



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 8

WEDNESDAY 22 NOVEMBER, 2017

Vol. 97—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

97 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2017 WAIRC 00866

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 93/2016 GIVEN ON 26 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2017 WAIRC 00866
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD	:	TUESDAY, 22 AUGUST 2017
DELIVERED	:	FRIDAY, 13 OCTOBER 2017
FILE NO.	:	FBA 10 OF 2017
BETWEEN	:	BARRY LANDWEHR Appellant AND SHARYN O'NEILL DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Chief Commissioner P E Scott
Citation	:	[2017] WAIRC 00234; (2017) 97 WAIG 551
File No.	:	U 93 of 2016

Catchwords	:	Industrial Law (WA) - Appeal against the decision of the Commission dismissing a claim that a teacher was unfairly dismissed - Hearing on the papers at first instance - Testing of veracity of evidence necessary where the papers contain conflicting material matters - Turns on own facts
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 26, s 29(1)(b)(i), s 49(2) <i>School Education Act 1999</i> (WA) s 239 <i>Public Sector Management Act 1994</i> (WA) s 78(2), s 79(3)(c) <i>School Education Regulations 2000</i> (WA) reg 38, reg 38(c)(i)
Result	:	Appeal allowed - Case remitted for further hearing and determination

Representation:

Counsel:

Appellant : Mr M D Cox and with him Ms R Collins

Respondent : Mr J M Carroll

Solicitors:

Appellant : MDC Legal

Respondent : State Solicitor for Western Australia

Case(s) referred to in reasons:

Alfresco Concepts Pty Ltd v Franse [2015] WAIRC 00244; (2015) 95 WAIG 437

Ayling v Director-General, Department of Education and Training [2009] WAIRC 00413; (2009) 89 WAIG 824

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66

Garbett v Midland Brick Co Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893; (2003) 129 IR 270

House v The King [1936] HCA 40; (1936) 55 CLR 499

Mt Newman Mining Co Pty Ltd v The Australian Workers Union, West Australian Branch, Industrial Union of Workers (1983) 63 WAIG 2397

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [2012] WASCA 50

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch v Inghams Enterprises Pty Ltd [2005] WAIRC 02347; (2005) 85 WAIG 3385

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

*Reasons for Decision***SMITH AP:****The appeal and the order appealed against**

- 1 The appeal is instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the IR Act) against a decision delivered by the Chief Commissioner on 26 April 2017 to dismiss an application referred by Barry Landwehr in U 93 of 2016.
- 2 Application U 93 of 2016 was a referral of a decision to dismiss a teacher, Barry Landwehr, on grounds of serious misconduct (supplementary statement of agreed facts, AB 143). Mr Landwehr claimed that he was unfairly dismissed by the Director of Education (the Director General) on 10 May 2016. He referred his claim to the Commission under s 29(1)(b)(i) of the IR Act, pursuant to s 239 of the *School Education Act 1999* (WA) and s 78(2) and s 79(3)(c) of the *Public Sector Management Act 1994* (WA).
- 3 Mr Landwehr was employed by the Harvey College of Agriculture as a design and technology teacher for a period of almost 10 years. He commenced employment on 1 July 2006. After he was initially employed under a number of fixed term contracts, he was made permanent on 30 June 2009. His terms of employment were governed by the *School Education Act Employees' (Teachers and Administrators) General Agreement* in force from time to time.
- 4 Mr Landwehr was dismissed on grounds that he had misconducted himself by making physical contact with a student that was not reasonable or necessary to manage the student (letter of dismissal, AB 69). The factual circumstances found by the investigator, and accepted by the learned Chief Commissioner, were that on 13 August 2015, a year 11 student directed a compressed air hose nozzle at Mr Landwehr's buttocks twice and released compressed air. Mr Landwehr pushed the student backwards into a wall. He continued to push the student after the student had dropped the compressed air hose. Mr Landwehr admonished the student for his dangerous use of compressed air. Mr Landwehr started back to class. The student said something and Mr Landwehr turned back to the student and grabbed him by the shirt.
- 5 Prior to the incident on 13 August 2015, Mr Landwehr, on 29 October 2014, had physical contact with another student that was not reasonable or necessary in managing the student's behaviour. The circumstances of the first incident were that two students had approached a door through which Mr Landwehr had just gone. The door locked immediately after him. One of the students banged on the door reasonably hard for a short period of time. Mr Landwehr opened the door and told the student that he was being disrespectful. He pushed the student backwards against a wall. An investigation report records that the investigator found that there was no requirement for Mr Landwehr to make physical contact with the student to manage or care for him, to maintain order or to prevent the risk of harm to any person (AB 205). When spoken to about the incident, Mr Landwehr said he had never intended to hurt the student. However, he admitted that he should not have made contact with the student, he was agitated by the student's mocking attitude and his reaction may have caused the student to feel intimidated. Mr Landwehr was disciplined for that incident, by the imposition of a fine and one day's pay, a reprimand and a requirement to undertake improvement action. The improvement action required Mr Landwehr to complete an online course on accountable and ethical decision-making and undertake counselling.

Conduct of the proceedings at first instance

- 6 The grounds upon which the appellant claimed that he had been harshly, oppressively or unfairly dismissed are set out in his application as follows in paragraph 5 (AB 27 - 28):

The penalty of dismissal was disproportionate to the conduct complained of when having regard to all the circumstances, including, but not limited to:

- a. Contrary to the basis for dismissal pursuant to the respondent's dismissal letter, the applicant accepted his conduct was inappropriate and was regretful the incidents occurred. See for example paragraph 11 of the applicant's response to the respondent dated 8 April 2016 (Attachment 2). It is apparent the respondent failed to properly take the applicant's response into account and dismissed the applicant without proper basis.
 - b. Contrary to the basis for dismissal pursuant to the respondent's dismissal letter, the applicant accepted the conduct complained of that is subject to this application and any previous beaches [sic] of discipline were similar. See for example the first page of the applicant's response dated 8 April 2016 (Attachment 2) where the applicant states '*my conduct was similar*'.
 - c. The respondent failed to take into proper account the applicant's severe mitigating circumstances such as the applicant's father being terminally ill with cancer during the time of the conduct complained of and subsequently passing away a couple of months from when the disciplinary process commenced.
 - d. The respondent failed to properly take into account the applicant expressed remorse for his actions. See for example paragraph 10 of the applicant's response to the respondent dated 8 April 2016 (Attachment 2).
 - e. The respondent failed to properly take the applicant's almost 10 year length of service into account.
 - f. The respondent failed to properly take into account the applicant was employed in a remote area where there may be a difficulty in obtaining teachers.
 - g. The respondent failed to properly take into account the applicant's positive references from peers and the community as attached to his response dated 8 April 2016 (Attachment 2). The respondent failed to properly take into account the applicant was engaged in volunteer community activities as outlined in those references.
 - h. The respondent failed to properly take into account the applicant did not deny the allegations and admitted the allegation of physical contact with a student at his very first opportunity, his written response dated 4 September 2016 (Attachment 3). The applicant also outlined in that response that he taught the student the life threatening dangers of compressed air and that shortly after the event the applicant apologised to the student for the physical contact.
 - i. The respondent failed to consider other penalties available under the *Public Sector Management Act 1994*.
- 7 Unusually, in this matter, although Mr Landwehr took issue with a number of material findings made by the investigator and the Director General going to the credibility of Mr Landwehr's account of the second incident, the hearing at first instance proceeded on the basis of a review of the documents considered by the Director General when making a decision to dismiss Mr Landwehr. Why such a procedural course was adopted is not clear. Mr Landwehr is represented by different solicitors and counsel in this appeal.
- 8 The finding made by the Director General of a breach of discipline was not challenged. Counsel for Mr Landwehr at first instance put the case for Mr Landwehr on grounds that the penalty of dismissal imposed upon him was disproportionate to the circumstances of his conduct. The parties agreed not to call any evidence before the learned Chief Commissioner, to use the words of the parties, 'on the basis of the scope of the application' made on behalf of Mr Landwehr. The matter proceeded by the tendering of brief statements of agreed facts and a number of documents were tendered by consent. These documents included:
- (a) Two investigation reports conducted into the first and second breaches of discipline. The first investigation report was made by a senior investigator of the standards and integrity branch of the Department of Education dated 18 March 2015 (AB 197 - 226). The second investigation report was made by a senior investigator of the standards and integrity branch of the Department of Education dated 22 January 2016 (AB 147 - 196).
 - (b) Documents which record accounts of the second incident by Mr Landwehr.
- 9 Both parties filed written submissions and appeared before the learned Chief Commissioner on 8 March 2017 and made brief oral submissions in support of the contentions the parties sought to raise on behalf of their respective clients.
- 10 In making the decision to dismiss Mr Landwehr, the Director General took into account findings made in both of the investigation reports that the first and second incidents related to unreasonable force against a student.
- 11 In her reasons for dismissing Mr Landwehr, the Director General stated (AB 65):
- In my letter dated 9 March 2016, I advised you that I had formed a preliminary view that you had committed a breach of discipline and that I was inclined to dismiss you from your employment pursuant to section 82A(3)(b) of the *Public Sector Management Act 1994*.
- You were given an opportunity to provide a written submission concerning my preliminary view and the action I proposed to take. I have considered your submission and wish to address some concerns you raised.
- Whilst I accept that some evidence provided by you to the Investigator was omitted from the report, it offered no additional weight when assessing the evidence in its entirety. The dangers associated with compressed air were never in contention during the investigation.

There is sufficient evidence to substantiate that the physical force you used exceeded what was necessary in the circumstance. I find it concerning that you seek to justify your actions, rather than accept that your conduct was inappropriate. As such, I remain apprehensive that you may repeat this behaviour in the future.

I do acknowledge that at the time of incident, you were dealing with family matters, including your father's illness and that this caused additional stress. However, this does not assure me that if faced with a significant stress in the future, you would not behave in the same manner.

Further to this, it is of great concern that you fail to comprehend that the previous matter investigated does not correlate with this matter, when both relate to unreasonable force against a student.

Having considered your response, I maintain the view that dismissal from your employment is the appropriate penalty.

My decision takes into account the duty of care responsibilities and the special position of trust that exists in the employee/student relationship. The community has an expectation, as do I, that Department of Education employees will behave in a manner that reflects the important role they have in modelling community values and standards.

The reasons for decision at first instance

- 12 After setting out the grounds of Mr Landwehr's claim in the application as filed, the learned Chief Commissioner set out the grounds which were expanded on behalf of Mr Landwehr in outlines of submission and during the hearing as follows [5]:
- (1) The dismissal will affect his prospects of finding other employment such as to constitute a disbarment from teaching, and that is unfair;
 - (2) The respondent's letter of dismissal indicates that he would receive all entitlements due to him, however, he was not given notice nor paid in lieu. As the dismissal was summary without notice, it can only be for serious misconduct. The letter of dismissal does not say that it was for serious misconduct but contemplated payment in lieu of notice. The summary nature of the dismissal was unfair.
 - (3) According to the respondent's website, there is a course available that deals specifically with prevention, de-escalation and restraint in respect of physical contact with students. This would have been a more appropriate course for Mr Landwehr as part of his improvement action plan, which arose from a previous incident, than the Accountable and Ethical Decision Making Course he was required to undertake.
- 13 The learned Chief Commissioner set out the grounds of the respondent's answer to Mr Landwehr's claim as follows [7]:
- (1) A full investigation was undertaken in which Mr Landwehr was provided with an opportunity to give his account and to make submissions, including as to penalty, following which the respondent terminated his employment;
 - (2) [The Director General] conducted as full and proper an investigation as was reasonable;
 - (3) Mr Landwehr had not complained of any procedural irregularities during the process; and
 - (4) Only two months prior to the incident of 13 August 2015, on 10 June 2015, Mr Landwehr was issued with a fine of one day's pay, a reprimand and was required to take improvement action relating to a breach of discipline. In this breach, on 29 October 2014, Mr Landwehr used force upon a student which was not reasonable or necessary in that he used his shoulder to push the student back against a wall.
- 14 The learned Chief Commissioner recounted a number of accounts given by Mr Landwehr in statements and interviews about the incident involving the compressed air. These were as follows:
- (a) Mr Landwehr provided a statement regarding the incident to Mr Dean Pfitzner, the deputy principal, within a matter of days after the incident. In it, he said that he 'felt air being squirted towards my bottom. I turned around and several boys were there. [The student] was the one holding the air hose, so I grabbed him and said to him that this is not appropriate and you are putting my life at risk'. He went on to explain about what happened afterwards. Although he mentioned grabbing the student when he saw the student holding the hose, he did not mention pushing or subsequently grabbing the student [9].
 - (b) In providing a written response to the formal allegation put to Mr Landwehr in a letter of 1 September 2015, Mr Landwehr:
 - (i) repeated the exact words he had used in his statement to Mr Pfitzner. However, when addressing the particulars of the allegation against him, Mr Landwehr went on to say that the student had actually squirted air 'in my bottom' [11]. He also said that he kept the student behind after class and talked about the seriousness of the event. He told the student that he was sorry, that he should not have grabbed him, but that if it had been a situation at work, the person 'being [perpetrated] could have caused [the student] a lot of pain' [12];
 - (ii) had originally tried to reduce the seriousness of what had happened by saying that the student had squirted air 'towards' his bottom when what had occurred was that the student had 'squirted air up my anus'. He also wrote that the student might have killed him by doing this and he yelled at the student [13];
 - (iii) agreed with the particular of the allegation that he had grabbed the student and pushed him backwards into a wall, saying that he did do this. He also said he pushed him holding his upper arms between his shoulder and elbows. He yelled at him saying you may have just killed me or you have put my life at risk. As he hit the wall he let the student go. He then turned and walked away [14];

- (iv) in response to the allegation that he had grabbed the student on the top of his shoulder whilst yelling at him, he disagreed that that had occurred and said he never changed his hold and grabbed his shoulders [15];
- (v) described the contact he made with the student as very minor and he did not use excessive force [15]; and
- (vi) emphasised the dangers of the misuse of compressed air with its potential to cause an embolism or massive bleeding [16].
- (c) When interviewed by the standards and integrity directorate of the Department of Education who conducted an investigation:
- (i) Mr Landwehr said [18]:
- I was up near the front of the Building and Construction workshop, bending over a tool rack on wheels when [the student] deliberately grabbed the air hose.
 - [The student] put it up my backside and squirted the air.
 - I don't know how [the student] put the air up my backside as my back was turned.
 - All I could feel is the thing getting inserted into my backside and squirted.
 - I felt the end of the air hose being pushed into my backside and then squirted, if that makes any sense.
 - You have got a bit of give when wearing clothing. I'm not saying that when it got inserted into my anus that it went right in or anything.
 - I am not saying that it penetrated my backside, but the end of it still went in. It sort of went into my anus cavity probably about 4 millimetres, as far as the clothes would allow it.
 - You have your pants there and when pushed against my pants, you can see the shape of my backside with my bottom exposed.
 - I was wearing long 'hard yakka' safety clothing and bonds underwear.
 - I have never had air squirted near my backside, or up my backside before, but that happened to me there and then and made me think, *'It could kill me, or has it killed me?'*
 - I turned around and saw [the student] holding the air hose. I grabbed hold of him between the shoulder and elbow of both arms and pushed him backwards about two to three steps in one action into the wall. I probably pushed [the student] backwards about two metres.
 - I let him go when he hit the wall or the side of the roller door.
 - The wall was made out of bricks and the rudder inside.
 - [The student] hit the wall very minor.
 - I can't answer what part of [the student's] body hit the wall. It was probably his shoulder.
 - I cannot recall how quickly I walked [the student] backwards.
- (ii) Mr Landwehr also said he did not know why he grabbed the student and he yelled at the student that he could have killed him. He expressed the opinion that if it had been in a work situation, another person would have just turned around and 'thumped' him. He also emphasised the dangers of compressed air, and that immediately after the compressed air was expelled, he thought he was going to be killed. He did not seek medical attention because he thought there is nothing that can be done [19].
- (iii) Mr Landwehr acknowledged that when he first spoke to Mr Pfitzner, he did not tell him he had 'physically manhandled' the student. He said he had told Mr Cantwell that the student had 'deliberately squirted air up my backside', that the student had 'put air up my anus'. He could not answer why he did not tell Mr Cantwell that he had pushed the student against the wall. Nor did he think it was pertinent that he had grabbed the student. What he thought was pertinent was the student's act [20].
- (iv) Although he denied using excessive force, Mr Landwehr said he could not answer what constitutes excessive force, but that '[p]ushing somebody back is not really excessive force'. Excessive force is '[p]unching somebody and hitting somebody' [21].
- (v) Mr Landwehr talked of the possible catastrophic effects of compressed air entering the bloodstream. He said he thought he was in danger and 'just grabbed' the student, thereby removing the risk. When he grabbed the student, the student dropped the air hose [22].
- (vi) Mr Landwehr said that if he had realised what was going to happen, he would have told the 'exact truth' about the extent of the actions, but he did not want to put the student in a bad light [23].
- (vii) Mr Landwehr denied using excessive force. He said in the scheme of things, if people understood the background of compressed air and all that type of stuff, they would have a totally different slant on the dangers of air compressors. It can be fatal [24].
- 15 The learned Chief Commissioner had regard to other matters which are set out in the investigation report. In particular, she noted that even though Mr Landwehr had said he told Mr Cantwell that the student 'put air up his anus', in Mr Cantwell's report and interview he said that Mr Landwehr told him it was 'towards' or 'in the vicinity of' him [25].

- 16 The learned Chief Commissioner referred to the following matters set out in the investigation report:
- (a) The report analyses all of the material, in particular, Mr Landwehr's two different accounts of the air being directed towards his buttocks and the air compressor gun being inserted in his anus. It considers what he was wearing and concludes that 'it would appear impossible that the end of the air compressor gun could be inserted into a person's anus through two layers of clothing'. It concludes that it was likely based on the various accounts of witnesses that the air gun was at least 30 centimetres from Mr Landwehr's buttocks, and that he is now attempting to exaggerate the severity of the student's actions to justify his own reaction [27].
 - (b) The investigation report concludes that whilst holding the student, Mr Landwehr has pushed him backwards from the air compressor hose toward the steel roller door frame and that despite Mr Landwehr admitting that the student dropped the hose as soon as he grabbed him, he continued to push the student three to four metres to the other side of the workshop and into the wall. Mr Landwehr failed to provide any explanation as to why he continued to push the student after there was no alleged risk; just saying 'I can't answer why I continued' [28].
 - (c) That it is likely that Mr Landwehr grabbed the student a second time around the shoulder and neck [29].
 - (d) After considering the medical evidence and the circumstances, Mr Landwehr's concern for his life is questionable [30].
 - (e) The actions of the student, whilst dangerous, were not of the severity that Mr Landwehr later claimed [32(1)].
 - (f) Mr Landwehr's first account, prior to being advised that his conduct was under scrutiny, appeared to be most accurate, that the release of compressed air from the hose was directed towards him and was not squirted up his anus [32(2)].
 - (g) There was evidence that compressed air can create a gas bubble which can be released into the vascular system, creating an embolism which may cause death. Alternatively, the pressure of air in the anus could cause massive and potentially fatal bleeding [32(4)].
 - (h) Mr Landwehr's concern for his life was questionable and he did not seek medical treatment either immediately or any time after the incident, nor did he report the incident or the student's conduct, but went home [32(5)].
 - (i) Mr Landwehr could not provide an accurate answer as to his understanding of excessive force. He said that he had never been taught the exact boundaries in relation to not having physical contact with students, although he had previously been counselled regarding physical contact with students. It was expected that Mr Landwehr would have a clear understanding of what was and what was not appropriate physical contact with a student [32(6)].
- 17 The learned Chief Commissioner observed that the Director General wrote to Mr Landwehr on 9 March 2016 and indicated that it was her preliminary view that she would be inclined to dismiss Mr Landwehr from his employment [33]. The Director General provided Mr Landwehr with an opportunity to make a submission which might include any explanation for his conduct or reasons why the proposed action should not be taken against him [34].
- 18 The Director General in her letter took into account that Mr Landwehr had previously been found to have committed a breach of discipline on 22 June 2015 in regards to very similar conduct for which he had received a fine, reprimand and improvement action.
- 19 The learned Chief Commissioner observed that Mr Landwehr responded on 8 April 2016 and had said that he recognised that his conduct in both occasions had been similar, but the circumstances within which the similar conduct occurred were very different. He said, in the former case, he was trying to restrain a student so as to prevent undue damage to school property and in the latter case he believed, in good faith, that his life had been put at risk [35]. It was also observed that his response:
- (a) dealt with the dangers of compressed air to health [36];
 - (b) reiterated that he had said sorry to the student for having grabbed him [36];
 - (c) he wanted to convey the trepidation and concerns that he felt in being subjected to being sprayed with compressed air, given his background as a tradesman trained in occupational health and safety [36];
 - (d) set out family matters at the time that 'seriously put me on a hedge, including the convalescence and eventual death of my father. I was very stressed' [36];
 - (e) he made a claim that the two incidents in 10 years of teaching were out of character and demeanour, not due to him not having learned, but due to the confluence of a number of unfortunate circumstances in which he was found vulnerable [37];
 - (f) set out an assurance that he intended to not repeat the behaviour in the future 'whatever it takes' [37];
 - (g) stated Harvey was a small community making it untenable for him to remain there if he was dismissed [37]; and
 - (h) referred to attached character references [37].
- 20 The learned Chief Commissioner observed that as a result of the first discipline incident Mr Landwehr completed the Department of Education's online accountability and ethical decision making course on or about 26 May 2015 and that this course covered, amongst other things, the Department of Education - Behaviour Management in Schools policy (the policy), the code of conduct, duty of care and physical contact with students [45] - [46]. She also observed that Mr Landwehr was reprimanded in a meeting with his principal on 2 July 2015 for about 45 minutes [47]. The minutes of the meeting record the principal did not direct Mr Landwehr to attend any further counselling sessions with him in this regard, but Mr Landwehr found two sessions of psychological counselling very helpful [48]. The parties agreed at first instance that this was

psychological counselling dealing with the impending death of Mr Landwehr's father, not for the purpose of assisting him in matters of physical contact with students [50].

- 21 In considering Mr Landwehr's explanation about the first incident, the learned Chief Commissioner observed that Mr Landwehr said the incident should not have happened, he should not have touched the student, and '[t]he rule states you are not meant to touch kids' [53]. When asked if he could have dealt with the situation differently, he said, 'I could have walked away and ignored it, but that is not me' [54]. The learned Chief Commissioner drew the inference that Mr Landwehr responded to the student's conduct by attempting to either intimidate or punish the student. He knew he had acted contrary to the 'rule' not to have physical contact with a student [55].
- 22 In respect of the second incident, the learned Chief Commissioner found that Mr Landwehr may have genuinely believed, in good faith, that his life had been put at risk [56]. She noted that Mr Landwehr was unable to identify what excessive force might be, except that it would be punching or hitting somebody. She also noted that he believed that by grabbing the student, he was removing the risk. He thought what he did was right and the student dropped the hose making the situation safe. However, he could not answer why he continued to hold the student and push him into the wall after he had dropped the air compressor hose [57]. She also noted that he said he believed that his actions were to establish order in the classroom [58].
- 23 The learned Chief Commissioner found that Mr Landwehr had made these comments after having undertaken a course which included matters the subject of disciplinary actions arising from his conduct about physical contact with the student, by pushing him backwards, that was not reasonable or necessary in managing the student's behaviour. She also noted that he undertook this course less than three months before the incident with the compressed air hose [59].
- 24 Of importance in this appeal, she found in both incidents, it was apparent that Mr Landwehr was either using his position to punish or intimidate the students, or he simply lost self-control and expressed his anger in a physical way [60].
- 25 The learned Chief Commissioner went on to find that it is important to state that the danger of the misuse of compressed air is not in contention. The issue was Mr Landwehr's response to the conduct of students. She found it appears his behaviour demonstrates either or both a lack of self-control or a desire to intimidate or punish by pushing and grabbing [61]. She also found that Mr Landwehr's conduct in pushing the student, continuing to push him when any threat had subsided, pushing with force, and subsequently grabbing the student was a breach of the respondent's policy in having physical contact with students. She found this was because it was not necessary for the management of the student [62]. Further, she found in those ways, the conduct of Mr Landwehr breached the policy [63].
- 26 The learned Chief Commissioner then considered the question whether the dismissal of Mr Landwehr was proportionate to the conduct. She observed that the Director General's reason for dismissal would be not only for it to punish him, but was also because of the two incidents and that he would appear not to have learnt from the previous findings and she held strong concerns that he would act in a similar way in the future. In these circumstances, she found that the reasons for dismissal went to the actual conduct and confidence in him in the future [64].
- 27 She observed that if the employer cannot have confidence in an employee's ability to comply with policies, particularly as they relate to physical contact with a student and self-control, demonstrated by a repeated failure, within a reasonably short time, and one which resulted in recent disciplinary action, then the employer is not acting unreasonably in no longer wishing to employ the employee [66]. She also observed that such conduct strikes at the heart of the contract, in particular the contract of a teacher who holds a duty of care to students. Further at [67] she observed that conduct that strikes at the heart of the contract is serious misconduct which may justify dismissal: *Blyth Chemicals Ltd v Bushnell* [1933] HCA 8; (1933) 49 CLR 66, 81.
- 28 The learned Chief Commissioner then found [68]:

Given that:

- (1) Mr Landwehr's conduct in August 2015 was of a very similar nature to his conduct for which he was disciplined less than three months earlier;
- (2) that he had, within three months prior to the second incident, undertaken improvement action including training and counselling regarding the proper and improper use of physical contact with a student;
- (3) that he had been reprimanded for the previous conduct;
- (4) his conduct appears to be punitive or intimidatory or demonstrates a lack of self control and a failure to learn from the past; and
- (5) the respondent could not have confidence in his future conduct based on his past conduct,

the dismissal was not disproportionate to the conduct.

- 29 The learned Chief Commissioner went on to consider whether the mitigating factors, that is length of service, family stresses, to recognise references and disbarment from teaching were matters that the Director General failed to consider which would mitigate Mr Landwehr's conduct and excuse his conduct.
- 30 The learned Chief Commissioner found that the correspondence to Mr Landwehr does not explicitly indicate that the Director General took account of Mr Landwehr's length of service [69]. She also found that regard was had by the Director General to Mr Landwehr's unfortunate family circumstances, but that the Director General found that she was not assured that if faced with a significant stress in the future Mr Landwehr would not behave in the same manner [71]. The learned Chief Commissioner also observed that Mr Landwehr claims that by being dismissed, he is denied his profession as a teacher because of the limitations on him now finding alternative employment as a teacher in the public system in Western Australia and it would be untenable for him to remain in Harvey as it is a small community [72] - [73].
- 31 In respect of Mr Landwehr's admission and apology, the learned Chief Commissioner found his admissions were largely overshadowed by his efforts to justify the conduct [75].

- 32 She then concluded that where a teacher has 10 years' experience and a history of inappropriate contact with students, contrary to policy, the length of service would not be a significant mitigating factor. Nor would his family circumstances [80]. She also found that other evidence contained within the investigators' reports, statements by fellow teachers and students and by Mr Landwehr, tend to indicate that Mr Landwehr's approach to dealing with students was robust, and that physical contact with students other than for the purposes of the policy was not out of character [81]. As to the claim that Mr Landwehr was under stress associated with his personal circumstances, the learned Chief Commissioner found that there was no suggestion that his conduct in the first incident, which occurred 10 months prior to the second incident, was because Mr Landwehr was under stress associated with his personal circumstances [82].
- 33 She observed that whilst the Director General is the employer of the largest number of teachers in this State, there is no evidence of Mr Landwehr's options and limitations [83]. In particular, she found that Mr Landwehr's future prospects as a teacher do not, in the circumstances of this case, override the issue of his conduct, his failure to fully recognise and accept his behaviour and the Director General's reasonable apprehension about his future conduct towards students in his care [84]. She also found that, in any event, there was no evidence of his future prospects as a teacher and that as he had previously worked as a tradesperson he is not denied the opportunity of making a living because he has a number of strings to his bow [85]. As to the apology, she found that his attempts to explain his conduct and excuse it by reference to the dangers of compressed air was tempered by his expressing that the response would have been worse if the incident had occurred in a workplace, which meant that the admissions and apology are not significant factors of mitigation [87].
- 34 As to the character references, the learned Chief Commissioner found that it was very laudable that Mr Landwehr makes a strong contribution to his community by his activities out of work, but that was not in itself sufficient to overcome the issue of his conduct towards students who are in his care and in the care of the Director General. She also found the references from his colleagues likewise did not overcome the findings of fact or the significance of his conduct. Finally, she found if the respondent failed to give this issue the weight Mr Landwehr wanted, it did not render the dismissal unfair, in light of the serious issue of his conduct [89]. In these circumstances, she found that the argument in respect of Mr Landwehr's argument that the Director General failed to consider or give proper weight to matters raised in mitigation must fail [90].

The grounds of appeal

- 35 Mr Landwehr's solicitors sought to amend Mr Landwehr's grounds of appeal in a notice filed on 24 May 2017. His solicitors also sought leave to further amend by adding ground 4 on 26 June 2017. On behalf of Mr Landwehr, it is sought to prosecute the following amended grounds of appeal as follows:

1. The Chief Commissioner erred in law and or fact in finding that the Appellant's conduct warranted summary dismissal because she did not have any regard or any sufficient regard to the following matters:
 - a) The student's provocation leading to the Appellant's conduct and the loss of composure or control that this caused to the Appellant:
 - i. While the Chief Commissioner stated at [61] that *'the danger of the misuse of compressed air is not in contention'*, she failed to have any or sufficient regard to the evidence:
 - A. of the actual and significant danger of fatality and or other serious injuries including severe respiratory distress and abdominal pain, neck and facial swelling, perforation of the colon, shredding of the bowel wall, severe haemorrhaging;
 - B. that this *'can occur without inserting the air hose into the anus. In several cases reported in the literature, the air hose was "fired" through clothes at a distance from the anus'*; and
 - C. that *'it takes only 1 or 2 seconds to deliver enough pressurised air to cause major damage'*;
 - ii. The Appellant responded instinctively and impulsively in a state of fear and shock to a provocation in the form of an assault by the student on his private parts with a high pressure air compressor, which placed his life at risk;
 - iii. The Commissioner comments that the Appellant lost self-control at [60], and that his behaviour demonstrated a lack of self-control at [61], [66] and [68(4)]. However, it was unreasonable and unfair to expect the Appellant to act with composure in those circumstances;
 - iv. By focussing on her assessment that the force used was excessive, the Chief Commissioner did not have regard to the instinctive and impulsive nature of the Appellant's response to the threat to his life, and therefore wrongly attributed to the Appellant a motive to punish or intimidate and or attributed culpability to his lack of control [60] - [61], [68(4)], his inability to explain why he grabbed the student [19], and his lack of clarity of mind at the time, with *'Lots of things ... going through my mind at the time of the incident'* [24];
 - v. While the Chief Commissioner says at [56] *'Mr Landwehr may have genuinely believed, in good faith, that his life had been put at risk'*, she errs in focussing on apparent inconsistencies in the Appellant's account as to whether the air compressor was directed towards him or pushed into his rectum. The error lies in overlooking the evidence that *'injury can occur without inserting the air hose into the anus. In several cases reported in the literature, the air hose was "fired" through clothes at a distance from the anus'*;

- vi. The fact that the Appellant was responding instinctively and impulsively to being assaulted by the student was an exculpatory circumstance, or at least an extenuating and mitigating circumstance, that should have been taken into account by a reasonable and fair minded employer in deciding whether or not to terminate the Appellant's employment;
 - vii. The learned Chief Commissioner had insufficient regard to regulation 28(c)(i) of the *School Education Regulations 2000* to assess whether the Appellant's physical contact with the student was justified, and failed to consider the fact that the Appellant was responding instinctively and impulsively in a state of fear and shock to a dangerous provocative assault on his private parts.
- b) The Appellant's personal circumstances, which render the summary dismissal disproportionately harsh because:
- i. the Appellant's father was terminally ill at the time of the incident leading to his summary dismissal, and he was therefore in a vulnerable psychological state to deal with the provocation;
 - ii. the Appellant had only been previously disciplined once in almost 10 years of service as a teacher, and that incident had also occurred while the Appellant's father was terminally ill;
 - iii. the impact on the Appellant of the summary dismissal is likely to be disbarment, or at least a significant impediment to his career as a teacher;
 - iv. the age of the Appellant, the fact that he had taught for the last almost 10 years and that he was therefore likely to face considerable difficulty obtaining alternative employment;
 - v. the Appellant had positive references from peers and members of the community about his teaching career and his voluntary community activities.
2. The Chief Commissioner erred in fact or law in finding that the Appellant's conduct warranted summary dismissal by placing excessive weight on the evidence of a previous disciplinary finding that the Appellant was involved in at [43], [44] and [68]:
- a) The Chief Commissioner erred in finding the Appellant's behaviour at [68(1)] '*was of a very similar nature to his conduct for which he was disciplined less than three months earlier*', because the circumstances of the second incident were significantly and relevantly different from the first. The particulars of ground 1.a) are repeated;
 - b) The Chief Commissioner did not give sufficient consideration to the Appellant's evidence that while the conduct was 'similar', the circumstances in which the second incident occurred were very different, amongst other reasons because the second incident involved an impulsive response to a provocation in the form of a dangerous assault on the Appellant. The particulars of ground 1.a) are repeated.
3. The Chief Commissioner erred in fact or law in concluding at [49], [59] and [83] that the Appellant should have learnt from the training, counselling and reprimand he received from the first incident; that his conduct demonstrated a failure to learn from the first incident; and at [68] that summary dismissal was not disproportionate to the conduct, because the circumstances of the second incident were significantly and relevantly different from the first. The particulars of ground 1.a) are repeated.
4. The learned Chief Commissioner erred in law and or fact and erred in the exercise of her discretion, because it was not open to the Chief Commissioner to find that:
- a) '*There was no suggestion that [the appellant's] conduct in the first incident, which actually occurred 10 months prior to the second incident, was because Mr Landwehr was under stress associated with his personal circumstances*' at [82]; as this finding is materially inconsistent with the evidence before the learned Chief Commissioner that his mother had died from cancer in recent years, and he was supporting his father through terminal cancers, which had caused the last few years to have been very hard for the appellant, for example at [37], [50], [70]; Transcript 8/3/17, p10; letter from Jim Britza, Captain, Harvey Volunteer Fire & Rescue Service and letter from Duncan Campbell, Vocational Trainer Assessor, WA College of Agriculture Harvey; and
 - b) '*... where a teacher has 10 years' experience and a history of inappropriate contact with students, contrary to policy, the length of service would not be a significant mitigating factor. Nor would his family circumstances ...*' at [80]:
 - i. because the premise '*a history of inappropriate contact with students*' is materially inconsistent with the following:
 - A. The appellant had almost of 10 years of unblemished teaching service with the respondent with no incidents disciplinary action for inappropriate contact with students until the first incident, which occurred about 10 months prior to the matter leading to his termination (for which he was disciplined some 3 months prior to the matter leading to his termination); and
 - B. two proximate recent instances of inappropriate contact with students within a relatively short period of time, respectively near and within the tenth year of otherwise unblemished service could not reasonably and fairly be said constitute a 'history' of the said conduct; and or

- ii. therefore the conclusion based on the premise is unjustified that his history of service and his personal circumstances are not significant mitigating factors, especially given the *proximity* of the two incidents and the fact that they occurred during a time of stressful family circumstances (the terminal illness of his father) and having regard to his personal circumstances (the positive contribution to the community, letters of support, difficulty obtaining alternative employment as a teacher).

General principles

- 36 The parties agree that in an appeal to the Full Bench the appellant must demonstrate error in accordance with the principles outlined in *House v The King* [1936] HCA 40; (1936) 55 CLR 499, 504 - 505.
- 37 In determining whether a dismissal of an employee is harsh, oppressive or unfair, the Commission must make an assessment against a range of indicia. In particular, on behalf of Mr Landwehr, counsel points to the following observations of the Industrial Appeal Court in *Garbett v Midland Brick Co Pty Ltd* [2003] WASCA 36; (2003) 83 WAIG 893; (2003) 129 IR 270 [72]:

Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other employment of the individual employee, and the employer's treatment of past incidents and of other employees. Where misconduct is alleged or relied upon there will be a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate any mitigating circumstances.

Ground 1(a) of the appeal

- 38 The main point raised in this appeal on behalf of Mr Landwehr relies substantially upon an argument that the material put before the Chief Commissioner established that the response by Mr Landwehr to the spray of compressed air on his buttocks, being an act that could cause death or serious injury, was an exculpatory response or alternatively the dangerous nature of the act was such a circumstance of mitigation that rendered his dismissal harsh, oppressive or unfair. This issue is raised in ground 1(a) of the appeal.
- 39 In ground 1(a), it is argued that in reaching her decision the learned Chief Commissioner did not have any regard, or any sufficient regard, to the student's potentially life-threatening provocation leading to Mr Landwehr's loss of composure or control resulting in an impulsive, instinctive and defensive response.
- 40 The Director General says that it is not open to raise this ground of appeal because it was not put on behalf of Mr Landwehr by his representatives at first instance, and on appeal Mr Landwehr is bound by the case run by counsel at first instance: *Alfresco Concepts Pty Ltd v Franse* [2015] WAIRC 00244; (2015) 95 WAIG 437; *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50 [49] - [52] (Martin CJ).
- 41 The argument put on behalf of Mr Landwehr, however, in this appeal is that by reference to the materials and to the evidence and the matters raised in the proceedings before the Commission, the requirements of reg 38 of the *School Education Regulations 2000* (WA) and the authorities dealing with the use of force in employment, require consideration of the circumstances of the use of force by Mr Landwehr. Put another way, it is argued that the point raised in ground 1(a) of the appeal, as articulated, is consistent with the matters raised in evidence before the learned Chief Commissioner at first instance. It is also argued that even if it could be said that Mr Landwehr's conduct, in making physical contact with the student who used the high pressure hose, did constitute misconduct, the Commission was still required to have regard to all of the surrounding circumstances to ascertain whether the dismissal was justified. In support of this proposition, the observations in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch v Inghams Enterprises Pty Ltd* [2005] WAIRC 02347; (2005) 85 WAIG 3385 and *Mt Newman Mining Co Pty Ltd v The Australian Workers Union, West Australian Branch, Industrial Union of Workers* (1983) 63 WAIG 2397 are relied upon to the effect that in cases involving incidents of fighting in the workplace, the conduct complained of must be judged on its merits pursuant to s 26 of the IR Act. Further, observations made in *Inghams* and *Mt Newman Mining Co Pty Ltd* make it clear that in making assessments of such acts of misconduct, issues such as provocation and whether any response to it is reasonably proportionate or not, will be relevant considerations.
- 42 It is argued that in the present matter, Mr Landwehr was the victim of an unexpected assault by a student on his private parts with a high pressure compressed air hose, which Mr Landwehr knew to be potentially fatal and which medical literature vindicates this fear. Mr Landwehr's actions were in response to this provocation and the threat presented by the actual conduct of the student that made him fear for his life. It is said that Mr Landwehr's response to the threat was proportionate to the use of the force in the circumstances of a threat to Mr Landwehr's life by the use of the high pressure hose. It was not a question so much of a person rationally assessing the situation, exhausting all other alternatives and then deciding to use force to maintain control of the situation. This, it is said, was something that happened very quickly, in circumstances that Mr Landwehr apprehended there was a direct, immediate threat to his life and he was responding impulsively and instinctively. Thus, it is argued that the reaction of Mr Landwehr was akin to provocation, or was a factor, that ought to have been taken into account by the learned Chief Commissioner but was not taken into account by her.
- 43 Regulation 38 of the *School Education Regulations* provides:
- A member of staff of a government school may, in the performance of the person's functions, take such action, including physical contact with a student or a student's property, as is reasonable —
- (a) to manage or care for a student; or
 - (b) to maintain or re-establish order; or

- (c) to prevent or restrain a person from —
 - (i) placing at risk the safety of any person; or
 - (ii) damaging any property.

- 44 It is argued that arising out of reg 38(c)(i) there should have been an assessment of the reasonableness of the reaction of Mr Landwehr in the circumstances that he was confronted with and this interpretation of reg 38 is consistent with the principles enunciated in *Inghams* and *Mt Newman Mining Co Pty Ltd*.
- 45 Thus, it is said that whilst the learned Chief Commissioner found that the danger of the misuse of compressed air is not in contention, she failed to have any, or sufficient regard, to the evidence of the real threat presented by the actual conduct of the student that made Mr Landwehr fear for his life. The learned Chief Commissioner also observed that Mr Landwehr lost self-control and his behaviour demonstrated a lack of self-control. Whilst this assessment is accurate, she should have found it is unreasonable and unfair to expect Mr Landwehr to act with composure in those circumstances. By focussing on the assessment that the force used was excessive, rather than whether it was reasonable conduct in all of the circumstances, the learned Chief Commissioner did not have regard to the instinctive and impulsive nature of Mr Landwehr's response to the threat of his life. Further, the learned Chief Commissioner wrongly attributed to Mr Landwehr a motive to punish or intimidate the student, and/or attributed culpability to his lack of control, his inability to explain why he grabbed the student and his lack of clarity of mind at the time. It is argued that his inability to explain and his lack of clarity is consistent with the action being impulsive and instinctive, being out of control in that sense that one cannot fully explain that action.
- 46 Whilst the learned Chief Commissioner acknowledged that Mr Landwehr may have genuinely believed, in good faith, that his life had been put at risk, it is argued that she erred in focussing on apparent inconsistency in Mr Landwehr's account as to whether the air compressor was directed towards him or pushed into his rectum. This error, it is said, lies in overlooking the evidence that injury can occur without inserting the air hose into the anus. The error lay also quite simply in failing to give proper consideration to the provocation leading to what was otherwise inappropriate contact with a student. Consequently, it is said that in circumstances where Mr Landwehr reasonably feared his life was at risk, his actions could be excused as an exculpatory circumstance or at least an extenuating and mitigating circumstance that should have been taken into account by a reasonable and fair-minded employer in deciding whether or not to terminate Mr Landwehr's employment.
- 47 It is acknowledged that the learned Chief Commissioner was not assisted by counsel acting for Mr Landwehr at first instance by a clear articulation of this ground in the grounds set out in the schedule to the application. Yet, it is said that this matter is raised in ground 5(h) of the application and in the applicant's submissions in reply at first instance which records there was no agreement between the parties that Mr Landwehr's use of force was not reasonable or necessary. Consequently, it is said that the question of reasonableness and necessity was in issue between the parties. Further, that reg 38 was put into issue in response to the Director General's submissions made at first instance. At paragraph 7 of the applicant's submissions in reply it is stated:
- The respondent raises (Respondent's submissions paragraphs 14 and 60(a)) regulation 38 of the *School Education Regulations 2000* at paragraphs 14 and 60(a) and says the applicant cannot rely on the limited defence that regulation offers to him. The applicant's case has never been about whether the conduct occurred or not (which the applicant did not deny in any regard) (Statement of Agreed Facts paragraph 14) or whether the conduct complained falls within the defence under that regulation. The applicant therefore did not anticipate a reliance on this regulation by the respondent. However if the respondent requires the Commission to turn its mind to this regulation, then the Commission ought also consider a report filed by the respondent's Occupational Physician Dr Roger Lai (Attachment 4 to the investigation report - agreed document 8). Dr Lai in his expert medical opinion states that it is appropriate to take misuse of compressed air as a serious safety incident and that compressed air entering the body can cause serious injury and occasionally death. The applicant may have therefore enjoyed the defence afforded by regulation 38(c)(i) as the physical contact was reasonable to prevent or restrain the student from placing the applicant's safety at risk. This has not been the applicant's case but the applicant is obliged to respond to the respondent raising regulation 38.
- 48 It is argued that what is raised in this paragraph is that there is medical evidence that establishes provocation which is only a sub-category of the question of reasonableness. Provocation is put on behalf of Mr Landwehr in the broad sense that can be construed as an impulsive instinctive response consistent with a loss of composure and a loss of control in response to a threat to life.
- 49 The submission is also made that it is not so much a question of whether Mr Landwehr's conduct was justified in terms of reg 38 or the policy, but the learned Chief Commissioner fell into error in finding that Mr Landwehr lost control by treating that loss of control as an exacerbation rather than an exculpation or mitigation.
- 50 It is argued that the Department of Education's policy is presumably drafted to align with the *School Education Regulations*, but there is not perfect comity between the policy and reg 38. In any event, to the extent of any inconsistency, the *School Education Regulations* prevail. It is pointed out that in her reasons for decision the learned Chief Commissioner did not consider reg 38. The considerations for whether an act placed at risk the safety of any person in regards to reg 38 was outlined in *Ayling v Director-General, Department of Education and Training* [2009] WAIRC 00413; (2009) 89 WAIG 824 [157] as being an objective test whereby the concept of risk conveys the possibility of danger rather than actual danger.
- 51 It is also argued that whilst the learned Chief Commissioner stated that she did not doubt the potential of the danger involved, she did not give any real consideration as required by reg 38 in assessing the reasonableness of Mr Landwehr's physical contact with the student, to the evidence of the objective danger and provocation to which he was responding. It is also contended that the finding made that Mr Landwehr's actions were a breach of the policy because it was not necessary for the management of the student was an incorrect application of the policy, or alternatively it overlooked the prevailing provision of reg 38. It is submitted that the application of the policy, like the *School Education Regulations*, requires focus on the reasonableness of

Mr Landwehr's actions in all of the circumstances. It is also pointed out that use of reasonable force against students by teachers is recognised and protected by s 257 of the Criminal Code which provides that:

It is lawful for a parent or a person in the place of a parent, or for a schoolmaster, to use, by way of correction, towards a child or pupil under his care, such force as is reasonable under the circumstances.

Ground 1(a) - Is it open on appeal to run a provocation argument?

52 Whilst the opening words to paragraph 5 of the schedule to the application could in one sense be said to encompass a provocation argument, it was not expressly pleaded as the general plea is that the penalty of dismissal was disproportionate to the conduct complained of when having regard to all the circumstances, including, but not limited to, the matters enumerated in paragraphs 5(a) to 5(i). Paragraphs 5(a) to 5(i) set out mitigatory matters. In paragraph 5(a), it is conceded that Mr Landwehr accepted his conduct was inappropriate and refers to paragraph 11 of Mr Landwehr's response dated 8 April 2016 and argues that the Director General failed to properly take Mr Landwehr's response into account. In paragraph 11 of Mr Landwehr's response dated 8 April 2016, he states he can assure the Director General that he intends not to repeat his behaviour in the future.

53 I do not agree the argument was raised in paragraph 5(h). Nor was such an argument directly put in written or oral submissions to the learned Chief Commissioner at first instance. Nor do I agree that reg 38 of the *School Education Regulations* was directly put into issue. Further, I do not agree that on facts put by Mr Landwehr that reg 38 would be open. Mr Landwehr's case at its highest that he now seeks to raise in this appeal is that he used force which would usually be regarded as excessive and inappropriate force against a student because he lost control. However, he says his conduct can be excused because he was in state of extreme fear that he had been or was about to be critically injured. In my opinion, in circumstances where:

- (a) it is agreed by Mr Landwehr that the student dropped the hose as soon as Mr Landwehr grabbed him; and
- (b) yet Mr Landwehr's loss of control continued as he continued to push the student and grabbed him a second time after desisting;

it is not open to argue (objectively) that the physical contact Mr Landwehr had with the student was reasonable to prevent or restrain the student from placing at risk the safety of Mr Landwehr as the risk to Mr Landwehr had ceased when the student dropped the hose.

54 Yet, Mr Landwehr's case before the learned Chief Commissioner relied upon medical evidence to justify his actions. The Director General when dismissing Mr Landwehr rejected his submission about the dangerous nature of the act of the student and found it concerning that Mr Landwehr did not accept that his behaviour was inappropriate.

55 Mr Landwehr does not seek to raise any new evidence. Counsel for the Director General, however, says that if this point had been raised at first instance, the Director General would not have agreed to have the matter dealt with on the papers and would have sought to meet the point by cross-examining Mr Landwehr. Consequently, it is argued that the Director General is prejudiced.

56 The difficulty I have with the position raised by the Director General is that the state of mind of Mr Landwehr when he was sprayed by compressed air and the severity of the act of the student in firing compressed air at Mr Landwehr were live issues raised squarely in the papers put before the learned Chief Commissioner. In the absence of testing of the veracity of material opinions expressed by the investigator and Mr Landwehr which were clearly in conflict, I do not see how a proper assessment could have been made about this issue unless the material in support of the investigator's assumptions and Mr Landwehr's contentions were closely scrutinised.

57 In *The Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 the scope of an enquiry by the Commission into whether an employee had been harshly, oppressively or unfairly dismissed and the onus of proof was considered at length. In joint reasons, Beech CC and I observed that an employer has an evidentiary burden to show there is sufficient evidence to raise the factual matters it relies upon as a reason to dismiss an employee [65] - [66]. Once the employer establishes its position in this regard, the onus moves to the employee to show that dismissal for that reason was harsh, oppressive or unfair [67].

58 In paragraph 41 of the applicant's submissions filed at first instance, it is stated:

Contrary to the reasons for dismissal, the applicant did not seek to '*justify [his] actions, rather than accept that [his] conduct was inappropriate*' (See Dismissal Letter)

- a. On the contrary, a general analysis of his letter to the respondent dated 8 April 2016 (Document 5 of the Statement of Agreed Facts) shows that the applicant accepted his conduct was inappropriate and was regretful the incidents occurred.
- b. The respondent failed to take into account the applicant's response and dismissed the applicant without proper basis.

59 If the whole of Mr Landwehr's response in his letter dated 8 April 2016 is read, it is apparent that the matters raised in that letter could form the basis of an argument of provocation in the sense characterised by Mr Cox on behalf of Mr Landwehr in this appeal. Mr Landwehr's response dated 8 April 2016 is a letter addressed to the Director General in which he raises a number of findings made by the investigator and accepted by the Director General that Mr Landwehr took issue with.

60 This argument goes to the finding made by the Director General that the first and second incidents of breach of discipline are similar.

61 In his response dated 8 April 2016, Mr Landwehr stated:

At the outset, I would like to clarify that, whilst it might be said that my conduct was 'similar' on both occasions, as it is stated, I must stress that the circumstances within which that similar conduct occurred were very different. In the former

case, I was trying to restrain a student so as to prevent undue damage to school property - i.e. gratuitously kicking a door. By contrast, in the latter case I genuinely believed, in good faith, that my life had been put at risk; despite any contrary speculation doubting the veracity of my claim in the investigation report - with which I disagree as being untenable and totally fanciful.

What is also clear in the investigation report is this:

1. The statements made by Dr Lai - the Department's own in-house Occupational Physician - as reported in the investigation report, leave no doubt about the seriously risky and dangerous aspects of [the student's] relevant action toward me. As reported - **(quote)** -
 - 2.15 On 15 September 2015, Dr Roger Lai, Occupational Physician, Employee Relations, provided advice via e-mail, relating to the dangers of air compressors and air embolism. He also attached a case report similar to the incident involving Mr Landwehr (Attachment 4). In summary Dr Lai stated:
 - There is a risk of air entering the body and disrupting soft tissues even without direct contact.
 - Compressed air squirted up the anus will cause serious injury and occasionally death.
 - The most important factor is the volume of air entered rather than the pressure. 40 PSI is enough to cause injury.

Further, in the Analysis part of the report, it says:

- 3.16 Dr Roger Lai stated that air compressor injuries can be very serious and compressed air squirted up the anus will cause serious injury and occasionally death. He provided a case report where a co-worker opened a high-pressure air hose nozzle and pushed it against the seat of someone's pants before applying the air for a few seconds. This resulted in extensive injuries (attachment 4).
- 3.17 Pounds per square inch (PSI) is used to measure the pressure of air within an air compressor. Dr Lai stated that 40 PSI was enough to cause someone injury. It was established that the air compressor used by [the student] on the day in question was set at approximately 100 PSI. There is no denying that the actions of [the student] had the potential to cause Mr Landwehr very serious injuries if the air was squirted up Mr Landwehr's anus as he now claims.

The investigator here concedes that '*... the actions of [the student] had the potential to cause Mr Landwehr very serious injuries ...*'; which, however regrettably, henceforth the investigator attempts to minimise in significance in regards to their impact upon my reaction. In addition, it is fair to say that Dr Lai's opinion substantiate the trepidation and concerns that I felt in being subjected to being sprayed with compressed air.

2. Further, at paragraph 2.17, in regards to my physical condition, it is reported as follows - **(quote)** -
 - 2.17 During the interview, Mr Landwehr provided Ms Wykes with a letter signed by Dr Lee Ming Yap (Dr Yap), Wellington Medical Centre, Harvey on 18 September 2015. The letter stated that Mr Landwehr had a history of per rectal bleeding on toilet paper about eight months prior, which was consistent with mild haemorrhoids. However, the medical examination on 18 September 2015 was normal with physical signs of small skin tag (attachment 5).

Reasonably, I say, Dr Yap's letter corroborates my awareness of being particularly vulnerable due to my condition; despite whether the haemorrhoids were [sic] flaring at the time of the incident or otherwise.

3. Further, at 2.18 it is reported that - **(quote)** -
 - 2.18 In addition, Mr Landwehr provided Mr [sic] Wykes with a hard-copy of electronic mail addressed from Dr James Parker, dated 7 September 2015. Dr Parker is part of a United States online support service at www.askdoctorparker.com where qualified doctors answer customer's health questions. Examination of the website revealed that any answer provided was not to take the place of an in-person visit to a medical doctor. The online question asked by Mr Landwehr was, '*How serious is compressed air being squirted up your anus?*' Dr Parker's reply included, '*If air pressure is released in the rectum, it can cause a catastrophic tear which will rupture the blood vessels supplying the colon. The patient may haemorrhage severely and then die from this blood loss*' (Attachment 6).

Needless to say, the above is further corroboration of the seriousness and risks of the action and fair justification of my own concerns.

4. Other additional material was provided by me to the investigator, which regrettably has been omitted by the investigator, without providing any reasons for it (attached). As it may be [sic] seen the material is further evidence that emphasises the dangers and risks of compressed air from an Occupational Health and Safety (OHS) perspective - this being an aspect of this matter that has been totally ignored by the investigator - thereby obliterating any considerations of it. Of note, the material includes a specific danger-sign located in workshops about compressed air expressly stating not to point the hose at anyone.

5. It is not in contention that students were inducted *inter alia* into the dangers that compressed air posed for OHS considerations at the start of the year; including [the student]. In fact, at 2.8, 6th dot-point, it is reported that during the interview, [the student] stated - **(quote)** -

- I was about half a metre from Mr Landwehr. The air pressure released from the hose was pretty fast.
- It wouldn't have hurt Mr Landwehr however if the air was to get into someone's bloodstream, it can be fatal

It is clear that [the student] was well aware of the risks and dangers that may arise as a result of misusing compressed air.

6. Despite the weight of the above evidence - and additional one however omitted for our present purposes - preposterously and without a shred of evidence supporting her speculation, the investigator states as follows - **(quote)** -

3.19 Mr Landwehr's concern for his life is questionable.

The investigator bases for making this unsubstantiated and - with due respect - ill-conceived 'finding' is said to be my 'failure' to seek medical treatment immediately. Nothing in the report supports such a negative speculation.

7. Despite all of the above, as stated in my first response, '*... I did say sorry I should not have grabbed you ...*' (Attachment #1 - page 1 of 2). What I have pointed out above is in an attempt to convey the trepidation and concerns that I felt in being subjected to being sprayed with compressed air, given my background as a tradesman trained in OHS.

62 In this letter Mr Landwehr squarely raises an argument that:

- (a) when sprayed by compressed air he feared his life was at risk; and
- (b) the investigator's finding that his concern for his life was questionable is unsubstantiated and against the weight of medical evidence.

63 Whilst Mr Landwehr did not directly raise in this response that his reaction to the compressed air being sprayed at or up his anus through his clothing caused him to lose control, it is apparent from his account he gave to the investigator as set out in the investigation report that he claimed his response to being sprayed was because he feared he was in immediate danger of being seriously injured and he reacted to remove the risk.

64 The learned Chief Commissioner found Mr Landwehr lost his self-control, but she did not examine whether the actions of the student caused the loss of control as an exculpatory or mitigatory circumstance. Nor was she invited by the parties to turn her mind to this issue. She did, however, find that the intent of Mr Landwehr when he lost control was to punish or intimidate the students in both the first and second incident. This finding in respect of the first incident was squarely open. The circumstances of the first incident raise different circumstances to the second incident as Mr Landwehr's health and safety was not under threat and by his own admission his conduct on that occasion could clearly be said to be an unreasonable use of force to punish and intimidate a student.

65 However, the finding that the intent of Mr Landwehr when he lost control in the second incident was to punish and intimidate the student was in my opinion not a finding that was open to the learned Chief Commissioner to make on the documents before her. This was not a finding made by the investigator. Nor was it an allegation raised by any of the five students who witnessed the incident or put to Mr Landwehr during the investigation.

66 I also have difficulty with the finding made by the investigator that was accepted by the learned Chief Commissioner that the actions of the student were not the severity that Mr Landwehr claims. It can be inferred from the investigator's report that this finding was made by regard to the following findings made by the investigator:

- (a) Mr Landwehr was wearing long 'Hard Yakka' safety pants and bonds underwear. Hard Yakka clothing is specifically engineered to endure the toughest of conditions and it would appear impossible that the end of the air compressor gun could be inserted into a person's anus through two layers of clothing (AB 161).
- (b) Based on the witness accounts, the air gun was at least 30 cm from Mr Landwehr's buttocks when the air was released (AB 161); and
- (c) Mr Landwehr did not seek any medical treatment immediately or any time after the incident (AB 163).

67 In attachment 4 to the investigator's report, the investigator put the following questions to Dr Roger Lai, an occupational physician employed by the Department of Education, in an email. In the email, the investigator said (AB 178):

I am seeking advice in relation to the dangers of air compressors and air embolism.

Whilst a teacher (wearing clothing) bent over in front of students to place tools away, one student has used an air-compressor hose and sprayed a shot of air toward his buttocks. It is not confirmed how close the air hose was to the teacher's buttocks, so let's assume that it was touching his clothing.

- The teacher claims that he has haemorrhoids.
- The teacher further claims that he was fearful he may die as a result of air embolism.
- Is it possible in this situation, to get air embolism as a result of air being squirted towards the bottom?
- If the shot of air was squirted directly up the teacher's anus (though [sic] clothing), is air embolism possible?
- What is the likely outcome of air embolism in this case?

- Do you believe it possible for this man to have died as a result of the above described act?

68 In response, Dr Lai said (AB 177):

Many people are unaware that air compressor injuries can be serious and occasionally fatal. I attach a case report similar to the scenario you describe. I have copied an abstract reproduced below:

In answer to your questions:

- 1) Yes there is a risk of air entering the body and disrupting soft tissues even where there is no direct contact. This is due to the solid column of air under pressure.
- 2) Compressed air squirted up the anus will cause serious injury and occasionally death
- 3) The most important factor seems to be volume of air entered rather than the pressure, 40psi is enough to cause injury
- 4) Yes, it is appropriate to take it very seriously as a safety incident.

The first paragraph in the discussion section of the attached article is informative.

69 The article attached to Dr Lai's report is a case report reported in the Journal of TRAUMA, Injury, Infection and Critical Care, titled 'Colorectal Blowout from Compressed Air: Case Report'. In the report, the authors state (AB 179 and 181):

A 29-year-old male presented to the Medical Center of Central Georgia Emergency Center in severe respiratory distress. The patient was working in a carpentry shop when a coworker opened a high-pressure air hose nozzle and pushed it against the seat of his pants. The air was applied for only a few seconds. The patient immediately complained of severe abdominal pain and within a few minutes developed neck and facial swelling. Shortly after the incident he began to experience difficulty in breathing and was transported to our emergency center. On arrival, the patient was unable to speak and was in severe respiratory distress. A large amount of subcutaneous air was present in the abdomen, thorax, and neck.

...

Review of the literature reveals a similar case report in 1904 from a British surgeon in London. In that case, the patient was 'blown up with an air force-pump' as a joke by four youths. The patient had the nozzle introduced into the anus in this case. The outcome was fatal, with the patient dying 3 hours after injury despite abdominal decompression. Case analysis of pressurized-air injuries often reveal a misguided coworker and unwise behavior. Those cases not involving misbehavior usually occurred when employees used an air hose to dust off their clothing. It is important to realize that this injury can occur without inserting the air hose into the anus. In several cases reported in the literature, the air hose was 'fired' through clothes at a distance from the anus. In our patient, the hose was pushed against the seat of his pants and fired through the pants.

...

In summary, compressed air can pose a threat to health and life of the uninformed user. The compressed air equipment used in industry and commercial use today provides enough force to produce colorectal injuries through clothing and without the nozzle being inserted into the anus. Users of this equipment need to be made explicitly aware of the calamitous consequences of its irresponsible use.

70 When regard is had to the reasons of the learned Chief Commissioner, it is apparent that she did not have regard to Dr Lai's opinion and the opinion set out in the case study when making the finding that the use of force by Mr Landwehr was unreasonable physical contact, involving punishing a student [82].

71 When the questions put to Dr Lai are read together with Dr Lai's answers and the case report provided by Dr Lai, it is clear that life-threatening internal injuries can occur by a volume of 40 PSI compressed air being fired 'through clothes at a distance from the anus'. When this medical opinion is considered, together with:

- (a) Mr Landwehr's statement that on the day in question the air compressor the student was using was set at 100 PSI; and
- (b) the statements made by students who witnessed the incident to the effect that the compressed air could have entered Mr Landwehr's anus through his clothing. One student said the 'air pressure went up Mr Landwehr's bum' (AB 150) and also said the nozzle was about 50 cm away; another said, 'Someone got the air-compressor and put it up Mr Landwehr's bum and squeezed the trigger (AB 151) and also said he did not know how far away the hose was because he did not see it and the other said, '[the student] put the air compressor hose up Mr Landwehr's bum and sprayed it the first time ... I'm pretty sure it was touching Mr Landwehr's body' (AB 151) and also said, 'I'm pretty sure the air compressor hose was against Mr Landwehr, although I didn't see this';

the findings made by the investigator and accepted by the Director General that Mr Landwehr's concern for his life was questionable and the actions of the student were not of the severity that Mr Landwehr later claimed, were findings that (in light of the fact that at no time did Mr Landwehr accept these findings) should have been scrutinised by the learned Chief Commissioner before she accepted these findings and went on to make a finding that the loss of control and actions of Mr Landwehr was to punish the student.

72 For these reasons, I am of the opinion that (i) and (v) of the particulars to ground 1(a) of the grounds of appeal have been made out. In these circumstances, the decision to dismiss Mr Landwehr's application should be suspended and remitted for further hearing and determination as the findings made by the investigator that appear not to be supported by the medical evidence require reassessment before finding Mr Landwehr's conduct warranted summary dismissal.

73 As to particulars (ii), (iii), (iv) and (vi) to ground 1(a), as these were matters that could be said to be raised in the material put by Mr Landwehr but not in the arguments put by counsel on his behalf at first instance, I am of the opinion that as this matter requires further hearing and determination which will require a reassessment of whether Mr Landwehr's concern for his life

was questionable and an assessment of the severity of the incident, it necessarily follows that the contentions in particulars (ii), (iii), (iv) and (vi) in ground 1(a) are matters relevant to this issue.

- 74 In these circumstances, where no further evidence would be sought to be led on behalf of Mr Landwehr, this is one of the exceptional matters where the interests of justice would allow these issues to be put on behalf of Mr Landwehr. However, if these points are pursued, the Director General should be afforded an opportunity to cross-examine Mr Landwehr about his state of mind when the incident occurred and his consequent actions and to adduce any further evidence the Director General says is relevant to these matters.

