF 2017	
CITATION NO.	2017 WAIRC 00357	

Result Order made

Order

This appeal having been listed for hearing before the Full Bench on 20 June 2017 and having received an application by letter dated 19 June 2017 on behalf of the appellant requesting the following orders and having received advice that the respondent does not oppose the orders proposed, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The hearing listed for 10:30 am on Tuesday, 20 June 2017 be adjourned; and
2. The appellant pay the respondent's costs thrown away to be assessed if not agreed.

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

[L.S.]

2017 WAIRC 00350

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	APPELLANT
	-and- JUNGHEE YOON	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
DATE	MONDAY, 19 JUNE 2017	
FILE NO.	FBA 7 OF 2015	
CITATION NO.	2017 WAIRC 00350	

Result	Orders made
Appearances	
Appellant	Ms C M Pilot (of counsel)
Respondent	Mr C A Fogliani (of counsel)

Order

The parties having filed a minute of proposed consent orders on 16 June 2017 to dispose of this appeal, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders by consent that —

1. The appeal be allowed.
2. The decision and order 1 of the orders made by Industrial Magistrate Cicchini dated 28 May 2015 be reversed, such that the respondent was not an employee under the *Long Service Leave Act 1958*.
3. Order 2 of the orders made by Industrial Magistrate Cicchini dated 28 May 2015 be set aside.
4. The respondent's claim be dismissed.
5. There be no order as to costs.

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

[L.S.]

AGREEMENTS—Industrial—Retirement from—

2017 WAIRC 00428

NOTICE**PSAAG 145 OF 1996****BUSH FIRES BOARD OF WA ENTERPRISE AGREEMENT 1996****PSAAG 13 OF 1997****FIRE AND RESCUE SERVICE OF WESTERN AUSTRALIA ENTERPRISE AGREEMENT (CSA) 1997****PSAAG 6 OF 1985****WESTERN AUSTRALIAN FIRE BRIGADES BOARD COMMUNICATIONS SYSTEMS OFFICERS SALARIES ALLOWANCES AND CONDITIONS OF SERVICE AGREEMENT 1985****PSAAG 124 OF 1996****WESTERN AUSTRALIAN STATE EMERGENCY SERVICE ENTERPRISE AGREEMENT 1996**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 47 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Fire and Emergency Services (formerly the Western Australian State Emergency Service, Bush Fires Board of WA - Fire and Rescue Service of Western Australia and Western Australian Fire Brigades Board), will cease to be a party to the *Bush Fires Board of WA Enterprise Agreement 1996*, *Fire and Rescue Service of Western Australia Enterprise Agreement (CSA) 1997*, *Western Australian*

Fire Brigades Board Communications Systems Officers Salaries Allowances and Conditions of Service Agreement 1985, Western Australian State Emergency Service Enterprise Agreement 1996, on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00413

NOTICE

AG 280 OF 1997

CENTRAL METROPOLITAN COLLEGE MISCELLANEOUS WORKERS' AGREEMENT 1997

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 33 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for the Department of Training and Workforce Development will cease to be a party to the *Central Metropolitan College Miscellaneous Workers' Agreement 1997* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00434

NOTICE

CLERKS (PUBLIC AUTHORITIES) - WESTERN AUSTRALIAN EGG MARKETING BOARD GENERAL AGREEMENT 2004

PSAAG 21 OF 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 53 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Lotteries Commission (Lotterieswest) ceased to be a party to the *Clerks (Public Authorities) - Western Australian Egg Marketing Board General Agreement 2004, No PSAAG 21 of 2004*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00422

NOTICE

AG 93 OF 2002

COMMUNITY WELFARE DEPARTMENT HOSTELS GENERAL AGREEMENT 2002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 42 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Local Government and Communities (formerly Department for Community Development) will cease to be a party to the *Community Welfare Department Hostels General Agreement 2002*, on and from the 23rd day of June 2017.

DATED at Perth this 29th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00410

NOTICE

PSAAG 4 OF 2000

CURRICULUM COUNCIL ENTERPRISE AGREEMENT 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 30 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the School Curriculum and Standards Authority (formerly the Curriculum Council of Western Australia) will cease to be a party to the *Curriculum Council Enterprise Agreement 1999* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00437

NOTICE

CY O'CONNOR COLLEGE OF TAFE PUBLIC SERVICE AND GOVERNMENT OFFICER'S ENTERPRISE AGREEMENT 2000

PSAAG 70 OF 2000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 56 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of Training and Workforce Development ceased to be a party to the *CY O'Connor College of TAFE Public Service and Government Officer's Enterprise Agreement 2000, PSAAG 70 of 2000*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00426

NOTICE

PSAAG 6 OF 1996

DEPARTMENT FOR THE ARTS (ENTERPRISE BARGAINING) AGREEMENT – 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 45 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Culture and the Arts (formerly the Department for the Arts), will cease to be a party to the *Department for The Arts (Enterprise Bargaining) Agreement - 1996* on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00409

NOTICE
AG 1 OF 1983
DEPARTMENT FOR YOUTH, SPORT AND RECREATION WEEKEND DUTY AGREEMENT 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 29 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Sport and Recreation (formerly the Department for Youth, Sport and Recreation) will cease to be a party to the *Department for Youth, Sport and Recreation Weekend Duty Agreement 1983* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00411

NOTICE
AG 101 OF 1996
DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT - AUSTRALIAN MANUFACTURING WORKERS UNION ENTERPRISE AGREEMENT 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 31 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Parks and Wildlife (formerly the Department of Conservation and Land Management) will cease to be a party to the *Department of Conservation and Land Management - Australian Manufacturing Workers Union Enterprise Agreement 1996* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00425

NOTICE
PSAAG 2 OF 2006
DEPARTMENT OF CORRECTIVE SERVICES KILLARA YOUTH SUPPORT SERVICE (JUVENILE JUSTICE OFFICERS) AGENCY SPECIFIC AGREEMENT 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 44 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Corrective Services, will cease to be a party to the *Department of Corrective Services Killara Youth Support Service (Juvenile Justice Officers) Agency Specific Agreement 2006* on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00433

NOTICE

**DEPARTMENT OF EDUCATION SERVICES OF WESTERN AUSTRALIA ENTERPRISE BARGAINING
AGREEMENT 1997
PSAAG 21 OF 1997**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 52 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of Education Services ceased to be a party to the *Department of Education Services of Western Australia Enterprise Bargaining Agreement 1997, No PSAAG 21 of 1997*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00418

NOTICE

AG 28 OF 1983

**DEPARTMENT OF MARINE AND HARBOURS COMMUTED OVERTIME AND SEA GOING ALLOWANCES
AGREEMENT 1983**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 38 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for the Department of Transport (formerly the Department of Marine and Harbours) will cease to be a party to the *Department of Marine and Harbours Commuted Overtime and Sea Going Allowances Agreement 1983*, on and from the 23rd day of June 2017.

DATED at Perth this 29th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00429

NOTICE

**DEPARTMENT OF STATE SERVICES, BUREAU SERVICES ENTERPRISE AGREEMENT NO. PSAAG 130 OF 1996
DEPARTMENT OF STATE SERVICES, SUPPLY WEST ENTERPRISE BARGAINING AGREEMENT NO. PSAAG
129 OF 1996**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 48 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Finance (formerly the Department of State Services), will cease to be a party to the *Department of State Services, Bureau Services Enterprise Agreement, No. PSA AG 130 of 1996* and *Department of State Services, Supply West Enterprise Bargaining Agreement, No. PSA AG 129 of 1996*, on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00441

NOTICE

**DEPARTMENT OF TRANSPORT (MARINE AND HARBOURS) CONSTRUCTION & MAINTENANCE
ENTERPRISE AGREEMENT 1994**

NO AG 91 OF 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 59 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of Transport will cease to be a party to the *Department of Transport (Marine and Harbours) Construction & Maintenance Enterprise Agreement 1994, No AG 91 of 1993*, on and from the 22nd day of June 2017.

DATED at Perth this 6th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00431

NOTICE

PSAAG 15 OF 1995

FAMILY AND CHILDREN'S SERVICES ENTERPRISE AGREEMENT 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 50 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Child Protection and Family Support (formerly Family and Children's Services), will cease to be a party to the *Family and Children's Services Enterprise Agreement 1995*, on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00412

NOTICE

AG 16 OF 2005

FREMANTLE PRISON – LHMU – INDUSTRIAL AGREEMENT 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 32 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Housing (Housing Authority) (formerly the Department of Housing and Works) will cease to be a party to the *Fremantle Prison – LHMU – Industrial Agreement 2005* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00406

NOTICE

PSAAG 17 OF 1997

GOVERNMENT PROPERTY OFFICE ENTERPRISE BARGAINING AGREEMENT 1997

PSAAG 141 OF 1996

**MINISTRY OF THE PREMIER AND CABINET, GOVERNMENT PROPERTY OFFICE ENTERPRISE
BARGAINING AGREEMENT 1996**

PSAAG 160 OF 1996

**MINISTRY OF THE PREMIER & CABINET, PUBLIC SECTOR MANAGEMENT OFFICE, ENTERPRISE
BARGAINING AGREEMENT 1996**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 26 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for Department of Premier and Cabinet (formerly the Ministry of the Premier and Cabinet, Government Property Office) will cease to be a party to the *Government Property Office Enterprise Bargaining Agreement 1997*, *Ministry of the Premier and Cabinet, Government Property Office Enterprise Bargaining Agreement 1996* and *Ministry of the Premier & Cabinet, Public Sector Management Office, Enterprise Bargaining Agreement 1996* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00442

NOTICE

IDENTITYWA AND COORDINATOR STAFF

CERTIFIED AGREEMENT 2013, NO AG 7 OF 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 65 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

IdentityWA on behalf of the Roman Catholic Archdiocese of Perth will cease to be a party to the *Identitywa and Coordinator Staff Certified Agreement 2013, No AG 7 of 2014*, on and from the 10th day of July 2017.

DATED at Perth this 6th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00424

NOTICE**PSAAG 1 OF 2006****INTRODUCTION OF SOCIAL TRAINER LEVEL 2 INDUSTRIAL AGREEMENT 2006**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 43 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Disability Services Commission, will cease to be a party to the *Introduction of Social Trainer Level 2 Industrial Agreement 2006* on and from the 23rd day of June 2017.

DATED at Perth this 29th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00438

NOTICE**LIBRARY AND INFORMATION SERVICE OF WESTERN AUSTRALIA (LISWA) ENTERPRISE BARGAINING AGREEMENT 1996****PSGAG 2 OF 1996**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 57 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of the Culture and the Arts (formerly the Library and Information Service of Western Australia) ceased to be a party to the *Library and Information Service of Western Australia (LISWA) Enterprise Bargaining Agreement 1996, PSGAG 2 of 1996*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00415

NOTICE**PSAAG 23 OF 1999****MAIN ROADS WESTERN AUSTRALIA - CSA SALARY PACKAGING AGREEMENT 1999**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 35 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for Main Roads Western Australia will cease to be a party to the *Main Roads Western Australia - CSA Salary Packaging Agreement 1999* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00435

NOTICE
MINISTRY OF JUSTICE SENIOR OFFICERS AGREEMENT
PSAAG 18 OF 1987
&
WORK CAMPS INDUSTRIAL AGREEMENT NO. PSA AG 4 OF 1994
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 No. APPL 54 of 2017
 IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of Corrective Services (formerly the Department of Justice, Ministry of Justice) ceased to be a party to the *Ministry of Justice Senior Officers Agreement, PSAAG 18 of 1987* and the *Work Camps Industrial Agreement No. PSA AG 4 of 1994*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00436

NOTICE
OFFICE OF ENERGY ENTERPRISE BARGAINING AGREEMENT 2000 PSAAG 52 OF 2000
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 No. APPL 55 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of Finance (formerly the Office of Energy) ceased to be a party to the *Office of Energy Enterprise Bargaining Agreement 2000, PSAAG 52 of 2000*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00430

NOTICE
PSGAG 13 OF 1996
PERTH THEATRE TRUST (ENTERPRISE BARGAINING) AGREEMENT - 1996
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 No. APPL 49 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Culture and the Arts (formerly the Perth Theatre Trust), will cease to be a party to the *Perth Theatre Trust (Enterprise Bargaining) Agreement - 1996*, on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00420

NOTICE
AG 57 OF 1976
RAILWAY WAGES GRADES LONG SERVICE AGREEMENT 1976
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 40 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for the Public Transport Authority (formerly Western Australian Railways Commission) will cease to be a party to the *Railway Wages Grades Long Service Agreement 1976*, on and from the 23rd day of June 2017.

DATED at Perth this 29th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00432

NOTICE
PSAAG 17 OF 1996
STATE HOUSING COMMISSION (HOMESWEST) ENTERPRISE BARGAINING AGREEMENT 1996
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 51 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Housing [Housing Authority] (formerly the State Housing Commission), will cease to be a party to the *State Housing Commission (Homeswest) Enterprise Bargaining Agreement 1996*, on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00419

NOTICE
AG 41 OF 2007
WA SPORTS CENTRE TRUST GENERAL AGREEMENT 2007
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 39 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for the West Australian Sports Centre Trust (trading as VenuesWest) will cease to be a party to the *WA Sports Centre Trust General Agreement 2007*, on and from the 23rd day of June 2017.

DATED at Perth this 29th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00417

NOTICE

AG 276 OF 1997

WESTERN AUSTRALIAN DEPARTMENT OF TRAINING TAFE INTERNATIONAL PUBLICATIONS (WESTERN AUSTRALIA) ENTERPRISE AGREEMENT 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 37 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Training and Workforce Development will cease to be a party to the *Western Australian Department of Training TAFE International Publications (Western Australia) Enterprise Agreement 1996*, on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00416

NOTICE

AG 257 OF 1997

WESTERN AUSTRALIAN DEPARTMENT OF TRAINING MISCELLANEOUS WORKERS' AGREEMENT 1997

AG 275 OF 1997

SOUTH-EAST METROPOLITAN COLLEGE MISCELLANEOUS WORKERS' AGREEMENT 1997

AG 282 OF 1997

SOUTH METROPOLITAN COLLEGE MISCELLANEOUS WORKERS' AGREEMENT 1997

AG 279 OF 1997

SOUTH-WEST REGIONAL COLLEGE MISCELLANEOUS WORKERS' AGREEMENT 1997.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 36 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Department of Training and Workforce Development will cease to be a party to the *Western Australian Department of Training Miscellaneous Workers' Agreement 1997*, *South-East Metropolitan College Miscellaneous Workers' Agreement 1997*, *South Metropolitan College Miscellaneous Workers' Agreement 1997* and *South-West Regional College Miscellaneous Workers' Agreement 1997*, on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00414

NOTICE

AG 21 OF 1996

WESTERN AUSTRALIAN GOVERNMENT RAILWAYS COMMISSION FREIGHT RAILWAY SYSTEM AGREEMENT 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 34 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for the Public Transport Authority (formerly Western Australian Government Railways Commission) will cease to be a party to the *Western Australian Government Railways Commission Freight Railway System Agreement 1995* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00439

NOTICE
WESTERN AUSTRALIAN MUSEUM ENTERPRISE AGREEMENT 1996
PSGAG 14 OF 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 58 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Executive Director of Labour Relations and Industry Development, as agent for the Department of the Culture and the Arts (formerly Western Australian Museum) ceased to be a party to the *Western Australian Museum Enterprise Agreement 1996, PSGAG 14 of 1996*, on and from the 22nd day of June 2017.

DATED at Perth this 7th day of July 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00427

NOTICE
PSAAG 1 OF 1988
WESTERN AUSTRALIAN PUBLIC SERVICE TRAINEESHIP AGREEMENT 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 46 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Public Sector Commission (formerly the Public Service Board), will cease to be a party to the *Western Australian Public Service Traineeship Agreement 1987* on and from the 23rd day of June 2017.

DATED at Perth this 30th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00408

NOTICE
AG 25 OF 1992
WESTRAIL ENTERPRISE BARGAINING AGREEMENT 1992
RCB AG 1 OF 1992

WESTRAIL ENTERPRISE BARGAINING AGREEMENT 1992
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 28 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Public Transport Authority (formerly Western Australian Government Railways Commission t/as Westrail) will cease to be a party to the *Westrail Enterprise Bargaining Agreement 1992, AG 25 of 1992* and the *Westrail Enterprise Bargaining Agreement 1992, RCB AG 1 of 1992* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00421

NOTICE

AG 71 OF 1994

WESTRAIL LOCOMOTIVE ENGINEMAN GRADES CYCLICAL ROSTERING AGREEMENT 1994

AG 275 OF 1995

WESTRAIL CUSTOMER AND SECURITY SERVICES OFFICER AGREEMENT 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 41 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

Executive Director of Labour Relations and Industry Development as agent for the Public Transport Authority (formerly Western Australian Railways Commission) will cease to be a party to the *Westrail Locomotive Engineman Grades Cyclical Rostering Agreement 1994* and *Westrail Customer and Security Services Officer Agreement 1995*, on and from the 23rd day of June 2017.

DATED at Perth this 29th day of June 2017.

(Sgd.) S BASTIAN,

[L.S.]

Registrar.

2017 WAIRC 00407

NOTICE

AG 299 OF 1995

ZOOLOGICAL GARDENS BOARD - GARDENERS WEEKEND WORK INDUSTRIAL AGREEMENT 1995

AG 157 OF 1996

ZOOLOGICAL GARDENS BOARD - KEEPERS CAREER STRUCTURE INDUSTRIAL AGREEMENT 1996

AG 34 OF 2010

ZOOLOGICAL PARKS AUTHORITY (OPERATIONS) AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 27 of 2017

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Executive Director of Labour Relations and Industry Development as agent for the Zoological Parks

Authority (formerly the Zoological Gardens Board) will cease to be a party to the *Zoological Gardens Board - Gardeners Weekend Work Industrial Agreement 1995*, *Zoological Gardens Board - Keepers Career Structure Industrial Agreement 1996* and *Zoological Parks Authority (Operations) Agreement 2010* on and from the 23rd day of June 2017.

DATED at Perth this 28th day of June 2017.

(Sgd.) S BASTIAN,

[L.S.]

Registrar.

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

2017 WAIRC 00449

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00449
CORAM : CHIEF COMMISSIONER P E SCOTT
HEARD : MONDAY, 13 MARCH 2017, WEDNESDAY, 22 MARCH 2017
DELIVERED : WEDNESDAY, 12 JULY 2017
FILE NO. : APPL 68 OF 2016
BETWEEN : PAULL & WARNER RESOURCES PTY LTD
 Applicant
 AND
 CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
 Respondent

CatchWords : Industrial law (WA) - Review of decision of the Construction Industry Long Service Leave Payments Board - Whether employer required to make contributions on behalf of employee - Entitlement to long service leave - Definition of construction industry - Exclusion of maintenance or repairs work - Whether maintenance work includes testing and inspection work to determine whether maintenance is required
Legislation : *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) s 3, s 3(1), s 3(1)(a)(i), s 50(3)(c)
Result : Board's decision set aside and another decision substituted
Representation:
Applicant : Ms H Millar of counsel
Respondent : Mr S Kemp of counsel and with him Ms R Harding of counsel

Reasons for Decision

1 The applicant, Paull and Warner Resources Pty Ltd, seeks a review of the Construction Industry Long Service Leave Payments Board's (the Board) decision of 1 November 2016, that it is obliged to pay long service leave contributions in respect of one of its employees, Mr Mapleson. The issue for determination is whether the work undertaken by Mr Mapleson is work in the construction industry in particular, whether the maintenance work he performed falls within an exception to the definition of 'construction industry', under the *Construction Industry Portable Paid Long Service Leave Act 1985* (the Act). That exception is 'the carrying out of maintenance or repairs of a routine or minor nature...' (s 3(1) '*construction industry*' (f)). If so, then the applicant is not required to make those contributions.

