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GENERAL ORDERS—

2018 WAIRC 00363

2018 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00363
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 23 MAY 2018, WEDNESDAY, 6 JUNE 2018
DELIVERED	**:**	WEDNESDAY, 13 JUNE 2018
FILE NO.	**:**	APPL 1 OF 2018
BETWEEN	**:**	ON THE COMMISSION'S OWN MOTION

CatchWords	**:**	State Wage order – Commission's own motion – Minimum wage for employees under *Minimum Conditions of Employment Act 1993* – Award rates of wage – Award minimum wage – Signs of future economic improvement – WPI preferred to AWOTE – CPI not disaggregated – Monopsonist power considered – State wage principles – Statement of Principles amended
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26(1)(c), s 26(1)(d)(vii), s 29A, s 36A, s 37, s 40, s 40B, s 50A(3), s 50A(3)(a)(v), s 50A(3)(d) *Minimum Conditions of Employment Act 1993* (WA) s 12, s 13 *Workplace Gender Equality Act 2012* (Cth)
Result	**:**	2018 State Wage order issued

Representation:

Mr B Entrekin on behalf of the Hon. Minister for Commerce and Industrial Relations

Mr K Black on behalf of the Chamber of Commerce and Industry of Western Australia (Inc)

Dr T Dymond on behalf of UnionsWA

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

Reasons for Decision

1 The *Industrial Relations Act 1979* (the Act) requires the Commission to make a General Order, the State Wage order, before 1 July each year. That Order is to set out the State Minimum Wage (SMW) applicable under s 12 of the *Minimum Conditions*

of Employment Act 1993 (the MCE Act) to employees 21 years of age and over, and to apprentices and trainees. The State Wage order is also to adjust rates of wages paid under awards and make consequential changes to awards.

2 The State Wage order also sets out a statement of principles to be applied and followed in relation to the exercise of jurisdiction under the Act to set the wages, salaries, allowances and other remuneration of employees, or the prices to be paid in respect of their employment (s 50A(1)(d)).

3 This matter was commenced on the Commission's own motion on 2 January 2018. The Commission published notices inviting submissions:

(1) on the Commission's website on 13 March 2018;

(2) in the Western Australian Industrial Gazette on 28 March 2018 (98 WAIG 111);

(3) in *The West Australian* newspaper on 31 March 2018 and 4 April 2018; and

(4) in *WA Business News* on 9 April 2018.

4 Written submissions and submissions in reply were received from the following persons and organisations:

(1) the Hon. Minister for Commerce and Industrial Relations (the Minister);

(2) the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA);

(3) UnionsWA;

(4) the Western Australian Council of Social Service Inc (WACOSS);

(5) the Australian Hotels Association (WA) (AHA); and

(6) three individuals.

5 The Commission convened on 23 May 2018 to hear submissions and receive evidence. Once again, the Commission had the considerable benefit of hearing from Mr David Christmas, Director of the Economic and Revenue Forecasting Division within the Western Australian Department of Treasury. Mr Christmas addressed the state of the Western Australian economy by reference to:

(a) the global and national context;

(b) the labour market;

(c) wages;

(d) inflation; and

(e) risks to the outlook.

6 We are grateful for those submissions and acknowledge the research and effort taken by those who made submissions.

7 The Commission reconvened on 6 June 2018 after the Fair Work Commission (FWC) issued its Annual Wage Review decision (AWR) (*Annual Wage Review 2017-18* [2018] FWCFB 3500) on 1 June 2018, dealing with the National Minimum Wage (NMW).

Impact on the State Wage order

8 As the Minister notes, there is no definitive data on how many employers and employees are covered by the Western Australian industrial relations system and how many are affected by the State Wage order.

9 The Department of Mines, Industry Regulation and Safety (DMIRS) previously estimated that between 22 and 36 per cent of Western Australian employees are covered by the State industrial relations system.

10 The Australian Taxation Office information indicates that it covers a maximum of 35.4 per cent of private sector employers in Western Australia (Minister's submission [55]).

11 Sixteen point four per cent of non-managerial employees in Western Australia are likely to be paid entirely in accordance with a State or national award. Award reliance in Western Australia has increased in recent years from 14.6 per cent of all non-managerial employees in 2014, to 16.4 per cent in 2016, compared with national award reliance at 20.4 per cent and 24.5 per cent, respectively.