Ground 1(b) of the appeal

- 75 In ground 1(b) of the grounds of appeal, it is argued that Mr Landwehr's personal circumstances rendered the summary dismissal disproportionately harsh. It is said that the characterisation of Mr Landwehr's conduct as an unreasonable use of force which was unjustifiable in the circumstances clouded consideration of all other mitigating circumstances.
- 76 An application is made to adduce fresh evidence in the form of a letter from the Teacher Registration Board dated 19 July 2017 enclosing a complaint to the State Administrative Tribunal seeking the cancellation of Mr Landwehr's teaching registration. Leave is sought for these documents to be admitted on grounds that if the application by the State Administrative Tribunal is granted, the appellant will not be able to teach in Western Australia. In her reasons for decision, the learned Chief Commissioner concluded there was no evidence of Mr Landwehr's future prospects of a teacher. It is said that that lack of evidence is now profoundly changed by the steps that the Teacher Registration Board has notified Mr Landwehr it intends to pursue for his deregistration.
- 77 Whilst it is acknowledged that family circumstances alone cannot make an employee immune from dismissal for any reason, it is also argued that family circumstances should be given adequate consideration in the ambit of mitigating circumstances.
- 78 It is argued that the learned Chief Commissioner erred in finding that where a teacher has 10 years' experience and a history of inappropriate contact with students, contrary to policy, the length of service would not be a mitigating factor and nor would the family circumstances.
- 79 It is submitted that regard should have been had to the fact that Mr Landwehr's father was terminally ill at the time of the incident leading to his summary dismissal. It is said therefore he was in a vulnerable psychological state to deal with the provocation.
- 80 It is also argued that the fact that Mr Landwehr had positive references from peers and members of the community about his teaching career and his voluntary community activities contributed to the summary dismissal being disproportionately harsh, in particular substantial weight should have been given to the positive reference from Mr Pfitzner, the deputy principal and line manager of Mr Landwehr, and references from other teachers who spoke positively about his performance as a teacher.
- 81 It is also argued that it is factually inaccurate to say there was a history of Mr Landwehr's repeated behaviour of a similar kind.
- 82 In light of the learned Chief Commissioner's findings about the seriousness of the breach of discipline in the second incident, no error in these findings about these factors can be demonstrated as the findings made by her were open on the material before her. For this reason, I am of the opinion this ground is not made out.
- 83 However, if after this matter is further heard the learned Chief Commissioner in respect of the issues raised in ground 1(a) of the appeal, and in the event the learned Chief Commissioner is to take a different view of Mr Landwehr's use of force in the second incident, it would be open to the parties to put to the learned Chief Commissioner that she should reconsider the matters put in mitigation in light of her findings about the seriousness of the second incident.
- 84 Consequently, it is not necessary to consider the application made on behalf of Mr Landwehr to adduce fresh evidence, as this is an application that can be made to the learned Chief Commissioner in a further hearing of this matter.

Grounds 2 and 3 of the appeal

- 85 In grounds 2 and 3 of the grounds of appeal, it is argued that the two incidents are fundamentally different.
- 86 In appeal ground 2, it is argued that the learned Chief Commissioner erred in fact or law in finding that Mr Landwehr's conduct warranted summary dismissal by placing excessive weight on the evidence of the previous disciplinary finding. In particular, it is argued that the finding that Mr Landwehr's behaviour was of a very similar nature to his conduct for which he was disciplined less than three months earlier was wrong because the circumstances of the second incident were significantly and relevantly different from the first. Whilst both involved physical contact with a student that would, on its face, be inappropriate, the second incident involved an impulsive response to a provocation to a potentially life-threatening assault. Consequently, it is said that whilst both incidents involved physical contact with a student, the learned Chief Commissioner did not consider the differences between the two incidents, and instead drew a conclusion that they were analogous and represented a history of inappropriate behaviour with students and found both incidents were of unreasonable physical contact involving punishment and manhandling of a student.
- 87 In appeal ground 3, it is argued that the learned Chief Commissioner erred in finding that Mr Landwehr should have learnt from the training, counselling and reprimand he received from the first incident. In support of this argument, Mr Landwehr relies upon what are said to be the significant differences of the second incident being an impulsive and instinctive response. Further, it is argued that the training and counselling that Mr Landwehr received following the previous incident contained in the improvement action plan did not focus on a teacher's physical contact with students. Of the eight units and 120 screens in the online course completed by Mr Landwehr only two screens deal with the topic of physical contact specifically. In these circumstances, it is said that there was not a sufficient basis for the learned Chief Commissioner to conclude that Mr Landwehr should have learnt from the training or counselling in a way that rendered his conduct in the second incident more contumelious.

88 In light of my reasons for upholding ground 1(a), insofar as particularised in (i) and (v), it is my opinion it is not necessary to decide whether grounds 2 and 3 of the appeal have merit. In a further hearing before the learned Chief Commissioner it would be open to Mr Landwehr to put a submission that if the learned Chief Commissioner forms the view that whilst the conduct of Mr Landwehr in both incidents was similar she should find that in some respects the circumstances of the second incident were materially different.

Ground 4 of the appeal

89 In appeal ground 4(a), it is argued it was not open to the learned Chief Commissioner to find that there was no suggestion that Mr Landwehr's conduct in the first incident, which occurred 10 months prior to the second incident, was because Mr Landwehr was under stress associated with his personal circumstances. This finding is said to be inconsistent with the evidence before the learned Chief Commissioner that his mother had died in recent years and he had been supporting his father through terminal cancers for a number of years, which had caused the last few years to have been very hard for Mr Landwehr.

90 I agree ground 4(a) of the appeal should be upheld. Given that the learned Chief Commissioner found that after the first incident Mr Landwehr underwent two sessions of psychological counselling dealing with the impending death of his father, it is apparent that the finding made by the learned Chief Commissioner that there was no suggestion that Mr Landwehr's conduct in the first incident was because he was under stress associated with his personal circumstances was erroneous. However, this finding, even if erroneous, would not in itself lead to a finding that the dismissal of Mr Landwehr was harsh, oppressive or unfair.

91 In ground 4(b) it is argued that it is a significant and unjustified overstatement to characterise Mr Landwehr as having a history of inappropriate contact with students in circumstances where he had only previously been disciplined once, relatively recently in almost 10 years' service as a teacher. Two incidents are said not to constitute a 'history'.

92 Further, it is argued that it appears the learned Chief Commissioner was referring to matters other than the first and second incident when she made this finding, as she observed that Mr Landwehr's approach to dealing with students was robust and that physical contact with students other than for the purposes of the policy was not out of character, was not supported by any evidence before her. It is pointed out on behalf of Mr Landwehr that the evidence in the investigation report is simply that Mr Landwehr engaged in bantering, including physical banter with students which was jocular and fairly benign, which was described in positive terms by many of the student witnesses who explained that they had a positive relationship with Mr Landwehr and they found him humorous.

93 On behalf of the Director General, it is argued that the reference to Mr Landwehr having 'a history of inappropriate contact with students, contrary to policy' [80] must be read as a reference only to the two incidents for which Mr Landwehr was disciplined. Further, that the observation made in passing by the learned Chief Commissioner that other evidence contained in the investigation reports tend to indicate Mr Landwehr's approach to dealing with students was robust, and that contact with students other than for the purposes of the policy was not out of character, is an observation that is supported by the evidence before the learned Chief Commissioner. The evidence was Mr Landwehr engaged in horseplay with the students that involved physical contact. The Director General says this observation by the learned Chief Commissioner was not a finding that this conduct was contrary to the policy or constituted misconduct and the learned Chief Commissioner did not rely upon it in determining whether the penalty of dismissal was disproportionate.

94 Whilst I agree that the two incidents could be characterised as a history of inappropriate physical contact with a student, I also agree that the learned Chief Commissioner in making this finding considered the incidents of horseplay to be indicative of his character as a teacher which she did not regard as a positive trait. Further, this finding appears to have been a matter that the learned Chief Commissioner took into account when considering whether the Director General could have confidence in the conduct of Mr Landwehr in the future.

95 In circumstances, where there was no evidence or material before the learned Chief Commissioner that the incidents of horseplay were regarded by the Director General in breach of a policy and in the face of statements made by the students in the investigation reports that such incidents were benign, I am of the opinion that ground 4(b) of the appeal has been made out.

Notice of contention

96 On behalf of the Director General, a notice of contention was filed on 6 June 2017. The notice states:

1. The appellant was not summarily dismissed.
2. If the appellant was summarily dismissed:
 - a. there was no requirement to put the appellant on notice that he may be dismissed without notice, and therefore it was not unfair to summarily dismiss the appellant without giving him notice that he may be dismissed without notice, and
 - b. in the alternative, the appellant was put on notice that he may be dismissed without being paid in lieu of notice.

97 It is clear that Mr Landwehr was summarily dismissed. He was given notice of termination by letter dated 10 May 2016. It is common ground he was paid up until 10 May 2016 and he received no payment in lieu of notice.

98 He was not given notice of termination. The letter sent to Mr Landwehr by the Director General dated 9 March 2016 does not by its terms constitute notice. In the letter the Director General simply stated that if she finds that he had committed a breach of discipline her preliminary view is that she would be inclined to dismiss him from his employment. However, in the letter, prior to making that decision, she invited him to make a submission as to why the proposed finding and action should not be taken against him.

99 For these reasons, the notice of contention is not made out.

Conclusion – Summary

100 I am of the opinion that ground 1(a)(i) and (v) and ground 4(a) and 4(b) have been made out and that an order should be made to suspend the operation of the decision to dismiss U 93 of 2016 and remit the case to the Commission for further hearing and determination.

KENNER ASC:

101 The appeal in this matter raises the issue of both appropriate workplace and classroom behaviour of a teacher and student. The incident giving rise to the dismissal of the appellant is set out in the reasons of Smith AP in some detail, which I have had the advantage of reading in draft form and need not be repeated. Suffice to say however, the misuse of compressed air, whether it be in the workplace or the classroom, may be a very dangerous event. The material provided to the respondent by Dr Lai, an occupational physician employed by the respondent, makes this plain. This is especially so, at a strength of 100 PSI, which seemed to be the case in this instance. Compressed air, even at a lower pressure of approximately 40 PSI, discharged close to a bodily orifice, even through clothing, can cause serious internal injury or worse.

102 For the reasons expressed by Smith AP, with which I am in general agreement, appeal grounds 1(a)(i) and (v) and (4)(a) and (b) should be upheld. The matter should be remitted to the learned Chief Commissioner for further hearing and determination.

103 I wish to make additional comment on one matter. The Investigation Report for this incident was included in the Appeal Book at Tab 9. - Supplementary Bundle of Agreed Documents: a. Standards and Integrity Investigation Report F15/0067403'. A part of it contains summaries of recorded interviews with persons relevant to the incident involving the appellant. One such interview was with a Mr Cantwell, who was on a one year contract as the head of the relevant department and to whom the appellant reported. Whilst Mr Cantwell did not witness the incident, he made some second-hand observations as to what he was told by others about the incident, including the student concerned who discharged the compressed air.

104 Most concerning however, there are contained in Mr Cantwell's record of interview, gratuitous, serious, bordering on slanderous, attacks on the appellant's character. These even go as far as derogatory remarks about the appellant's alleged mental health. The remarks were completely unresponsive to the specific allegations against the appellant and were plainly highly prejudicial to him. They were also quite at odds with the independent character evidence led before the Commission at first instance, and considered by the learned Chief Commissioner. The comments were also unsupported by any direct evidence. Irrelevant and highly prejudicial material such as this, should not be included in Investigation Reports. Investigation Reports are very important documents that are reviewed and considered by senior management of the respondent when making significant, and possibly career ending, decisions about employees. It is most regrettable that this material was included and such material should not be included in the future.

EMMANUEL C:

105 In circumstances where the parties were in dispute about a fact as material as whether Mr Landwehr feared for his life, and that was a matter the learned Chief Commissioner needed to consider when deciding whether the penalty was disproportionate, the parties should not have asked the Commission to decide the matter on the papers.

106 It is also regrettable that the learned Chief Commissioner was not assisted by Mr Landwehr's counsel at first instance.

107 I have had the benefit of reading Smith AP's draft reasons for decision.

108 I agree with Her Honour's reasons in relation to grounds 1(a), 1(b), 2, 3 and 4(a).

109 I would uphold grounds 1(a)(i), 1(a)(v) and 4(a). The matter should be remitted to the Commission for further hearing and determination.

110 I take a different view to Smith AP in relation to ground 4(b).

Ground 4(b)

111 The finding at [80] was based on the two incidents, which the learned Chief Commissioner correctly noted involved inappropriate contact with students that was contrary to policy. It is not an error to characterise the two incidents as a history.

112 At [81], the learned Chief Commissioner observes that 'Mr Landwehr's approach to dealing with students was robust, and that physical contact with students other than for the purposes of the policy was not out of character'. On the documents before the learned Chief Commissioner, including the summary of Mr Landwehr's interview on 30 September 2015, it was open to her to make that finding.

113 Relevantly, the learned Chief Commissioner distinguishes between contact with students that is 'other than for the purposes of the policy' and contact with students that is 'contrary to policy'.

114 I disagree that the learned Chief Commissioner was referring to matters other than the two incidents when she made the finding at [80] of her reasons.

115 Further, in my view, the learned Chief Commissioner did not rely on her observations at [81] when considering whether the Director General could have confidence in Mr Landwehr in the future. Rather, she relied on the two incidents which were contrary to policy when she considered that matter.

116 Accordingly, I would not uphold ground 4(b).

2017 WAIRC 00879

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BARRY LANDWEHR	APPELLANT
	-and- SHARYN O'NEILL, DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL	
DATE	TUESDAY, 17 OCTOBER 2017	
FILE NO.	FBA 10 OF 2017	
CITATION NO.	2017 WAIRC 00879	
Result	Appeal allowed, decision suspended and remitted to the Commission	
Appearances		
Appellant	Mr M D Cox (of counsel) and with him Ms R Collins (of counsel)	
Respondent	Mr J M Carroll (of counsel)	

Order

This appeal having come on for hearing before the Full Bench on 22 August 2017 and having heard Mr M D Cox (of counsel) and with him Ms R Collins (of counsel) on behalf of the appellant, and Mr J M Carroll (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 13 October 2017, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is allowed.
2. The order made by the Commission on 26 April 2017 [2017] WAIRC 00234; (2017) 97 WAIG 551 is suspended.
3. The case is remitted to the Commission at first instance for further hearing and determination.

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

[L.S.]

2017 WAIRC 00830

APPEAL AGAINST DECISIONS OF THE COMMISSION IN MATTER NO. APPL 11/2017 GIVEN ON 24 MARCH 2017
AND 7 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**FULL BENCH**

CITATION	:	2017 WAIRC 00830
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER
HEARD	:	MONDAY, 12 JUNE 2017
DELIVERED	:	TUESDAY, 19 SEPTEMBER 2017
FILE NO.	:	FBA 7 OF 2017
BETWEEN	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Appellant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction : **Western Australian Industrial Relations Commission**
Coram : **Commissioner D J Matthews**
Citation : **[2017] WAIRC 00175; (2017) 97 WAIG 365;**
[2017] WAIRC 00205; (2017) 97 WAIG 366
File No. : **APPL 11 of 2017**

CatchWords : Industrial Law (WA) - Application for interpretation and variation of industrial agreement - Power of the Commission to interpret considered and compared to power of the Industrial Magistrate's Court to interpret an industrial agreement in the course of an application to enforce an industrial agreement considered

Legislation : *Industrial Relations Act 1979* (WA) s 23(1), s 26(1)(b), s 27(1)(a), s 27(1)(a)(ii), s 27(1)(a)(iv), s 35(1), s 40B, s 44, s 46, s 46(1), s 46(1)(b), s 46(2), s 46(3), s 46(5), s 47, s 49, s 49(2a), pt III, s 81CA(1), s 83, s 83(3), s 83(4), s 83(5), s 83(7), s 83A, s 83E, s 84A, s 90, s 114(1)

Industrial Relations Commission Regulations 2005 (WA) reg 52, reg 52(1), reg 52(1)(b), reg 53(1)(c)

Magistrates Court (Civil Proceedings) Act 2004 (WA)

Industrial Arbitration Act 1912 (WA) s 88

Conciliation and Arbitration Act 1904 (Cth) s 110

Industrial Relations Act 1988 (Cth) s 51

Workplace Relations Act 1996 (Cth) s 413

Result : Appeal upheld

Representation:

Counsel:

Appellant : Mr C Fogliani

Respondent : Mr J Carroll

Solicitors:

Appellant : W.G. McNally Jones Staff Lawyers

Respondent : State Solicitor's Office

Case(s) referred to in reasons:

Actors' Equity of Australia v Australian Broadcasting Corporation [1986] FCA 618; (1986) 17 IR 393

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99

Barlow v Qantas Airways Ltd (1997) 75 IR 100

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 2623

Derby Meat Processing Co Ltd v West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 862

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2013) 94 WAIG 1

Field Construction Co v The Boilermakers' Society of Australia, Union of Workers, Coastal Districts (1961) 41 WAIG 990

Firefair Pty Ltd v Employee Relations Commission of Victoria [1996] 1 VR 446

George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498

Health Services Union of Western Australia (Union of Workers) v The Director General of Health [2012] WAIRC 01117; (2012) 93 WAIG 1

Master Builders' Association of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation [1981] FCA 49; (1981) 54 FLR 358

Mount Newman Mining Co Pty Limited v Australian Workers' Union, WA Branch Industrial Union of Workers (1986) 66 WAIG 1925

Norwest Beef Industries Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124

- Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
- Pemberton v Civil Service Insurance Agency Pty Ltd [2008] WAIRC 01116; (2008) 88 WAIG 1768
- Rainbow Coast Neighbourhood Centre Inc v Wood [2011] WAIRC 00821; (2011) 91 WAIG 1831
- Re Cram; Ex parte The Newcastle Wallsend Coal Co Pty Ltd [1987] HCA 29; (1987) 163 CLR 140
- Re Harrison; Ex parte Hames [2015] WASC 247
- Re Queensland Electricity Commission and Ors; Ex parte Electrical Trades Union of Australia (1987) 21 IR 151
- Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia [1987] HCA 63; (1987) 163 CLR 656
- Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 1873
- Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 990
- Ruane v Woodside Offshore Petroleum Pty Ltd (1991) 71 WAIG 913
- The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00451; (2014) 94 WAIG 787
- The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2015] WAIRC 00797; (2015) 95 WAIG 1503
- The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00754; (2013) 93 WAIG 1431
- The Commissioner of Railways v West Australian Locomotive Engine Drivers, Firemen's and Cleaners' Union of Workers (1941) 21 WAIG 451
- The Liquor, Hospitality and Miscellaneous Union, WA Branch v The Roman Catholic Bishop of Bunbury Chancery Office and Ors (2007) 87 WAIG 1148
- The Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2015] WASC 150; (2015) 95 WAIG 1593
- Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
- United Voice WA v Director General, Department of Education [2013] WAIRC 00053; (2013) 93 WAIG 80

Reasons for Decision

SMITH AP:

Introduction

- 1 This is an appeal against two decisions of the Commission given on 24 March 2017 and 7 April 2017 in APPL 11 of 2017.
- 2 APPL 11 of 2017 was an application made by the respondent, the Public Transport Authority of Western Australia (the PTA), for an interpretation of cl 5.2 of the *Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016* (No. AG 19 of 2016) (the Industrial Agreement) pursuant to s 46 of the *Industrial Relations Act 1979* (WA) (the Act).
- 3 In response to the PTA's application, The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch (the union) made an application that APPL 11 of 2017 be dismissed pursuant to the power conferred in s 27(1)(a) of the Act as it had brought an application under s 83 of the Act in the Industrial Magistrate's Court in M 101 of 2016 to enforce the Industrial Agreement in a claim that the PTA failed to comply with cl 5.2.1(b)(i). The application to dismiss APPL 11 of 2017 was made on grounds that the application for an interpretation of the Industrial Agreement constitutes further proceedings which are neither necessary or desirable in the public interest; and were an abuse of process or a vexatious application.
- 4 After hearing the parties, the Commission made an order on 24 March 2017 dismissing the union's application pursuant to s 27(1)(a) of the Act ([2017] WAIRC 00175; (2017) 97 WAIG 365). On the same day, the Commission issued reasons for decision declaring the true interpretation of cl 5.2.1(b) of the Industrial Agreement ([2017] WAIRC 00177; (2017) 97 WAIG 361). On 7 April 2017, the Commission issued an order, after having received a request pursuant to s 46(2) of the Act, to issue the declaration in the form of an order ([2017] WAIRC 00205; (2017) 97 WAIG 366).
- 5 As one of the issues raised in this appeal relates to the power of the Commission to interpret an industrial agreement under s 46 of the Act and the power to enforce the terms of an industrial agreement conferred on the Industrial Magistrate by s 83 of the Act, it is important to consider the matters pleaded in the PTA's application for interpretation of the Industrial Agreement. In schedule A of the application, the PTA sets out the grounds upon which the application is made as follows:

Title and number of award and clause under which the questions arise:

The questions the subject of this application arise under clause 5.2 of the *Public Transport Authority/ ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016* (No. AG 19 of 2016), which is in force and is included within the definition of 'award' for the purposes of section 46(5) of the Act.

Questions to which an answer is sought by the Applicant

...

Question 1:

When deciding whether an employee is reasonably able to use public transport to travel to and from the depot from which the employee is temporarily working for a shift, is the Depot Manager permitted to base the decision on the employee's ability to use public transport to travel between the employee's home depot and the other depot at the relevant times?

Question 2:

When deciding whether an employee is reasonably able to use public transport to travel to and from the depot from which the employee is temporarily working for a shift, is the Depot Manager permitted to treat a timetabled Transperth Train Operations service departing from or ending at the employee's home depot as 'public transport' for the purposes of clause 5.2.1(b) when the employee is able to alight from or embark on the service at a platform adjacent to the other depot?

Order Sought by the Applicant:

The Applicant seeks an order varying clause 5.2.1 of the industrial agreement as follows for the purpose of giving fuller effect to the provision, by deleting the words 'to and from' wherever they appear in clause 5.2.1(b) and to substitute the words 'between the home depot and'.

Facts Giving Rise to the Application

- 1) The Respondent contends that the Applicant has breached clause 5.2 of the industrial agreement, contending that a rail car driver employee, Mr Peter Olynyk, was entitled to be paid temporary transfer allowance calculated based on the rate in clause 5.2.1(b)(i) for shifts worked on 25 and 28 May 2016, whereas the allowance paid to him by Applicant was calculated based on the rate in clause 5.2.1(b)(ii).
- 2) The Applicant's payment to Mr Olynyk of the temporary transfer allowance based on the rate in clause 5.2.1(b)(ii) is based on the following facts:
 - a. Mr Olynyk's home depot is Mandurah Depot, which is located on Rafferty Road, Mandurah, Mandurah [sic].
 - b. Mr Olynyk is sometimes required to start work at his home depot before 05:00 hours.
 - c. On 25 May 2016 and again on 28 May 2016, the Respondent required Mr Olynyk to start work at its Nowergup Depot at 0700 hours.
 - d. The Nowergup Depot is located at 201L Hester Avenue, Nowergup, Western Australia.
 - e. The kilometres for which the temporary transfer allowance was required to be paid by the Applicant to Mr Olynyk was between 108.5 and 111 kilometres - the Applicant's payment was based on the greater distance.
 - f. Timetabled Transperth Train Operations services departed from the Mandurah station, which is adjacent to the Mandurah Depot, at 05:04, 05:17 and 05:27 hours and would have arrived at the platform adjacent to the Nowergup Depot before 07:00 hours - e.g. the 05:27 train would have arrived at about 06:54 hours.
 - g. Instructions had previously been issued by the Applicant to employees confirming arrangements for timetabled Transperth Train Operations services to drop off or pick up drivers working a Nowergup Depot shift at the platform adjacent to the Nowergup Depot, and Mr Olynyk was able to alight and embark on those services at that platform on 25 and 28 May 2016.
 - h. Another employee whose home depot was Mandurah and who was rostered on the same shifts as Mr Olynyk on 25 and 28 May 2016 travelled between Mandurah and Nowergup Depots on those days using timetabled Transperth Train Operations services.
 - i. Timetabled Transperth Train Operations services were travelling between the platform adjacent to the Nowergup Depot and the Mandurah station at the conclusion of Mr Olynyk's shifts on 25 and 28 May 2016.
- 3) The Respondent bases its contention on the following facts and contentions:
 - a. Mr Olynyk's residential address is 14 Tennyson Avenue, Halls Head, Western Australia.
 - b. It was not possible on 25 or 28 May 2016 for Mr Olynyk to use public transport to travel from his residential address to Nowergup Depot by 0700 hours.
 - c. It was not reasonably possible for Mr Olynyk to use public transport to travel from Nowergup Depot to his residential address at the end of his shift.
- 6 In the union's notice of answer filed on 14 February 2017 in which they made an application that APPL 11 of 2017 be dismissed, they pleaded:
 1. On 19 July 2016, the Respondent brought an application under section 83 of the *Industrial Relations Act 1979* (WA) to enforce the *Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers Industrial Agreement 2016)* (the Agreement).
 2. That application is claim M101 of 2016 in the Industrial Magistrates Court of Western Australia.
 3. The claim before the Industrial Magistrates Court is that the Applicant failed to comply with clause 5.2.1(b)(i) of the Agreement by underpaying Rail Car Driver Peter Olynyk his travel allowance due for 28 May 2016.

4. In determining M101 of 2016, the Industrial Magistrates Court will be required to interpret the Agreement and specifically look at the construction of clause 5.2.1(b)(i) of the Agreement.
5. On 26 April 2017, the claim is listed before the Industrial Magistrates Court of Western Australia.

The union's application to dismiss

- 7 The union pointed out in its submissions at first instance that the starting point in considering its application to dismiss the application for an interpretation is the PTA has a prima facie right to have its s 46 application heard and determined by the Commission: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00451; (2014) 94 WAIG 787 [58].
- 8 The union argued if the Commission was the only entity that possessed jurisdiction to deal with the industrial matter and dispute, then the onus was on it to demonstrate that it is not necessary or desirable in the public interest to have this matter determined by the Commission would be a heavy one. However, they pointed out that the issues raised were not just before the Commission in APPL 11 of 2017, they are also before the Industrial Magistrate's Court in M 101 of 2016. In particular, they argued that the Industrial Magistrate's Court has an implied jurisdiction to interpret the Industrial Agreement in the process of determining, pursuant to s 83 of the Act, whether the PTA has breached cl 5.2.1 of the Industrial Agreement.
- 9 The union also argued that it could be inferred from the PTA's conduct in lodging APPL 11 of 2017 that it did not want the Industrial Magistrate to interpret cl 5.2 and the effect of the application brought pursuant to s 46 is that the Industrial Magistrate will be bound by the Commission's interpretation. To that extent, it was argued that the PTA was engaging in forum shopping, and in doing so is creating a duplicity of proceedings.
- 10 The union also put a contention that there was no benefit in having the Commission hear the PTA's s 46 application when the issues in that application were already seized by the Industrial Magistrate's Court and that if any error occurs in the interpretation of the Industrial Agreement then an appeal could be heard and determined by the Full Bench of the Commission.

Clause 5.2 of the Industrial Agreement

- 11 Clause 5.2 provides:

5.2 Temporary Transfer Allowance

- 5.2.1 When an employee is required to commence and conclude a shift at a metropolitan depot other than the home depot to which the employee is stationed, the following shall apply:

- (a) When the distance the employee is required to travel from the employee's usual place of residence to the depot from which the employee is temporarily working is greater than the distance the employee is required to travel from his or her usual place of residence to the employee's home depot, the employee shall be paid an allowance per kilometre in both directions calculated on the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.
- (b) The allowance payable per kilometre will be:
 - (i) \$1.72 where the Depot Manager of the employee's home depot is satisfied that the employee is not reasonably able to use public transport to travel to and from the other depot; and otherwise
 - (ii) Half the figure nominated in paragraph (i) of this subclause where the Depot Manager of the employee's home depot is satisfied that the employee is reasonably able to use public transport to travel to and from the other depot.
- (c) The rates referred to in this subclause shall be adjusted by the Employer from time to time during the term of the Agreement by reference to changes to the median of the Perth metropolitan Tariff 1 weekday rates per kilometre charged by all licensed taxis in Perth. The adjustment shall take effect from the date nominated by the employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekday rate.

- 5.2.2 For the avoidance of doubt, a Trainee Driver will not be stationed at a home depot and will not be entitled to the temporary transfer allowance unless the Employer has agreed in writing with the Trainee Driver to the contrary.

Submissions made by the parties at first instance on the merits of the PTA's application for interpretation

(a) The PTA's submissions

- 12 In support of its application for an interpretation of the Industrial Agreement, the PTA filed written submissions on 20 March 2017. In those submissions, they point out that cl 5.2 of the Industrial Agreement contains the eligibility criteria for payment of a temporary transfer allowance and state that the purpose of the allowance is to recognise the cost and time taken for the extra distance to be travelled (to work). An employee is eligible to receive the allowance if:
 - (a) an employee is required to commence and conclude a shift at a depot other than the home depot which the employee is stationed; and
 - (b) the distance between the employee's residence and the other depot is further than the distance between the employee's residence and the home depot.
- 13 Consequently, the rate of the allowance paid depends upon the employee's ability to use public transport to travel to the other depot.
- 14 The PTA argued that despite the fact reg 52 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) requires an application for interpretation of an industrial instrument to have attached to it a statement of facts giving rise to the

application, the facts leading to an application to interpret an industrial instrument are immaterial to the determination of the application. In support of this proposition, the PTA referred to the decision in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2015] WAIRC 00797; (2015) 95 WAIG 1503 [25] (*Rostering Practices Payment Case*). They also cited the decision of the Industrial Relations Court of Australia in *Barlow v Qantas Airways Ltd* (1997) 75 IR 100, 115.

- 15 In respect of question 1, the PTA argued that when deciding whether an employee is reasonably able to use public transport to travel to and from the depot from which the employee is temporarily working for a shift, the depot manager is permitted to base the decision on an employee's ability to use public transport to travel between the employee's home depot and the other depot at the relevant times.
- 16 The PTA contended that cl 5.2.1(b) of the Industrial Agreement is ambiguous as it is silent as to the point from which the depot manager is to assess an employee's ability to use public transport to travel to the other depot. The PTA argued that the ambiguity could be cured by deleting the words 'to and from' wherever they appear in cl 5.2.1(b) of the Industrial Agreement and substituting the words 'between the home depot and'. They also argued that the words 'place of residence' in cl 5.2.1(a) of the Industrial Agreement is relevant to the calculus of distance rather than the depot manager's assessment of an employee's ability to use public transport. In particular, the words 'place of residence', as they appear in cl 5.2.1(a), do not import a requirement for the depot manager to consider whether an employee is able to use public transport from his place of residence to the other depot.
- 17 The PTA argued that:
- (a) it is unlikely to the point of remote that an employee will ever have public transport available on the doorstep of their place of residence;
 - (b) the depot manager's decision must be a reasonable one and, to that end, the depot manager is required to turn his or her mind to identifying a location (eg the home depot) from which to assess an employee's ability to use public transport to travel to and from the other depot;
 - (c) clearly an employee is not required to attend the home depot, particularly if public transport is available from an employee's place of residence to the other depot. Yet, an employee cannot claim the higher rate of the allowance if the employee is unwilling to take public transport where available from the home depot to travel the extra distance; and
 - (d) it is said that it is the custom and practice of all depot managers to assess an employee's ability to use public transport from at least the home depot.
- 18 In the PTA's written submissions, they used the facts giving rise to Mr Olynyk's application in the Industrial Magistrate's Court to illustrate what they say is the effect of the interpretation of cl 5.2.1(b) of the Industrial Agreement.
- 19 The PTA put an argument that in answering question 2 when deciding whether an employee is reasonably able to use public transport to travel to and from the other depot, the depot manager:
- (a) is entitled to treat as 'public transport' a timetabled Transperth Train Operations service departing from or ending at the employee's home depot; and
 - (b) a timetabled Transperth Train Operations service includes a service that rail car drivers are aware of and is 'timetabled' in the sense that it is timed to allow a stop at the other depot.
- (b) The union's submissions**
- 20 The union also filed written submissions on 20 March 2017. In its written submissions, it pointed out that in the dispute between the PTA and the union in the interpretation of cl 5.2.1(b) of the Industrial Agreement two points of friction arise. The first point between the parties is what is meant by the words 'public transport'. The second point is:
- (a) whether the depot manager has to be reasonably satisfied that the relevant employee can use public transport to get from their place of residence to the foreign depot (and return); or
 - (b) whether the depot manager has to be reasonably satisfied that the relevant employee can use public transport to get from their home depot to the foreign depot (and return).
- 21 The union argued that the opening words in cl 5.2.1 which provide 'When an employee is required to commence and conclude a shift at a metropolitan depot other than the home depot to which the employee is stationed, the following shall apply', make it clear that the employee is not required to travel from their place of residence to the home depot and then on to the foreign depot, instead, the employee is to travel directly from their place of residence to the foreign depot.
- 22 The union put a submission that cl 5.2.1(a) reveals a lot about cl 5.2 of the Industrial Agreement, and the intention of the parties who made the agreement:
- (a) firstly, cl 5.2.1(a) provides that an employee is entitled to be paid an allowance where the distance from the employee's place of residence to the employee's home depot is greater than the distance from the employee's place of residence to the foreign depot;
 - (b) secondly, the provision provides that the employee's entitlement to the allowance will be pegged to each extra kilometre that the employee needs to travel in order to get to and from the foreign depot as opposed to what the employee would have had to travel if they were instead required to start work at their home base; and
 - (c) thirdly, the provision explains that the purpose of the allowance is to compensate the employee for the extra cost and time that the employee will incur by having to travel a greater distance to start work. The allowance is therefore there to benefit the employee, not the employer.

- 23 The union pointed out that cl 5.2.1(b) provides the rates at which an employee will be paid for each extra kilometre that they have to travel when they are required to start and finish work at a foreign depot. If the depot manager at the employee's home depot is reasonably satisfied that the employee is not reasonably able to use public transport to travel to and from the foreign depot, the employee is paid at a rate of \$1.72 for each extra kilometre that the employee has to travel to get from their place of residence to the foreign depot (and return). If the depot manager is reasonably satisfied that the employee can use public transport then the employee gets paid at half that rate.
- 24 The union contended that the words 'public transport' in cl 5.2.1(b) should have their ordinary meaning. It says the plain and ordinary meaning of the words means transport (such as buses and trains) which is available to and accessible to the public and travels on fixed routes.
- 25 The union's submission also addressed the factual circumstances in the application which relate to Mr Olynyk. The union argued that in the circumstances set out in the application it is not possible to use public transport to get to the PTA's Nowergup depot. This they said is because there are no transport services that are available to the public that go to the Nowergup depot. The PTA's working timetables do not list Nowergup depot as a timetabled stop and whilst a PTA rail car may travel from Clarkson or Butler train stations to Nowergup depot, that leg of the trip is not accessible to the public. Thus, they argued travel to Nowergup depot could not accurately be described as public transport for the purpose of cl 5.2.1(b) of the Industrial Agreement.
- 26 The union also argued that there is a degree of ambiguity in cl 5.2.1(b) as it speaks about the use of public transport to travel to and from the foreign depot. They point out the foreign depot is only one location in the calculation and the provision does not expressly state what the other location is.
- 27 The union argued that cl 5.2.1(b), properly read, means that the employee needs to reasonably be able to:
- (a) on the trip to the foreign depot catch public transport from the employee's place of residence to the foreign depot; and
 - (b) on the trip from the foreign depot catch public transport from the foreign depot to the employee's place of residence.
- 28 The union contended that this construction is supported by the opening words in cl 5.2.1 which provides that the clause only applies where the PTA does not want the employee to start and finish work at that employee's home depot. It follows therefore that cl 5.2.1(b) does not require the employee to use private transport to get to their home depot before starting their shift and then to catch public transport from their home depot to the foreign depot (and vice versa on the return trip).
- 29 The unions also argued that there is no express or implied requirement in cl 5.2.1(b), or anywhere else in the Industrial Agreement, that requires an employee to travel by private transport to their home depot before they can become entitled to the allowance referred to in cl 5.2.1 of the Industrial Agreement.
- 30 In answer to the questions proposed by the PTA, the union said:
- Question 1
- The answer to question 1 is no. This is because subclauses 5.2.1(b)(i) and (ii) require the Depot Manager to base his or her decision on the employee's ability to use public transport to travel between the employee's usual place of residence and the depot where the employee will be temporarily be [sic] working.
- Question 2
- The answer to question 2 is yes, but only if the timetabled Transperth Train Operations service is a service that can be used by the public. This is because a timetabled Transperth Train Operations service that is not accessible by the public does not fall within the plain and ordinary meaning of the words 'public transport'.
- 31 In the circumstances, the union contended that the Commission should not vary the wording of cl 5.2 of the Industrial Agreement and that a declaration about the proper interpretation of cl 5.2 would be sufficient to cure any ambiguity that might exist in the clause.

Reasons for decision at first instance

- 32 After very briefly summarising the submissions made on behalf of the parties, the learned Commissioner referred to the fact that the application by the union was made against the background that there are proceedings before the Industrial Magistrate's Court (which have not been heard) dealing with a dispute which is on all fours with the dispute before the Commission, including that the 'Facts Giving Rise to the Application' (which the applicant is obliged to provide under reg 52(1)(b) of the Regulations) are the facts that will be considered by the Industrial Magistrate's Court.
- (a) **The union's application to dismiss**
- 33 The learned Commissioner then found that s 46(3) of the Act is a complete answer to the union's application to dismiss under s 27(1)(a)(ii) and s 27(1)(a)(iv) of the Act. In making this finding, he found:
- (a) Parliament has decided that, insofar as the interpretation of awards (as defined by s 46(5) of the Act) is concerned, what the Commission says goes.
 - (b) Some of the reasons why Parliament has so provided may be the Commission:
 - (i) is a specialist tribunal and has better knowledge of practical considerations and industrial realities affecting the parties before it than a court may do;
 - (ii) is charged with declaring the 'true' interpretation of awards;
 - (iii) may play an inquisitorial role if it chooses to do so; and

(iv) is not bound by the rules of evidence.

- (c) The Commission is, Parliament evidently considers, best placed to get to the bottom of what parties meant by words included in relevant industrial instruments.
- (d) It can hardly be undesirable or an abuse of process for the Commission to play the role Parliament has given it even, or perhaps especially, when it is known that its decision will impact on extant proceedings elsewhere.
- (e) The learned Commissioner considered that he is providing the assistance to the Industrial Magistrate's Court which Parliament says he might rather than inappropriately cutting across that Court's jurisdiction.

(b) Determination of the interpretation of cl 5.2.1 of the Industrial Agreement

34 The learned Commissioner said the first question to be determined in interpreting the Industrial Agreement is whether the text reveals the intention of the parties or whether the text is ambiguous and regard ought to be had to the evidence of surrounding circumstances. He then found that cl 5.2.1(b) may seem ambiguous to others, including the parties, but it did not appear to be ambiguous to him. He observed that:

- (a) clause 5.2.1 only arises for consideration 'when an employee is required to commence and conclude a shift at a metropolitan depot other than the home depot to which the employee is stationed';
- (b) the circumstance triggering consideration is one where a rail car driver is starting work at a foreign depot; and
- (c) unless the clause directs attention to the home depot in some way there is no need, in that circumstance, to bring the home depot into calculations. The person is not starting work there. The person is starting work at the foreign depot.

35 The learned Commissioner found that cl 5.2.1(a) does bring the home depot into calculations but only in the limited way there provided; that is, as a factor in the calculation to assess whether an allowance is payable. Even then the allowance is said under cl 5.2.1(a) to be calculated on 'the extra distance the employee is required to travel' and whether there is an 'extra distance' is to be determined by comparing the distance between the rail car driver's usual place of residence and the home depot and the distance between rail car driver's usual place of residence and the foreign depot. Therefore, the learned Commissioner found that cl 5.2.1(a) invites a comparison which assumes that there will be travel from a rail car driver's usual place of residence to a foreign depot and consequently the relevant locations are the rail car driver's usual place of residence and the foreign depot.

36 Turning to cl 5.2.1(b) he found that:

- (a) there is no need whatever, to understand the subclause and how it operates, to, as a matter of course, think about the home depot as a relevant location; and
- (b) rail car drivers will in the expected event go from their usual place of residence to the foreign depot and back for the commencement of, and at the conclusion of, their working day. They are the locations which are travelled to and from and accordingly it is those locations which are evidently to be considered under cl 5.2.1(b).

37 Even if the learned Commissioner had found there was ambiguity in cl 5.2.1(b) and he had regard to surrounding circumstances, he found the clear effect of Mr Mark Maciek Wirski's evidence was that the home depot is not always, or even as a rule of thumb, considered to be a relevant location under cl 5.2.1(b).

38 The learned Commissioner found whether an employee is reasonably able to use public transport to travel to and from his or her usual place of residence to a foreign depot will only be able to be decided on a case by case basis and what is reasonable will depend on the circumstances. He then made a number of observations which he said could only be meant as a rough guide with the answer depending on the circumstances of the particular case under consideration. These were as follows:

- (a) If a bus does not stop at the door of a rail car driver's usual place of residence this does not mean he or she is not reasonably able to use public transport to get to and from the foreign depot. A rail car driver would, in the ordinary event, be reasonably able to use public transport where access to it is reasonably proximate to his or her usual place of residence.
- (b) Simply because a rail car driver would have to backtrack to their home depot to get to a foreign depot by train does not mean he or she is not reasonably able to use public transport to get to a foreign depot. There may be a bus stop within walking distance which takes the rail car driver to a train station from which the foreign depot may be reached before the rail car driver's start time.
- (c) Short car journeys to park and ride facilities, or a person being dropped off at public transport, do not necessarily rule out a finding that a person is reasonably able to use public transport, especially if this is something a rail car driver ordinarily does to attend their home depot. In ordinary language, a person will say they get to work on public transport even if they have been dropped off, or driven a short distance, to access it.
- (d) It would be unreasonable, without more, in terms of the quantum of the allowance paid, for a rail car driver who normally drives to his or her home depot for work to drive past his or her home depot, where a train is waiting or coming which would get him or her to the foreign depot on time, on his or her way to a foreign depot.

39 The learned Commissioner then found that he did not wish to decide specific factual circumstances and did not intend to do so, they being obviously multitudinous.

40 Turning to the consideration of what 'public transport' means in cl 5.2.1(b), the learned Commissioner referred to the argument made in respect of Nowergup depot and observed that the circumstances that arise at that depot is that only rail car drivers can embark and disembark a train at Nowergup depot and other passengers, while physically able to do so, are not permitted to embark and disembark there.

- 41 The learned Commissioner found that the words 'public transport' include trains operated by the PTA which run through the Nowergup depot and that rail car drivers who use such trains to get to Nowergup depot use public transport to do so. In making this finding, he rejected the union's submission about the meaning of public transport and found that to do so he would have to ignore everything that has ever been decided in relation to the correct interpretation of industrial instruments and accept, as having an important role in the arena, the dark arts of sophistry.
- 42 The learned Commissioner then answered the questions asked in the notice of application in light of his reasons as follows:
- (1) Not as a rule but circumstances may arise where that is appropriate depending on the facts;
 - (2) Yes.
- 43 He then declared that the true interpretation of cl 5.2.1(b) is as follows:
- That in considering whether an employee is reasonably able to use public transport to travel to and from a depot other than the employee's home depot under clause 5.2.1(b) the depot manager of the employee's home depot shall consider as the relevant locations the employee's usual place of residence and the other depot.

Grounds of appeal

- 44 The union's grounds of appeal are set out in a further amended schedule filed on 9 June 2017. These are as follows:

1. The Commissioner erred in law in dismissing the RTBU's section 27(1)(a) application.

Particulars

- i. The Commissioner acted on a wrong principle by finding in paragraph [22] of his reasons for decision that section 46(3) was a 'complete answer' to the RTBU's section 27(1)(a) application.
 - ii. The Commissioner acted on a wrong principle by finding in paragraph [27] of his reasons for decision that the Commission's role under section 46 of the Act was to provide 'assistance to the Industrial Magistrate's Court'.
 - iii. The first amended ground of appeal is of such importance that in the public interest an appeal should lie. This is because there have been three recent occasions, including in this case, where the PTA has used a section 46 application to delay or interrupt an application that is before the Industrial Magistrates Court. On each occasion the RTBU has made a section 27(1)(a) application to have the section 46 application dismissed. On each occasion the Commissioner has dismissed the RTBU's section 27(1)(a) application. There is also a fourth, undecided matter currently before the Commissioner where the same argument has arisen. It is likely that the parties will rely on the same type of arguments in the future if the issue is not resolved by the Full Bench.
2. The Commissioner made an error of law in interpreting the words 'public transport' in clause 5.2.1(b) as encompassing locations adjacent to the PTA's railway tracks which are not accessible to the public at large.

Particulars

- i. The word 'public' in the term 'public transport' refers to the public at large.
 - ii. The stop adjacent to the Nowergup Depot is not one where members of the public at large are able to board or alight from a train.
 - iii. It was erroneous for the Commissioner to find that there is public transport to and from the Nowergup Depot via the PTA's rail network.
3. The Commissioner erred in law by failing to provide adequate reasons about why he declared the true interpretation of clause 5.2.1(b) of the Agreement as:

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

Particulars

- i. The Commissioner found at paragraphs [55] and [56] of his reasons for decision that the depot manager could treat the relevant locations, for the purpose of clause 5.2.1(b) of the Agreement, as a park and ride facility that is located a short car journey from a person's usual place of residence; and the foreign depot.
 - ii. Those findings in paragraphs [55] and [56] of the reasons for decision cannot be read harmoniously with the Commissioner's declaration.
4. The Commissioner erred in law in interpreting clause 5.2.1 of the Agreement by finding in paragraphs [55] and [56] of the reasons for decision that a depot manager is entitled to treat a railcar [sic] as being reasonably able to use public transport to travel between that railcar driver's usual place of residence and a foreign depot in circumstances where:
 - a. there is a short car journey between the railcar driver's usual place of residence and a park and ride facility;
 - b. where the railcar driver can be dropped off at public transport; or
 - c. the railcar driver drives their car past their home depot while traveling to or from a foreign depot.

Particulars

- i. If a railcar driver has to drive their car from their usual place of residence to a park and ride facility, or has to be dropped off at a park and ride facility by someone else, then that railcar driver could not be said to be using public transport to travel from their usual place of residence to the foreign depot and back again.
- ii. Just because a railcar driver drives their car past their home depot while traveling to or from a foreign depot, and there is public transport available between the home depot and the foreign depot, it does not follow that the railcar driver can use public transport to travel from their usual place of residence to the foreign depot and back again.

Orders soughtPrimary order sought

- B. The Full Bench upholds the appeal and:
 - i. quashes the declaration made by the Commissioner on 7 April 2017; and
 - ii. varies the order made by the Commissioner made on 24 March 2017 to instead be that the RTBU's section 27(1)(a) application is upheld and the PTA's application in APPL 11 of 2017 is dismissed.

Alternate order sought

- C. The Full Bench upholds the appeal and varies the declaration made by the Commissioner on 7 April 2017 to instead read:
 - i. The true meaning of the words 'public transport' in clause 5.2.1(b) of the Agreement does not include locations along the PTA's railway network which are inaccessible to members of the general public who are using that railway network.
 - ii. In considering whether an employee is reasonably able to use public transport to travel to and from a depot other than the employee's home depot under clause 5.2.1(b), the depot manager of the employee's home depot shall consider as the relevant locations the employee's usual place of residence and the other depot.
 - iii. If an employee needs to use a mode of transport, other than public transport, to travel between their usual place of residence and a foreign depot then that employee is entitled to the higher allowance that is contained in clause 5.2.1(b)(i) of the Agreement.

The parties' submissions on the hearing of the appeal**(a) The union's submissions**

45 In ground 1 of the grounds of appeal the union contends that in making the decision to dismiss its s 27(1)(a) application the learned Commissioner acted on a wrong principle by finding:

- (a) that s 46(3) was a 'complete answer' to the union's application; and
- (b) that the Commission's role under s 46 of the Act was to provide 'assistance to the Industrial Magistrate's Court'.

46 The union concedes that whilst the nature of the power entrusted in the Commission by virtue of s 46 of the Act was a relevant consideration for the learned Commissioner to take into account, it was not a complete answer to the union's application. It says the jurisdiction of the Commission to determine the PTA's s 46 application was just one of a range of relevant considerations. It had to be weighed against the union's public interest arguments and the union's claim that the PTA's application was an abuse of process.

47 The union says the learned Commissioner should have balanced each of the following factors:

- (a) the PTA was ordinarily entitled to invoke the jurisdiction of the Commission under s 46;
- (b) section 46 enabled the Commission to bind the Industrial Magistrate's Court to a particular interpretation of cl 5.2.1 of the Industrial Agreement;
- (c) the Industrial Magistrate's Court was also empowered to resolve the interpretation issue between the parties (albeit, not equally empowered);
- (d) the PTA's s 46 application amounted to forum shopping and created a duplicity of proceedings;
- (e) at the time of the hearing before the learned Commissioner, there were only five weeks to go until the trial in the Industrial Magistrate's Court;
- (f) the PTA's s 46 application was going to have a material bearing on the proceedings before the Industrial Magistrate's Court; and
- (g) the PTA's s 46 application was going to waste the time and resources of the parties, the Industrial Magistrate's Court and the Commission. In particular, the s 46 application could not resolve the question that the Industrial Magistrate has to answer as to whether or not it is open for the depot manager to be reasonably satisfied that Mr Olynyk could use public transport to get from his usual place of residence to the foreign depot and back on the two days where he was required to go and work at Nowergup. That is a factual issue that is not resolved and has not been resolved by the s 46 application.

48 The union also makes a submission that the Commission's role under s 46 is not to provide assistance to the Industrial Magistrate's Court. This is because the learned Commissioner did not confine himself to making a finding of law about the

proper interpretation of the Industrial Agreement. In his reasons for decision, the learned Commissioner made obiter dicta comments about a range of different factual scenarios and how those scenarios should align with cl 5.2.1 of the Industrial Agreement. Section 46 of the Act does not empower the Commission to assist the Industrial Magistrate's Court in this way.

- 49 In these circumstances, the union says if it is persuaded that ground 1 of the appeal is made out then the Full Bench should re-exercise the discretion conferred by s 27(1)(a) of the Act and dismiss the PTA's s 46 application in APPL 11 of 2017.
- 50 In ground 2 of the grounds of appeal the union says that the learned Commissioner correctly identified that while rail car drivers could board and alight from a train at Nowergup depot, ordinary members of the public could not. It said that the learned Commissioner erred by ignoring the significance of the word 'public' in the term 'public transport' in cl 5.2.1 of the Industrial Agreement. It says the word public ordinarily refers to the public at large and given the learned Commissioner's acceptance that the public at large could not board or alight from a train at the Nowergup depot, it was contrary to the plain meaning of the meaning of the words 'public transport' to find that Nowergup depot was accessible via public transport.
- 51 When it was put to counsel for the union that the declaration made by the learned Commissioner was not a declaration about the true meaning of the words 'public transport' in response a submission was put that this issue was dealt with in the learned Commissioner's reasons for decision and by doing so he has determined the factual dispute which was contrary to what he said in his actual declaration issued in the order. That is when you are looking at the two locations of the foreign depot and the usual place of residence a person can get to the foreign depot of Nowergup.
- 52 In grounds 3 and 4 of the grounds of appeal the union argues that the learned Commissioner's declaration, divorced from the reasons for decision, whilst reflecting an accurate interpretation of cl 5.2.1 of the Industrial Agreement, when the declaration is read by regard to what is said in the reasons for decision, the declaration makes no sense, or is plainly wrong.
- 53 The union points out there is an obligation on the Commission to provide adequate reason for decision. This obligation includes a requirement that the reasons for decision be clear and coherent. There are two purposes for this rule. The first purpose 'is to enable the parties to understand why they have won or lost'. The second is to 'ensure that decision makers approach their important task with sufficient rigour': *Pemberton v Civil Service Insurance Agency Pty Ltd* [2008] WAIRC 01116; (2008) 88 WAIG 1768 [235] - [236].
- 54 It is said that the learned Commissioner's reasons for making the declaration were not clear or coherent because although the declaration states that the relevant locations for the purpose of cl 5.2.1 of the Industrial Agreement are the rail car driver's usual place of residence and the foreign depot, in his reasons for decision he says that the following locations are relevant for the purpose of cl 5.2.1:
- (a) any of the following:
 - (i) the rail car driver's usual place of residence;
 - (ii) a park and ride facility that is located a short car journey from a person's usual place of residence;
 - (iii) a location where a rail car driver can be dropped off; or
 - (iv) the rail car driver's home depot if the rail car driver drives their car past that home depot on the way to and from the foreign depot; and
 - (b) the foreign depot.
- (b) The PTA's submissions**
- 55 The PTA says there is no merit in ground 1 of the grounds of appeal. Firstly, the union accepted before the Commissioner at first instance that:
- (a) the starting point is that the PTA has a prima facie right to have its s 46 application heard and determined; and
 - (b) if the Commission was the only entity that possessed the jurisdiction to deal with the industrial matter in issue, then the onus on the union that it is not necessary or desirable in the public interest to have the matter determined would be a heavy one.
- 56 Secondly, it says the application by it for a true interpretation of the Industrial Agreement was the industrial matter before the Commission. Thirdly, no other court or body has jurisdiction to make such a declaration. Section 46(3) of the Act provides that a declaration under s 46 is binding on all courts and all persons. This will clearly include the Industrial Magistrate's Court. Fourthly, the Industrial Magistrate's Court has no power or jurisdiction to declare the true meaning of an agreement. Rather, the Industrial Magistrate's Court can 'enforce' industrial instruments. This may require an Industrial Magistrate to consider the correct interpretation of an agreement, however, this does not provide any power for the Industrial Magistrate to declare the true meaning of an industrial agreement. Accordingly, the PTA says the Commission is the only entity that has jurisdiction to deal with the industrial matter raised by the PTA and as such, on the union's own concession, there is a heavy onus on the union to establish why the Commission ought not to exercise its exclusive jurisdiction.
- 57 It is for this reason that the learned Commissioner was correct to find that s 46(3) is a complete answer to the application. This is because s 46(3) makes it clear that the jurisdiction of the Commission over such matters is exclusive of all other courts and bodies.
- 58 The PTA say from a practical perspective, it is also correct that the Commission can provide assistance to an Industrial Magistrate by declaring the true interpretation of the Industrial Agreement. This is because the Industrial Magistrate will be assisted (as a matter of practicality) by being able to look at a decision of the Commission to find the true meaning of an agreement.
- 59 The PTA, however, concedes that what has been decided by the learned Commissioner in the declaration is that it only deals with one aspect of the matters of dispute in Mr Olynyk. However, the PTA says that that simply demonstrates that the

jurisdiction of the Industrial Magistrate under s 83 of the Act and the Commission under s 46 of the Act are entirely different as it was a different dispute that was before the Commission under s 46 than the dispute before the Industrial Magistrate's Court.

- 60 The PTA says the reason why the factual circumstances of Mr Olynyk are referred to in the application is not only because the Regulations require a statement of facts being set out in support of an application, but also because the facts demonstrate the public transport question that has arisen in the matter before the Commission under s 46. Further, that the facts demonstrate that there is a dispute on the interpretation, but it does not ultimately determine what the interpretation of the provisions of the Industrial Agreement is going to be in relation to Mr Olynyk.
- 61 The PTA also says that its application has not led to an additional level of proceedings. It says even if the Full Bench, on an appeal from the Industrial Magistrate's Court, were to make a finding about the interpretation of the Industrial Agreement, that would not have an effect on the operation of s 46(3) of the Act. As such, a decision would not bind all the courts in the State, so that the respondent could still bring a s 46(3) application before the Commissioner at first instance. In making this submission, it is said that in those circumstances the Commissioner at first instance hearing the s 46(3) application would most likely follow the interpretation given by the Full Bench on the appeal from the Industrial Magistrate, but it would not necessarily. There might be other facts and circumstances which can be raised before the Commission on a s 46 application which are not admissible before the Industrial Magistrate because it is only the matters in dispute between the parties in the case which the Commission might then decide that the Full Bench had erred.
- 62 The PTA says that whilst s 46(3) is the complete answer to the union's s 27(1)(a) application, it also says there is another reason why it was almost inevitable that such an application be dismissed. These are:
- (a) on an application to the Industrial Magistrate's Court to enforce an industrial instrument the Court may impose a penalty on the employer; and
 - (b) if the learned Commissioner summarily dismissed the PTA's interpretation application then, whilst the PTA waited for the Industrial Magistrate's Court claim to be dealt with, it would be left with one of two undesirable choices. It would either choose to suffer the oppression of being forced to apply the union's interpretation of the Industrial Agreement (which the PTA necessarily believes to be erroneous) or it would continue to apply its own interpretation on pain of facing further possible penalties at the hand of the Industrial Magistrate's Court for continuing breaches of the Industrial Agreement.
- 63 Once this matter is taken into account and understood, it can be seen that the approach taken by the PTA in this case was in fact an approach of a model employer, to ensure the meaning of the Industrial Agreement is clarified as soon as possible, and to ensure it does not breach (or continue to breach) the Industrial Agreement.
- 64 In respect of ground 2 of the grounds of appeal which is directed at the true meaning of 'public transport', the PTA says it is implicit in the findings made by the learned Commissioner in his reasons for decision that he declared what the true interpretation of 'public transport' is. However, if the Full Bench was to find that the observations made by the learned Commissioner do not amount to a declaration of the true interpretation of the meaning of 'public transport' within the meaning of cl 5.2 of the Industrial Agreement, then the observations made in relation to the meaning of 'public transport' are not appealable and ground 2 is an incompetent ground of appeal. If that proposition is not accepted, then the PTA says that the learned Commissioner correctly found that the ordinary meaning of the term 'public transport' means 'trains accessible to the public'. It is not the case, the PTA says, that the learned Commissioner found that there is public transport to and from the Nowergup depot. Rather he found that when a rail car driver uses trains that are available to the public in order to alight at Nowergup depot, they are using public transport. This finding, it is said, is correct for two reasons. First, the phrase 'public transport' on its ordinary meaning means transport that is available to the public. In this case the union does not contend that the trains used by rail car drivers when accessing Nowergup depot are not available to the public, nor could it do so, as that would be contrary to the evidence. The union's contention that, despite the fact that members of the public are able to use the transport which the rail car drivers are using to get to Nowergup depot, the transport somehow becomes something other than public transport when the train arrives at Nowergup depot. It is not a correct interpretation. To adopt such an interpretation would be to divorce the word 'public' from 'transport'. Secondly, the PTA says the learned Commissioner was also correct when the true interpretation of the clause is considered taking into account the objective intention of the parties. It is said that the clause is intended to compensate a rail car driver for the extra time and distance that he or she is required to travel to a foreign depot. If the union's construction was accepted, then even where a rail car driver was reasonably able to use a train operated by the PTA to get from their home depot in Mandurah to a foreign depot (being Nowergup), they would receive double the allowance to compensate them for the extra time and distance to travel despite the fact that they could obtain free (and convenient) transport on the publicly available trains that will stop at Nowergup depot for rail car drivers. Thus, it is said the objective intention of the parties is that there would be no need for double the allowance to be paid in those circumstances, given that the rail car driver can easily access free and convenient public transport.
- 65 The PTA says that ground 3 of the grounds of appeal is without merit. First of all they say that the ground is meaningless because the union attacks the declaration made by the learned Commissioner as to the true meaning of cl 5.2.1(b) on the basis that the learned Commissioner gave inadequate reasons, however, the union ultimately seeks for the Full Bench to declare the true interpretation of cl 5.2.1(b) in the same manner as the learned Commissioner so declared. Thus, they say there is no utility in the Full Bench considering this ground of appeal.
- 66 The PTA also point out that the ratio of the reasons for decision is a finding that is whether an employee is reasonably able to use public transport will only be able to be decided on a case by case basis and what is reasonable will depend upon all the circumstances. In making observations that there may be other relevant locations, such as for example the park and ride facility where a driver may be dropped off at to use public transport, are obiter observations which are not appealable. Further, in any event, at its highest, all the learned Commissioner is saying is that in certain circumstances it might be appropriate for

the depot manager to consider whether or not the rail car driver can take a short car journey to a park and ride facility when considering if the rail car driver is reasonably able to use public transport.

- 67 The PTA makes a similar submission in relation to ground 4 of the grounds of appeal. It says that ground 4 is based on an incorrect assumption regarding the finding of the learned Commissioner. All the learned Commissioner did was to make obiter observations. Obiter observations, it is said, are not a decision within the meaning of s 49 of the Act so there is no jurisdiction of the Full Bench to consider the matters raised in ground 4.

Public interest - findings

- 68 When considering whether the matter is of such importance that in the public interest an appeal should lie, the principles are well established. In *Rainbow Coast Neighbourhood Centre Inc v Wood* [2011] WAIRC 00821; (2011) 91 WAIG 1831, the Full Bench observed in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 1873 it was settled by a Full Bench unanimously [24]:

[T]hat the words 'public interest' are not to be narrowed to mean 'special or extraordinary circumstances'. An application may involve circumstances which are neither special nor extraordinary. It may involve circumstances which, because of their very generality, are of great importance in the public interest. Each matter will be a question of impression and judgment whether the appeal has the required degree of importance. Also important questions that may have effect in other industries, and substantial matters of law affecting jurisdiction, can give rise to matters of sufficient importance in the public interest to justify an appeal: *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 (Ritter AP) [13] - [14].

- 69 I am of the opinion that the appeal against the decision dismissing the union's application is of sufficient importance it is in the public interest an appeal should lie. This is because the appeal raises important questions of law going to the jurisdiction of the Commission to interpret an 'award' (including an industrial agreement) pursuant to the power conferred by s 46 of the Act and the power of the Industrial Magistrate's Court to enforce an award, industrial agreement or order pursuant to s 83 of the Act.

Scope, purpose and function of applications brought under s 46 and s 83 of the Act - two specific powers

(a) Application for enforcement - s 83 of the Act

- 70 Much has been written about the scope and purpose of the exclusive jurisdiction of the Industrial Magistrate's Court to enforce an industrial instrument including awards and industrial agreements brought under s 83 of the Act.
- 71 Pursuant to s 83(3) and s 81CA(1) of the Act, an application for enforcement comes with the general jurisdiction of an Industrial Magistrate's Court. An application of this kind cannot be made to the Commission. Section 83 applications are civil penalty proceedings whereby a penalty may be imposed on a person found to have contravened an industrial instrument (s 83E). Orders can also be made against an employer requiring payment of any amount found to have been underpaid to an employee (s 83A). When hearing a matter under s 83, the Industrial Magistrate is bound by the rules of evidence. The powers, practice and procedure to be observed by an Industrial Magistrate's Court when exercising general jurisdiction are those provided for by the *Magistrates Court (Civil Proceedings) Act 2004* (WA) as if the proceedings were a case within the meaning of that Act.
- 72 An enforcement of an industrial instrument requires a finding being made by an Industrial Magistrate's Court of an actual contravention or failure to comply with an industrial instrument. Where a contravention is proved, the Industrial Magistrate's Court may provide relief in the nature of injunctive relief to prevent any further contravention or failure to comply (s 83(5)). The Industrial Magistrate's Court can also make an interim order under s 83(5) (s 83(7)).
- 73 Consequently, the purpose of the Industrial Magistrate's Court proceedings brought pursuant to s 83 of the Act is to determine whether a pre-existing legal obligation or entitlement (by operation of a provision in an industrial instrument) has been breached.
- 74 Claims for the enforcement of existing legal rights necessarily invoke the exercise of judicial power: *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* [1987] HCA 63; (1987) 163 CLR 656, 666; *Re Cram; Ex parte The Newcastle Wallsend Coal Co Pty Ltd* [1987] HCA 29; (1987) 163 CLR 140; *Re Cram* applied in *Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623.