Background

2 The applicant's Chief Executive Officer and director, Simon Michael Paull, gave evidence that the company's aim is to be a "one stop shop" for emergency, safety and fire-related services and to effectively run emergency services for [its] clients in WA's mining sector by supplying ambulances, fire trucks, medical and rescue equipment and emergency services personnel, such as paramedics and fire technicians, on site on a permanent basis' (paragraph 9 of the witness statement of Simon Michael Paull).

3 He says that:

We test and inspect all the existing fire systems and the mobile fleet fire suppression on clients' sites to Australian Standards.

Witness Statement of Simon Michael Paull [11]

4 The applicant contracted to FMG Solomon Pty Ltd and others to provide 'fire suppression, maintenance and associated services' (Statement of Agreed Facts, Attachment 2, Agreement for the Provision of Fire Suppression, Maintenance and Associated Services (the contract), Part 2 – Scope of Work and Specifications) at its mine and port operations. FMG is in the mining industry, not in the construction industry. The detailed scope of work of that contract included the supply, installation and maintenance of a range of systems and the testing of those systems at regular intervals in accordance with Australian Standard AS 1851-2012 (the Standard). The systems involved were fire suppression, gas suppression, vehicle suppression, fire sprinkler, fire deluge, access control, gas monitoring, medical oxygen, automatic external defibrillation, vehicle extraction, portable fire extinguishers, fire hydrant, fire hose reel, diesel fire pump, exit and emergency lighting, vehicle personnel stretchers, lay-flat fire hoses and locomotive fire systems.

5 Mr Mapleson was employed by the applicant as a Sprinkler Fitter between 5 December 2013 and 22 September 2016. Mr Mapleson performed work under the contract between the applicant and FMG. He did so at two locations: FMG's premises at Solomon Hub and at the Port in Port Hedland. The work at Solomon was from December 2013 to April 2016, and

from July 2016 until his employment finished in September 2016. In the period 16 April to 22 July 2015, he worked at Port Hedland. Therefore, of his total period of employment of two years and nine months, three months and one week were spent at Port Hedland and the remainder at Solomon, being two years and six months.

- 6 Importantly, the parties agree that the duties Mr Mapleson performed 'included testing and inspecting and performing maintenance and repairs on FMG's fire assets, including fire pumps, hose reels, hydrants, sprinkler systems, valves, fire indicator panels and smoke detectors, fire extinguishers and special hazards' (Statement of Agreed Facts, [11]).
- 7 Based on the evidence of Mr Paull, Mr Brad John McCallum, the applicant's Operations Manager, and Mr Mapleson, it is clear that testing and inspection work took between 70% and 75% of Mr Mapleson's time. This was his priority and it was programmed at particular intervals to meet the requirements of the Standard.
- 8 Mr Mapleson undertook rectification and repair work on equipment he identified, from his testing and inspection, as being faulty or failing. He did that work where he could do it there and then, or fit it around his testing and inspection work, which were the priorities. If parts were not immediately available, they needed to be ordered through Mr McCallum. Mr McCallum would prepare a quote for the work and FMG would determine if, when and by whom the work would be done. According to the evidence, where FMG wanted the work done, it mainly fell to Mr Mapleson, although not exclusively.
- 9 Mr Mapleson gave evidence of assisting a contractor, Cummins, to do some work by turning the pumps on and off while it did some work.
- 10 Mr Mapleson assisted in the installation of two sprinkler systems at Solomon in May and August 2016. In the first instance, he performed work for a few days of the two weeks taken to do the installation. He put an alarm valve into existing pipework, and ran a pipe through the end of a tunnel to the sprinkler system.
- 11 In the second instance, FMG hired six tradespersons from a company in Melbourne, to install a wet sprinkler system. Mr Mapleson says his role was supervisory, in organising that crew, including ordering and following up on parts and equipment. He assisted with putting up, cutting and moving pipes up several storeys. He performed four days of this work as part of his normal swing and stayed for a further four days beyond his roster to help get the job finished.
- 12 At Solomon, the plant and equipment were new and the water quality was good, so there was significantly less maintenance and repair work required than at the Port.
- 13 Mr Mapleson described the repair, replacement and rectification work he did, and provided photographs. It ranged from replacing a hose nozzle and batteries to cleaning and replacing Y-strainers, through to installing new pressure gauges, adding locks, changing a pump from cut-in/cut-out to cut-in only and adding a drain pipe to enable pressure testing. He disassembled and reassembled pipework which was not correctly sequenced, and many other similar jobs.
- 14 Mr Mapleson also spent considerable time travelling to and from and around the site and completing paperwork associated with the testing, inspection and maintenance work. He spent time on incidental tasks such as preparing safe working instructions and timesheets, and attending meetings.
- 15 Mr Paull says the applicant engages subcontractors to do installation work because it cannot release its employees from their testing and inspection work, otherwise its testing and inspection work would fall behind schedule and clients' assets may not be compliant with requirements.
- 16 Mr McCallum says Mr Mapleson was engaged as a Sprinkler Fitter with a job description that stated that the purpose of the role was 'to undertake all aspects of maintenance, repair and installation of both wet and dry sprinkler suppression systems, with the aim of ensuring that [the applicant] offers an industry leading standard of service to its clients.' However, Mr McCallum says that this was not an accurate reflection of Mr Mapleson's role, which was to test and inspect FMG's fire assets at its Solomon and Port Hedland sites to ensure they complied with Australian Standards. He says the title of Sprinkler Fitter was requested by clients including FMG. He says:

[The applicant] used the job title 'Sprinkler Fitter' at the request of clients, including FMG. Part of the reason for this is that AS1851-2012 requires that any rectification work performed on a 'wet' fire system must be performed by a qualified sprinkler fitter. However, it is not cost effective for either us or our clients to engage a non-qualified fire technician just to perform tests and inspections and a separate qualified sprinkler fitter just to do rectification work on a sprinkler system. It makes more sense to hire one person, with the sprinkler fitter qualification, to do testing and inspections even where the testing and inspections will comprise the vast majority of the employee's workload, as in Mr Mapleson's case.

- 17 Both Mr Paull and Mr McCallum also gave evidence that the position description of Sprinkler Fitter for Mr Mapleson's position was not specific to his work at FMG's sites but was a generic one, used for the purposes of employing suitably qualified people for work on a range of clients' sites, not just FMG sites. If Mr Mapleson's work on FMG sites finished, the applicant had the capacity to move him to another of the sites that it services.
- 18 Mr Mapleson described his work by reference to the Sprinkler Fitter classification, noting that the applicant's contract with FMG required an Australian certified Sprinkler Fitter to be on site. He explained the work of a Sprinkler Fitter, the systems on which a Sprinkler Fitter works, and his work for the applicant in this way:
 14. A Sprinkler Fitter is someone who works on, installs, tests and maintains fire systems.
 15. A typical sprinkler/hydrant system consists of a pipework network connected to a permanent water supply with fire control valves. The system incorporates local and fire brigade alarms. It has automatic sprinkler systems spaced regularly in protected areas such as a building or piece of plant or equipment or hydrants would be located around the perimeter of the premises.
 16. Any loss of water pressure in the pipework network would cause the fire pumps to automatically start.
 17. Throughout my time at Solomon I did work in various categories:

- (a) Sprinkler Fitter work, which included fire pumps, hydrants, hose reels, valves and sprinkler systems;
- (b) sparky work which I got my open cable license to do, including smoke alarms and fire indicator panels;
- (c) other work which I got the licenses required to perform, including special hazards and fire extinguishers.

18. When I was at Port, I did:

- (a) Sprinkler Fitter work, including sprinkler systems, hydrants and fire pumps; and
- (b) other work including special hazards.

Exhibit R4

19 However, Mr Mapleson agrees that for the purposes of meeting the Standard, it is not necessary for the person doing the testing and inspection work to be a Sprinkler Fitter. Rather, it requires 'a competent person' (ts 88).

The parties' submissions

The applicant

20 The applicant says that Mr Mapleson was not engaged as an employee 'in the construction industry' and therefore not entitled to be registered as an employee under the *Construction Industry Portable Paid Long Service Leave Act* because:

- (a) the major and substantial purpose of Mr Mapleson's role was to test and inspect FMG's fire assets (including fire inspection panels, portable and wheeled fire extinguishers, fire hydrants, fire blankets, fire hose reels, water pumps and water valves) to ensure they met Australian Standards;
- (b) the primary and substantial duties performed by Mr Mapleson while employed by the Applicant were to test and inspect FMG's fire assets at its established mine sites;
- (c) Mr Mapleson spent approximately 80-85% of his working hours testing and inspecting FMG's fire assets;
- (d) testing and inspection work fall outside the definition of work carried out in the "construction industry" in the Act;
- (e) Mr Mapleson also undertook minor, routine and/or repetitive maintenance and repair work which falls within the exception to the definition of construction work under the Act as such work was carried out for the Applicant and/or FMG who are not substantially engaged in the construction industry; and
- (f) the only work performed by Mr Mapleson which falls within the definition of construction work under the Act is major or significant repair, rectification or installation work which accounted for, at most, 15% of Mr Mapleson's working hours and was not the primary or substantial purpose of Mr Mapleson's role.

Applicant's Notice of Review, Schedule A at [7]

- 21 The applicant says that where any significant installation or maintenance work was required, it engaged subcontractors to perform that work.
- 22 Mr Mapleson worked on a roster of eight consecutive 12 hour days on site followed by six days off. Each 'swing' of Mr Mapleson's roster consisted of 96 hours. Approximately 75% of that time was spent in testing and inspecting. Neither of the testing or inspecting tasks is work that falls within the definition of 'construction industry' according to the applicant.
- 23 The miscellaneous tasks Mr Mapleson undertook, such as rectification and repair work, travel, documentation and meetings, were ancillary to Mr Mapleson's primary duties and responsibilities of testing and inspection of FMG's fire assets. The minor and more routine maintenance and repair work described earlier accounted for no more than 15% of Mr Mapleson's time.
- 24 The applicant says testing and inspection work were for the purpose of ascertaining whether the fire suppression assets being tested required maintenance. Such work is not maintenance work itself, even though it may lead to maintenance work being carried out by Mr Mapleson or someone else.
- 25 The applicant refers to Ipp J's decision in *Aust-Amec Pty Ltd and Others v Construction Industry Long Service Leave Payments Board* (1995) 15 WAR 150; 62 IR 412 which dealt with the issue of whether the plaintiffs in that matter who were involved in 'non-destructive testing' were within the construction industry. His Honour noted that the parties in that matter agreed that 'non-destructive testing is a way of testing materials and structures to see if they meet required specifications or require repair, maintenance or replacement without destroying them' (at 160). His Honour held that the investigatory work was not maintenance itself.
- 26 The applicant relies on the test it says applies in this case, that being the one set out by Ipp J in *Aust-Amec*:
- (1) whether the work completed by the employee was in the construction industry as defined. If so,
 - (2) the degree to which that work formed part of the overall duties of the employee.
- 27 The applicant says that in interpreting the definition of construction industry in s 3 of the Act, caution needs to be exercised. The respondent applies a very broad meaning to the term maintenance which, if applied, would actually incorporate the range of activities well beyond that, and which are not properly contemplated by the separation of the various terms within the definition of construction industry.
- 28 The applicant notes that Mr Mapleson agreed that the maintenance or repair work he undertook was minor. It was always routine on the basis that it followed the programme set out in the Standard.

The respondent

- 29 In essence, the respondent says that inspection and testing are integral to maintenance. Therefore, Mr Mapleson's maintenance work was not of a routine or minor nature.
- 30 The respondent refers to the job description for Mr Mapleson's role where its purpose is said to be to 'undertake all aspects of maintenance, repair and installation of both wet and dry sprinkler suppression systems' and the required qualifications include a 'sprinkler fitter trade certification'.
- 31 It describes the essence of Mr Mapleson's work as being 'to ensure, in the event of a fire, that a continuous supply of water at the appropriate pressure was delivered from various water storage sites to douse the fire, either through sprinkler systems or the hydrant and fire hoses' (respondent's submissions [13]). This is said to involve, at first, weekly testing of the fire pumps, and then monthly testing, and monthly testing of hydrants and hoses and valves, and six-monthly and annual tests of all equipment. It says that Mr Mapleson 'performed maintenance and repairs to the equipment where required and also modified some of the equipment which had been constructed incorrectly'. As the systems at Solomon were new and the water quality was good, there was very little need for repairs or maintenance. The systems at Port Hedland were older and the water quality was poor, so the systems required more attention.
- 32 The respondent says that Mr Mapleson's primary role at Solomon remained that of a Sprinkler Fitter, testing and maintaining the water based fire suppression systems on site. Mr Mapleson worked in a classification of Sprinkler Fitter in accordance with the job description. That indicated the Role Purpose was to undertake all aspects of maintenance, repair and installation of both wet and dry sprinkler suppression systems and the qualification required for the position included Sprinkler Fitter trade qualification.
- 33 The respondent says that at least some of the work performed by Mr Mapleson was maintenance work and in accordance with the authorities, that was sufficient. It also notes that under the FMG contract, the applicant was required, amongst other things, to:
- (a) be responsible for the supply, installation and **maintaining** of the fire systems and associated services of FMG;
 - (b) supply, install and **maintain** fire detection systems, fire sprinkler systems, fire deluge systems, fire hydrant systems, lay flat fire hoses and diesel fire pump systems;
 - (c) supply all systems, equipment and parts required for those tasks.
- FMG Contract, part 2 – Scope of work
- 34 It says that a proper analysis of the work that Mr Mapleson was engaged in demonstrates that the testing was part of maintaining the system – that is, it was maintenance.
- 35 However, the respondent says that the decision of Ipp J in *Aust-Amec Pty Ltd v Construction Industry Long Service Leave Payments Board* (1995) 15 WAR 150 can be distinguished on the basis that the statement that 'work performed to determine whether maintenance is required is not maintenance itself' was made in the context of determining whether or not the employers in that case were 'in the construction industry' and not whether the employee was performing work within the industry. It also sought to distinguish that decision on the basis of the nature of the employer's business and also says that Ipp J found that it was arguable that some of the employees performing inspection work might be working in the construction industry, but made no finding due to a lack of evidence. His Honour did not attempt to define the term 'maintenance' and, the respondent says, that his findings are based on the particular facts before him.
- 36 The respondent also says that the exception to maintenance or repairs being part of the construction industry is on the basis that they are routine or minor in nature. It describes the circumstances it says are designed to meet that description, but says that it is not intended to require the Board to analyse the work of an employee into either 'substantial repair and maintenance' and 'minor repair and maintenance' in order to determine whether contributions should be made by the employer to the Board. It says that would lead to an unworkable position that an employee might be engaged in the construction industry one day because he or she performs some substantial maintenance, but not the next because he or she is only required to perform routine or minor maintenance. In any event, it says that Mr Mapleson's work required him to be a qualified Sprinkler Fitter and he undertook major maintenance on an ad hoc basis where problems occurred. This was not routine or minor maintenance.
- 37 The respondent says that its second argument is that testing and inspection are by their very nature part of maintenance. The contract between the applicant and FMG was essentially a maintenance contract.
- 38 The respondent also refers to the terms of the Standard to support its argument. Routine service is defined at 1.5.13 of the Standard as 'inspection (including survey), testing and preventative maintenance at specific intervals'. There are three stages, and stage two includes 'routine servicing as defined' which itself includes 'preventative maintenance' which is a 'series of actions, including lubrication, cleaning, adjustment and replacement of components at pre-determined times to minimise the incidence of a breakdown'.
- 39 The process is that where testing and inspection identify a failure, rectification or resolution takes place, followed by a further test.
- 40 Rectification is defined in the Australian Standard as 'the repair or replacement of components found to be defective' (1.5.11).
- 41 The respondent says the FMG agreement read together with the Standard indicates that the applicant was required to maintain the fire systems using routines set out in the Standard. Those are 'routines for testing' not 'routine testing'. These require regular inspection and testing to identify any failures or faults and the rectification of those failures or faults. The testing and inspection are therefore clearly part of maintenance as being the only way to identify fault or failure other than in the course of a fire.

- 42 The respondent also refers to various decisions of the Commission regarding the major and substantial employment test and the principle purpose test. In either case, Mr Mapleson's purpose of working as a Sprinkler Fitter was to enable the applicant to meet its obligations to supply, install and maintain the various fire systems.

Australian Standard 1851-2012

- 43 The Standard is titled 'Routine Service of Fire Protection Systems and Equipment'. In its Preface, it notes that it 'incorporates a considerable amount of new material and technical changes for routine service (maintenance) of fire protection systems and equipment in the light of user experience and feedback.'
- 44 Its scope 'is applicable to the routine service procedures for fire protection systems and fire equipment'. It sets out a summary of the major changes made to the previous Standard, the first of which is that the 'Title changed to overcome reported ambiguity but still reflect the concept of inspection, test and preventative maintenance. The term 'maintenance' has been replaced by 'routine service''.
- 45 The Foreword of the Standard is, relevantly, as follows:

The criteria adopted for revising this Standard include reliability, integrity, functionality and performance of fire protection systems and equipment. Consideration has also been given to the interfaces between fire protection systems and other building safety systems.

The Standard contains inspection, test, preventive maintenance and survey requirements to demonstrate that the fire systems and equipment installed in a building are achieving a standard of performance to which they were designed (the approved design). The Standard may be applied to fire systems and equipment regardless of building age. The Standard may be applied to demonstrate the minimum performance standard required by the National Construction Code (NCC) BCA, Volume 1, for new buildings or it may also be applied to existing buildings constructed to an approved design prior to the current BCA edition of the NCC. The Standard may also be used to develop specific routine service requirements for fire systems or equipment that are part of an alternative solution designed to satisfy the performance requirements of the NCC. Application of the Standard may also support health and safety acts and regulations.

The scope of this Standard is identified as Stage 2 of the process and procedures diagram in Figure 1.7. It includes the inspection, test, preventive maintenance and survey, coupled with records to be kept and reports to be made, culminating in the issue of a yearly condition report.

The revised inspection, test, preventive maintenance and survey regimes in this Standard address the functional aspects of installed fire protection systems and equipment on a periodic basis, with the objective that systems and equipment operate effectively at all times. The regimes aim to ensure that fire protection systems and equipment are in working order throughout the year or period of interest; not only at the time of annual inspection and test. A significant objective of this Standard is to provide reliability of fire protection systems and equipment, linking design, installation, commissioning and maintenance.

This Standard includes a requirement to annually test all aspects of system interconnection; for example, detection and alarm systems with atrium smoke exhaust plant, alarm systems with stairwell pressurization, automatic fire sprinkler systems with mechanical services fire mode operation and warning facilities. This will require adequate documentation of interconnections between the various systems as required in the design, installation and commissioning Standards.

...

This Standard provides a set of requirements to increase the probability that fire protection systems and equipment will function as intended by the respective design, installation and commissioning Standards, thus achieving reliability.

Continuous correct functioning is a basic criterion, and the yearly survey requirement also assures that system performance capability (efficacy) is not degraded by building or occupancy changes, which could otherwise adversely affect the capability of the system to perform as originally intended.

Routine service (maintenance) is concerned with the principle that a system will continue to perform to the approved design when routine service is conducted on a pre-determined and regular basis.