12 The DMIRS has provided details of the five most commonly accessed private sector award summaries on its website. They are:

	Award
1	Restaurant, Tearoom and Catering Workers' Award
2	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
3	Building Trades (Construction) Award 1987
4	Metal Trades (General) Award
5	Clerks (Commercial, Social and Professional Services) Award

13 The top five private sector awards discussed with employers and employees who contact Wageline are:

Rank	Award
1	Building Trades (Construction) Award 1987
2	Hairdressers Award 1989
3	Restaurant, Tearoom and Catering Worker's[sic] Award
4	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
5	Metal Trades (General) Award

14 The Minister says that this suggests that the awards in hospitality, retail, construction, hairdressing, clerical and metal trades industries are amongst the most widely utilised in the Western Australian system.

15 UnionsWA refers to the *Ministerial Review of the State Industrial Relations System Interim Report* (the Interim Report) for estimates of numbers of employees covered by the State system, as being between 21.7 per cent and 36.2 per cent of the employees in the State. It estimated that approximately 23.8 per cent of employees are in the unincorporated sector, being approximately 318,777 employees.

16 The Interim Report also refers to data from the Wageline contact centre of the Private Sector Labour Relations Division of the DMIRS, showing the number of calls received each year. For 2016-17, of the calls that pertain to the State system:

a) 20 per cent related to award free employees;

b) 14 per cent concerned the *Building Trades (Construction) Award*;

c) 11 per cent concerned the *Restaurant, Tearoom and Catering Workers' Award*;

d) 9 per cent concerned the *Hairdressers Award*; and

e) 8 per cent concerned the *Shop and Warehouse (Wholesale and Retail Establishments) Award*.

(The Interim Report, Attachment 7B [1])

17 UnionsWA also notes that the Interim Report provides a list of over 60 award-free classifications in the State system that are reliant on the MCE Act.

18 CCIWA refers to comments by the Productivity Commission about the award-reliance of employees in the accommodation and food services, administrative and support services, retail trades, other services, and health care and social assistance industries. Such employees are more likely to be female, and are younger and less skilled on average than other groups (Productivity Commission Inquiry Report No. 76, *Workplace Relations Framework* (Volume 1) (30 November 2015) 308).

19 CCIWA also notes (emphasis in original):

> For the private sector small businesses under the State system, there is significant reliance upon the SMW and award wages and conditions as industrial agreements are not a practical or viable option. As the Productivity Commission stated, '*increasing the wages of the low paid through minimum wages and conditions is a better method of income redistribution than the tax transfer system*'. It was further noted that no system of re-distribution is perfectly targeted and that many households that receive award wages are not in the lowest-income households.

(CCIWA's submission [231])

20 Employees in accommodation and food services; administrative and support services; retail trade, and rental, hiring and real estate services account for nearly 40 per cent of all award-reliant employees, and small businesses in those industries account for a large share of employment.

21 In 2016, we noted that:

> 144 There are varying views on the basis for calculating the number of employees and employers covered by the State industrial relations system and affected by the State Wage order. In the private sector, they are employees of sole traders, partnerships, some trusts and incorporated businesses which are not trading or financial corporations. In addition, there are State public sector employees.
>
> 145 We note that the State Wage Order deals not merely with the minimum wage for award free employees but also award covered employees and also award rates. It will directly affect some and will have indirect effects on others. It covers the rates for juniors, apprentices and trainees, and sets out the Principles to be applied to a range of types of claims which might come before the Commission, so as to guide the parties in pursuing, and the Commission in deciding, those claims.
>
> 146 While the State Wage order deals with more than the minimum wage, this is its most direct effect, along with setting the increase for award rates. Therefore, its most direct effect is on award free and award covered employees and their employers. It also provides a floor and, what some have described as, a signalling effect to those not directly covered, for their wage setting. So while the numbers actually covered or directly affected by the minimum wage is difficult to determine, it is clearly of significance to many employers and employees, either directly or indirectly.
>
> 147 Those employees dependent on the minimum wage are more likely to be employed in small businesses.
>
> 148 As UnionsWA submits, it is likely that vulnerable groups of employees are overrepresented within the private sector of the state industrial relations system, partly due to them being employed in small private sector businesses.

149 In terms of low income households, UnionsWA refers to the Productivity Commission's report, noting that:

> Employees in the lowest income groups are more likely to be on the minimum wage than those in higher income groups (and by more than a fivefold factor) (figure 4.8). So, while most people in the lowest quintile are not in work (and therefore do not receive any wages), almost half of those who are in work are paid at a minimum rate.
>
> (*2016 State Wage Case* [2016] WAIRC 00358; (2016) 96 WAIG 636)

22 This remains the situation, that the number of employers and employees affected by the State Wage order is significant. Award-reliance has increased in recent years, and enterprise bargaining has declined, as we discuss later in these reasons. In those circumstances, the State Wage order is important to many employers and employees in this State.