(b) Interpreting an industrial agreement - general principles of interpretation

- 75 In determining whether a party to proceedings has contravened or failed to comply with a provision of an industrial instrument, an Industrial Magistrate's Court must necessarily interpret the provisions of an industrial agreement in accordance with the principles that apply to the interpretation of industrial agreements: *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2013) 94 WAIG 1. These principles are also to be applied by the Commission when hearing and determining an application for the true interpretation of an award as defined under s 46 of the Act, which includes an industrial agreement.
- 76 In *Health Services Union of Western Australia (Union of Workers) v The Director General of Health* [2012] WAIRC 01117; (2012) 93 WAIG 1, Beech CC and I observed that [38] - [40]:

Firstly, it is clear that the task of construction of industrial instruments is to be approached in a way that allows for a generous construction. Secondly, part of the context of construction of an industrial instrument is how it is made. Where an industrial instrument is an award, the principles to be applied were set out by French J in *City of Wanneroo v Holmes* (378 - 379) where his Honour said:

The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words: *Re Clothing Trades Award* (1950) 68 CAR 597 (Aust Indus Ct, Full Ct). The words are to be read as a whole and in

context: *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: *Picard v John Heine & Son Ltd* (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all: *Seymour v Stawell Timber Industries Pty Ltd* (1985) 13 IR 289 at 290; 9 FCR 241 at 244 (Northrop J) (13 IR at 299; 9 FCR at 254) (Keely J) cf 13 IR at 309; 9 FCR at 265 (Gray J). The logs of claim and arbitrator's reasons for decision may be referred to to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. Evidence of the conduct of the parties subsequent to the making of the award however, cannot be relied upon to construe it: *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444, 446, disapproving *Merchant Seamen's Guild of Australia v Sydney Steam Collier Owners and Coal Stevedores Association* (1958) 1 FLR 248. That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:

'... it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.' – See also *Re Crown Employees (Overtime) Award* [1969] AR(NSW) 60 at 63; *Re Hospital Employees Administrative and Clerical (State) Award* (1982) 2 IR 123.

It is of course no part of the court's task to assign a meaning in order that the award may provide what the Court thinks is appropriate – *Australian Workers Union v Graziers Association (NSW)* (1939) 40 CAR 494. Indeed it has been said that a tribunal interpreting an award must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the award making authority – *Re Health Administration Corporation; Re Public Hospital Nurses (State) Award* (1985) 12 IR 122; *Rogers Meat Co Pty Ltd v Howarth* [1960] AR(NSW) 291; *Re Government Railways and Tramways (Engineers etc) Award* [1928] AR 53 at 58 (Cantor J).

Justice French subsequently reaffirmed what he said in *City of Wanneroo v Holmes* in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* when he observed [57]:

It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities — *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned — see eg *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):

Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.

Later, Kirby and Callinan JJ in *Ancor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241; (2005) 79 ALJR 703; (2005) 138 IR 286 [96] and [129] favoured an even more generous contextual approach that had been expressed in *Kucks* by Madgwick J who had said (184):

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

77 These observations were applied by the majority of the Full Bench in *United Voice WA v Director General, Department of Education* [2013] WAIRC 00053; (2013) 93 WAIG 80 [53]. In that matter, Beech CC and I observed that [52]:

To construct the intention of the parties, regard must be had to the principles that apply to the construction of contracts: *Short v F W Hercus Pty Ltd* [1993] FCA 51; (1993) 40 FCR 511, 518 - 519 (Burchett J); *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2010] FCAFC 90; (2010) 186 FCR 88 [90] - [96] (Logan J). Importantly, regard cannot be had to the actual intention of parties or their expectations. Evidence of such matters is usually inadmissible: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981-1982) 149 CLR 337, 352 (Mason J). Ascertaining the presumed intention of the parties requires the objective determination of what a reasonable person would have understood the contract (in this matter the 2010 agreement) to mean, as at the date that it was made, taking into account the object of the contract and the surrounding circumstances known to the parties: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 [11]. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 the Full Court of the High Court said [40]:

This Court, in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* at 461-462 [22]).

78 In an appeal to the Industrial Appeal Court against the decision of the Full Bench, the Industrial Appeal Court found the Full Bench had erred in construing the provision of the industrial agreement in question, but did not find error with the analysis of the principles to be applied when interpreting an industrial agreement: *Director General, Department of Education v United Voice WA*. Justice Pullin, with whom Le Miere J agreed [18] - [22]:

- (a) affirmed the application of the principle in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40] and *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22];
- (b) applied the principle in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 requiring ambiguity before regard could be had to surrounding circumstances;
- (c) had regard to the principle in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109 that a phrase must be construed in the context of the agreement read as a whole; and
- (d) had regard to the principle that industrial agreements are not always framed with that careful attention to form and draftsmanship which one expects to find in an Act of Parliament: *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498, 503.

79 In *Re Harrison; Ex parte Hames* [2015] WASC 247 Beech J summarised the general principles that apply to construction of contracts and other instruments. At [50] - [51] he said:

The general principles relevant to the proper construction of instruments are well-known. In summary:

- (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
- (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
- (3) the objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;
- (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
- (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
- (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Kidd v The State of Western Australia* [2014] WASC 99 [122]; *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [106] - [112]; *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd* [2014] WASC 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).

These general principles apply in the construction of an industrial agreement (*Director General, Department of Education v United Voice WA* [2013] WASC 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (*Amcor Ltd v Construction, Forestry, Mining & Energy Union* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); *Director General v United Voice* [81]; see also *Amcor v CFMEU* 66 (Kirby J), 129 - 130 (Callinan J)).

80 Thus, it appears clear that, in interpreting industrial agreements, they are:

- (a) to be interpreted generously;
- (b) drafted without the careful attention given to the form of a statutory instrument;
- (c) enforceable at law within a statutory context and a person bound cannot be freed or discharged from any liability or penalty or from the obligation by reasons of any contractual provision (s 114(1) of the Act); and
- (d) to be interpreted in light of the context of the industrial character and purpose of an industrial agreement not divorced from industrial realities in the industry to which an industrial agreement extends.

(c) **Applications for a true interpretation of an industrial agreement - s 46 of the Act**

81 Section 46 of the Act provides:

- (1) At any time while an award is in force under this Act the Commission may, on the application of any employer, organisation, or association bound by the award —
 - (a) declare the true interpretation of the award; and
 - (b) where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.
- (2) A declaration under this section may be made in the Commission's reasons for decision but shall be made in the form of an order if, within 7 days of the handing down of the Commission's reasons for decision, any organisation, association, or employer bound by the award so requests.
- (3) Subject to this Act, a declaration made under this section is binding on all courts and all persons with respect to the matter the subject of the declaration.
- (4) Section 35 does not apply to or in relation to this section unless an order is made under subsection (1)(b) or under subsection (2).
- (5) In this section *award* includes an order, including a General Order, made by the Commission under any provision of this Act other than this section and an industrial agreement.

82 Little has been written in Western Australia for many years about the scope, purpose and effect of the power of the Commission conferred by s 46 to declare the true interpretation of an 'award' as defined in s 46(5).

83 When one delves into the history of interpretation of s 46 and its predecessors in the *Industrial Arbitration Act 1912* (WA), it emerges that the purpose of s 46 is to determine the objective intention of the parties as it is embodied in the words they have used. This may involve ascertaining whether an ambiguity arises in a provision in an award and, if so, to then examine the surrounding circumstances of the conditions of the relevant industry at the time of the making of the award (or in the case of an industrial agreement, the entering into the industrial agreement) to ascertain the true intention of the provision. If no ambiguity is raised, no inquiry is necessary. However, regard cannot be had to surrounding circumstances to determine if an ambiguity arises: *Director General, Department of Education v United Voice WA* [19] (Pullin J). If an ambiguity is raised and if after inquiry a defect emerges revealing the true meaning is not reflected in the words used in the provision in question, then pursuant to s 46(1)(b) the Commission is empowered to remedy the defect or to amend the provision to give fuller effect to the true meaning.

84 Section 88 of the *Industrial Arbitration Act 1912* in 1941 provided:

With respect to every Award the Court by order at any time during the term of the Award may declare the true interpretation of the Award and shall have power to amend the provisions of the Award for the purpose of remedying any defect therein or of giving fuller effect thereto.

85 In 1941, a predecessor to the Full Bench of this Commission, the Court of Arbitration of Western Australia, held that the Court in a proper case should exercise its power of interpretation irrespective of whether the Industrial Magistrate's Court or any other court had under its consideration any case or cases involving applications for enforcement in which the construction or interpretation of a provision of an award was involved: *The Commissioner of Railways v West Australian Locomotive Engine Drivers, Firemen's and Cleaners' Union of Workers* (1941) 21 WAIG 451. In that matter, the majority of the Court found in the matter before it the parties had not drawn any attention to any ambiguity, latent or otherwise, in the clause in question (451). The question put to the Court asked not for an interpretation of the award, but for a decision on certain facts upon which the Industrial Magistrate had already delivered a decision that the Commissioner of Railways was not satisfied and the proper remedy was by way of an appeal from the Industrial Magistrate's decision.

86 In 1984 in the often cited decision of the Industrial Appeal Court in *Norwest Beef Industries Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 2124, as the principles that apply to the construction of the terms of an award, the matters before the Court concerned appeals against a decision of the Full Bench in respect of two applications made pursuant to s 46 of the Act to the true interpretation of provisions in two meat industry awards before Martin C. At the time the appeals to the Court were heard, s 90 of the Act provided appeals from a decision of the Full Bench could only be made on the ground that the decision is erroneous in law or is in excess of jurisdiction. In that context, Olney J observed (2130):

Without intending to unnecessarily add to the volume of judicial and other opinion that has been expressed over many years concerning the function of section 46 and its equivalent provisions in previous State and counterpart Federal legislation, it is appropriate at this stage to observe that in view of the limited appellate jurisdiction of this Court these appeals are only competent if in the facts of the particular case the declaration of the true interpretation of the awards in question involves a question of law. It has not been suggested on either side that the case is otherwise and for that reason and also in view of the conclusion I have reached, it is neither appropriate nor necessary for me to enter upon a consideration of whether a question of law is in fact involved. It is sufficient to say that I am by no means convinced that on every occasion an application for the declaration of the true interpretation of an industrial award will necessarily involve a question of law entitling a dissatisfied party to take the matter through the appellate structure ultimately to this Court. There is some authority to suggest that the jurisdiction of the Commission pursuant to section 46 is at least in part arbitral in nature and indeed I can imagine circumstances where the only real function to be performed upon an application for a declaration as to the true interpretation of an award would be fact finding, and this would be particularly so in cases where the meaning of terms or the established custom and usage in an industry are in issue.

- 87 After considering the arguments put on behalf of the parties, the majority of the Court dismissed the appeals after finding the Full Bench had correctly stated the relevant principles of law and there was no ambiguity in the relevant provisions of the awards.
- 88 In the decision of the Full Bench that was the subject of the appeal to the Industrial Appeal Court in *Norwest Beef*, O'Dea P and Collier C in a joint judgment set out at some length the approach to the interpretation of an award under s 46 of the Act that had been established since the enactment of the power to do so was conferred upon the Court of Arbitration by s 88 of the *Industrial Arbitration Act 1912: Derby Meat Processing Co Ltd v West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 862. At (864 - 865) O'Dea P and Collier C found:

It is now trite law that when the meaning of language read in its ordinary and natural sense is obtained it is not necessary or indeed permissible to look to the intention of the parties. Furthermore the strict rules do not permit construction of any document by having regard to acts done under it, see *Seamen's Union of Australia v. Adelaide Steamship Co. Ltd. and Others* 46 F.L.R. 444 applying; *L. Schuler A. G. v. Wickman Machine Tool Sales Ltd* (1973) 2 All E.R. 39. See also *Amalgamated Engineering Union v. Adams and Co. Pty. Ltd. and Others* 24 C.A.R. 63 at 67.

There are normally limitations on the permissible extent of considering matters extraneous to the award. The following are examples:—

We have referred to the provisions of the relevant clauses of the award and examined also the terms of the judgment accompanying it to see what the nature and circumstances of the industry were to which the clauses were addressed and what was the object appearing from the nature and circumstances of the industry which the tribunal in framing those clauses had in view. This is an authoritative and sound method of approach to the question of the proper interpretation of an award regulating the conditions of employment of employees in an industry as complex as iron and steel making. It should be pointed out, however, that nothing that has been said would justify a meaning being given to the words that they are not capable of bearing. (In re Iron and Steel Works Employees (Australian Iron & Steel Limited) Award (No. 2) [1943] 42 A.R. 462 at 470.)

Again—

Where a provision has appeared in an award or succession of awards for a lengthy period of time and been acted upon without challenge by parties in a certain manner then if the award is reasonably capable of bearing such a meaning the Court ought in the normal course to adopt it as its proper meaning. (*O'Donnell v. Walter Buchanan Limited* (1947) N.Z.L.R. 906 at 910.)

It is not without precedent, of course, for this Commission to treat a long held practice as expressing the true intention of an award but we think the fundamental rules of construction are normally applied unless it is necessary to seek out and apply the true meaning because the award when read is ambiguous or susceptible of more than one meaning. This was the approach followed by the first President of the Court of Arbitration when speaking of the equivalent to section 46 of the present Act by which equivalent the Court was empowered to 'declare the true interpretation of the award, and shall have power to amend the provisions of the award for the purpose of remedying any defect therein or giving fuller effect thereto'.

The President said:—

A perusal of section 88 of the Act above quoted will show that in an interpretation case this Court is exercising not only its judicial but also its arbitral functions, and consequently where there is in an award any doubt or uncertainty or ambiguity as to any of its provisions, or when there has been an accidental omission or where something has been inserted in error, the Court is entitled to look into the whole of the surrounding circumstances and explore what avenues it may deem necessary even to the extent, where desirable, of appointing experts to investigate and report, in order to ascertain the true intention and to remedy a defect in the award; provided always, of course, that a specific provision of the award to which the foregoing does not apply may not be altered. (*The Chief Secretary and the Hospital Employees' Industrial Union of Workers of W.A. (Coastal Branch)* 11 W.A.I.G. 105 at 106.)

Twenty years later Jackson J. the then President, said:—

1. Normally speaking, an Award is interpreted by reading the document itself and giving to the words used their ordinary commonsense English meaning. If, when this is done, there is no doubt or ambiguity, then the obvious meaning is the one which is to be given to the words used. Occasionally a rare case may arise where it may be shown that there has been some slip or error in the wording used and, if this is demonstrated clearly, then undoubtedly the error should be corrected.

2. If, upon the reading of the Award any provision is susceptible of more than one meaning, then it is the duty of the Court to seek and apply the true meaning. For this purpose regard may be had to the history of the Award and the circumstances and conditions of the industry at the time it was made. Regard may also be had, in my opinion, under the provisions of section 90 of the Act, to whatever can be ascertained to have been the true intention of the award-making tribunal. I mention section 90 in this connection because that is the section which authorises the Court to declare the true interpretation of an Award and in the same section the Court is empowered to amend the Award for the purpose of remedying any defect therein or of giving fuller effect thereto. The granting of these powers presupposes that an award may not have properly expressed the Court's true intention.

3. Where the Award being interpreted is one which has been made by the Court itself and made at a time when the members of the Court were the same as those constituting the Court at the time the interpretation is sought, there should in general be little difficulty in the Court ascertaining from its own files and records what was intended. If then the Award has not expressed what the Court knows to have been its true intention, it is just and equitable that

the true intention should immediately be made known and, if necessary, the Award amended accordingly. In doing so, the Court departs from the normal principles of interpretation of documents as applied by the civil Courts but it does so because, in my opinion it is empowered to do this by the legislature and the whole spirit of the Act under which this Court operates is that technicalities should be avoided and justice and equity should be done.

4. Where, however, the Court is interpreting an Award made by some other industrial tribunal (such as a Conciliation Commissioner or an Industrial Board) or made by the Court itself, but by the Court as constituted by previous occupants of the Bench, it is not so easy for the Court to ascertain the true intention of the tribunal which made the Award. Where the Award was made by a tribunal still in existence and readily available, the Court can take advantage of paragraph (vi) of section 71 and refer the question to that tribunal for a report. Where the Award was made by a differently constituted Court then, in the absence of any clear expression of intention such as might appear on the transcript particularly at the time of the speaking to the minutes of the Award, the Court interpreting the Award can in general only apply the normal rules of legal interpretation. (The United Furniture Trades Industrial Union of Workers, Perth, W.A. v. Dale Manufacturing Co. Pty. Ltd. and others 30 W.A.I.G. 539 at 540.)

In our respectful opinion where it is necessary to seek the true meaning of a provision susceptible of more than one meaning departure from normal principles of interpretation is not necessarily involved.

Nevile J., as President, may be thought to have gone somewhat further in *Field Construction Co. v. The Boilermakers' Society of Australia, Union of Workers, Coastal Districts* 41 W.A.I.G. 990 where in part of his judgment he said:—

That then raises the question as to how we should now interpret the Award. Normally, once the meaning of the words 'outside work' in this industry is ascertained from the evidence to be work away from the workshop or its vicinity, there would seem to be little ambiguity in the remainder of the clause, so one would feel impelled to give to the words their ordinary meaning. But in this case the clause has to the knowledge of all parties, been applied in a much more restricted sense. It is clear that in 1938 and also as, I think, in 1951, both the employers and the Unions assumed that the clause only applied to workers sent to an outside job and to those picked up on that job. It follows, I think, that when the parties in 1954 agreed to the insertion in the current Award of a clause in words identical with those in which the similar provision in previous Awards had been expressed, they could not have intended the clause to operate in a manner differing from that in which it had previously operated over such a long period. At the risk therefore of doing some violence to the words in which the clause is expressed, I would interpret the clause as if the words 'sent to' were substituted for the words 'engaged on'. After all, as Isaacs J. pointed out in *Pickard v. John Heine & Son Ltd.* (1924) 35 C.L.R. at p.6, an industrial tribunal when interpreting an Award, is acting in an arbitral rather than a purely judicial function, and should therefore attempt to interpret the Award in a sense best fitted to carry into effect the intention of the Award making tribunal even if such an interpretation in effect amends the Award.

Moreover, in my view, once it is made clear that the words in which an Award is expressed do not correctly express the Court's intention in making the Award, there is a defect in the Award. (See *Hospital Employees' Case* 11 W.A.I.G. 105.) I should perhaps add that it will be only in very rare cases that the Court can be absolutely sure that a defect of that nature exists as, ordinarily, the Court's intention can be ascertained only from the words it has used in making the Award. But in this case I am so convinced, and as, if this were an application for interpretation we would have authority under section 90 of the Act to cure the defect, I think we should in this application interpret the Award so as to give effect to the intention of the parties and the Court.

Upon reading the awards Martin C. understood their meaning and adopted the interpretation for which the respondent contended and rejected the appellants' argument while finding that such an interpretation was clearly different to that applied to the awards in the practices followed in the industry. There was nothing in the material before him which would compel a different interpretation unless by reference to the general practices which he found operating in the industry, it appears that the words of the awards do not correctly express their intention when they were made, even though they are not susceptible of more than one meaning nor ambiguous in the accepted sense. The appellants relied upon the practice as constituting an accepted custom in the industry but their argument went more to the ordinary meaning of the provisions of the awards than to a new intention to be found outside the words used.

In exercising the Commission's jurisdiction Martin C. was entitled to refer to the sources from which he obtained the history which he recounted including the expressed opinion of Mr Commissioner O'Sullivan. He was not bound by that opinion but what he did ascertain led him to firm conclusions. If those matters be treated for the moment as relevant aids to interpretation a number of things should be noted. The practice of the employers, which in 1972 was affirmed by Mr Commissioner O'Sullivan, was inconsistent with the intention which was expressed in the earlier awards which he issued, as that intention is normally construed, by reading the awards. Furthermore, to the extent the practice of paying penalties to slaughtermen then applied, it was not supported by a literal reading of the relevant provisions. The Commission settled the dispute, including that matter, in 1972 and the employers continued to assess payment for penalties as before but the provisions remained unamended. Yet it is to those provisions the Commission must look to ascertain what was the intention unless the known practice leads to an assumption that something different is agreed upon and intended to be adopted.

It may be possible to construe the inaction of the union over the years as acceptance of the employer's application of the provisions but it does not follow that the union accepted or recognised that such application accorded with the true interpretation.

To ignore the plain meaning because that meaning has not been applied in practice is to go beyond what was done in the Field Construction case (*supra*) where it was made clear to the Court, because both parties assumed it to be the case, that the words in which the award was expressed did not correctly express the Court's intention and the award was therefore defective.

In our opinion Martin C. had no alternative in these circumstances but to seek the clear expression of intention from the language of the awards. There is ample provision to apply for their amendment.

... It is no part of the duty of the Court in construing an award on an application for interpretation to give it a meaning either with the object of prescribing that which it considers to be proper or for the purpose of carrying out what it supposes to be the intention of the award-making authority unless the words of the award can reasonably bear that meaning. (*The Australian Workers Union v. E. A. Abbey and Others* 40 C.A.R. 494 at 495.)

- 89 On appeal from the decision of the Full Bench in *Norwest Beef* this approach was approved. Justice Olney said (2133):

If it be the case that the correct approach to the interpretation of an industrial award is to read the document itself and give to the words used their ordinary commonsense English meaning (see Jackson J. in *United Furniture Trades Industrial Union v. Dale Manufacturing Co. Pty. Ltd.*, 30 W.A.I.G. 539, at p. 540) then the first task in every case will be to determine whether the words used are capable in their ordinary sense of having unambiguous meaning. If that question is answered in the affirmative then the further consideration of the expressed or supposed intention of the award making tribunal does not fall to be considered. The majority of the Full Bench in this case took that view when they said:

It is now trite law that when the meaning of language read in its ordinary and natural sense is obtained it is not necessary or indeed permissible to look to the intention of the parties.

In my opinion the majority of the Full Bench has correctly stated the basic principle to be applied in the interpretation of industrial awards. Any other conclusion would lead to industrial anarchy. If the contrary were the case every employer, union official and indeed each employee would need to have available to him the expressed views of the award making tribunal whether they be expressed before or after the making of the award in order to determine the intention of the tribunal whilst the award itself would be rendered meaningless.

- 90 Although Brinsden J was in the minority in *Norwest Beef* as he found the clause in question in both awards to be ambiguous, his Honour applied the same approach to interpretation of the awards as O'Dea P and Collier C did. He observed that ambiguity in a document can arise in two circumstances. Firstly, his Honour found ambiguity can arise from doubt as to the construction in the totality of the ordinary and in themselves well understood English words the parties have employed. Secondly, his Honour found ambiguity may arise from the diversity of subjects to which those words may, in the circumstances, be applied (2127). Justice Brinsden then observed the latter is a matter of interpretation of terms which is always a question of fact (2127). After considering the meaning of the provisions in the award, his Honour found (2127):

In the hope that I have not fallen into the lawyers' trap of seeing difficulties where none exist my view is Clause 12 is ambiguous in a number of respects. Having reached that view it seems to me I am entitled not only to consider earlier awards involving the same parties and the reasons for the making of them, but also the conduct of the parties over the years in the carrying on of their relations to each other pursuant to the earlier awards and indeed under these two awards: see *Furniture Trades Award v. Foy and Gibson* 30 W.A.I.G. 231; *Merchant Service Guild v. Sydney Steam Collier Owners* 1 F.L.R. 248 at 251, 254, 256, 257.

- 91 In other jurisdictions, observations about a similar provision in Commonwealth legislation and the difference between an application for interpretation of an award and proceedings for its enforcement were made by the Full Court of the Federal Court in *Master Builders' Association of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* [1981] FCA 49; (1981) 54 FLR 358. Section 110 of the *Conciliation and Arbitration Act 1904* (Cth), and later s 51 of the *Industrial Relations Act 1988* (Cth), and subsequently s 413 of the *Workplace Relations Act 1996* (Cth) provided that the Court may give an interpretation of an award and the decision of the Court is final and conclusive and binding on the organisations and persons bound by the award who have had an opportunity of being heard by the Court.

- 92 In *Master Builders'*, the Court held that the jurisdiction of the Federal Court to interpret an award did not extend to the determination of the issue of entitlements of a particular employee. At (360 - 361), Evatt and Northrop JJ found:

The nature of the jurisdiction and powers conferred by s. 110 of the Act are described by Northrop J. in *Re Metal Industry Award 1971 (Part II)-Draughtsmen, Production Planners and Technical Officers* ((1978) L.B.Co.'s Indus. Arb. Serv., Current Review, p. 543). His Honour drew a distinction between the jurisdiction conferred by s. 110 and the jurisdiction and powers conferred on the court to enforce compliance with an award, c. f. s. 119, s. 122 and s. 123 of the Act. In his reasons for judgment his Honour said:

The present application, in substance and in form, seeks an order affecting the right of John Valves Pty. Ltd. to deduct payment from the wages payable to a specified employee on specified days. Any order made is binding on each of the organizations and persons bound by the award. The construction of cl. 9(b) of the award is not in dispute, the only issue relates to the finding of facts and the application of the clause to the facts so found. This process does not constitute an interpretation of an award under s. 110 of the Act. It is in the nature of the enforcement of an award.

'Sections 119, 122 and 123 of the *Conciliation and Arbitration Act* confer jurisdiction on the Court under which a person is able to seek the enforcement of an award. The procedures applicable to proceedings under those sections are different to the procedures applicable to proceedings under s. 110. In proceedings under those sections, the Court is empowered to determine disputed questions of fact and to construe an award. The Court then applies the award as so construed to the facts so found and makes orders necessary to give effect thereto. Any order made, subject to any appeal, is binding on the parties to the proceedings before the Court and forms the basis of an estoppel between those persons' ((1978) L.B.Co.'s Indus. Arb. Serv., Current Review, at p. 545).

- 93 The *Master Builders'* decision has been construed as authority for the proposition that in determining an application for interpretation under s 110 of the *Conciliation and Arbitration Act* and later s 413 of the *Workplace Relations Act* there is no power to determine factual disputes. In *Barlow v Qantas Airways Ltd*, Marshall J in considering an appeal against a decision interpreting the words in an award, 'Where a flight attendant is reinstated or re-employed following a successful appeal against dismissal', certain consequences of being returned to a seniority list were to follow. At (115 - 116) Marshall J said:

If I am in error in determining that Wilcox CJ correctly interpreted cl 23(a)(ix) of the award and that restoration of the seniority rights of the third respondents was only possible as a result of the re-employment of them following a successful appeal against dismissal, there is insufficient material before the Court to enable a determination as to whether each of the third respondents was 'dismissed'. Whether such 'dismissals' occurred is a contested question of fact which is inappropriate for determination in proceedings under s 413 of the Act: see *Printing and Kindred Industries Union v Bendigo Advertiser and Independent Pty Ltd* (unreported, Industrial Relations Court of Australia, Gray J, 25 February 1988) where his Honour said at pp 9-10:

'It is no part of the function of the Court, in determining an application pursuant to s 110 of the Act [now s 413], to determine the facts of any particular case. It is therefore unnecessary for me to determine whether any particular employee has reached pensionable retiring age, and to construe that phrase.'

See also *Victoria v Australian Teachers Union* (1993) 49 IR 149 at 151 where Northrop J said:

'Section 51 corresponds to s 110 of the Australian *Conciliation and Arbitration Act* 1904. It has been held that the provision is designed to enable the Court to give an authoritative decision on the meaning of an award. Essentially the decision is based upon the proper construction of words used in the award. The construction is to have general application and is not directed to the particular facts of any matter in dispute between parties. At the same time it is necessary for the Court to have some background information to constitute a framework within which the award is to be construed.'

See further *Media Entertainment and Arts Alliance v John Fairfax Group Ltd* (1993) 49 IR 374 at 375.

Consequently, in the event that I am in error as to the correct interpretation of the award, it would not be appropriate to make a declaration in the terms sought by the appellant. It would be more appropriate to remit the matter to the trial judge to enable him to determine if agreement can be reached on the question as to whether each of the third respondents was dismissed. In the absence of such agreement it would be appropriate for the application to be dismissed on the basis that it essentially seeks enforcement of the award as distinct from an interpretation upon undisputed facts: see *Master Builders Association of Victoria v BLF* (1981) 54 FLR 358 at 360-362 and *Actors Equity v Australian Broadcasting Corporation* (1986) 17 IR 393 at 394.

Having regard to the foregoing the order I would make is that the appeal be dismissed.

- 94 It does not follow from Marshall J's reasoning that the *Master Builders'* decision or the decision of Gray J in *Actors' Equity of Australia v Australian Broadcasting Corporation* [1986] FCA 618; (1986) 17 IR 393 are authority for the proposition that an interpretation of an industrial instrument can only be made without regard to any facts found by the decision maker. It was, however, correct to find as Marshall J did that in *Qantas* a determination of whether a particular employee had been dismissed was a question of fact relevant to the enforcement of the award. This distinction was made by Gray J in *Actors' Equity*. In that case, controversy had arisen as to whether a member of the union, Mr Larking, was entitled to receive some of the gross revenue from the sale of a documentary pursuant to a provision in an award for 'voice over work'. An interpretation was sought in relation to the performance of 'voice over work'. Evidence of what constituted 'voice over work' was heard and considered by Gray J. At (394 - 395) Gray J said:

It should be understood clearly that, in this proceeding, the court is not called upon to decide any question as to the rights of Mr Larking. In points of defence filed prior to the hearing, the respondent raised the contention that 'the contract the subject of the proceedings was not a contract of employment'. This contention was based on the misapprehension that Mr Larking's rights would be determined in the proceeding. At the hearing, Mr Peterson agreed that the question whether Mr Larking was or was not an employee was not in issue in this case. A proceeding under s 110 would not be appropriate for a determination of the issue of the entitlements of a particular person. See *Master Builders Association (Vic) v Australian Building Construction Employees & Builders Labourers' Federation* (1981) 54 FLR 358, especially at 360-362.

There can be no doubt that a real controversy exists between the parties as to the proper construction of cl 50 of the award. It is conceded that that clause and cl 47 of Determination No 114 of 1974 are in identical terms in all material respects. The opposing contentions which have been raised in relation to Mr Larking are therefore likely to be raised in relation to other members of the applicant. Such members may wish to know where they stand before accepting offers to perform work of various kinds in relation to television programmes. There would be little point in seeking an interpretation of the determination, even if there were power in the court to give such an interpretation, because, for future purposes at least, the award supersedes the determination (see cl 4 of the award). In addition, it is at least arguable that the rights of persons in Mr Larking's position may depend upon the award, and not upon the determination. On one view of cl 50 of the award, no right arises until a sale to an overseas organisation has been effected; a right is then accorded to each person falling within the clause, as having been engaged as an employee in the original recording of the programme concerned. Mr Peterson informed the court that sales of 'Douglas Mawson — The Survivor' have been made to overseas buyers, both before and after the award came into effect. This fact may give rise to rights under cl 50 of the award, for those employees engaged in the original recording of that programme. It is unnecessary to reach a final determination on this question in the present case. It is enough that the question is arguable. For these reasons it seems to me to be entirely appropriate for the court to exercise its jurisdiction under s 110 of the Act, to give an interpretation of cl 50 of the award in the present case.

The interpretation was sought in relation to the performance of 'voice over' work. The parties differed somewhat as to the meaning to be attributed to this phrase. In an affidavit filed with the application, the federal secretary of the applicant described 'voice over' as work performed by an actor or actress, by recording a spoken narrative to synchronise with visual images, where the narrative is recorded at a different point in time to the visual images and the narrator does not necessarily appear in the visual images. Mr Peterson pointed out that voice over work may be done by a person who is not an actor or an actress, but who may be, for instance, an announcer. He also stated that voice over work is often performed by recording on tape, entirely independently of the visual images; the voice tape is then edited as part of the sound track, and synchronised with the visual images to make the completed programme. Mr Peterson also stated that it is usual that the narrator is not seen in a television programme.

Accepting these differences of view, for the purposes of this case, it can be taken that 'voice over' work includes the recording of a narrative by a person who does not appear in a television programme, but which narrative forms part of the sound track of that programme.

- 95 Thus, Gray J did not allow any evidence going to the question whether Mr Larking was an 'employee' as defined for the purposes of the award as such a determination of fact was a matter that went to the enforcement of the award provision and was not a matter that should be determined in an application for interpretation. It is also clear from his Honour's reasons that matters of fact that go to the interpretation of words in an award that are likely to be raised by a group of persons whose conditions of employment are covered by the award, are relevant matters of fact that can be taken into account in determining the meaning of particular words in an industrial instrument. Such evidence is often matters going to the custom, practice and usage of particular types of work that exist in a particular industry.
- 96 Similar issues were raised in the Supreme Court of Victoria in *Firefair Pty Ltd v Employee Relations Commission of Victoria* [1996] 1 VR 446. In that matter, the union applied to the Employee Relations Commission for a declaration that two of its members belonged to a particular classification under an award. The Commission granted the application. The employer applied for a review of the decision on grounds that the application was in substance in the nature of proceedings for enforcement of the award and should have been brought in the Magistrate's Court. In making this submission, the employer relied upon the reasoning in *Master Builders'*. Justice Hansen rejected this argument in *Firefair* finding that the Commission's power to declare the 'meaning or effect' of an award was wider than a mere power to interpret.
- 97 Notwithstanding the legislation considered in *Firefair* is different to the power conferred in s 46 of the Act, Hansen J made some observations that are apposite to the scope, purpose and function of s 46 of the Act. Firstly, his Honour said (454):

It is important to bear in mind the nature of a declaratory order. Such an order is a declaration of the right of a party. It does not enforce the right, but declares it: see *Hasham v Zenab* [1960] A.C. 316 (J.C.). If, notwithstanding the declaration, it is necessary to enforce the right, a separate order is required to carry the declaration into effect. In a suit for specific performance, for instance, such an order can be made by the court at the same time as the declaration is made or later if the time for performance of the relevant obligation has not yet arrived. It is no bar to an application for a declaration that it involves the determination of disputed facts.

- 98 Secondly, his Honour said (456):

Once it is concluded that the application was for a declaration of existing right and that the declaration was within the power in s. 29 there can be no argument that the proceeding was in the nature of enforcement. For that is to argue that in effect the application sought relief which was obtainable only in the Magistrates' Court by way of s. 160. But that was not this proceeding, and it is not to the point that the employees could have chosen to commence such a proceeding in that court.

In its reasons on this aspect of the appeal, the commission seems to have considered it relevant that it was not a court and bound by the rules of evidence and where legal representation was not universal. I am not sure what is meant by these comments and note merely that the conclusion on a question of statutory interpretation cannot vary according to whether or not the subject body is a court. There is power or there is not, and one acts within that power or one does not. The meaning or effect of the words of the legislature does not vary according to whether the consideration is that of a court or another body such as the ER Commission.

Interpretation or a decision on the facts for enforcement?

- 99 It is plain that by the enactment of the power to vary an award (as defined in s 46(5)), the power to declare the true meaning of an award is wider than the power to interpret that was conferred on the Federal Court by s 110 of the *Conciliation and Arbitration Act* and successive provisions of the *Industrial Relations Act 1988* and the *Workplace Relations Act*.
- 100 From the authorities referred to above and the express provisions of s 46 and s 83 of the Act, the following principles emerge in respect of an award as defined in s 46(5):
- (a) The power to interpret the true meaning of an award, pursuant to the power conferred by s 46, is to enable a determination of whether ambiguity arises and to resolve it, if it does.
 - (b) If a provision in question is capable in the ordinary sense of not having an ambiguous meaning, then consideration of the expressed or supposed intention of the provision does not fall to be considered under s 46.
 - (c) If a provision is found to be ambiguous, the Commission acting pursuant to s 46 can embark upon a fact-finding exercise to determine the surrounding circumstances that existed when the award or industrial agreement was made. These surrounding circumstances can include ascertaining the object of the provision by:
 - (i) inquiring into the history of the award;

- (ii) any established custom, practice or usage which led to the making of the award and any relevant established custom, usage and practice since the award was made.
- (d) If ambiguity is found and after ascertaining the true meaning of the award and declaring its effect it is found the words in the provision in question are defective, in that the words do not put into effect or reflect that meaning or it is found that the words used require amendment to give fuller effect to the true meaning, the Commission is authorised to exercise arbitral power to amend the provision.
- (e) The power to interpret an award or industrial agreement pursuant to s 46 of the Act is, except for the power to amend a provision in s 46(1)(b), merely declaratory and any declaration made cannot be made as an order to enforce a right.
- (f) The determination of whether a particular employee has an entitlement pursuant to the provisions of an award is an enforcement matter in relation to which the Industrial Magistrate has exclusive jurisdiction to determine, pursuant to the power conferred by s 83 of the Act.

Conclusion - Is error established?

(a) Union's application to dismiss PTA's s 46 application

- 101 When regard is had to the proper construction of the power of the Commission to interpret an award or industrial agreement pursuant to the power conferred by s 46 of the Act, it is clear the learned Commissioner erred in his construction of s 46 and in finding that s 46(3) was a complete answer to the union's s 27(1)(a) application to dismiss the PTA's application. He also erred in finding that the Commission's role under s 46 was to provide assistance to the Industrial Magistrate's Court.
- 102 The powers conferred by s 83 of the Act and s 46 of the Act can be characterised as special powers within the Act when contrasted with the Commission's general jurisdiction conferred by s 23(1) of the Act to enquire into and deal with any 'industrial matter'.
- 103 The power conferred by s 46 to interpret an award or industrial agreement is a power to determine whether ambiguity arises in the provisions of the instrument.
- 104 The principles applying for the exercise of the power to determine the meaning of a provision in the absence of ambiguity is the same as the power of an Industrial Magistrate to interpret a provision in enforcement proceedings instituted pursuant to s 83 of the Act. As Hansen J pointed out in *Firefair*, these principles apply irrespective of the point that the Commission pursuant to s 26(1)(b) is not bound by rules of evidence (456).
- 105 Whilst s 46(3) of the Act provides that a declaration made under s 46 is binding on all courts and persons, the effect of this provision is not to elevate the power to interpret conferred by s 46(3) as a superior power to the power conferred on an Industrial Magistrate to enforce the provisions of an award or industrial agreement. This is because the function and operative scope of the power conferred by s 46(3) is different to the function and operative scope of proceedings instituted under s 83 of the Act. Section 46(3) provides for a bald interpretive power, or put another way a declaratory power although not exclusively as s 46(1)(b) also provides for the Commission to amend the award to remedy any defect or to give fuller effect, in the case of ambiguity: *Crews*. However, s 83 may require an interpretation of an award or industrial agreement as a step in the process of the Industrial Magistrate deciding if there has been a breach.
- 106 Consequently, insofar as the dispute as to the meaning of cl 5.2.1. of the Industrial Agreement relates to all employees of the PTA whose terms and conditions are covered by the Industrial Agreement, the Commission has jurisdiction to make a declaration as the rights of those employees and the PTA in determining the true meaning of cl 5.2.1 pursuant to s 46 of the Act.
- 107 However, the Commission had no power to consider whether cl 5.2.1 had been breached by the PTA by not paying Mr Olynyk an allowance calculated in accordance with the rate specified in cl 5.2.1(b)(i). In particular, the Commission had no power to consider the alleged facts pleaded in the PTA's application under the heading, 'Facts giving rise to the application', as the matters pleaded relate solely to issues of fact applicable only to the circumstances of Mr Olynyk as to whether cl 5.2.1 has been breached by the PTA and, if so, whether orders should be made under s 83 of the Act, in particular whether on the day in question Mr Olynyk was able to use public transport to travel to and from the foreign depot.
- 108 Questions 1 and 2 in the PTA's application, however, are capable of being predicated on factual circumstances that can arise generally and perhaps can be said not to be restricted to the facts pleaded as they relate to Mr Olynyk. Potentially both questions relate to circumstances that could be raised at any time when a depot manager is required to assess whether an employee whose employment is covered by the Industrial Agreement is entitled to payment of an allowance calculated in accordance with cl 5.2.1(b)(i) or cl 5.2.1(b)(ii).
- 109 Yet, the parties did not seek to restrict the matters for hearing before the learned Commissioner to matters that applied generally to all employees whose terms and conditions of employment are covered by the Industrial Agreement. Both parties raised circumstances relevant to and made arguments relating to the circumstances of Mr Olynyk's claim and contentions about whether the PTA had breached the Industrial Agreement.
- 110 Whilst the matters put in questions 1 and 2 were matters that were within the jurisdiction of the Commission to consider in an application to declare the true meaning of cl 5.2.1, the matters the learned Commissioner should have taken into account when considering the union's application to dismiss the PTA's application for interpretation were, in my opinion:
- (a) The PTA was ordinarily entitled to invoke the jurisdiction of the Commission under s 46 to seek a declaration of the true meaning of cl 5.2.1 of the Industrial Agreement as both parties in written submissions filed prior to the hearing at first instance put an argument that cl 5.2.1 was ambiguous.

- (b) Section 46(3) of the Act enabled the Commission to bind the Industrial Magistrate's Court by the making of a declaration to an interpretation of cl 5.2.1 of the Industrial Agreement insofar as it applies to all employees whose terms and conditions of employment are covered by the Industrial Agreement.
- (c) The Industrial Magistrate's Court is also empowered to resolve the interpretation dispute insofar as the issues raised relate to the circumstances of Mr Olynyk.
- (d) The Commission is not empowered under s 46 to determine whether cl 5.2.1 had been breached by the PTA by not paying Mr Olynyk an allowance calculated in accordance with the rate specified in cl 5.2.1(b)(i) of the Industrial Agreement.
- (e) On 19 July 2016, the union brought an application under s 83 to enforce the Industrial Agreement in claim M 101 of 2016. The claim before the Industrial Magistrate's Court alleges that the PTA failed to comply with cl 5.2.1(b)(i) of the Industrial Agreement by underpaying rail car driver Mr Olynyk his travel allowance due for 28 May 2016.
- (f) M 101 of 2016 was listed for hearing before the Industrial Magistrate's Court on 26 April 2017.
- (g) The PTA made its application for interpretation pursuant to s 46 on 1 February 2017.

111 Given that:

- (a) the PTA delayed bringing the s 46 application;
- (b) the fact that the s 46 factual circumstances relied upon by the PTA related only to the circumstances of Mr Olynyk, that is, it was the same matter that was before the Industrial Magistrate's Court, and was not about the circumstances applying generally; and
- (c) because the Commission is not empowered pursuant to s 46 to enforce the provisions of an Industrial Agreement;

I am of the opinion the learned Commissioner erred in dismissing the union's application.

112 The learned Commissioner, however, did not consider these matters.

113 For these reasons, I am of the opinion that ground 1 of the appeal has been made out. However, this preliminary issue has not come before the Full Bench prior to a hearing of the merits. Consequently, it would be difficult to uphold the appeal, suspend the decision to dismiss the union's application to dismiss the PTA's application for interpretation and remit the matter for further hearing and determination or vary the decision by making an order to dismiss the PTA's application. This is because the PTA's application has been heard, determined and a declaration made.

(b) Are the terms of the declaration made pursuant to s 46 erroneous?

114 In my opinion, ground 2 is incompetent. Although the learned Commissioner made observations and a finding about the meaning of the words 'public transport' and was the central issue raised in question 2, he made no declaration of the true meaning of these words as they appear in cl 5.2.1(b) of the Industrial Agreement. Whilst he turned his mind to question 2 and said the answer was, 'Yes', he made no declaration of his finding. The only declaration the learned Commissioner made related to the matters put in question 1. In these circumstances, the finding made by the learned Commissioner about the meaning of 'public transport' in cl 5.2.1(b) of the Industrial Agreement must be regarded as mere obiter and do not have any binding effect pursuant to s 46(3) of the Act.

115 For these reasons, ground 2 of the appeal has not been made out.

116 As to ground 3 of the appeal, I do not agree that the reasons for decision were inadequate. In particular, although the union argues that the reasons for decision were not clear or coherent, I do not agree. The heart of the union's complaint with the observations made in the reasons for decision is that a number of observations are inconsistent with the declaration made by the learned Commissioner.

117 When the terms of the declaration are read with the reasons for decision, including the answer the learned Commissioner gives to question 1, in my respectful opinion I agree a clear inconsistency arises. Question 1, in effect, asks when deciding whether an employee is reasonably able to use public transport to travel to a foreign depot, whether the depot manager is permitted to base the decision on the employee's ability to use public transport between the employee's home depot and the other depot? The learned Commissioner's answer to this question is, 'Not as a rule but circumstances may arise where that is appropriate depending on the facts' ([66], AB 43).

118 Yet, in the declaration of the true meaning of cl 5.2.1(b) the learned Commissioner declares that the depot manager is to consider as relevant locations the employee's place of residence and other depot. The clear inference that arises from the terms of the declaration is that the employee's home depot is not a relevant location. However, such an inference is inconsistent with the answer given by the learned Commissioner to question 1.

119 As to ground 4, as the union points out, the declaration is inconsistent with the observations made by the learned Commissioner that in determining whether a person is able to use public transport to get to and from the foreign depot, access to and proximity to a bus stop, park and ride facilities or obtaining a lift from another person to public transport may be relevant circumstances for a depot manager to consider when determining whether an employee is reasonably able to use public transport. Plainly, these 'circumstances' could, if the learned Commissioner's reasoning is applied, constitute relevant locations and such a finding is inconsistent with the declaration.

120 For these reasons, I am of the opinion that ground 4 of the appeal has been made out.

- 121 I am not satisfied that the declaration should be varied by the Full Bench. However, I am of the opinion that the declaration should be quashed. The reasons why I am of the opinion that the declaration should not be varied are as follows.
- 122 Firstly, the observation made by the learned Commissioner that a consideration of whether a particular employee is reasonably able to use public transport to travel to and from a depot will depend upon the circumstances that are relevant to the particular individual employee is correct. Such an assessment may or may not include an assessment of the location of the employee's home depot, the location of the foreign depot and any other relevant location. A determination of this issue is a question of fact.
- 123 Secondly, whether a PTA rail depot can also be regarded as the use of 'public transport' within the meaning of cl 5.2.1(b) of the Industrial Agreement is, in my opinion, ambiguous.
- 124 Clause 5.2.1 must be construed in context as one condition of employment. An employee to whom cl 5.2.1 applies may or may not be considered a member of the public when travelling to a foreign depot. Clause 5.2.1 applies to an allowance an employee is to receive when travelling to commence work at a foreign depot. It is apparent from cl 5.2.1 that the time spent travelling to work is otherwise unpaid time as the employee is not at work until their shift commences: see cl 3.1 and c. 5.1 of the Industrial Agreement.
- 125 Consequently, when regard is had to the words 'to use public transport' in their context as part of the whole of the agreement, the words are capable of being construed either as:
- (a) the use of public transport infrastructure upon which an employee can embark, travel and alight at particular locations (which would include a depot); or
 - (b) the use of public transport that is only available to a member of the public to embark, travel and alight (which would not include a depot that a member of the public cannot depart from or alight at).
- 126 Having reached the view that ambiguity arises, regard could be had to the history of cl 5.2.1 and the conduct of the parties in relation to each in respect of this provision as part of the surrounding circumstances in ascertaining the intention of the provision. In the absence of evidence about such matters at first instance, it is my opinion that the Full Bench is not in a position to determine the true interpretation of the meaning of the words 'public transport' in cl 5.2.1 of the Industrial Agreement.
- 127 For these reasons, I am of the opinion that an order should be made to uphold the appeal and quash the declaration.

SCOTT CC

- 128 I have had the benefit of reading the draft reasons of Her Honour, the Acting President. I agree with those reasons and have nothing to add

KENNER ASC

- 129 The Commission at first instance had an application before it under s 46 of the *Industrial Relations Act 1979* (WA) to interpret cl 5.2.1 of the *Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016*. The issue arising between the parties was the method of calculating payment of an allowance to railcar drivers when they are required to begin their days' work at a depot other than their home depot. In short, the difference between the parties was that the Union contended that a depot manager should be required under the clause to assess whether the driver can travel from and back to their usual place of residence by public transport. On the other hand, the PTA contended that the relevant factor for the depot manager's decision should be travel from and back to the driver's home depot. The learned Commissioner decided on its true interpretation under cl 5.2.1(b) that a depot manager shall consider the relevant locations as the employee's usual place of residence and the other depot, to which they are required to travel.
- 130 The Union now appeals against the declaration. However, there is a twist. At first instance, the Union also made an application under s 27(1)(a)(ii) and (iv) of the Act, that the application to interpret the Agreement should be dismissed. The Union contended that the interpretation proceedings were not necessary or desirable in the public interest and constituted an abuse of process.
- 131 The s 27(1)(a) application was made by the Union because there was on foot at the time of the interpretation proceedings before the learned Commissioner, enforcement proceedings in the Industrial Magistrates Court between the parties involving the same factual allegations. The Union argued before the Commission at first instance, that the proper interpretation of cl 5.2.1 of the Agreement was a live issue both before the Industrial Magistrates Court and the Commission. The Union argued that the Industrial Magistrate has an implied jurisdiction to interpret the Agreement, and an inference could be drawn from the PTA's interpretation application at first instance, that it wanted the Commission and not the Industrial Magistrate to interpret the Agreement and make a declaration, which will then be binding on the Court. The submission was that this led to a duplication of proceedings, was forum shopping and would be a waste of time and resources.
- 132 The learned Commissioner rejected the Union's application. He held that s 46(3) of the Act, to the effect that a declaration of the Commission under s 46 binds all courts, was a complete answer to the issue. Furthermore, the learned Commissioner held that the Commission, as a specialist industrial tribunal, has been given by Parliament a specific power to interpret awards and industrial agreements and it is best placed to determine such matters. In doing so, the Commission provides assistance to the Industrial Magistrates Court and does not cut across its jurisdiction. He further held that it could not be an abuse of process or undesirable for the Commission to exercise a power that Parliament has given to it.
- 133 Accordingly, the Union also appeals against the learned Commissioner's dismissal of its s 27(1)(a) application.

Ground 1 - s 27(1)(a)

- 134 The Union in ground one maintained that the Commission erred in dismissing its application under s 27(1)(a). There were two bases for this. Firstly, the Union said that the learned Commissioner was wrong to conclude that s 46(3) of the Act was a "complete answer" to the application to dismiss. Secondly, the Union maintained that the learned Commissioner erred in saying that the role of the Commission was to provide assistance to the Industrial Magistrates Court.
- 135 As the s 27(1)(a) application by the Union did not finally decide the matter between the parties, and therefore it was a "finding" for the purposes of s 49(2a) of the Act, the Full Bench must form an opinion that the matter is of such importance that, in the public interest, an appeal should lie. In this respect, the Union contended that the matter was of importance in the public interest because at the time of the appeal, there had been three occasions where the PTAPTA had brought applications under s 46 of the Act to "delay or interrupt" applications for enforcement before the Industrial Magistrates Court. On each of those three occasions, s 27(1)(a) applications were brought by the Union and on each occasion, the application was dismissed by the Commission. The submission was that it was likely that the issue would arise in the future and therefore it was a matter of importance in the public interest for the Full Bench to consider whether it is "legitimate for the Commission to entertain a s 46 application where that application will cut across proceedings that are before the Industrial Magistrates Court" (see appellant's further outline of submissions 9 June 2017 par 6).
- 136 I do not, without more being before the Full Bench, accept the contention of the Union that the purpose of the s 46 application by the PTA was to delay or interrupt the Industrial Magistrates Court proceedings or otherwise to cut across those proceedings. However, given that the Full Bench wrote to the parties on 7 June 2017, seeking submissions from them on the hearing of the appeal, as to the relationship between ss 46 and 83 of the Act, I consider that the matter is of such importance that in the public interest, leave to appeal on this point should lie. On at least one past occasion, the relationship between key provisions of the Act has been regarded as sufficiently important for an appeal to lie in the public interest: *Mount Newman Mining Co Pty Limited v Australian Workers' Union, WA Branch Industrial Union of Workers* (1986) 66 WAIG 1925.
- 137 Section 27(1)(a) is a power to dismiss an application or refrain from further hearing an application. This power is broad in scope and should be exercised with caution. It is in the following terms:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
- (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
- (i) that the matter or part thereof is trivial; or
 - (ii) that further proceedings are not necessary or desirable in the public interest; or
 - (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

And

...

- 138 In *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431, in considering an application under s 27(1)(a)(ii) to dismiss a matter before the Commission in the public interest, I said at pars 22 and 23:

22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:

- 35 Given the construction I have placed on s 36A(1) of the Act, it is for the PTA to demonstrate that it would not be in the public interest for the Proposed Award to be made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:

"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law,

namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1]* (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) *Access to Justice*, vol II, book 1 (1978) pp 5ff; Raz, *The Authority of Law*, (1979), at p 217)."

23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

139 This approach to s 27(1)(a) of the Act was affirmed on appeal to the Full Bench (*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00451; (2014) 94 WAIG 787) and on further appeal to the Industrial Appeal Court (*The Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2015] WASCA 150; (2015) 95 WAIG 1593).

140 By s 46(1) of the Act it is open to an organisation or an employer bound by an award (which for present purposes includes the Agreement), to make an application to the Commission to interpret it. On such an application, the Commission may declare its true interpretation and if it considers it necessary, by order, vary the award to overcome any defect or to make the meaning of the relevant provision clearer. Importantly, for the purposes of this appeal, a declaration made by the Commission, is, subject to the Act, "binding on all courts and persons with respect to the matter the subject of the declaration": s 46(3) Act.

141 Therefore, the clear purpose of s 46 is to enable an industrial matter concerning a dispute as to the proper meaning of the terms of an award or industrial agreement, to be resolved by the Commission by declaring its true interpretation. Subject to any right of appeal exercised by either party to such an application, the clear intention of Parliament, by the enactment of s 46(3), is that such a determination by the Commission is final and binding. Perhaps this is so because an award made by the Commission under the Act is not an instrument of the parties, but one made by the Commission itself. The Commission is responsible under the Act for its awards and may on its own motion, vary them under s 40B and cancel defunct awards under s 47. The reasons for award making and variation are also matters of record of the Commission. However, it is not necessary to finally decide this point for the purposes of this appeal and in the absence of argument on the history of s 46(3) of the Act.

142 The nature of s 46 proceedings has been the subject of consideration in Full Bench and the Industrial Appeal Court decisions. It is unnecessary for me to refer to them at any length, other than to observe that it has been held that s 46 applications may not just involve bare questions of law. They may also involve at least in part, an arbitral and fact finding function, particularly where it may be necessary to discover a particular custom or practice in an industry and in circumstances where a variation may be necessary to correct any defect or to make the meaning of a provision more clear: *Field Construction Co v The Boilermakers' Society of Australia, Union of Workers, Coastal Districts* (1961) 41 WAIG 990; *Norwest Beef Industries Limited and Anor v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 2124 per Olney J at 2130. Furthermore, the power to interpret an award under s 46 is a specific power and is to be distinguished from the Commission's general dispute resolution power in s 44 of the Act: *The Liquor, Hospitality and Miscellaneous Union, WA Branch v The Roman Catholic Bishop of Bunbury Chancery Office and Ors* (2007) 87 WAIG 1148.

143 On the other hand, the power in s 83 is part of the machinery in Part III of the Act dealing with enforcement of the Act, awards, industrial agreements and orders. By Part III the Industrial Magistrates Court is established which is given both general and prosecution jurisdictions. Apart from the Industrial Magistrates Court, the Full Bench of the Commission also has an enforcement jurisdiction in respect of certain contraventions of the Act as prescribed by s 84A. The powers conferred on the Industrial Magistrates Court under s 83 are also specific to the enforcement of a prescribed industrial instrument, where a person contravenes or fails to comply. The power exercised is purely judicial, in the sense that it involves the ascertainment and enforcement of an existing legal right. On a finding of a contravention or failure to comply, the Industrial Magistrates Court may impose a civil penalty: s 83(4). The Industrial Magistrates Court also is required to order an employer to pay an amount of money to an employee, in the case where an underpayment of money on an enforcement action, is established. It is also clear, as with the practical effect of the s 46(3) final declaratory power, that s 83 confers an exclusive jurisdiction to enforce industrial instruments: s 83(3) Act.

- 144 When looked at in this way, ss 46 and 83 are both specific, but clearly distinct powers, with different purposes and which are exercised by different jurisdictions. The final disposition of an application under s 46 of the Act is the making of a declaration as to the meaning and effect of an award or industrial agreement. The final disposition of an s 83 application to enforce an industrial instrument, is either an order of dismissal, or, in the case where a contravention or failure to comply is proved, the issue of a caution or the imposition of a penalty. Further orders for the payment of monies owed may be made.
- 145 Whilst it may be the case that the Industrial Magistrates Court is called on to interpret an award or industrial agreement as a part of the exercise of its jurisdiction to enforce such an industrial instrument, that is plainly not the purpose of the power. The ability of the Industrial Magistrates Court to construe the terms of an award or industrial agreement for example, as a part of hearing an application to enforce the same, is little different to the Commission being required to interpret an award or industrial agreement, as a part of resolving a dispute under s 44 of the Act, which dispute is not a matter of bare interpretation: *Crewe and Sons Pty Ltd v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623; *Roman Catholic Archbishop of Bunbury*. The Industrial Magistrates Court has no jurisdiction or power to make a binding declaration of the kind specified by ss 46(1) and (3), just as the Commission may not make an order to enforce an award or industrial agreement, under any provision of the Act, although an order made under s 44 may incidentally have such an effect: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 990 per Kennedy J at 992.
- 146 In my view, the Commission should not decline to exercise its powers of interpretation under s 46 of the Act, in a proper case of interpretation before it, only because another court may have before it, a claim to enforce the same award. This was held to be so by Dwyer J in *The Commissioner of Railways v West Australian Locomotive Engine Drivers, Firemen's and Cleaners' Union of Workers* (1941) 21 WAIG 451 at 451.
- 147 Returning then to this matter. To the extent that the learned Commissioner relied on s 46(3) as the answer to the Union's s 27(1)(a) application, in my view, he did not err. Firstly, the right of the PTA to invoke the jurisdiction of the Commission to interpret an award or industrial agreement under the Act, in accordance with s 46, is open to it at any time. Where the application under s 46 raises proper issues for interpretation, then a party seeking it is entitled to expect the Commission to exercise its jurisdiction, unless very good reason not to do so is established. Secondly, in the circumstances of these proceedings, given the Commission's power to declare the true interpretation of the Agreement, intended by Parliament by s 46(3) to be paramount, where no other tribunal possesses the same jurisdiction and power, the onus on the Union to persuade the Commission to refrain from the exercise of its powers in this case, was a heavy one. As was said by Deane J in *Re Queensland Electricity Commission and Ors; Ex parte Electrical Trades Union of Australia* (1987) 21 IR 151 at 162:
- The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed (1959), p 193). In the rare instances where a particular court or tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, *Merchant Service Guild of Australasia v Commonwealth Steamship Owners* Association [No 1]* (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary considerations of public policy but an uncertain privilege which could be withheld at any time on unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context" in Cappelletti and Weisner (eds) *Access to Justice*, vol II, book 1 (1978) pp 5ff; Raz, *The Authority of Law*, (1979), at p 217).
- 148 The application before the Commission at first instance was made under s 46. It sought the Commission's answer to two questions posed by the PTA, as to the meaning of cl 5.2.1(b) of the Agreement in relation to the payment of a temporary transfer allowance. The terms of the application on its face, sought answers to proper questions for interpretation. The facts set out in the s 46 application, as required by reg 52(1) of the *Industrial Relations Commission Regulations 2005* (WA), were, we were informed, the same facts to be raised before the Industrial Magistrates Court in relation to the employee concerned, Mr Olynyk. However, that does not convert what is a procedural requirement of the Regulations, as a part of the context of the interpretation application, to a de-facto enforcement of the Agreement. The relief sought in the s 46 application was an answer to the two questions posed, as required by reg 53(1)(c) of the Regulations. The application did not purport to, nor could it, seek to enforce any entitlement in respect of Mr Olynyk. The reference to the statement of facts in the proceedings at first instance, from the outlines of submissions filed, was for purposes of illustration. The questions posed were generic and not fact specific. Any declaration made at first instance would bind the parties to the Agreement, and all employees covered by it, which from its terms, appeared to be about 286 employees, as at the date the Agreement was registered on 8 April 2016. In that sense, the relief sought and the outcome of the s 46 application, was wholly different in kind to that in the Industrial Magistrates Court proceedings.
- 149 What I have just said in my view, is a complete answer to the Union's submissions to the Full Bench that in some way the s 46 application constituted forum shopping or a duplication of proceedings. In the context of my earlier comments as to the nature of ss 46 and 83 of the Act and proceedings brought under those provisions, this simply could not be the case.

- 150 As to the final points made by the Union in relation to this ground of appeal, those being the timing of the Industrial Magistrates Court proceedings, the impact on them and the possibility of a waste of time and resources, even if it were necessary to consider these issues, they could not constitute grounds for the exercise of the s 27(1)(a)(ii) power, considering the views expressed above by Deane J in *Re QEC*.
- 151 In any event, given that the PTA s 46 application sought a declaration from the Commission to apply to its entire workforce covered by the Agreement, and not just one employee as in the Industrial Magistrates Court proceedings, it seems to me it would have made good sense, in those circumstances, to seek and adjournment of the Industrial Magistrates Court proceedings, pending the determination of the s 46 application, and the exercise of rights of appeal by either party.
- 152 As to the final point made by the Union, I agree with respect that it was not correct for the learned Commissioner to say the Commission's role is to provide assistance to the Industrial Magistrates Court. The Commission's duty is to determine the correct interpretation of the award or industrial agreement and to make a declaration accordingly. This includes any necessary variation to clear up a lack of certainty of meaning or to give proper effect to the original intention of the provision in question. However, I regard the learned Commissioner's remarks in this respect at par 27 of his reasons, when read in the context of the reasons, as obiter. It was clear that the reason for the dismissal of the Union's s 27(1)(a) application was based on s 46(3) of the Act, as referred to by the learned Commissioner at par 22 of his reasons.
- 153 Accordingly, ground 1 is not made out.

Ground 2 – "public transport"

- 154 By this ground the Union complains that the learned Commissioner was in error in interpreting the words "public transport" in cl 5.2.1(b) of the Agreement. This referred to the learned Commissioner's reasons where he found that the public at large unlike train drivers, were not able to alight at the stop adjacent to the Nowergup Depot. Despite this, the learned Commissioner concluded that there was still public transport available to and from the Nowergup Depot on the PTA's rail network. The Union therefore maintained that this constituted an error of law in the interpretation of cl 5.2.1(b) of the Agreement.
- 155 This ground of appeal is directed to question 2 in the grounds of the application which was in the following terms:

Question 2:

When deciding whether an employee is reasonably able to use public transport to travel to and from the depot from which the employee is temporarily working for a shift, is the Depot Manager permitted to treat a timetabled Transperth Train Operations service departing from or ending at the employee's home depot as "public transport" for the purposes of clause 5.2.1 (b) when the employee is able to alight from or embark on the service at a platform adjacent to the other depot?

- 156 Whilst the learned Commissioner did not incorporate his answer to this question into the declaration made, which I comment on below, read in context, the terms of the declaration must be read with the reasons for decision and the answers to the specific questions posed.
- 157 The learned Commissioner rejected that Union's argument that because a train stops at the Nowergup Depot from which drivers can alight but the public cannot, this means that such transport is not "public transport" for the purposes of cl 5.2. He concluded that the words "public transport" mean what they say and that train drivers who use trains to get to the Nowergup Depot are using public transport for the purposes of the clause. The Union argued that this conclusion was an error because the word "public" means the public at large and as the Commission concluded that the public could not alight at the Nowergup platform, it was wrong to conclude that transport was "public transport".
- 158 It is common ground that train drivers employed by the PTA travel on its rail network free of charge.
- 159 In my view, the transport the subject of question two is public transport. Firstly, the words of cl 5.2.1 (b) require a depot manager to consider whether an employee may "use public transport" to travel to and from the other (foreign) depot. The clause does not say that the foreign depot is to be accessible to the public at large. It is the means of conveyance to and from the foreign depot that is key. Secondly, as a matter of ordinary meaning, the words "public transport" must be taken to apply to any means of conveyance provided to the public at large, whether they be trains, buses, ferries, to enable people to move about the metropolitan area. There was no suggestion that trains provided by the PTA in the ordinary course, are not public transport or that in this case, members of the public are not able to be on the trains that travel through the Nowergup Depot, and from which, drivers may alight at that depot. If the question was asked of a member of the public, whether such a train service was public transport, I have no doubt that the answer would be "yes".
- 160 Thirdly, in my view, this ordinary and natural meaning of "public transport" is confirmed when one has regard to the terms of cl 5.2 of the Agreement, in the context of its object and purpose. The clear intent of the clause is to provide compensation to drivers at a greater rate, when they are required to use either their or someone else's transport to travel from their home to a foreign depot and back. If the depot manager is of the view that this is not necessary, and the driver can travel on the PTA service and get to the foreign depot, in this case Nowergup, then it makes common sense that the employee should not be paid double the allowance otherwise payable. As was submitted by the PTA, it would seem to defeat the purpose of the clause, if, in circumstances where a driver can travel for free to Nowergup, they would nonetheless be required to be paid at double the rate, simply because a member of the public could not alight at the stop where the drivers do.
- 161 Finally, with respect, it is difficult to see the logic in the contention that a train service such as that under consideration at first instance in question two, would be "public transport" when it stops at the station prior to the Nowergup Depot and passengers board and alight, and the same at the station after it, but transforms into something else in between. In my view, the learned Commissioner made no error in his conclusion in this regard.