Surveys are scripted activities in the routine service schedules as a check for any component degradation or building changes that may impact on system performance. The survey requirements of this Standard do not require auditing to AS 4655, *Fire safety audits*.

Exhibit R3, 7

- 46 **Section 1.5 – Definitions** includes **Competent person**. This is '[a] person who has acquired through training, qualification, experience, or a combination of these, the knowledge and skill enabling them to correctly perform the required task'.
- 47 At 1.5.10, it defines 'preventative maintenance' as '[a] series of actions including lubrication, cleaning, adjustment and replacement of components at a predetermined frequency, to minimize the incidence of breakdown.'
- 48 At 1.5.11, 'rectification' is defined as '[t]he repair or replacement of components found to be defective'.
- 49 At 1.5.13, it defines 'routine service' as '[i]nspection (including survey), testing and preventative maintenance at specific intervals (see Figure 1.7).'
- 50 At 1.5.20, 'Testing' is defined as '[c]onfirmation of correct function or performance of a component or system.'
- 51 There is no suggestion that the definitions within the Standard and the words contained in the Act have any relationship. They are for different purposes. Where the Standard defines a certain activity or process, it is for the purposes of the Standard. I find that it is not to be taken as having the same meaning as any term within the Act. On this basis, reference to 'routine maintenance' or 'maintenance' within the Act is to be interpreted by reference to definitions within that Act or, in the absence of those definitions, to be given their ordinary meaning. However, as I will note later, the Standard does contain some assistance in determining the meanings to be attributed to terms.

Issues and consideration

- 52 There is little dispute about the facts. The dispute is how to interpret them and how the work Mr Mapleson performed is to be categorised.
- 53 Having considered all of the evidence about the work Mr Mapleson performed in the context of the contract held by the applicant with FMG, the Standard where it is relevant and the position description of a Sprinkler Fitter, it is clear that the fire systems Mr Mapleson worked on required inspection and testing in a programmed way. This was Mr Mapleson's scheduled and priority work. Its purpose is that set out in the Standard.
- 54 I note that there is a distinction to be drawn between the scope and purpose of the applicant's contract with FMG and Mr Mapleson's main purpose, priorities and duties. One of the purposes of the contract is to ensure the proper and efficient functioning of the fire systems. To achieve that, they need to be inspected and tested. If testing and inspection identify that rectification or repair work is necessary, it is to be done, as part of ensuring the proper operation of the system. However, when it comes to Mr Mapleson's role, it had a main purpose, and major and substantial duties which formed a subset of the contract.
- 55 The position description for the Sprinkler Fitter position in which Mr Mapleson was employed described the Role Purpose as:
To undertake all aspects of maintenance, repair and installation of both wet and dry sprinkler suppression systems, with the aim of ensuring that [the applicant] offers an industry leading standard of service to its clients.

Witness statement of Brad John McCallum [14]

Witness statement of Simon Bolding, Annexure A (page 41)

- 56 There were a number of conditions associated with Mr Mapleson's performance of rectification or maintenance work. They included if the work could be done there and then, or was urgent and could be done within his normal swing, and not impinge on his inspection roster, he would do it. If it required more than one person or could not be done within six hours, then the applicant would prepare a quote for FMG, and FMG would decide how, by whom and when the work would be done. The necessity for the work was identified in the inspection and testing. It is not routine maintenance that is scheduled, but is preventative in that it is identified as a fault or failure which requires rectification, discovered during inspection and testing.
- 57 Therefore, Mr Mapleson's job was not to maintain. That was ancillary. His job was to inspect and test. If a fault or failure was identified and he had time to perform the work, and it did not impinge on his inspection roster, Mr Mapleson would do the rectification work. The applicant worked on the basis that 75% of Mr Mapleson's hours, apart from incidental activities such as travel, meetings and administration, were spent on inspection and testing. The remainder was available for rectification and other work, if it fitted within the parameters I have outlined above.
- 58 The applicant engaged Mr Mapleson as a Sprinkler Fitter to do the inspection and testing work because FMG requires a Sprinkler Fitter. That qualification was not strictly necessary for the purposes of a 'competent person', as required by the Standard, performing the inspection and testing work. However, it ensures that any incidental rectification or maintenance work can be done by the same person, as a matter of cost effectiveness, flexibility and convenience. This is rather than having a Fire Technician, who would be limited to testing and inspection only.

Did Mr Mapleson's work meet the exclusion to the definition of 'construction industry' in the Act?

- 59 The exclusion is:
(3)(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;
- 60 In *Aust-Amec*, Ipp J dealt with whether the plaintiff was employing employees in the 'construction industry'. He noted (at 161 – 2):

Broadly speaking (and ignoring work occasionally done to a limited extent by a limited number of the plaintiffs' employees), the activities of the plaintiffs, in so far as they relate to the construction industry, constitute investigatory services performed to determine whether maintenance or other construction work is required. Those services, in my view, do not constitute maintenance itself.

To the extent that the testing performed by the plaintiffs is applicable to materials and structures in the construction industry, that testing is merely, as the parties have expressed it, "to see if (the materials and structures) meet required specifications or require repair, maintenance or replacement". Work performed to determine whether maintenance is required is not maintenance itself. In my opinion, the industry in which the plaintiffs are engaged is a service industry relating to the construction industry, but it is not "in" the construction industry as defined. In the circumstances I conclude that the plaintiffs are not required to register in terms of s 30(1) of the [*Construction Industry Portable Long Service Leave Act 1985*].

...

I have concluded that the industry of non-destructive testing of materials carried on by the plaintiffs is not a construction industry as defined, and the plaintiffs are not "in the construction industry". In the circumstances, the plaintiffs' entitlement to the orders claimed depends on whether any of their employees are employees "in the construction industry". In this regard, the fact that persons are employers in respect of certain employees does not mean that they are employers in respect of all their employees, including those who are not in the construction industry. If, therefore, the plaintiffs are employers of employees, some of whom are in the construction industry, the question arises: in respect of which of their employees are the plaintiffs liable to pay contributions.

Whether a person is an employee in the construction industry depends not only on whether some of the work carried out by him or her is in the construction industry, but, also, on the degree to which that work forms part of the overall duties of the person concerned.

- 61 There seems to be no contention that, apart from whether Mr Mapleson's work was covered by the exception to the definition of construction industry contained in s 3(1)(a)(i), he was engaged in construction work.
- 62 There is no definition of *maintenance* work within the Act. The ordinary meaning is 'the act of maintaining'. To *maintain* is 'to keep in due condition, operation, or force; keep unimpaired' (Macquarie Dictionary, 6th ed, 708).
- 63 Maintenance work does not expressly include the requirement to inspect or test. It is arguable that inspection and testing are part of, and for the purpose of, keeping something in due condition or force, or unimpaired. However, they are not necessarily part of the one action. Where inspection and testing find no fault or failure, no rectification or repair work is necessary. This is where the respondent's argument that the testing, inspection and rectification are all part of maintenance fails.
- 64 My conclusion in this is reinforced by an examination of the Standard. It uses terms which set out a number of stages. The stages it describes are inspection, test and preventative maintenance.
- 65 Preventative maintenance is defined as including 'lubrication, cleaning, adjustment and replacement of components'.
- 66 Rectification is repair or replacement of defective components.
- 67 It is of note that the latest version of the Standard has replaced the term 'Maintenance' as being the overarching descriptor of work involved with the term 'routine service'. This is said to be to overcome ambiguity, 'but still reflect the concept of inspection, test and preventative maintenance'. Therefore, the Standard at least recognises that maintenance is the 'preventative' work and rectification is the repair and replacement, following the testing and inspection. 'Maintenance' is not, at least for the purposes of the Standard, the overarching term encompassing inspection and testing.
- 68 It is clear, too, that while Mr Mapleson did inspection and testing, and that it was often convenient for him to do any rectification work, or maintenance that was identified by the inspection and testing as being necessary, he did it only if his schedule of inspection and testing allowed; if it did not require a significant amount of time; and if the parts were available and FMG approved it.
- 69 In the context of the work undertaken by Mr Mapleson, the comment by Ipp J in *Aust-Amec*, a different work context, is, with respect, valid. That is, it was investigatory to determine whether maintenance or rectification was required. Therefore, for the purposes of these circumstances, I respectfully adopt his Honour's comment that 'work performed to determine if maintenance is required is not maintenance itself'.
- 70 Therefore, both the purpose of, and the major and substantial work of, inspection and testing by Mr Mapleson were not maintenance work. The maintenance or repair work he did undertake was ancillary to and minor compared with the remainder of his work. It was also minor of itself, which Mr Mapleson acknowledged. He described some of those tasks as falling within routine maintenance set out in the Australian Standard.
- 71 The installation work Mr Mapleson performed in May and August 2016 were not part of his normal work, and in any event, took up only a small amount of his overall working time during his employment with the applicant.
- 72 I have considered the authorities referred to by the parties, including *Coinvest Limited v Celsius Corporate Services Pty Ltd* [2017] VCC 796 relating to the Victorian Act and *Hopkins v My Glazier Pty Ltd* [2006] SAIRC 87 relating to the South Australian Act. Each deals with the meanings of terms used in their different legislative schemes. While they add to the consideration of some aspects of this matter, they are to be distinguished on the basis that the scope and definitions in those schemes differ sufficiently significantly from the Act such that they are not able to provide any guidance to the determination of this matter.
- 73 Therefore, I conclude that the maintenance or repair work undertaken by Mr Mapleson falls within the exclusion to the definition of 'construction industry' in s 3(1) of the Act in that they were minor.
- 74 In accordance with s 50(3)(c) of the Act, the decision of the Board dated 1 November 2016 is to be set aside and I find that the applicant is not required to make contributions to the Board in respect of Mr Mapleson.

2017 WAIRC 00451

**REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 1
NOVEMBER 2016**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PAULL & WARNER RESOURCES PTY LTD

APPLICANT

-v-

CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT

DATE

FRIDAY, 14 JULY 2017

FILE NO/S

APPL 68 OF 2016

CITATION NO.

2017 WAIRC 00451

Result

Board's decision set aside and another decision substituted

Order

HAVING HEARD from Ms H Millar of counsel on behalf of the applicant and Mr S Kemp of counsel and with him Ms R Harding of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* and the *Construction Industry Portable Paid Long Service Leave Act 1985*, hereby orders:

1. THAT the decision of the Construction Industry Long Service Leave Payments Board on 1 November 2016 in relation to Mr Paul Mapleson be set aside; and
2. THAT the following decision be substituted in lieu thereof:

THAT Mr Paul Mapleson is not required to be registered as an employee under the *Construction Industry Portable Paid Long Service Leave Act 1985* based on the nature of his employment with the applicant.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00223

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WILLIAM GEOFFREY CARTER	APPLICANT
	-v-	
	MT PLEASANT BOWLING CLUB INC	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 21 APRIL 2017	
FILE NO/S	U 13 OF 2017	
CITATION NO.	2017 WAIRC 00223	

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms V Gnjatic as agent

Order

HAVING heard the applicant on his own behalf and Ms V Gnjatic 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 respondent's agent, Ms Viki Gnjatic be and is hereby granted leave to appear at the hearing by telephone link from Sydney, New South Wales.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00224

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WILLIAM GEOFFREY CARTER	APPLICANT
	-v-	
	MT PLEASANT BOWLING CLUB INC	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 21 APRIL 2017	
FILE NO.	U 13 OF 2017	
CITATION NO.	2017 WAIRC 00224	

Result	Direction issued
Representation	
Applicant	In person
Respondent	Ms V Gnjatic as agent

Direction

HAVING heard Mr W Carter on his own behalf and Ms V Gnjatic as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the Commission's jurisdiction to hear and determine the herein application be heard as a preliminary issue.
- (2) THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely with copies of documents referred to by the maker of the statement being annexed to it by no later than 12 May 2017.
- (3) THAT the matter be listed for hearing for one day on a date to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00299

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2017 WAIRC 00299
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 26 MAY 2017
DELIVERED	:	TUESDAY, 30 MAY 2017
FILE NO.	:	U 13 OF 2017
BETWEEN	:	WILLIAM GEOFFREY CARTER Applicant AND MT PLEASANT BOWLING CLUB INC Respondent

Catchwords	:	<i>Industrial law (WA) – Termination of employment – Harsh, oppressive or unfair dismissal – Whether the Commission has jurisdiction – Trading corporation – Principles applied – Applicant's claim beyond jurisdiction of Commission</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA) s 29(1)(b)(i)</i> <i>Commonwealth of Australia Constitution Act (Cth) s 51(xx)</i> <i>Fair Work Act 2009 (Cth) s 26</i> <i>Associations Incorporation Act 2015 (WA)</i>
Result	:	Dismissed for want of jurisdiction
Representation:		
Applicant	:	In person
Respondent	:	Ms I Lewin-Jones

Case(s) referred to in reasons:

Wilson v Riverton Rossmoyne Bowling and Recreation Club [2009] WAIRC 00465; (2009) 89 WAIG 1000

R v The Judges of the Federal Court of Australia and another; Ex parte The Western Australian National Football League (Inc) and another (1979) 143 CLR 190 ("Adamson")

Case(s) also cited:

Aboriginal Legal Service of Western Australia (Inc) v Mark James Lawrence [2008] WASCA 254

Reasons for Decision

- 1 The applicant Mr Carter was employed by the respondent the Mount Pleasant Bowling Club Inc as its Bar and Functions Manager from about mid-September 2016 to the date of the termination of his employment on 28 January 2017. It is not controversial that Mr Carter was originally employed on a permanent part-time basis working 30 hours per week, which was later increased to 40 hours per week. Mr Carter maintained that despite his contracted hours of duty, he worked many hours in excess of these to perform his duties at the Club.
- 2 Mr Carter maintained that his dismissal by the Club was harsh, oppressive and unfair. He maintained that despite his efforts in improving the results of the activities of the Club, actions by the employer provided obstacles to him achieving the results intended.
- 3 Whilst denying that Mr Carter was unfairly dismissed, the Club raised a fundamental jurisdictional issue, that being that it is and was at all material times of Mr Carter's employment, a trading corporation for the purposes of s 51(xx) of the *Commonwealth of Australia Constitution Act* (Cth). Accordingly, the effect of this, if established, is that Mr Carter's claim is beyond the jurisdiction of this Commission by reason of s 26 of the *Fair Work Act 2009* (Cth). This issue was listed for hearing as a preliminary issue to determine whether Mr Carter's claim was beyond the Commission's jurisdiction.

The facts

- 4 The facts in relation to the preliminary issue were not in dispute. The Club is an incorporated association under the *Associations Incorporation Act 2015* (WA) and has been so since 1988. The Club was formed originally as a men's club in 1960. In 1963 the Club had 113 full members and 109 associate members. A clubhouse was built in 1965 and in 1996, membership for ladies was introduced. A copy of the Club's Constitution was annexure B to the witness statement of Ms Lewin-Jones, who has been the President of the Club since December 2016.
- 5 The purpose of the Club, as specified in the Constitution, is to undertake sporting activities, specifically lawn bowling. The Club is a not-for-profit corporation but Ms Lewin-Jones maintained that it engages in substantial trading activity. The trading activities of the Club are engaged in for the purposes of supporting the objects and purposes of the Club under the Constitution, and the Club trades under its incorporated name "The Mount Pleasant Bowling Club Inc". The trading activities involve activities both with members and also with the public at large.
- 6 Ms Lewin-Jones outlined the facilities and services provided for members of the Club. Those facilities and services include the clubhouse; function rooms; bowling greens for the use of members for pennant and interclub competitions; fully maintained greens; clubrooms for social interaction and meetings relating to bowling activities; bar facilities; function rooms for hire; various competitions throughout the year; and social bowling for non-members who wish to learn how to bowl.
- 7 The trading and commercial activities engaged in by the Club were outlined by Ms Lewin-Jones, which she said are used to support the activities of the Club for the benefit of members. Those trading activities include alcohol sales to members, guests and customers who hire the Club facilities for functions; room hire and kitchen charges applied to both members and the public alike for functions at the Club, which is a major source of income for the Club; the payment of fees for bowls and greens for visitors and other groups; and regular Friday evening dinners prepared by an outside chef for both members and the public.
- 8 Ms Melkus is the treasurer of the Club and has been in this position since August 2014. As a part of her job as the Club treasurer, Ms Melkus maintains the accounts relating to the financial management of the Club. This involves the preparation of the Club's various financial statements including its profit and loss and balance sheet, amongst others. Annexed to Ms Melkus' witness statement at annexure B was the Club's balance sheet as at April 2017. Annexure C was the Club's profit and loss statement for the period July 2016 to April 2017. The profit and loss statement records total income from bar sales and bingo - video of approximately \$300,000. Subscription revenue (member fees) was about \$26,000. Green fees are a further \$32,500 approximately. There was also an amount of income described as "special events" in the sum of about \$10,400, along with fundraising activities including raffles in the sum of about \$18,100. The hall and kitchen hire income was approximately \$7,500, along with some general catering income of \$5,400. Additionally, there was some sponsorship income in the sum of approximately \$4,000, which Ms Melkus said was significantly higher in the previous year, at around \$12,000. The total income recorded in the profit and loss statement for this period was \$413,438.37.
- 9 By far and away, the largest expense for the Club relates to cost of sales in relation to the bar facilities and miscellaneous items, amounting to some \$125,205.04. Leaving aside the other expenses, it was quite clear from the profit and loss statement, that the income from bar sales and bingo - video of approximately \$300,000, represented about 72% of the Club's income for the relevant period. This does not include the other income from functions, special events and membership fees, that I have referred to above.
- 10 As mentioned, this evidence was unchallenged and I find accordingly.