Proposed outcomes

23 Western Australia's current SMW is $708.90.

24 The Minister submits that a flat dollar increase of $19.20 represents a fair and sustainable amount that would provide a meaningful increase to minimum and award wage earners. This represents an increase of 2.7 per cent, taking the SMW to $728.10 per week. A flat dollar increase to award rates would provide the greatest benefit to the lowest paid.

25 UnionsWA submits that an increase of $50 per week in the SMW and in award wages, or 6.2 per cent, whichever is greater, will meet the considerations set out in s 50A(3) of the Act. For the lower award rates from C14 – C10, this would equate to $50 per week and for C9 – C5, a percentage increase would assist in alleviating the compression of relativities by providing between $51.63 and $58.48 respectively for those higher classifications.

26 CCIWA says that it supports responsible and sustainable wage growth through the SMW and that an increase in the SMW and award wages of no more than 1.2 per cent would meet the requirements of the Act. It says considerable weight ought to be given to the requirement on the Commission to consider the capacity of employers as a whole to bear the costs of increased wages, salaries and other remuneration as set out in s 50A(3)(d). To apply such weight is necessary to facilitate viable and sustainable businesses capable of meeting future conditions.

27 According to WACOSS, an increase to the SMW and minimum award rates of $50 per week would be consistent with the need to maintain a fair system of wages and conditions in the current Western Australian context, and would be a very reasonable increase which takes into account current economic conditions. WACOSS's particular focus is the adequacy of living standards and quality of life of Western Australians living on low incomes.

28 The AHA submits that an increase of 1 per cent to the SMW and award wages is appropriate given the particular factors facing its industry.

29 In respect of the three submissions received from individuals, Patricia Carmichael says that '[t]he Minimum wage pay rise must be kept in line with Politicians' annual pay rise[s]'.

30 Two submissions were made by persons who provided their names but did not want them published. The first contends that the current SMW is too low by contemporary standards given the current costs of living; is at poverty level; does not provide a fair and equitable level of income, and does not meet the needs of the low-paid. This person says that the criteria used by the Western Australian Salaries and Allowances Tribunal would appear more equitable. This submission says that the SMW should be set at $25 per hour or $950 per week.

31 The final individual submission says that the adult rate of pay should apply to all employees from 18 years of age, rather than 21 years of age.

Section 50A(3) – the issues to be considered

32 Section 50A(3) of the Act sets out a range of social, labour market and economic matters the Commission is required to consider in making the State Wage order. They are:

(a) the need to —

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

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

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

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

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

(vi) encourage ongoing skills development; and

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

and

(b) the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and

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

(d) to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration; and

(e) for the purposes of subsection (1)(b) and (c), the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and

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

(g) any other matters the Commission considers relevant.

33 The Commission is also to have regard to the matters set out in s 26(1)(c) of the Act.

34 The legislation does not specify whether any of these matters is to take precedence or is to carry greater weight. Rather, each of them is to be considered and their relative weight will depend on the circumstances prevailing at the time. Some of those matters appear to be in conflict, while others overlap. Therefore, it is appropriate to look at them in a holistic rather than segmented way, and to assess and balance them.

35 The concept of fairness is common to a number of the matters to be considered. Fairness is to be viewed from a broad, not narrow, perspective. It requires consideration of what is fair to both parties to the employment relationship – to employers *and* employees. Therefore, in considering the appropriate level of the SMW and award wage increases, some compromise of each party's interests is necessary. The Commission is also required to have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole, and those other matters set out in s 26(1)(c).

36 A useful starting point, and a way of setting the context and background for consideration of these issues, is to examine the state of the Western Australian economy generally, of particular industries, and how they affect and reflect the labour market. It is then appropriate to examine the fairness considerations and the effect on our decision.

The state of the economy of Western Australia

37 The Minister produced a useful snapshot of some essential economic indicators from the 2018-19 State Budget.

Indicator	2016-17 Actual	2017-18 Estimated Actual	2018-19 Budget Forecast	2019-20 Forward Estimate	2020-21 Forward Estimate
Gross State Product	-2.7%	2.5%	3.25%	3.75%	3.0%
State Final Demand	-7.2%	-0.25%	-0.25%	3.75%	3.75%
Employment Growth	-0.9%	2.25%	1.5%	2.0%	2.25%
Unemployment Rate	6.2%	5.75%	5.75%	5.5%	5.25%
Wage Price Index	1.4%	1.5%	1.75%	2.75%	3.0%
Consumer Price Index	0.6%	1.0%	1.5%	2.0%	2.5%

(Minister's submission [13]
Table 1: Economic forecasts – major economic aggregates, WA)

38 This demonstrates that the Western Australian economy has improved in the last 12 months with further strengthening forecast in the forward estimates to 2020-21. However, Western Australia is at or near the bottom of the economic downturn since the difficult economic environment following the end of the resources boom. It is entering a period of economic transition, during which growth is expected to be gradual.