162 This ground is not made out.

Ground 3 – adequate reasons

163 This ground complains that the learned Commissioner did not provide adequate reasons for his declaration. The contention of the Union was that when read with the declaration itself, the reasons, in particular pars 55 and 56, are not consistent with the declaration and were not clear or coherent.

164 A Commissioner must give adequate reasons, as an incident of the decision-making process. They are required by the Act in s 35(1). Reasons for decision need only be adequate; they are not required to sift through each piece of evidence and argument. The basis for the decision needs to be ascertainable: *Robe River Iron Associates* per Nicholson J at pp 996-999; *Ruane v Woodside Offshore Petroleum Pty Ltd* (1991) 71 WAIG 913. I am not persuaded that the learned Commissioner failed to give adequate reasons for his decision. The consideration of the Commission was revealed by his reasons. The Union does not agree with how he arrived at his conclusions. That is a different issue. The basis of the Union's complaint has more to do with ground four. A further difficulty with both this ground and the next is, as has been noted above, the Union does not cavil with the actual declaration made by the Commission. I comment on this issue further, when dealing with ground four below.

165 Accordingly, this ground fails.

Ground 4 – interpretation of cl 5.2.1

166 Despite the point just made as to the declaration, as to this ground, the Union complained that the learned Commissioner erred in law in construing cl 5.2.1 of the Agreement, having regard to his observations at pars 55 and 56 of his reasons. Those observations referred to a train driver taking a short car journey to a "park and ride" and being dropped off at public transport, necessarily excludes the conclusion that the person is thereby able to use public transport. The learned Commissioner referred to a hypothetical person as saying they may travel to work on public transport, even if they are driven a short distance to or dropped off at public transport, to access it.

167 The Union maintained that in so concluding, the learned Commissioner erred in his interpretation of cl 5.2.1 of the Agreement. As I understood the argument, the Union contended this could not be correct because, for example, if an employee had to be dropped off to a "park and ride" or drive themselves to such a facility, that could not be regarded as using public transport.

168 I do not agree. The difficulty with the Union's argument is that it regards the depot manager's decision in cl 5.2.1(b) as absolute. Clause 5.2.1(b) does not say that a depot manager is to be satisfied whether an employee is able or not able to use public transport. The required decision of the depot manager is whether an employee is "reasonably" able to do so. This requires an assessment by a depot manager as to whether it is within reason, that an employee may access public transport. This involves an objective evaluation, having regard to the circumstances of the case. "Reasonable" in the Shorter Oxford English Dictionary is defined to include "1. Endowed with reason. ... 2. Having sound judgement; sensible, sane. Also, not asking for too much ME. b. requiring the use of reason ... 3. Agreeable to reason; not irrational, absurd or ridiculous ME. 4. Not going beyond the limit assigned by reason; not extravagant or excessive; moderate ME ...". In the context of this meaning, it would be with respect, an absurd construction of cl 5.2.1(b) to suggest that it would only be reasonable for an employee to use public transport if a bus, train or other conveyance, literally stopped outside an employee's residence. Whilst this could conceivably be the case, in my view, it was in this context, that the learned Commissioner referred to possible examples in pars 55 and 56 of his reasons. These observations must be read in the context of the learned Commissioner's earlier remarks in pars 51 to 54, that each case will turn on its own circumstances. He was not making any factual determinations and the comments referred to at pars 55 and 56, were only a "rough guide".

169 It is trite to observe, and it is not necessary to refer to authority which is now so well known, that awards and industrial agreements should be construed generously and in accordance with common sense. I do not consider the above approach to the interpretation of cl 5.2.1(b) involves any strain on the ordinary meaning of the words used in it. On the contrary, this approach to cl 5.2.1(b) is entirely consistent with the accepted canons of interpretation of industrial instruments.

170 Thus, even if the learned Commissioner's observations at pars 55 and 56 could be considered findings, which in my view is extremely doubtful, given the context in which the remarks were made earlier in his reasons as I have noted above, I do not consider them to be wrong. A circumstance may well arise where a depot manager may consider a short walk from an employee's residence to public transport, to enable the employee to travel to a foreign depot from their home, means that the "employee is reasonably able to use public transport to travel to and from the other depot" for the purposes of cl 5.2.1(b)(ii).

171 In effect, the declaration made was consistent with the Union's case as put at first instance. The PTA now accepts that the declaration is correct and in my view this is plainly so. The terms of cl 5.2.1(a) of the Agreement say nothing of an employee's home depot. The trigger for the assessment in cl 5.2.1(b) by a depot manager, is the distance of travel from an employee's "usual place of residence" to the depot from which they will be working. The home depot is irrelevant to the threshold trigger for this assessment. Reading the clause, it is difficult to see any other reasonable conclusion that could be open.

172 With respect, it would have been better had the learned Commissioner incorporated his answers to the questions referred to in his reasons and raised in the application, in his declaration, and in a consistent fashion. This is so because the declaration needs to be read harmoniously with the reasons for decision. The reference to the home depot in the answer to question one, may be said to be somewhat confusing and inconsistent with the terms of the declaration. However, as the Union has not established that the terms of the decision of the Commission, in the form of the declaration made, was erroneous, and in any event, largely reflects what it sought to replace it with, in my view the appeal should be dismissed.

2017 WAIRC 00869

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 11/2017 GIVEN ON 7 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2017 WAIRC 00869
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 CHIEF COMMISSIONER P E SCOTT
 ACTING SENIOR COMMISSIONER S J KENNER
HEARD : BY WRITTEN SUBMISSIONS - 20 SEPTEMBER 2017, 21 SEPTEMBER 2017 AND
 28 SEPTEMBER 2017
DELIVERED : MONDAY, 16 OCTOBER 2017
FILE NO. : FBA 7 OF 2017
BETWEEN : THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES,
 WEST AUSTRALIAN BRANCH
 Appellant
 AND
 PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
 Respondent

ON APPEAL FROM:

Jurisdiction : Western Australian Industrial Relations Commission
Coram : Commissioner D J Matthews
Citation : [2017] WAIRC 00175; (2017) 97 WAIG 365;
 [2017] WAIRC 00205; (2017) 97 WAIG 366
File No. : APPL 11 of 2017

CatchWords : Industrial Law (WA) - Supplementary decision - Orders to be made in light of reasons for
 decision
Legislation : *Industrial Relations Act 1979* (WA) s 27(1)(a), s 27(1)(a)(ii), s 27(1)(a)(iv), s 46
Result : Order made
Representation:
Counsel:
Appellant : Mr C Fogliani
Respondent : Mr J Carroll
Solicitors:
Appellant : W.G. McNally Jones Staff Lawyers
Respondent : State Solicitor's Office

Supplementary Reasons for Decision

SMITH AP AND SCOTT CC:

Introduction

- 1 In reasons for decision delivered on 19 September 2017 ([2017] WAIRC 00830) the majority of the Full Bench upheld ground 1 and ground 4 of the appeal.
- 2 Ground 1 stated that the Commissioner erred in law in dismissing the union's s 27(1)(a) application. The union's application was an application to dismiss the substantive application, made by the Public Transport Authority of Western Australia (the PTA), pursuant to s 46 of the *Industrial Relations Act 1979* (WA) (the Act), to interpret the *Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016* (No. AG 19 of 2016) (the Industrial Agreement) (APPL 11 of 2017).
- 3 Section 27(1)(a)(ii) and s 27(1)(a)(iv) empower the Commission to dismiss an application or refrain from hearing without proceeding to hear the substantive application. Section 27(1)(a)(ii) and s 27(1)(a)(iv) provide:

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

- (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —

- ...
- (ii) that further proceedings are not necessary or desirable in the public interest; or
- ...
- (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
- 4 Ground 4 of the appeal raised an error going to determination of the substantive application in APPL 11 of 2017.
- 5 On 19 September 2017, the Full Bench issued a minute of proposed order in the following terms:
1. The appeal be and is hereby upheld.
 2. The decisions made by the Commission in matter APPL 11 of 2017 given on 24 March 2017 ([2017] WAIRC 00175; (2017) 97 WAIG 365) and on 7 April 2017 ([2017] WAIRC 00205; (2017) 97 WAIG 366) are hereby quashed.
- 6 On 20 September 2017, by email, the PTA made the following submission:
- The respondent wishes to raise the following matters regarding the minute.
- Given that the proposed orders quash the decision of Commissioner Matthews that relates to the Union's application for the matter to be dismissed under section 27(1)(a) of the IR Act, the effect of the orders will be to have the Union's s 27(1)(a) application undecided and still on foot.
- The respondent therefore is of the view that in conjunction with the order quashing the Commissioner's decisions, it will be necessary for the Full Bench to also make an order dismissing the PTA's s 46 application (in accordance with the Full Bench's reasons that Commissioner Matthews ought to have done so).
- If such an order is not made, it is not clear to the respondent what is to happen to either (i) the PTA's s 46 application which has not been dismissed but also not remitted, or (ii) the Union's s 21(1)(a) [sic] application, which has not been dealt with, nor remitted.
- 7 On 21 September 2017, by email, the union made the following submission:
- The current minute of proposed orders would quash the orders made by Matthews C on 24 March 2017 ([2017] WAIRC 00175; (2017) 97 WAIG 365) and 7 April 2017 ([2017] WAIRC 00205; (2017) 97 WAIG 366).
- The effect of the proposed order would be to re-enliven Matthews C's jurisdiction to hear and determine the PTA's section 46 application, and the RTBU's section 27(1)(a) application (*Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1990) 70 WAIG 2083, 2086; and *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* (2014) 94 WAIG 800, 801).
- At paragraphs [110]-[113] of the reasons for decision of the Full Bench, the majority have suggested that Matthews C should have upheld the RTBU's section 27(1)(a) application and dismissed the PTA's section 46 application. Given that finding, there appears to be no practical purpose in quashing Matthews C's decision to dismiss the RTBU's section 27(1)(a) application.
- A practical solution would be for the Full Bench to vary Matthews C's decision dated 24 March 2017 to instead uphold the RTBU's section 27(1)(a) application, and dismiss the PTA's section 46 application.
- 8 On 28 September 2017, the parties were informed the members of the Full Bench were of the opinion that the order dismissing the union's (s 27(1)(a)) application should be quashed as whilst the majority found the learned Commissioner erred in dismissing the union's application, it held that the union's application was not capable of being determined as the substantive matter had been finally determined.
- 9 The Full Bench then issued a further minute of proposed order on 28 September 2017 as follows:
1. The appeal be and is hereby upheld.
 2. The declaration made by the Commission in matter APPL 11 of 2017 given in reasons for decision delivered on 24 March 2017 ([2017] WAIRC 00177; (2017) 97 WAIG 361) and on 7 April 2017 ([2017] WAIRC 00205; (2017) 97 WAIG 366) are hereby quashed.
 3. The order made on 24 March 2017 ([2017] WAIRC 00175; (2017) 97 WAIG 365) is quashed.
 4. APPL 11 of 2017 is dismissed.
- 10 By email sent on 28 September 2017, the union informed the Full Bench that it did not wish to speak to the further minute.
- 11 However, the PTA, by email sent on 28 September 2017, retracted its earlier advice that it was the PTA's submission that the substantive application in APPL 11 of 2017 should be dismissed and made the following submission:
- First, the respondent is of the view that the Full Bench has no power to dismiss APPL 11 of 2017, except through exercising its discretion under s 27(1)(a) on the Union's application.
- Secondly, a majority of the Full Bench has found that Matthews C erred by failing to take into account relevant considerations when considering the section 27(1)(a) application to dismiss. On the basis of that finding, the Full Bench (will) quash the order made by Matthews C on the section 27(1)(a) application. The section 27(1)(a) application therefore will remain on foot and has not been dealt with. The respondent says that, in light of the majority's reasons, the Full

Bench must either remit the matter back to Matthews C to reconsider the section 27(1)(a) application or determine the section 27(1)(a) application itself.

Thirdly, the majority held that the section 27(1)(a) application would not [sic] capable of being determined because the substantive matter had been finally determined. However, the Full Bench has (or will, when it issues the final orders) quash the decision, order and declaration of Matthews C, so the substantive matter will not have been determined, therefore there is (i) no obstacle to the section 27(1)(a) application being determined, and (ii) given that the section 27(1)(a) application has been made, and now not dealt with, the Commission (either as the Full Bench, or Matthews C on remittal) is obliged to exercise its jurisdiction and deal with that application.

The respondent is therefore of the view that there are two possible forms of orders which the Full Bench can make in light of its reasons:

- 1) Quash the relevant declaration and decision, and suspend the order (made on the section 27(1)(a) application) and remit the matter back to Matthews C for determination; or
- 2) Quash the relevant declaration and decision, and then reconsider the section 27(1)(a) application, and, depending on the outcome of that reconsideration, orders will need to be made to give effect to that decision.

12 With respect, the PTA's submissions misconstrue the scope of the union's s 27(1)(a) application. It was an application made on 14 February 2017 to dismiss the substantive application prior to a hearing on the merits. Its specific purpose was to avoid a hearing of the merits of the interpretation of the Industrial Agreement before the Commission. The grounds of the union's application to dismiss were that the union sought:

- a. that Application 11 of 2017 be dismissed under section 27(1)(a) of the *Industrial Relations Act 1979* (WA) because:
 - i. it constitutes further proceedings which are neither necessary or desirable in the public interest; and
 - ii. that it is an abuse of process or is a vexatious application, and
- b. to reserve its rights for costs under section 27(c) [sic] of the *Industrial Relations Act 1979* (WA).

13 If the union's application under s 27(1)(a) had been successful, the hearing of claim M 101 of 2016 in the Industrial Magistrate's Court would have proceeded on 26 April 2017 wherein the Industrial Magistrate in determining whether the PTA had breached cl 5.2.1(b)(i) of the Industrial Agreement would have been called upon to interpret the meaning of cl 5.2.1(b)(i).

14 Leaving aside the issue of the PTA's delay in bringing the application, given that the matter before the Commission related only to factual circumstances of the claim before the Industrial Magistrate's Court (that is, the determination of whether a particular employee has an entitlement that is owing pursuant to cl 5.2.1(b)(i) of the Industrial Agreement), and to the fact that such a claim is an enforcement matter in relation to which the Industrial Magistrate has exclusive jurisdiction and the Commission is not empowered under s 46 of the Act to enforce the provisions of an industrial agreement, Smith AP (Scott CC agreeing) found the learned Commissioner erred in dismissing the union's application [101(f)] and [111].

15 As it is now not open to dismiss the PTA's substantive application at a preliminary or interlocutory stage of proceedings, Smith AP (Scott CC agreeing) found that it would be difficult to uphold the appeal, suspend the decision to dismiss the union's application and remit for further hearing [113].

16 It does not follow, however, that the Full Bench has no power to dismiss the PTA's substantive application. Smith AP (Scott CC agreeing) found the declaration made by the learned Commissioner was erroneous and should be quashed [127]. Because the majority also found that the learned Commissioner erred in dismissing the union's application to dismiss the PTA's substantive application, it necessarily follows that an order should be made to dismiss APPL 11 of 2017.

17 For these reasons, we are of the opinion that an order should be made in terms of the minute of proposed order issued on 28 September 2017.

KENNER ASC:

18 As the order is of the majority I have nothing further to add.

2017 WAIRC 00870

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH	APPELLANT
	-and-	
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER	
DATE	MONDAY, 16 OCTOBER 2017	
FILE NO.	FBA 7 OF 2017	
CITATION NO.	2017 WAIRC 00870	

Result	Appeal upheld
Appearances	
Appellant	Mr C Fogliani (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 12 June 2017, and having heard Mr C Fogliani (of counsel) on behalf of the appellant and Mr J Carroll (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 19 September 2017, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be and is hereby upheld.
2. The declaration made by the Commission in matter APPL 11 of 2017 given in reasons for decision delivered on 24 March 2017 ([2017] WAIRC 00177; (2017) 97 WAIG 361) and on 7 April 2017 ([2017] WAIRC 00205; (2017) 97 WAIG 366) are hereby quashed.
3. The order made on 24 March 2017 ([2017] WAIRC 00175; (2017) 97 WAIG 365) is quashed.
4. APPL 11 of 2017 is dismissed.

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

[L.S.]

2017 WAIRC 00908

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION STASS ENVIRONMENTAL PTY LTD AS TRUSTEE FOR THE STASS FAMILY TRUST	APPELLANT
	-and- NOLAN PAUL GROBLER	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS	
DATE	TUESDAY, 31 OCTOBER 2017	
FILE NO/S	FBA 12 OF 2017	
CITATION NO.	2017 WAIRC 00908	

Result	Appeal dismissed
---------------	------------------

Order

WHEREAS on 24 July 2017 an appeal was lodged in the Commission;

AND WHEREAS the notice of appeal has not been served on the respondent;

AND WHEREAS on 23 October 2017 the appellant informed the Commission that he 'will not be able to follow up on the FBA 12/2017 matter';

NOW THEREFORE, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed for want of prosecution.

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

[L.S.]

NOTICES—Award/Agreement matters—

2017 WAIRC 00946

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 18 of 2017

APPLICATION FOR A NEW AGREEMENT TITLED**“SHIRE OF YALGOO COMPREHENSIVE ENTERPRISE AGREEMENT 2017”**

NOTICE is given that an application has been made to the Commission by the *Shire of Yalgoo*, under the *Industrial Relations Act 1979* for the registration of the above Agreement.

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

3.2. Who the Agreement Covers

The parties to this Agreement shall be:

- 3.2.1. The Shire of Yalgoo, 37 Gibbons Street, Yalgoo, Western Australia (Employer);
- 3.2.2. Employees employed by the Shire of Yalgoo, excluding Employees who meet the following criteria (Employees):
- An employee employed under a common law contract which specifies exclusion from the coverage of this enterprise agreement; and
 - the Chief Executive Officer or Deputy Chief Executive Officer.
- 3.2.3. Western Australian Municipal, Roads Board, Parks and Racecourse Employees Union of Workers Perth (the Union).
- 3.2.4. This Agreement shall apply in the state of Western Australia to approximately 18 employees.

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00880

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2017 WAIRC 00880
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 4 OCTOBER 2017
DELIVERED : WEDNESDAY, 18 OCTOBER 2017
FILE NO. : M 55 OF 2016
BETWEEN : NAM THANH NGUYEN

CLAIMANT

AND

NORTH METROPOLITAN HEALTH SERVICE

RESPONDENT

Catchwords : Alleged breach of the WA Health – Health Services Union – PACTS – Industrial Agreement 2014 and WA Health – Health Services Union – PACTS – Industrial Agreement 2016 – Alleged failure to pay correct overtime – Alleged failure to credit additional annual leave – Construction of clauses 12(1), 12(7), 15 and 33.11 of the Agreements

Instruments : WA Health – HSUWA – PACTS – Industrial Agreement 2011
 WA Health – HSUWA – PACTS – Industrial Agreement 2014
 WA Health – HSUWA – PACTS – Industrial Agreement 2016

Case(s) referred to in reasons : *Miller v Minister of Pensions* [1947] 2 All ER 372

Result : Claim not proven

Representation:

Claimant : Mr K. Trainer as agent

Respondent : Mr J. Carroll (counsel) instructed by the State Solicitor of Western Australia

REASONS FOR DECISION

Background

- 1 The respondent's agency PathWest employs the claimant.
- 2 The claimant's employment with the respondent, which is the subject of a written agreement, commenced in 2004. Since September 2008 the claimant has worked as a laboratory technician in PathWest's Haematology and Coagulation Department at Royal Perth Hospital.
- 3 The terms and conditions of the claimant's employment are and have been governed by various industrial agreements. At the material times the applicable agreements were the WA Health – HSUWA – PACTS – Industrial Agreement 2014 and the WA Health – HSUWA – PACTS – Industrial Agreement 2016. I will hereinafter refer to the applicable agreement as 'the Agreement'.
- 4 The claimant is and has at all material times been employed as a permanent, part-time shift worker required to work 68 hours per fortnight on a four-week roster. The roster comprises a regular shift pattern which rotates over the four week cycle. Excluding meal breaks, each shift comprises 8.5 hours.
- 5 From time to time during the period of this claim, the claimant was asked by his supervisors and managers to work additional shifts to cover for colleagues absent for various reasons. On such occasions, he generally agreed to work those additional shifts. His agreement to fill the shift roster vacancies in such circumstances was recorded in writing and his roster was adjusted accordingly. The additional shifts that he generally agreed to work were week day shifts.
- 6 In the period prior to the pay period ending 21 January 2016, each additional shift was paid as overtime from the time at which the claimant's rostered hours for the whole of the roster plus his additional shift hours exceeded 76 hours per fortnight. Consequently, the claimant was paid at the ordinary rate for the first eight hours (plus any penalties for an afternoon or night shift) for the first additional shift insofar as it brought his fortnightly hours up to 76 hours. All hours worked in excess of 76 hours was paid at the overtime rate. Accordingly, the last half hour of his first additional shift was paid as overtime occurring on the day that shift was worked. Payment for working a second or subsequent additional shift was made at the overtime rates calculated on the basis that the day worked was an additional shift to which overtime applied.
- 7 From the pay period ending 21 January 2016, PathWest changed the way it calculated and paid the claimant's overtime entitlement. Its new approach was to treat all ordinary rostered shifts and any additional shifts worked up to 76 hours as ordinary time and then all hours worked in addition, whether it be on the original rostered shift or an additional shift, as overtime.
- 8 Given that the claimant's pay cycle commences on Monday and ends on the Sunday of the second week, the effect of the change was to treat the hours worked (rostered shifts plus additional shifts) on week days up to 76 hours as ordinary hours. Consequently each rostered shift worked on weekends was treated as an additional shift to which overtime applied. However, prior to the change when the claimant had been rostered to work on the weekend, penalty rates of 50% on Saturday and 75% on Sunday applied. By treating the additional shifts worked during the week as ordinary time, the overtime payable for working a weekend shift was set off against the penalties payable on the weekend.

Claimant's Complaint

- 9 The claimant asserts that the change has resulted in the diminution of his income as compared to the same hours worked prior to the change and also has had an effect upon his entitlement to an additional week's leave as a shift worker.
- 10 In that regard he asserts that prior to the change he received an additional week's annual leave as a shift worker who worked thirty five weekend days per year. His ongoing roster qualified him for that entitlement. By changing the way overtime is calculated, the ordinary rostered weekend shifts are no longer counted as days towards the additional leave entitlement. The claimant has, in effect, deleted his additional leave entitlement by changing the normal weekend shifts to become overtime shifts.
- 11 The claimant says that, in calculating overtime as it does, the respondent has misapplied cl 12.1 of the Agreement which has had the perverse effect of decreasing his entitlements notwithstanding that he worked substantial additional hours.
- 12 The claimant asserts that between 11 January 2016 and 7 March 2017 that the respondent has not paid him his correct entitlements and therefore has underpaid him \$16,746.50.

Response

- 13 The respondent says that from time to time it offered the claimant the opportunity to vary his ordinary hours of work and that such offer was conditional upon the claimant consenting in writing to such a variation under cl 12.1 of the Agreement.
- 14 As a result of the claimant providing such written consent, the respondent has varied the claimant's ordinary hours in accordance with the claimant's written consent and has paid him in accordance with cl 12.1 of the Agreement.
- 15 The respondent denies having underpaid the claimant, maintaining that it has paid him in accordance with the Agreement.

Agreed Facts

1. At all material times the respondent employed the claimant.
2. The claimant's employment was governed by a written contract of employment which provided inter alia:
 - a. The claimant's employment was permanent part-time.
 - b. Allowed the claimant's hours of employment to be on any day Monday to Sunday, inclusive.
 - c. Provided that the claimant could be required to work any of the 24 hours of the day.
 - d. Required to work a total of 68 hours per fortnight.
3. The terms and conditions of the claimant's employment were regulated by the WA Health – HSUWA – PACTS – Industrial Agreement 2011 and its successor agreements.

4. The claimant's shifts were determined by the respondent who published the shifts in a roster which had a four week life.
5. The claimant was rostered to work eight shifts of 8.5 hours each fortnight comprising 68 hours.
6. From time to time the respondent offered the claimant the opportunity to work shifts which had the effect of the claimant working more than 68 hours per fortnight.
7. On each and every occasion in which the respondent offered the claimant the opportunity to work shifts which had the effect of the claimant working more than 68 hours in particular fortnights, the claimant signed a form (exhibit 1) that stated:

For some time we have been filling shift roster vacancies by offering part time shift employees the opportunity to work these available shifts. These are paid as additional hours including the appropriate penalties. There is a requirement within the award (section 12.1) that consent is required by the employee in writing prior to working these shifts. Would you please complete the table below for any extra shifts you are willing to pick up. Completion of this table will indicate your consent to work these shifts as required under section 12.1 of the award.

Please note: Overtime is paid where less than 48 hours notice is given or more than 76 hours are worked within the fortnightly pay period.

8. That between 11 January 2016 and 7 March 2017 the claimant worked the additional shifts set out in the schedule annexed to his amended particulars of claim lodged 31 March 2017.

Facts in Issue

1. Approach to work additional shifts

The claimant asserts that the respondent approached him to work additional shifts to be treated over and above his ordinary rostered hours.

The respondent says that from time to time the respondent has offered the claimant the opportunity to vary his ordinary hours of work conditional upon the claimant consenting in writing to such variation.

2. Agreement to work in excess of 76 hours

The claimant asserts that he only agreed to work the hours beyond 76 hours in the roster period as overtime shifts and expressly advised the respondent's supervisors that he would only complete the additional shifts on that basis. He says that the respondent's supervisors expressly agreed to that.

The respondent denies that and says further, that on each occasion the claimant agreed to vary his ordinary hours of work and that his agreement to the variation is wholly recorded in his written consent provided to the respondent.

Resolution of Contentious Factual Issues

16 Mr Alan Morling (Mr Morling), scientist in charge of the respondent's Haematology Department at Royal Perth Hospital, testified that in early 2016 he became aware of the change in the way PathWest calculated and paid overtime. The issue was brought to his attention by the claimant.

17 Mr Morling said that after becoming aware of the change, he clearly stated to shift workers that any future shifts would be paid according to the approach that PathWest was using. He said that he consistently told the claimant that when he chose to work a vacant shift which was offered, and signed the form, he would be paid as PathWest determined. Mr Morling said that at no time did he tell the claimant that he would be paid according to the previous method, and emphasised to the claimant that it was not within his power to determine how the payment would be calculated.

18 In determining the disputed issues, I observe that the claimant carries the legal burden of proof for his claim. Each party carries the legal burden of proving those things which he or it asserts.

19 The standard of proof required to discharge the respective burdens of proof is the balance of probabilities. This standard was explained by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 as follows:

That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not [374].

20 Accordingly, where in these reasons I say that 'I am satisfied' of a fact or matter or otherwise make a finding as to a fact or matter, I am saying 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

21 The claimant bears the onus of satisfying me of those facts which he asserts.

22 Having considered the competing versions of events given by the claimant and Mr Morling, I am unable to prefer one to the other. At the very least, Mr Morling's testimony weighs equally to that of the claimant. There is no basis for rejecting Mr Morling's evidence or otherwise attributing lesser weight to it. Consequently it follows that the claimant has not been able to satisfy me of those disputed factual things which he asserts.

Issues

23 The claimant's case is that on each occasion he worked an additional shift, the respondent was required to assess the hours worked in the additional shifts as being accumulated on the hours the claimant was rostered to work for the fortnight in question.

24 The respondent's case is that by agreeing in writing to work the shifts offered, the claimant's ordinary hours of work for the relevant fortnight was amended for the purpose of calculating overtime, the claimant would be entitled to overtime for each hour worked in excess of 76 hours per fortnight. The respondent says that the proper construction of cl 12.1 of the Agreement produces such a result.

- 25 The respondent says in the alternative, that if the claimant's ordinary hours were not varied under cl 12.1 of the Agreement then cl 12.7(g) of the Agreement operates to modify the terms and conditions of working those shifts and has the same effect.
- 26 The issue of an entitlement to additional leave turns upon the extent to which the employee has worked 'ordinary shifts' on Sundays and for public holidays. The number of ordinary shifts which the claimant has worked on Sundays will depend on the outcome of the primary issue of whether the claimant's ordinary hours were varied.

Determination

- 27 Clause 14.10(a) provides:

10. Subject to the parameters for ordinary hours set out in this clause and to the applicable Agreement provisions for part-time employees, the provisions of the relevant overtime clause will apply for time worked at the direction of the employer:

a. in excess of agreed rostered hours.

- 28 It is clear that the overtime provision in cl 15 of the Agreement will apply to all hours worked in excess of the agreed rostered hours subject to the Agreement provisions for part-time employees. The part-time employment provision in cl 12 of the Agreement takes precedence to the extent of any inconsistency.

- 29 Clause 12.1 of the Agreement provides:

12.1 The employer may vary the ordinary hours of a part time employee where the employee consents in writing provided that the employer will give the part time employee 48 hours' notice of such variation in hours. For periods of less than 48 hours' notice, payment for the hours in addition to the ordinary hours will be paid in accordance with Clause 15 – Overtime.

- 30 Clause 12.1 allows an employee's ordinary hours to be varied with the employee's consent. The clause envisages variation by adding hours to ordinary hours. Where less than 48 hours' notice is given to work, then any extra hours agreed to be worked are to be paid as overtime. Conversely, where at least 48 hours' notice is given, then the varied hours do not necessarily attract overtime. Those agreed varied hours are paid as ordinary hours unless they constitute hours in excess of 76 hours in which case the hours worked in excess of 76 hours attract overtime rates for the purposes of cl 14.10(a) and cl 15 of the Agreement.

- 31 On each occasion the claimant worked the shifts to which this claim relates, he initialled a form containing the statement referred to above in which he consented to working the shift and being paid overtime when more than 76 hours are worked within a fortnightly period.

- 32 The consent to work extra shifts had the effect of varying the published roster. The roster was changed by agreement as permitted by cl 12.1 of the Agreement. Consequently, an entitlement to overtime did not arise until such time as 76 hours in a fortnight had been worked. Overtime hours are those hours worked in excess of 76 hours which in the claimant's case occurred in the last shifts of the relevant fortnight. Such interpretation gives effect to the last sentence of cl 12.1 of the Agreement. Otherwise it would have no work to do.

- 33 I am satisfied that the claimant's construction of cl 12.1 of the Agreement is its proper construction.

- 34 The respondent argues in the alternative, that cl 12.7(g) of the Agreement has application.

- 35 Clause 12.7(g) provides:

(g) Modified Terms and Conditions

(i) Notwithstanding the provision of subclause 12.1, and subject to subclauses 12.7(d), (e) and (f), where a part time employee has previously indicated in writing a willingness to work extra hours of extra shifts or both, such employee will be paid at the base rate of pay plus applicable shift penalties for work up to 76 hours per fortnight, without receiving prior notice.

(ii) The indication given by an employee of their willingness to work extra hours may be withdrawn at any time, provided such advice is given in writing.

(iii) An indication by an employee of their willingness to work additional hours does not oblige the employee to work additional hours if they are offered by the employer. An employee may refuse to work any additional hours offered to them and may not be required to give any reasons for refusing. Any such refusal is without prejudice to the employee.

(iv) The employer may not make it a condition of employment that an employee agrees to be available to work additional hours.

(v) Consistent with the operation of this Agreement there will be no rostered split shifts.

- 36 Clause 12.7(g) provides that an employee will be paid at the base rate of pay plus applicable shift penalties for work done up to 76 hours per fortnight without receiving prior notice.

- 37 Clause 12.7 provides part-time employees who wish to access the opportunity to work additional hours by covering short-term relief with such opportunity, may do so provided they indicate in writing their willingness to work extra hours or extra shifts, or both, and agree to the modified conditions set out in cl 12.7(f) of the Agreement.

- 38 The requirements for the application of cl 12.7 of the Agreement have been met with respect to the claimant in that:

1. Extra shifts were offered to him to cover for colleagues absent for various reasons.
2. He agreed to the modified terms being that he would only be paid overtime when more than 76 hours were worked within a fortnight.
3. He signed the consent form that indicated in writing his willingness to work extra shifts. The reference to cl 12.1 in the consent is inconsequential as it does not affect the nature of his consent.

- 39 It follows that cl 12.7(g) of the Agreement has application.

Result

- 40 I am satisfied that the respondent's current practice in respect to accounting for hours worked by the claimant is consistent with cl 12.1 and/or cl 12.7 of the Agreement.
- 41 Although one can well understand the claimant's sense of grievance resulting from the change that occurred quite unilaterally in January 2016 which resulted in lesser pay and entitlements, it does not follow that what the respondent has done is without foundation. Indeed, to the contrary.
- 42 It follows that the claimant's argument with respect to additional leave falls away.
- 43 The claim is not proven.

G. CICCHINI**INDUSTRIAL MAGISTRATE**

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00364

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2017 WAIRC 00364
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 7 JUNE 2017
DELIVERED	:	THURSDAY, 22 JUNE 2017
FILE NO.	:	B 45 OF 2017
BETWEEN	:	DARRYL WAYNE ANGLESEY Claimant AND TIMBERGLEN PTY LTD Respondent

CatchWords	:	Industrial Law (WA) - Claim for enforcement of contract of employment - Respondent contends Western Australian Industrial Relations Commission does not have jurisdiction to hear and determine claims for enforcement of contracts of employment of employees of constitutional corporations - Held <i>Fair Work Act 2009</i> (Cth) does not exclude Western Australian Industrial Relations Commission from hearing and determining such claims - Jurisdiction found
Legislation	:	<i>Commonwealth Constitution</i> <i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) <i>Judiciary Act 1903</i> (Cth)
Result	:	Jurisdiction found
Representation:		
Claimant	:	Mr G Stubbs of counsel
Respondent	:	MS F Stanton of counsel
Solicitors:		
Claimant	:	Jardine & Associates
Respondent	:	MDS Legal

Case referred to in reasons:*Christos Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67**Cases also cited:***Marina Saldanha v Fujitsu Australia Pty Ltd* (2008) 89 WAIG 76*Kevin Higgins v Gateway Printing* (2010) 90 WAIG 529*Reasons for Decision*

- 1 Mr Anglesey has brought a claim seeking that the Western Australian Industrial Relations Commission enforce his contract of employment with Timberglenn Pty Ltd, a constitutional corporation.
- 2 Timberglenn Pty Ltd says that the Western Australian Industrial Relations Commission does not have jurisdiction to hear and determine such claims when they are brought against constitutional corporations. It contends that if section 26 *Fair Work Act*

2009 (Cth) is properly constructed it is inconsistent with the *Industrial Relations Act 1979* (for the purposes of the argument insofar as the *Industrial Relations Act 1979* gives the Western Australian Industrial Relations Commission jurisdiction to hear and determine such claims against constitutional corporations) and that, accordingly, the effect of section 109 *Commonwealth Constitution* is that the *Fair Work Act 2009* (Cth) prevails over the *Industrial Relations Act 1979* and the *Industrial Relations Act 1979* is, in that regard and to that extent, invalid.

- 3 I note that Timbergleng Pty Ltd complied with section 78B *Judiciary Act 1903* (Cth).
 - 4 It is accepted that, on its face, the *Industrial Relations Act 1979* provides the Western Australian Industrial Relations Commission with jurisdiction to hear and determine claims for enforcement of contracts of employment. That is, no issue is taken with the correctness of the conclusions reached by Acting Senior Commissioner Scott, as she then was, in *Christos Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67.
 - 5 However, Timbergleng Pty Ltd says that sections 26 and 27 *Fair Work Act 2009* (Cth) make it clear that the *Industrial Relations Act 1979* has no application to constitutional corporations and their employees.
 - 6 Timbergleng Pty Ltd says sections 26(1), 2(a) and 3(c) *Fair Work Act 2009* (Cth) make it very clear that Federal Parliament intended that the *Industrial Relations Act 1979* would have no application to employees of constitutional corporations.
 - 7 In relation to section 27(2)(o) *Fair Work Act 2009* (Cth) appearing to provide that Federal Parliament did not have such an intention in relation to claims for enforcement of contracts of employment, Timbergleng Pty Ltd points to section 26(2)(b)(ii) *Fair Work Act 2009* (Cth) which provides that included in the definition of “State industrial law”, and thus ousted by section 26(1) *Fair Work Act 2009* (Cth), is:

“an Act of a State...that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes, providing for the establishment or enforcement of terms and conditions of employment.”
 - 8 Timbergleng Pty Ltd argues that it would be a strange result if sections 26(2)(b)(ii) and 27(2)(o) *Fair Work Act 2009* (Cth), when read together, had the effect that Federal Parliament intended to oust State legislation that provided for the establishment or enforcement of terms and conditions of employment for the employees of constitutional corporations but also intended to allow State legislation which provided for claims for the enforcement of contracts of employment by such employees to operate.
 - 9 Timbergleng Pty Ltd argues the nonsense or absurdity that it says emerges can only be resolved by taking, as a start and end point, that Federal Parliament intended, and clearly so, to oust the operation of the *Industrial Relations Act 1979* in relation to constitutional corporations and their employees. If that is accepted, Timbergleng Pty Ltd says, it should also be clear that whatever section 27(2)(o) *Fair Work Act 2009* (Cth) was trying to achieve it cannot have been intended to achieve allowing the Western Australian Industrial Relations Commission to hear and determine claims for the enforcement of contracts of employment brought by employees of constitutional corporations.
 - 10 If support for this proposition is required, then Timbergleng Pty Ltd says section 26(2)(b)(ii) *Fair Work Act 2009* (Cth) provides that support insofar as it provides that legislation which has as its, or one of its, main purpose the enforcement of terms and conditions of contracts of employment is ousted.
 - 11 In terms of what section 27(2)(o) *Fair Work Act 2009* (Cth) was intended to achieve Timbergleng Pty Ltd suggests that it seeks to avoid it being argued that Federal Parliament is encroaching on the power of State Parliaments to make legislation, of a non-industrial kind, dealing with contracts, which may include contracts of employment. Timbergleng Pty Ltd argues that section 27(2)(o) *Fair Work Act 2009* (Cth) makes it clear that Federal Parliament was, by section 27 *Fair Work Act 2009* (Cth), making “a great effort to make sure that what is being done here [by the *Fair Work Act 2009* (Cth)] does not cut across the areas that are traditionally well understood to be the preserve of the States.” (ts 10).
 - 12 The argument is interesting and was well put but, in my view, fails.
 - 13 It does so for the following reasons:
 - (1) There is no argument put that the *Industrial Relations Act 1979* does not give the Western Australian Industrial Relations Commission the jurisdiction to hear and determine claims for enforcement of contracts of employment;
 - (2) Federal Parliament must be taken to have known that the Western Australian Industrial Relations Commission had such a power when it enacted the *Fair Work Act 2009* (Cth);
 - (3) Having excluded the operation of the *Industrial Relations Act 1979* by sections 26(1), 2(a) and 3(c) *Fair Work Act 2009* (Cth) Federal Parliament expressly ruled back in, knowing that the *Industrial Relations Act 1979* contained such a power, a law of a State, which must by the generality used be read to include the *Industrial Relations Act 1979*, so far as that law of a State dealt with claims for enforcement of contracts of employment;
 - (4) If, given this clarity, it was necessary to read section 27(2)(o) with section 26(2)(b)(ii) *Fair Work Act 2009* (Cth) it is important to note that they refer to different things. Section 26(2)(b)(ii) *Fair Work Act 2009* (Cth) refers to “enforcement of terms and conditions of employment” while section 27(2)(o) *Fair Work Act 2009* (Cth) refers to “enforcement of contracts of employment”. Federal Parliament must be taken to have used the term “contracts of employment” in section 27(2)(o) *Fair Work Act 2009* (Cth) deliberately and with the intention of distinguishing the paragraph from section 26(2)(b)(ii) *Fair Work Act 2009* (Cth), with it being unnecessary to decide for present purposes what is the intended difference.
 - 14 I find that the Western Australian Industrial Relations Commission has jurisdiction to hear and determine Mr Anglesey’s claim.
-

2017 WAIRC 00871

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00871
CORAM : COMMISSIONER D J MATTHEWS
HEARD : TUESDAY, 12 SEPTEMBER 2017, WEDNESDAY, 13 SEPTEMBER 2017,
 WEDNESDAY, 20 SEPTEMBER 2017
DELIVERED : MONDAY, 16 OCTOBER 2017
FILE NO. : B 45 OF 2017
BETWEEN : DARRYL WAYNE ANGLESEY
 Claimant
 AND
 TIMBERGLEN PTY LTD
 Respondent

CatchWords : Contractual benefits claim - Claimant's employment terminated - Claim refers to payment of days off in lieu - Claim characterised in the proceedings as underpayment of annual leave entitlement - Respondent contends claimant had no contractual entitlement to days off in lieu - Respondent contends in the alternative that days off in lieu never properly approved - Respondent contends annual leave balance was properly adjusted to account for days off in lieu taken without contractual entitlement thereto during course of employment or in the alternative without approval - Contractual entitlement to 636.7 hours of annual leave found as at date of termination - Respondent's defence rejected on several grounds - Claim upheld - Payment ordered

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979
Minimum Conditions of Employment Act 1993

Result : Claim upheld; payment ordered

Representation:

Counsel:

Claimant : Mr G Stubbs
Respondent : Ms F Stanton

Solicitors:

Claimant : Jardine & Associates
Respondent : MDS Legal

Case referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Union, Miscellaneous Workers Division, Western Australian Branch v Board of Management, Fremantle Hospital and Hospital Service (Unreported, Complaint No 87 of 1997, delivered 17 November 1997)

Ian Macfarlane v Halperin Fleming & Meertens (2002) 82 WAIG 150

Cases also cited:

Girons v FMC Technologies Australia Limited (2015) 95 WAIG 1886

Griggs v The Noris Group of Companies [2006] SASC 23

Lai Corporation Pty Ltd (Receiver and Manager Appointed) v Steinberg (Unreported, WASC, Library No 6376, 11 July 1986)

Reasons for Decision

Background and Factual Findings

- 1 The claimant was relevantly employed by the respondent for the period 11 September 2011 to 15 October 2015.
- 2 During that period of employment the claimant took many days off work which he claimed as, and which were processed and paid as, "days off in lieu."
- 3 A "day off in lieu" was leave earned by working outside of ordinary hours.
- 4 The claimant's ordinary hours were 38 hours a week.
- 5 Under the contracts of employment covering the relevant period the claimant had an entitlement to 20 days of annual leave per annum.
- 6 At the time the claimant's employment was terminated the respondent came to the view, having turned its mind to it, that the claimant had never had, during the relevant employment, a contractual entitlement to paid days off in lieu.

- 7 The respondent calculated that the claimant had been paid for, expressed in hours, 433.08 hours by way of days off in lieu to which he had no contractual entitlement.
- 8 The respondent decided to treat the days off in lieu as properly having been annual leave days. When the respondent made its final payment to the claimant upon the ending of his employment it reduced the claimant's accrued annual leave entitlement by 433.08 hours.
- 9 The claimant lodged a Notice of Claim on 24 March 2017 alleging a "failure to pay 'lieu days' as agreed in writing and by way of oral contract further to contract of employment, being 433.08 hours at \$47,847.1."
- 10 In opening, counsel for the claimant referred to some of the matters set out above.
- 11 I then asked counsel:
"Is the better characterisation of the claim that there was an underpayment of the annual leave entitlement? Is that essentially what happened here?"
(ts 26)
- 12 Counsel relevantly responded:
"Well, look, the - yes, I agree with what you've said. And I think the characterisation, quite succinctly one of he had an entitlement to a certain amount of annual leave and they have deducted money from that annual leave, there's nothing in the contract that gives them entitlement to do so."
(ts 27)
- 13 The hearing proceeded on the basis that this was the claim. On several occasions I enquired of counsel for the respondent whether this different characterisation of the claim in any way prejudiced it. No adjournment of the matter was sought to allow the respondent to consider whether it was prejudiced and, if so, to deal with that prejudice.
- 14 As I understood it, the respondent felt that this characterisation made no difference to its defence because it argued that, in the absence of a contractual entitlement to days off in lieu, or, in the presence of such an entitlement but the absence of proper approval for the taking of such days, the result must be that the days off were, in fact and at law, days of annual leave.
- 15 The respondent argued that once the facts and law were properly understood the claimant's annual leave entitlement, appropriately reduced by the conversion of paid days off in lieu to annual leave, was paid in full.
- 16 I find the following as facts based on uncontroverted evidence:
- during the course of the relevant period of employment the claimant made claims for days off in lieu covering the period of 433.08 hours which is in dispute in these proceedings;
 - those claims were processed by the respondent as days off in lieu; and
 - the 433.08 hours in dispute were paid as days off in lieu by the respondent during the course of the claimant's relevant employment.
- 17 I find also that, leaving to one side the respondent's legal argument, and again on uncontroverted evidence, that the claimant had an entitlement to well over 600 hours of annual leave at the time his employment ended.
- 18 The respondent's records, the payslips which became Exhibit 3 in these proceedings, show the claimant's annual leave entitlement growing over the period of relevant employment and, from 15 June 2015 on, they show a total exceeding 600 hours.
- 19 Exhibit 7 shows that as at the end of his employment the claimant's accrued but unused annual leave totalled 636.7 hours.
- 20 No serious effort was made by the respondent to establish that, leaving its legal argument to one side, its records were incorrect.
- 21 However, as a matter of fairness to all, some rough calculations were done on the run during the hearing to investigate whether the claimant could have built up such an entitlement to annual leave during the relevant period of employment and I have refined those calculations in the course of the writing of these reasons.
- 22 I find, given that:
- the relevant period of employment was 4 years and 23 days;
 - the claimant was entitled to 20 days of annual leave per annum; and
 - public holidays worked by the claimant were added to his annual leave entitlement (28 days over the relevant period) - the claimant's annual leave entitlement over the relevant period would have totalled over 800 hours.
- 23 It was also clear on the evidence that the claimant took some annual leave during the period of relevant employment, which obviously ran down his annual leave entitlement, but not a great amount given that most time off was taken as days off in lieu.
- 24 I find as a fact that the payslips provided to the claimant contained, without turning to the legal argument made by the respondent, an accurate tally of his annual leave entitlement and that, at the time of the ending of the employment, the total was 636.7 hours, as shown by exhibit 7.
- 25 I find as a fact, the claimant's evidence on this not having been disputed, that during most of the relevant period of employment he reported to persons who held the position of "General Manager" and that for most of that period the person holding the position was Mr Mark Edwin Jones.
- 26 I find that by letter dated 11 December 2013 (exhibit 5) Mr Jones wrote to the claimant stating in relevant part:
"In our recent discussions regarding your appointment as Executive Chef you asked me to clarify a few points regarding holidays, lieu days and your expected hours of work."

I can confirm that you will be entitled to the normal four weeks' annual leave and that you will also be entitled to lieu days should you be required to work on public holidays or extra days other than your normal 5 days per week. Any lieu days owing will be added to the payroll system for you to take at a convenient time."

- 27 I find as a fact, it not being in contest, that, as Mr Jones informed the claimant in the letter, "any lieu days owing" were added to the respondent's payroll system and that the claimant took them at convenient times.
- 28 I note the respondent argues that this letter could not vary the contract of employment (exhibits 1 and 10) because the contract of employment was a written contract which included a subclause, clause 1.4, stating, in part, "this contract constitutes the entire agreement between the parties."
- 29 I note the respondent also argues that the letter sets out, if anything, a "policy" of the respondent and that the policy could only apply to persons who worked a five day week. The respondent says that as the claimant's role required him to work on any day of the week, and did not provide for a five day week, that either the policy could not have applied to the claimant, and proceeds on the erroneous basis that there was an existing agreement the claimant worked a five day week, or, to the extent it might be argued to apply, it did not because it was inconsistent with the contract of employment and clause 15.1 of the contract of employment provided that where there is inconsistency between a policy and the contract the contract prevails.
- 30 I finally note in this regard the respondent argues that even if, on its face, the letter might be said to have relevantly varied the claimant's contract, Mr Jones had no authority to vary the contract and, as a matter of law, there was no variation to it.
- 31 I find as a fact, on uncontroverted evidence, that at various times throughout the claimant's relevant period of employment Mr Jones took an active interest in the size of the claimant's annual leave entitlement and its relationship to the claimant taking days off in lieu.
- 32 In or around September 2014 Mr Jones did a review of the claimant's annual leave entitlement showing in the respondent's records and, in or around August 2015, with Mr Jones' superior, Martin Smith, described in the proceedings as the "Managing Director", Mr Jones did an investigation of the claimant's days off in lieu and annual leave entitlements.
- 33 The September 2014 review led to Mr Jones organising for the claimant's annual leave entitlement to be reduced to reflect that some days which had been claimed by the claimant, and processed and paid by the respondent, as days off in lieu had not been authorised to be taken as such.
- 34 Otherwise, I find, on the uncontroverted evidence given, that, if the review or investigation led to any change to the respondent's records in relation to the claimant, whether for days off in lieu or annual leave, the changes were small ones.
- 35 I note the respondent says that the review and investigation were flawed and that, in any event, the claimant had no contractual entitlement to days off in lieu and that the respondent's records are, in that sense, irrelevant as a matter of law.
- 36 I find as a fact, her evidence on this point not having been undermined in any way, that Ms Susan Joy Donkersloot, the person who processed the respondent's payroll, only added a day off in lieu to the claimant's credit in the respondent's records if she was satisfied it had been appropriately authorised.
- 37 I note the respondent says that the system of authorisation was lax and that entries into the records may not have reflected true authorisations and that, in any event, the claimant had no contractual entitlement to days off in lieu and that the respondent's records are, in that sense, irrelevant as a matter of law.
- 38 I also find as a fact, relying on the evidence of the sole director of the respondent, Mr St John David Hammond, which I reproduce below, that when making its final payment to the claimant the respondent reduced the accrued annual leave entitlement of the claimant from 636.7 hours to 203.62 hours, upon Ms Donkersloot doing the best calculations she was able to, admitting that she could not guarantee they were exactly correct, to reflect its view that 433.08 hours should have been taken as annual leave and not as days off in lieu.
- 39 In evidence in chief Mr Hammond gave the following evidence:

"Now, was there a point in time where you became interested in Mr Anglesey's leave accruals?---Ah, at the time of, ah, Mr Anglesey's termination from Timberglan.

And specifically, were you concerned with all leave or any particular type of leave?---Ah, we were concerned with the total quantum of annual leave and the fact that there had been a significant amount of hours accrued - ah, accrued as days in lieu.

MATTHEWS C: Who's "We"?---Ah, myself and my partners.

STANTON, MS: And what did you do in relation to that matter, that concern?---Ah, we looked into the hours, ah, that had been accrued as holiday leave and we looked into the hours that had been accrued into, ah, days in lieu. And we found that there was, ah, an inconsistent chain of approvals for those days in lieu. Ah, Mr Anglesey was, ah, at that stage, being terminated, ah, summarily for gross misconduct and that - at that point in time, the, ah, days in lieu, ah, that had been used were then reversed or - or swapped out for annual leave."

(ts 203)

- 40 Under cross-examination Mr Hammond gave evidence as follows:

"And the situation was, during that whole period, that lieu days were quite a separate thing from annual leave entitlements, weren't they?---Absolutely.

Now, the position is that if a lieu day was - well, you accept entirely I assume that during the course of his employment, that Mr Anglesey was paid, on numerous occasions, lieu days. Is that right?---Yes.

That wasn't just some notional payment. He was paid into his bank account money characterised in his pay advices as lieu days?---Yes, sir."

(ts 208 -209)

“Now, the parting between Mr Anglesey and Timberglen was certainly not consensual by any means and basically the situation is that you - to be clear on this, you authorised the deduction of every lieu day that he had taken from the time of his employment in September 2011 through to the time of his termination in October of 2015 from his annual leave entitlement, didn't you?---Yes, sir.”

(ts 212)

- 41 The respondent asks me, against that factual background, to conclude as follows:
- (a) the claimant had no contractual entitlement to the 433.08 hours taken as days off in lieu or, in the alternative, that the claims for those hours were not properly approved;
 - (b) that the 433.08 hours must be characterised as annual leave because they were not worked but were paid and, absent a contractual entitlement to days off in lieu, or, absent proper authorisation for the days to be taken as days off in lieu, they can only have been taken as annual leave;
 - (c) the respondent was entitled to amend the claimant's annual leave entitlement at any time to make it accurate; and
 - (d) the respondent only became aware the claimant had been paid money to which he was not contractually entitled, or which had been paid without proper approval, at the time of calculating the claimant's final payment upon the ending of his employment and, at that time, the respondent was entitled to amend the claimant's annual leave entitlement to make it accurate and pay out the correct annual leave entitlement.
- 42 I note here that the respondent did not argue, or make any attempt to establish by way of evidence, that the claimant did not think he had an entitlement to days off in lieu. Nor did the respondent seek to establish, or if it did it did not make a final submission, that the claimant made claims for days off in lieu knowing that they had not been authorised or in the hope that the lack of authorisation would be overlooked. That is, there was no effort to establish, or no ultimate submission, that the claimant had been in any way “rotting the system”.
- 43 It would, of course, have been difficult to sustain such an assertion given the content of exhibit 5 and given the claimant made quite transparent claims for payment for days off in lieu during the period of relevant employment, that these were processed in the normal way and were paid and reflected as such in the payslips provided to him by the respondent.
- 44 I also note the evidence that on at least one occasion, in September 2014, the respondent, informed the claimant that leave taken as days in lieu had not been approved and those days were instead taken off the claimant's annual leave entitlement. This can only have emboldened the claimant in a belief that he had an entitlement to days off in lieu, so long as they were properly approved, and that whenever there was a problem his employer would correct it.

Consideration

- 45 Determining the claimant's contractual entitlement is a simple matter. Under his contract of employment the claimant was entitled to 20 days of annual leave each year. As at the date of his employment ending he had accumulated 636.7 hours of unused annual leave.
- 46 This is evidenced by the respondent's own records.
- 47 It is also evidenced by everything heard before me. The claimant claimed many days off as days off in lieu. They were processed and paid as such. The respondent did not reduce the claimant's annual leave entitlement for these days, except on one occasion during the course of the claimant's employment, that referred to in [44] above.
- 48 The respondent did not argue that this was not the history and, again, that history is reflected in its own records.
- 49 The situation arose where the sole director of the respondent, when the claimant's employment ended, decided that the claimant had no contractual entitlement to days off in lieu and at that point organised for all the days off in lieu to be calculated and characterised as annual leave, thus reducing the claimant's annual leave entitlement to the amount paid to him.
- 50 The respondent's defence to the claim is, consistent with the actions taken by Mr Hammond, the claimant's annual leave entitlement, properly calculated once the terms of the claimant's contract are understood and applied, was fully paid to him.
- 51 I reject the respondent's defence to the claim for the following reasons:
- (a) the defence in truth has nothing to do with the claimant's contractual entitlement to annual leave and is, although the respondent disavowed this characterisation of it and did not attempt to pursue it as one in these proceedings, really a claim (or counterclaim) that it had overpaid the respondent;
 - (b) properly characterised, acceptance of the respondent's defence would fall foul of section 90(2) *Fair Work Act 2009* (Cth); and
 - (c) acceptance of the respondent's defence would, in any event, be totally unfair to the claimant, taking into account all of the circumstances.

Claim for overpayment disguised as a defence to contractual entitlement to annual leave

- 52 The respondent's defence, in my respectful view, does not ask me to undertake an examination of the claimant's contractual entitlements or matters such as whether the claimant's contract of employment was varied or whether, if it was, the appropriate authorisations were given for the entitlement under the varied contract. Rather the respondent invites me to rewrite the history.
- 53 That is, the respondent asks me to find that the days off in lieu should never have been taken as days off in lieu, its records should have looked different as at the time the claimant's employment ended and, if everything had been done properly, the claimant would not, as a matter of fact, have had a contractual entitlement to 636.70 hours of annual leave as at that date.
- 54 I find that, whatever the respondent may now say, as at the date of the ending of his employment the claimant had a contractual entitlement to be paid unused annual leave and that the amount of that leave was 636.7 hours.
- 55 The respondent's case can only be characterised as a claim or counterclaim for an overpayment.

- 56 It was stressed during the proceedings, and in particular by Mr Hammond in the evidence reproduced above, that annual leave entitlements and entitlements to days off in lieu were completely separate and discrete matters within the respondent's business.
- 57 Accepting this, the respondent's claim, properly characterised, is that it paid the claimant some money during his employment to which he had no entitlement, that is payments for days off in lieu when the claimant had no entitlement to such payments or, if he did, when they were not properly authorised.
- 58 That is, on any reasonable view, a claim or counterclaim alleging overpayment and has nothing at all to do with the claimant's contractual entitlement to accrued and unused annual leave, which claim is supported by the terms of the contract and quantified by the respondent's own records.
- 59 In my view the claimant's contractual entitlement to annual leave is clear, as is the quantification of that entitlement. I find that the respondent's argument that I should now accept, or sanction, its reduction of the entitlement because different things should have happened during the course of the claimant's employment, and if they had happened the entitlement would have been different, to be artificial. I find that the respondent's case is, in truth, a claim or counterclaim relating to alleged overpayments.

Section 90(2) Fair Work Act 2009 (Cth)

- 60 The respondent's characterisation of its case is essentially that an analysis should be taken of whether the contract allowed days off in lieu and, if so, whether preconditions for payment of them were met.
- 61 The case proceeds to the intended result that, if I accept one or the other of those arguments, the days off in lieu must be converted to annual leave and the annual leave entitlement the respondent's own records show be reduced.
- 62 Acceptance of the characterisation, and the result it invites, would, in my view, lead me into falling foul of section 90(2) *Fair Work Act 2009* (Cth) and similar legislation which has the purpose of protecting employees from employers doing exactly what the respondent has done here, and now seeks that I sanction.
- 63 Section 90(2) *Fair Work Act 2009* (Cth) provides as follows:
- “If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.”
- 64 The section has cousins in Western Australian legislation such as section 17C *Minimum Conditions of Employment Act 1993*.
- 65 The purpose of such legislation, deeply rooted in the righting of historical injustices where employers reduced payments to employees to settle debts the employer unilaterally decided employees owed to the employer, is to protect employee entitlements from unrelated claims upon them by the employer.
- 66 In my view an employer who unilaterally comes to the view that an employee has taken and been paid for days off under one heading of leave and that the leave should have been taken and paid for as annual leave, and unilaterally changes the annual leave entitlement to reflect that view, with the result that an employee is not paid a sum of money by way of unused annual leave, is entering territory which section 90(2) *Fair Work Act 2009* (Cth) provides it should not.
- 67 I find that, if I accepted the respondent's characterisation of the matter, and went down the path I am invited to, it would undermine the import of legislation that protects employees from employers bringing and deciding its own claims against employees and using employee entitlements to satisfy them.
- 68 I have read *Ian Macfarlane v Halperin Fleming & Meertens* (2002) 82 WAIG 150 in which Commissioner Smith (as she then was) made obiter comments about a situation where an employer deducted an amount from the final pay of an ex-employee (representing a deduction from wages and the ex-employee's accrued annual leave entitlement) and resisted a claim for recovery of the amount on the basis that the ex-employee owed that sum to the employer.
- 69 Given the way I have characterised this matter the decision is arguably analogous to this matter in that the respondent here effectively says that the claimant owes it money and it was entitled to recover that money by reducing the final payment of the annual leave entitlement to the claimant.
- 70 Commissioner Smith said at [25] that, had the question arisen for decision, she would have held that there is nothing to prevent an employer from recovering from monies outstanding on one item (namely salary and accrued annual leave that is due and owing under the contract of employment), an amount which is due and owing by an employee pursuant to the express terms of a contract of employment.
- 71 The difference between that case and this is that in that case the contract of employment made clear and express reference to reimbursement of the subject item in the exact circumstances which arose and which were considered by the Western Australian Industrial Relations Commission.
- 72 There is no such provision in the contract of employment in this case. If there had been a provision in the contract of employment allowing for set off against a contractual entitlement this matter may have required quite a different approach and perhaps detailed analysis of the respondent's claim (or counterclaim).
- 73 I also note, having considered it, that the facts of this matter are quite different to those in *Australian Liquor, Hospitality and Miscellaneous Union, Miscellaneous Workers Division, Western Australian Branch v Board of Management, Fremantle Hospital and Hospital Service*, a decision referred to at [22] of Commissioner Smith's decision.
- 74 In that case a statutory provision prohibited the payment of the money that the employer later “recovered” by a deduction of pay.
- 75 There is no statutory provision prohibiting the respondent from doing what I have found it is saying it has done, despite its protestations against the characterisation, being to mistakenly overpay the claimant.

Fairness

- 76 Having found the core contractual entitlement relevant here, one of 20 days of annual leave each year, and having quantified that entitlement to be 636.7 hours, and taking into account all of the surrounding circumstances established by the evidence, I consider that it would be entirely contrary to section 26(1)(a) *Industrial Relations Act 1979* to do anything other than grant the claim.
- 77 In determining claims of a denied contractual benefit, as with any exercise of jurisdiction under the *Industrial Relations Act 1979*, section 26(1)(a) provides that I must act according to equity and good conscience.
- 78 Here the claimant over a long period of time made claims for days off in lieu. He thought he was entitled to them. There was no evidence led that before Mr Jones became the claimant's General Manager the claimant had been in any way discouraged in this belief by those to whom he reported. Mr Jones clearly had ostensible authority in relation to the claimant whatever the respondent might argue about his actual authority. There is no good reason given as to why the claimant would not take the contents of exhibit 5 at face value as applying to him and have acted upon them.
- 79 In fact the claimant did act on the contents of the letter and continued to claim days off in lieu and, what is more, his claims were processed and paid by the respondent without controversy.
- 80 On one occasion there was a reversal but this was on the basis of a lack of authorisation (not a denial of the entitlement itself) and this could have only emboldened the claimant in beliefs that he had an entitlement to days off in lieu and if he was doing the wrong thing it would be brought to his attention.
- 81 The respondent was clearly aware of the claimant's annual leave entitlement (see exhibits 19 and 26, examples of reports showing annual leave entitlement totals which went to the respondent's sole director) and never informed him that the total may be wrong (other than on one occasion already referred to herein).
- 82 In fact, the respondent reviewed and investigated issues the respondent now relies upon and those processes did not lead to any material change to the annual leave entitlement total, by which I mean a change consistent with the position the respondent adopted at the end of the claimant's employment and continued into these proceedings.
- 83 On the evidence, no attempt having been made to prove otherwise, the claimant made transparent claims for days off in lieu pursuant to his honest belief that he was entitled to them.
- 84 The respondent, through agents the claimant was entitled to believe represented the respondent on these matters, processed those claims and the claimant was paid for days off in lieu, his annual leave entitlement being unaffected.
- 85 To the extent that days were taken which were not authorised appropriately these were brought to the claimant's attention and remedied without incident.
- 86 The persons with the power to so remedy the records conducted a review and investigation into the claimant's entitlement to days off in lieu without referring anything to the claimant upon their completion.
- 87 At the time of the ending of the claimant's employment everything changed on the view of the director of the respondent, and the respondent imposed that view by unilaterally altering the claimant's entitlement to annual leave, and, what is more, by an amount which I note Ms Donkersloot admitted she could not be sure was correct. This was all quite unfair.

Conclusion

- 88 I will order that the respondent pay to the claimant forthwith the amount of \$20,721.62 less the applicable tax representing 433.08 hours at \$47.8471 (the hourly rate of pay not having been disputed by the respondent).