Legal principles

- 11 The law in relation to whether or not a corporation is a trading corporation is well settled. There is no doubt that the Club is an incorporated body and is a corporation. Whether it is a trading corporation needs to be assessed against the relevant legal principles. In a case not dissimilar to the present matter in *Wilson v Riverton Rossmoyne Bowling and Recreation Club* [2009] WAIRC 00465; (2009) 89 WAIG 1000 I set out the relevant legal principles applicable to the present issue at pars 13 to 15 as follows:
 - 13 The respondent is plainly a corporation. Whether it is a trading or financial corporation is a matter of fact and agree. Most recently the relevant principles in relation to characterising a corporation as a trading or financial corporation were considered in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No. 2)* (2008) 252 ALR 136. In this decision, the Industrial Appeal Court, on appeal from a decision of the Full Bench of the Commission, considered whether the appellant in those proceedings was a trading corporation for the purposes of s51 (xx) of the Commonwealth

Constitution. The leading judgement in the majority was that of Steytler P with whom Pullin J agreed. Steytler P referred to the five frequently cited judgements of the High Court in relation to the tests as to whether a corporation should be classified as a trading incorporation. After considering the relevant High Court judgements, Steytler P summarised the relevant principles at par 68 as follows:

“The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:

- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* at CLR 239; *State Superannuation Board* at CLR 303–4; *Tasmanian Dam case* (at CLR 156, 240, 293; *Quickenden* at (49)–(51), (101); *Hardeman* at [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* at CLR 208, 234, 239; *State Superannuation Board* at CLR 303–4; ALR 14–15; *Hughes v Western Australian Cricket Assn Inc* (1986) 19 FCR 10 at 20; 69 ALR 660 at 671 (*Hughes*); *Fencott* at CLR 622; *Tasmanian Dam case* at CLR 156, 240, 293; *Mid Density* at FCR 584; *Hardeman* at [22].
 - (3) In this context, “trading” is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* at ALR 624, 644; FLR 139, 159–60; *Adamson* at CLR 235; ALR 474; *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184–5 and 203; 40 ALR 609 at 618 and 635; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325 at 330; 59 ALR 334 at 339,4 IPR 467 at 472; *Quickenden* at (101).
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* at CLR 539, 563, 569; *Ku-ring-gai* at ALR 625, 645; FLR 140, 167; *Adamson* at CLR 219; *E* at FCR 343, 345; *Pellow* at [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* at CLR 543; *Ku-ring-gai* at ALR 643; FLR 160; *State Superannuation Board* at CLR 304–6; *E* at FCR 343. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as “trade”: *St George County Council* at CLR 543 per Barwick CJ; *Tasmanian Dam case* at CLR 156; per Mason J.
 - (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a “trading corporation” is a question of fact and degree: *Adamson* at CLR 234; per Mason J; *State Superannuation Board* at CLR 304; *Fencott* at CLR 589; *Quickenden* at (52), (101); *Mid Density* at FCR 584.
 - (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* at CLR 294–5, 304; *Fencott* at CLR 588–9, 602, 611, 622–4; *Hughes* at FCR 20; *Quickenden* at (101); *E* at FCR 344; *Hardeman* at [18].
 - (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* at CLR 209, 211; *Ku-ring-gai* at ALR 624, 627–8, 643, 648, FLR 139, 142, 160, 167; *Bevanere* at FCR 330; *Hughes* at FCR 19–20; *E* at FCR 343; *Fowler*; *Hardeman* at [26].”
- 14 The fact that a corporation is a club formed for the purposes of the promotion of a particular sport or activity for the benefit of members, is not fatal to the conclusion that the corporation is a trading corporation for the purpose of s51 (xx) of the Commonwealth Constitution. This issue was the subject of consideration by High Court in one of the judgements considered by Steytler P in *Aboriginal Legal Service*. In *The Judges of the Federal Court of Australia and another; ex parte The Western Australian National Football League (Inc) and another* [1978-1979] 143 CLR 190 (“*Adamson*”). At issue *Adamson* was whether the Nation Football League and a Western Australian football club were trading corporations. The High Court, after considering previous authority in relation to the characterisation of a corporation as a trading or financial corporation, and the activities of the league and the club respectively, concluded by majority (Barwick CJ, Mason, Jacobs and Murphy JJ; Gibbs, Stephen and Aickin JJ dissenting) that the league and clubs were trading corporations within both s 51(xx) of the Commonwealth Constitution and s 6 of the Trade Practices Act 1974 (Cth) respectively.
- 15 In considering this issue, Mason J examined the activities of the West Perth Football Club and observed as follows at 236:
- “West Perth derives income from two main sources: First, from the operations from its football team in the competition run by the WA League; secondly, from various trading activities which it conducts. The first form of income includes the distribution received by it as a member club of the WA League and membership fees for admission to matches in which its teams participate. The second source of income is from bar trading and catering. Its gross income from bar trading was (1976) \$116,277(1977) \$139,644. Its net profit on trading in those years was (1976) \$41,087 (1977) \$49,925. A third and minor source of income is revenue from the sale of club ties, objects and souvenirs.
- The fact that West Perth is a club and that therefore its sales of liquor and food are largely made to members does not in my view affect its character as a trading corporation. There is no reason why an incorporated club which is heavily involved in trading activities should not be held to be such a corporation, despite the fact that its trading activities are related to its character as a club and that it provides social functions, amenities and services for its members”.
- 12 I adopt and apply those principles for the purposes of determining the present matter.

Consideration

- 13 From all of the evidence, which as I have said was not in dispute, I have no doubt in applying the above legal principles; that the Club is and was at the material time of Mr Carter's employment, a trading corporation for the purposes of s 51(xx) of the *Commonwealth Constitution*. It was clear on the evidence, that trading activities from the Club's bar and gaming revenue alone, constituted nearly three quarters of the Club's total income. This does not include the other miscellaneous function income through room hire and other external activities as established on the evidence. Plainly, that activity is trading activity, being the sale of alcohol and other drinks at prices fixed by the Club. The level of this trading activity, as a proportion of the overall Club revenue, was significant and substantial.
- 14 As I concluded in *Wilson*, the fact that the trading activities are engaged in for the purposes of the Club under its Constitution and for the benefit of its members, does not mean, as was made clear in *R v The Judges of the Federal Court of Australia and another; Ex parte The Western Australian National Football League (Inc) and another* (1979) 143 CLR 190, that the Club may not be characterised as a trading corporation. The present test for whether a corporation is a trading corporation, is based principally on the activities of the corporation and is not determined by its objects or purposes under its governing constitution or rules.
- 15 For the foregoing reasons, the Commission must come to the conclusion that the Club is a trading corporation. As such, Mr Carter's unfair dismissal claim is beyond the Commission's jurisdiction as a consequence of s 26 of the *Fair Work Act*. The application must therefore be dismissed and I order accordingly.

2017 WAIRC 00300

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	WILLIAM GEOFFREY CARTER	APPLICANT
	-v-	
	MT PLEASANT BOWLING CLUB INC	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER	
DATE	TUESDAY, 30 MAY 2017	
FILE NO/S	U 13 OF 2017	
CITATION NO.	2017 WAIRC 00300	

Result Dismissed for want of jurisdiction

Representation

Applicant In person
Respondent Ms I Lewin-Jones

Order

HAVING heard the applicant on his own behalf and Ms I Lewin-Jones on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2017 WAIRC 00277

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	JOHN RICHARD DE BOER	CLAIMANT
	-v-	
	CITY OF PERTH	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	TUESDAY, 16 MAY 2017	
FILE NO/S	B 217 OF 2016	
CITATION NO.	2017 WAIRC 00277	

Result	Orders made
Representation	
Claimant	Mr K Trainer, as agent
Respondent	Ms S Walker, of counsel, and with her Mr S Kemp, of counsel

Orders

HAVING heard Mr K Trainer, as agent, on behalf of the claimant and Ms S Walker, of counsel, and with her Mr S Kemp, of counsel, on behalf of the respondent and by consent;

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

1. That by close of business Monday 22 May 2017 the claimant file and serve:
 - (a) any witness statements and documents upon which he intends to rely; and
 - (b) a brief outline of submissions and any authorities on which he intends to rely.
2. That by close of business Friday 26 May 2017 the respondent file and serve:
 - (a) any witness statements and documents upon which it intends to rely; and
 - (b) a brief outline of submissions and any authorities on which it intends to rely.
3. That the respondent inform the claimant of any witnesses it intends to call at the hearing by close of business Thursday 25 May 2017.
4. That witness statements will constitute the evidence in chief of those who give them.
5. That the parties are to inform the Western Australian Industrial Relations Commission prior to the hearing of which witnesses they will require for cross-examination.
6. The respondent provide the claimant with copies of all:
 - 6.1 correspondence and documents (whether electronic or otherwise) relating to the claimant's:
 - 6.1.1 initial employment;
 - 6.1.2 appointment to a driving position of night shift;
 - 6.1.3 return to work programme on the day shift; and
 - 6.1.4 appointment to a day shift driving position.
 - 6.2 the respondent's Policy and Procedure Handbook.
 - 6.3 the respondent's written practices, procedures and assessment requirements for drivers that require a HR licence or more.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2017 WAIRC 00358

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00358
CORAM : COMMISSIONER D J MATTHEWS
HEARD : TUESDAY, 30 MAY 2017
DELIVERED : MONDAY, 19 JUNE 2017
FILE NO. : B 217 OF 2016
BETWEEN : JOHN RICHARD DE BOER
 Claimant
 AND
 CITY OF PERTH
 Respondent

CatchWords	:	Contractual benefits claim - Claim that contract contains term that claimant drives trucks for respondent - Claim that conduct of parties evinces an intention that the claimant was employed as a truck driver - Claimant removed from duties that involved driving trucks due to safety incident - Law applied to uncontroverted facts - Employee owes a duty of reasonable care and skill in carrying out duties - Respondent considers claimant's driving unsafe - Respondent's view untested in proceedings - Claim dismissed
Legislation	:	<i>Industrial Relations Act 1979</i>
Result	:	Claim dismissed
Representation:		
Claimant	:	Mr K Trainer, as agent, and with him Ms A Ballantyne
Respondent	:	Ms S Walker, of counsel, and with her Mr S Kemp, of counsel

Case referred to in reasons:

X v The Commonwealth (1999) 200 CLR 177 [188]

Cases also cited:

Australian Goldfields NL, in liquidation v Northern Australian Diamonds NL [2009] WASCA 98

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539

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

Commonwealth Bank of Australia v Barker [2013] FCAFC

Downe v Sydney West Area Health Service (No 2) [2008] NSWSC 159

Kylie Nicole Lawsen v Winun Ngari Aboriginal Corporation (2014) 94 WAIG 1767

Matthews v Cool or Cosy Pty Ltd & Anor [2004] WASCA 114

Qantas Airways Limited v Joyce (2014) 94 WAIG 1655

Sydney City Council v Goldspar Australia Proprietary Limited [2006] FCA 472

Unsworth v Tristar Steering and Suspension Australia Ltd [2008] FCA 1224

Weston v WA Property Lawyers (2015) 95 WAIG 1455

William Hill Organisation Ltd v Tucker [1999] ICR 291

Reasons for Decision

- Mr John Richard De Boer claims that it is a term of his contract of employment with the respondent that he drives the respondent's trucks.
- Mr De Boer says he is employed as a truck driver having been the successful applicant for such a position in 1995.
- In the alternative, as I understand it, Mr De Boer says that the evidence of conduct over the last 20 years or so establishes that he is employed by the respondent as a truck driver, or at least employed in a role which has, as a significant and regular component, the driving of trucks.
- Mr De Boer seeks an order that the respondent "allow [him] the benefit of the contract of employment and return [him] to his role of Truck Driver...". (Notice of Application [7.10]).
- This is essentially an order for specific performance.
- The respondent denies that Mr De Boer is employed as a truck driver and denies that he is employed in a role which has, as a core or significant component, the driving of trucks.
- The respondent says that Mr De Boer is employed as a "Sanitation Worker/Street Cleaner Level 5" and that role, with reference to the position description applying to it, is not a truck driver position, does not necessarily involve truck driving and, at the most, only involves the occasional driving of trucks.
- The respondent says that as Mr De Boer is not employed as a truck driver, nor in a role which has as a core or significant component the driving of trucks, and as he is employed in a role that may be performed without driving trucks, it cannot be in breach of the contract of employment if Mr De Boer is not being allowed by it to drive its trucks.
- The documentation provided to me was of limited assistance in determining the terms of Mr De Boer's contract of employment.
- A contract of employment dated 19 November 1990 recorded that Mr De Boer was, from 21 November 1990, to be appointed "to the position of Rubbish Swamper in the Engineering Department". Neither party contended that this contract of employment was determinative of the present dispute.
- Mr De Boer said that in 1995 he had successfully applied for an advertised position of "refuse driver on the night shift" (Witness Statement of Mr John De Boer [10] and [11]) but he did not produce the contract of employment or any documentation associated with the position.

- 12 Mr De Boer also contended that a request he made in a letter by him to Mr Lionel Nicholson, Manager – Operations, dated 28 November 2007 was accepted by the respondent with the effect “the respondent agreed that I would be put onto the day shift permanently as a driver”. (Witness Statement of Mr John De Boer [21] and Appendix B).
- 13 The letter and Mr Nicholson’s response make no reference to a position of truck driver and the communications are of no consequence in relation to Mr De Boer’s contention.
- 14 Ultimately, Mr De Boer contended that I should infer from the conduct of the parties that he was employed as a truck driver or in a position which had, at its core, the driving of trucks.
- 15 However, because of uncontroverted facts and the application of the law to those facts, I do not need to decide whether Mr De Boer was employed as a truck driver or in a role which had at its core the driving of trucks.
- 16 The uncontroverted facts are that on 29 January 2016 the respondent wrote to Mr De Boer, following an incident relating to his driving of a truck during his employment, and informed him, amongst other things, that:
 - (1) He is “obliged to exercise reasonable care and skill in the performance of [his] duties”;
 - (2) He had “failed to meet these requirements”; and
 - (3) He “will ... be removed from driving duties until further notice”.
- 17 Mr De Boer did not, at the time or in these proceedings, attempt to argue that he had not failed to meet the requirements set out above or that the respondent was not entitled to take the action that it did in removing him from driving until further notice.
- 18 The law is that there is an implied term in every contract of employment that the employee possesses and exercises reasonable care and skill in carrying out the employment (see *X v The Commonwealth* (1999) 200 CLR 177 at [188] per McHugh J).
- 19 Applying the law to the facts the respondent was, as at January 2016, of the view that Mr De Boer was not able to perform truck driving with reasonable care and skill. Apparently it remains of that view.
- 20 The quality of that view, either as at January 2016 or now, was not tested in these proceedings.
- 21 Mr De Boer asks me to order his return to his role as a truck driver, or to a role which has at its core truck driving, in enforcement of his contract. Even if I were to consider doing so I would have to also consider that it is an implied term of his contract that he has the necessary level of skill and care to perform that role or those duties. I could not possibly make such an order where the employer says he is not and Mr De Boer has made no attempt to undermine that view, let alone succeeded in doing so.
- 22 Accordingly, the claim must be dismissed.
- 23 If there was not such an implied term, or if Mr De Boer had challenged and succeeded in some way in undermining the respondent’s reliance upon it, this matter would have opened up considerably given the issues that would have then been enlivened.
- 24 I can say nothing definitive about those issues, not being required to decide them to determine the matter, but given they were argued before me I make some brief comment:
 - (1) There being no written contract of employment and no evidence of contractual discussion the best that could be done in determining the terms and conditions of Mr De Boer’s employment would be to consider the conduct of the parties, viewed in the light of the provisions of the *City of Perth Outside Workforce Enterprise Bargaining Agreement 2012* which applied to him;
 - (2) A consideration of the history of the conduct of the parties, taking into account all relevant circumstances, makes it unlikely that Mr De Boer was ever employed as a truck driver, there being no such position;
 - (3) Equally, however, the conduct likely establishes that Mr De Boer was employed in a role which had as a core or significant duty the driving of trucks;
 - (4) In relation to (3) above Mr De Boer has for many years, and until January 2016, had the driving of trucks as a core or significant part of the duties he performed for the respondent;
 - (5) It is unlikely that a great deal can, from a contractual point of view, be read into those periods when Mr De Boer was fit to drive trucks but did not do so. Those periods came at the end of return to work programmes when Mr De Boer had been medically cleared to drive trucks but, because of arrangements made to cover his absence from work, Mr De Boer was made to wait until it was convenient to the respondent and other employees for him to resume his normal duties. It was clearly the common understanding of Mr De Boer and the respondent at these times that Mr De Boer would be returning to truck driving, the only issue being a question of when it was convenient, to the respondent and others, for him to do so. That common understanding arose out of what was the normal conduct of the parties in relation to Mr De Boer’s employment;
 - (6) There is nothing in the *City of Perth Outside Workforce Enterprise Bargaining Agreement 2012* which tells the reader that Mr De Boer could not have been employed in a role which has, as a core or significant duty, the driving of trucks. As a relevant circumstance the clause to which I was directed indicated that truck driving may very well be a core or significant part of the position the respondent tells me Mr De Boer held. The conduct of the parties suggests it was;
 - (7) If the driving of trucks was an essential term of Mr De Boer’s contract of employment it is possible that contract was terminated by the respondent in January 2016, but, of course, Mr De Boer took no action in relation to his dismissal if indeed it was a dismissal;

- (8) Even if it was an essential term of the contract of employment that Mr De Boer engage in truck driving, and even in the absence of the respondent's action in January 2016, I would have been unlikely to enforce the term by way of specific performance as I was not convinced by Mr De Boer that there is implied into the role a term that the respondent will ensure its employee is given the opportunity of using and displaying such a skill. There are limited circumstances in which such a term will be implied and I am not convinced they were demonstrated here; and
- (9) I would, of course, have implied a term that Mr De Boer receive a payment for work done but there was no allegation that the respondent was in breach of such a term. In fact Mr De Boer has suffered no monetary loss at all and the January 2016 action of the respondent did not affect his remuneration.
- 25 In closing, I can understand that Mr De Boer thought in January 2016 that he was merely being "suspended" for a period of time from driving trucks and that the suspension may have been lifted by now. However, as a matter of contractual entitlement he presently has no entitlement to drive trucks for the respondent.

2017 WAIRC 00356

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JOHN RICHARD DE BOER

CLAIMANT

-v-

CITY OF PERTH

RESPONDENT**CORAM** COMMISSIONER D J MATTHEWS**DATE** MONDAY, 19 JUNE 2017**FILE NO/S** B 217 OF 2016**CITATION NO.** 2017 WAIRC 00356**Result** Claim dismissed**Representation****Claimant** Mr K Trainer, as agent, and with him Ms A Ballantyne**Respondent** Ms S Walker, of counsel, and with her Mr S Kemp, of counsel*Order*

HAVING heard Mr K Trainer, as agent, and with him Ms A Ballantyne for the claimant and Ms S Walker, of counsel, and with her Mr S Kemp, of counsel, for the respondent; and

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

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

The claim be dismissed.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2017 WAIRC 00360

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TAHNEE EDHOUSE

APPLICANT

-v-

TUSCANY FOR HAIR

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** THURSDAY, 22 JUNE 2017**FILE NO/S** U 60 OF 2017**CITATION NO.** 2017 WAIRC 00360

Result Application dismissed

Order

WHEREAS this is an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS on 7 June 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* (WA), orders –
 THAT this application be, and by this order is, dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
 Commissioner.

2017 WAIRC 00381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00381
CORAM : COMMISSIONER T EMMANUEL
HEARD : MONDAY, 15 MAY 2017, FRIDAY, 9 JUNE 2017
DELIVERED : TUESDAY, 4 JULY 2017
FILE NO. : B 189 OF 2016
BETWEEN : NOLAN PAUL GROBLER
 Applicant
 AND
 MR ANDRE STASIKOWSKI
 STASS ENVIRONMENTAL (ABN 73 976 537 552)
 Respondent

CatchWords : Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment - Claim for annual leave, leave loading, notice and superannuation - Proper name of employer - Application upheld in part - Order issued

Legislation : *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Minimum Conditions of Employment Act 1993 (WA)
Fair Work Act 2009 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)

Result : Application upheld in part

Representation:

Applicant : Mr N Grobler
Respondent : Mr A Stasikowski

Cases referred to in reasons:

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Nolan Paul Grobler v Mr Andre Stasikowski Stass Environmental [2017] WAIRC 00115; (2017) 97 WAIG 289
Hotcopper Australia Ltd v Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Reasons for Decision

- 1 Mr Grobler worked as an environmental technician for an entity trading as Stass Environmental for nearly five years. He has made a claim against Mr Andre Stasikowski Stass Environmental (ABN 73 976 537 552) for 76 days' annual leave, 17.5% leave loading on those days and also on the 19 days' annual leave he says he took while employed, one week's notice and superannuation on his untaken annual leave. At the hearing Mr Grobler decided not to pursue his claim for notice.
- 2 The parties agree that Mr Grobler was an employee entitled to annual leave, leave loading and superannuation under his contract of employment. However, Stass Environmental says Mr Grobler's contractual benefits have not been denied. In short, Stass Environmental says it does not owe Mr Grobler anything.
- 3 The main issue in dispute is whether Stass Environmental directed Mr Grobler, and he agreed, to use up all of his annual leave during quiet periods each year.