2017 WAIRC 00901

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DARRYL WAYNE ANGLESEY	CLAIMANT
	-v- TIMBERGLEN PTY LTD	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	WEDNESDAY, 25 OCTOBER 2017	
FILE NO/S	B 45 OF 2017	
CITATION NO.	2017 WAIRC 00901	

Result	Claim upheld; payment ordered
Representation	
Claimant	Mr G Stubbs of counsel
Respondent	Ms F Stanton of counsel

Order

HAVING heard Mr G Stubbs, of counsel, for the claimant and Ms F Stanton, of counsel, for the respondent; and

HAVING given reasons for decision;

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

The respondent forthwith pay to the claimant the sum of \$20,721.62 less tax.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2017 WAIRC 00913

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00913
CORAM : COMMISSIONER D J MATTHEWS
HEARD : TUESDAY, 24 OCTOBER 2017
DELIVERED : THURSDAY, 2 NOVEMBER 2017
FILE NO. : B 45 OF 2017
BETWEEN : DARRYL WAYNE ANGLESEY
 Claimant
 AND
 TIMBERGLEN PTY LTD
 Respondent

CatchWords : Speaking to the minutes and applications for interest and legal costs and expenses – Interest not dealt with in reasons for decision – No claim made for interest in the proceedings – No power to award interest – Application dismissed – No power to award legal costs for interlocutory proceedings or substantive proceedings – Matter not frivolously defended – No basis to award expenses – Application for legal costs and expenses dismissed

Legislation : *Industrial Relations Act 1979*

Result : Applications dismissed

Representation:

Counsel:

Claimant : Mr T Jardine
Respondent : Ms F Stanton

Solicitors:

Claimant : Jardine & Associates
Respondent : MDS Legal

Case referred to in reasons:

John Maurice McLoughlin and Donald James Blackwell v Western Power Corporation (2000) 80 WAIG 3084

Reasons for Decision

(Given extemporaneously as edited by the Commission)

- 1 The successful claimant makes applications for orders for interest to be payable on the judgment sum and for legal costs and expenses.
- 2 The application for an order for interest is made by way of a speaking to the minutes.
- 3 A speaking to the minutes is not the appropriate forum to remedy a failure to consider interest in the reasons for decision, even if there were such a failure.
- 4 A speaking to the minutes is an opportunity for the parties to address the Commission on situations in which the proposed order does not reflect the reasons for decision. Interest is not referred to in the reasons.
- 5 Interest was not sought in the proceedings.
- 6 There is no “plus interest” in [20] of the Notice of Claim filed 24 March 2017. I understand what the claimant says about the Notice of Claim form not giving a party the facility to make reference to interest, given that [20] only invites entry of alleged denied contractual benefits and the value of the contractual benefits.
- 7 Even so, it would have been appropriate, if interest was sought, to simply insert “plus interest” when completing the form.
- 8 Interest was not referred to by the claimant’s counsel when opening his case.

- 9 In any event, the Commission doesn't have power to award interest (see *John Maurice McLoughlin and Donald James Blackwell v Western Power Corporation* (2000) 80 WAIG 3084).
- 10 The combination of there being no power to award interest, a speaking to the minutes not being the appropriate way to seek interest, and that interest wasn't sought on the claim or at the substantive hearing means that the application for interest must fail.
- 11 The claimant also makes a discrete application for costs, which is properly brought at this time.
- 12 Ultimately the situation is that there is no provision to award legal costs, which is the bulk of what is sought by the successful claimant.
- 13 There is clearly, pursuant to section 27(1)(c) *Industrial Relations Act 1979*, no power to award legal costs for the substantive hearing.
- 14 The claimant seeks legal costs associated with a preliminary hearing in this matter.
- 15 The preliminary hearing was an application in relation to jurisdiction brought by the respondent, which was unsuccessful. The claimant says that section 27(1)(o) *Industrial Relations Act 1979* provides that the Commission may make such orders as may be just with respect to any interlocutory proceedings and that includes the costs of those proceedings. The claimant says that, unlike section 27(1)(c) *Industrial Relations Act 1979*, there is in section 27(1)(o) no reference to awarding legal costs not being within the Commission's power.
- 16 It appears clear to me however that this is a case where the principle of statutory interpretation that the specific overrides the general applies. Section 27(1)(c) *Industrial Relations Act 1979*, as it specifically deals with legal costs, would override any argument that 27(1)(o) *Industrial Relations Act 1979* leaves available a power to order the payment of legal costs for interlocutory proceedings.
- 17 I find there is no power to award legal costs under section 27(1)(o) *Industrial Relations Act 1979* for the interlocutory proceedings and that section 27(1)(c) makes clear I may not award legal costs for the substantive hearing.
- 18 I make no order for costs.
- 19 That leaves only the filing fee, the claimant tells me, in relation to an order for expenses.
- 20 Usually, expenses are only ordered where a claim has been frivolously or vexatiously defended.
- 21 This matter was not frivolously or vexatiously defended.
- 22 Although the matter ultimately went against the respondent, I can assure the parties that, in my consideration of it, it was not a frivolous or vexatious defence. There were some complexities to work through before the result was arrived at, as simple as that result may seem when someone reads the reasons for decision.
- 23 Additionally, the true nature of the claim did not emerge from the Notice of Claim filed 24 March 2017 and only emerged and was clarified during the course of the claimant's opening and in response to questions from me.
- 24 The claimant says that the respondent was always aware of the true nature of its case from correspondence but the respondent was entitled to enter the hearing on the basis that the claimant's case was as set out in the originating document. The respondent did not seek an adjournment but pressed on and ran the defence that they did, unsuccessfully, but certainly not vexatiously or frivolously.

2017 WAIRC 00928

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ALEXANDER EDWARD HOULDSWORTH	APPLICANT
	-v-	
	WATPAC CIVIL & MINING	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 8 NOVEMBER 2017	
FILE NO/S	B 110 OF 2017	
CITATION NO.	2017 WAIRC 00928	
Result	Application dismissed	

Order

WHEREAS this is an application referred to the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on 19 October 2017, the applicant advised the Commission that he intended to pursue his claim through the Federal Circuit Court; and

WHEREAS on 20 October 2017, the Commission directed the applicant to confirm by 6 November 2017 whether or not he wished to pursue his claim in this Commission. The Commission advised that if nothing further was heard from the applicant, the Commission would proceed on the basis that the applicant does not wish to proceed with his claim in this Commission; and

WHEREAS no further correspondence has been received from the applicant.

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2017 WAIRC 00927

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KARYN LISIGNOLI	APPLICANT
	-v-	
	NYOONGAR WELLBEING AND SPORTS ABORIGINAL CORPORATION	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 8 NOVEMBER 2017	
FILE NO/S	B 54 OF 2017	
CITATION NO.	2017 WAIRC 00927	

Result	Application dismissed
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms A Woods (of counsel)

Order

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

AND WHEREAS on 14 September 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 00926

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KARYN LISIGNOLI	APPLICANT
	-v-	
	WAYNE NANNUP - CHAIRPERSON NYOONGAR WELLBEING AND SPORTS ABORIGINAL CORPORATION	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 8 NOVEMBER 2017	
FILE NO/S	U 32 OF 2017	
CITATION NO.	2017 WAIRC 00926	

Result	Application dismissed
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms A Woods (of counsel)

Order

WHEREAS this is an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS on 14 September 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 00868**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION FIONA N MACRI	APPLICANT
	-v-	
	CITY OF MANDURAH SENIORS AND COMMUNITY CENTRE	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	MONDAY, 16 OCTOBER 2017	
FILE NO/S	U 208 OF 2016	
CITATION NO.	2017 WAIRC 00868	

Result	Application dismissed
---------------	-----------------------

Representation

Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS this application was listed for a show cause hearing on 16 October 2017;
 AND WHEREAS at the hearing on 16 October 2017 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;
 AND HAVING given reasons for the decision during the hearing on 16 October 2017;
 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 00875**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JOSEPH QUINLAN	APPLICANT
	-v-	
	JENNY DAVIS BELMONT SPORTS & RECREATION INC. (ABN 60 846 438 080)	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	TUESDAY, 17 OCTOBER 2017	
FILE NO/S	U 192 OF 2016	
CITATION NO.	2017 WAIRC 00875	

Result	Respondent's application upheld; Application dismissed
Representation	
Applicant	No appearance
Respondent	Ms M Clohessy, of counsel, and with her Mr D Suttner, of counsel

Order

WHEREAS on 24 November 2016 the applicant made an application to the Western Australian Industrial Relations Commission alleging unfair dismissal;

AND WHEREAS on 28 September 2017 my chambers wrote to the parties informing them that I was considering dismissing the matter for want of prosecution and that the matter was listed for hearing to show cause on 17 October 2017;

AND WHEREAS the respondent made an application on 10 October 2017 seeking dismissal of the application pursuant to section 27(1)(a) *Industrial Relations Act 1979*;

AND WHEREAS at the hearing on 17 October 2017 there was no appearance by or for the applicant and the Commission proceeded in the absence of the applicant;

NOW THEREFORE I, the undersigned, having given my reasons for decision during the hearing and pursuant to the powers conferred on me under section 27(1)(a) *Industrial Relations Act 1979* hereby order –

THAT the respondent's application for dismissal of the application pursuant to section 27(1)(a) *Industrial Relations Act 1979* is upheld and application U 192/2016 be dismissed for want of prosecution.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Alan Brandstater	Chief Executive Officer Shire of Capel	U 126/2017	Commissioner D J Matthews	Withdrawn
Gerhardus Lloyd De Swardt	Wenco Pty Ltd	B 114/2017	Senior Commissioner S J Kenner	Discontinued
Hendricus Johannes Westkamp	Mustafa Mahmoud	B 69/2017	Commissioner T Emmanuel	Discontinued
Jaimee Maxwell	Mindarie Keys Early Learning School	U 218/2016	Commissioner D J Matthews	Discontinued
Kory Waddingham	SMS Innovative Labour Pty Ltd	B 97/2017	Commissioner T Emmanuel	Discontinued
Nick De Luca	The Roman Catholic Archbishop of Perth	U 91/2017	Commissioner T Emmanuel	Discontinued
Roneece Cupitt	Glass Jar Australia Limited	U 22/2017	Commissioner D J Matthews	Discontinued
Roneece Cupitt	Glass Jar Australia Limited	B 22/2017	Commissioner D J Matthews	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation, Industrial Union of Workers Perth	North Metropolitan Health Service	Emmanuel C	C 8/2017	10/02/2017	Dispute re grievances of union members	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	Child and Adolescent Health Service	Emmanuel C	C 18/2017	22/06/2017	Dispute re grievance of union member	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	East Metropolitan Health Service	Emmanuel C	C 19/2017	02/08/2017 31/08/2017	Dispute re withdrawal from Acute Medical Unit 12 Hour Shift Agreement 2014	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00922

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 APRIL 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DR POH KOOI LOH

APPELLANT

-v-

MS ELIZABETH MACLEOD
CHIEF EXECUTIVE
EAST METROPOLITAN HEALTH SERVICE**RESPONDENT****CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR S BIBBY - BOARD MEMBER
MR M WARNER - BOARD MEMBER**DATE**

TUESDAY, 7 NOVEMBER 2017

FILE NO.

PSAB 5 OF 2017

CITATION NO.

2017 WAIRC 00922

Result	Direction issued
Representation (by correspondence)	
Appellant	Mr T Smetana (of counsel)
Respondent	Ms J van den Herik (as agent)

Direction

HAVING heard Mr T Smetana (of counsel) on behalf of the appellant and Ms J van den Herik (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (Act), directs –

1. THAT the appellant file and serve written submissions about the Board's jurisdiction under s 80I(1)(c) of the Act by 15 November 2017.
2. THAT the respondent file and serve written submissions about the Board's jurisdiction under s 80I(1)(c) of the Act by 22 November 2017.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2017 WAIRC 00911

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 2 AUGUST 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ROBERT ADAMS

APPELLANT

-v-

WA COUNTRY HEALTH SERVICE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MR S GREGORY - BOARD MEMBER**DATE**

WEDNESDAY, 1 NOVEMBER 2017

FILE NO.

PSAB 16 OF 2017

CITATION NO.

2017 WAIRC 00911

Result	Direction issued
Representation (by correspondence)	
Appellant	Mr D Stojanoski (of counsel)
Respondent	Mr D Anderson (of counsel)

Direction

HAVING heard Mr D Stojanoski (of counsel) on behalf of the appellant and Mr D Anderson (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 21 November 2017.
2. THAT the appellant file and serve outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 12 December 2017.
3. THAT the respondent file and serve outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 23 January 2018.
4. THAT the appellant file and serve written submissions by 7 February 2018.
5. THAT the respondent file and serve written submissions by 21 February 2018.
6. THAT this matter be listed for a four-day hearing after 8 March 2018.
7. THAT discovery be informal.
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
The Greens (WA) Inc. Staff Agreement 2017 AG 11/2017	N/A	Western Australian Administration, Clerical and Services Union of Employees	The Greens (WA) Inc	Commissioner T Emmanuel	Discontinued
WA Health System - United Voice WA - Hospital Support Workers Industrial Agreement 2017 AG 12/2017	10/13/2017	Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services, North Metropolitan Health Service, South Metropolitan Health Service, WA Country Health Service	United Voice WA	Commissioner T Emmanuel	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2016 WAIRC 00929

ENTERPRISE ORDER PURSUANT TO S.42I

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS & CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANTS

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER D J MATTHEWS

DATE

TUESDAY, 13 DECEMBER 2016

FILE NO

APPL 73 OF 2016

CITATION NO.

2016 WAIRC 00929

Result Orders made

Representation

First Applicant Mr D Stojanoski, of Counsel

Second Applicant Ms J Moore

Respondent Mr R Bathurst, of Counsel

Order

HAVING heard the Mr D Stojanoski, of Counsel, for the first applicant and Ms J Moore for the second applicant and Mr R Bathurst, of Counsel, for the respondent on 13 December 2016;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* make the following orders:

1. The Respondent is to file and serve its proposed enterprise order by 19 December 2016.
2. Evidence in chief in the matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
3. The Applicants are to file and serve the witness statements upon which they intend to rely, with copies of documents referred to by the maker of the statement being annexed, by 3 February 2017.
4. The Respondent is to file and serve the witness statements upon which they intend to rely, with copies of documents referred to by the maker of the statement being annexed, by 3 March 2017.
5. The matter be listed for a five day hearing from 27 March 2017 to 31 March 2017.

(Sgd.) D J MATTHEWS,
Commissioner,
Public Service Arbitrator.

[L.S.]

2017 WAIRC 00080

ENTERPRISE ORDER PURSUANT TO S.42I

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS & CIVIL SERVICE ASSOCIATION
OF WESTERN AUSTRALIA INCORPORATED

APPLICANTS

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 16 FEBRUARY 2017

FILE NO

APPL 73 OF 2016

CITATION NO.

2017 WAIRC 00080

Result Order made by consent

Representation (by correspondence)

First Applicant Ms R Cosentino

Second Applicant Ms J Moore

Respondent Mr R Bathurst

Order

HAVING heard the Ms R Cosentino, of Counsel, for the first applicant and Ms J Moore for the second applicant and Mr R Bathurst, of Counsel, for the respondent by correspondence;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by the consent of the parties make the following order:

1. The orders dated 13 December 2016 be varied by adding further orders 6 and 7 as follows:
 6. The Applicants are to file and serve by 17 March 2017 any expert evidence in response to expert evidence adduced by the Respondent;
 7. The Respondent is to file and serve by 24 March 2017 any expert evidence in response to the Applicants' expert evidence.

(Sgd.) D J MATTHEWS,
Commissioner,
Public Service Arbitrator.

[L.S.]

2017 WAIRC 00168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00168
CORAM : PUBLIC SERVICE ARBITRATOR
 COMMISSIONER D J MATTHEWS
HEARD : MONDAY, 20 MARCH 2017
DELIVERED : THURSDAY, 23 MARCH 2017
FILE NO. : APPL 73 OF 2016
BETWEEN : WESTERN AUSTRALIAN POLICE UNION OF WORKERS, CIVIL SERVICE
 ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
 Applicants
 AND
 COMMISSIONER OF POLICE
 Respondent

CatchWords : Application for recusal - Application brought on basis of reasonable concern of apprehended or ostensible bias - Principles discussed and applied - Application dismissed

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)
Industrial Relations Act 1988 (Cth)
Workplace Relations Act 1996 (Cth)

Result : Application dismissed

Representation:

Counsel:

First Applicant : Mr M Ritter SC of counsel
 Second Applicant : No appearance
 Respondent : Mr R Bathurst of counsel

Solicitors:

First Applicant : Slater and Gordon Lawyers
 Respondent : State Solicitor's Office

Cases referred to in reasons:

Al v King QC FCA Merkel J, 31 May 1996, BC 9602233
British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283
Christian v Societe Des Produits Nestle SA (No 1) [2015] FCAFC 152
Cunningham v Traynor [2016] WADC 168
Gascor v Ellicott [1997] 1 VR 332
GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd [2013] FCAFC 150
Isbester v Knox City Council (2015) 255 CLR 135
Islam v Director General of Justice and Community Safety Directorate (2015) 301 FCR 156
Johnson v Johnson (2000) 201 CLR 488
Cf Livesey v New South Wales Bar Association (1983) 151 CLR 288
Minister for Health v Health Services Union of Western Australia (Union of Workers) (2015) 95 WAIG 526
Re Polites; ex parte The Hoyts Corporation Pty Ltd (1991) 173 CLR 78
Warwick Entertainment Centre Pty Ltd v Earlmist Pty Ltd [2016] WASC 79

Cases also cited:

British American Tobacco Australia Ltd v Gordon (2007) NSWSC 109
Caltex Refining Co Pty Ltd & Anor v Australian Workers Union, NSW Branch (1990) 35 IR 100
Cluinies-Ross v Mercedes College (2000) 80 WAIG 1949
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

Kaldas v Barbour (No 2) [2016] NSWSC 1886

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705

Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council [2009] NSWCA 300

NSW Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union v Liverpool City Council (2016) 259 IR 1

R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546

R v Judge Russell; Ex parte Reid (1984) 35 SASR 417

R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256

Re J.R.L.; Ex parte C.J.L. (1986) 161 CLR 342

Re L; Ex parte L (1986) 161 CLR 342

S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358

Slaveski v Victoria [2010] VSC 97

Workcover Authority of New South Wales v Concrete Constructions Group Pty Ltd [2000] NSWIRComm 65

Reasons for Decision

- 1 The application of the Western Australian Police Union of Workers and the Civil Service Association of Western Australia Incorporated for an enterprise order under section 42I *Industrial Relations Act 1979* relating to the terms and conditions of employment for Police Auxiliary Officers employed by the Commissioner of Police is listed for a five-day hearing before me commencing 27 March 2017.
- 2 On 8 March 2017 solicitors acting for the Western Australian Police Union of Workers wrote to my chambers asking that I recuse myself from the hearing of the application.
- 3 By email from my chambers dated 9 March 2017 it was indicated that a formal application would need to be made for the matter to be heard and determined.
- 4 On 10 March 2017 a Notice of Application was filed by the Western Australian Police Union of Workers seeking an order that I recuse myself from hearing the application “on the basis that there exists reasonable grounds for concern of apprehended or ostensible bias arising from Commissioner Matthews’ former professional relationship with a litigant.” It may immediately be said that the application, in the event, had a wider compass than this.
- 5 On 17 March 2017 solicitors acting for the Western Australian Police Union of Workers wrote to my chambers asking that I answer a series of questions related to the application and my Associate responded, providing answers, by letter that same day.
- 6 The application was heard before me on 20 March 2017.
- 7 The Western Australian Police Union of Workers provided me with an outline of submissions before the hearing on 20 March 2017. The Commissioner of Police provided me with an outline of submissions at the hearing.
- 8 The Civil Service Association of Western Australia Incorporated did not make an application that I recuse myself and played no part in the hearing of the application.
- 9 The Commissioner of Police through counsel at the hearing told me that he did not wish to take an adversarial approach to the application, the decision on it being a matter for me, and that his submissions were made simply by way of, it was hoped, helpful counterpoint.
- 10 At [19], [20] and [23] of its outline of submissions the Western Australian Police Union of Workers set out the core of its argument following, and responding to, the “three step” approach explained by Gageler J in *Isbester v Knox City Council* (2015) 255 CLR 135 at [59].
- 11 It is convenient to set out each of the steps articulated by Gageler J and what the Western Australian Police Union of Workers says about them in relation to the present application.

Step 1 – Identification

- 12 Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. At [19] the Western Australian Police Union of Workers submitted in relation to step one:
 - (a) The Commissioner's employment with the State Solicitor's Office (a state entity) for 23 years.
 - (b) The Commissioner specialised in industrial relations and employment law when so employed.
 - (c) Therefore the Commissioner represented the State and emanations of the State in industrial relations matters in state and federal jurisdictions.
 - (d) The Commissioner's past representation of the State of Western Australia *Cunningham v Traynor* [2016] WADC 168, when the interests of the State aligned with the police officer defendants; and the Commissioner may have acted for the Commissioner of Police in other matters.
 - (e) The Commissioner having been solicitor and counsel for the Minister for Health an emanation of the State, in the *HSU case*, which was decided on 23 April 2015.
 - (f) The Commissioner was appointed to the WAIRC in March 2016.

- (g) In the *HSU case* the Commissioner proofed Mr Watson, including a discussion of his evidence and the economic data relied upon and examined Mr Watson in chief, and Mr Watson is to be giving evidence for an emanation of the State, in the present matter, about the same matters.

Step 2 - Articulation

13 Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. At [20] the Western Australian Police Union of Workers submitted in relation to step two:

- (a) The Commissioner has had a long association with the State, in his employment and as solicitor and counsel for the State.
- (b) That association only ended in March 2016 and so was a relationship that not only extended for a long period but also ended relatively recently.
- (c) These factors together with the factor that the Commissioner has acted in the past for the Commissioner of Police might cause the Commissioner to identify with the State in a matter that involves the State and Unions as adversaries.
- (d) The *HSU case* was argued about two years ago and decided on 23 April 2015 - less than two years ago.
- (e) Additionally the *HSU case* involved the Commissioner acting for the Minister for Health, on behalf of the State, in one of the few cases which, like the present, will involve the Commission's consideration of the meaning and effect of s 26(2A) to s 26(2C) of the IRA. Although the present case does not, unlike the *HSU case*, involve the setting of wage increases in the context of the State's Public Sector Wages Policy and s 26(2A) of the IRA, it is understood that the Commissioner of Police will be contending that the State budget cannot afford the benefits for employees that the Union is seeking as part of the agreement, and will, like the *HSU case* be relying upon s 26(2A) of the IRA and expert economic and treasury evidence to support its case. In that context, the prior relationship between the Commissioner Matthews and witnesses, as set out earlier is significant.
- (f) In the *HSU case*, the Commissioner, as solicitor and counsel for the Minister, proofed and led in chief Mr Richard Watson the same person who it is proposed give economic evidence on behalf of the Respondent in the present case.
- (g) The Minister's economic evidence in the *HSU case* tried to establish the State was in a difficult financial position, set out the cost of public sector wages generally and specifically regarding health employees, and set out the purpose of the Public Sector Wages Policy - to aid a return to budget surplus as soon as possible.
- (h) The relevant legal submissions of the Minister in the *HSU case* emphasised that now s 26(2A) and s 26(2B) of the IRA had been enacted, the "public interest" should be at the forefront of decision-making by the Commission under s 26 of the IRA; and the relationship between decisions made by the Commission in relation to the public sector and the State's financial position, and the Government's plans in relation to that financial position are matters, amongst others, that the Commission must take into account in the exercise of its jurisdiction in relation to the public sector. The submissions are expected to be repeated by the State in the present case.
- (i) Thus there is likely to be some commonality of parties (given that the Commissioner of Police is a state public figure and relies on the State for his budget), issues, evidence and witnesses, between the present case and the relatively recently decided *HSU case*. In that case, Commissioner Matthews, as counsel, made strong submissions about and presumably advised his client about the meaning and effect of s 26(2A) and s 26(2B) of the IRA in the context of the State's difficult financial position. That financial position will not have, presumably, improved significantly from the time when the evidence was tendered in the *HSU case*.

Step 3 - Consideration

14 Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way. At [23] the Western Australian Police Union of Workers submitted in relation to step three:

Taking all of the above into account Commissioner Matthews ought to properly recuse himself from hearing the application. A reasonable apprehension of bias, of the requisite type arises from his identification with the State and the Commissioner of Police, his employment by and representation of the State and emanations of the State over a long period and until relatively recently; combined also with the commonality of issues and evidence from the present to the *HSU case*, and the Commissioner's role in that application. A reasonable bystander to this case could look at the things and comment, to use sporting vernacular, "but the Commissioner was part of the State's team, in the same game, on the same ground, with similar teammates, but in a different position", the last time a case like this was before the Commission.

- 15 I emphasise, as senior counsel for the Western Australian Police Union of Workers did at the hearing, that it is contended that the "accumulation" of factors is determinative of the application rather than any single factor. In short the Western Australian Police Union of Workers says that this is a case where "the whole is greater than the sum of its parts".
- 16 I have been greatly assisted, especially given that my decision needs to be made quickly, by the research done by the parties and their provision to me of the relevant authorities.
- 17 Although there was some argument about the applicability of parts of some of those decisions to the present matter there was no argument put to me by either side to the effect that the principles set out in any of them was wrong or even doubtful.
- 18 Those authorities have provided considerable guidance to me on what the putative "fair-minded lay observer" would think about the issues raised by the Western Australian Police Union of Workers.

- 19 Where the thinking of the fair-minded lay observer is, in some of those decisions, informed by different factual scenarios and legislative contexts I have not, on close consideration, found those differences so great that I consider it is inappropriate to inform myself from those decisions on how a fair-minded lay observer might approach this matter. This will become clearer in the balance of my reasons for decision.
- 20 Firstly, I look at the submission made that I might resolve the substantive application otherwise than as the result of a neutral evaluation of the merits because the Commissioner of Police is a government entity and I worked for another government entity for 23 years, specialising in industrial relations and employment law for much of that time and represented other government entities on industrial relations and employment law matters in that time. As part of this submission I include reference to me having appeared for the State of Western Australia in a matter involving officers of the Commissioner of Police and that I may have represented or advised the Commissioner of Police in matters relating to industrial relations and employment law (although I do not remember any such specific occasions and the Western Australian Police Union of Workers did not refer me to any it knew of through its own research).
- 21 This question of what the fair-minded lay observer would do with this information is really answered conclusively by the decision in *Re Polites; ex parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.
- 22 At pages 87 to 88 the High Court in that matter observed that “a prior relationship of legal advisor and client does not generally disqualify the former advisor, on becoming a member of a tribunal...from sitting in proceedings before that tribunal...to which the former client is a party.”
- 23 The High Court goes on to note exceptions to that general rule which will need to be dealt with later but the above passage reveals, in my view, that the issue that it is submitted “gets the ball rolling” against me hearing the matter is really quite neutral.
- 24 There will need to be more. Of course the Western Australian Police Union of Workers says there is more, and so my background may be relevant background to what is later developed, but at the moment I need to deal with whether anything particularly relevant arises out of the circumstances of my previous employment.
- 25 I find, on the basis of *Re Polites; ex parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78, that there is not. All that my background reveals is that I may have acted for the Commissioner of Police and did act for what senior counsel for the Western Australian Police Union of Workers refers to as “other emanations of the State” in the past. Such relationships will not disqualify me.
- 26 Before leaving the issue I note that the passage reproduced above follows one where the High Court reproduces section 10(2) *Industrial Relations Act 1988* (Cth) and makes comments that the holding of certain attributes by an appointee arising from their professional background, without more, would not be a sound basis for recusal where those attributes are the reason for the person’s appointment.
- 27 I accept that there is no equivalent to section 10(2) *Industrial Relations Act 1988* (Cth) applying to me and my appointment. However, I do not read the passage at page 87 as relying for its full force and effect upon the presence and terms of section 10(2) *Industrial Relations Act 1988* (Cth).
- 28 In my view the comments, especially insofar as there is adoption of the passage from an English case within them, are to the effect that:
 - (a) specialist tribunals may be expected to be filled with persons who have particular experience and expertise suited to the work of that tribunal;
 - (b) that experience and expertise will normally be achieved in the course of the member’s professional career;
 - (c) that career might suggest a particular attitude to the exercise of the specialist tribunal’s powers on the part of the member; and
 - (d) this, in itself, will not be a sound basis for recusal in any matter before the specialist tribunal.
- 29 So here given the nature of the jurisdiction of the Western Australian Industrial Relations Commission since the passing of the *Workplace Relations Act 1996* (Cth) (with the changes to the jurisdiction of the Western Australian Industrial Relations Commission to which I allude being continued under the *Fair Work Act 2009* (Cth)) it is unsurprising that a person appointed to the Western Australian Industrial Relations Commission might have experience working within government.
- 30 It is entirely possible, while not as a result of legislative prescription as might have occurred under the *Industrial Relations Act 1988* (Cth), that an appointee to the Western Australian Industrial Relations Commission may be appointed on the basis of a government background and where that occurs, to paraphrase the High Court, “Commissioners who are appointed on account of their industrial background spent in government service are not disqualified merely because a person with that background has a measure of knowledge or are likely to have a particular attitude to the exercise of the Commissions powers.”
- 31 Even if I had represented or advised the Commissioner of Police in employment law or industrial relations matters, I think the above would render such a circumstance largely neutral in my consideration of the application for recusal.
- 32 Assuming that there is force in senior counsel’s “emanations of the State” argument (even though I think it should be noted that the State is not a homogeneous beast in the areas of employment law and industrial relations and that, as a product of legislation, most government entities have separate corporate identities) my position does not change. I am not sure a “government experience background” means much more than, or anything different from, in the current context, the “corporate experience background” or “union experience background” that, in my view, the High Court was saying is irrelevant in *Re Polites; ex parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.

- 33 The Western Australian Police Union of Workers says however that there is a particular matter which gives rise to a concern that I might resolve the substantive application otherwise than as the result of a neutral evaluation of the merits such that I should recuse myself.
- 34 That matter is my involvement in *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526.
- 35 I acted as counsel for the Minister for Health in that matter. The matter was an arbitration under section 42G *Industrial Relations Act 1979* (generally referred to as a “consent arbitration”) in which a Commission in Court Session determined salary increases for a two-year period for some of the Minister’s employees with the parties agreeing the lower and upper limits of the increase within which the Commission in Court Session could act.
- 36 As part of the case I ran an argument about the effect sections 26(2A) to 26(2C) *Industrial Relations Act 1979* should have on the determination. The argument is set out at [113], [119] and [120] of the reasons for decision of the Commission in Court Session.
- 37 I also, of course, proofed and led evidence from the witnesses called by the Minister for Health.
- 38 The current substantive application is clearly different from the matter of *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526 as the current application is one for an enterprise order covering various terms and conditions of employment, although it is true to say that the size of salary increases is one of the issues in dispute.
- 39 The Western Australian Police Union of Workers says that sections 26(2A) to 26(2C) *Industrial Relations Act 1979* will again be relevant in this matter and that at least one of the witnesses I proofed and led in *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526, Mr Richard Watson, will be a witness in this matter.
- 40 The argument in full is set out above in the passage reproducing the outline of submissions filed for the Western Australian Police Union of Workers.
- 41 As developed by senior counsel for the Western Australian Police Union of Workers at the hearing, the submission is that I was so involved in the “State’s case” in *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526 that the fair-minded lay observer would have real and reasonable (and for my part actionable) doubts about whether I could, two years later, extricate myself from identification with that case.
- 42 That is, taking into account all of the circumstances, and especially the commonality of issues in the *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526 and this case, and the appearance of Mr Richard Watson in both, it is said a fair-minded lay observer would have a real and reasonable (and for my part actionable) concern that having been part of “the State’s side” only two years ago I might, even unconsciously, remain “a part of that side” and remain enmeshed in, or a part of, the “the fabric of the State”.
- 43 I think that the submissions do a disservice to the fair-minded lay observer and his or her capabilities, or at least his or her imputed capabilities.
- 44 A fair minded lay observer having the level of sophistication the cases impute to him or her (see *Johnson v Johnson* (2000) 201 CLR 488 at 493, 509; *Cf Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Christian v Societe Des Produits Nestle SA (No 1)* [2015] FCAFC 152 at [27]; *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser Healthcare (UK) Ltd* [2013] FCAFC 150 at [37]; *Warwick Entertainment Centre Pty Ltd v Earlmist Pty Ltd* [2016] WASC 79 at [10]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at [139]-[140]) would know that counsel run all sorts of arguments on instructions and that there is no real relationship between the running of such an argument and the professional and impartial consideration of such arguments from the entirely different position of decision-maker. The fair-minded lay observer would know that decision-makers hear debate about matters that they debated as counsel regularly and without drama.
- 45 There is nothing special about the argument here being one of “recent controversy” as senior counsel for Western Australian Police Union of Workers puts it.
- 46 The controversy may have been recent (although I think two years is not really all that recent) but the fair-minded lay observer would know also that the controversy was, for all intents and purposes, resolved by the decision of the Commission in Court Sessions in *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526.
- 47 At [119] to [123] of the decision of the Commission in Court Session the matter of controversy, including my client’s argument in relation to it, was accurately set out, with respect, and met directly.
- 48 A fair-minded lay observer would know that the decision of the Commission in Court Session on the point makes a difference. That difference is that the argument put by me as counsel is not really alive anymore.
- 49 In terms of me finding that the cases cited by the parties in this matter provide good guidance as to the attributes of a fair-minded lay observer, and how he or she would react to certain circumstances, I am reinforced in my views by the decisions in *Islam v Director General of Justice and Community Safety Directorate* (2015) 301 FCR 156 and *AL v King QC* FCA Merkel J, 31 May 1996, BC 9602233.
- 50 Before I leave this issue I return to the exceptions referred to by the High Court at page 88 of *Re Polites; ex parte The Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 that “if the correctness or appropriateness of advice given to the clients is a live issue for determination by the tribunal...the erstwhile legal advisor should not sit” and “a fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal

adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate” and “if the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue.”

- 51 I do not consider that any of these exceptions apply to the present case. At a different time I represented a different entity and made arguments which were decided in clear language by a body which, even if I am not bound to follow, I would require very persuasive reasons to depart from.
- 52 In relation to the involvement of Mr Richard Watson as a witness in both the *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526 and the present matter it is significant to note that he was and will be an expert witness. A fair-minded lay observer would understand that he was and is obliged to provide independent assistance by way of objective unbiased opinions. It would be difficult to see how I could become biased, or be seen to be biased, by a past professional association with such a person.
- 53 In any event, I accept the reasoning in *Gascor v Ellicott* [1997] 1 VR 332 that a fair-minded lay observer would not think that having proofed and examined witnesses in the course of earlier proceedings would make a decision-maker unable to decide a later matter in which those witnesses will appear otherwise than as a result of a neutral evaluation of the merits.
- 54 I return to [23] of the outline of submissions for the Western Australian Police Union of Workers and decide, by way of putting words into the mouth of the fair-minded lay observer responding to the matters raised therein:
- (1) a long period in government service providing advice and advocacy to government entities is, in the current circumstances, and probably in general terms, really neither here nor there;
 - (2) while an especially close relationship between Commissioner Matthews and the Commissioner of Police might, depending on the facts, have been relevant there is no evidence of such a relationship here;
 - (3) the commonality of issues and evidence between this case and the *Minister for Health v Health Services Union of Western Australia (Union of Workers)* (2015) 95 WAIG 526 is not as great as all that given that matter concerned only one issue and this concerns many;
 - (4) to the extent there is, or will be, commonality of issues, the passage of time and the fact that there is now a decision available that was not available in 2015 make a difference;
 - (5) to the extent there is, or will be, commonality of evidence, the passage of time makes a difference as does the fact that the evidence will be expert evidence; and
 - (6) running a particular argument or proofing and leading one witness two years ago is not a level of enmeshment in a matter that would make extrication from the case a difficult exercise.
- 55 I do not find this matter to be a finely balanced one. If I had done so, the practical considerations of the delay recusal would cause, as well as those potentially associated with the formation of a Full Bench, may have loomed large. In the event I do not need to consider them.
- 56 The application is dismissed.

2017 WAIRC 00169

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS, CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	APPLICANTS
	-v-	
	COMMISSIONER OF POLICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER D J MATTHEWS	
DATE	THURSDAY, 23 MARCH 2017	
FILE NO	APPL 73 OF 2016	
CITATION NO.	2017 WAIRC 00169	
<hr/>		
Result	Application dismissed	
Representation		
First Applicant	Mr M Ritter SC of counsel	
Second Applicant	No appearance	
Respondent	Mr R Bathurst of counsel	
<hr/>		

Order

HAVING heard Mr M Ritter SC, of counsel, on behalf of the first applicant and Mr R Bathurst, of counsel, on behalf of the respondent on 20 March 2017; and

THERE being no appearance by the second applicant; and

HAVING given reasons for decision in which I determined to dismiss the application filed 10 March 2017 seeking my recusal;

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

THE application filed 10 March 2017 seeking my recusal is dismissed.

(Sgd.) D J MATTHEWS,
Commissioner,
Public Service Arbitrator.

[L.S.]

2017 WAIRC 00180

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS, CIVIL SERVICE ASSOCIATION
OF WESTERN AUSTRALIA INCORPORATED

APPLICANTS

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER D J MATTHEWS

DATE

MONDAY, 27 MARCH 2017

FILE NO

APPL 73 OF 2016

CITATION NO.

2017 WAIRC 00180

Result	Order made
Representation	
First Applicant	Mr M Ritter SC of counsel
Second Applicant	Ms J Moore of counsel
Respondent	Mr R Bathurst of counsel

Order

HAVING heard Mr M Ritter SC, of counsel, on behalf of the first applicant, Ms J Moore, of counsel, on behalf of the second applicant, and Mr R Bathurst, of counsel, on behalf of the respondent;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* and by the consent of the parties make the following orders:

1. The hearing dates 27 to 31 March 2017 be vacated;
2. The hearing be relisted on dates to be fixed; and
3. The application be listed for a directions hearing on 11 April 2017.

(Sgd.) D J MATTHEWS,
Commissioner,
Public Service Arbitrator.

[L.S.]

2017 WAIRC 00822

ENTERPRISE ORDER PURSUANT TO S.42I
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2017 WAIRC 00822
CORAM : PUBLIC SERVICE ARBITRATOR
 COMMISSIONER D J MATTHEWS
HEARD : TUESDAY, 13 DECEMBER 2016, MONDAY, 20 MARCH 2017, THURSDAY, 23
 MARCH 2017, FRIDAY, 24 MARCH 2017, TUESDAY, 11 APRIL 2017, TUESDAY,
 18 APRIL 2017, MONDAY, 3 JULY 2017, TUESDAY, 4 JULY 2017, WEDNESDAY, 5
 JULY 2017, THURSDAY, 6 JULY 2017
DELIVERED : MONDAY, 18 SEPTEMBER 2017
FILE NO. : APPL 73 OF 2016
BETWEEN : WESTERN AUSTRALIAN POLICE UNION OF WORKERS
 First Applicant
 CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
 Second Applicant
 AND
 COMMISSIONER OF POLICE
 Respondent

CatchWords : Application for enterprise order - Relevant principles to be applied - Parties proposed
 enterprise orders contain agreed provisions - Agreed provisions are industrial matters and
 fair and reasonable in all the circumstances - Certain provisions remain in dispute -
 Consideration given to submissions and evidence of the parties and the fairness and
 reasonableness of disputed proposed provisions

Legislation : *Industrial Relations Act 1979*
Police Act 1892

Result : Enterprise order to be made

Representation:

First Applicant : Mr M Ritter SC, of counsel, and with him Mr D Stojanoski of counsel
Second Applicant : Ms A Wallish
Respondent : Mr H Dixon SC, of counsel, and with him Mr R Bathurst of counsel

Solicitors:

First Applicant : Slater & Gordon
Respondent : State Solicitor's Office

Cases referred to in reasons:*Re Harrison; Ex Parte Hames* [2015] WASC 247*Western Australian Police Union of Workers v Minister for Police* (1982) 62 WAIG 1401**Cases also cited:**

2017 State Wage Order (2017) 97 WAIG 693

CMFEU v Hamberger [2011] FCA 719*Fireman and Deckhands (Port Jackson and Manly Steamship Company Limited) Award* [1959] AT 353*Hanssen v Construction, Forestry, Mining and Energy Union (Western Australian Branch)* (2004) 84 WAIG 694*Hospital Employees Conditions of Employment (State) Award* [1976] AR 275*Iron and Steel Works Employees (Australian Iron & Steel Pty Limited – Port Kembla) Award and Another Award* [1965] AR 449*R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322*Sealanes (1985) Pty Ltd v The Shop, Distributive and Allied Employees' Association of Western Australia and Ors* (2004) 84
 WAIG 3158*Shift Worker Case* [1972] AR 633*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority* (2011) 91
 WAIG 694

The Executive Director Department of Education, The Liquor, Hospitality and Miscellaneous Union (WA Branch); The Executive Director Labour Relations Division Department of Commerce; The Liquor, Hospitality and Miscellaneous Union (WA Branch) (2010) 90 WAIG 615

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, The Peel Health Services Board, an WA Country Health Service v Health Services Union of Western Australia (Union of Workers) (2015) 95 WAIG 52; [2015] WAIRC 00332

Tobacco Institute of Australia v National Health and Medical Research Council (1996) 71 FCR 265

Western Australian Police Union of Workers v The Civil Service Association of Western Australia Inc (2011) 91 WAIG 1851

Western Australian Police Union of Workers v The Minister for Police (1982) 62 WAIG 1401

Zhang v Canterbury City Council (2001) 51 NSWLR 589

Reasons for Decision

- 1 The necessary preliminary matters having been dealt with, the applicants filed a Notice of Application for an enterprise order to be made pursuant to section 42I *Industrial Relations Act 1979* on 6 December 2016 attaching a copy of the enterprise order they sought.
- 2 The respondent filed a copy of the enterprise order he sought on 19 December 2016.
- 3 Under cover of letter from the respondent's solicitors dated 8 June 2017, a draft enterprise order was provided to me which contained clauses agreed by the parties with the clauses remaining in dispute being marked for my attention.
- 4 Events at, and subsequent to, the hearing of the matter further defined the matters about which there was, and was not, dispute between the parties.
- 5 The following are the matters remaining in dispute and about which evidence was led and submissions made. Although there were two applicants I have not generally distinguished between them in my reasons as the second applicant simply adopted the evidence led and submissions made by the first applicant.

Hours of Duty – Vote and Veto

- 6 The applicants seek a subclause, proposed clause 11(6), which would provide that any change to shift arrangements otherwise prescribed by the relevant clause may only occur if at least 66% of the employees affected by the proposed change agree to it, and the respondent, the Western Australian Police Union of Workers and the "Employee Relations Division" endorse the change.
- 7 The respondent opposes the proposed subclause.

Hours of Duty – Missed Meal Break Payments

- 8 The applicants propose that there be no restriction upon the number of times within any given pay period that an employee can claim and be paid for a missed meal break (provided there is no more than one claim per shift).
- 9 The respondent proposes that the number of claims per pay period paid be limited to five, with any additional claims requiring the respondent's approval before payment is made.

Overtime

- 10 The applicants propose a paragraph, proposed clause 13(3)(a), which provides that the entitlement to payment for working overtime commences once an employee has worked more than 15 minutes outside the employee's normal working hours.
- 11 The respondent proposes that overtime only be payable once an employee has worked more than 30 minutes outside the employee's normal working hours.
- 12 The applicants also propose a paragraph, proposed clause 13(3)(c), which would have the effect that the calculations applied to payment for overtime worked would be done on a weekly basis.
- 13 The respondent proposes that the calculations applied to payment for overtime worked be done on a daily basis.
- 14 The difference between the two positions on this second issue is that under the applicants' proposed clause the point at which the payment of overtime at double time, rather than at time and a half, is more likely to be reached under the applicants' proposed clause than the respondent's proposed clause.
- 15 The applicants propose that clause 13, whatever form it ultimately takes, ought not include the term "duly authorised officer." The effect of this, as I understand it, would be that only the "employer" can direct that overtime be worked (and not a "duly authorised officer") and in relation to certain agreements for the clearing of accumulated time off in lieu of payment for overtime, these would have to be between an employee and the "employer" and not between an employee and a "duly authorised officer."
- 16 The respondent proposes that clause 13, whatever form it ultimately takes, include references to "duly authorised officer" in three places with the effect that a "duly authorised officer" may direct that overtime be performed and enter into the agreements referred to above in relation to the taking of accumulated time off in lieu of payment for overtime.

Shift Rate Allowance

- 17 The applicants propose a subclause, clause 18(1), which provides that employees get the same shift allowance payment rates as sworn police officers.
- 18 The respondent proposes a subclause that provides the employees with particularised amounts for the life of the enterprise order, which amounts are lower than those to which sworn police officers are entitled.

Frontline Allowance

- 19 The applicants propose a clause, clause 30, which would provide that certain employees, protective service officers, be paid an allowance of 10% of their rate of ordinary pay.
- 20 The respondent opposes the clause and proposes no alternative clause.

Annual Leave

- 21 The applicants propose a subparagraph, clause 32(1)(a)(ii), which would give employees working a “rotating roster”, defined by proposed clause 32(1)(d), 280 hours of annual leave.
- 22 The respondent proposes a clause which gives all employees, including those working a rotating roster, 240 hours of annual leave.

The Arguments of the Parties in Relation to Each IssueHours of Duty – Vote and Veto

- 23 The applicants say that what they seek for employees would align the conditions of employees with the sworn police officers alongside whom they work. The applicants say it is unfair for these two occupational groups to have different conditions in this regard, and especially so given that the employees perform duties which sworn police officers previously did and that, when sworn police officers did those duties, they enjoyed the conditions in relation to rostering the employees now seek.
- 24 The respondent opposes the proposed subclause.
- 25 The applicants say, quoting Senior Counsel for the first applicant, that the proposed subclause:
 “...has a potential to minimise disputes at the workplace and - for two reasons. One, because it democratises the process. And secondly, that there is less of a difference between what the Police Officers can do in relation to rosters and Police Auxiliary Officers working alongside them.”

(ts 59)

- 26 The respondent says that the employees have operated under a rostering system which does not have the features the applicants seek for six or more years without, on the evidence, “any difficulty” (ts 189).
- 27 The respondent says that flexibility in rostering is important to him, that the applicants’ proposed subclause restricts that flexibility and that the evidence does not support “the type of restrictions which are put forward on the practices that have been demonstrated to operate without any difficulty or any unfairness” (ts 189).
- 28 To the extent that the applicants seek an alignment with conditions regulating sworn police officers, I sought information on the history of the relevant conditions for sworn police officers and was informed by the parties, and I think I can summarise the positions of all neutrally, that the relevant conditions were given in exchange for the respondent securing the agreement of the Western Australian Police Union of Workers to the potential for greater flexibility in the rostering of sworn police officers.

Hours of Duty – Missed Meal Break Payments

- 29 The applicants say their proposed subclause “...simply involves an alignment with police officer conditions working in the same spheres or work and in some instances the same station and it is fair to align in those circumstances” (ts 59).
- 30 Later the applicants expanded their argument in support of the clause beyond parity to say that as a matter of inherent fairness there should not be, within the enterprise order, a discretion residing in someone to refuse a missed meal break payment if the meal break has been missed (ts 339).
- 31 The respondent says that the current arrangements have been in place for some time and that there is no evidence of problems with their operation. The respondent says the evidence is that if employees “miss their meal breaks, they are entitled to put in a claim and when the claim is put in”, at least as far as the evidence goes, they are not refused (ts 195).

Overtime

- 32 The applicants rely on “consistency and parity with sworn officers” and the minimisation or avoidance of dispute in the workplace arising out of the lack thereof (ts 59 – 60).
- 33 The applicants expanded their argument in support of the clause beyond parity to say that it is inherently unfair for the enterprise order to operate, as the respondent seeks, in such a way that “you can work for 29 minutes [extra] every day of your shift and get nothing” (ts 338).
- 34 The respondent says that there is no evidence of employees having to regularly work beyond their normal hours, that where there is an entitlement to overtime under current arrangements it is paid without difficulty and that the nature of the work done by sworn police officers is such that there are good reasons why they should have a differently formulated overtime entitlement to the employees (ts 194 – 195).
- 35 In relation to the term “duly authorised officer”, the applicants say that overtime will still need to be authorised if the term does not appear, so there is no risk to the respondent, but that it is desirable that overtime does not have to be authorised by a “duly authorised officer.”
- 36 The applicants explain it this way at [54] and [55] of their Outline of Closing Submissions:
 “...out of necessity, senior officers and representatives [other than “duly authorised officers”] may be required to direct police auxiliary officers to perform overtime in circumstances where formal delegation of authority in a written form has not occurred [and] in such cases, overtime must still be approved by the employer before it is paid, however, the removal of the reference to duly authorised officer provides greater flexibility to accommodate unknown or unanticipated situations.”

- 37 The applicants did not argue that “parity and consistency” with sworn police officers was a string to their argument’s bow but observed, at [56], that there is no reference to “duly authorised officer” in the industrial agreement provisions regulating overtime for sworn police officers.
- 38 The applicants made no submissions in relation to why the agreements in relation to the taking of accumulated time off in lieu should not be entered into by a “duly authorised officer.” Obviously the argument made on the ground of the “exigencies of the situation” does not apply to such agreements.
- 39 The respondent argues that the matters he proposes be authorised by the “duly authorised officer”, where he includes the term in his proposed clause, “should only be given or allowed by a person with the authority to do so” ([60] of respondent’s Outline of Opening Submissions) and that if it is to be the respondent himself who must give such approval this would be “entirely unworkable” ([59] of respondent’s Outline of Opening Submissions).

Shift Rate Allowances

- 40 The applicants rely on “consistency and parity” with sworn police officers “given the circumstances in which the nature of shift work for employees is identical to that experienced by sworn police officers” (ts 60, 339).
- 41 The applicants also rely on some evidence about staffing levels and workload at the Perth Watch House, and the extent to which these issues have affected adherence to written policies and procedures and caused stress and fatigue to employees.
- 42 The respondent repeats its argument to the effect that the employees are a different occupational group to sworn police officers and that there is no basis for alignment established by argument or evidence.
- 43 The respondent argues the evidence about staffing levels and workload is irrelevant.

Frontline Allowance

- 44 The applicant says the allowance ought be paid to employees to “compensate for the additional skills, responsibilities, risks and hardship associated with the particular duties of [protective service officers]” (ts 60).
- 45 The respondent says that the position of protective service officer was classified having regard to the “skills, responsibilities, risks and hardship” associated with it and that absent an application for reclassification of the position, not made here, there can be no justification for an allowance to compensate for matters already acknowledged by the position’s classification (ts 195).

Annual Leave

- 46 The applicants say that those involved in particular types of shift work, with some of the employees being an example, are, across other industries, “not uncommonly” entitled to an “additional week of annual leave.” The applicants say that such an entitlement would enhance the working conditions of employees and “has the potential to increase industrial harmony and also decrease attrition rates” (ts 61).
- 47 Reliance was placed on the decision of Fielding C in *Western Australian Police Union of Workers v Minister for Police* (1982) 62 WAIG 1401 which refused an application for an increase in the annual leave entitlement of sworn police officers from six weeks to seven weeks. As I understand the argument, it was that insofar as Fielding C was unwilling to grant the application in that case because it would apply to all sworn police officers, including those who did not work on a rotating roster pattern, that problem does not arise here because the additional week of leave is only sought for employees who work a rotating roster pattern. (ts 337)
- 48 The applicants also say, at [42] of their Outline of Closing Submissions, that the employees on a rotating roster pattern work public holidays without payment of penalty rates and that, while six weeks of annual leave may compensate for that, “there is no additional consideration built into that leave entitlement for shift work, that is, having to work weekends and the reduction in leisure and family time that results from shift work.”
- 49 The applicants say six weeks of leave compensates the employees only for working public holidays at their ordinary rate of pay and not otherwise.
- 50 The applicants also rely on some evidence about staffing levels and workload at the Perth Watch House, and the extent to which these issues have affected adherence to written policies and procedures and caused stress and fatigue to employees.
- 51 The respondent, while not taking issue with the contention that shift workers typically enjoy an “additional week of annual leave”, questions the base to which the additional week of leave is added. The respondent notes that employees under his proposal have an entitlement to six weeks of annual leave and the “additional week” sought by the applicants would be a seventh week of leave. The respondent says that the “community standard” for annual leave remains four weeks of leave with an additional, and fifth, week of leave where shift work is performed.
- 52 The respondent says that the requirement to work shifts, and public holidays at normal time, will be reflected in the employees having not just five, but six, weeks of annual leave and that there is no support, including in the decision of Fielding C, to be found anywhere for persons receiving six weeks of annual leave to receive a seventh week of annual leave because of shift work or working public holidays at normal time or for any other reason.
- 53 The respondent argues the evidence about staffing levels and workload is irrelevant.

Additional Arguments

- 54 The respondent pointed to the fact that many of the matters in relation to which the applicants and the respondent disagree have been the subject of provisions in an industrial agreement for some years and that the provisions he seeks be included in the enterprise order mirror those provisions.

- 55 The respondent placed reliance on a lack of evidence of complaints and disputation about the matters the subject of clauses sought by the applicants for inclusion in the enterprise order and said that the alternative clauses he says should be included “have been demonstrated to work effectively” (ts 306).
- 56 The applicants addressed reliance on such an argument in closing submissions (both oral and, in outline form, in writing) by saying that there is no onus upon an applicant for an enterprise order to establish that a term or condition has, in the past, operated in an unfair way for an alternative to be adjudged, by the Western Australian Industrial Relations Commission, as fair and reasonable.
- 57 The applicants argued that even if there is no evidence of particular problems relating to a term or condition that has been in operation, and there is evidence that it has been operating effectively, this cannot mean, as a matter of logic, that the term or condition cannot be improved upon. The applicants said that such terms and conditions may be improved upon if it is fair and reasonable that this occur.
- 58 The respondent also placed reliance on the fact that in 2013 the applicants, following an overwhelming majority vote in favour by their members, agreed to the terms and conditions for the employees that are more or less the same as those contained in the enterprise order he seeks be made.
- 59 The applicants said that the agreement was for three years, and no longer, and the fact of the agreement, and the size of the majority in support, have no relevance to what is, on the evidence and argument before me now, fair and reasonable to include in an enterprise order to operate into the future.
- 60 There was significant evidence and argument about the state of the economy of Western Australia, Public Sector Wages Policy Statements, the financial position and fiscal strategy of the State of Western Australia and the financial position of WA Police.
- 61 Insofar as there was divergence between the parties about the significance of that evidence it may be boiled down as follows. The applicants said whether additional cost is incurred is largely up to the respondent, and how efficiently it manages the circumstances affected by the clauses they seek, and that, in any event, the cost of their claims (at the outside let’s say around \$1 million) would be a drop in the ocean that is the WA Police expense budget, let alone when considered in terms of the State expense budget.
- 62 The respondent said that one million dollars is still one million dollars; that is, a lot of money. The respondent said in circumstances where the State has a large debt and has, by way of strategy to reduce that debt, targeted public sector expenditure that “every dollar counts” and it is not to the point that one million dollars may be, when placed against other amounts, relatively small.
- 63 The respondent also urged me to consider the possible financial impact of the clauses in any enterprise order I make “flowing on” to other occupational groups, within Government in particular.
- 64 The applicants said that the issue of “flow on” is essentially a furphy and points to a lack of evidence of it ever having actually occurred in the way the respondent alleges it might.

Evidence

- 65 At Schedule 1 to these reasons for decision may be found a list of witness statements admitted into evidence with an indication given where a witness gave evidence in person.
- 66 Evidence material to my decision will be referred to as necessary in the balance of these reasons for decision.

Consideration

- 67 I must make an enterprise order which provides for any matter that might otherwise be provided for in an industrial agreement (section 42I(1)(c) *Industrial Relations Act 1979*) and which is fair and reasonable in all of the circumstances (section 42I(1)(d) *Industrial Relations Act 1979*).
- 68 Following *Re Harrison; Ex Parte Hames* [2015] WASC 247, section 42I(1)(c) *Industrial Relations Act 1979* means that I may only include in the enterprise order provisions with respect to an industrial matter or for the prevention or resolution of disputes, disagreements or questions relating to an industrial matter.
- 69 I cannot usefully expand on, explain or place any gloss upon the clear words of section 42I(1)(d) *Industrial Relations Act 1979*.
- 70 As with any exercise of my jurisdiction under the *Industrial Relations Act 1979* I must apply section 26(1) *Industrial Relations Act 1979* and here, given that I am making a “public sector decision”, as defined by section 26(2B) *Industrial Relations Act 1979*, I must take into consideration the matters referred to in section 26(2A) *Industrial Relations Act 1979*.
- 71 In relation to the matters mentioned above under the heading “Additional Arguments” I comment as follows for the time being, with more detailed reasoning being given as and when the need arises in the balance of my reasons.
- 72 It is neither here nor there that the applicants agreed to certain terms and conditions in the past nor that this agreement followed a vote in favour, of any margin, by their members.
- 73 Agreement to a provision for a period of time but no longer (putting to one side the possible operation of section 41(6) *Industrial Relations Act 1979*) says nothing instructive to me about the fairness or reasonableness of a provision which will operate beyond that period of time.
- 74 However, evidence about the operation of a provision over a period of time is relevant and may be instructive.
- 75 A lack of complaint or disputation about the operation of a provision cannot as a matter of logic lead to the conclusion that some or most or all persons affected are content with the operation of the provision nor can it lead to conclusions that the provision must be fair and reasonable or that it cannot, fairly and reasonably, be improved upon.

- 76 However, insofar as evidence of the operation of a provision over a period of time is relevant, a lack of evidence about complaints or disputation, while not having as a matter of logic the implications set out above, does have its place in assessing the operation of the provision. It does not prove in itself that the provision is operating fairly and reasonably nor does it prove that the provision cannot be improved upon but it is not entirely irrelevant in determining what might be fair and reasonable for the next period of time.
- 77 It is a "circumstance" I may take into account and give weight.
- 78 In relation to section 26(2A) *Industrial Relations Act 1979* I say for the time being that I am of the view that the matters referred to therein only need to be considered if I am otherwise satisfied that a provision has merit. Also, and even if a provision has merit, I agree with the respondent that I need not place weight on the matters in section 26(2A) *Industrial Relations Act 1979* if the cost associated with the provision is nominal only.

"Agreed" Matters

- 79 The parties have informed me of the provisions which none of them dispute ought be included by me in the enterprise order I make.
- 80 The parties accept that the provisions I include in the enterprise order are ultimately a matter for me and that I should only include them, even where there is "agreement" about them, if I am satisfied that they relate to industrial matters and are, in all of the circumstances, fair and reasonable.
- 81 I have read the "agreed" provisions against this background.
- 82 I am satisfied that each relates to an industrial matter.
- 83 In relation to whether they are fair and reasonable, where each party, with two of those parties being represented by Senior Counsel, and highly competent solicitorial teams, tell me that, so far as they are concerned, the provisions are, in all of the circumstances, fair and reasonable there would have to be something startling about a provision to cause me to ask the parties to remark upon it.
- 84 My scan of the "agreed" provisions prior to the hearing revealed no such provision and I did not, at the hearing, call for comment upon any of the agreed provisions. My more recent review of the provisions, and one undertaken with me having provisional views about what I may include in the enterprise order, reveals nothing calling for comment.
- 85 I am content to include the "agreed" provisions in the enterprise order as I find that they relate to industrial matters and because I find they are, in all of the circumstances, with one of those circumstances being the attitude of the parties to them, fair and reasonable.
- 86 I have considered the matters in section 26(2A) *Industrial Relations Act 1979* in coming to this conclusion.
- 87 I note that there are only around 350 employees affected by the enterprise order I make and that the pay scale agreed upon is a compressed one, starting at around \$50,000 and topping out below \$90,000.

Hours of Duty – Vote and Veto

- 88 I am not persuaded that, in all of the circumstances, it would be fair and reasonable to include in the enterprise order the subclause the applicants seek.
- 89 The circumstances primarily relied upon, that sworn police officers alongside whom the employees work have this provision, is unpersuasive.
- 90 There is nothing inherently unfair or unreasonable about persons working alongside each other having different terms and conditions of employment where those persons belong to different occupational groups regulated by different industrial instruments.
- 91 As a start point it would be expected that different occupational groups would have different terms and conditions of employment resulting from different histories of classification, negotiation and arbitration.
- 92 The source of, and the reasons for, the differences will normally be explicable on the basis of those histories. That the occupational groups work alongside each other would not, in most cases, be a good place to start in characterising the differences, in term of fairness, reasonableness or otherwise, let alone a good place to finish in relation to such a task.
- 93 The system of industrial regulation that has developed and become entrenched in this State is far too complex and sophisticated to reduce matters of fairness and reasonableness to physical proximity at the workplace, even across similar shift patterns.
- 94 Sometimes "links" between occupational groups working alongside each other develop. It may become accepted that different occupational groups, to some extent because they work alongside each other, ought receive the same percentage pay increase for instance. Other strong links may be expressed or developed over time.
- 95 The uncoupling of such a link may, prima facie, be unfair and, in itself, lead to disputes and disagreement.
- 96 Such a factor may thereby become a highly relevant matter in negotiations and arbitrations.
- 97 But generally, absent such history, there is nothing of particular significance in terms of fairness or reasonableness in employees of one occupational group working in physical proximity to those of another occupational group, even across similar or the same shift patterns.
- 98 In my respectful view, a contention that the employees should have the same entitlement to a vote, and through the Western Australian Police Union of Workers the possibility of veto, in relation to their rosters because sworn police officers have such entitlements fails, without more, to take flight.

- 99 That it appears common that the respondent agreed that sworn police officers should have these entitlements in return for something given by sworn police officers and the Western Australian Police Union of Workers quickly shows up how unconvincing, without more, the contention is.
- 100 The difference, once the complex and sophisticated nature of our industrial relations system is understood, cannot be characterised, in itself, as unfair or unreasonable. It is just a difference.
- 101 The applicants attempt to take the argument beyond a parity argument by saying the employees perform duties that sworn police officers used to perform, that sworn police officers had the entitlements when they did those duties, and that as the employees do not have the entitlements, while doing those same duties, a diminution in entitlements has effectively occurred and that this is unfair and unreasonable.
- 102 This argument is more against the applicants' contention than for it. It introduces the history, accepted by all parties, that there is, and was intended to be, differences between the position of a sworn police officer and the position of a police auxiliary officer.
- 103 That some duties previously performed by sworn police officers were able to be, uncontroversially, carved out to be performed by police auxiliary officers without affecting the core duties of sworn police officers points up the difference between the positions of police auxiliary officer and sworn police officer.
- 104 They are clearly different positions capable of clear delineation. It is rational, against that background, for the terms and conditions of each occupational group to be different. It would be a surprising result if they were not.
- 105 Sworn police officers have the entitlement to a vote and veto because they belong to an occupational group which achieved such entitlements. Police auxiliary officers do not belong to that occupational group. It is not to the point that the employees may perform the same duties previously performed by sworn police officers. The significant matter is that the positions of sworn police officers and police auxiliary officers are different positions.
- 106 However, just because I do not accept the applicants' arguments does not mean that, as a matter of course, I should find that the alternative provisions proposed by the respondent are fair and reasonable.
- 107 The respondent says that the roster system in place under the *Western Australia Police Auxiliary Officers Industrial Agreement 2013* has given the respondent adequate flexibility in relation to the rostering of employees and that flexibility is important to it, especially in circumstances where the flexibility in the rostering of sworn police officers is affected by the vote and veto entitlements they enjoy.
- 108 The respondent also says there is no evidence the system has produced any difficulties for the employees and that this is a good indicator of the fairness and reasonableness of the system provided for by the *Western Australia Police Auxiliary Officers Industrial Agreement 2013*.
- 109 The applicants say there is some evidence of difficulties because of this exchange between Senior Counsel and a witness for the respondent, Senior Sergeant Christina Janet Johnston, in cross-examination:
- “And so the answer to my question a little earlier when you said, “Auxiliary Officers didn't get a vote”, and you agreed with that, that's correct, isn't it? --- Well, unfortunately under the Industrial Agreement they don't get to vote.
- Yes? --- So
- You said, “Unfortunately”, didn't you? --- Yes.
- Thank you.”
- (ts 277)
- 110 This is not evidence of any difficulty associated with the employees not having a vote.
- 111 A combination of rejection of the applicants' arguments in support of their proposed subclause and acceptance that the current provisions give the respondent the flexibility important to it, and which I accept is reasonable, and have not produced difficulties is, in my view, a solid basis to include in the enterprise order the same provisions as those that operated in relation to rostering under the *Western Australia Police Auxiliary Officers Industrial Agreement 2013*.
- 112 At [33] of their Outline of Closing Submissions the applicants state “the respondent's proposed order also includes flexible rostering arrangements that effectively dispense with the need to have any standard rostering arrangements at all.”
- 113 This submission is expanded upon at [34] to [41].
- 114 Subject to any other parts of my decision which affect specific parts of the relevant clause I am proposing to effectively “roll over” clause 11 for the reasons given above. I do not understand the respondent to be seeking any changes to the rostering system bearing the characterisation stated at [33] of the Applicant's Outline of Closing Submissions nor would I be inclined to make any such changes given that a key plank in the respondent's argument was that the clause has been operating well.
- Hours of Duty – Missed Meal Break Payments
- 115 As I understand the evidence and submissions, all claims for reimbursement for missed meal breaks are subject to approval before payment is made but, after five such claims in any one pay period, a higher level of approval is required before payment is made.
- 116 In that context the arguments of the parties deal with whether it is fair and reasonable that something different occur in relation to the sixth and following claims for reimbursement as when compared to the first to fifth claims.
- 117 The applicants say that there is no reason why the sixth claim should trigger a different approach.
- 118 The respondent says the present system is causing no difficulties.

- 119 The applicant's argument based on "alignment" with sworn police officers carries little weight with me for the reasons I gave above under the previous heading.
- 120 I take as my start point that the evidence did not demonstrate that there was any difference between a first claim and a sixth claim. In my view, if a payment is to be made for a missed meal break, and each payment is triggered by that event, I would need a reason to treat the sixth claim as being different from the first claim.
- 121 No such reason has been offered.
- 122 I could speculate that if more than five meal breaks are missed in a pay period the respondent would like this to come to the attention of an appropriately senior officer for review and reaction. This can, however, be achieved by internal reporting arrangements.
- 123 The need to address whatever problem might be revealed by "excessive" missed meal payments can be dealt with in ways that do not require a different system for the approval for claims beyond the fifth claim.
- 124 It is fair and reasonable that all missed meal breaks in any given pay period be dealt with by way of the same system or process.
- 125 Whether the provision I order will cost the respondent anything is highly doubtful but, even if it does, the cost will be minimal and can be avoided by the respondent through effective management.

Overtime

- 126 The applicants' argument based on "consistency and parity" with sworn police officers carries little weight with me for the reasons previously given.
- 127 I add, in relation to the argument under this heading, that the respondent put forward a positive argument against consistency and parity to the effect that sworn police officers have a more generously formulated entitlement to overtime because of the inherently unpredictable nature of their work. I find there is force in that argument.
- 128 The role of a police auxiliary officer is clearly one having a greater scope for routine than a sworn police officer. Both the respondent and the employees know with a great degree of certainty when a shift will start and finish and the evidence has not established that for this occupational group as a whole the prospect of having to work beyond the end of the shift is more than an insignificant one.
- 129 That leaves the argument that it is simply unfair for the employees to be at risk of working an extra 29 minutes on every shift and get nothing.
- 130 I think in terms of fairness and reasonableness the characterisation of that risk is necessary, or at least appropriate.
- 131 This is an instance where I do not place store in the provisions for which the respondent contends having being agreed to previously by the Western Australian Police Union of Workers, following a vote of members, but I think it is appropriate to take into account how those provisions have been operating.
- 132 I hasten to add to my earlier comments on this issue that an employee group complying with the terms of an industrial agreement, without complaint, cannot later be "used against them." An employee group may believe the terms of an agreement to be operating in an unfair way but, recognising that they agreed to them, may, maturely, suffer their effect until the opportunity arises for change to be agreed or arbitrated upon.
- 133 But when the employee group says, or it is said on their behalf, that a term which has operated in relation to them for some time is not fair and reasonable because of some risk inherent in the term, I consider I need evidence that allows me to assess the risk and decide whether it is one that needs to be addressed.
- 134 There is no evidence that there is a significant, or really any, risk that the employees might work for 29 minutes extra every day and "get nothing." The evidence is, in fact, all the other way. That is, that such a risk has simply not materialised in any significant way across the occupational group while the term sought by the respondent has been in place.
- 135 The evidence is that the current provision has been "road tested" without producing unfair or unreasonable consequences.
- 136 I say the same in relation to the issue of whether calculations are done on a daily or weekly basis.
- 137 This again is an issue where I think it is appropriate to look for evidence of problems that have arisen with the provision advocated for by the respondent given that it has been in operation for some years.
- 138 I accept, as the applicants say, that just because there have been no complaints does not mean there have been no problems and just because there have been no problems does not mean the provisions cannot be improved upon.
- 139 However, even accepting those things, given the significance of the change contemplated by the applicants proposed clause I would expect some evidence which competed with the fair assertion, supported by some evidence, that the provisions proposed by the respondent have operated for some time without throwing up individual, let alone systemic, problems. There was no such evidence.
- 140 In relation to the issue of the term "duly authorised officer" appearing in clause 13, I note that a definition of the term is one of the "agreed" provisions and is in these terms:

"Duly Authorised Officer means an officer or officers appointed in writing by the Employer to have approval authority as provided in the WA Police Delegation Schedule or other relevant document."

- 141 There is no problem with the term as defined applying to approvals for the taking of accumulated time in lieu for the payment of overtime, or at least no problem put to me, and it seems fair and reasonable for the term to be ordered by me to operate in this context.
- 142 This leaves the matter, said by the applicants to be problematic, that in “unknown or unanticipated situations” it may be appropriate for an employee to work overtime, and the employee may do so, even though it is not possible, before the overtime is worked, for a “duly authorised officer” to approve it.
- 143 Although the applicants led no evidence of situations in the past which were, before they arose, “unknown or unanticipated” in such a way as to prevent the obtainment of approval before overtime was worked I am inclined to the view that such situations have become more likely now that protective service officers have joined the ranks of the employees.
- 144 I do not think I am entering the territory of unhelpful speculation to suggest that this is, as things stand, a relevant change in the circumstances I need to consider in making an enterprise order.
- 145 The nature of the work of protective service officers may lead to overtime needing to be worked when that situation was, at the time the decision needs to be made, previously “unknown and unanticipated.”
- 146 I do not understand that the applicants suggest that in each instance where overtime is to be worked the approval of the Commissioner of Police needs to be obtained. That would not be fair or reasonable in all of the circumstances. The applicants’ proposed clause, by its simple deletion of the term “duly authorised officer” from clause 13(1)(a), does not achieve its intended purpose.
- 147 Against the background of my reasons the parties should confer on a clause which has the effect that in an unknown or unauthorised situation a protective service officer may, uncontroversially, work overtime without the approval in advance otherwise necessary for the working of overtime. If the parties cannot agree on a proposed clause I stand ready to draft one for inclusion in the enterprise order.

Shift Rate Allowances

- 148 The main argument put up by the applicants in support of the proposed clause is “consistency and parity” with sworn police officers. I have already set out why I find that argument unpersuasive.
- 149 The evidence about staffing levels, workload, adherence to policies and procedures, and stress and fatigue at the Perth Watch House was enough to open up some debate in these proceedings but there was not enough evidence to distil all of the issues and adjudicate upon them.
- 150 In any event, these are not the type of issues that would ordinarily be compensated for by a shift allowance, let alone lead to an across the board decision on the appropriate amount of allowances for all employees, including those who do not work at the Perth Watch House. The issues should be explored and, if necessary, dealt with in some other way.
- 151 Absent any other argument, and in light of the evidence that the term has operated for some years without causing difficulties, I find it difficult to identify something that would make continuation of the arrangements anything but fair and reasonable.

Frontline Allowance

- 152 The applicants point to what they say are the “additional” skills, responsibilities, risks and hardships associated with the duties of protective service officers. I have taken this as a reference to protective service officers having skills, responsibilities, risks and hardships additional to those of other police auxiliary officers.
- 153 The argument, in my view, fails to recognise that, or give adequate consideration to, the possibility that different skills, responsibilities, risks and hardships required by positions within occupational groups may be relevant to, and acknowledged by, the classification given to the positions.
- 154 That a position is classified at level X rather than level Y may be because of the skills, responsibilities, risks and hardships associated with the position.
- 155 The evidence is that for protective service officers the matters to which the applicants point as a reason for the allowance have already been taken into account in the classification of the position.
- 156 In these circumstances it would not be fair and reasonable to increase the remuneration of the position by compensating protective service officers for things for which they are already being paid.

Annual Leave

- 157 It is true, as the applicants argue, that shift workers are “not uncommonly” entitled to an “additional week of annual leave.” However, no evidence was led about that additional week taking a shiftworker up to seven weeks of annual leave.
- 158 I consider that a term that a shiftworker have seven weeks of annual leave to be a significant matter and I would have expected a party seeking it to present a case reflecting its significance.
- 159 The applicants have argued that such an entitlement would enhance the working conditions of the employees. This is undoubtedly true but is not in itself an argument that in any way addresses the fairness and reasonableness of the term in all of the circumstances.
- 160 The applicants also argue that such a term “has the potential to increase industrial harmony.” To this it might be said that speculation on the effect is hardly a good ground upon which to make such a significant change to working conditions and that “industrial harmony” may only be “increased” if that term is understood to mean “the happiness of the employees”, which is clearly too narrow a definition of “industrial harmony”, given all of the circumstances I am obliged to consider.

- 161 The applicants say the term also has the potential to “decrease attrition rates.” Again I do not find speculation of this kind, without more, persuasive and I am not convinced that “attrition rates” are a concern of mine in setting the terms and conditions which are fair and reasonable to those subject to them.
- 162 I have found the invocation of the decision of Fielding C in *Western Australian Police Union of Workers v Minister for Police* (1982) 62 WAIG 1401 unhelpful. The case had its own arguments and its reasons their own internal logic. To say that Fielding C may have granted an extra week of leave if the applicant in that case had confined the claim to those working a rotating roster pattern, and the possibility of that outcome should influence my decision making, is extremely tenuous.
- 163 No one can know what Fielding C would have done in that circumstance and, even if he had done what the applicants speculate he may have, he would have done so on the evidence and argument before him.
- 164 I intend to make my decision on the evidence and argument before me and, doing so, I am totally unconvinced that it would be fair and reasonable to give police auxiliary officers who work rotating rosters a seventh week of annual leave.
- 165 I consider it fair and reasonable that such employees have six weeks of annual leave. Four weeks of annual leave is the community standard and the extra two weeks of leave enjoyed by the police auxiliary officers compensates them fairly and reasonably for working rotating shifts and for working public holidays at their ordinary rate of pay.
- 166 For the sake of completeness, I repeat that the evidence about staffing levels, workload, adherence to policies and procedures, and stress and fatigue at the Perth Watch House was enough to open up some debate in these proceedings but there was not enough evidence to distil all the issues and adjudicate upon them.
- 167 In any event, these are not the type of issues that would sound in an extra week of leave, let alone lead to an across the board decision on the appropriate amount of leave for all employees, including those who do not work at the Perth Watch House.

Section 26 Industrial Relations Act 1979

- 168 My decision is, in my view, consonant with section 26(1) *Industrial Relations Act 1979*.
- 169 I have had regard to the matters referred to in section 26(2A) *Industrial Relations Act 1979* and the evidence led, and arguments made, in relation to those matters. As a result of my findings in relation to the substantial merits of claims set out above I do not find there is any basis upon which those matters ought affect my decision making.

Conclusion

- 170 I respectfully ask that the parties convey to my chambers their attitude to submitting a draft enterprise order reflecting all agreements between them (including those arrived at by way of correspondence provided after the hearing being the applicants “Post Arbitration Matters” document and the last paragraph of the respondent’s letter of 31 July 2017) and the above reasons for decision.
- 171 If there is a willingness on the part of the parties to undertake this process I will communicate further with the parties in terms of timing.
- 172 I would ask that the parties inform my Associate, by email by 4pm Friday, 22 September 2017 as to whether they are prepared to submit a draft enterprise order.

Schedule 1

First Applicant:

- (1) Witness statement of Dr Thorsten Stromback* filed 21 March 2017;
- (2) Witness statement of Travis Hagan filed 3 February 2017;
- (3) Witness statement of Michael Philip Chinn* filed 23 June 2017;
- (4) Witness statement of Judith Ann Thompson filed 23 June 2017;
- (5) Witness statement of Alexandra Louise Shanks filed 23 June 2017;
- (6) Witness statement of Francis Robert Whitford* filed 23 June 2017; and
- (7) Witness statement of Paul Craig Hunt* filed 23 June 2017 with use to be made of the attachments filed 3 February 2017 and supplementary witness statement of Paul Craig Hunt filed 27 June 2017.

Respondent:

- (1) Witness statement of Alex Wells filed 21 June 2017;
- (2) Witness statement of Christina Johnston* filed 21 June 2017;
- (3) Witness statement of Kristin Anne Uta Berger* filed 21 June 2017;
- (4) Witness statement of Lysle Cabbage filed 21 June 2017;
- (5) Witness statement of Craig Davis filed 21 June 2017;
- (6) Witness statement of Bradley John Williams filed 21 June 2017;
- (7) Witness statement of Anthony Kannis filed 21 June 2017;
- (8) Witness statement of Tony Clark* filed 21 June 2017 with use to be made of attachments filed 3 March 2017;
- (9) Witness statement of Richard Watson* filed 3 March 2017 and supplementary statement filed 13 June 2017;
- (10) Witness statement of John Domenico Candeloro* filed 3 March 2017 with revised costing June 2017; and
- (11) Witness statement of Lee Clissa filed 3 March 2017.

* Gave viva voce evidence

2017 WAIRC 00909

ENTERPRISE ORDER PURSUANT TO S.42I

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

FIRST APPLICANT

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

SECOND APPLICANT**-v-**

COMMISSIONER OF POLICE

RESPONDENT**CORAM**PUBLIC SERVICE ARBITRATOR
COMMISSIONER D J MATTHEWS**DATE**

TUESDAY, 31 OCTOBER 2017

FILE NO

APPL 73 OF 2016

CITATION NO.

2017 WAIRC 00909

Result	Enterprise order made
Representation	
First Applicant	: Mr M Ritter SC, of counsel, and with him Mr D Stojanoski of counsel
Second Applicant	: Ms A Wallish
Respondent	: Mr H Dixon SC, of counsel, and with him Mr R Bathurst of counsel

Order

HAVING heard Mr M Ritter SC, of counsel, and with him Mr D Stojanoski, of counsel, for the first applicant and Ms A Wallish for the second applicant and Mr H Dixon SC, of counsel, and with him Mr R Bathurst, of counsel, for the respondent;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby order -
 THAT an enterprise order in the terms of the following schedule be and is hereby binding upon the parties hereto with effect from the date hereof.

(Sgd.) D J MATTHEWS,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

**WESTERN AUSTRALIA POLICE
 AUXILIARY OFFICERS ENTERPRISE ORDER 2017**

PART A – APPLICATION OF ENTERPRISE ORDER

Clause 1 – Title

- (1) This Enterprise Order shall be known as the Western Australia Police Auxiliary Officers Enterprise Order 2017.
- (2) This Enterprise Order cancels and replaces the *Western Australia Police Auxiliary Officers Industrial Agreement 2013*.

Clause 2 – Area and Scope

- (1) This Enterprise Order shall extend to and bind all Police Auxiliary Officers appointed under Part IIIB of the *Police Act 1892 (WA)*.
- (2) This Enterprise Order shall operate over the whole of the State of Western Australia.
- (3) (a) This Enterprise Order extends to and binds the Commissioner of Police, 2 Adelaide Terrace, East Perth 6004.

- (b) The following were negotiating parties in the bargaining prior to this Enterprise Order for the purposes of section 42J(5)(b) of the *Industrial Relations Act 1979* (WA):
- (i) Western Australian Police Union of Workers 639 Murray Street, West Perth 6005; and
 - (ii) Civil Service Association of Western Australia Incorporated Level 5, 445 Hay Street, Perth 6000.

Clause 3 – Arrangement

PART A – APPLICATION OF ENTERPRISE ORDER	2
Clause 1 – Title	2
Clause 2 – Area and Scope	2
Clause 3 – Arrangement	2
Clause 4 – Relationship to Award	5
Clause 5 – Term	5
Clause 6 – Definitions	5
Clause 7 – No Further Claims	8
PART B – CONTRACT OF EMPLOYMENT AND DISPUTE SETTLEMENT	9
Clause 8 – Probation	9
Clause 9 – Introduction of Change	9
Clause 10 – Dispute Settlement Procedure	10
PART C – HOURS ARRANGEMENTS	11
Clause 11 – Hours of Duty	11
Clause 12 – Part Time Employment	16
Clause 13 – Overtime	18
Clause 14 – Casual Employment	23
PART D - SALARY	24
Clause 15 – Salary	24
PART E – ALLOWANCES	28
Clause 16 – Adjustment of Allowances	28
Clause 17 – On Call, Close Call and Standby Allowances	28
Clause 18 – Shift Allowance	29
Clause 19 – Camping Allowance	30
Clause 20 – Higher Duties Allowance	32
Clause 21 – Motor Vehicle Allowance	33
Clause 22 – Relieving Allowance	33
Clause 23 – Travelling Allowance	35
Clause 24 – Property Allowance	38
Clause 25 – Transfer Allowance	41
Clause 26 – Disturbance Allowance	42
Clause 27 – Removal Allowance	43
Clause 28 – Forensic Qualifications Allowance	44
Clause 29 – Clothing Allowance	45
PART F – LEAVE	46
Clause 30 – Personal Leave	46
Clause 31 – Annual Leave	51
Clause 32 – Employee Initiated Cash Out of Accrued Annual Leave	55
Clause 33 – Purchased Leave (42/52 Leave Arrangement)	56
Clause 34 – Purchased Leave (Deferred Salary Arrangement)	57
Clause 35 – Long Service Leave	57
Clause 36 – Bereavement Leave	62
Clause 37 – Parental Leave	63
Clause 38 – Cultural/Ceremonial Leave	72

Clause 39 – Blood/Plasma Donors Leave	72
Clause 40 – Leave For International Sporting Events	73
Clause 41 – Leave For Defence Force Reserves Training	73
Clause 42 – Leave Without Pay	74
PART G – UNION FACILITIES	75
Clause 43 – Union Communication with Members and Union Facilities for Union Representatives	75
Clause 44 – Leave To Attend To Union Business	75
Clause 45 – Trade Union Training Leave	76
PART H – RETIREMENT, REMOVAL OR DEATH OF AN EMPLOYEE	78
Clause 46 – Retirement, Removal or Death of an Employee	78
PART I - SCHEDULES	79
Schedule A – Overtime Meal Allowance	79
Schedule B – Camping Allowance	80
Schedule C - Travelling, Transfer and Relieving Allowance	81
Schedule D – Motor Vehicle Allowance	83
Schedule E – Metropolitan Area	84

Clause 4 – Relationship to Award

- (1) This Enterprise Order shall apply to the exclusion of the *Civil Service Association Western Australia Police Auxiliary Officers' Award 2013*.

Clause 5 – Term

- (1) This Enterprise Order shall operate from the date that the Enterprise Order is made until 1 November 2018.
- (2) Notwithstanding subclause (1) of this clause, this Enterprise Order will continue in force after the expiry of its term until a new industrial agreement, enterprise order or an award, in substitution for this Enterprise Order, has been made or registered by the WAIRC.

Clause 6 – Definitions

For the purpose of this Enterprise Order, the following definitions shall apply:

- (1) **Casual** means an employee engaged by the hour as determined by the Employer.
- (2) **Commissioner** means the Commissioner of Police appointed pursuant to the provisions of the *Police Act 1892 (WA)*.
- (3) **Commercial Accommodation** includes, but is not limited to, hotels, motels, serviced apartments, bed and breakfasts, road house or self-contained accommodation.
- (4) A **Day** shall mean from midnight to midnight.
- (5) **Dentist** means a person registered under the *Health Practitioner Regulation National Law (WA) Act 2010* in the dental profession whose name is entered on the Dentists Division of the Register of Dental Practitioners kept under that Law.
- (6) **Dependant** for the purpose of determining eligibility for Annual Leave Travel Concession means:
- (a) a Partner; and/or
 - (b) any child who relies on the officer for their main financial support;
- who does not have an equivalent entitlement of any kind.
- (7) **Dependant** for any purpose other than Annual Leave Travel Concession means:
- (a) Partner;
 - (b) child/children; or
 - (c) other family members who reside with the Employee and who rely on the Employee for main support.
- (8) **Duly Authorised Officer** means an officer or officers appointed in writing by the Employer to have approval authority as provided in the WA Police Delegation Schedule or other relevant document.
- (9) **Emergency** means:
- (a) an unforeseen urgent crisis;
 - (b) serious public disorder; and
 - (c) searches;
- but shall not include normal Police Auxiliary Officer activity or the prevention of payment of any penalty provision covered by this Enterprise Order in normal Police Auxiliary Officer duty or a requirement to attend Court outside a rostered shift.
- (10) **Employee** means any person appointed under the provisions of the *Police Act 1892 (WA)* as a Police Auxiliary Officer.
- (11) **Employer** means the Commissioner of Police.

- (12) **Family** in relation to an Employee means the Employee, Partner and all dependent children living with the Employee.
- (13) **Fixed Term Contract** means the appointment to a position whereby the dates of commencement and termination of employment are specified in writing to the Employee.
- (14) **Headquarters** means the place in which the principal work of an Employee is carried out, as defined by the Employer.
- (15) **Irregular Part Time Employee** means a Part Time Employee who is employed to work on an irregular basis, a set amount of hours over a prescribed period (eg 200 hours over 6 months).
- (16) **Known Situations** for the purposes of clause 11 – Hours of Duty means operational circumstances which are not an Emergency or Public Interest as defined but situations where it is anticipated in advance that additional Employees will be needed on a particular shift.
- (17) **Medical Practitioner** has the same meaning as it has in the *Health Practitioner Regulation National Law (WA) Act 2010*.
- (18) **Metropolitan Area** means all of that area comprising North West Metropolitan, South East Metropolitan, Central Metropolitan and South Metropolitan policing districts as depicted in Schedule E. When applying this definition, the areas of Rottnest Island, Pinjarra and Dwellingup are considered outside the Metropolitan Area.
- (19) The following terms shall have specific meaning in relation to **Motor Vehicle Allowances**:
- (a) A **year** means 12 months commencing on the 1st day of July and ending on the 30th day of June next following.
 - (b) **Metropolitan Area** as defined.
 - (c) **South West Land Division** is as defined by Schedule One of the *Land Administration Act 1997* (WA) excluding the area contained within the Metropolitan Area.
 - (d) **Rest of State** means that area south of 23.5 degrees south latitude, excluding the Metropolitan Area and the South West Land division.
- (20) **Normal Salary** for the purpose of clause 15 – Salary means salary as provided at clause 15(2) and does not include overtime or other additional allowances.
- (21) **North West** means all that part of the State north of the 26th degree south parallel of latitude and shall be deemed to include Shark Bay.
- (22) **Officer in Charge** means an Employee who is the Officer in Charge of a police station in the Metropolitan Area, a police station located outside the Metropolitan Area and who resides in that locality, or an Employee relieving in such position.
- (23) **Part Time Employee** means an Employee who is regularly employed to work less than 40 hours per week.
- (24) **Partner** means:
- (a) a person who is legally married to the Employee; and/or
 - (b) a person who lives with the Employee as the Partner of the Employee on a bona fide domestic basis (including same sex Partners).
- (25) **Practicable** means practicable in the fair and reasonable opinion of the Employer. Provided that if any dispute shall arise as to whether in any case such opinion is fair and reasonable, the dispute shall be determined in accordance with the dispute settlement procedure in this Enterprise Order.
- (26) **Public Event** shall be deemed to include the following: the Christmas/New Year Road Safety Campaign, Easter Road Safety Campaign, Perth Christmas Pageant, Royal Agriculture Society Show, Australia Day Skyshow, Anzac Day Services and Marches, City to Surf Fun Run, and similar such events.
- (27) **Public Holiday** shall be deemed to include the following: New Year's Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Sovereign's Birthday, Western Australia Day, and Labour Day.
- (28) **Public Interest** means:
- (a) protection of life or property caused by extraordinary events;
 - (b) security for Heads of State/Public Figures and special events; and
 - (c) searches;
- but shall not include normal Police Auxiliary Officer activity or the prevention of payment of any penalty provision covered by this Enterprise Order in normal Police Auxiliary Officer duty or a requirement to attend Court outside a rostered shift.
- (29) **Public Transport** means any means of public transport approved by the Employer.
- (30) **Region** means region of the State within the meaning of section 39(2) of the *Police Act 1892* (WA).
- (31) **Special Area** means:
- (a) any portion of the State that is:
 - (i) east of longitude 119 degrees east; or
 - (ii) north of the 26 degrees of south latitude;
 - (b) Yalgoo, Mount Magnet, Cue and Meekatharra; and
 - (c) any area outside the State designated a special area by the Employer.

- (32) **Union** means either the:
- (a) Western Australian Police Union of Workers; or
 - (b) Civil Service Association of Western Australia Incorporated;
- whichever is applicable.
- (33) **WAIRC** means the Western Australian Industrial Relations Commission.
- (34) **WA Police** means the Western Australia Police Force.
- (35) **Work Area** means an Employee's current work area, sub-district or district (or parts thereof) as determined by the Employer.

Clause 7 – No Further Claims

- (1) There shall be no further claims during the term of this Enterprise Order.

PART B – CONTRACT OF EMPLOYMENT AND DISPUTE SETTLEMENT

Clause 8 – Probation

- (1) Period of Probation:
- (a) All Employees appointed to the position of Police Auxiliary Officer will be subject to a probationary period of nine months.
 - (b) Prior to the expiry of the period of probation, an assessment will be made of the Employee's performance, efficiency and conduct. The Employer shall:
 - (i) confirm the permanent appointment; or
 - (ii) extend the period of probation by up to a further three months (up to a maximum of 12 months in total) and provide the Employee with the necessary support and remedial action to assist the Employee to meet the requirements of the position; or
 - (iii) terminate the services of the Employee by giving one week's notice or payment in lieu thereof.
 - (c) If no written notification of any of the items in subclause (1)(b) of this clause is received by the Employee prior to the expiry of the period of probation, permanent appointment is considered to have occurred.

Clause 9 – Introduction of Change

- (1) Employer's Duty to Notify
- (a) Where the Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on Employees, the Employer will notify the employees who may be affected by the proposed changes and the Union.
 - (b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the Employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of the Employee to other work or locations and restructuring of jobs. Provided that where this Enterprise Order makes provision for alteration of any of the matters referred to herein an alteration will be deemed not to have significant effect.
- (2) Employer's Duty to Discuss Change
- (a) The Employer will discuss with the Employees affected and the Union, inter alia, the introduction of the changes referred to in subclause (1) of this clause, the effects the changes are likely to have on Employees, measures to avert or mitigate the adverse effects of such changes on Employees and will give prompt consideration to matters raised by the Employees and/or the Union in relation to the changes.
 - (b) The discussion will commence as early as practicable after a firm decision has been made by the Employer to make the changes referred to in subclause (1) of this clause.
 - (c) For the purposes of such discussion, the Employer will provide to the Employees concerned and the Union, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on Employees and any other matters likely to affect Employees provided that the Employer shall not be required to disclose confidential information, the disclosure of which would be inimical to the Employer's interest.

Clause 10 – Dispute Settlement Procedure

- (1) Any questions, disputes or difficulties arising between the Employer and Employees in relation to a matter arising from this Enterprise Order will be dealt with in accordance with the following procedure:
- (a) Stage One:
 - (i) Any Employee(s) with a question, dispute or disagreement should discuss the matter with the immediate supervisor or Union representative in the first instance.

- (ii) The supervisor or Union representative is to investigate the matter. If the matter cannot be resolved or an authoritative answer given on the day the issue is raised, then a response should be provided within three days.
- (iii) Should a response require time to establish an answer, the supervisor shall keep the Employee(s) informed of his or her progress in resolving the matter.
- (b) Stage Two:
 - (i) If the Employee(s) continue(s) to be aggrieved or the issue is still in dispute, the matter is to be discussed between the Employee's representative and the Employer's nominated representative and an attempt made to resolve the matter. Notification of any question or disagreement may be made verbally or in writing.
 - (ii) At any stage, the parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter.
 - (iii) If the matter is not resolved within five working days of the date of notification under subclause (1)(b)(i) of this clause, either party may notify the Secretary of the Union (or his or her nominee), or the Employer (or his or her nominee) of the existence of a dispute or disagreement.
 - (iv) The Secretary of the Union (or his or her nominee) and the Employer (or his or her nominee) shall confer on the matter notified by the parties within five working days and:
 - (aa) where there is agreement on the matter in dispute, the parties shall be advised within two working days; or
 - (bb) where there is disagreement on any matter it may be referred to the WAIRC.
- (c) Stage Three
 - (i) Where any matter referred to the WAIRC is not resolved by conciliation, it may be resolved by arbitration in accordance with the provisions of the *Industrial Relations Act 1979* (WA).

PART C – HOURS ARRANGEMENTS

Clause 11 – Hours of Duty

- (1) For the purpose of this clause:
 - (a) **Known Situations** means operational circumstances which are not an Emergency or Public Interest as defined but situations where it is anticipated in advance that additional Employees will be needed on a particular shift.
 - (b) **Specific Managerial Requirements** means any specific requirement in relation to the Code of Conduct, Occupational Safety and Health, Operational Requirements and/or Diversity.
- (2) Ordinary Hours of Duty:
 - (a) The prescribed hours of duty shall average 40 hours per week or 80 hours per fortnight. Shifts can be rostered on any day inclusive of Saturdays, Sundays and Public Holidays.
 - (b) A Work Area's permanent roster pattern may be changed by the Employer provided a minimum of one month's notice is given to all Employees affected by the change (except in accordance with subclause (9) of this clause).
 - (c) All rosters shall have weekly leave days off rostered together where Practicable.
- (3) Termination of a roster pattern:

Any roster may be terminated in any of the following circumstances:

 - (a) there is mutual agreement between the Employer and the affected Employees;
 - (b) there is a bona fide health and safety issue; or
 - (c) the roster is failing to meet the operational objectives of the Work Area.
- (4) Standard Rosters:
 - (a) Forty hours per week is to be worked as 5 x 8 hour shifts or 4 x 10 hour shifts as rostered.
 - (b) Employees may be rostered on a Standard Roster to perform duties on more than one category of shift during any weekly period. However, such a combination of shifts shall be subject to the following provisions:
 - (i) An Employee may be rostered to work on day and afternoon or day and evening shifts in any weekly period.
 - (ii) An Employee may be rostered to work on afternoon and evening shifts in any weekly period.
 - (iii) Except as provided in subclause (4)(c) of this clause, any combination of day/night or afternoon/night shifts shall not be rostered.
 - (iv) An Employee may be rostered to work evening and night shifts in any weekly period, provided that the shift start times do not vary by more than four hours.
 - (v) The combination of shifts will not be alternated on a daily basis (e.g. day-afternoon-day-afternoon or afternoon-day-afternoon-day-afternoon).

- (c) Shifts on Standard Rosters shall be worked as required by local conditions provided that:
- (i) such changes as prescribed in this subclause, shall be indicated in advance on rosters when rosters are posted in accordance with subclause (9) of this clause; and
 - (ii) in accordance with Occupational Safety and Health principles, additional Employees may be rostered on particular days from day shift on to afternoon, evening or night shift in any week to cover Known Situations.
- (d) To the extent Practicable, shifts on Standard Rosters shall be distributed equally between all shift working Employees during a three month roster cycle or such other cycle as agreed between the supervisor and majority of affected Employees.
- (5) Alternative working arrangements to a Standard Roster:
- (a) Notwithstanding the above, where it is considered necessary to provide more efficient operations, the Employer may authorise the operation of alternative working arrangements in a Work Area.
 - (b) The continuing operation of any alternative working arrangements, so approved, will depend on the Employer being satisfied that the efficient functioning of the Work Area is being enhanced by its operation.
 - (c) Such alternative working arrangements shall be deemed to be Flexible Rostering Arrangements.
- (6) Flexible Rostering Arrangements:
- (a) The average of 40 hours per week is to be worked in any combination of between six to 12 hour shifts over an agreed period, as determined by the Employer.
 - (b) All rosters:
 - (i) must be developed in consultation with affected Employees;
 - (ii) must meet operational and service delivery requirements; and
 - (iii) must comply with relevant Occupational Safety and Health legislation, Codes of Practice, Guidance Notes and Australian and Industry Standards.
- (7) Shift Work Provisions:
- (a) Employees shall be designated to work Prescribed Hours of Duty in the category of shifts as set out below:
- | | |
|-----------------|---|
| Day shift | Any shift which commences on or between 0600 hours and 1030 hours each day. |
| Afternoon shift | Any shift which commences on or between 1100 hours and 1630 hours each day. |
| Evening shift | Any shift which commences on or between 1700 hours and 1930 hours each day. |
| Night shift | Any shift which commences on or between 2000 hours and 0530 hours each day. |
- (8) Shifts shall be worked as required by local conditions, provided that:
- (a) in accordance with Occupational Safety and Health principles, additional Employees may be rostered on particular days from day shift onto afternoon, evening or night shift in any week to cover Known Situations;
 - (i) such changes as prescribed in subclause (8)(a) of this clause shall be indicated in advance on rosters when rosters are posted in accordance with subclause (9) of this clause;
 - (ii) In the event any roster is altered for a Known Situation, where Practicable a minimum of 24 hours' notice should be given to the Employee affected by such alteration; and
 - (b) to the extent Practicable, shifts shall be distributed equally between all shift working Employees during a three month roster cycle or such other cycle as agreed between the supervisor and majority of affected Employees.
- (9) Posting and Varying a Roster:
- (a) A roster shall be posted at each place of employment not later than 1300 hours on the Tuesday preceding the week to be worked, except fortnightly rosters which shall be posted at each place of employment no later than 1300 hours on the Tuesday preceding the fortnight to be worked. The roster will show hours of duty and rest days for the ensuing week or fortnight. Such rosters may be varied or suspended by the Officer in Charge, supervisor or another Duly Authorised Officer in an Emergency, where such action is in the Public Interest, or where such action represents Specific Managerial Requirements.
 - (b) The roster pattern is to remain in place for the full settlement period. However, the Employee may request to change the shift they have been rostered to work to meet a change in personal circumstances. Such changes may be made after the roster has been posted, and if agreed by the Employer. Shift allowances will only be paid for shifts actually worked.
 - (c) The starting times of shifts may be varied daily, but only within the parameters of the shift type as specified in subclause (7) of this clause. Where Practicable, an Employee will be given a minimum of 24 hours' notice of any alteration to the start time of his or her rostered shift.
 - (d) The shift type, that is, day, afternoon, evening or night shift may not be altered after the roster is posted except as provided in subclauses (8)(a), (9)(a) or (9)(b) of this clause.

- (e) Where, as a result of attendance at Court, from matters arising during the course of an Employee's duties, a combination of afternoon and day shift or evening and day shift or, in the case of a flexible roster, night and day shift is rostered in any week an amount equivalent to the shift allowance provided under clause 18 – Shift Allowance shall be paid for each day shift rostered due to the attendance at Court.
- (10) Broken Shifts:
Notwithstanding the provisions of this clause, the daily hours may be worked as a broken shift:
- (a) if the Employee applies in writing for permission to work such shifts; and
- (b) if the Employer agrees.
- (11) Meal Breaks:
- (a) (i) Employees are entitled to the following paid meal breaks:
- (aa) eight hour shift – 40 minutes
- (bb) nine hour shift – 45 minutes
- (cc) ten hour shift – 50 minutes
- (dd) twelve hour shift – one hour
- (ii) At the election of the Employee and with the approval of the Officer in Charge or supervisor the paid meal period for nine, 10 and 12 hour shifts may be taken as two breaks. If the paid meal break is not able to be taken only one meal claim under subclause (11)(c) of this clause is payable.
- (b) A meal break taken in accordance with subclause (11)(a) of this clause shall commence at a time within the 4th, 5th or 6th hour of the commencement of an eight or nine hour shift or within the 5th, 6th or 7th hour of the commencement of a ten or twelve hour shift. This meal break shall be considered as time worked.
- (c) Should circumstances arise whereby an Employee is prevented by continuous duty from partaking a meal as provided in subclause (11)(a) of this clause, such Employee shall be reimbursed in accordance with the rate prescribed by Item 15 of Schedule C – Travelling, Transfer and Relieving Allowance, provided that an Employee shall only be entitled to one claim per shift.
- (d) The provisions of this subclause shall not apply to an Employee in receipt of any entitlement prescribed under clause 19 – Camping Allowance, clause 22 – Relieving Allowance, or clause 23 – Travelling Allowance.
- (e) Where shifts of other than eight hours are worked, meal periods, commencement time of meal periods and shift allowances provided under subclause (1) of clause 18 – Shift Allowance shall be allowed on a pro rata basis according to the number of hours in the shift.
- (12) Ten Hour Break Between Shifts:
- (a) Subject to the provisions of this clause an Employee shall, where Practicable, be allowed a break between shifts in the following terms:
- (i) Other than in an Emergency or in the Public Interest, an Employee shall be allowed at least 10 consecutive hours off duty between the end of one ordinary shift and the commencement of the next ordinary hours shift.
- (ii) Where an Employee who has not had at least 10 consecutive hours off duty since the completion of his or her last ordinary shift is fatigued due to authorised Overtime and there is four hours or more of the next rostered shift remaining to be worked, the Employee may, with the approval of his or her Officer in Charge, supervisor or another Duly Authorised Officer, be excused from such part of the shift to allow the designated break and shall be deemed to have commenced that shift at the rostered start time. Where a part shift is worked a shift penalty, if appropriate, will be paid.
- (iii) Where an Employee, who has not had at least 10 consecutive hours off duty since the completion of his or her last ordinary shift, is fatigued due to authorised Overtime and there are less than four hours of the rostered shift remaining to be worked, the Employee may, with the approval of his or her Officer in Charge, supervisor or another Duly Authorised Officer, be excused from duty and shall be deemed to have worked the shift. However in these circumstances, a shift allowance will not be paid.
- (iv) Overtime is to be documented as directed by an Officer in Charge, supervisor or another Duly Authorised Officer.
- (v) An Employee seeking to be excused from his or her next rostered shift or part shift must personally contact his or her Officer in Charge, supervisor or another Duly Authorised Officer for approval prior to the commencement of the shift. Such approval shall not be withheld except in an Emergency or in the Public Interest.
- (13) Weekends off Duty:
- (a) Where Practicable, an Employee should be allowed four rostered weekends off duty over each period of 12 weeks.
- (14) Christmas/New Year:
- (a) Where Practicable, an Employee should be allowed one Christmas Day and one New Year's Eve off duty in each three year period.

- (b) For the purpose of this subclause:
- (i) **Christmas Day** means 0000 hours 25 December to 2359 hours 25 December; and
 - (ii) **New Year's Eve** means 1800 hours 31 December to 1759 hours 1 January.

Clause 12 – Part Time Employment

- (1) **Hours**
- (a) A Part Time Employee may be employed to work an average of less than 40 hours per week. The provisions of clause 11 - Hours of Duty shall apply on a pro rata basis with the exception of subclause (8)(b) of that clause.
 - (b) A Part Time Employee may also be employed on an irregular basis from week to week, but with a set amount of hours over a prescribed period (e.g. 200 hours over six months).
 - (c) A Part Time Employee's hours may be varied by the Employer with the consent of the Employee.
 - (d) Where a Part Time Employee does not consent to vary their hours, the additional hours worked are to be paid at overtime rates.
- (2) **Overtime**
- (a) Where a Part Time Employee does consent to vary their hours, all time worked in excess of eight hours in a day constitutes overtime unless shifts in excess of eight ordinary hours have been rostered for that Work Area, in which case, all hours in excess of the ordinary hours rostered for that Work Area in a day constitute overtime.
 - (b) All time worked in excess of 40 hours in a week by a Part Time Employee constitutes overtime.
 - (c) Where a Part Time Employee does not consent to vary their hours as provided in subclause (1)(c) of this clause the additional hours worked are to be paid at overtime rates. This clause does not apply where a Part Time Employee has been rostered to work a New Year or Christmas Shift in accordance with subclause (14) of clause 11 – Hours of Duty.
- (3) **Salary**
- (a) A Part Time Employee shall be paid a proportion of the appropriate full time salary contained in clause 15 - Salary dependent on the number of hours worked. The salary shall be calculated in accordance with the following formula:

$$\frac{\text{Hours Worked Per fortnight}}{80} \times \frac{\text{Full-Time fortnightly Wages}}{1}$$
 - (b) A Part Time Employee shall be entitled to all available salary increments, on the same basis as a full time Employee, on a pro rata basis by calculating the hours worked by the Part Time Employee each fortnight as a proportion of 80.
- (4) **Shift Allowance**
- (a) A Part Time Employee working ordinary hours shifts of other than eight hours shall be paid a proportion of the appropriate allowance contained in subclause (1) of clause 18 – Shift Allowances.
- (5) **Other Provisions**
- (a) Other provisions of this Enterprise Order apply to Part Time Employees on a pro rata basis.
- (6) **Accommodation of Requests to Work Part Time**
- (a) The Employer shall, where Practicable, accommodate reasonable requests from Employees to work part time hours or to vary part time hours.

Clause 13 – Overtime

- (1) For the purpose of this clause:
- (a) **Overtime** means all work performed only at the direction of the Employer or a Duly Authorised Officer outside the Prescribed Hours of Duty. Direction to perform overtime shall be given at the time the circumstances arise to work outside the Prescribed Hours of Duty. Where it is not feasible for the Employee to seek permission to work overtime prior to doing so, the circumstances shall be reported at the first available opportunity to the Employer or a Duly Authorised Officer who shall, if the working of overtime was justified, retrospectively authorise the overtime.
 - (b) **Prescribed Hours of Duty** means an Employee's normal working hours as prescribed by the Employer in accordance with clause 11 – Hours of Duty.
 - (c) **Ordinary Travelling Time** means time that an Employee would have ordinarily spent in travelling once daily from the Employee's home to the Employee's usual Headquarters and home again.
 - (d) **Excess Travelling Time** means all time travelled on official business outside Prescribed Hours of Duty and away from the Employee's usual Headquarters in accordance with subclause (5) of this clause.
 - (e) **Fortnightly Salary** means an Employee's substantive salary exclusive of any allowances such as temporary special allowance and/or higher duties allowance unless otherwise approved by the Employer. Provided that a special allowance or higher duties allowance shall be included in Fortnightly Salary when Overtime is worked on duties for which these allowances are specifically paid.
- (2) **Reasonable Hours of Overtime:**
- (a) The Employer may require an Employee to work reasonable Overtime at overtime rates as specified in this clause.

- (b) An Employee may refuse to work Overtime in circumstances where the working of such Overtime would result in the Employee working hours which are unreasonable, having regard to:
 - (i) any risk to Employee health and safety;
 - (ii) the Employee’s personal circumstances including any family responsibilities;
 - (iii) the needs of the workplace;
 - (iv) the notice (if any) given by the Employer of the Overtime and by the Employee of his or her intention to refuse it; and
 - (v) any other relevant matter.

(3) Overtime:

- (a) An Employee who works Overtime for a greater period than 30 minutes shall be entitled to payment in accordance with subclause (3)(c) of this clause, or time off in lieu of payment in accordance with subclause (3)(b) of this clause, or any combination of payment or time off in lieu.

(b) Time off in lieu:

- (i) An Employee who performs authorised Overtime may elect to be paid for such Overtime or alternatively be allowed time off in lieu thereof.
- (ii) Where the Employee’s election is for time off in lieu of Overtime such time off in lieu is to be taken at a time which is mutually agreed by the Employee and a Duly Authorised Officer.
- (iii) As soon as Practicable after the completion of each period of authorised Overtime the Employee shall submit a claim in a form directed by the Employer in which he or she shall elect to be either paid for the Overtime duty or given time off in lieu thereof.
- (iv) The Employee is required to clear accumulated time off in lieu within two months of the Overtime being performed. Provided that by agreement between the Employee and the Duly Authorised Officer, time off in lieu of payment for Overtime may be accumulated beyond two months from the time the Overtime is performed so as to be taken in conjunction with periods of approved leave.
- (v) If the Employee is not released to clear leave within two months of the Overtime being performed and no further agreement prescribed in subclause (3)(b)(iv) of this clause is reached, the Employee shall be paid for the Overtime worked.
- (vi) Time off in lieu shall be calculated at the ordinary hours of pay.

(c) Payment for Overtime:

- (i) For the first three hours worked outside the Prescribed Hours of Duty on any one day at the rate of time and one half:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{80} \times \frac{3}{2}$$

- (ii) After the first three hours worked outside the Prescribed Hours of Duty on any one day at the rate of double time:

$$\text{i.e. } \frac{\text{Fortnightly Salary}}{80} \times \frac{2}{1}$$

(d) Time Worked Past Midnight:

Where an Employee is required to work a continuous period of Overtime which extends past midnight into the succeeding day the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of payment provided for in this subclause.

(e) Minimum Periods for Return to Duty:

- (i) An Employee, having received prior notice, who is required to return to duty:
 - (aa) on any weekly leave day, other than during Prescribed Hours of Duty, shall be entitled to payment at the rate in accordance with subclause (3)(c) of this clause for a minimum of three hours; and
 - (bb) before or after the Prescribed Hours of Duty on any day shall be entitled to payment at the rate in accordance with subclause (3)(c) of this clause for a minimum period of one and one half hours.
- (ii) For the purpose of subclause (3)(e)(i) of this clause, where an Employee is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.
- (iii) The provisions of subclause (3)(e)(i) of this clause shall not apply in cases where it is customary for an Employee to return to the place of employment to perform a specific job outside the Prescribed Hours of Duty, or where the Overtime is continuous (subject to a meal break) with the completion or commencement of Prescribed Hours of Duty.

- (iv) Where an Employee is required to return to duty at a time when he or she would not ordinarily have been on duty, and no notice of this recall was given prior to the completion of usual duty on the last day of work prior to the day on which recalled to duty, then if recalled to duty:
 - (aa) on any weekly leave day, otherwise than during Prescribed Hours of Duty, he/she shall be entitled to payment at the rate in accordance with subclause (3) of this clause for a minimum period of three hours.
 - (bb) before or after the Prescribed Hours of Duty on any day other than a weekly leave day he/she shall be entitled to payment at the rate in accordance with subclause (3) of this clause for a minimum period of two and a half hours.
- (v) For the purposes of subclause (3)(fe)(iv) of this clause:
 - (aa) Time spent in travelling to and from the place of duty where the Employee is actually recalled to duty shall be included with actual duty performed for the purpose of overtime payment.
 - (bb) An Employee recalled for duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an Employee called out more than once within any such minimum period shall not be entitled to any further payment for the time worked within that minimum period.
 - (cc) Where an Employee is required to work beyond the minimum period on the first or subsequent recall for duty, the additional time worked at the conclusion of that minimum period shall be paid in accordance with the appropriate rate in subclause (3) of this clause.
 - (dd) Where an Employee is recalled for a second or subsequent period of duty outside of the initial minimum period, the Employee shall be entitled to payment for a new minimum period, and the provisions of subclause (3)(e)(iv) of this clause shall be reapplied.
 - (ee) No claim for payment shall be allowed in respect of any recall to duty, including travelling time, which amounts to less than 30 minutes.
- (f) Overtime at a Place Other than Usual Headquarters:
 - (i) When an Employee is directed to work Overtime at a place other than usual Headquarters, and provided that the place where the Overtime is to be worked is situated in the area within a radius of 50 kilometres from usual Headquarters, and the time spent in travelling to and from that place is in excess of the time which an Employee would ordinarily spend in travelling to and from usual Headquarters, and provided such travel is undertaken on the same day as the Overtime is worked, then such excess time shall be deemed to form part of the Overtime worked.
 - (ii) Except as provided in subclauses (5)(b) and (5)(e) of this clause, when an Employee is directed to work Overtime at a place other than usual Headquarters, and provided that the place where the Overtime is to be worked is situated outside the area within a radius of 50 kilometres from usual Headquarters and the time spent in travelling to and from that place is in excess of the time which the Employee would ordinarily spend in travelling to and from usual Headquarters, then the Employee shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (5) of this clause.
- (g) Ten Hour Break:
 - (i) When Overtime is worked, a break of not less than 10 hours shall be taken between the completion of work on one day and the commencement of work on the next, without loss of salary for ordinary working time occurring during such absence.
 - (ii) Provided that where an Employee is directed to return to or continue work without the break provided in subclause (3)(hg)(i) of this clause, then the Employee shall be paid at double the ordinary rate until released from duty, or until the Employee has had 10 consecutive hours off duty without loss of salary for ordinary working time occurring during such absence.
- (4) Meal Allowances:
 - (a) Except in the case of Emergency, an Employee shall not be compelled to work more than five hours Overtime duty without a meal break. At the conclusion of a meal break, the calculation of the five hour limit recommences.
 - (b) An Employee required to work Overtime of not less than two hours, and who actually purchases a meal shall be reimbursed in accordance with Schedule A – Overtime Meal Allowance, in addition to any payment for Overtime to which that Employee is entitled.
 - (c) An Employee working a continuous period of Overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Schedule A – Overtime Meal Allowance until that Employee has worked a further five hours Overtime from the time of the last meal break.
 - (d) If an Employee, having received prior notification of a requirement to work Overtime, is no longer required to work Overtime, then the Employee shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.

(5) Excess Travelling Time:

An Employee eligible for payment of Overtime, who is required to travel on official business outside normal working hours and away from usual Headquarters shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates on a normal working day and at time and one half rates on any weekly leave day, other than during Prescribed Hours of Duty, provided that:

- (a) such travel is undertaken at the direction of the Employer;
- (b) such travel shall not include:
 - (i) time spent in travelling by an Employee on duty at a temporary Headquarters to the Employee's home for weekends for the Employee's own convenience;
 - (ii) time spent in travelling by plane between 2300 hours and 0600 hours;
 - (iii) time spent in travelling by train between 2300 hours and 0600 hours;
 - (iv) time spent in travelling by ship when meals and accommodation are provided;
 - (v) time spent in travel resulting from the permanent transfer or promotion of an Employee to a new location;
 - (vi) time of travelling in which an Employee is required by the Employer to drive, outside ordinary hours of duty, a departmental vehicle or to drive the Employee's own motor vehicle involving the payment of mileage allowance, but such time shall be deemed to be Overtime and paid in accordance with subclause (3) of this clause. Passengers, however, are entitled to the provisions of subclause (5) of this clause; and
 - (vii) time spent in travelling to and from the place at which Overtime or a recall to duty is performed, when that travelling time is already included with actual duty time for the payment of Overtime.
- (c) For the purpose of this clause, Employees based in the Metropolitan Area - as part of their regular job requirements - may be required to perform Overtime duties anywhere within the District to which they are appointed and the Perth Watch House. Time spent travelling to and from the place in which Overtime duties are to be performed, at either of the aforementioned locations, will not be deemed as time worked nor will time off in lieu of such travel be granted.
- (d) Time off in lieu will not be granted for periods of less than 30 minutes.
- (e) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty, which is in excess of the Employee's Ordinary Travelling Time.
- (f) Where the urgent need to travel compels an Employee to travel during the Employee's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.
- (g) In the case of an Employee absent from usual Headquarters, not involving an overnight stay, the time spent by the Employee, outside the Prescribed Hours of Duty, in waiting between the time of arrival at place of duty and the time of commencing duty, and between the time of ceasing duty and the time of departure by the first available transport, shall be deemed to be Excess Travelling Time.
- (h) In the case of an Employee absent from usual Headquarters that does involve an overnight stay, the time spent by the Employee, outside the Prescribed Hours of Duty, in waiting between the time of ceasing duty on the last day and the time of departure by the first available transport, shall be deemed to be Excess Travelling Time.

(6) Special Conditions:

Any group of Employees whose duties necessarily entail special conditions of employment shall not be subject to the Prescribed Hours of Duty in clause 11 – Hours of Duty if the Employer so determines.

Clause 14 – Casual Employment

(1) Salary

- (a) A Casual Employee shall be paid for each hour worked at the appropriate classification contained in clause 15 - Salary in accordance with the following formula:

$$\frac{\text{Fortnightly salary}}{80}$$

With the addition of 20% in lieu of annual leave, sick leave and payment for public holidays.

(2) Conditions of Employment

- (a) The employment of a Casual Employee may be terminated at any time by the Casual Employee or the Employer giving to the other, one hour's prior notice. In the event of the Employer or Casual Employee failing to give the required notice, one hour's salary shall be paid or forfeited.
- (b) The provisions of clause 13 – Overtime do not apply to Casual Employees who are paid by the hour for each hour worked. Additional hours are paid at the normal casual rate.
- (c) A Casual Employee shall be informed that their employment is Casual and that they have no entitlement to paid leave, with the exception of bereavement leave, before they are engaged.
- (d) A Casual Employee is entitled to a minimum payment of three hours per shift, regardless of time actually worked.
- (e) Shift penalties are paid if the type of shift the Employee is working attracts a penalty.

PART D - SALARY**Clause 15 – Salary**

- (1) For the purpose of this clause:
- (a) **Normal Salary** means salary as provided at subclause (2) of this clause and does not include overtime or other additional allowances.
- (2) (a) Rates of Pay – General:
- (i) The salary rates in the following table are payable in respect of ordinary hours of duty as provided in clause 11 – Hours of Duty.
- (ii) The amounts set out in Column A were the rates applicable to Employees prior to 2 November 2016.
- (iii) The amounts set out in Column B, which reflect a 1.5% increase to the rates in Column A agreed between the parties, have been paid on and from the first pay period commencing on or after 2 November 2016.
- (iv) The amounts prescribed in Column C, which reflect a 1.5% increase to the rates in Column B, are to be paid on and from the first pay period commencing on or after 2 November 2017.

	Column A Rate prior to 2 November 2016 (\$ per annum)	Column B Rate from first pay period on or after 2 November 2016 (\$ per annum)	Column C Rate from first pay period on or after 2 November 2017 (\$ per annum)
Police Auxiliary - Cadets			
Under 17 years	23,743	24,099	24,460
17 years	28,354	28,779	29,211
18 years	32,964	33,458	33,960
19 years	37,577	38,141	38,713
20 years	42,186	42,819	43,461
Over 21 years	46,104	46,796	47,498
Academy In-Training			
Recruits in Training	50,362	51,117	51,884
Band One			
AP1.1	60,254	61,158	62,075
AP1.2	61,856	62,784	63,726
AP1.3	63,457	64,409	65,375
AP1.4	65,059	66,035	67,026
AP1.5	66,660	67,660	68,675
Band Two			
AP2.1	68,661	69,691	70,736
AP2.2	70,033	71,083	72,149
AP2.3	71,434	72,506	73,594
AP2.4	72,864	73,957	75,066
AP2.5	74,320	75,435	76,567
Band Three			
AP3.1	77,045	78,201	79,374
AP3.2	78,584	79,763	80,959
AP3.3	80,158	81,360	82,580
AP3.4	81,761	82,987	84,232
AP3.5	83,395	84,646	85,916

- (3) Incremental Progression:
- (a) Employees will progress to the maximum of their salary band by annual increments, after 12 months' continuous service at each increment point, unless there is an adverse report on the Employee's performance and conduct which recommends the non-payment of an annual increment.
- (b) The following process shall apply where a report on an Employee's performance or conduct recommends non-payment of an annual increment:
- (i) The Employee will be shown the report which shall include details of previous warnings and counselling and shall be required to initial it.
- (ii) The Employee will be provided with an opportunity to comment in writing.
- (iii) The Director of Human Resources will immediately consider an Employee's comments and make a decision as to whether to approve the payment of the increment or withhold the payment of the increment for a specific period.
- (iv) Where the increment is withheld, a performance management plan will be established, including regular monitoring of the Employee's compliance. The Employer will, prior to the expiry of the specified period, complete a further report in which the above provisions will apply.

- (v) The non-payment of an increment will not change the normal anniversary date of any further increment payments.
- (4) Formula Rates:
- (a) For the purpose of ascertaining the rate per fortnight, the total annual salary shall be multiplied by 12 and divided by 313.
 - (b) For the purpose of ascertaining the rate per day, the rate per fortnight shall be divided by 10.
 - (c) For the purpose of ascertaining the rate per hour, the annual salary prescribed in subclause (2) of this clause shall be divided by 313, multiplied by 12, and divided by 80.
- (5) Payment of Salary:
- (a) An Employee's salary shall be paid by direct funds transfer to the credit of an account nominated by the Employee at a Bank, Building Society or Credit Union approved by the Under Treasurer or an Accountable Officer.
- (6) Where an Employee has previous relevant experience with WA Police, the Employer may take this into consideration in re-engaging such an Employee. The Employer has absolute discretion to:
- (a) exempt the Employee from undertaking part or full academy training;
 - (b) waive the requirements for the Employee to undertake a period of probation; and/or
 - (c) appoint the Employee to a salary which recognises the previous relevant police experience.
- (7) Where an Employee has previous relevant experience in another policing jurisdiction or service, the Employer may take this into consideration in employing such an Employee. The Employer has absolute discretion to:
- (a) exempt the Employee from undertaking part or full academy training;
 - (b) determine a reduction in the probationary period; and/or
 - (c) appoint the Employee to a salary which recognises the previous relevant police experience.
- (8) Recovery of Overpayments:
- (a) Overpayments may be recovered by the Employer at a rate agreed between the Employer and Employee, provided that the rate at which the overpayment is recovered is not less than the rate at which it was overpaid or \$50.00 per week, whichever is the lesser amount, per pay period.
 - (b) If deduction in this manner should cause undue financial hardship, a lesser rate of repayment may be negotiated.
- (9) Recovery of Underpayments:
- (a) Where an error has resulted in an Employee being underpaid by more than 10% of their Normal Salary, the Employer will reinstate the shortfall within two working days of the error being notified to the Human Resources Directorate.
 - (b) Where the underpayment is less than 10% of an Employee's Normal Salary, the shortfall will be included in the next available pay, where Practicable.
 - (c) Where an error has resulted in an Employee not being paid all or part of any payments due in addition to their Normal Salary (such as overtime or other allowances), the Employer will make every effort to include such payment in the next available pay following the error being notified to the Human Resources Directorate.
- (10) Salary Packaging:
- (a) An Employee may, by agreement with the Employer, enter into a salary packaging arrangement in accordance with the WA Police Flexible Remuneration Packaging Agreement or any similar salary packaging arrangements offered by the Employer.
 - (b) Salary packaging is an arrangement whereby the entitlements under this Enterprise Order, contributing toward the Total Employment Cost of an Employee, can be reduced by and substituted with another, or other, benefits.
 - (c) For the purpose of this subclause, **Total Employment Cost** (TEC) means the cost of salary and other benefits aggregated to a total figure or TEC, less the cost of Compulsory Employer Superannuation Guarantee contributions. TEC is calculated by adding:
 - (i) base salary;
 - (ii) other cash allowances (e.g. annual leave loading);
 - (iii) non-cash benefits (e.g. superannuation, motor vehicles);
 - (iv) any Fringe Benefit Tax liabilities currently paid; and
 - (v) any variable components.
 - (d) Where an Employee enters into a salary packaging arrangement, the Employee will be required to enter into a separate written agreement with the Employer that sets out the terms and conditions of the arrangement.
 - (e) The salary packaging arrangement must be cost neutral in relation to the total cost to the Employer.
 - (f) The salary packaging arrangement must comply with relevant taxation laws and the Employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the Employee.
 - (g) In the event of any increase or additional payments of tax or penalties associated with the employment of the Employee under the salary packaging agreement or the provision of Employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the Employee.

- (h) In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this subclause or any other reason as agreed between the Employee and the Employer, the Employee may vary or cancel a salary packaging arrangement.
- (i) The salary of the Employee prior to the application of the salary packaging arrangement will be utilised for the purposes of calculating overtime and annual leave loading.
- (j) The Employer shall not unreasonably withhold agreement to salary packaging on request from an Employee.

PART E – ALLOWANCES

Clause 16 – Adjustment of Allowances

- (1) The rates applying to Motor Vehicle Allowance, Travelling Allowance, Transfer Allowance, Removal Allowance, Relieving Allowance, Camping Allowance, and Overtime Meal Allowance contained in this Enterprise Order and relevant Schedules shall be reviewed and adjusted administratively as required in accordance with the corresponding rates under the *Public Service Award 1992*.
- (2) Where there is a separate formula agreed for supper allowances, rates are to be adjusted in accordance with such formula.
- (3) Wherever an allowance is expressed as an annual rate in this Enterprise Order, pro rata payment only shall be allowed if an Employee does not qualify for a complete year.
- (4) For the purpose of ascertaining a fortnightly or daily rate of an annual allowance, the formula prescribed in subclause (4) of clause 15 – Salary shall apply.
- (5) Daily rates of allowance computed in accordance with the foregoing formula shall be payable in respect of days of ordinary duty only.

Clause 17 – On Call, Close Call and Standby Allowances

- (1) For the purpose of this clause:
 - (a) **On Call** shall mean a situation in which an Employee is rostered, or directed by a Duly Authorised Officer, to be available to respond forthwith for duty outside of the Employee's ordinary working hours or shift. An Employee placed On Call shall remain contactable by telephone or paging system for all of such time unless working in response to a call or with the consent of his or her appropriate senior officer.
 - (b) **Close Call** shall mean a situation in which an Employee is rostered, or directed by a Duly Authorised Officer, that they are or may be required to attend for extra duty sometime before their next normal time of commencing duty and that the Employee is to remain at his or her residence and be required to be available for immediate recall to duty.
 - (c) **Standby** shall mean a situation in which an Employee is rostered or directed by a Duly Authorised Officer to remain in attendance at his or her place of employment at that time, overnight and/or over a non-working day, and may be required to perform certain tasks periodically or on an ad hoc basis. Such Employees shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where Practicable.
- (2) An Employee who is authorised by the Employer or a Duly Authorised Officer to hold themselves available under any of the conditions contained in subclause (1) of this clause shall be paid the appropriate hourly allowance as follows:

	Prior to 2 November 2016	From first pay period on or 2 November 2016 (1.5%)	From first pay period on or after 2 November 2017 (1.5%)
On Call	\$7.05	\$7.16	\$7.27
Close Call	\$10.51	\$10.67	\$10.83
Standby	\$13.96	\$14.17	\$14.38

- (3) Payment in accordance with subclause (2) of this clause shall not be made in respect to any period for which payment is otherwise made in accordance with the provisions of clause 13 – Overtime when the Employee is recalled to work.
- (4) An Employee, whilst in a restricted situation specified in subclause (1) of this clause, shall receive a minimum payment of four hours regardless of the actual specified period.
- (5) An Employee rostered according to subclause (1) of this clause, shall for the purpose of overtime, be deemed to have commenced duty at time of notification of recall.

Clause 18 – Shift Allowance

- (1) Employees shall be paid the following allowance for each ordinary eight hour shift in accordance with the shift type as rostered.