- 4 The parties also disagree about the name of Mr Grobler's employer. Mr Grobler says it is Patricia Margaret Stasikowski as trustee for Stass Family Trust trading as Stass Environmental. Stass Environmental says the correct employer is Stass Environmental Pty Ltd.
- 5 To resolve this matter, I must decide:
- Who was Mr Grobler's employer?
 - Does Stass Environmental owe Mr Grobler annual leave?
 - Does Stass Environmental owe Mr Grobler leave loading?
 - Does Stass Environmental owe Mr Grobler superannuation?

Law

- 6 The principles that apply to denied contractual benefits claims are well settled. The claim must relate to an 'industrial matter' and be made by an employee. The benefit claimed must be one the employee is entitled to under a contract of service and not arise under an award or order of the Commission. The benefit must have been denied by the employer: *Hotcopper Australia Ltd v Saab* [2001] WAIRC 03827; (2001) 81 WAIG 2704 [34].

Who was Mr Grobler's employer?

- 7 The parties agree Mr Grobler was employed by the Stass Family Trust trading as Stass Environmental from 13 December 2011 to 28 October 2016.
- 8 Mr Grobler gave evidence that at all times he was employed by Patricia Margaret Stasikowski as trustee for Stass Family Trust trading as Stass Environmental. He argues that the ABN for the Stass Family Trust appears on his two employment contracts, a letter Stass Environmental gave to him in early 2012 confirming his employment, his termination letter and a reference letter Stass Environmental gave to him after he was dismissed. Further, Patricia Margaret Stasikowski as trustee for the Stass Family Trust appears on his government visa sponsorship documents.
- 9 The respondent agrees that Patricia Margaret Stasikowski was the trustee for the Stass Family Trust trading as Stass Environmental when Mr Grobler was employed in 2011. Mr Stasikowski gave evidence that on 4 July 2016 Patricia Margaret Stasikowski was removed as trustee and Stass Environmental Pty Ltd became the trustee for the Stass Family Trust. Mr Stasikowski tendered a deed of removal and appointment of trustee which supports his evidence.
- 10 I accept that Mr Grobler was employed by the Stass Family Trust which was trading as Stass Environmental at all material times. I generally accept the evidence given by Mr Grobler and Mr Stasikowski about this issue. It is not surprising that Mr Grobler was unaware the trustee changed.
- 11 I find Patricia Margaret Stasikowski was trustee for the Stass Family Trust when Mr Grobler was employed in December 2011 until 4 July 2016, when Stass Environmental Pty Ltd became the trustee of the Stass Family Trust.
- 12 It is clear that Stass Environmental Pty Ltd has been served with Mr Grobler's claim and has responded to it. Mr Stasikowski confirmed, and I am satisfied, that he appeared in these proceedings on behalf of Stass Environmental Pty Ltd as trustee for the Stass Family Trust.
- 13 I will order that the name of the respondent be amended to Stass Environmental Pty Ltd as trustee for the Stass Family Trust.
- 14 As I found at [39] in *Nolan Paul Grobler v Mr Andre Stasikowski Stass Environmental* [2017] WAIRC 00115; (2017) 97 WAIG 289, the Commission's jurisdiction to hear and determine Mr Grobler's claim is not affected by whether Mr Grobler was employed by Patricia Margaret Stasikowski or Stass Environmental Pty Ltd as trustee for the Stass Family Trust.

Does Stass Environmental owe Mr Grobler annual leave?

- 15 The parties disagree about how much annual leave Mr Grobler took while he was employed.
- 16 Mr Grobler gave evidence that he took 19 days' annual leave while employed by Stass Environmental. When asked, Mr Grobler said that he was sure about the dates and number of days because he has 'got them documented by photographs. [His] wife generally keeps good records'. Mr Grobler did not tender photographs or other records in support of his evidence about when he took annual leave.
- 17 The parties tendered agreed documents. These included two employment contracts. One is dated 2 September 2011 and the other is dated 11 November 2013. The contracts are the same except for their dates, the base salary provided and the superannuation rate.
- 18 Mr Grobler argues that under his employment contracts he was entitled to four weeks' annual leave per year. Across the course of his employment, that amounted to 95 days. The parties agree that Stass Environmental did not pay Mr Grobler for any untaken annual leave when he was dismissed. As a result, Mr Grobler says he is owed 76 days' annual leave.
- 19 Stass Environmental takes a very different view. In essence, it says the parties agreed that Mr Grobler would take all of his annual leave during quiet periods, including the annual December shutdown. It says from 2014 to his last day of employment in 2016, Mr Grobler took at least 353 days off work on full pay and, by using an average of 100 days per year for 2012 and 2013, Stass Environmental expects that Mr Grobler took 'in excess of 500 days' off work on full pay. As a result, it says it paid Mr Grobler for more annual leave than he was entitled.
- 20 Mr Stasikowski and Dr Patricia Stasikowski gave evidence for Stass Environmental. They both described a meeting they say took place in about mid December 2011, around the time Mr Grobler was employed. At its highest, Mr Stasikowski's evidence about this issue is that he told Mr Grobler there would be long periods with no work, he must take his leave in quiet periods and his leave would not roll over from year to year.
- 21 Mr Stasikowski gave evidence about Stass Environmental's annual shutdowns and defined those periods as 'official shutdowns where I'm not working, where I'm now taking my holiday'.

- 22 Dr Stasikowski's evidence was that Mr Grobler was told at the meeting that he needed to take his leave during periods when there was no work and that his leave would not roll over from one year to the next. She said he agreed to that arrangement. During cross-examination, she rejected Mr Grobler's assertion that a meeting with her never took place.
- 23 Mr Grobler disputes Mr Stasikowski's and Dr Stasikowski's evidence. He says there was no meeting with Dr Stasikowski. In cross-examination Mr Grobler agreed that Mr Stasikowski said there would be long quiet periods but he said he did not agree and would not have agreed to use up all of his leave in quiet periods. He said that was not common practice and he had always planned to return for a holiday to South Africa. Mr Grobler says he and Mr Stasikowski agreed that during quiet periods he would set up a home office, set up a workshop, develop field tools and service and repair the company vehicle. In essence, Mr Grobler's evidence is that he agreed to take leave during quiet periods, not that quiet periods would be construed as his leave.
- 24 Mr Stasikowski gave evidence that Mr Grobler had at least 353 days off work in which to take his annual leave while he was employed. He tendered diary extracts, diary planners and emails from 2012 to 2016 contained in Appendix A to Appendix G of the respondent's written submissions, which he says supports his evidence. Mr Stasikowski says he only recorded Mr Grobler's absences from work in his diary in the first year because, after that, they had an understanding and Mr Stasikowski knew what to expect of Mr Grobler.
- 25 Mr Stasikowski's diary entries for 2012 show that Mr Grobler took 12 days' leave outside the annual shutdowns. These days are not included in the 19 days' annual leave the parties agree Mr Grobler took. Neither party raised these 12 days during the hearing or in submissions.
- 26 Mr Stasikowski's evidence focussed on Mr Grobler only doing fieldwork and nothing else. He attempted to demonstrate during his cross-examination of Mr Grobler how little time it takes to clean a pump and disputed that Mr Grobler had equipment at home to maintain. The gist of his evidence was that if Mr Grobler was not doing fieldwork, Mr Grobler must have been on annual leave.
- 27 Mr Stasikowski gave evidence that he assumed Mr Grobler was taking his leave when Mr Grobler was not working. He agreed in cross-examination that Mr Grobler never asked to take leave other than the 19 days Mr Grobler says he took, saying that '[as far] as I was concerned, [Mr Grobler] took a hundred days a year, fully paid'.
- 28 Mr Stasikowski also referred to clause 41.10 of the Manufacturing and Associated Industries and Occupations Award 2010, saying it provides that when the company is closed, Mr Grobler is automatically on leave.
- 29 Mr Grobler gave evidence that he worked during the periods Stass Environmental and Mr Stasikowski say the business was closed, tendering many documents in support. He also says he did work other than fieldwork, including cleaning and calibrating equipment, servicing and repairing vehicles, conducting experiments, keeping stocks up, ordering parts and labouring.
- 30 Mr Grobler disputed that it takes such a short time to clean a pump and gave evidence that he had plenty of equipment to maintain, tendering pictures of equipment and emails between the parties describing some of the equipment Mr Stasikowski asked Mr Grobler to return after he was dismissed.
- 31 To the extent of any inconsistency, I prefer Mr Grobler's evidence about annual leave to Mr Stasikowski's and Dr Stasikowski's evidence. I find Mr Grobler a reliable witness. Mr Grobler's evidence was consistent, supported by documentary evidence and not materially disturbed during cross-examination.
- 32 On the question of whether at a meeting in December 2011 Mr Grobler was directed, and agreed, to take all of his leave each year, I prefer Mr Grobler's evidence to that of Dr Stasikowski. That is because Dr Stasikowski's position was not borne out by the documentary evidence produced in relation to Mr Grobler being on annual leave when the business was shutdown.
- 33 For reasons I will explain, I find Mr Stasikowski an unreliable witness.
- 34 On many occasions Mr Stasikowski's evidence was inconsistent, either with his earlier evidence or with Stass Environmental's exhibits. For example, Mr Stasikowski first said Mr Grobler was on leave for a particular period, then said Mr Grobler did not do work that he should have at that time and when Mr Grobler pointed out the inconsistency, Mr Stasikowski replied 'you were partially on leave, there was a day job'.
- 35 Mr Stasikowski gave evidence that point 3 of [1] of Stass Environmental's written submissions is an accurate record of the number of days each year that Stass Environmental was closed. It is not an accurate record because point 3 states that in 2013 there were 21 working days from 1 January until 18 January and from 11 December to 31 December when Mr Grobler took annual leave. In fact, there were 26 working days in those periods. Stass Environmental made similar errors when calculating the number of working days during the shutdowns in 2015.
- 36 Stass Environmental's exhibits also contradict one another. Mr Stasikowski said, and Stass Environmental submits in its written submissions, that Appendix E to Appendix G are a full record of the emails Mr Grobler sent recording the days he worked. At the beginning of each appendix, Mr Stasikowski used the emails to colour in days in a diary planner, showing Mr Grobler's days worked and days off, and wrote a summary of the days at the top of the diary planner. Stass Environmental's emails do not match its diary planner records. Mr Stasikowski said the diary planner is an accurate record of all the days Mr Grobler worked but he also says 'there could have been a few days over the five years' where Mr Grobler otherwise worked which Mr Stasikowski did not have an 'exact record for'.
- 37 Mr Stasikowski's evidence and Stass Environmental's written submission was that, based on the emails in Appendix E, in 2014 Mr Grobler worked 133 days and took 107 days off. This conflicts with the summary in the diary planner in Appendix E, which provides that Mr Grobler worked 131 days and had 124 days off. When this discrepancy was pointed out to Mr Stasikowski, he said Stass Environmental's written submissions were correct. If that is correct, then the diary planner, which Mr Stasikowski says was based on the emails, is not accurate.
- 38 Mr Stasikowski gave evidence that from 2014 until Mr Grobler's last day of work, Mr Grobler had 353 days off work. He said he calculated this by adding '133, 127, 129 and 84' which he says were the days Mr Grobler took off work in the last 3 years

- he worked. Those numbers add up to 473, not 353. Three of those numbers, 133, 129 and 84, are the number of days Stass Environmental says in its written submissions that Mr Grobler worked, rather than took off work. The number of days Stass Environmental says Mr Grobler took off work, 107, 111 and 117, add up to 335 and not 353.
- 39 There were many discrepancies between Stass Environmental's exhibits. For example, in 2014 the summary in the diary planner says Mr Grobler took 124 days off work, whereas the coloured days in the diary planner show 122 days off work, Stass Environmental's written submissions say Mr Grobler took 107 days off work and the emails show Mr Grobler took 124 days off work. In 2015, the summary in the diary planner says Mr Grobler took 113 days off work, whereas the coloured days in the diary planner show 114 days off work, Stass Environmental's written submissions say Mr Grobler took 111 days off work and the emails show Mr Grobler took 115 days off work. In 2016, the summary in the diary planner says Mr Grobler took 103 days off work, whereas the coloured days in the diary planner show 118 days off work, Stass Environmental's written submissions say Mr Grobler took 117 days off work and the emails show Mr Grobler took 108 days off work.
- 40 Mr Grobler produced emails and text messages that support his evidence that he was working on days when Mr Stasikowski says he was not. Stass Environmental says, and Mr Grobler concedes, that those emails and text messages do not show that Mr Grobler worked a full day on any given occasion. Stass Environmental disputes that the fuel receipts tendered by Mr Grobler prove anything, saying they could have been receipts for fuel for personal use. But Stass Environmental concedes it reimbursed Mr Grobler for those fuel receipts. The emails, text messages and fuel receipts lead me to conclude that Mr Grobler was working, and Stass Environmental would have been aware he was working, on many of the days that Stass Environmental says Mr Grobler was not working because the business was closed.
- 41 As I have stated, Mr Stasikowski was an unreliable witness. There were many inconsistencies in his evidence. He contradicted himself on a number of occasions. He gave conflicting evidence when answering questions about the accuracy of his records. During cross-examination, he said his diary records were 'completely accurate' in terms of the work Mr Grobler did. He would not concede in cross-examination that his records may not be completely accurate, even where it was obvious that the concession needed to be made and he seemed to accept my observation that his records were not accurate. When asked which records the Commission should prefer, to the extent of inconsistency, Mr Stasikowski first said Stass Environmental's written submissions. He conceded there may be 'a day here or there' that he mistook. He then said the emails were correct.
- 42 Given that Mr Stasikowski's evidence was inconsistent and disturbed in a number of respects, and the many inconsistencies between Stass Environmental's notice of answer, written submissions, diary extracts, diary planner and emails, I cannot accept Mr Stasikowski's evidence to the extent that it conflicts with Mr Grobler's evidence.
- 43 I find Stass Environmental's records are not accurate. In creating the records, Mr Stasikowski has relied on two wrong assumptions. First, that if Mr Grobler was not doing fieldwork (shown, Stass Environmental says, by its emails), then Mr Grobler was on leave. But I accept that Mr Grobler did more than just fieldwork for Stass Environmental. In order to perform the fieldwork, it was necessary for Mr Grobler to prepare and maintain equipment. Mr Stasikowski's second wrong assumption is that Mr Grobler was automatically on leave during shutdown periods. I accept that Mr Grobler agreed to take leave during quiet periods, not that quiet periods would be construed as his leave.
- 44 Mr Stasikowski's argument that clause 41.10 of the Manufacturing and Associated Industries and Occupations Award 2010 provides that when the company is closed, Mr Grobler is automatically on leave does not particularly assist Stass Environmental. In any event, that award could only have applied in the last few months of Mr Grobler's employment, when I understand that the business was not closed anyway, given Stass Environmental was not a national system employer until July 2016.
- 45 Mr Stasikowski's evidence that Mr Grobler was an employee, rather than a contractor, because of visa requirements and his focus on Stass Environmental being a 'one-man band' gives me the impression that Stass Environmental was happy to treat Mr Grobler as a contractor. Stass Environmental approached its response to Mr Grobler's claim as though Mr Grobler was only working on a particular day if he had claimed fuel. I was left with the impression that Mr Stasikowski considered that any contractual obligation Stass Environmental may have owed Mr Grobler was offset by the undemanding nature of Mr Grobler's role.
- 46 But Mr Stasikowski and Stass Environmental agreed that Mr Grobler was a full-time employee who was paid a salary. He was not a contractor. Indeed, Mr Stasikowski says Mr Grobler was paid for hundreds of days when he was not working. As I state in [27], Mr Stasikowski agreed that Mr Grobler only asked for 19 days' annual leave while employed. There was no agreement to offset and no agreement that Mr Grobler would use up his annual leave each year. In those circumstances, it is not an adequate answer to Mr Grobler's claim to say that because Mr Grobler had no work to do then he must have been on annual leave.
- 47 Stass Environmental may have found Mr Grobler unproductive and assumed that he was on annual leave during shutdown periods, which was when Mr Stasikowski took his own leave. If Stass Environmental was concerned about Mr Grobler's productivity, it should have managed his performance. It led no evidence about any warnings it gave Mr Grobler about poor performance. In any event, that would also not be an adequate answer to Mr Grobler's claim. An employer cannot unilaterally decide that an employee is on annual leave because he is unproductive.
- 48 I find Stass Environmental did not direct Mr Grobler to take, and Mr Grobler did not use up, his leave during those quiet periods. I accept that Stass Environmental shut its business to the public and I find Mr Grobler worked during those periods.
- 49 Because Mr Grobler did not use up his annual leave in any given year, it accumulated from year to year, first under the *Minimum Conditions of Employment Act 1993* (WA) and then under the *Fair Work Act 2009* (Cth).
- 50 I accept Mr Grobler's evidence that he took 19 days' annual leave and I find Mr Grobler was denied his contractual benefit to 76 days' annual leave.

51 The parties agree that Mr Grobler's gross daily pay was \$217.89. Seventy-six days' annual leave equates to \$16,559.64.

Does Stass Environmental owe Mr Grobler leave loading?

52 The parties agree, and I find, that Mr Grobler has a contractual entitlement to 17.5% annual leave loading per year.

53 The contract does not provide that the leave loading is only due when annual leave is taken.

54 Mr Grobler gave evidence, and Stass Environmental concedes, that he never received leave loading while he was employed.

55 Stass Environmental argues that Mr Grobler was paid for many more days than he worked and therefore any obligation to pay leave loading on annual leave was offset. Mr Grobler gave evidence, and Stass Environmental concedes, that there was no agreement between the parties about offset. Mr Stasikowski said he 'took it as [his] management decision' that Stass Environmental could offset the entitlement to leave loading, even though there was no agreement about it.

56 I accept the parties' evidence about offset and I find that Stass Environmental has no right to offset entitlements it owes Mr Grobler.

57 I find that Stass Environmental denied Mr Grobler his contractual benefit to 17.5% leave loading on 95 days' annual leave. That equates to \$3,622.42, being 95 x \$217.89 x 17.5%.

Does Stass Environmental owe Mr Grobler superannuation?

58 At the hearing Mr Grobler sought to amend his claim about superannuation, from 9.5% to 9.25% superannuation.

59 Mr Grobler seemed to be confused about whether he was claiming a benefit denied under his contract or statute, being the *Superannuation Guarantee (Administration) Act 1992* (Cth).

60 Mr Grobler says if he had taken the 76 days' annual leave he claims is owed while he was employed, Stass Environmental would have had to pay him superannuation on that amount under his contract. Accordingly, Mr Grobler claims Stass Environmental has denied his contractual benefit to 9.25% superannuation on the 76 days' annual leave.

61 Mr Grobler and Mr Stasikowski both gave evidence that Stass Environmental paid Mr Grobler superannuation on his salary while Mr Grobler was employed.

62 Stass Environmental argues, and Mr Grobler concedes, that there is no express term of Mr Grobler's contract that entitles Mr Grobler to be paid superannuation on accrued annual leave upon termination of employment.

63 In arguing the Commission should order that Stass Environmental pay Mr Grobler 9.25% superannuation on the 76 days' annual leave, Mr Grobler may be arguing that the Commission should accept that there is an implied term of his contract that entitles him to be paid 9.25% superannuation on accrued annual leave payable upon termination. I cannot accept that because it does not satisfy the five conditions in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, that the term sought to be implied must:

- a. be reasonable and equitable;
- b. be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- c. be so obvious that it goes without saying;
- d. be capable of clear expression; and
- e. not contradict any express terms of the contract.

64 I find the contract is effective without the implied term and therefore it is not necessary to imply the term to give business efficacy to the contract. It is also not so obvious that it goes without saying.

65 Mr Grobler's contract entitles him to be paid 9.25% superannuation on his gross base salary. Mr Grobler agrees that was paid.

66 I find Mr Grobler was not denied his contractual benefit to superannuation. Of course, that does not affect any statutory claim Mr Grobler may make in relation to superannuation that may be due on an amount paid in relation to his annual leave.

Does Stass Environmental owe Mr Grobler one week's notice?

67 At the hearing Mr Grobler conceded he did not have an entitlement to the one week's notice under his employment contract and abandoned that part of his claim.

Conclusion

68 As I state above, I find Stass Environmental denied Mr Grobler his contractual benefits to:

- a. 76 days' annual leave, which equates to \$16,559.64, being 76 x \$217.89; and
- b. 17.5% leave loading on 95 days' annual leave, which equates to \$3,622.42, being 95 x \$217.89 x 17.5%.

69 I will make an order that Stass Environmental pay Mr Grobler \$20,182.06, being \$16,559.64 + \$3,622.42.

2017 WAIRC 00382

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NOLAN PAUL GROBLER	APPLICANT
	-v- MR ANDRE STASIKOWSKI STASS ENVIRONMENTAL (ABN 73 976 537 552)	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 4 JULY 2017	
FILE NO/S	B 189 OF 2016	
CITATION NO.	2017 WAIRC 00382	

Result	Name of respondent amended
Representation	
Applicant	Mr N Grobler
Respondent	Mr A Stasikowski

Order

HAVING heard from Mr N Grobler on his own behalf and Mr A Stasikowski on behalf of the respondent;
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
THAT the name of the respondent be amended to ‘Stass Environmental Pty Ltd as trustee for the Stass Family Trust’.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2017 WAIRC 00383

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NOLAN PAUL GROBLER	APPLICANT
	-v- STASS ENVIRONMENTAL PTY LTD AS TRUSTEE FOR THE STASS FAMILY TRUST	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 4 JULY 2017	
FILE NO/S	B 189 OF 2016	
CITATION NO.	2017 WAIRC 00383	

Result	Application upheld in part
Representation	
Applicant	Mr N Grobler
Respondent	Mr A Stasikowski

Declaration and order

HAVING heard from Mr N Grobler on his own behalf and Mr A Stasikowski on behalf of the respondent;
NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) –

1. DECLARES that the respondent denied the applicant contractual benefits of annual leave and annual leave loading.
2. ORDERS that the respondent pay the applicant \$20,182.06 (gross), being the total of the denied contractual benefits, within 14 days of the date of this order.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2017 WAIRC 00440

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	MATTHEW RAYMOND HARP	
	-v-	
	S&S POWDER COATERS	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	TUESDAY, 11 JULY 2017	
FILE NO/S	U 16 OF 2017	
CITATION NO.	2017 WAIRC 00440	

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr B James

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on Friday, 7 April 2017, the Commission convened a conference for the purpose of scheduling and conciliating between the parties; and
 WHEREAS the matter was then listed for hearing of a preliminary matter on Monday, 26 June 2017; and
 WHEREAS on Sunday, 9 July 2017, the Commission received an email from the applicant indicating that he wished to withdraw his claim;
 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 00372

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	KRISHNAVENI PANISILVAM	
	-v-	
	EDUCATION DEPARTMENT OF WESTERN AUSTRALIA	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 28 JUNE 2017	
FILE NO/S	B 184 OF 2016	
CITATION NO.	2017 WAIRC 00372	

Result	Application dismissed
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Order

WHEREAS this is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS the Commission convened conferences on 23 January 2017 and 14 June 2017 for the purpose of conciliating between the parties; and
 WHEREAS at the conference on 14 June 2017, the Commission directed the applicant to inform the Commission by 22 June 2017 of any matters remaining unresolved in her claim that are within the Commission's jurisdiction, in particular:

1. the nature of the benefit claimed;
2. how the benefit claimed is a contractual benefit – that is, not a benefit arising under a policy, guideline, or award or industrial agreement; and
3. what she seeks to rectify that denied benefit.

WHEREAS the Commission also advised that if this information was not provided by 22 June 2017, the Commission may dismiss the application; and

WHEREAS on 20 June 2017 the applicant requested an extension of time in which to inform the Commission of those particulars; and

WHEREAS on 21 June 2017 the Commission advised it granted the applicant that an extension of time to close of business 27 June 2017 and noted that the same conditions as set out in the letter of 15 June 2017 still apply; and

WHEREAS the Commission has received no further correspondence from the applicant; and

WHEREAS in the circumstances of the applicant having been granted an extension in which to particularise any outstanding aspect of her claim and having failed to do so, the Commission is of the opinion that further proceedings are not necessary or desirable in the public interest.

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2017 WAIRC 00391

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PAUL WILLIAMS	APPLICANT
	-v-	RESPONDENT
	SOLAIRE LIFESTYLE PTY LTD	
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	TUESDAY, 11 JULY 2017	
FILE NO/S	B 65 OF 2017	
CITATION NO.	2017 WAIRC 00391	

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr K Towers

Order

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

WHEREAS on Friday, 16 June 2017, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference, the parties reached agreement in principle to settle the dispute, which included that the applicant would file a *Form 14 – Notice of withdrawal or discontinuance*; and

WHEREAS on Tuesday, 4 July 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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Ashley Duddington	Morgan and Mansour Family Trust and Morgan Family Trust ABN 31 378 377 138	U 56/2017	Senior Commissioner S J Kenner	Discontinued
Bradley John Healey	De Marte Welding Services	U 99/2016	Commissioner T Emmanuel	Discontinued
Brendan Farrell	WA Consolidated Grain Products	U 53/2017	Senior Commissioner S J Kenner	Discontinued

Parties		Number	Commissioner	Result
Buffy Lefroy	Rowena Puetollano (Chairperson), Marnja Jarndu Womens Refuge	U 49/2016	Commissioner T Emmanuel	Discontinued
Chloe Ellison	Montgomery Orange Pty Ltd T/A The Mapleson Family Trust	U 28/2017	Senior Commissioner S J Kenner	Discontinued
Damon Paul Lusk	The Roman Catholic Bishops of Western Australia through the delegated employing authority Catholic Education Office of Western Australia	U 197/2016	Commissioner D J Matthews	Discontinued
Daundasekara Mudiyansele Kithsiri Bandara Deegala	The Roman Catholic Bishops of Western Australia through the delegated employing authority Catholic Education Office of WA	U 199/2016	Commissioner D J Matthews	Discontinued
Dilukshana Asiri Godage	The Roman Catholic Bishops of Western Australia through the delegated employing authority Catholic Education Office of Western Australia	U 200/2016	Commissioner D J Matthews	Discontinued
Eugenia Barkopoulos	Woodlakes IGA (Gabriel)	U 102/2016	Commissioner T Emmanuel	Discontinued
Gurpreet Kaur Chauhan	Essence of India	B 158/2016	Commissioner D J Matthews	Discontinued
John DeJose	Nest Egg Guardians Inc	B 65/2016	Commissioner D J Matthews	Discontinued
Jordann Mangini	Graham John Smith and Robyn Gail Smith as Trustees for the Smith Family Trust trading as Chinta Designs	U 57/2017	Senior Commissioner S J Kenner	Discontinued
Katharina Preukschas	Roman Catholic Bishops of W.A. through the delegated employing authority of Catholic Education Office of W.A.	U 196/2016	Commissioner D J Matthews	Discontinued
Miss Lucy Burman	Mr Harsha Jayatilake for Western Healthcare Pty Ltd as Trustee for Mithila Family Trust, Rockingham GP	U 147/2016	Commissioner T Emmanuel	Discontinued
Ms Rachael Bufton	Dr Tony Leeflang Vet24	U 3/2017	Commissioner D J Matthews	Discontinued
Paul Jeffrey Allsop	Commissioner of Police	B 38/2017	Senior Commissioner S J Kenner	Discontinued
Reece Stephenson	James Nurmi Thorough (Company)	B 43/2017	Senior Commissioner S J Kenner	Consent
Tania Malkin	Yawoorrong Miriuwung Gajerrong Yirrgeb Noong Dawag Aboriginal Corporation t/as MG Corporation	B 214/2016	Commissioner D J Matthews	Discontinued
Ulysses Mozo Abe	The Roman Catholic Bishops of Western Australia through the delegated employing authority Catholic Education Western Australia	U 201/2016	Commissioner D J Matthews	Discontinued

CONFERENCE—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Independent Education Union of Western Australia, Union of Employees	Dr Tim McDonald Executive Director of Catholic Education	Matthews C	C 23/2016	09/11/2016	Dispute re alleged non compliance with the Termination of Employment, Introduction of Change and Redundancy General Order 2005 - 2005 WAIRC 01715	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Nursing Federation, Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act (1927) WA as the Hospitals formerly comprised in the Metropolitan Health Service Board	Emmanuel C	C 7/2016	16/05/2016	Dispute re leave entitlements	Discontinued
Western Australian Prison Officers Union Of Workers'	Department of Corrective Services	Matthews C	C 9/2017	N/A	Dispute re alleged failure to comply with c 173 of the Department of Corrective services Prison Officers' Enterprise Agreement 2016	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00353

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

MONDAY, 19 JUNE 2017

FILE NO.

APPL 4 OF 2017

CITATION NO.

2017 WAIRC 00353

Result Further Direction further amended

Representation (by written correspondence)

Appellant Mr M Georgiou

Respondent Mr N John, of counsel

Further amended Further Direction

WHEREAS on 9 May 2017, the Commission issued an Amended Further Direction ([2017] WAIRC 00255) granting a second further extension of time to 29 May 2017 for the appellant to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* (the IR Regulations); and

WHEREAS by email on 13 June 2017, the appellant requested an extension for a further four weeks from 1 August 2017 in which to comply with reg 62 of the IR Regulations; and

WHEREAS the appellant attached to that email a medical certificate dated 9 June 2017 which included Dr Bhardwaj stating he would be grateful if the appellant could be considered for an extension on his submission with the deadline date being moved to 1 August 2017; and

WHEREAS the respondent neither consents to, nor opposes, the request for an extension; and

WHEREAS the respondent noted that if the Commission decides to keep the appeal on foot and should the appellant not meaningfully engage with the process of his own appeal by any extended date, the Commission could, without further notice, return to the outcome decided at the Directions hearing convened on 8 June 2017 for a further extension referred to in its letter of the same date, ie that the appeal be deemed to be withdrawn; and

WHEREAS the Commission is of the opinion that granting the request is fair and reasonable in the circumstances.

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 Tuesday, 1 August 2017.

2. THAT if the appellant applies for any further extension, such application is to be made by no later than Tuesday, 1 August 2017 and it should be accompanied by evidence to substantiate the grounds of application.
3. THAT if the appellant does not comply with Direction 1, or apply for a further extension by Tuesday, 1 August 2017, the appeal will be deemed to be withdrawn without further notice.

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

On behalf of the Western Australian Industrial Relations Commission.

2017 WAIRC 00379

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ADIB ABDENNABI

APPELLANT

-v-

THE COMMISSIONER OF POLICE
WA POLICE

RESPONDENT**CORAM**

CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER D J MATTHEWS

DATE

FRIDAY, 30 JUNE 2017

FILE NO/S

APPL 42 OF 2016

CITATION NO.

2017 WAIRC 00379

Result

Appeal adjourned

Representation

(by written correspondence)

Appellant

Mr R Yates of counsel

Respondent

Mr N Barron of counsel

Order

WHEREAS this is an appeal pursuant to s 33P of the *Police Act 1892* (the Police Act); and

WHEREAS on 28 July 2016, the WAIRC issued an Order ([2016] WAIRC 00676); and

WHEREAS on 30 June 2017, the appellant requested an amendment to that Order to adjourn the appeal for a further period of six months; and

WHEREAS the request included written evidence of the respondent's consent to this request; and

WHEREAS having considered the provisions of s 33T(3) of the Police Act the Commission considers that it is in the interests of justice to grant an adjournment of the hearing of the appeal.

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

THAT Orders 1, 2, 3 and 4 of the Order issued on 28 July 2016 ([206] WAIRC 00676) be replaced with the following orders.

1. THAT the hearing of the appeal be adjourned until 10 January 2018.
2. THAT the appeal be listed for mention on 10 January 2018.
3. THAT compliance with reg 91 of the *Industrial Relations Commission Regulations 2005* by the Commissioner of Police need not occur until further order.
4. THAT either party may apply to vary the terms of this order

(Sgd.) P E SCOTT,
Chief Commissioner,

[L.S.]

On behalf of the Western Australian Industrial Relations Commission.

2017 WAIRC 00445

WAIKIKI PRIVATE HOSPITAL HEALTH SERVICES UNION (HSUWA) ENTERPRISE AGREEMENT 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

MR ANTHONY JAMES ROBINSON TRADING AS WAIKIKI PRIVATE HOSPITAL
 TRADES AND LABOUR COUNCIL OF WESTERN AUSTRALIA
 CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA (INC)
 AUSTRALIAN MINES AND METALS ASSOCIATION (INCORPORATED)
 HONOURABLE MINISTER FOR COMMERCE

RESPONDENTS**CORAM** COMMISSIONER T EMMANUEL**DATE** TUESDAY, 11 JULY 2017**FILE NO/S** AG 10 OF 2017**CITATION NO.** 2017 WAIRC 00445**Result** Name of respondent amended**Representation (by correspondence)****Applicant** Ms K Heal**Respondents** Ms N Taylor, Mr Anthony James Robinson trading as Waikiki Private Hospital*Order*

WHEREAS this is an application under s 41 of the *Industrial Relations Act 1979* (WA) to register an agreement as an industrial agreement;

AND WHEREAS on 30 June 2017 and 5 July 2017 the first respondent and applicant confirmed the proper respondent in this matter is the first respondent only;

AND HAVING heard from the parties, the Commission is satisfied that the proper respondent in this matter is the first respondent only and it is appropriate to remove the remaining respondents in this matter;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the respondents in this matter be removed except for the first respondent, Mr Anthony James Robinson trading as Waikiki Private Hospital.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2017 WAIRC 00361

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR MINH QUOC TRAN

APPLICANT

-v-

LIDO RESTAURANT

RESPONDENT**CORAM** CHIEF COMMISSIONER P E SCOTT**DATE** THURSDAY, 22 JUNE 2017**FILE NO/S** B 70 OF 2017**CITATION NO.** 2017 WAIRC 00361**Result** Respondent's name amended*Order*

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

WHEREAS on 21 June 2017, the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conference, the parties agreed that the respondent's name should be amended to reflect its true identity; and
 WHEREAS the Commission is of the opinion that it is appropriate to issue an order amending the respondent's name.
 NOW THEREFORE, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT the respondent's name be deleted and replaced with "Hoang Trang Family Trust and Phi and Mai Family Trust Trading as Lido Restaurant".

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.**2017 WAIRC 00446**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANTONIA WONG	APPLICANT
	-v- RON GABELISH	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 12 JULY 2017	
FILE NO	PSA 1 OF 2017	
CITATION NO.	2017 WAIRC 00446	

Result	Name of respondent amended
Representation (by correspondence)	
Applicant	Ms A Wong
Respondent	Mr J Ross (as agent)

Order

WHEREAS this is an application under s 80E(2)(a) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS the Public Service Arbitrator has heard from Ms A Wong on her own behalf and Mr J Ross (as agent) on behalf of the respondent about the proper name of the respondent;
 AND WHEREAS the Public Service Arbitrator is of the opinion that it is appropriate to amend the name of the respondent;
 NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the name of the respondent be amended to 'North Metropolitan Health Service'.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner,
Public Service Arbitrator.**2017 WAIRC 00447**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANTONIA WONG	APPLICANT
	-v- NORTH METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 12 JULY 2017	
FILE NO	PSA 1 OF 2017	
CITATION NO.	2017 WAIRC 00447	

Result Summons to witness set aside
Representation (by correspondence)
Applicant Ms A Wong
Respondent Mr J Ross (as agent)

Order

WHEREAS this is an application under s 80E(2)(a) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS on 15 June 2017, on the respondent's application, the Registrar issued a summons to Stephanie Teoh to give evidence and produce documents;
 AND WHEREAS on 11 July 2017 the respondent asked the Public Service Arbitrator to set aside the summons to Stephanie Teoh;
 NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the summons issued by the Registrar on 15 June 2017 to Stephanie Teoh be, and by this order is, set aside.

(Sgd.) T EMMANUEL,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

2017 WAIRC 00369

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DAVID DOUGLAS RIVETT	APPLICANT
	-v-	
	RICHMOND WELLBEING INC. ABN 36658041325	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 27 JUNE 2017	
FILE NO.	U 47 OF 2017, B 47 OF 2017	
CITATION NO.	2017 WAIRC 00369	

Result Direction issued
Representation
Applicant Mr D Hoffman (as agent)
Respondent Mr S Mare (as agent)

Direction

HAVING heard Mr D Hoffman (as agent) on behalf of the applicant and Mr S Mare (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the respondent file and serve an answer to the applicant's further particulars in B 47 of 2017 by 7 July 2017.
2. THAT the applicant file and serve outlines of evidence by 21 July 2017.
3. THAT the respondent file and serve outlines of evidence by 4 August 2017.
4. THAT the applicant file and serve an outline of written submissions by 18 August 2017.
5. THAT the respondent file and serve an outline of written submissions by 1 September 2017.
6. THAT applications U 47 of 2017 and B 47 of 2017 be heard together.
7. THAT these applications be listed for hearing after 15 September 2017.
8. THAT discovery be informal.
9. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

NOTICES—Appointments—

2017 WAIRC 00385

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

Sarah Jane Kemp

On and from 29 June 2017



Susan Bastian
REGISTRAR

3 July 2017

2017 WAIRC 00461

APPOINTMENT OF ACTING CHIEF EXECUTIVE OFFICER

Pursuant to Section 23 of the Public Sector Management Act 1994 I hereby appoint

SUSANE HUTCHINSON

as the acting Chief Executive Officer of the Department of the Registrar, WA Industrial Relations Commission with effect from 31 July – 11 August 2017 inclusive.

Pursuant to Section 93(1) of the Industrial Relations Act 1979 SUSANE HUTCHINSON will also be the REGISTRAR for the above period.