	Prior to 2 November 2016	From first pay period on or after 2 November 2016 (1.5%)	From first pay period on or after 2 November 2017 (1.5%)
Saturday and Sunday Day Shift Penalties	\$36.66	\$37.21	\$37.77
Afternoon Shift Penalties	\$41.76	\$42.39	\$43.03
Evening Shift Penalties	\$53.26	\$54.06	\$54.87
Night Shift Penalties	\$62.63	\$63.57	\$64.52

- (2) Employees who work shifts of other than eight hours duration under the provisions of clause 11 — Hours of Duty or clause 12 – Part Time Employment shall be paid the shift allowance prescribed in subclause (1) of this clause where appropriate on a pro rata basis.
- (3) Pro Rata Arrangements for Twelve, Ten and Nine Hour Shifts
- (a) Where an eight hour block of a 12 hour shift is worked within the night shift span of hours (2000 hours to 0530 hours), a night shift allowance will be paid in conjunction with a 50% entitlement to the evening shift allowance. For example, an Employee commencing a 12 hour shift at 1900 hours will be entitled to four hours at the evening shift allowance and eight hours at the night shift allowance.
- (b) For all other 12 hour shifts, the shift penalty to apply is based on commencement time for the first eight hours and the following shift type for the remaining four hours. For example, an Employee commencing a shift at 0700 hours will be considered to have worked a day shift (no penalty unless weekend) and will be paid 50% of the afternoon shift allowance.
- (c) For a 10 hour evening shift, allowances will be applied as follows, depending on the start time:
1700 hours to 1730 hours start time: shift allowance payable = 1.25 evening shift.
1800 hours to 1930 hours start time: shift allowance payable = 0.25 evening shift + 1.00 night shift.
- (d) For a nine hour evening shift, allowances will be applied as follows, depending on the start time:
1700 hours to 1730 hours start time: shift allowances payable = 1.125 evening shift.
1800 hours to 1930 hours start time: shift allowance payable = 0.125 evening shift + 1.00 night shift.
- (e) For all other applicable nine or 10 hour shifts, the shift allowance is based on commencement time and is paid pro rata. For example, a 10 hour shift will incur a 1.25 of the applicable shift allowance; a nine hour shift will incur a 1.125 of the applicable shift allowance.

Clause 19 – Camping Allowance

- (1) For the purpose of this clause:
- (a) **Camp of a Permanent Nature** means single room accommodation in skid mounted or mobile type units, caravans, or barrack type accommodation where the following are provided in the camp:
- (i) water is freely available;
 - (ii) ablutions including a toilet, shower or bath and laundry facilities;
 - (iii) hot water system;
 - (iv) a kitchen, including a stove and table and chairs, except in the case of a caravan equipped with its own cooking and messing facilities;
 - (v) an electricity or power supply; and
 - (vi) beds and mattresses except in the case of caravans containing sleeping accommodation.
- For the purpose of this definition, caravans located in caravan parks or other locations where the above are provided shall be deemed a Camp of a Permanent Nature.
- (b) **House** means a house, duplex or cottage (including transportable type accommodation) which is self-contained and in which the facilities prescribed for Camp of a Permanent Nature are provided.
- (c) **Other than a Permanent Camp** means a camp where any of the above is not provided.
- (2) An Employee, who is stationed in a Camp of a Permanent Nature, shall be paid the appropriate allowance prescribed by Item (1) or Item (2) of Schedule B – Camping Allowance for each day spent camping.
- (3) An Employee who is stationed in a camp - Other than a Permanent Camp - or is required to camp out, shall be paid the appropriate allowance prescribed by Item (3) or Item (4) of Schedule B – Camping Allowance for each day spent camping.

- (4) Employees who occupy a House shall not be entitled to allowances prescribed by this clause.
- (5) Employees accommodated at a government institution, hostel or similar establishment shall not be entitled to allowances prescribed by this clause.
- (6) Where an Employee is provided with food and/or meals by the Employer free of charge, then the Employee shall only be entitled to receive half the appropriate allowance to which the Employee would otherwise be entitled for each day spent camping.
- (7)
 - (a) An Employee shall not be entitled to receive an allowance for periods in excess of 91 consecutive days unless the Employer otherwise determines. Provided that where an Employee is reimbursed under the provisions of clause 23 – Travelling Allowance, then such periods shall be included for the purpose of determining the 91 consecutive days.
 - (b) The Employer, in reviewing any claim under this subclause, may determine an allowance other than what is contained in Schedule B – Camping Allowance.
- (8) When camping, an Employee shall be paid the allowance on Saturdays and Sundays if available for work immediately preceding and succeeding such days and no deduction shall be made under these circumstances when an Employee does not spend the whole or part of the weekend in camp, unless the Employee is reimbursed under the provisions of clause 23 – Travelling Allowance.
- (9)
 - (a) This clause shall be read in conjunction with clauses 22 – Relieving Allowance, 23 – Travelling Allowance, and 25 – Transfer Allowance for the purpose of paying allowances, and camping allowance shall not be paid for any period in respect of which travelling, transfer or relieving allowances are paid. Where portions of a day are spent camping, the formula contained in clause 23 – Travelling Allowance shall be used for calculating the portion of the allowance to be paid for that day.
 - (b) For the purpose of this subclause arrival at Headquarters shall mean the time of actual arrival at camp. Departure from Headquarters shall mean the time of actual departure from camp or the time of ceasing duty in the field subsequent to breaking camp, whichever is the latter.
- (10) Employees in receipt of an allowance under this clause shall not be entitled to receive the incidental allowance prescribed by clause 23 – Travelling Allowance.
- (11) Whenever an Employee provided with a caravan is obliged to park the caravan in a caravan park he or she shall be reimbursed the rental charges paid to the authority controlling the caravan park, in addition to the payment of camping allowance.
- (12) Where an Employee, who is not supplied with camping equipment by the Employer, hires such equipment as is reasonable and necessary, he or she shall be reimbursed such hire charges, in addition to the payment of camping allowances.

Clause 20 – Higher Duties Allowance

- (1) An Employee who is directed by the Employer to act in a position which has a minimum rate of pay higher than the ordinary rate of pay of his or her own substantive position, and who performs the full duties and accepts the full responsibility of the higher position for a continuous period of 40 or more consecutive working hours, shall, subject to the provisions of this clause, be paid an allowance equal to the difference between the Employee's own salary and the salary he or she would receive if he or she was permanently appointed to the position in which he or she is so directed to act.
- (2) An Employee who is directed by the Employer to perform the duties of a higher classification which has a minimum rate of pay higher than the ordinary rate of pay of his or her own substantive position and who performs the full duties and accepts the full responsibility of the higher classification for a continuous period of 40 or more consecutive working hours, shall, subject to the provisions of this clause, be paid a Temporary Special Allowance equal to the difference between the Employee's own salary and the salary he or she would receive if he or she was permanently appointed to the classification in which he or she is so directed to perform.
- (3) Where an Employee who has qualified for payment of higher duties allowance or temporary special allowance under this clause is required to act in another position or other positions which have a minimum rate of pay higher than the ordinary rate of pay of the Employee's own substantive position and he or she performs the full duties and accepts the full responsibility of the higher position for periods less than 40 consecutive working hours without any break in acting service, such Employee shall be paid a higher duties allowance for such periods; provided that payment shall be made at the highest rate the Employee has been paid during the term of continuous acting or at the rate applicable to the position in which he or she is currently acting – whichever is the lesser.
- (4) Where an Employee, who is in receipt of an allowance granted under this clause and has been so for a continuous period of 12 months or more, proceeds on a period of approved leave of absence of not more than 240 hours, he or she shall continue to receive the allowance for the period of leave. Provided that this subclause shall also apply to an Employee who has been in receipt of an allowance for less than 12 months if during his or her absence no other Employee acts in the position in which he or she was acting immediately prior to proceeding on leave and he or she resumes in the position immediately on return from leave.
- (5) Where an Employee who is in receipt of an allowance granted under this clause proceeds on a period of approved leave of absence of more than 240 hours, he or she shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

Clause 21 – Motor Vehicle Allowance

- (1) An Employee who is required to use his or her motor car or motorcycle for the performance of duties shall be paid an allowance at the appropriate rate prescribed in Schedule D – Motor Vehicle Allowance. In addition, he or she shall be paid an allowance of \$10.00 per month for each calendar month he or she is required to maintain a motor vehicle.
- (2) An Employee may request to his or her Officer in Charge or supervisor to use his or her motor car or motorcycle when travelling, in lieu of utilising the mode of transport that would have been provided by the Employer and the Officer in Charge or supervisor may approve such a request. Such a request and approval shall be in writing. In these circumstances, the Employee shall be paid an allowance at the appropriate rate prescribed in Schedule D – Motor Vehicle Allowance, provided that reimbursement is not to exceed the cost of the fare for the mode of transport that would have been provided by the Employer.
- (3) The provisions of subclause (2) of this clause do not apply to Employees travelling within the Metropolitan Area.

Clause 22 – Relieving Allowance

An Employee who is required to take up duty away from Headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the Employee's usual place of residence, shall be reimbursed reasonable expenses on the following basis:

- (1) Where the Employee is:
 - (a) supplied with accommodation and meals free of charge; or
 - (b) accommodated at a government institution, hostel or similar establishment and supplied with meals, reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule C – Travelling, Transfer and Relieving Allowance.
- (2) Where Employees are fully responsible for their own accommodation, meals and incidental expenses and Commercial Accommodation is utilised:
 - (a) For the first 49 days after arrival at the new locality, reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule C – Travelling, Transfer and Relieving Allowance.
 - (b) For periods in excess of 49 days after arrival in the new locality, reimbursement shall be in accordance with the rates prescribed in Column B, Items (4) to (8) of Schedule C – Travelling, Transfer and Relieving Allowance for Employees with Dependants or Column C, Items (4) to (8) of Schedule C – Travelling, Transfer and Relieving Allowance for other Employees; provided that the period of reimbursement under this subclause shall not exceed 49 days without the approval of the Employer.
- (3) Where Employees are fully responsible for their own accommodation, meals and incidental expenses and other than Commercial Accommodation is utilised, reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule C – Travelling, Transfer and Relieving Allowance.
- (4) Where the Employee is provided with accommodation free of charge and only some or no meals free of charge, reimbursement shall be at the applicable rate prescribed in Column A, Item (1), (2) or (3) of Schedule C – Travelling, Transfer and Relieving Allowance and the Employee shall be reimbursed for the appropriate breakfast, lunch and dinner not provided free of charge in accordance with the appropriate breakfast, lunch or dinner rates prescribed in Column A, Item (12), (13) or (14) of Schedule C – Travelling, Transfer and Relieving Allowance.
- (5) If an Employee whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the Employee shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of \$203.00 to cover incidental personal expenses; provided that an Employee shall receive no more than one lump sum of \$203.00 in any one period of three years.
- (6) Reimbursement of expenses shall not be suspended should an Employee become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with these provisions and the Employee continues to incur accommodation, meal and incidental expenses.
- (7) When an Employee who is required to relieve or perform special duties in accordance with the preamble of this clause is authorised by the Employer to travel to the new locality in the Employee's own motor vehicle, reimbursement for the return journey shall be as follows:
 - (a) Where the Employee will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by subclause (1) of clause 21 – Motor Vehicle Allowance.
 - (b) Where the Employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be in accordance with the appropriate rate prescribed by subclause (2) of clause 21 – Motor Vehicle Allowance. Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would otherwise be utilised for such return journey.
- (8) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the Employer.
- (9) The provisions of clause 23 – Travelling Allowance shall not operate concurrently with the provisions of this clause to permit an Employee to be paid allowances in respect of both travelling and relieving expenses for the same period; provided that where an Employee is required to travel on official business which involves an overnight stay away from the

Employee's temporary Headquarters the Employer may extend the periods specified in subclause (12) of this clause by the time spent in travelling.

- (10) An Employee who is directed to relieve another Employee or to perform special duty away from the Employee's usual Headquarters and is not required to reside temporarily away from his or her usual place of residence shall, if the Employee is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the Employee travelling by public transport to and from the place of temporary duty.
- (11) For the purpose of this clause, Employees based in the Metropolitan Area as part of their regular job requirements may be directed to relieve another Employee or to perform special duty anywhere within the District to which they are appointed and the Perth Watch House. Duties performed at either of these locations will not attract Relieving Allowance.

Clause 23 – Travelling Allowance

An Employee who travels on official business shall be reimbursed reasonable expenses on the following basis:

- (1) When a trip necessitates an overnight stay away from Headquarters and the Employee is supplied with accommodation and meals free of charge, reimbursement shall be in accordance with the rates prescribed in Item 1, 2 or 3 of Schedule C – Travelling, Transfer and Relieving Allowance. Such accommodation and meals shall be of an acceptable standard of at least single room accommodation with private toilet and bathroom facilities, where available.
- Where meals are supplied, the standard of such meals shall be reflective of the values in Items 12 and 13 of Schedule C – Travelling, Transfer and Relieving Allowance, where available.
- (2) When a trip necessitates an overnight stay away from Headquarters and the Employee is fully responsible for his or her own accommodation, meals and incidental expenses and Commercial Accommodation is utilised, reimbursement shall be in accordance with the rates prescribed in Item 4 to 8 of Schedule C - Travelling, Transfer and Relieving Allowance.
- (3) When a trip necessitates an overnight stay away from Headquarters and the Employee is fully responsible for his or her own accommodation, meals and incidental expenses and accommodation other than camping or Commercial Accommodation is utilised, reimbursement shall be in accordance with the rates prescribed in Item 9, 10 or 11 of Schedule C – Travelling, Transfer and Relieving Allowance.

- (4) To calculate reimbursement under subclauses (1), (2) and (3) of this clause for a part of a day, the following formulae shall apply:

(a) If departure from Headquarters is:

Before 0800 hours	100% of the daily rate
0800 hours or later but prior 1300 hours	90% of the daily rate
1300 hours or later but prior to 1800 hours	75% of the daily rate
1800 hours or later	50% of the daily rate

(b) If arrival back at Headquarters is:

0800 hours or later but prior to 1300 hours	10% of the daily rate
1300 hours or later but prior to 1800 hours	25% of the daily rate
1800 hours or later but prior to 2300 hours	50% of the daily rate
2300 hours or later	100% of the daily rate

(c) The rate to be applied is that applicable for the locality/town in which the Employee stays overnight, except for the final day or part thereof which is calculated at the rate for the previous overnight location.

- (5) When a trip necessitates an overnight stay away from Headquarters and the Employee is provided with accommodation free of charge but only some or no meals free of charge, reimbursement shall be at the rate prescribed in item 1, 2 or 3 of Schedule C – Travelling, Transfer and Relieving Allowance or for part of a day as proportioned in subclause (4) of this clause and the Employee shall be reimbursed for the appropriate breakfast, lunch or dinner not provided free of charge in accordance with the breakfast, lunch or dinner rates prescribed in Items 12, 13 or 14 of Schedule C – Travelling, Transfer and Relieving Allowance.
- (6) (a) (i) When an Employee stationed in the Metropolitan Area travels to a place outside of that area or an Employee stationed outside the Metropolitan Area travels to a place outside a radius of 24 kilometres measured from the Employee's Headquarters and the trip does not involve an overnight stay away from Headquarters, reimbursement for all meals claimed shall be at the rates set out in Item 12, 13 or 14 of Schedule C – Travelling, Transfer and Relieving Allowance, subject to the Employee's certification that each meal claimed was actually purchased and consumed over a recognised meal period and the Employee was outside the respective area for the whole of the recognised meal period.
- (ii) Provided that when an Employee departs from Headquarters before 0800 hours and does not arrive back at Headquarters until after 2300 hours on the same day the Employee shall be paid at the appropriate rate prescribed in Items 4 to 8 of Schedule C – Travelling, Transfer and Relieving Allowance.
- (b) For the purpose of subclause (6)(a) of this clause:
- (i) Where an ordinary hours shift is being worked the recognised meal break in that shift shall be 40 minutes in the case of an eight hour shift and on a pro rata basis where an ordinary hours shift of other than eight hours is being worked. Such meal period to be authorised by the Officer in Charge or supervisor to commence at some time within the 4th, 5th or 6th hour of the shift for an eight hour shift and on a pro rata basis for ordinary hours shifts of other than eight hours. For an ordinary hours shift only one meal may be purchased and consumed over the shift; and

- (ii) Where the travel extends beyond an ordinary hours shift:
- (aa) an Employee travelling a minimum of 10 hours shall be entitled to a further meal break; and
- (bb) for each further five hours travelled from the completion of the previous meal break, a further meal break.
- (iii) In determining the appropriate rate for the meal where the meal period falls between the span of hours in Column 1, the appropriate rate prescribed in Column 2 shall apply.

Column 1	Column 2
0600 hours or later but before 1100 hours	breakfast
1100 hours or later but before 1600 hours	lunch
1600 hours or later but before 2200 hours	dinner
2200 hours or later but before 0600 hours	supper

- (7) (a) An Employee stationed in the Metropolitan Area who is disadvantaged financially by additional travelling costs incurred due to a requirement to attend an Academy course for a period of five days or more may be paid a special allowance.
- (b) Each claim is to be dealt with on its individual merits with the maximum allowable reimbursement being the rate prescribed in Item 1 of Schedule C – Travelling, Transfer and Relieving Allowance.
- (8) In addition to the rates contained in Schedule C – Travelling, Transfer and Relieving Allowance an Employee shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.
- (9) If on account of lack of suitable transport facilities an Employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the Employee shall be reimbursed the actual cost of such accommodation.
- (10) Reimbursement of expenses shall not be suspended should an Employee become ill whilst travelling, provided such illness is recognised and approved in accordance with the provisions of this Enterprise Order and the Employee continues to incur accommodation, meal and incidental expenses.
- (11) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying officer unless the Employer or his nominee has endorsed the account.
- (12) An Employee stationed in the Metropolitan Area who is relieving at, or temporarily transferred to, any place within that area shall not be reimbursed the cost of meals purchased, but an Employee travelling on duty within that area who for operational reasons is unable to return to Headquarters for a scheduled meal and as a consequence is absent from his or her Headquarters over the specified meal period shall be paid at the rate prescribed by Item 15 of Schedule C – Travelling, Transfer and Relieving Allowance for each meal necessarily purchased, provided that:
- (a) a requirement to return to Headquarters for a scheduled meal break would lead to additional travelling costs or cause lost working time due to travel which is in excess of the rate prescribed in Item 15 of Schedule C – Travelling, Transfer and Relieving Allowance; and
- (b) such travelling is not within the suburb in which the Employee resides.
- A specified meal period for the purpose of this subclause shall be a meal period authorised by the Officer in Charge or supervisor to commence at some time within the 4th, 5th or 6th hour of the shift for an eight hour shift and on a pro rata basis for ordinary hours shifts of other than eight hours.
- (13) An Employee travelling on an aircraft (fixed or rotary wing) which travels outside a radius of 50 kilometres measured from the Employee's Headquarters and returns to the place of departure without landing at another place shall not be entitled to any allowance under this clause unless the trip extends for a period in excess of four hours and the Employee certifies he or she purchased a meal for consumption on the trip. Where the aircraft lands at other than the departure point and the Employee purchases and consumes a meal the provisions of this clause apply.
- (14) Where interstate travel is involved the time differences are to be disregarded for the purpose of calculating travelling allowance and Western Australian time is to be used in claiming allowances involving an overnight stay.
- (15) Where an Employee claims reimbursement for meals or the daily rate specified for Commercial Accommodation in Items 4 to 14 of Schedule C – Travelling, Transfer and Relieving Allowance the Employee shall certify that the meals were purchased or Commercial Accommodation was actually utilised. An Employee may be required to produce receipts or other evidence to substantiate any claim. Meal allowances shall not apply where a meal is supplied without charge to an Employee.
- (16) An Employee shall only be paid one allowance for any one meal period.
- (17) When it can be shown to the satisfaction of the Employer by the production of receipts that reimbursement in accordance with Schedule C – Travelling, Transfer and Relieving Allowance does not cover an Employee's reasonable expenses for a whole trip the Employee shall be reimbursed the excess expenditure.
- (18) (a) An Employee stationed in the Metropolitan Area who attends a training course at the Police Academy may request to be provided with accommodation at the Police Academy and the Employer may provide such accommodation, where Practicable.

- (b) In such circumstances, Employees are fully responsible for their own meals and incidental expenses and are not entitled to the allowances prescribed by this clause.

Clause 24 – Property Allowance

- (1) For the purpose of this clause the following expressions shall have the following meanings:

- (a) **Agent** means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

- (b) **Expenses** in relation to an Employee means all costs incurred by the Employee in the following areas:

- (i) Legal fees paid to a solicitor, or in lieu thereof fees charged by a Settlement Agent, for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out in the non-contentious business cost determination made under section 275 of the *Legal Profession Act 2008* (WA);
- (ii) Disbursements duly paid to a solicitor or a Settlement Agent necessarily incurred in respect of the sale or purchase of the Residence;.
- (iii) Real estate agent's commission to a maximum of 50% of the following amounts and a maximum of 50% of any goods and services tax paid on the real estate agent's commission fee:

Contract sale price	Real estate agent's commission
Up to \$50,000	4.75%
Over \$50,000 to \$100,000	\$2,375 plus 3% on the amount over \$50,000
Over \$100,000 to \$150,000	\$3,875 plus 2.5% on the amount over \$100,000
Over \$150,000 to \$250,000	\$5,125 plus 2.25% on the amount over \$150,000
Over \$250,000	\$7,375 plus 2% on the amount above \$250,000

- (iv) Stamp Duty;
- (v) Fees paid to the Registrar of Titles or to the Employee performing duties of a like nature and for the same purpose in another State or Territory of the Commonwealth;
- (vi) Expenses relating to the execution or discharge of a first mortgage; and
- (vii) The amount of expenses reasonably incurred by the Employee in advertising the residence for sale.
- (c) **Locality** in relation to an Employee means:
- (i) within the Metropolitan Area; and
- (ii) outside the Metropolitan Area, that area within a radius of 50 kilometres from an Employee's Headquarters when they are situated outside of the Metropolitan Area.
- (d) **Property** shall mean a Residence, including a block of land purchased for the purpose of erecting a Residence thereon to the extent that it represents a normal urban block of land for the particular Locality.
- (e) **Residence** includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement including dwelling / house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular Locality.
- (f) **Settlement Agent** means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under the law.

- (2) When an Employee is transferred from one Locality to another in the Public Interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Employee has no control, the Employee shall be entitled to be paid a property allowance for reimbursement of Expenses incurred by the Employee:

- (a) in the sale of a Residence in the Employee's former Locality, which, at the date on which the Employee received notice of transfer to a new Locality:
- (i) the Employee owned and occupied; or
- (ii) the Employee was purchasing under a contract of sale providing for vacant possession; or
- (iii) the Employee was constructing for the Employee's own permanent occupation, on completion of construction; and
- (b) in the purchase of a Residence or land for the purpose of erecting a Residence thereon for the Employee's own permanent occupation in the new Locality.

- (3) An Employee shall be reimbursed such following Expenses as are incurred in relation to the sale of a Residence:

- (a) if the Employee engaged an Agent to sell the Residence on the Employee's behalf – 50% of the amount of the commission paid to the Agent in respect of the sale of the Residence;
- (b) if a solicitor was engaged to act for the Employee in connection with the sale of the Residence – the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the Residence;
- (c) if the land on which the Residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an Employee shall, if, in a case where a solicitor acted for the mortgagee in respect of the discharge of

- the mortgage and the Employee is required to pay the amount of professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage – the amount so paid by the Employee; and
- (d) if the Employee did not engage an Agent to sell the Residence on his or her behalf – the amount of the Expenses reasonably incurred by the Employee in advertising the Residence for sale.
- (4) An Employee shall be reimbursed such following expenses as are incurred in relation to the purchase of a Residence:
- (a) if a solicitor or Settlement Agent was engaged to act for the Employee in connection with the purchase of the Residence – the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor or Settlement Agent in respect of the purchase of the Residence;
- (b) if the Employee mortgaged the land on which the Residence was erected in conjunction with the purchase of the Residence, then an Employee shall, if, in a case where a solicitor acted for the mortgagee and the Employee is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuracy fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage – the amount so paid by the Employee; and
- (c) if the Employee did not engage a solicitor or Settlement Agent to act for the Employee in connection with the purchase or such a mortgage – the amount of the Expenses reasonably incurred by the Employee in connection with the purchase or the mortgage, as the case may be, other than a procuracy fee paid by the Employee in connection with the mortgage.
- (5) An Employee is not entitled to be paid a property allowance under subclause (2)(b) of this clause unless the Employee is entitled to be paid a property allowance under subclause (2)(a) of this clause, provided that:
- (a) The Employer may approve the payment of a property allowance under subclause (2)(b) of this clause to an Employee who is not entitled to be paid a property allowance under subclause (2)(a) of this clause if the Employer is satisfied that it was necessary for the Employee to purchase a Residence or land for the purpose of erecting a Residence thereon in his or her new Locality because of the transfer from the former Locality.
- (b) The Employer may approve the payment of a property allowance in relation to the sale of a Residence which the Employee owned but did not occupy at the date on which the Employee received notice of transfer, if the Employer is satisfied that it was necessary for the Employee to purchase a Residence or land for the purpose of erecting a Residence thereon in his or her new Locality because of the transfer from the former Locality.
- (6) For the purpose of these provisions it is immaterial that the ownership, sale or purchase is carried out on behalf of an Employee who owns solely, jointly or in common with:
- (a) the Employee's Partner;
- (b) a Dependant relative; or
- (c) the Employee's Partner and a Dependant relative.
- (7) Where an Employee sells or purchases a Residence jointly or in common with another person not being a person referred to in subclause (6) of this clause, the Employee shall be paid only the proportion of the Expenses for which the Employee is responsible.
- (8) An application by an Employee for a property allowance shall be accompanied by evidence of the payment by the Employee of the Expenses, being evidence that is satisfactory to the Employer.
- (9) Where more than one Employee jointly sells or purchases a Residence, each Employee shall only be reimbursed the proportion of the Expenses for which the Employee is responsible.
- (10) An application by an Employee for a property allowance shall be accompanied by evidence satisfactory to the Employer of payment by the Employee of the Expenses.
- (11) Notwithstanding the foregoing provisions, an Employee is not entitled to the payment of a property allowance:
- (a) In respect of a sale or purchase prescribed in subclause (2) of this clause which is effected:
- (i) more than 12 months after the date on which the Employee took up duty in the new Locality; or
- (ii) after the date on which the Employee received notification of being transferred back to the former Locality; provided that the Employer may, in exceptional circumstances, grant an extension of time for such period as is deemed reasonable.
- (b) Where the Employee is transferred from one Locality to another solely at the Employee's own request or on account of misconduct.

Clause 25 – Transfer Allowance

- (1) Subject to subclauses (2) and (5) of this clause, an Employee who is transferred to a new locality in the Public Interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Employee has no control, shall be paid at the rates prescribed in Column A, Item (4), (5) or (6) of Schedule C – Travelling, Transfer and Relieving Allowance for a period of 14 days after arrival at new Headquarters within Western Australia or Column A, Items (7) or (8) of Schedule C – Travelling, Transfer and Relieving Allowance for a period of 21 days after arrival at a new Headquarters in another State of Australia; provided that if an Employee is required to travel on official business during the said periods, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of clause 23 – Travelling Allowance to permit an Employee to be paid allowances in respect of both travelling and transfer expenses for the same period.

- (2) Prior to the payment of an allowance specified in subclause (1) of this clause, the Employer shall:
- (a) require the Employee to certify that permanent accommodation has not been arranged or is not available from the date of transfer. In the event that permanent accommodation is to be immediately available, no allowance is payable; and
 - (b) require the Employee to advise the Employer that should permanent accommodation be arranged or become available within the prescribed allowance periods, the Employee shall refund the pro rata amount of the allowance for that period the occupancy in permanent accommodation takes place prior to the completion of the prescribed allowance periods.

Provided also that should an occupancy date which falls within the specified allowance periods be notified to the Employer prior to the Employee's transfer, the payment of a pro rata amount of the allowance should be made in lieu of the full amount.

- (3) If an Employee is unable to obtain reasonable accommodation for the transfer of his or her home within the prescribed period referred to in subclause (1) of this clause and the Employer is satisfied that the Employee has taken all possible steps to secure reasonable accommodation, such Employee shall, after the expiration of the prescribed period, be paid in accordance with the rates prescribed by Column B, Items (4), (5), (6), (7) or (8) of Schedule C – Travelling, Transfer and Relieving Allowance as the case may require, until such time as the Employee has secured reasonable accommodation; provided that the period of reimbursement under this subclause shall not exceed 77 days without the approval of the Employer.
- (4) When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an Employee on transfer, an appropriate rate of reimbursement shall be determined by the Employer.
- (5) An Employee who is transferred to Employer accommodation shall not be entitled to reimbursement under this clause, provided that:
 - (a) where entry into Employer accommodation is delayed through circumstances beyond the Employee's control an Employee may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the Employee and Dependants less a deduction for normal living expenses prescribed in Column A, Items (16) and (17) of Schedule C – Travelling, Transfer and Relieving Allowance; and provided that
 - (b) if any costs are incurred under subclause (2) of clause 26 – Disturbance Allowance, the Employee shall be reimbursed by the Employer.

Clause 26 – Disturbance Allowance

- (1) An Employee who is transferred in accordance with subclause (1) of clause 25 – Transfer Allowance and incurs expenses in the areas referred to in subclause (2) of this clause (clause 26) as a result of that transfer shall be reimbursed the actual expenditure incurred upon production of receipts or such other evidence as may be required.
- (2) In accordance with subclause (1) of this clause the Employer will reimburse the following:
 - (a) Costs incurred for the installation/connection/reconnection of a telephone at the Employee's new residence, provided a telephone had been installed at the Employee's former residence. Reimbursement shall also be made where an Employee is transferred and leaves the residence in which he or she had installed a telephone and returns to the former locality on subsequent transfer;
 - (b) Costs incurred with the connection or reconnection of water, gas and/or electricity services to the Employee's household; and
 - (c) Costs incurred with the redirection of mail for a period of three months.

Clause 27 – Removal Allowance

- (1) When an Employee is transferred in the Public Interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Employee has no control, the Employee shall be reimbursed:
 - (a) the actual reasonable cost of conveyance of the Employee and Dependants;
 - (b) the actual cost (including insurance) of the conveyance of an Employee's household furniture effects and appliances up to a maximum volume of 45 cubic metres provided that a larger volume may be approved by the Employer in special cases.
 - (c) an allowance of \$572.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an Employee is required to transport their furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the Employee is at least \$3,429.00;
 - (d)
 - (i) reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of \$184.00.
 - (ii) Pets are defined as dogs, cats, birds or other domestic animals kept by the Employee or the Employee's Dependants for the purpose of household enjoyment.
 - (iii) Pets do not include domesticated livestock, native animals or equine animals.
- (2) An Employee who is transferred solely at their own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the Employer prior to removal.

- (3) An Employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the Employee's motor vehicle. If authorised by the Employer to travel to a new locality in the Employee's own motor vehicle, reimbursement shall be as follows:
- (a) Where the Employee will be required to maintain a motor vehicle for use on official business at the new Headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause (1) of clause 21 – Motor Vehicle Allowance.
 - (b) Where the Employee will not be required to maintain a motor vehicle for use on official business at the new Headquarters reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause (2) of clause 21 – Motor Vehicle Allowance.
 - (c) Where an Employee or their Dependants have more than one vehicle, and all the vehicles are to be relocated to the new residence, the cost of transporting or driving up to two vehicles shall be deemed to be part of the removal costs.
 - (d) Where only one vehicle is to be relocated to the new residence, the Employee may choose to transport a trailer, boat or caravan in lieu of the second vehicle. The Employee may be required to show evidence of ownership of the trailer, boat or caravan to be transported.
 - (e) If the Employee tows the caravan, trailer or boat to the new residence, the additional rate per kilometre is to be 3.5 cents per kilometre for a caravan or boat and 2.0 cents per kilometre for a trailer.
- (4) The Employee shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the Employer, who may authorise the acceptance of the more suitable; provided that payment for a volume amount beyond 45 cubic metres shall not occur without the prior written approval of the Employer.
- (5) The Employer may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an Employee, with prior approval of the Employer, disposes of their household furniture effects and appliances instead of removing them to the new Headquarters; provided that such payments shall not exceed the sum which would have been paid if the Employee's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.
- (6) Where an Employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the Employee is obliged to store furniture, the Employee shall be reimbursed the actual cost of such storage up to a maximum allowance of \$1,065.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Employer.
- (7) Receipts must be produced for all sums claimed.
- (8) New Employees shall be entitled to receive the benefits of this clause if they are required by the Employer to participate in any training course prior to being posted to their respective positions in WA Police. This entitlement shall only be available to Employees who have completed their training and who incur costs when moving to their first posting.
- (9) The Employer may agree to provide removal assistance greater than specified in this Enterprise Order and if in the event that the Employee to whom the benefit is granted elects to leave the position, on a permanent basis, within 12 months, the Employer may require the Employee to repay the additional removal assistance on a pro rata basis. Repayment can be deducted from any monies due to the Employee.
- (10) For the purpose of subclause (9) of this clause, **elects to leave the position** means the Employee freely chooses to leave the position in the ordinary course of promotion, transfer or resignation and this necessitates the Employer obtaining a replacement Employee.

Clause 28 – Forensic Qualifications Allowance

- (1) Subject to the Employer's approval, an Employee who has:
- (a) successfully completed a qualification at Diploma level or above which is a mandatory requirement for the Employee's position;
 - (b) prepared or delivered expert evidence used by the courts; and
 - (c) four years' continuous experience in the forensic field;
- will receive an allowance equivalent to 10% of the base salary rate of the Employee's substantive rank.
- (2) An Employee must be working in the field in which the Employer has assessed them to be eligible for the forensic qualifications allowance to receive payment of the allowance.
- (3) Sole discretion regarding determination and assessment for eligibility of forensic qualifications allowance remains with the Employer.

Clause 29 – Clothing Allowance

- (1) Civilian Clothing Allowance:
- (a) An Employee who is directed to carry out duties in civilian clothes for a period of five consecutive working days or more in any one calendar year shall be paid a clothing allowance at the rate \$985.00 per annum. Following the approval of the Employer, the allowance shall be paid as an annual lump sum payment in advance.

(2) Pregnancy Clothing Allowance:

- (a) An Employee who is no longer able to wear her uniform comfortably due to pregnancy shall be paid an allowance of \$985.00 per annum on a pro rata basis from the time at which the Employee's uniform no longer fits comfortably until the time at which the Employee proceeds on parental leave. Following the approval of the Employer, the allowance shall be paid as an annual lump sum payment in advance.

PART F – LEAVE**Clause 30 – Personal Leave**

- (1) The intention of Personal Leave is to give Employees and the Employer greater flexibility by providing leave on full pay for a variety of personal purposes. Personal Leave includes sick leave. Personal leave is not for circumstances normally met by other forms of leave. This clause does not apply to Casual Employees.
- (2) An Employee employed on a Fixed Term Contract for a period of 12 months or more shall be credited with the same entitlement as a permanent Employee. An Employee on a Fixed Term Contract for a period less than 12 months shall be credited on a pro rata basis for the period of the contract.
- (3) A Part Time Employee shall be entitled to the same personal leave credits as a full time Employee but on a pro rata basis according to the number of hours worked each fortnight. Payment for personal leave shall only be made for those hours that would normally have been worked had the Employee not been on personal leave.
- (4) Entitlement:

- (a) The Employer shall credit each permanent, full time Employee with 120 hours of personal leave for each year of continuous service of which 104 are cumulative and 16 hours are non-cumulative as follows:

	Personal leave (cumulative)	Personal leave (non-cumulative)
On the day of initial appointment	52 hours	16 hours
On completion of 6 months' continuous service	52 hours	0 hours
On the completion of 12 months' continuous service	104 hours	16 hours
On the completion of each further period of 12 months' continuous service	104 hours	16 hours

- (b) Where Employees access personal leave, it shall be deducted from their non-cumulative entitlement in the first instance.
- (c) In the year of accrual, the 120 hours personal leave entitlement may be accessed for illness or injury, carer's leave, unanticipated matters or planned matters in accordance with the provisions of this clause. On completion of each year of accrual, unused personal leave from that year up to a maximum of 104 hours will be cumulative and added to personal leave accumulated from previous years.
- (d) Unused non-cumulative leave will be lost on completion of each anniversary year.
- (e) Whilst Employees are able to access personal leave in accordance with subclause (8)(a) of this clause, to ensure compliance with the *Minimum Conditions of Employment Act 1993* (WA) a minimum of 80 hours must be available to Employees each anniversary year for an Employee's entitlement to paid leave for illness or injury; or carer's leave.
- (f) Personal leave may be taken on an hourly basis.
- (5) Variation to Ordinary Working Hours:
- (a) When an Employee's ordinary working hours change during an anniversary year, hours of personal leave are to be adjusted to reflect the pro rata portion for that anniversary year.
- (b) At the time ordinary working hours change, hours of personal leave are adjusted to reflect ordinary working hours up to that point in time as a proportion of the total ordinary working hours for the anniversary year.
- (c) Personal leave is credited pro rata on a weekly basis from the time ordinary working hours change until the next anniversary date such that total hours credited for that anniversary year is on a pro rata basis according to the number of ordinary working hours for the period.
- (6) Reconciliation:
- (a) At the completion of an anniversary year, where an Employee has taken personal leave in excess of their current and accrued entitlement the unearned leave must be debited at the commencement of the following anniversary year/s.
- (b) The requirements of the *Minimum Conditions of Employment Act 1993* (WA) must be met at the commencement of the following anniversary year. The remaining portion of debited personal leave that exceeds the leave credited is to be debited at the commencement of the subsequent and where necessary following anniversary year(s).
- (c) Where an Employee ceases duty and has taken personal leave that exceeds the leave credited for that anniversary year, the Employee must refund the value of the unearned leave, calculated at the rate of salary as at the date the leave was taken. No refund is required in the event of the death of the Employee.

- (7) Access:
- (a) An Employee is unable to access personal leave while on any period of leave without pay; annual or long service leave, except as provided for in subclauses (10) and (11) of this clause and clause 37 – Parental Leave.
 - (b) If an Employee has exhausted all accrued personal leave the Employer may allow an Employee who has at least 12 months' service to anticipate up to 40 hours personal leave from next year's credit. If the Employee ceases duty before accruing the leave, the value of the unearned portion must be refunded to the Employer, calculated at the rate of salary as at the date the leave was taken, but no refund is required in the event of the death of the Employee.
 - (c) In exceptional circumstances, the Employer may approve the conversion of an Employee's personal leave to half pay to cover an absence on personal leave due to illness.
- (8) Application for Personal Leave:
- (a) Reasonable and legitimate requests for personal leave will be approved subject to available hours. Subject to subclause (4)(a) of this clause, the Employer may grant personal leave in the following circumstances:
 - (i) where the Employee is ill or injured;
 - (ii) to provide care or support to a member of the Employee's Family or household who requires care or support because of an illness or injury to the member; or an unexpected emergency affecting the member;
 - (iii) for unanticipated matters of a compassionate or pressing nature which arise without notice and require immediate attention; and
 - (iv) by prior approval of the Employer having regard for operational requirements and the needs of the Employee, planned matters where arrangements cannot be organised outside of normal working hours. Planned personal leave will not be approved for regular ongoing situations.
 - (b) The Employer may grant two days unpaid personal leave per occasion to an Employee to provide care and support to a member of the Employee's Family or household due to the birth of a child to the member. This entitlement does not of itself limit an Employee's access to paid personal leave as provided by subclause (8)(a) of this clause, or paid partner leave provided by subclause (6) of clause 37 – Parental Leave. This leave may also be substituted with accrued annual leave, long service leave and/or time off in lieu of overtime.
 - (c) Employees must complete the necessary application and clearly identify which of the above circumstances apply to their personal leave request.
 - (d) Where Practicable, the Employee must give reasonable notice prior to taking leave. Where prior notice cannot be given, notice must be provided as early as possible on the day of absence. Where possible, an estimate of the period of absence from work shall be provided.
- (9) Evidence:
- (a) Except in respect of a day on which an Employee becomes ill or injured while on duty and for the first five single day absences in a calendar year, an application for personal leave by an Employee on account of illness or injury shall be supported by a certificate of a Medical Practitioner or, where the illness or injury involves a dental condition, by a certificate of a Dentist. Save that where the Employee is stationed in a remote or rural locality and there is no Medical Practitioner within that locality, a certificate from an attending registered nurse or certification of the incapacity by the Employee's Officer in Charge or supervisor shall suffice. Where the Employer has good reason to believe that the absence may not be legitimate, the Employer may request that evidence be provided. Should an Employee become ill or injured while on duty, an application for personal leave on account of the illness or injury does not require a supporting certificate.
 - (b) Personal leave will not be granted where an Employee is absent from duty because of personal illness attributable to the Employee's serious and wilful misconduct in the course of the Employee's employment.
 - (c) Where there is doubt about the cause of an Employee's illness, the Employer may require the Employee to submit to a medical examination by a Medical Practitioner of the Employer's choice, which the Employee must attend. Where it is reported that the absence is because of illness caused by the Employee's serious and wilful misconduct in the course of the Employee's employment, or the Employee fails without reasonable cause to attend the medical examination, the fee for the examination must be deducted from the Employee's salary and personal leave will not be granted.
 - (d) If the Employer has reason to believe that an Employee is in such a state of health as to render a danger to themselves, fellow Employees or the public, the Employee may be required to obtain and furnish a report as to the Employee's condition from a registered Medical Practitioner nominated by the Employer. The Employer shall pay the fee for any such examination.
- (10) Re-crediting Annual Leave:
- (a) Where an Employee is ill or injured during the period of annual leave and produces at the time, or as soon as Practicable thereafter, medical evidence to the satisfaction of the Employer that as a result of the illness or injury the Employee was confined to their place of residence or a hospital for a period of at least seven consecutive calendar days, the Employer may grant personal leave for the period during which the Employee was so confined and reinstate annual leave equivalent to the period of confinement.

- (11) Re-crediting Long Service Leave:
- (a) Where an Employee is ill or injured during the period of long service leave and produces at the time, or as soon as Practicable thereafter, medical evidence to the satisfaction of the Employer that as a result of illness or injury the Employee was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the Employer may grant personal leave for the period during which the Employee was so confined and reinstate long service leave equivalent to the period of confinement.
- (12) Personal Leave without Pay Whilst Ill or Injured
- (a) Employees who have exhausted all of their personal leave entitlements and are ill or injured may apply for personal leave without pay. Employees are required to complete the necessary application and provide evidence to satisfy a reasonable person. The Employer shall not unreasonably withhold this leave.
- (b) Personal leave without pay not exceeding a period of three months in a continuous absence does not affect salary increment dates, anniversary date of personal leave credits, long service leave entitlements or annual leave entitlements. Where a period of personal leave without pay exceeds three months in a continuous absence, the period in excess of three months is excised from qualifying service.
- (c) Personal leave without pay is not available to Employees who have exhausted all of their personal leave entitlements and are seeking leave for circumstances outlined in subclauses (8)(a)(ii), (8)(a)(iii), (8)(a)(iv) or (8)(b) of this clause. However, other forms of leave including unpaid carer's leave and leave without pay may be available.
- (13) Other Conditions:
- (a) Where an Employee who has been retired from WA Police on medical grounds resumes duty therein, hours of personal leave at the date of retirement shall be reinstated. This provision does not apply to an Employee who has resigned from WA Police and is subsequently reappointed.
- (b) Unused personal leave will not be cashed out or paid out when an Employee ceases their employment.
- (14) Worker's Compensation:
- (a) Where an Employee suffers a disability within the meaning of section 5 of the *Worker's Compensation and Injury Management Act 1981* (WA) that necessitates the Employee being absent from duty, personal leave with pay shall be granted to the extent of hours of personal leave. In accordance with section 80(2) of the *Worker's Compensation and Injury Management Act 1981* (WA) where the claim for worker's compensation is decided in favour of the Employee, debited hours of personal leave are to be reinstated and the period of absence shall be granted as leave without pay.
- (15) Portability:
- (a) The Employer shall credit an Employee additional hours of personal leave up to those held at the date that Employee ceased previous employment provided:
- (i) immediately prior to commencing employment in WA Police, the Employee was employed in the service of:
- (aa) the Western Australian Public Sector; or
- (bb) the Commonwealth Government of Australia; or
- (cc) any other State or Territory of Australia; and
- (ii) the Employee's employment with the WA Police commenced no later than one week after ceasing previous employment; and
- (iii) the personal leave credited shall be no greater than that which would have applied had the entitlement accumulated whilst employed in the WA Police.
- (b) The maximum break in employment permitted by subclause (15)(a)(ii) of this clause may be varied by the approval of the Employer provided that where employment with the WA Police commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the Employee ceased with the previous employer.
- (16) Travelling time for Regional Employees:
- (a) Subject to the evidence requirements set out in subclauses (9)(a)-(d) of this clause, a regional Employee who requires medical attention at a medical facility in Western Australia located 240 kilometres or more from their Headquarters will be granted paid travel time undertaken during the Employee's ordinary working hours up to a maximum of 40 hours per annum.
- (b) The Employer may approve additional paid travel time to a medical facility in Western Australia where the Employee can demonstrate to the satisfaction of the Employer that more travel time is warranted.
- (c) The provisions of subclauses (16)(a) and (16)(b) of this clause are not available to Employees whilst on leave without pay or personal leave without pay.

- (d) The provisions of subclauses (16)(a) and (16)(b) of this clause apply as follows:
- (i) An Employee employed on a Fixed Term Contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent Employee for each full year of service and pro rata for any residual portion of employment.
 - (ii) An Employee employed on a Fixed Term Contract for a period less than 12 months shall be credited with the same entitlement on a pro rata basis for the period of employment.
 - (iii) A Part Time Employee shall be entitled to the same entitlement as a full time Employee for the period of employment, but on a pro rata basis according to the number of ordinary hours worked each fortnight.

Clause 31 – Annual Leave

- (1) (a) (i) Each Employee shall be granted annual leave of 240 hours on full pay for each year of service.
- (1) (a) (ii) Annual leave shall be calculated on a calendar year basis commencing on 1 January in each year. Provided that an Employee stationed in the North West shall be granted an additional 40 hours leave on full pay for each year of service in the North West.
- (b) With consent of the Employer, annual leave may be taken in more than one period. Such periods may be single days. The number of hours deleted shall be subject to the number of ordinary hours the Employee is rostered to work on such single day.
- (c) Where annual leave is taken in more than one period as provided in subclause (1)(b) of this clause, the travelling time allowed under subclause (9) of this clause shall only apply to one period of annual leave per annum.
- (2) (a) For the purpose of compiling the annual leave roster showing the commencing and finishing date of annual leave prescribed by subclause (1) of this clause each Employee shall, by no later than 30 June each year, give notice to the Employer of the dates that the Employee prefers to commence and finish the Employee's annual leave in the year immediately following.
- (b) The notice referred to in subclause (2)(a) of this clause shall be submitted to the Officer in Charge or supervisor.
- (3) (a) An Employee shall only take annual leave in accordance with the dates indicated in relation to the Employee on the roster of annual leave applicable in that year unless the dates on the roster are altered.
- (b) The Employer or the Officer in Charge or supervisor concerned may alter the dates indicated on the roster of annual leave either in relation to a particular Employee or generally.
- (4) An Employee is not entitled to accumulate annual leave except with the written permission of the Employer.
- (5) Where the Employer is of the opinion that special circumstances exist in a particular case the Employer may grant an Employee leave (not being annual leave) with or without payment during that period.
- (6) (a) Where an Employee on annual leave is recalled to attend at Court from matters arising during the course of the Employee's duties or to perform other duties the Employee shall be paid or be entitled to receive for each day or part thereof additional payment at ordinary rates for the period of the recall including travelling time plus one shift added to his or her annual leave. Alternatively, the Employee may elect to have two shifts added to his or her annual leave.
- (b) Where an Employee is required to attend Court or to perform other duties on an additional day granted for previous attendance under subclause (6)(a) of this clause, the Employee shall be entitled to receive an additional one shift for attending Court or performing other duties, plus an additional two shifts, a total entitlement of three shifts. The additional shifts under this subclause shall be taken at a time mutually agreed between the Employee and the Employer.
- (c) Where an Employee has had to leave a holiday destination to travel for Court and then advised prior to starting work that his or her attendance is no longer required he or she shall be entitled to the additional annual leave days as provided in subclause (6)(a) of this clause.
- (d) Where an Employee is ill or injured during his or her period of annual leave and produces at the time, or as soon as Practicable thereafter, medical evidence to the satisfaction of the Employer that he or she was as a result of illness confined to his or her place of residence or a hospital for at least seven days, he or she may with the approval of the Employer be granted, at a time convenient to the Employer, additional leave equivalent to the period during which he or she was so confined unfit.
- (7) Notwithstanding the provisions contained in this clause the salary payable to a Part Time Employee during the period of leave shall be calculated, based on the fortnightly salary at the time the leave is taken, in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{80} \times \text{Full time fortnightly wages}$$
- (8) Annual Leave Loading:
 - (a) A loading of 18.75% shall be paid to Employees in December in the calendar year in which the leave accrues, calculated on the Enterprise Order rate of pay with respect to a maximum of five weeks' annual leave. Provided that in no case shall the loading exceed the Annual Leave Loading maxima as published by the Department of Commerce at the time of payment.

- (b) In respect to Part Time Employees, the loading is to be proportioned according to the average number of hours worked in that calendar year.
- (c) Annual Leave Loading shall not be paid for any pro rata leave to which an Employee is entitled on resignation.
- (9) Annual Leave Travel Concessions:
- (a) Employees Stationed in Remote Areas:
- (i) Travel concessions prescribed under subclause (9)(a)(viii) of this clause are provided to an Employee, and Dependants when proceeding on annual leave to either Perth, Geraldton or other place outside of the Employee's district which is approved by the Employer, from Headquarters situated in the District Allowance Areas 3, 5 and 6, and in that portion of Area 4 located north of 30 degrees South latitude, as depicted in *the Public Service Award 1992*.
- (ii) Employees are required to serve a year in these areas before qualifying for travel concessions. However, Employees who have less than a year's service in these areas and who are required to proceed on annual leave to suit the Employer's convenience or who are unable to complete the required 12 months' service in the special area due to causes beyond the Employee's control will be allowed the concessions. The travel concession may also be given to an Employee who proceeds on annual leave before completing a year's service, provided that the Employee returns to the area to complete the years' service at the expiration of the period of leave.
- (iii) The mode of travel is to be at the discretion of the Employer.
- (iv) Provided the travel concession does not exceed the value of the fully refundable return economy airfare from his or her Headquarters to Perth, an Employee may elect to use the travel concession to purchase a return economy airfare or equivalent Motor Vehicle Allowance to any destination of his or her choice. Should the cost of the chosen return economy airfare be less than the value of the fully refundable return economy airfare to Perth, the lesser amount shall be paid. Accommodation costs of any travel package arrangement will not be paid as part of this travel concession.
- (v) Travel concessions not utilised within 12 months of becoming due will lapse.
- (vi) Where special circumstances exist, the Employee's Dependants may utilise the travel concession provided in subclause (9)(a)(viii) of this clause at a different time to the Employee. Special circumstances shall include those where the leave roster precludes the Employee from taking leave during school holidays or at the same time as his or her Dependants.
- (vii) Part Time Employees are entitled to travel concessions on a pro rata basis according to the average number of hours worked per week. Travelling time shall be calculated on a pro rata basis according to the number of hours worked.
- (viii)

Approved mode of travel	Travel concession	Travelling time
(aa) Air	Fully refundable return economy airfare for the Employee, and Dependants.	One day each way.
(bb) Road	Full Motor Vehicle Allowance rates, but reimbursement not to exceed the cost of the fully refundable return economy airfare.	North of 20 degrees South Latitude – two and one half days each way. Remainder – two days each way.
(cc) Air and Road	Full Motor Vehicle Allowance rates for car trip, but reimbursement not to exceed the cost of the fully refundable return economy airfare for the Employee and Dependants.	North of 20 degrees South Latitude – two and one half days each way. Remainder – two days each way.

- (b) Employees stationed in special areas:
- (i) The travel concessions prescribed under subclause (9)(b) of this clause are provided to an Employee and the Employee's Dependants when proceeding on annual leave to either Perth or other place outside of the Employee's district which is approved by the Employer from Headquarters other than those designated in subclause (9)(a) of this clause but within a Special Area as defined.
- (ii) The travel concessions are only payable to an Employee who has completed 12 months' service in the Special Area or, if the Employee has not completed 12 months' service in the Special Area before proceeding on annual leave, does so on the Employee's return from annual leave before the Employee again takes annual leave.
- (iii) The travel concession shall be repaid to the Employer by the Employee if the Employee fails to complete 12 months' service in the Special Area unless that failure is due to causes beyond the Employee's control.

Approved mode of travel	Travel concession
(aa) Public Transport	Free return passes to Perth or other place approved by the Employer on public transport for the Employee and the Employee's Dependants.
(bb) Private Vehicle	Full Motor Vehicle Allowance rates but reimbursement not to exceed the cost of public transport specified in (aa), above.
(cc) Public Transport and a Private Vehicle	Free return passes to Perth or other place approved by the Employer and the full Motor Vehicle Allowance rate provided that reimbursement is not to exceed the cost of public transport specified in (aa), above.

- (c) Employees other than those designated in subclause (9)(a) of this clause, whose Headquarters are situated outside a radius of 240 kilometres from Perth City Railway Station and who travel to Perth for their annual leave shall be granted by the Employer reasonable travelling time to enable them to complete the return journey.
- (d) To standardise the entitlement the following criteria is to be used:
- (i) 240 km to 499 km – half-day travelling each way but taken as one additional day;
 - (ii) 500 km to 1000 km – one day travelling time each way; and
 - (iii) in excess of 1000 km and north of the 26th parallel - two and one half days each way, and all stations south of the 26th parallel but in excess of 1000 km shall be allowed the equivalent of a counterpart north of the 26th parallel.
- (10) Notwithstanding the foregoing provisions in this clause, the Employer may direct an Employee to take accrued annual leave and may determine the date of which such leave shall commence.
- (11) (a) Where the Employer and Employee have not agreed when the Employee is to take his or her annual leave the Employer is not to refuse the Employee taking, at any time suitable to the Employee, any period of annual leave the entitlement to which accrued more than 12 months before that time.
- (b) The Employee is to give the Employer at least two weeks' notice of the period during which the Employee intends to take his or her leave which accrued more than 12 months before that time.
- (12) The provisions of this clause do not apply to Casual Employees.

Clause 32 – Employee Initiated Cash Out of Accrued Annual Leave

- (1) (a) Subject to subclause (2) of this clause, the Employer and Employee may agree that the Employee forego part of the Employee's entitlement to accrued annual leave in exchange for equivalent payment at the rate which would have applied had the leave been taken at the time the agreement is made.
- (b) The payment includes applicable annual leave loading in accordance with subclause (8)(a) and (b) of clause 31 – Annual Leave.
- (2) The following considerations apply to the cashing out of accrued annual leave:
- (a) the Employee initiates a written request, to the Employer, to cash out accrued annual leave;
 - (b) the Employer may agree, in writing, to the request from the Employee;
 - (c) there must be an annual leave entitlement that has accrued in previous years;
 - (d) no more than 50% of the Employee's total accrued annual leave entitlement can be cashed out;
 - (e) the remaining entitlements after the cash out are not less than two weeks accrued annual leave;
 - (f) each instance of cashing out of annual leave must be a separate written agreement between the Employer and Employee; and
 - (g) annual leave accruing in the year the request for cashing out is made cannot be cashed out in that year.
- (3) It is the Employee's responsibility to seek information on any taxation implications arising from the payout of annual leave.

Clause 33 – Purchased Leave (42/52 Leave Arrangement)

- (1) The Employer and an Employee may agree to enter into an arrangement whereby the Employee can purchase up to 10 weeks' additional leave.
- (2) The Employer will assess each application for a 42/52 salary arrangement on its merits and give consideration to the personal circumstances of the Employee seeking the arrangement.
- (3) Where an Employee is applying for purchased leave of between 5 and 10 weeks, the Employer will give priority access to those Employees with caring responsibilities.
- (4) Access to this entitlement shall be subject to:
- (a) the Employee having satisfied the agency's accrued leave management policy;
 - (b) the requirement for an Employee who has purchased 9 weeks' to take one week annual leave before accessing purchased leave; and
 - (c) the requirement for an Employee who has purchased 10 weeks' leave to take two weeks annual leave before accessing their purchased leave.

- (5) Notwithstanding subclauses (4)(b) and (4)(c) of this clause, the Employer may allow an Employee to access purchased leave before they have accessed one or two weeks' annual leave, whichever applies, where the Employee requests it. Any such request may only be refused by the Employer if there are reasonable grounds to do so.
- (6) The provisions of subclauses (4)(b) and (4)(c) of this clause do not apply to an Employee who purchases less than 9 weeks' leave.
- (7) An agreement to take a reduced salary spread over the 52 weeks of the year will yield the following amounts of purchased leave:

Number of weeks' salary spread over 52 weeks	Number of weeks' purchased leave
42	10
43	9
44	8
45	7
46	6
47	5
48	4
49	3
50	2
51	1

- (8) (a) Purchased leave is not able to be accrued. The Employee is entitled to pay in lieu of any purchased leave not taken. In the event that the Employee is unable to take such purchased leave, their salary will be adjusted in the last pay period in February to take account of the fact that time worked during the previous year was not included in their salary.
- (b) Untaken purchased leave will be paid out at the rate at which it was purchased.
- (9) (a) Where an Employee who is in receipt of an allowance provided for in clause 20 – Higher Duties Allowance, proceeds on any period of purchased leave, the Employee shall not be entitled to receive payment of the allowance for any period of purchased leave.
- (b) Other than when an Employee is on a period of purchased leave, the higher duties allowance component of an Employee's salary shall not be affected by an agreement to reduce the Employee's salary for purchased leave purposes.
- (10) Overtime is paid at the ordinary rate of salary and not the reduced rate.
- (11) In the event that a Part Time Employee's ordinary working hours are varied during the year, the salary paid for such leave will be adjusted in the last pay in February to take account of any variations to the Employee's ordinary working hours during the previous year.
- (12) The provisions of this clause do not apply to Casual Employees.

Clause 34 – Purchased Leave (Deferred Salary Arrangement)

- (1) With the written agreement of the Employer, an Employee may elect to receive, over a four year period, 80% of the salary they would otherwise be entitled to receive in accordance with clause 15 – Salary.
- (2) On completion of the fourth year, an Employee will be entitled to 12 months' leave and will receive an amount equal to 80% of the salary they were otherwise entitled to in the fourth year of deferment.
- (3) Where an Employee completes four years of deferred salary service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro rata basis for all purposes.
- (4) An Employee may withdraw from this scheme prior to completing a four-year period by written notice. The Employee will receive a lump sum payment of salary forgone to that time but will not be entitled to equivalent absence from duty.
- (5) The Employer will ensure that the superannuation arrangements and taxation effects are fully explained to the Employee by the relevant Authority. The Employer will put any necessary arrangements into place.

Clause 35 – Long Service Leave

- (1) Employees shall qualify for long service leave in the following terms:
- (a) An Employee who has completed 10 years' continuous service with the Employer shall be entitled to 520 hours long service leave on full pay.
- (b) For each subsequent period of seven years' service, an Employee shall be entitled to an additional 520 hours long service leave on full pay.
- For recording purposes and to facilitate flexible working arrangements where other than eight hours is worked in a day and/or 40 hours in a week, long service leave will be debited at the actual number of hours rostered during the period of leave.
- (c) Subject to the Employer's approval, an Employee may elect to take the leave in periods of single days or more.

- (d) For the purpose of determining an Employee's long service leave entitlement under the provisions of subclauses (1)(a) and (1)(b) of this clause, the term **continuous service** includes any period during which the Employee is absent on full pay or part pay but does not include:
- (i) any period exceeding two weeks during which an Employee is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Western Australian Public Sector.
 - (ii) any period during which an Employee is taking a long service leave entitlement or any portion thereof except in the case of subclause (8) of this clause when the period excised will equate to a full entitlement of 13 weeks;
 - (iii) any service by an Employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when his or her prior service had actually entitled the Employee to the long service leave provided under this clause; and
 - (iv) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave.
- (e) Payment made for long service leave granted to an Employee who has been employed on a part time basis or on both a full time and part time basis during a qualifying period shall be adjusted according to the hours worked by the Employee, subject to the following:
- (i) If an Employee consistently worked on a part time basis for a regular number of hours during the whole of the Employee's qualifying service, the Employee shall continue to be paid the salary determined on that basis during the long service leave.
 - (ii) A Part Time Employee shall have the same entitlement to long service leave as full time Employees. However, payment made during such periods of long service leave shall be adjusted according to the hours worked by the Employee during that accrual period.
- (2) (a) Long service leave shall be taken at any time within six years of it becoming due, at the convenience of the Employer. Provided that the Employer may approve the deferment of the taking of long service leave beyond six years in exceptional circumstances. Provided further that such exceptional circumstances shall include retirement within seven years of the date of entitlement.
- (b) Approval to defer the taking of long service leave may be withdrawn or varied at any time by the Employer giving the Employee notice in writing of the withdrawal or variation.
- (c) Subject to approval of the Employer, an Employee may clear a long service leave entitlement by taking double time at half pay or compacting to half time at double pay. The excised period of continuous service when an Employee has elected to compact a long service leave entitlement will be 13 weeks. The excised period of continuous service when an Employee has elected to take double time at half pay will be 26 weeks.
- (d) Subject to approval of the Employer, an Employee may cash out any portion of an accrued entitlement to long service leave, provided that the Employee proceeds on a minimum of 10 days' annual leave in that calendar year. Where an Employee cashes out any portion on an accrued entitlement to long service leave, the entitlement accessed is excised for the purpose of continuous service.
- (3) On application to the Employer a lump sum payment for the money equivalent of any:
- (a) Long service leave entitlement for continuous service as provided in subclauses (1)(a) and (1)(b) of this clause, shall be made to an Employee who resigns, retires, is retired or is dismissed or in respect of an Employee who dies;
 - (b) Pro-rata long service leave based on continuous service of a lesser period than that provided in subclauses (1)(a) and (1)(b) of this clause, for a long service leave entitlement shall be made:
 - (i) to an Employee who retires at or over the age of 55 years or who is retired on the grounds of ill health if the Employee has completed not less than 12 months' continuous service before the date of retirement;
 - (ii) to an Employee who, not having resigned is retired by the Employer for any other cause, if the Employee has completed not less than three years continuous service before the date of retirement; or
 - (iii) in respect of an Employee who dies, if the Employee has completed not less than 12 months' continuous service before the date of death.
 - (c) In the case of a deceased Employee, payment shall be made to the estate of the Employee unless the Employee is survived by a legal dependant approved by the Employer, in which case payment shall be made to the legal dependant.
- (4) The calculation of the amount due for long service leave accrued and for pro rata long service leave shall be made at the rate of salary of an Employee at the date of retirement or resignation or death, whichever applies.
- (5) (a) An Employee who desires to be granted a period of long service leave shall give at least two months' notice in writing of the fact and shall make application to the Employer. The application shall state the amount of leave required and the date from which the leave is to commence. In case of emergency and for reasons to be stated in writing, an Employee may at any time apply to the Employer for any long service leave due.