Susan Bastian

CHIEF EXECUTIVE OFFICER

18 July 2017

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 74/2016	N/A	N/A	Matthews C	Request for mediation	23/01/2017	Concluded
APPL 65/2016	N/A	N/A	Matthews C	Request for mediation	14/12/2016	Concluded
APPL 50/2016	N/A	N/A	Matthews C	Request for mediation	N/A	Concluded
APPL 12/2017	N/A	N/A	Matthews C	Request for mediation	N/A	Concluded
APPL 47/2016	N/A	N/A	Emmanuel C	Request for mediation	30/08/2016 17/10/2016	Concluded
APPL 40/2016	N/A	N/A	Emmanuel C	Request for mediation	20/07/2016 08/09/2016	Concluded

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 1/2016	Jarrad Parsons	Main Roads WA	Emmanuel C	Discontinued	2/11/2016

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2017 WAIRC 00346

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 MONDAY, 19 JUNE 2017
FILE NO/S APPL 66 OF 2016
CITATION NO. 2017 WAIRC 00346

Result Name of respondent amended

Representation (by correspondence)

Applicant Mr N Marsh (of counsel)

Respondent Mr J Carroll (of counsel)

Order

WHEREAS this is a referral to the Commission under the *Public Sector Management Act 1994* (WA);

AND WHEREAS by email on 16 June 2017 the parties agreed to the Commission amending the name of the respondent;

AND WHEREAS the Commission is of the opinion that it is appropriate to amend the name of the respondent;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to ‘Director General, Department of Education’.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2017 WAIRC 00351

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00351
CORAM : COMMISSIONER T EMMANUEL
HEARD : TUESDAY, 30 MAY 2017
DELIVERED : MONDAY, 19 JUNE 2017
FILE NO. : APPL 66 OF 2016
BETWEEN : MR LESLIE MAGYAR
Applicant
AND
DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
Respondent

CatchWords : Industrial Law (WA) - Teacher - Breach of discipline - Disciplinary action taken - Direction was a lawful order - Lawful order disobeyed - Penalty appropriate

Legislation : *Public Sector Management Act 1994* (WA) s 78(2)(b)(iv), s 80A, s 80, s 80(a), s 82A(3)(b)
School Education Act 1999 (WA) s 63

Result : *Application dismissed*

Representation:

Applicant : Mr N Marsh (of counsel)

Respondent : Ms R Hartley (of counsel)

Case referred to in reasons:

R v Darling Island Stevedoring & Lighterage Co Ltd (1938) 60 CLR 601

Reasons for Decision

- 1 Mr Magyar is a teacher at Kent Street Senior High School.
- 2 Mr Magyar has referred to the Commission under s 78(2)(b)(iv) of the *Public Sector Management Act 1994* (WA) (**PSM Act**) the Department of Education's decision to take disciplinary action after it found that Mr Magyar committed a breach of discipline when he disobeyed a direction.
- 3 The school Principal, Ms Ward, directed Mr Magyar not to alter his classroom without consulting his line manager. In February 2016, the Department put the allegation to Mr Magyar that in June 2015 he altered his classroom without consulting his line manager when he set up a standalone computer. Mr Magyar responded in writing to the allegation and declined to be interviewed about the matter. Following an investigation by the Standards and Integrity Directorate (**SID**), the Department found that Ms Ward's direction was a lawful order, Mr Magyar altered his classroom without consulting his line manager and Mr Magyar committed a breach of discipline under s 80(a) of the PSM Act. As a result, the Department took disciplinary action under s 82A(3)(b) of the PSM Act, reprimanding Mr Magyar and fining him one day's pay.
- 4 I must decide:
 1. Did Ms Ward 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?
- 5 At the hearing, Mr Magyar gave evidence. Ms Ward and Ms Pelham gave evidence for the Department. Ms Pelham is a senior investigator at SID.
- 6 The parties tendered agreed documents which included Ms Ward's letter directing Mr Magyar not to alter his classroom without consultation, the Department's letter of allegation, Mr Magyar's response to the allegation, emails between Mr Magyar and his line manager, the investigation report and the Department's letters to Mr Magyar about the outcome of the investigation.

Question 1 – Did Ms Ward direct Mr Magyar?

- 7 The parties agree that Ms Ward's letter to Mr Magyar dated 5 July 2014 directs him not to alter his classroom without 'full and proper consultation' with his line manager:

Dear Les

I understand from Michelle that you have collected school keys and a pass code as you intend to return to work next term. That is good to hear.

Brian has also forwarded to me an email where you have asked about the competency that you will need to know about to commence the term. As you know, Mark Nickels is also teaching a Cert II course and he will be able to assist you in your transition back into the school. As luck would have it, Gavin Chadwick will also be on site for the first two weeks of school as he is doing relief for the Aviation teachers who are on tour at that time. You may already be aware that I am also going on the Aviation tour so won't be able to welcome you back in person until week three. Gavin will be able to ensure that all necessary documentation is available for you to resume your teaching duties.

In the meantime, please note the following:

- You are most welcome to enlist the support of the gardeners to move any of your belongings from the office down near room 62 up to the office near room 1. I am mindful that your personal items were not relocated in your absence.
- Our RTO for the Cert II that you will be delivering was audited in term two. They passed their audit and we have a certificate stating that the facilities in room 1 comply with the RTO requirements as they presently stand.
- The curriculum for the entire Certificate II has been locked in with the RTO. Brian has this information and will be able to provide you with what needs to take place in second semester.
- Given the above information, **I direct you not to make any alterations to room 1 without full and proper consultation with your direct line management** – Lyn Diver and Brian Gould. It is imperative that this room maintains a standard of occupational health and safety. I am aware that there is no power source in the centre of the room at this stage. Do not reinstate the second computer screens currently located in your office or the stand alone hub until consultation with your line management has been undertaken and infrastructure, if required, has been put in place to ensure that any machines located there are placed safely and ensure that you are well positioned to maintain your duty of care.

You should have received this information in an email from me on 5 July 2014. I am forwarding a hard copy on letterhead so that you are fully aware of the importance to follow the directive provided above.

Yours faithfully

Mrs Kath Ward

Principal

(bold added)

- 8 Mr Magyar gave evidence that he received and read the letter. He agreed that he was directed not to make any alteration without full and proper consultation with his line manager. He said he understands the direction to mean that if he was going to bring back a second computer screen, reinstall the computer hub (a collection of computers) or make some major alteration that might affect the delivery of the Certificate II computer course, he would need permission.
- 9 Mr Magyar's construction of the direction is not reasonable. The direction is not to make any alterations to the classroom without consultation. It is not limited in the way Mr Magyar suggests.
- 10 I have no difficulty finding Ms Ward directed Mr Magyar not to alter his classroom without consulting his line manager.

Question 2 – Was the direction a lawful order?

- 11 Mr Magyar argues that the direction was unlawful because it was not authorised by s 63 of the *School Education Act 1999* (WA) (**SE Act**) or it was unreasonable as a blanket direction because that would be unworkable. He says teachers must be able to alter their classrooms. Various examples were put to the witnesses about major versus minor alterations. Mr Magyar says what he did, in bringing a standalone computer into his classroom, was no different to bringing a book into his classroom. He says the standalone computer was not connected to the school network and does not compromise the school.
- 12 The Department says that the direction was a lawful order because under the SE Act, a teacher's functions are subject to the direction and control of the Principal. Ms Ward can direct and control teachers at the school to ensure she fulfils her functions as Principal.
- 13 The Department rightly concedes that the direction must be reasonable as well as lawful and says that it was.
- 14 Mr Magyar was due to return to the school in Term 3 of 2014. While Mr Magyar was away from the school, from November 2013 until September 2014, his classroom was refitted with new computers and equipment. The computers were connected to the school network and software for the Certificate II computer course was downloaded onto the computers. The school received a certificate confirming that the Registered Training Organisation (RTO) for the Certificate II computer course had passed its audit in Term 2 of 2014 and the facilities in Mr Magyar's classroom complied with the RTO's requirements. Mr Magyar's classroom mirrored the classroom next to it.
- 15 Ms Ward gave evidence that she was concerned Mr Magyar would alter his classroom and that would mean it no longer complied with the RTO's requirements. She found Mr Magyar challenging to manage and the school had dealt with 'an awful lot of situations' relating to Mr Magyar. She said that the issues have never been personal and she and Mr Magyar have a cordial relationship.
- 16 Given the importance of keeping Mr Magyar's classroom and its facilities unchanged, she gave Mr Magyar the direction in writing. She said she took the time to explain in her letter why she was giving Mr Magyar the direction. In cross-examination, Ms Ward said that Mr Magyar had previously told her that he preferred a clear and formal directive to know exactly what was expected of him, so she told him that she would give him formal directives.
- 17 Ms Ward and Mr Magyar both gave evidence about an incident in November 2013. Ms Ward said, and Mr Magyar does not dispute, that in late 2012 she approved Mr Magyar establishing a standalone hub with the clear direction that the standalone hub could never be connected to the network or have internet access. Ms Ward gave evidence that Mr Magyar admitted in a meeting in Term 4 of 2013 that 'a very clever year 12 student had given that computer access to the internet'.
- 18 Mr Magyar agreed twice in cross-examination that he had admitted at the meeting that 'a very clever year 12 student had given the computer access to the internet'. He then said he could not recall the exact words he had said at the meeting. He denied he made a concession to that effect and said there was no access to the internet by a very clever year 12 student. In re-examination Mr Magyar said he connected the standalone hub to the internet using his mobile phone and downloaded software with a student. He said he could not recall what he said at the meeting where these matters were discussed, that he had given incoherent and incomplete answers which were 'not expressed very well' at the meeting, but he disputes Ms Ward's account of what was said at the meeting.
- 19 I prefer Ms Ward's evidence to the extent of any conflict between their evidence. This is because Ms Ward's evidence was consistent and undisturbed whereas Mr Magyar contradicted himself by disputing Ms Ward's account of what he had said even though he agreed twice in cross-examination that he had said it. Mr Magyar seemed to focus on the student not having accessed the internet, because Mr Magyar had accessed the internet and then disconnected it while the student was there. Mr Magyar did not seem to appreciate that by his own admission he disobeyed the clear direction he was given. He had been directed not to connect the standalone hub to the internet and he did anyway.
- 20 Ms Ward has been employed by the Department for nearly 30 years and has been a Principal for 12 years. I accept her evidence that she found Mr Magyar difficult to manage, that he had not followed the clear direction she had given him in late 2012 and that concerned her. I accept that those circumstances led Ms Ward to give Mr Magyar the direction in writing on 5 July 2014.
- 21 Employees have a common law obligation to obey lawful and reasonable orders: *R v Darling Island Stevedoring & Lighterage Co Ltd* (1938) 60 CLR 601, 621 - 622. The learned authors of *The Modern Contract of Employment* (2012), Ian Neil and David Chin, state:

What is reasonable is essentially a question of fact and balance and will be controlled by considerations arising from 'the nature of the employment, the established usages affecting it, the common practices which may exist and the general provisions of the instrument [such as an award or statute] governing the relationship'. For example, directions to: travel to a zone of danger, where there was no immediate threat of violence or disease, prevent an employee from wearing a caftan and thongs to work, remove body piercing, not display pro-union or anti-union stickers to preserve workplace harmony, prevent the repetition of privately engaged in sexual harassment of a co-employee, attend a medical examination to confirm an employee's fitness, and provide a urine sample for drug testing were found to have been reasonable. On the other side, examples of directions that were found to have been unreasonable include requirements to not wear the badge of a union and to not perform work for an extended or indefinite period [6.120]. (footnotes omitted)

- 22 In circumstances where the classroom had been refitted and audited while Mr Magyar was away from school, and the school had a certificate stating the facilities in Mr Magyar's classroom complied with the RTO's requirements as they presently stood and Ms Ward wanted the two computer classrooms to mirror one another, it was reasonable of Ms Ward to direct Mr Magyar not to alter his classroom without consulting his line manager.
- 23 That Ms Ward did not direct the other computing teacher in the same way does not assist Mr Magyar. I accept Ms Ward's evidence that the direction was not necessary for the other computing teacher and I consider her approach to be reasonable in the circumstances.
- 24 Ms Ward was well within her rights to give the direction. I find Ms Ward's direction was lawful under the SE Act and at common law. I find the direction was a lawful and reasonable order.

Question 3 - Did Mr Magyar disobey the lawful order?

- 25 The parties agree, and Mr Magyar gave evidence, that he set up a standalone computer in his classroom.
- 26 The Department says Mr Magyar disobeyed the lawful order when he set up the standalone computer in the classroom.
- 27 Mr Magyar says that setting up the standalone computer was a minor adjustment and one he made so that he could engage a student by doing advanced computing with him. In cross-examination Mr Magyar agreed he altered the classroom but said that the direction only applied if he was teaching the Certificate II computer course, which he was not at the relevant time.
- 28 Mr Magyar says the Department's construction of the direction is incorrect. The direction cannot be a blanket direction not to alter his classroom without consulting his line manager. Mr Magyar argues that the direction is limited to matters that impact on the curriculum, certification or occupational health and safety (OHS). Establishing a standalone computer was a minor, not major, alteration. It did not impact on the Certificate II computer course, which he was not teaching. The standalone computer was not connected to the school network so students could not access the school's file server. He therefore did not disobey the direction.
- 29 Mr Magyar gave evidence that the direction is limited to not reinstating the second computer screen or standalone computer hub, in order to keep the classroom in its current state for the Certificate II computer course and to avoid OHS issues. He says he complied with the direction because he did not reinstate the second computer screen or standalone computer hub.
- 30 As I state at [9], I disagree with Mr Magyar's construction of the direction. I reject his argument that because he did not reinstate the second computer screen or standalone computer hub and his actions did not impact on the curriculum, certification or OHS, he did not breach the direction. Ms Ward's direction was not to alter his classroom without consulting his line manager. When Mr Magyar set up a standalone computer he altered his classroom.
- 31 To the extent that Mr Magyar argues he consulted his line manager by exchanging emails with her, I find that was not consultation.
- 32 The emails show the line manager asking Mr Magyar why he had set up the standalone computer and how it fit into his curriculum and assessment schedule. Mr Magyar did not consult with his line manager before altering his classroom. At best, he explained why he did it, after he had done it, when his line manager asked him about it.
- 33 I find Mr Magyar disobeyed the lawful order.

Question 4 – Should there have been a lesser penalty or no penalty?

- 34 Ms Pelham gave evidence about the process of the investigation and how the Department decides on a penalty after a breach has been established.
- 35 I accept Ms Pelham's evidence, which was not disturbed in any material way, and I find that the Department conducted a thorough, fair investigation process. I find the Department correctly found that Mr Magyar disobeyed a lawful order, therefore committing a breach of discipline under s 80 of the PSM Act.
- 36 Mr Magyar complained that the allegation was only brought to his attention some eight months after the school referred the matter to SID. That does seem a long time. However, it does not negate the fact that Mr Magyar disobeyed a lawful order.
- 37 Mr Magyar admitted in evidence that he set up a standalone computer. Mr Magyar says a standalone computer can cause no harm because it is just a computer sitting against the wall, turned off for most of the time. He says it is no different to bringing a book into the classroom. I disagree. I accept the evidence of Ms Ward and Ms Pelham and I find that a computer that operates outside the Department's standard operating environment may create a risk to the school or its students.
- 38 It was not for Mr Magyar to decide whether it was important for him to obey the lawful order.
- 39 I cannot accept Mr Magyar's submission that no penalty or just a reprimand should have been imposed. Disobeying a lawful order is a serious matter and it is appropriate that a penalty be imposed.
- 40 Under s 82A(3)(b) of the PSM Act, the Department may take disciplinary action where it finds that an employee has committed a breach of discipline. Disciplinary action in Division 3 of the PSM Act means:

80A. Terms used

In this Division —

disciplinary action, in relation to a breach of discipline by an employee, means any one or more of the following —

- (a) a reprimand;
- (b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;

- (c) transferring the employee to another public sector body with the consent of the employing authority of that public sector body;
 - (d) if the employee is not a chief executive officer or chief employee, transferring the employee to another office, post or position in the public sector body in which the employee is employed;
 - (e) reduction in the monetary remuneration of the employee;
 - (f) reduction in the level of classification of the employee;
 - (g) dismissal;
- 41 I accept that the penalty of a reprimand and a fine of one day's pay was at the very low end of the scale considering the range of disciplinary action available to the Department and the circumstances of this matter.
- 42 I consider that the Department imposed a rather lenient penalty. In circumstances where the Department did not argue that I should increase the penalty, I will not make an order increasing the penalty.

Does the Agreement invalidate the Department's findings?

- 43 Mr Magyar's written submissions did not address the questions I must decide and they raise just one argument. The *School Education Act Employees' (Teachers and Administrators) General Agreement 2011 (Agreement)* and the *Teachers (Public Sector, Primary and Secondary) Award 1993* provides for a grievance procedure. Because the proper grievance procedure was not followed, the Department's finding that Mr Magyar disobeyed a lawful order is invalid. This argument was not raised at the hearing.
- 44 The Agreement Mr Magyar refers to was replaced by the *School Education Act Employees' (Teachers and Administrators) General Agreement 2014* on 20 April 2015. The grievance provisions are substantially the same. As Mr Magyar says, under the Agreement where an employee has a grievance with his or her Principal or line manager, the employee must notify him or her and if the matter is not resolved informally, a more formal process can follow. But that submission is not relevant to this matter. The evidence does not show that Mr Magyar started a grievance process. Even if he did, that does not prevent the Department from investigating an alleged breach of discipline or from making findings in relation to the alleged breach of discipline. Conduct the subject of a disciplinary process does not need to be dealt with as a grievance.
- 45 The Agreement does not invalidate the Department's findings.

Conclusion

- 46 Mr Magyar's reprimand and fine of one day's pay stand.
- 47 Mr Magyar's application is dismissed.

2017 WAIRC 00352

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR LESLIE MAGYAR

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE MONDAY, 19 JUNE 2017
FILE NO/S APPL 66 OF 2016
CITATION NO. 2017 WAIRC 00352

Result Application dismissed
Representation
Applicant Mr N Marsh (of counsel)
Respondent Ms R Hartley (of counsel)

Order

HAVING heard Mr N Marsh (of counsel) on behalf of the applicant and Ms R Hartley (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application be, and by this order is, dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
 Commissioner.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2017 WAIRC 00370

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2017 WAIRC 00370
CORAM : CHIEF COMMISSIONER P E SCOTT
HEARD : TUESDAY, 6 JUNE 2017
DELIVERED : WEDNESDAY, 28 JUNE 2017
FILE NO. : RFT 29 OF 2015
BETWEEN : STEVE BURKE TRANSPORT PTY LTD
 Applicant
 AND
 TOLL TRANSPORT PTY LTD T/AS TOLL IPEC
 Respondent

CatchWords : Owner-driver contract dispute - Calculation of loss and damage for breach of contract - Identity of party to proceedings - Legal costs - Application for costs

Legislation : *Industrial Relations Act 1979* (WA) s 26, s 27, s 27(1), s 27(1)(a), s 27(1)(b), s 27(1)(c)
Owner-Drivers (Contracts and Disputes) Act 2007 (WA) s 4(b), s 43, s 43(1)(j)
Corporations Act 2001 (Cth) s 131(1)

Result : Respondent ordered to pay applicant

Representation:

Counsel:

Applicant : Mr W Spyker
Respondent : Mr A Sharpe

Solicitors:

Applicant : Spyker Legal
Respondent : K & L Gates

Reasons for Decision

- 1 In Reasons for Decision issued on 10 February 2017 ([2017] WAIRC 00069), I found that Toll Transport Pty Ltd trading as Toll IPEC was obliged to pay Steve Burke Transport Pty Ltd that amount which represents the unexpired portion of the contract, from 11 September 2015 to the last working day of June 2016.
- 2 The parties were to confer with a view to identifying and agreeing the amount due. The parties have been unable to agree.

Identity of the applicant and parties to proceedings

- 3 The resolution of this claim has been complicated by the issue of the identity of the applicant and how this affects the calculation of loss.
- 4 In my Reasons for Decision of 10 February 2017, I made the following observations:
 - 30 The MAA (Metropolitan Agent Agreement) sets out that it is an agreement between Toll IPEC and Steve Burke. The dispute that was referred to the Tribunal in 2013 had as its applicant the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (the TWU). The Deed of Release in respect of the 2013 dispute is between Toll Transport Pty Ltd t/as Toll IPEC and Stephen Burke. The parties to that dispute are referred to in the Deed of Release as being Toll IPEC and Stephen Burke. The background to the Deed describes Mr Burke as being a contractor. (I also note in passing that in the 2013 referral, both the TWU in its *Notice of referral* and Toll in its *Notice of answer* referred to the applicant as being Mr Burke when it was the TWU.)
 - 31 Neither party raised the issue that this application is made by Steve Burke Transport Pty Ltd not by Mr Steve Burke personally, who is the party to the MAA and the Deed.
 - 32 As neither party has raised the issue of the separation of the corporate identity of Steve Burke Transport Pty Ltd and Stephen Burke it is my intention to treat Mr Burke and Steve Burke Transport Pty Ltd as one entity, albeit that, strictly speaking, they are not. I think in the circumstances, it would be contrary to the intention of the parties in the way in which they have argued the matter and contrary to equity and good conscience to make that formal separation.