- (b) An Employee may prior to commencing long service leave request approval for the substitution of another date for commencement of long service leave and the Employer may approve such substitution.
- (6) Recognition of Pro Rata Service with other Government employers:
- Interstate:
- (a) Where an Employee was, immediately prior to being employed as a Police Auxiliary Officer under the provisions of the *Police Act 1892 (WA)*, employed in the service of the Commonwealth or of any other State of Australia and the period between the date when the Employee ceased previous employment and the date of commencing employment does not exceed one week, that Employee shall be entitled to long service leave determined in the following manner:
- (i) the pro rata portion of long service leave to which the Employee would have been entitled up to the date of appointment as a Police Auxiliary Officer shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any such long service leave during that employment shall be deducted from any long service leave to which the Employee may become entitled under this clause; and
- (ii) the balance of the long service leave entitlement of the Employee shall be calculated upon appointment as a Police Auxiliary Officer in accordance with the provisions of this clause.
- (b) The maximum break in employment permitted by subclause (6)(a) of this clause, may be varied by the approval of the Employer provided that where employment as a Police Auxiliary Officer commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the Employee ceased with the previous employer or in the case of defence forces the Employee applied to join the WA Police before ceasing the previous employment and was inducted into police training in the first available Police Auxiliary Officer Training Course. This matter must be negotiated and documented as part of the recruitment process.
- (c) An Employee previously employed by the Commonwealth or by any other State of Australia shall not proceed on any period of long service leave until the Employee:
- (i) has served a period of not less than three years continuous service with the Employer; and
- (ii) is entitled to 520 hours long service leave on full pay.
- (d) The Employer may approve of an Employee proceeding on long service leave prior to the Employee completing three years continuous service.
- (e) Nothing in this subclause shall be deemed to confer on any Employee previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the Employee's favour prior to the date on which the Employee commenced employment as a Police Auxiliary Officer.
- Intrastate:
- (f) Where an Employee was immediately prior to being employed as a Police Auxiliary Officer under the provisions of the *Police Act 1892 (WA)*, an Employee in:
- (i) the Public Service of Western Australia;
- (ii) a statutory authority listed in Schedule 1 of the *Financial Management Act 2006 (WA)*;
- (iii) either of the Houses of the Parliament of the State under the separate control of the President or Speaker or under their joint control;
- (iv) the Health Education Council (or its predecessor); or
- (v) the Nurses Board of WA;
- and the period between the date when the Employee ceased previous employment and the date of commencing employment as a Police Auxiliary Officer does not exceed one week, that Employee shall be entitled to 520 hours of long service leave on full pay on whichever is the earliest date of:
- (vi) the date on which the Employee would have become entitled to long service leave had the Employee remained in the former employment; or
- (vii) the date determined by:
- (aa) calculating the pro rata portion of long service leave to which the Employee would have been entitled up to the date of appointment as a Police Auxiliary Officer, in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the Employee may become entitled under this clause; and
- (bb) by calculating the balance of the long service leave entitlement of the Employee upon appointment as a Police Auxiliary Officer in accordance with the provisions of this clause.
- (g) The maximum break in employment permitted by subclause (6)(f) of this clause may be varied by the approval of the Employer, provided that where employment as a Police Auxiliary Officer commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro

rata annual leave paid out at the date the Employee ceased with the previous employer. This matter must be negotiated and documented as part of the recruitment process.

- (h) An Employee who was not paid out for accrued and pro rata annual leave held at the date of ceasing previous employment shall comply with the provisions of subclause (6)(f) of this clause.
 - (i) In addition to any entitlement arising from the application of subclause (6)(f) of this clause, an Employee previously employed by a prescribed State body or statutory authority may, on approval of the Employer, be credited with any period of long service leave to which the Employee became entitled during the former employment but had not taken at the date of appointment as a Police Auxiliary Officer, provided the Employee's former employer had given approval for the Employee to accumulate the entitlement.
- (7) An Employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months' continuous service before the date of retirement may make application to take pro rata long service leave before the date of retirement.
- (8) (a) A full time Employee who, during a qualifying period towards an entitlement of long service leave, was employed continuously on both a full and part time basis, may elect to take a lesser period of long service leave calculated by converting the part time service to equivalent full time service.
- (b) A full time Employee who, during a qualifying period towards an entitlement of long service leave, was employed continuously on a part time basis, may elect to take a lesser period of long service leave calculated by converting the part time service to equivalent full time service.
- (9) Notwithstanding the foregoing provisions in this clause, the Employer may direct an Employee to take accrued long service leave and may determine the date of which such leave shall commence.
- (10) Where an Employee is ill during the period of long service leave and produces at the time, or as soon as Practicable thereafter, medical evidence to the satisfaction of the Employer that as a result of the illness the Employee was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the Employer may grant personal leave for the period during which the Employee was so confined and reinstate long service leave equivalent to the period of confinement.
- (11) (a) An Employee shall, when recalled from long service leave to attend at Court from matters arising during the course of their duties or to perform other duties, be paid or be entitled to for each day or part thereof additional payments at ordinary hours rates for the period of the recall including travelling time plus one shift added to their long service leave or at the option of the Employee two shifts added to their long service leave.
- (b) Where an Employee is required to attend Court or to perform other duties on an additional day granted for previous attendance under subclause (11)(a) of this clause, the Employee shall be entitled to leave of an additional one shift for attending Court or performing other duties and leave equal to a further two shifts, a total entitlement of three shifts. Such additional shifts as prescribed under this clause shall be taken at a time mutually agreed between the Employee and the Employer.
- (c) Where an Employee has had to leave a holiday destination to travel back for Court and is then advised prior to starting work that their attendance is no longer required they shall be entitled to the additional days added to their long service leave as provided in subclause (11)(a) of this clause.
- (12) The provisions of this clause do not apply to Casual Employees.

Clause 36 – Bereavement Leave

- (1) Employees shall, on the death of:
- (a) the Partner of the Employee;
 - (b) the child, step child or grandchild of the Employee (including adult child, step child or grandchild);
 - (c) the parent, step parent, or grandparent of the Employee or their Partner's parent;
 - (d) the brother, sister, step brother or step sister of the Employee; or
 - (e) any other person who, immediately before that person's death, lived with the Employee as a member of the Employee's household;
- be eligible for up to two days' paid bereavement leave.
- (2) Provided that, at the request of an Employee, the Employer may exercise discretion to grant bereavement leave to an Employee in respect of some other person with whom the Employee has a special relationship.
- (3) The two days need not be consecutive.
- (4) Bereavement leave is not to be taken during any other period of leave.
- (5) Payment of such leave may be subject to the Employee providing evidence of the death or relationship to the deceased, satisfactory to the Employer.
- (6) An Employee requiring more than two days' bereavement leave in order to travel interstate or overseas in the event of the death interstate or overseas of a member of the Employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the Employee is eligible, have immediate access to annual leave and/or accrued long service leave and/or leave without pay provided all accrued leave is exhausted.

- (7) Subject to prior approval from the Employer, an Employee entitled to bereavement leave and who as a result of that bereavement travels to a location within Western Australia that is more than 240 kilometres from their workplace will be granted paid time off for the travel period undertaken in ordinary hours up to a maximum of two shifts or 16 hours, whichever is the greater, per bereavement.
- (8) The Employer may approve additional paid travel time within Western Australia where the Employee can demonstrate to the satisfaction of the Employer that more than two days travel time is warranted.

Clause 37 – Parental Leave

- (1) For the purpose of this clause:
- (a) **Employee** means full time Employees, Irregular Part Time Employees, Part Time Employees and Eligible Casual Employees.
- (b) **Parental Leave** shall be unpaid and/or paid leave as approved under this clause.
- (c) **Adoption** in relation to a child, is a reference to a child who:
- (i) is not the child or the stepchild of the Employee or the Employee's Partner;
- (ii) is, or will be, under 16 years old as at the day of placement, or the expected day of placement, of the child; and
- (iii) has not lived continuously with the Employee for six months or longer.
- (d) **Day of Placement**, in relation to the adoption of a child by an Employee, means the earlier of the following days:
- (i) the day on which the Employee first takes custody of the child for the adoption; or
- (ii) the day on which the Employee starts any travel that is reasonably necessary to take custody of the child for the adoption.
- (e) **Primary Care Giver** means the person who assumes the principal role of providing care and attention to a child.
- (f) **WA Public Sector** means:
- (i) all agencies, ministerial offices and non-SES organisations as defined in section 3 of the *Public Sector Management Act 1994* (WA); and
- (ii) employing authorities as defined in section 5 of the *Public Sector Management Act 1994* (WA).
- (g) For the purposes of this clause an "**Eligible Casual Employee**" means a Casual Employee employed by the Employer:
- (i) on a regular and systematic basis for several periods of employment with a break of no more than three months between each period of employment and where the combined length of the periods of employment are at least 12 months and the breaks of employment were the result of the Employer's initiative; or
- (ii) on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and, but for the birth or adoption of a child, the Employee has a reasonable expectation of continuing engagement on a regular and systematic basis.
- (2) Entitlement to Parental Leave:
- (a) Subject to the requirements of this clause an Employee is entitled to a period of up to 52 consecutive weeks' unpaid parental leave in respect of the birth of a child to an Employee or the Employee's Partner or the Adoption of a child.
- (b) Subject to the requirements of this clause an Employee who is the Primary Care Giver, and who has completed 12 months' continuous service in the WA Public Sector immediately preceding the parental leave, will be entitled to 560 hours' (14 weeks) paid parental leave in respect of the birth of a child to an Employee or the Employee's Partner or the Adoption of a child that will form part of the 52 week unpaid entitlement.
- (c) Service performed by an Eligible Casual Employee for a public sector employer shall count as service for the purposes of determining 12 months continuous service as per subclause (2)(b) of this clause only where:
- (i) the Eligible Casual Employee has become a permanent or Fixed Term Contract Employee with the same employer; and
- (ii) the break between the period of eligible Casual employment and permanent or Fixed Term Contract employment is no more than three months.
- (d) The Employer may request evidence of Primary Care Giver status.
- (e) An Employee seeking to adopt a child shall be entitled to two days' unpaid leave for the Employee to attend interviews or examinations as required for the adoption procedure. Employees working or residing outside the Perth Metropolitan Area are entitled to one additional day's leave. The Employee may take any paid leave entitlement in lieu of this leave.
- (f) The period of paid parental leave can be extended by the Employee taking double the leave on a half-pay basis and its effect is in accordance with subclause (11)(b) of this clause.
- (g) Paid parental leave for primary care purposes for any one birth or Adoption shall not exceed the entitlement provided at subclause (2)(b) of this clause or its half-pay equivalent.

- (h) Where both Partners are employed in the WA Public Sector, the leave shall not be taken concurrently except for special circumstances and with the approval of the Employer.
 - (i) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between Partners, employed within the WA Public Sector, assuming the role of Primary Care Giver.
 - (j) An Employee must take paid and unpaid parental leave in one continuous period.
 - (k) Where less than the 52 weeks' parental leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.
 - (l) An Eligible Casual Employee who does not meet the criteria outlined in subclause (2)(c) of this clause is entitled to unpaid parental leave only.
- (3) Notice Requirements:
- (a) An Employee is entitled to parental leave only after he or she has given the Employer at least eight weeks' written notice of his or her intention to take the leave, the date the Employee proposes to commence parental leave and the proposed period of leave to be taken.
 - (b) An Employee who has given the Employer notice of their intention to take parental leave shall provide the Employer with a medical certificate from a registered Medical Practitioner naming the Employee, confirming the pregnancy and the estimated date of birth.
 - (c) An Employee is not in breach of subclause (3)(a) of this clause by failing to give the required period of notice if such failure is due to the birth of the child taking place prior to the date the Employee had intended to proceed on parental leave.
 - (d) An Employee is not in breach of subclause (3)(a) of this clause by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.
 - (e) An Employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period of leave elect to reduce or extend the period stated in the original application provided four weeks' written notice is provided.
- (4) Commencement of Parental Leave:
- (a) A pregnant Employee can commence the period of paid parental leave any time up to six weeks before the expected date of birth.
 - (b) A pregnant Employee can commence the period of unpaid parental leave any time up to six weeks before the expected date of birth of the child or earlier if the Employer and Employee so agree, but must not start later than the birth of the child.
 - (c) An eligible Employee identified as the Primary Care Giver can commence the period of paid parental leave from the birth date or for the purpose of Adoption from the Day of Placement of the child.
 - (d) The minimum period of absence on parental leave for a pregnant Employee can commence six weeks before the expected date of birth and end six weeks after the day on which the birth has taken place. An Employee may continue to work or resume duty during this minimum period, however, the Employer may require the Employee to provide a certificate from a registered Medical Practitioner indicating that the Employee is fit to continue or resume duty within this minimum period.
 - (e) Where the pregnancy of an Employee terminates other than by the birth of a living child, not earlier than 20 weeks before the expected date of the birth, the entitlement to paid parental leave remains intact and subject to the eligibility requirements of this clause. Such paid parental leave cannot be taken concurrently with any paid personal leave in accordance with clause 30 – Personal Leave.
 - (f) The period of paid parental leave must be concluded within 12 months of the birth of the child.
 - (g) The Employer, may, in exceptional circumstances, allow an Employee to take paid parental leave that will result in the Employee being on paid parental leave more than 12 months after the birth of the child.
 - (h) Where an application for parental leave has been granted for the Adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave, or return to work.
- (5) Payment for Paid Parental Leave:
- (a) Paid parental leave will be paid at ordinary rates and will not include the payment of any form of allowance or penalty payment.
 - (b) An Employee in receipt of a higher duties allowance for a continuous period of 12 months immediately prior to commencing paid parental leave, is to continue to receive the higher duties allowance paid at the full rate for the first four weeks only, regardless of whether paid parental leave is taken at half pay.
 - (c) An Employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences.

- (d) An Employee is entitled to remain on paid parental leave if the pregnancy results in other than a live child; the Employee is incapacitated following the birth of the child; or the child dies or is hospitalised such that the Employee or the Employee's Partner is not providing principal care to the child.
 - (e) Parental leave payment for Part Time Employees is to be determined according to an average of the hours worked by the Employee over the preceding 12 months or their ordinary working hours at the time of commencement of parental leave, exclusive of any form of allowance or penalty payment, whichever is greater.
- (6) Partner Leave:
- (a) An Employee who is not taking parental leave is entitled to one week's partner leave as prescribed by this clause in respect of the:
 - (i) birth of a child to the Employee's Partner; or
 - (ii) Adoption of a child who is not the child or the stepchild of the Employee and/or the Employee's Partner, is under the age of 16, and has not lived continuously with the Employee for six months or longer.
 - (b) Subject to available credits, the entitlement to one week's partner leave may be taken as:
 - (i) paid personal leave, subject to subclause (6)(g) of this clause;
 - (ii) paid annual and/or long service leave;
 - (iii) paid accrued time off in lieu of overtime; and/or
 - (iv) unpaid partner leave.
 - (c) Unless the Employer agrees, Partner leave must not start before:
 - (i) If the leave is birth related leave, the date of birth of the child; or
 - (ii) If the leave is adoption related leave, the day of placement of the child.
 - (d) (i) Subject to subclause (6)(d)(ii) of this clause, the taking of partner leave by an Employee shall have no effect on their or their Partner's entitlement, where applicable, to access paid parental leave.
 - (ii) Where applicable, unpaid partner leave taken by an Employee shall be counted as part of the Employee's unpaid parental leave entitlement.
 - (e) Any public holidays that fall during partner leave shall be counted as part of the partner leave and do not extend the period of partner leave.
 - (f) The taking of accrued time off in lieu of overtime for partner leave purposes shall be subject to the provisions of clause 11 – Hours of Duty, and clause 13 – Overtime where applicable.
 - (g) An Employee may access their accrued personal leave entitlements for partner leave purposes, subject to the requirements of the *Minimum Conditions of Employment Act 1993* (WA) being met. That is, a minimum of 80 hours' personal leave must be kept available for an Employee to access for the purposes of an Employee's entitlement to paid leave for illness or injury or carer's leave.
 - (h) The right to access hours of personal leave for partner leave purposes does not affect an Employee's right to take more than five days' personal leave for the purpose provided for in clause 30 – Personal Leave.
 - (i) An Employee is entitled to request an extension to the period of unpaid partner leave up to a maximum of eight weeks.
 - (j) The extended unpaid partner leave may be taken in separate periods, but, unless the Employer agrees, each period must not be shorter than two weeks.
 - (k) The Employer is to agree to an Employee's request to extend their unpaid partner leave made under subclause (6)(i) of this clause unless:
 - (i) having considered the Employee's circumstances, the Employer is not satisfied that the request is genuinely based on the Employee's parental responsibilities; or
 - (ii) there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the Employer and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:
 - (aa) cost;
 - (bb) lack of adequate replacement staff;
 - (cc) loss of efficiency; and
 - (dd) impact on the production or delivery of products or services by the Employer.
 - (l) The Employer is to give the Employee written notice of the Employer's decision on a request to extend their unpaid partner leave. If the Employee's request is refused, the notice is to set out the reasons for the refusal.
 - (m) An Employee who believes their request to extend unpaid partner leave has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Employer to demonstrate that the refusal was justified in the circumstances.

- (n) Where the Employer agrees to an Employee's request to extend their period of unpaid partner leave under subclause (6)(k) of this clause, the Employer must allow an Employee to elect to substitute any part of that period of unpaid partner leave with accrued annual leave, long service leave and/or time off in lieu of overtime.
 - (o) An Employee on unpaid partner leave is not entitled to paid personal leave.
 - (p) The total period of partner leave provided by this clause shall not exceed eight weeks.
 - (q)
 - (i) The Employee shall give not less than four weeks' notice in writing to the Employer of the date the Employee proposes to commence partner leave, stating the period of leave to be taken.
 - (ii) An Employee who has given the Employer notice of their intention to take partner leave shall provide the Employer with a medical certificate from a registered Medical Practitioner naming the Employee, or the Employee's Partner, confirming the pregnancy and the estimated date of birth.
 - (r) The provisions of subclause (11) of this clause concerning the effect of parental leave on the contract of employment shall apply to Employees accessing partner leave, with such amendment as necessary.
 - (s) An Eligible Casual Employee, as defined in subclause (1) of this clause, is only entitled to unpaid partner leave.
- (7) Transfer to a Safe Job:
- (a) Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the Employee make it inadvisable for the Employee to continue in her present duties, as is certified necessary by a registered Medical Practitioner, the duties shall be modified or the Employee may be transferred to a safe position of the same classification until the commencement of parental leave.
 - (b) A pregnant Employee may work part time in one or more periods whilst she is pregnant where she provides the Employer with a medical certificate from a Medical Practitioner advising that part time employment is, because of her pregnancy, necessary or preferable.
 - (i) The terms of part time employment undertaken in accordance with subclause (7)(b) of this clause shall be in writing.
 - (ii) Such employment shall be in accordance with clause 12 – Part Time Employment.
 - (c) In the absence of an alternative requirement, and unless otherwise agreed between the Employer and Employee, an Employee shall provide the Employer with four weeks' written notice of an intention to:
 - (i) vary part time work arrangements made under subclause (7)(b) of this clause; or
 - (ii) revert to full time employment during the Employee's pregnancy.
 - (d) An Employee reverting to full time employment in accordance with subclause (7)(c)(ii) of this clause will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the Employee's skill and abilities as the substantive position held immediately prior to undertaking part time employment.
 - (e) If the transfer to a safe position is not Practicable, the Employee is entitled to be absent from the workplace on full pay for the period during which she is unable to continue in her present position.
 - (f) An Employee who is absent from work pursuant to subclause (7)(e) of this clause shall be paid the amount she would reasonably have expected to be paid if she had worked during that period. This includes an Eligible Casual Employee.
 - (g) An entitlement to be absent from the workplace on full pay is in addition to any leave entitlement the Employee has.
 - (h) An entitlement to be absent from the workplace on full pay ends at the earliest of whichever of the following times is applicable:
 - (i) the end of the period stated in the medical certificate;
 - (ii) if the Employee's pregnancy results in the birth of a living child – the end of the day before the date of birth; or
 - (iii) if the Employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy.
- (8) Interaction with Other Leave Entitlements:
- (a) An Employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or accrued long service leave for the whole or part of the period of parental leave.
 - (b) Where annual and/or long service leave is substituted that leave shall form part of the 52 weeks' parental leave entitlement.
 - (c) An Employee on parental leave is not entitled to paid personal leave and other paid absences provided in this Enterprise Order.
 - (d) Where the pregnancy of an Employee terminates other than by the birth of a living child then the Employee shall be entitled to such period of paid personal leave or unpaid leave for a period certified as necessary by a registered Medical Practitioner. Such paid personal leave cannot be taken concurrently with a period of paid parental leave.
 - (e) Where a pregnant Employee not on parental leave suffers illness related to the Employee's pregnancy or is required to undergo a pregnancy related medical procedure the Employee may take any paid personal leave to which the Employee is entitled or such further unpaid leave for a period certified as necessary by a registered Medical Practitioner.

- (f) An Employee is entitled to apply for leave without pay following parental leave to extend their leave by up to two years.
 - (g) Approval for an extension to unpaid Parental Leave will be subject to all other available leave entitlements being exhausted.
 - (h) The Employer is to agree to a request for extended unpaid parental leave unless:
 - (i) the Employer is not satisfied that the request is genuinely based on the Employee's parental responsibilities; or
 - (ii) agreeing to the request would have an adverse impact on the conduct of operation or business of the Employer and those grounds would satisfy a reasonable person.
 - (i) The Employer is to give the Employee written notice of the Employer's decision on a request for extended unpaid parental leave under subclause (8)(f) of this clause. If the request is refused, the notice is to set out the reasons for the refusal.
 - (j) An Employee who believes their request for extended unpaid parental leave under subclause (8)(f) of this clause has been unreasonably refused may seek to enforce it as a minimum condition of employment, and the onus will be on the Employer to demonstrate that the refusal was justified in the circumstances.
 - (k) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both Partners work for the WA Public Sector the total combined period of leave without pay following parental leave will not exceed two years.
- (9) Communication during Parental Leave:
- (a) If the Employer makes a decision that will have a significant effect on the status, responsibility level, pay or location of an Employee's position whilst on parental leave, the Employer must take all reasonable steps to give the Employee information about, and an opportunity to discuss, the effect of the decision on that position.
 - (b) An Employee shall also notify the Employer of changes of address or other contact details that might affect the Employer's capacity to comply with subclause (9)(a) of this clause.
- (10) Return to Work:
- (a) An Employee shall confirm the intention to return to work by notice in writing to the Employer not less than four weeks prior to the expiration of the period of parental leave.
 - (b) An Employee on return from parental leave shall be entitled to the same position, or a position equivalent in pay, conditions and status and commensurate with the Employee's skill and abilities, as the substantive position held immediately prior to proceeding on parental leave. Where an Employee was transferred to a safe job pursuant to subclause (7)(a) of this clause the Employee is entitled to return to the position occupied immediately prior to the transfer.
 - (c) An Employee may return, subject to the approval of the Employer, on a part time basis to the same position occupied prior to the commencement of leave or to a different position at the same classification level on a part time basis in accordance with the part time provisions of this Enterprise Order, or on a modified basis that involves the Employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the Employee worked immediately before starting parental leave.
 - (d) Subject to the Employer's approval an Employee who has returned on a part time or modified basis may resume working on the same basis and at the same classification level the Employee worked immediately before commencing parental leave.
 - (e) If, on finishing parental leave, an Employee has returned to work on a part time or modified basis, the Employer may subsequently require the Employee to resume working on the same basis as the Employee worked immediately before starting parental leave.
 - (f) A requirement can be made under subclause (10)(e) of this clause only if:
 - (i) the requirement is made on the grounds relating to the adverse effect that the Employee continuing to work on a modified or part time basis would have on the conduct of the operations or business of the Employer and those grounds would satisfy a reasonable person; or
 - (ii) the Employee has a child who has reached the compulsory education period as defined in section 6 of *the School Education Act 1999* (WA).
 - (g) Where the position occupied by the Employee no longer exists the Employee shall be entitled to a position of the same classification level with duties similar to that of the abolished position.
- (11) Effect of Leave on Employment Contract:
- (a) Paid parental leave will count as qualifying service for all purposes.
 - (b) Qualifying service for any purpose is to be calculated according to the number of weeks of paid parental leave that were taken at full pay or would have been had the Employee not taken paid parental leave at half pay. Employees who take paid parental leave on half pay do not accrue entitlements beyond those that would have accrued had they taken the leave at full pay.
 - (c) Absence on unpaid parental leave or extended unpaid parental leave shall not break the continuity of service of Employees.

- (d) Where an Employee takes a period of unpaid parental leave or extended unpaid parental leave exceeding 14 calendar days in one continuous period, the entire period of such leave shall not be taken into account in calculating the period of service for any purpose. Periods of unpaid leave of 14 days or less shall count as continuous service.
- (e) An Employee on parental leave may terminate employment at any time during the period of leave by providing the required written notice.

Clause 38 – Cultural/Ceremonial Leave

- (1) Employees are entitled to time off without loss of pay for cultural/ceremonial purposes, subject to agreement between the Employer and Employee and sufficient leave credits being available.
- (2) Such leave shall include leave to meet the Employee's customs, traditional law and to participate in cultural/ceremonial activities.
- (3) Cultural/ceremonial leave may be taken as whole or part days off. Each day or part thereof shall be deducted from:
 - (a) the Employee's annual leave entitlements;
 - (b) the Employee's long service leave entitlements; or
 - (c) time off in lieu.
- (4) Time off without pay may be granted by arrangement between the Employer and the Employee for cultural/ceremonial purposes.
- (5) The Employer may request reasonable evidence of the legitimate need for the Employee to be allowed time off.
- (6) The provisions of this clause do not apply to Casual Employees.

Clause 39 – Blood/Plasma Donors Leave

- (1) Subject to operational requirements, Employees shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:
 - (a) prior arrangements with the supervisor have been made and at least two days' notice has been provided; or
 - (b) the Employee is called upon by the Red Cross Blood Centre.
- (2) The notification period shall be waived or reduced where the supervisor is satisfied that operations would not be unduly affected by the Employee's absence.
- (3) The Employee shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- (4) Employees shall be entitled to two hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.
- (5) The provisions of this clause do not apply to Casual Employees.

Clause 40 – Leave For International Sporting Events

- (1) Special leave with pay may be granted by the Employer to an Employee chosen to represent Australia as a competitor or official, at a sporting event which meets the following criteria:
 - (a) it is a recognised international amateur sport of national significance; or
 - (b) it is a world or international regional competition; and
 - (c) no contribution is made by the sporting organisation towards the Normal Salary of the Employee.
- (2) The Employer shall make enquiries with the Department of Sport and Recreation as to:
 - (a) whether the application meets the above criteria; and
 - (b) the period of leave to be granted.
- (3) The provisions of this clause do not apply to Casual Employees.

Clause 41 – Leave For Defence Force Reserves Training

- (1) The Employer must grant leave of absence for the purpose of Defence service to an Employee who is a volunteer member of the Defence Force Reserves or Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.
- (2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.
- (3) Application for leave of absence for Defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the Employee shall provide a certificate of attendance to the Employer.
- (4) Paid leave:
 - (a) An Employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.
 - (b) Part Time Employees shall receive the same paid leave entitlement as full time Employees but payment shall only be made for those hours that would normally have been worked but for the leave.
 - (c) On written application, an Employee shall be paid salary in advance when proceeding on such leave.
 - (d) Casual Employees are not entitled to paid leave for the purpose of Defence service.
 - (e) An Employee is entitled to paid leave for a period not exceeding 112 hours on full pay in any period of 12 months commencing on 1 July in each year.

- (f) An Employee is entitled to a further period of paid leave not exceeding 16 calendar days, in any period of 12 months commencing on 1 July. Pay for this leave shall be at the rate of the difference between the normal remuneration of the Employee and the Defence Force payments to which the Employee is entitled if such payments do not exceed Normal Salary. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the Employee.
- (5) Unpaid leave
- (a) Any leave for the purpose of Defence service that exceeds the paid entitlement prescribed in subclause (4) of this clause shall be unpaid.
- (b) Casual Employees are entitled to unpaid leave for the purpose of Defence service.
- (6) Use of other leave
- (a) An Employee may elect to use annual or long service leave credits for some or all of their absence on Defence service, in which case they will be treated in all respects as if on normal paid leave.
- (b) The Employer cannot compel an Employee to use annual leave or long service leave for the purpose of Defence service.

Clause 42 – Leave Without Pay

- (1) Subject to the provisions of subclause (2) of this clause, the Employer may grant an Employee leave without pay for any period and is responsible for the placement of that Employee on his or her return.
- (2) Every application for leave without pay will be considered on its merits and may be granted provided:
- (a) the work of WA Police is not inconvenienced; and
- (b) all other leave credits of the Employee are exhausted.

PART G – UNION FACILITIES

Clause 43 – Union Communication with Members and Union Facilities for Union Representatives

- (1) The Employer will recognise Union representatives in WA Police and will allow them to carry out their role and functions.
- (2) The Union will advise the Employer in writing of the names of Union representatives in WA Police.
- (3) The Employer shall recognise the authorisation of each Union representative in WA Police and shall provide them with the following:
- (a) paid time off from normal duties to perform their functions as a Union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the Electorate Delegates Committee and to attend Union business;
- (b) access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, Internet, photocopiers and stationery. Such access to facilities will be negotiated at WA Police level and shall not unreasonably affect the operation of the organisation;
- (c) a notice board for the display of Union materials, and appropriate broadcast email facilities to communicate with Union members;
- (d) notification of the commencement of new Employees, and as part of their induction, time to discuss the benefits of Union membership with them;
- (e) access to Industrial Instruments, policies and procedures;
- (f) access to information on matters affecting Employees in accordance with clause 9 – Introduction of Change; and
- (g) the names of any Equal Employment Opportunity and Occupational Safety and Health representatives.
- (4) WA Police policies and procedures governing the appropriate access and use of facilities will apply.

Clause 44 – Leave To Attend To Union Business

- (1) The Employer shall grant paid leave at the ordinary rate of pay during normal working hours to an Employee:
- (a) who is required to attend or give evidence before any Industrial Tribunal;
- (b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;
- (c) when prior arrangement has been made between the Union and the Employer for the Employee to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings;
- (d) who as a Union-nominated representative is required to attend joint Union/management consultative committees or working parties; and
- (e) where the Employee is a Director of the Union and is required to attend meetings to fulfil that role.
- (2) The granting of leave is subject to the Employer's convenience and shall only be approved:
- (a) where reasonable notice is given for the application for leave;
- (b) for the minimum period necessary to enable the union businesses to be conducted or evidence to be given; and
- (c) for those Employees whose attendance is essential.

- (3) The Employer shall not be liable for any expenses associated with an Employee attending to Union business.
- (4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.
- (5) An Employee shall not be entitled to paid leave to attend to Union business other than as prescribed by this clause.
- (6) The provisions of the clause shall not apply to:
 - (a) special arrangements made with the Union which provide for unpaid leave for Employees to conduct Union business; and
 - (b) when an Employee is absent from work without the approval of the Employer.

Clause 45 – Trade Union Training Leave

- (1) Subject to the Employer's convenience, paid leave of absence shall be granted by the Employer to Employees who are nominated by the Union to attend short courses or seminars as from time to time approved by the Employer.
- (2) An Employee shall be granted up to a maximum of five days' paid leave per calendar year for trade union training or similar courses or seminars approved by the Employer. However, leave of absence in excess of five days and up to 10 days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed 10 days.
 - (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.
 - (b) Where a Public Holiday, Public Service Holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.
 - (c) Subject to subclause (3)(a) of this clause, shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.
 - (d) Part Time Employees shall receive the same entitlement as full time Employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
- (4)
 - (a) Any application by an Employee shall be submitted to the Employer for approval at least four weeks before the commencement of the course unless the Employer agrees otherwise.
 - (b) All applications for leave shall be accompanied by a statement from the Union indicating that the Employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue, relevance of course/seminar, and the authority which is conducting the course.
- (5) A qualifying period of 12 months service shall be served before an Employee is eligible to attend courses or seminars of more than half-day duration. The Employer may, where special circumstances exist, approve an application to attend a course or seminar where an Employee has less than 12 months' service.
- (6)
 - (a) The Employer shall not be liable for any expenses associated with an Employee's attendance at trade union training courses.
 - (b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

PART H – RETIREMENT, REMOVAL OR DEATH OF AN EMPLOYEE

Clause 46 – Retirement, Removal or Death of an Employee

- (1) Retirement:
 - (a) An Employee may retire on attaining the age of 55 years by giving the appropriate period of notice.
- (2) Examination by Medical Board:
 - (a) Where the Employer is of the opinion that an Employee is not fit for further service, he may direct the Employee to be examined by a medical board.
 - (b) The medical board referred to in subclause (2)(a) of this clause shall consist of three legally qualified Medical Practitioners nominated by the person who holds or acts in the office of Commissioner of Health under the *Health Act 1911* (WA).
 - (c) An Employee shall not fail to carry out a direction given pursuant to subclause (2)(a) of this clause.
 - (d) Where the medical board referred to in subclause (2)(b) of this clause, reports to the Employer that the Employee in question is unfit for further active service the Employer shall advise the Employee of the date the Employee will cease duty.
- (3) Allowances Paid on Death of an Employee:

Where an Employee dies the Partner of the Employee and such of the children of the Employee as are under the age of 18 years are entitled to the allowances prescribed by clause 23 – Travelling Allowance, clause 25 – Transfer Allowance and clause 27 – Removal Allowance for the conveyance of themselves and their furniture and effects to the Metropolitan Area or to any part of the State approved by the Employer.
- (4) Leave Entitlement to be Paid Out:

On the death of an Employee the Employer may grant to the relatives of the Employee who were dependent on the Employee at the date of the Employee's death the monetary equivalent, computed to the date of death, of:

 - (a) annual leave accrued and owing to the Employee;
 - (b) long service leave accrued and owing to the Employee; and

- (c) pro rata leave for each completed month of service of the Employee in the current year.

PART I - SCHEDULES**Schedule A – Overtime Meal Allowance**

Breakfast	\$10.80 per meal
Lunch	\$13.30 per meal
Evening Meal	\$15.95 per meal
Supper	\$10.80 per meal

Schedule B – Camping Allowance

South of 26 degrees South Latitude	Rate Per day	Item
Permanent Camp - Cook provided by the Department	\$40.60	1
Permanent Camp - No cook provided	\$54.10	2
Other Camping - Cook provided by the Department	\$67.85	3
Other Camping - No cook provided	\$81.15	4
North of 26 degrees South Latitude	Rate Per day	Item
Permanent Camp - Cook provided by the Department	\$58.55	1
Permanent Camp - No cook provided	\$72.10	2
Other Camping - Cook provided by the Department	\$85.60	3
Other Camping - No cook provided	\$99.15	4

Schedule C - Travelling, Transfer and Relieving Allowance

ITEM	PARTICULARS	COLUMN A DAILY RATE First 49 days after arrival at new locality	COLUMN B DAILY RATE Period of Relief in Excess of 49 Days EMPLOYEE WITH DEPENDANTS	COLUMN C DAILY RATE Period of Relief in Excess of 49 Days EMPLOYEE WITHOUT DEPENDANTS
ALLOWANCE TO MEET INCIDENTAL EXPENSES (\$)				
(1)	WA - South of 26° South Latitude	14.55	-	-
(2)	WA - North of 26° Latitude	21.70	-	-
(3)	Interstate	21.70	-	-
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL (\$)				
(4)	WA - Metropolitan Hotel or Motel	305.45	152.70	101.80
(5)	Locality South of 26° South Latitude	208.55	104.30	69.50
(6)	Locality North of 26° South Latitude			
	Broome	456.70	228.35	152.25
	Carnarvon	255.15	127.55	85.05
	Dampier	366.70	183.35	122.25
	Derby	342.20	171.10	114.05
	Exmouth	292.70	146.35	97.55
	Fitzroy Crossing	370.20	185.10	123.40
	Gascoyne Junction	291.70	145.85	97.25
	Halls Creek	247.20	123.60	82.40
	Karratha	445.70	222.85	148.55
	Kununurra	331.70	165.85	110.55
	Marble Bar	271.70	135.85	90.55
	Newman	338.95	169.50	113.00
	Onslow	273.30	136.65	91.10
	Pannawonica	192.70	96.35	64.25
	Paraburdoo	259.70	129.85	86.55
	Port Hedland	367.15	183.55	122.40
	Roebourne	241.70	120.85	80.55
	Shark Bay	240.20	120.10	80.05
	Tom Price	320.20	160.10	106.75
	Turkey Creek	235.70	117.85	78.55
	Wickham	508.70	254.35	169.55
	Wyndham	254.70	127.35	84.90

ITEM	PARTICULARS	COLUMN A DAILY RATE First 49 days after arrival at new locality	COLUMN B DAILY RATE Period of Relief in Excess of 49 Days EMPLOYEE WITH DEPENDANTS	COLUMN C DAILY RATE Period of Relief in Excess of 49 Days EMPLOYEE WITHOUT DEPENDANTS
(7)	Interstate - Capital City			
	Sydney	304.90	152.45	101.60
	Melbourne	288.55	144.30	96.15
	Other Capitals	270.10	135.05	89.95
(8)	Interstate - Other than Capital City			
		208.55	104.30	69.50
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	93.65	-	-
(10)	WA - North of 26° South Latitude	128.25	-	-
(11)	Interstate	128.25	-	-

TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.

(12)	WA - South of 26° South Latitude	
	Breakfast	16.30
	Lunch	16.30
	Dinner	46.50
(13)	WA - North of 26° South Latitude	
	Breakfast	21.20
	Lunch	33.20
	Dinner	52.20
(14)	Interstate	
	Breakfast	21.20
	Lunch	33.20
	Dinner	52.20
MISSED MEAL		
(15)	Rate per meal	6.35
DEDUCTION FOR NORMAL LIVING EXPENSES		
(16)	Each adult	26.25
(17)	Each child	4.50

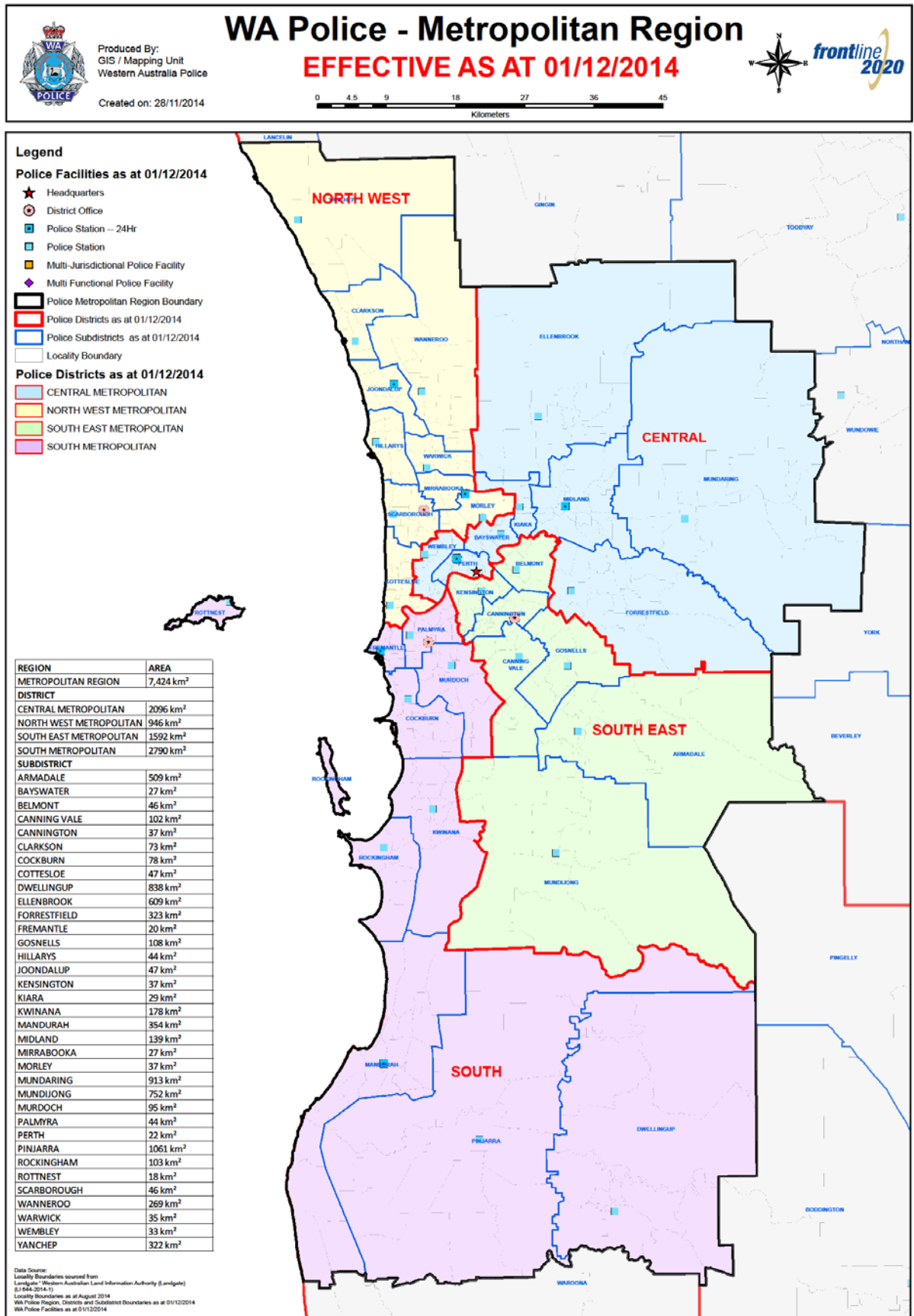
Schedule D – Motor Vehicle Allowance

AREA AND DETAILS	Rate (cents) per kilometre ENGINE DISPLACEMENT (In Cubic Centimetres)		
	OVER 2600cc	OVER 1600cc to 2600cc	1600cc & UNDER
Metropolitan Area	89.5	64.5	53.2
South West Land Division	91.0	65.4	54.0
North of 23.5 Degree South Latitude	98.6	70.6	58.3
Rest of the State	94.3	67.5	55.6

MOTOR CYCLE ALLOWANCE

Distance Travelled During a Year on Official Business	Rate Cents per Kilometre
Rate per kilometre	31

Schedule E – Metropolitan Area



NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2017 WAIRC 00903

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the following Agreements, namely the -

1. *Allect Services (Bentley WA) Enterprise Agreement 2005*
2. *ANI Wear Resistant Products Division Enterprise Bargaining Consent Agreement 1998*
3. *BP Refinery-Kwinana VDU2 Stage 1 Upgrade-Project Agreement 1998*
4. *Cape Modern Workshop Employees' Agreement*
5. *City of Canning and Engineering Workshop Employees Enterprise Bargaining Agreement 1996 – The*
6. *Cleanaway Technical Services Forrestdale Enterprise Bargaining Agreement 1997*
7. *Cleanaway Technical Services Brookdale Enterprise Bargaining Agreement 2000 – The*
8. *Cockburn Hire Engineering Enterprise Agreement*
9. *Crane Aluminium Systems Balcatta Enterprise Agreement 2000*
10. *Cryeng Pty Limited Industrial Agreement 2003*
11. *Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2001 – 2004*
12. *Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2003-2006*
13. *Eltin Surface Mining Pty Ltd Boddington Gold Mine Maintenance Agreement 1996*
14. *Email Limited Major Appliance Group- Osborne Park Service Technicians Enterprise Agreement 1997*
15. *Enterprise Bargaining Agreement Crane Aluminium Systems Employees of the company*
16. *Fluor Daniel Diversified Plant Services Argyle Diamond Mine Enterprise Agreement 1999*
17. *Fluor Daniel Power & Maintenance Services Maintenance Services Power Plant Maintenance Enterprise Agreement 1998*
18. *Fluor Global Services Power Plant Maintenance Enterprise Agreement 2000-2003*
19. *Forward Engineers Agriculture Workshop Enterprise Agreement 1999*
20. *Fremantle Foundry & Engineering Co Pty Ltd Enterprise Bargaining Agreement 1999*
21. *Harnischfeger of Australia Pty Ltd Western Region Workshop, Repair, Manufacture and Maintenance Agreement 2003*
22. *Inghams (Osborne Park) Shift Work Enterprise Agreement 2003*
23. *Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2003*
24. *Inghams Poultry Processing (Osborne Park) Enterprise Agreement 2004*
25. *IPC Industrial Maintenance Pty - Kwinana Shutdown Agreement*
26. *James Hardie Building Services Ltd. trading as Quell Fire & Safety Products, Perth, Portable Service Certified Agreement 1996*
27. *JFK Engineering Pty Ltd Enterprise Agreement 1996 – 1997*
28. *JFK Engineering Pty Ltd Enterprise Agreement 1998 – 1999*
29. *Kewdale Engineering & Construction Enterprise Bargaining Agreement No 4 – 1998*
30. *Printing (Institute of Technology - Apprentices) Industrial Agreement*

on the grounds that there is no employee to whom the Agreements apply.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin 130/2016 on all correspondence.

Dated at Perth this 17th day of October 2017

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00940

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the following Agreements, namely the -

1. *Arthur Yates and Co Limited Canning Vale Western Australia Site Agreement*
2. *Atkins Carlyle Ltd (Belmont Warehouses) Enterprise Agreement 1995*
3. *Australian Wool Handlers (Albany) Enterprise Agreement, 2000*
4. *Australian Wool Handlers (Spearwood) Enterprise Agreement, 1998*
5. *Broadway Fresh and SDA Agreement 2003*
6. *Bunnings Forest Products Pty Ltd Storepersons Enterprise Agreement 1996*
7. *Bunnings (Non Warehouse Stores)/SDA Agreement 2002*
8. *City Gems Perth and SDA Agreement 2003*
9. *Coles Distribution Centre Enterprise Agreement 1994, No. AG 38 of 1995*
10. *Coles Variety City Store Rostering Agreement 1993*
11. *Coles Myer Logistics Pty. Ltd. Myer Distribution Centre Carousel Road Cannington Site Agreement 1999*
12. *Dewsons Coo롱gup and SDA Agreement 2004*
13. *Dyson's Packaging Pty Ltd Enterprise Agreement 1995, No. AG 212 of 1995*
14. *Elders Limited (Spearwood Wool Store) Enterprise Agreement 1995, No. AG 235 of 1995*
15. *Elders Limited (Spearwood Wool Store) Enterprise Agreement 1996*
16. *FAL and SDA Enterprise Agreement 1994*
17. *Feeding Frenzy Perth and SDA Agreement 2003*
18. *Fish Feast Kardinya SDA Agreement 2002*
19. *Fish Feast Greenmount SDA Agreement 2002*
20. *Fish Feast Joondalup SDA Agreement 2002*
21. *Fish Feast Gosnells SDA Agreement 2002*
22. *Fish Feast Lathlain SDA Agreement 2002*
23. *Fish Feast Maylands SDA Agreement 2002*
24. *Fish Feast Kelmscott SDA Agreement 2002*
25. *Fish Feast Canning Vale SDA Agreement 2003*
26. *Fish Feast Malaga SDA Agreement 2003*
27. *Fish Feast Halls Head SDA Agreement 2003*
28. *Goodman Fielder Consumer Foods (Canningvale) Enterprise Agreement 2004/2005*
29. *Gordon & Gotch Limited Enterprise Bargaining Agreement 1996*
30. *Gordon & Gotch Limited Enterprise Bargaining Agreement 1997*
31. *Inghams Enterprise Storemen's Agreement 1994*
32. *Inghams Enterprises Pty Ltd Distribution Enterprise Bargaining Agreement 2000*
33. *Inghams Enterprises (Telesales) Enterprise Bargaining Agreement 2003*
34. *Kebab Company - Joondalup Perth and SDA Agreement 2003*

on the grounds that there is no employee to whom the Agreements apply.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin 130/2016 on all correspondence.

Dated at Perth this 1st day of November 2017

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00916

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the following Agreements, namely the -

1. *K Mart Armadale Rostering Agreement 1994*
2. *K-Mart Food Services (Wages) Agreement 1994*
3. *Mandurah Forum Takeaway and SDA Agreement 2003*
4. *Mitre 10 Warehouse Employees Agreement 2002*
5. *Myer Stores Limited Distribution Centre Carousel Road Cannington Site Agreement 1994*
6. *Nestle Australia Ltd Kewdale - SDA Agreement 2001*
7. *Osborne Cold Stores Enterprise Bargaining Agreement 1996, No. AG 125 of 1996*
8. *P & O Cold Storage Ltd Enterprise Agreement 1995, No. AG 26 of 1995*
9. *P & O Cold Storage Ltd Enterprise Agreement 1997*
10. *P & O Cold Storage Ltd Enterprise Agreement 1996, No. AG 66 of 1996*
11. *PVS/Worths Pty Ltd Jobskills Retail Agreement*
12. *PVS/Boutique Consolidated Pty Ltd Jobskills Retail Agreement*
13. *PVS/Silkside Pty Ltd Jobskills Retail Agreement*
14. *PVS/Suzanne Grae Corporation Pty Ltd Jobskills Retail Agreement*
15. *PVS/Universal Retailers Pty Ltd Jobskills Retail Agreement*
16. *PVS/Skyjack Jobskills Retail Agreement*
17. *PVS/Fabric Warehouse Jobskills Retail Agreement*
18. *PVS/Prints and Presence Jobskills Retail Agreement*
19. *PVS/Sportsgirl Sportscraft Group Jobskills Retail Agreement*
20. *PVS/Aquarius Cards and Gifts Jobskills Retail Agreement*
21. *PVS/Repco Auto Parts Jobskills Retail Agreement*
22. *PVS/Jacksons Drawings Supplies Pty Limited Jobskills Retail Agreement*
23. *PVS/Desert Designs Jobskills Retail Agreement*
24. *PVS/Peppermint Tree Jobskills Retail Agreement*
25. *PVS/Gardner Electronics Jobskills Retail Agreement*
26. *PVS/Poolmart Jobskills Retail Agreement*
27. *Rand National Transport Enterprise Bargaining Agreement 2002*
28. *River Rooster Bridgetown, SDA Enterprise Agreement 1998*
29. *River Rooster Stratton, SDA Enterprise Agreement 2001*
30. *River Rooster Coolbellup, SDA Enterprise Agreement 2001*

on the grounds that there is no employee to whom the Agreements apply.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. Admin 130/2016 on all correspondence.

Dated at Perth this 6th day of November 2017

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2017 WAIRC 00914

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the following Agreements, namely the -

1. *Water Corporation Redeployment, Retraining and Redundancy Agreement 1996*
2. *Water Corporation Corporate Affairs Branch Local Agreement 1998*
3. *Water Corporation Corporate Information Support Branch Local Agreement 1998*
4. *Water Corporation Infrastructure Development Branch Local Agreement 1998*
5. *Water Corporation Planning & Development Division Corporate & Regulatory Planning Branch Local Agreement 1998*
6. *Water Corporation Human Resources Branch Local Agreement 1998*
7. *Water Corporation Environment Branch Local Agreement 1998*
8. *Water Corporation Infrastructure Planning Branch Local Agreement 1998*
9. *Water Corporation Land Development Branch Local Agreement 1998*
10. *Water Corporation Executive Support/Human Resources Planning and Development Division Local Agreement 1998*
11. *Water Corporation Revenue Policy Branch Local Agreement 1998*
12. *Water Corporation Management Review & Audit Branch Local Agreement 1998*
13. *Water Corporation Operations Development Services Branch Local Agreement 1998*
14. *Water Corporation Executive Services Branch Local Agreement 1998*
15. *Water (Customer Centre, Customer Services Division) Local Agreement 1998*
16. *Water Corporation Project Management Branch Local Agreement 1998*
17. *Water Corporation Infill Sewerage Program and the Project Management Infill Sewerage Branch Local Agreement 1998*
18. *Contracts and Land Management Services Branch Local Agreement 1998*
19. *Water Corporation Engineering and Contracts Division Executive Support Branch Local Agreement 1998*
20. *Water Corporation Finance and Administration Division Executive Support Team Local Agreement 1998*
21. *Water Corporation Commercial Division Local Agreement 1998*
22. *Water Corporation Finance & Administration Division, Management Accounting Branch Local Agreement 1998*
23. *Water Corporation Finance and Administration Division Facilities Management Branch Local Agreement 1998*
24. *Water Corporation Financial Services Branch Local Agreement 1998*
25. *Water Corporation Supply Policy Branch Local Agreement 1998*
26. *Water Corporation Perth Region Local Agreement 1998*
27. *Water Corporation Carnarvon Business Unit Local Agreement 1998*
28. *Water Corporation Bulk Water & Wastewater Division Local Agreement 1998*
29. *Water Corporation Engineering and Technical Services Branch Local Agreement 1998*
30. *Water Corporation Agricultural Region Local Agreement 1998*
31. *Water Corporation Goldfields Region Local Agreement 1998*
32. *Water Corporation Construction Branch Local Agreement 1998*
33. *Water Corporation South West Region Local Agreement 1998*
34. *Water Corporation Midwest Region Local Agreement 1998*
35. *Water Corporation North West Region Local Agreement 1998*
36. *Water Corporation Great Southern Region Local Agreement 1998*

on the grounds that there is no employee to whom the Agreements apply.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. *Admin 130/2016 Vol 6* on all correspondence.

Dated at Perth this 27th day of October 2017

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

PUBLIC SERVICE APPEAL BOARD—Notation of—

The following were matters before the Commission under the Public Service Appeal Board.

Application Number	Parties		Commissioner	Matter	Dates	Result
PSAB 4/2017	Jonathan Shields	North Metropolitan Health Service	Emmanuel C	Appeal against the decision to terminate employment on 28 March 2017	14/06/2017	Discontinued
PSAB 19/2016	Jonathan Shields	North Metropolitan Health Service	Emmanuel C	Appeal against disciplinary penalty and decision on 9 September 2016	02/12/2016	Discontinued

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 68/2017	N/A	N/A	Emmanuel C	Request for mediation	12/07/2017	Concluded

RECLASSIFICATION APPEALS—

2017 WAIRC 00872

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MATTHEW READ

APPLICANT

-v-

DEPARTMENT OF TRANSPORT

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER T EMMANUEL

DATE

MONDAY, 16 OCTOBER 2017

FILE NO

PSA 3 OF 2017

CITATION NO.

2017 WAIRC 00872

Result Application dismissed

Representation (by correspondence)

Applicant Mr M Read

Respondent Mr S Barrett

Order

WHEREAS this is an application under s 80E(2)(a) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 16 October 2017 the applicant informed the Public Service Arbitrator by email that he wished to discontinue his application;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

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

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

[L.S.]

PUBLIC SECTOR MANAGEMENT ACT 1994—Matters dealt with—

2017 WAIRC 00448

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GREGG HATTRICK MEIKLE

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** COMMISSIONER D J MATTHEWS**DATE** WEDNESDAY, 12 JULY 2017**FILE NO.** APPL 25 OF 2017**CITATION NO.** 2017 WAIRC 00448**Result** Recommendation made**Representation****Applicant** Ms L Carbone, of counsel, and with her Mr G Meikle**Respondent** Mr D Anderson, of counsel, and with him Mr P Milward*Recommendation*

HAVING heard Ms L Carbone, of counsel, and Mr G Meikle for the applicant and Mr D Anderson, of counsel, and Mr P Milward for the respondent and at the conclusion of the conference on 12 July 2017 in relation to the above matter Commissioner D J Matthews recommended:

- (1) An application for the lifting of the 'flag' on Mr Meikle's future employment be made to the Employment Suitability Assessment Committee;

AND that if such an application is made Commissioner D J Matthews recommends that in light of the following matters:

- (a) Mr Meikle's otherwise unblemished record of service over a long period of time both before and after the relevant incident;
- (b) The circumstances surrounding the relevant incident;
- (c) Mr Meikle's contrition;
- (d) That Mr Meikle's contrition may not have been previously fully expressed on his behalf by those communicating with the Department; and
- (e) The financial circumstances of Mr Meikle;

THAT:

- (2) The Employment Suitability Assessment Committee convene as soon as is reasonably possible to consider the application; and
- (3) That Mr Meikle be given the opportunity to address the Employment Suitability Assessment Committee in person in support of the application.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2017 WAIRC 00876

**REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2017 WAIRC 00876
CORAM : COMMISSIONER D J MATTHEWS
HEARD : ON THE PAPERS

WRITTEN SUBMISSIONS : TUESDAY, 19 SEPTEMBER 2017, FRIDAY, 6 OCTOBER 2017
DELIVERED : WEDNESDAY, 17 OCTOBER 2017
FILE NO. : APPL 25 OF 2017
BETWEEN : GREGG HATTRICK MEIKLE
 Applicant
 AND
 MS SHARYN O'NEILL DIRECTOR GENERAL,
 DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Applicant contests penalties imposed for seven breaches of discipline - Respondent contends reprimands and fines imposed were appropriate - Totality principle discussed and applied - Found fine of seven days of pay disproportionate to misconduct when circumstances fully considered - Found fine of four days of pay appropriate in all the circumstances

Legislation : *Public Sector Management Act 1994*
School Education Act 1999

Result : Penalty adjusted

Representation:

Applicant : In person
Respondent : Mr D Anderson of counsel
Solicitors:
Respondent : State Solicitor's Office

Reasons for Decision

- 1 The applicant was found by the respondent to have committed seven breaches of discipline. The first breach of discipline was that the applicant had committed an act of misconduct in accessing a database of the respondent on five separate occasions between 3 April 2015 and 19 April 2015 for personal reasons. The other six breaches of discipline related to the use made by the applicant of the information obtained from the database.
- 2 By way of factual background, the applicant came to the conclusion that a group of students from the school at which he taught had been harassing him and his family at their home, including the causing of damage to their property, and following an incident during the April school holidays in 2015 he accessed the schools records in relation to those students and made use of the information obtained to contact their parents.
- 3 By way of penalty, the respondent imposed a reprimand and a fine of one day's pay for each breach of discipline.
- 4 The applicant accordingly was reprimanded seven times and had a fine of \$2,728.95 imposed upon him, representing seven days of pay.
- 5 By Notice of Referral lodged on 10 May 2017 pursuant to section 78(2)(b)(iv) *Public Sector Management Act 1994* (and I note that by section 239 *School Education Act 1999* members of the teaching staff of Government Schools are subject to Part 5 *Public Sector Management Act 1994*) the applicant denied he had committed any act of misconduct and sought an order quashing the reprimands and fines.
- 6 As the applicant, subsequent to lodgement of the notice, successfully argued that the respondent remove from his records a note that he is not to be re-employed by the respondent unless the application for employment is referred to the respondent's Standards and Integrity Directorate (colloquially called a "flag"), he now challenges only the penalties imposed upon him.
- 7 I have approached consideration of penalty on the basis that my consideration follows a hearing de novo on the matter and that the penalties to be imposed are ones which are now appropriate. That is, I do not pretend to be able to stand in the shoes of the respondent as at the date the penalties were imposed. I give full regard to, and have respect for, the view the respondent took of the matter but consider it is open to me to impose different penalties if I find it appropriate to do so.
- 8 Before turning to penalty, I characterise the applicant's wrongdoing in light of what I have been told about it.
- 9 The applicant was clearly frustrated by a campaign of harassment and, having identified the perpetrators, he wished to do something about it as soon as possible. I accept that his access to the database and the use made of the information obtained related solely to attempts to end the harassment.

- 10 However, there is a right way and a wrong way to go about things and the applicant clearly chose the wrong way. Parents give information to the respondent for it to be used in the education and management of their children. The respondent's staff can only access that information in ways the respondent authorises them to for the education and management of students.
- 11 The applicant accepts the respondent did not authorise him to access the information in the way he did or for the purpose that he did.
- 12 Although it was reasonable for the applicant to assume that the harassment of him related to his employment by the respondent, the applicant uncontestedly accessed and used confidential information held by the respondent for a personal purpose.
- 13 Such conduct had clear potential to damage the trust that parents place in the respondent when they give her private information.
- 14 If the applicant required private information to take the steps he wished to stop the harassment and could only get that information from the respondent then he should have made a request of the respondent for the information explaining why he wanted it. If this could only be done after the April school holidays because those in authority could not be raised by the applicant during the holidays, which the applicant says was the case, then he simply had to wait for their return.
- 15 The applicant, however annoyed he was, should not have taken matters into his own hands by accessing and using the private information within the respondent's records over the school holidays.
- 16 The applicant was obviously frustrated because he felt his privacy had been invaded by students. I agree with the respondent, however, that the applicant in turn invaded the privacy of others and that the present situation is one where the maxim of "two wrongs do not make a right" may be applied.
- 17 If the applicant believes that his conduct was reasonable or excusable he is wrong. On any objective view he misconducted himself for the reasons found by the respondent, now expanded upon in this decision.
- 18 I turn then to the matter of the appropriate penalties.
- 19 The respondent makes clear that the monetary penalties imposed were intended to be a punishment (with the principle disciplinary objectives being specific and general deterrence). I agree that this should be the purpose of the penalties imposed in this case.
- 20 On the face of it penalties of a reprimand and a fine of one day's pay for each breach of discipline are not inappropriate having regard to the seriousness of the breaches and taking into account what the applicant says about them, dealt with above.
- 21 However, I consider it fair to have regard to the totality principle.
- 22 It is normal for those imposing penalties by way of punishment to ensure that the aggregation of the penalties for each act of wrongdoing is a just and appropriate measure of the total wrongdoing involved.
- 23 I consider it necessary to make sure the total penalty imposed is not disproportionate to the wrongdoing viewed in its entirety and having regard to all the circumstances of the case, including those referable to the applicant.
- 24 I consider that to simply impose a fine of a day's pay for each breach of discipline found and to inform the applicant that this adds up to seven days of pay, without more, misses the just and appropriate step of ensuring the total monetary penalty reflects the wrongdoing. I now attempt to undertake that step.
- 25 In assessing the wrongdoing in this matter each and all of the breaches of discipline were part of one course of conduct. Each and all relate to the applicant obtaining and using (in much the same way) information about students who he believed had been harassing him in an attempt to have the harassment stop.
- 26 Taking into account the explanation for the applicant's conduct, and looking at the wrongdoing as a whole, emphasising that the applicant's actions, while wrong, related to him taking lawful steps to bring the harassment to an end and constituted a single course of conduct, I find that a fine equating to seven days of pay is not a just and appropriate penalty. I find that a fine amounting to \$2,728.95 is too high, especially given that it is comprised of seven fines for what was in effect a single course of conduct and one attended by extenuating circumstances.
- 27 I find this to be the case even though, technically, the first breach of discipline covers five separate breaches and could have been cast that way leading to a total of 11 breaches of discipline. It would still be one course of conduct.
- 28 I consider that a fine of four days of pay to be a just and appropriate penalty applying the totality principle. This is a fine of \$1559.40. That amount cannot be said to be insubstantial and it will, in my view, effectively send the message to the applicant and others that information within the respondent's databases should only be used for their intended purposes. There are few wage earners who can lose basically a week's pay without it hurting.
- 29 I take into account the applicant's present ability to pay and find that he has the ability to pay such a fine given that the "flag" no longer appears on his record.
- 30 I have not taken into account what the applicant tells me have been the consequences of the "flag" having been placed on his record. The "flag" is not part of the matter now before me and even though I take into account the applicant's current financial circumstances, which may have been contributed to by the "flag", I have only found it necessary to do so in finding that I am not persuaded the applicant does not have the capacity to pay the fine I consider appropriate.
- 31 Otherwise the financial consequences of the "flag" are not really relevant given that the respondent would still have been entitled to "flag" the applicant's record even if she had, in the first place, imposed a fine of four day's pay (or any other penalty for that matter).
- 32 The reprimand for each breach of discipline stands as these are not affected by the totality principle.

33 Finally, I have been clear that I have imposed penalties looking at the matter afresh and, while having respect for it, have not approached the matter on the basis of assessing the penalties at the time the respondent imposed them. Had I done so I would have had difficulty in finding it was fair for the respondent to impose a substantial financial penalty at the same time as she, by “flagging” the respondent’s record, severely affected his ability to earn an income.

2017 WAIRC 00883

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GREGG HATTRICK MEIKLE

APPLICANT

-v-

MS SHARYN O'NEILL DIRECTOR GENERAL,
DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS

DATE FRIDAY, 20 OCTOBER 2017

FILE NO/S APPL 25 OF 2017

CITATION NO. 2017 WAIRC 00883

Result	Penalty adjusted
Representation	
Applicant	In person
Respondent	Mr D Anderson of counsel

Order

HAVING heard the applicant on his own behalf on the papers and Mr D Anderson, of counsel, for the respondent on the papers; and

HAVING given reasons for decision;

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

THAT insofar as the penalty imposed by the respondent on the applicant included a fine of seven days of pay it be adjusted to include instead a penalty of a fine of four days of pay.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

PUBLIC SECTOR MANAGEMENT ACT 1994—Notation of—

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

Application Number	Parties	Commissioner	Matter	Dates	Result
APPL 31/2016	Diane Campbell Ms Sharyn O'Neill, Director General, Department of Education	Emmanuel C	Referral to Commission under Public Sector Management Act 1994	12/08/2016 20/12/2016	Discontinued
APPL 24/2017	Bruce Bradford Ms Sharyn O'Neill Director General, Department of Education	Matthews C	Referral to Commission under Public Sector Management Act 1994	26/06/2017	Discontinued