- 33 Therefore, whilst I refer in these reasons to both Mr Burke, who is the sole director of Steve Burke Transport, and to him as a natural person, it should not be thought that there is any significance in the distinction between those two for the purposes of this matter.
- 5 On reading the outlines of submissions of the parties, I noted that the issue of the income received by Steve Burke Transport Pty Ltd and the distribution of that income, including to Mr Burke personally, was the primary area of dispute between the parties.
- 6 Therefore, I raised with the parties, through my Associate:
- (1) Whether the Tribunal should continue to treat the matter of quantum of damages in the same way – that is, to treat Steve Burke Transport Pty Ltd and Stephen Burke as one entity, as that was the way the parties treated the situation in the past and had argued the matter before me; and
 - (2) If so, should Mr Steve Burke be joined as a party.
- 7 The applicant notes that in a Memorandum dated 15 June 2011, from Tony Consedine of Toll to Steve Burke, it is clear that the intention was for Toll to enter into the Metropolitan Agent Agreement (the MAA) with a corporate entity soon to be set up by Mr Burke. Mr Burke established Steve Burke Transport Pty Ltd on 22 June 2011 and provided Toll with the details of the company and its ABN. In spite of this, the MAA, dated 30 June 2011, was expressed as being between Toll and Steve Burke.
- 8 All invoices issued to Toll were on the letterhead of Steve Burke Transport, and Toll made payments to the corporate entity. The termination letter was addressed to the corporate entity.
- 9 The applicant also refers to s 131(1) of the *Corporations Act 2001* (Cth) which provides that:
- If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:
- (a) within the time agreed to by the parties to the contract; or
 - (b) if there is no agreed time — within a reasonable time after the contract is entered into.
- 10 The applicant says that given the circumstances and the timing of the signing of the MAA, the company being set up and ratified, Steve Burke Transport Pty Ltd became bound by the contract and entitled to the benefit of the MAA.
- 11 The applicant notes my Reasons for Decision and that only after that decision does the respondent say that it is necessary to depart from the approach taken in the matter to the point of its Outline of Submission on Quantum filed on 23 May 2017 by seeking to distinguish between Mr Burke personally and the company for the purposes of the assessment of damages.
- 12 The applicant says Mr Burke is the sole director of the company and is reliant on the company as his sole source of income. This is confirmed in the letter from the accountants, HTC Partners, dated 16 May 2017, that the company's benefit flowed through to Mr Burke via various mechanisms including dividends, Director's Fees and Employee Benefit Expenses.
- 13 The respondent says that the Tribunal should not continue to treat Mr Burke and Steve Burke Transport Pty Ltd as one entity when considering quantum, and that Mr Burke should be joined as a party.
- 14 The respondent says that as Mr Burke personally was the party to the MAA, he is the proper applicant in these proceedings and the applicant's case appears to claim Mr Burke's loss rather than that of the company. There is said to be a three-fold difference in the quantum actually claimed and that which might be expected if the claim was made by reference to the loss of Steve Burke Transport Pty Ltd. Therefore, the respondent says the Tribunal should acknowledge the legal distinction between Mr Burke and Steve Burke Transport Pty Ltd for the purposes of the hearing on quantum, and he should be joined to the proceedings.
- 15 The respondent also notes that for Mr Burke to be taken to have entered into the MAA on behalf of the company before the company was registered, the *Corporations Act 2001* (Cth) s 131(1) requires that the company ratify the contract within a reasonable time and it did not do so.
- 16 Having considered the parties' arguments, I have decided that what must be considered is the company's situation, not Mr Burke's, and I have decided against joining Mr Burke to the proceedings. This is for two reasons.
- 17 Firstly, I noted in my reasons for decision at [32] that neither party had raised the issue of the separation of the corporate identity and that I intended to treat Mr Burke and the company as the one entity, albeit that strictly speaking they are not. To continue to do so for the purposes of determining loss risks double-counting. It would also be contrary to the doctrine of privity of contract (*Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] UKHL 1; [1915] AC 847; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] HCA 8; (1956) 95 CLR 43 at 66, 67 and 80). There are no circumstances in this case to justify varying from that approach.
- 18 I have decided against joining Mr Burke to proceedings as it is not necessary and only complicates matters. The applicant is the company, not Mr Burke.
- 19 Secondly, Toll intended that the company would be the party to the contract, the company performed the work and invoiced Toll. Toll paid the company. It is disingenuous to now rely on this technicality of the lack of ratification of Mr Burke entering the contract on behalf of the company when Toll's own conduct recognised that the contract was with the company.

The law regarding loss and damage

- 20 According to s 43(1)(j) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act), the Full Bench of the Commission deals with appeals against decisions of the Tribunal. In *Shacam Transport Pty Ltd v Damian Cole Pty Ltd* [2014] WAIRC 01294; (2014) 94 WAIG 1835, it set out the principles for loss and damage flowing from a breach of contract at [22].

- 22 The relevant legal principles governing an assessment of damages were summarised by Buss JA in *Australian Goldfields NL (In liq) v North Australian Diamonds NL* [2009] WASCA 98; (2009) 40 WAR 191. At [276] his Honour observed:

The general contractual principle governing the measure of damages is that the innocent party suing for breach of contract is to be placed in the same position, so far as money can do it, as if the contract had been performed: see *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] per French CJ, Gummow, Heydon, Crennan and Kiefel JJ; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J; *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 237 per Gibbs CJ; *Wenham v Ella* (1972) 127 CLR 454 at 471 per Gibbs J. The innocent party is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss): see *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11 - 12 per Mason, Wilson and Dawson JJ. The innocent party should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss suffered by reason of the breach of contract. Ordinarily, this involves a comparison between the position in which the innocent party would have been if the breach of contract had not occurred and what, relevantly, represents the position in which the innocent party is in after the occurrence of the breach: see *Amann Aviation* (at 116) per Deane J.

- 23 Thus, the Tribunal was required to assess the loss or losses flowing from the respondent's breach of contract, which when assessed should aim to place the innocent party (in this matter the appellant) in the position it would have been if six weeks' notice had been given by the respondent to terminate the owner-driver contract.

...

- 29 For these reasons, we are of the opinion that ground 1 of the appeal has been made out. Whilst in light of this finding it is not necessary to consider ground 2 of the appeal, we would make the following observations:

- (a) We do not agree that there was no evidence before the Tribunal upon which an assessment of a profit margin could be assessed. An assessment of a head of damage need not be calculated in a way that is precise. In *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 Toohey J observed (138):

[T]he quantification of damages is 'in many cases no more than an approximation lacking in mathematical or economic accuracy or sufficiency' (*Pennant Hills Restaurants* (1981), 145 C.L.R., at p. 636) or even that the assessment of damages 'does sometimes, of necessity, involve what is guess work rather than estimation' (*Jones v Schiffmann* (1971), 124 C.L.R. 303, at p. 308). It is now almost a century since Bowen L.J. said in *Ratcliffe v. Evans* ([1892] 2 Q.B. 524, at pp. 532-533):

'As much certainty and particularity must be insisted on ... in ... proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'

- (b) The Tribunal had before it a statement of income paid by the respondent and an estimate of expenses incurred by the appellant. The estimate was prepared by the respondent's financial controller (exhibit R3). It also had before it exhibit B which was a profit and loss statement prepared on behalf of the appellant showing income received and actual expenses incurred by the appellant. As exhibit R3 was an estimate and exhibit B was a statement of actual expenses, less weight should have been given by the Tribunal to the calculations contained in exhibit R3 than exhibit B.
- (c) In any event, exhibit R3 does not support the respondent's argument that an amount of \$2,000 a week should be deducted from the measure of damages. To do so would, when the expenses set out in exhibit R3 are analysed, result in a double counting of some variable outgoings. In particular, the amount allocated to fuel and repairs and tyres was \$130,104 per annum or approximately \$2,502 per week. Also, exhibit R3 does not take account of other expenses which are accounted for in exhibit B. These include:
- (i) variable expenses for the cost of payments to sub-contract drivers, travel and accommodation expenses; and
- (ii) numerous other fixed costs such as bank fees, bookkeeping fees, company costs, credit fees, insurance, loan expenses and stamp duty.
- (d) As exhibit B contains a comprehensive list of expenses incurred by the appellant and is not merely an estimate of some expenses, if an amount representing the profit generated from the engagement of the appellant's prime mover should have been deducted from the quantum of damages, then the Tribunal should have assessed that amount by regard to a gross profit of \$38,268.80 for nine months reflected in exhibit B, which is approximately \$1,000 per week.

- 21 The applicant says the loss suffered by reason of Toll's breach is the income earned each year and disbursed to Mr Burke either as Director's Fees or Employee Benefit Expenses and profits as follows:

Year	Director's Fees	Employee Benefits Expenses	(Loss) Profit for the Year	Total
2012	-	\$152,600	\$120,497	\$273,097
2013	-	\$188,570	\$95,259	\$283,829
2014	\$150,000	\$216,286	(\$107,205)	\$259,063
2015	\$120,000	\$63,320	\$72,374	\$255,694
2016	\$100,000	\$4,875	(\$2,954)	\$101,921

Applicant's submissions, 18 April 2017 [22]

- 22 The average for the years 2012 to 2015 is a figure of \$267,920. The amount for the year 2016 was \$101,921. Therefore, the loss is simply the deduction of the amount from the average each year, being \$165,999. The applicant says that this is the amount which would, but for the respondent's breach of contract, have been paid to Steve Burke as either Director's Fees or Employee Benefit Expenses, or retained as profit, and this is the amount he seeks.
- 23 The applicant also says that Mr Burke was an owner-driver for the purposes of s 4(b) of the *Owner-Drivers (Contracts and Disputes) Act 2007* and the sole director of the company, and therefore the two items of Director's Fees or Employee Benefit Expenses are alternative and standard accounting methods of disbursing the profits, or what would have contributed to the profits, of the business.
- 24 The same figure is arrived at by an alternative method of calculation. This is the total income less expenses for accountancy, depreciation, finance costs, but not Director's Fees or Employee Benefit Expenses. The applicant says this is the method used in *Shacam Transport Pty Ltd v Damian Cole Pty Ltd* [2014] WAIRC 01294. It says that by deducting the variable expenses from the overall income, the result is the quantification of the net income that falls into the hands of the operator (in this case, Mr Burke). Either methodology is said to produce the same loss figure.
- 25 The applicant says that treating the company's loss as Mr Burke's loss and treating them as one entity for the purpose of assessing quantum of loss is consistent with the requirements of s 27(1)(a) and (b) of the *Industrial Relations Act 1979* (the IR Act). To do otherwise is to rely on legal technicalities.
- 26 The respondent says it is not valid to include those amounts that flowed through to Mr Burke, such as Employee Benefit Expenses. This is reinforced by the fact that the wages for Mr Burke's partner, Ms Curlewis, were included in that category, and cannot be seen as other than a normal business expense to be deducted for the purpose of calculating the loss.
- 27 It also says that the two years during which the Blackwoods work was part of the company's work, which was compensated for by the settlement, ought to be excluded for the purpose of averaging the company's income.
- 28 It also objects to the inclusion of an expense for legal costs relating to this matter.

Calculations

- 29 For the purpose of calculating the loss arising from the breach, and to put the company in the position it would have been in but for the breach, I conclude that I ought to look at what the real loss was, not at how the various aspects of the accounts and financial reports of the company are categorised.
- 30 The applicant's tax and financial accounts are divided into various groupings. In some years, the accounts provided a Director's Fee and some years it did not. Some years it provided Employee Benefits Expenses as significantly higher than in other years. The way these were categorised affected the profit or loss for the year. In 2012, there were no Director's Fees, Employee Benefits Expenses were \$152,600 and a profit of \$120,497, totalling \$273,097 income derived through the contract. In 2013, there were also no Director's Fees but there were Employee Benefit Expenses of \$188,570, and a profit remaining of \$95,259, totalling \$283,829. In 2014, the Director's Fees were \$150,000 and the Employee Benefit Expenses were \$216,286, a loss of \$107,205, leaving a total of \$259,063. In 2015, \$120,000 was paid as Director's Fees, \$63,320 as Employee Benefits Expenses, a profit of \$72,374 and a total of \$255,694. In 2016, \$100,000 was paid in Director's Fees and \$4,875 in Employee Benefits Expenses and a resultant loss of \$2,954, totalling \$101,921.
- 31 It seems to me that the method of apportionment amongst those items meant that Director's Fees, Employee Benefit Expenses and profit were combined in different ways each year. Where either Director's Fees or Employee Benefits Expenses or both are high, the profit or loss is affected significantly. As this is a company with a sole director who (apart from the sole director's partner, Ms Curlewis) was the only person working in the business, the Director's Fees, the Employee Benefits Expenses and the Profits all come from the same pool of funds. They all come from the amounts paid to the company by Toll, as Toll was the only source of income for the business.
- 32 If no Director's Fees were paid, or no Employee Benefits Expenses paid, then the profit would be around the same amount rather than fluctuating from year to year. Therefore, I intend to treat Director's Fees, Employee Benefit Expenses and profits as one figure. These figures take account of the total income and the fixed and variable expenses of running the business. I deal with Ms Curlewis's wages later.
- 33 The alternative method of calculation of loss advocated by the applicant is valid, too. That is, to deduct from the total income received from Toll, the variable expenses of such items as accounting, depreciation, finance costs, office expenses and truck expenses. The result is the same.

Years to be averaged

- 34 I would remove the 2012 and 2013 figures from the calculations of loss because those years include the Blackwoods run (a significant proportion of the run) which was removed from the work undertaken by the company for Toll. There was a settlement after its removal. Therefore, 2014 and 2015 are to be used for the average income.

Ms Curlewis's wages

35 I would also remove the amount paid to Ms Curlewis in wages and superannuation of \$44,813 from the Employee Benefits Expenses for the financial year 2015. I reject the applicant's argument that because Ms Curlewis was Mr Burke's partner at that time, that this is a benefit which flowed through to him. This amount did not form part of those three components I have found would, but for the accounting methodology, have formed the profit.

36 Therefore, for that year, the Employee Benefits Expenses ought to be reduced by that amount.

37 In any event, the issue is not resolved by what flowed through to Mr Burke. It is the total of the loss to the company that is relevant.

Legal costs

38 The legal costs for 2016 of \$8,350 are those incurred by the applicant in pursuing this matter and were treated as an expense. If this were to be allowed to remain in the calculation, it would have the effect of enabling the applicant to recover legal costs which s 27(1) of the IR Act prohibits the Tribunal from ordering. I note in passing that s 27(1)(c) prohibits the Tribunal from ordering the payment of costs 'for the services of any legal practitioner'. There is merely a one line expense in the accounts so it is difficult to know whether all of the expense relates to this matter and all of it relates to the legal practitioners' services as opposed to other associated costs. In any event, the applicant did not seriously challenge its removal.

Total loss

39 Therefore, the calculation of the real or underlying loss to the applicant is caused by the breach:

- The income received less expenses.
- The expenses include variable expenses, for example, accounting, depreciation, finance, office and truck expenses, Ms Curlewis's wages and the legal costs, but does not include the Employee Benefit Expenses or Director's Fees.
- The calculation is to be an average of the 2014 and 2015 figures.
- The loss is then the difference between those figures as an average compared with the 2016 figures.

Total loss for 2014		\$259,063
Loss for 2015	\$255,694	
less	-\$44,813	
Total loss for 2015		\$210,881
Total loss for 2014 – 2015		\$469,944

40 Therefore, the average for those two years is:

$$\frac{\$469,944}{2} = \$234,972$$

41 The income for 2016 was \$101,921. The legal costs of \$8,350 which were deducted need to be added back in. Therefore, the income figure for 2016 to be used for the purpose of calculating the loss is \$110,271. The difference between the average of 2014 and 2015, and 2016 is \$124,701. This constitutes the loss suffered by the company as a result of the respondent's breach.

Costs

42 The applicant says that notwithstanding the provisions of s 27(1)(c) of the IR Act, it is appropriate to order that the respondent pay the applicant's costs in the circumstances. He refers to authorities for dealing with matters which are frivolous or vexatious as justifying such orders.

43 The applicant says that the respondent originally sought documents for the purpose of dealing with the question of costs to demonstrate the applicant's overheads and operating costs, despite those matters being set out in the applicant's profit and loss statements. However, at conciliation, the respondent's solicitors said they no longer required such documents.

44 The applicant asks that the Tribunal exercise its discretion and depart from what it describes as 'the ordinary rule', and require the respondent to pay the applicant's legal costs in the proceedings.

45 At the hearing, the applicant appeared to concede that the Tribunal cannot order the respondent to pay the applicant's legal costs because of the provision of s 27(1)(c) of the IR Act. However, he seeks an allowance for witness costs.

46 According to s 43 of the OD Act, s 27 of the IR Act applies to the exercise of the jurisdiction of the Tribunal. Section 27(1)(c) of the IR Act provides:

Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

...

- (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent;

...

47 The applicant refers to the 'ordinary rule' in respect of costs. However, the requirements of s 27(1)(c) do not constitute an ordinary rule such that the Tribunal can depart from it and exercise discretion to do otherwise. The provisions of s 27(1)(c) are

quite clear that the Commission may order costs and expenses but not the costs for the services of any legal practitioner or agent. Therefore, there is no power for the Tribunal to make the order for legal costs sought by the applicant.

- 48 As to witness costs, in *Denise Brailey v Mendex Pty Ltd trading as Mair and Co Maylands* (1993) 73 WAIG 27 the Full Bench noted that the Commission's consideration of that issue arises under s 26 of the IR Act, meaning that equity, good conscience and the substantial merits of the case are to be considered. It said 'costs ought not to be awarded, except in extreme cases'. The test in this jurisdiction is not one of frivolous or vexatious pursuit or defence of a claim.
- 49 This is not a case that meets the 'extreme' case test but one which arose due to some confusion about the applicant's calculation of loss and the applicant calling a witness to explain the calculation on which the claim was based.
- 50 The application for costs must be dismissed.
- 51 A minute of proposed order shall now issue.

2017 WAIRC 00380

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

STEVE BURKE TRANSPORT PTY LTD

APPLICANT

-v-

TOLL TRANSPORT PTY LTD T/AS TOLL IPEC

RESPONDENT

CORAM

CHIEF COMMISSIONER P E SCOTT

DATE

MONDAY, 3 JULY 2017

FILE NO/S

RFT 29 OF 2015

CITATION NO.

2017 WAIRC 00380

Result

Respondent ordered to pay applicant

Order

HAVING HEARD Mr W Spyker of counsel on behalf of the applicant and Mr A Sharpe of counsel on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Owner-Driver (Contracts and Disputes) Act 2007* and the *Industrial Relations Act 1979*, hereby orders:

1. THAT the respondent shall pay to the applicant the amount of \$124,701, being the loss caused by the breach.
2. THAT such amount is to be paid within 21 days of the date of this order.
3. THAT the application be and is otherwise, hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.