39 Western Australia's 2.7 per cent decline in Gross State Product (GSP) was the only decline amongst all states and territories. Net exports are forecast to increase by 10.0 per cent in 2017-18 and 12.5 per cent in 2018-19. Net exports are a significant contributor to Gross State Product, which as a consequence is expected to rise by 3.25 per cent in 2018-19.

40 The Western Australian Government expects that household consumption will take over from exports as the major driver of growth from 2019-20.

41 State Final Demand (SFD) fell by 7.2 per cent in 2016-17 and again was the only such decline in SFD amongst all states and territories.

42 SFD is forecast to decline by a further 0.25 per cent in 2017-18 and 2018-19 before returning to positive growth of 3.75 per cent in 2019-20.

The Western Australian labour market

43 Total employment growth in Western Australia is described by the Minister as robust, with an annual average increase of 2.2 per cent to March 2018 following a fall of 1.4 per cent to March 2017. This year's growth is the strongest in almost five years. However, unemployment is still relatively high (6.2 per cent in 2016-17 and the forecast average for 2017-18 is 5.75 per cent). Job vacancies have grown by 24.7 per cent with a 16.6 per cent increase in the Internet Vacancy Index. This is ahead of increases in all other states and territories.

44 Full-time employment in Western Australia has gone from greater than -1.0 per cent a year ago to 2.8 per cent in March 2018. Part-time employment has increased by 1.1 per cent in that period.

45 Total employment in Western Australia fell by 0.9 per cent in 2016-17 but is now forecast to increase by 2.25 per cent in 2017-18, 1.5 per cent in 2018-19 and 2.0 per cent in 2019-20.

46 Employment growth in Western Australia in the year ended February 2018 varied between industries.

Industry	Change ('000)
Health care and social assistance	23.4
Education and training	14.3
Arts and recreation services	10.0
Professional, scientific and technical services	7.8
Manufacturing	7.8
Construction	7.2
Agriculture, forestry and fishing	7.0
Electricity, gas, water and waste services	3.3
Accommodation and food services	1.2
Information media and telecommunications	0.6
Mining	-1.1
Transport, postal and warehousing	-2.8
Public administration and safety	-4.6
Wholesale trade	-4.7
Financial and insurance services	-4.8
Rental, hiring and real estate services	-7.7
Administrative and support services	-8.1
Retail trade	-15.8

(Figures taken from Minister's submission (page 8),
Table 2 – Employment by industry in WA (000s), February 2017 – February 2018)

47 Unemployment is declining from a 16-year high. It has gone from 6.2 per cent in 2016-17 to 5.9 per cent in the year to March 2018, with forecasts of 5.75 per cent in both 2017-18 and 2018-19. The national unemployment rate is 5.5 per cent.

48 The Minister points out that while the seasonally adjusted unemployment rate in Western Australia has increased from 6.1 per cent to 6.9 per cent, it needs to be noted that the participation rate has grown from 68.1 per cent to 68.7 per cent, representing nearly 13,000 additional people entering the labour market.

49 In the last five years, total monthly working hours in all jobs in Western Australia has fallen 2.27 per cent compared to a national increase of 7.47 per cent. Western Australia is the only state to have had a decline in monthly working hours over that period.

50 Youth unemployment has steadily increased in recent years from 6.0 per cent in June 2008 to over 16 per cent in April 2018. It has exceeded the national average for at least the last nine months. Outside of the Perth metropolitan area, it is around 16.6 per cent in Mandurah and 14.8 per cent in the Wheatbelt.

51 There has been argument about the rates of pay for juniors and apprentices and whether increases in the SMW will lead to the loss of jobs and job opportunities for this group.

52 CCIWA refers to the Australian Government's submission to AWR that low-paid jobs are an important pathway into the workforce. It is through low-paid jobs that people build skills and experience to gain higher-paid work in the future.

53 CCIWA expresses concern that youth unemployment has remained persistently high, and is deteriorating. Every avenue available must be used to encourage entry-level opportunities. It says care must be taken to avoid pricing low-skilled youth out of entry-level jobs through large increases in award wages. It is critical that young people enter and remain in the workforce.

54 In respect of both youth unemployment and the need to provide a fair system of wages, WACOSS says that although s 13 of the MCE Act provides for juniors to be paid percentages of the adult rate, junior rates are an anachronism. It says that there is no evident correlation between youth unemployment rates and minimum wage rises in Australia. The international research is said to support this.

55 Further, WACOSS says that the arguments supporting proportionate youth wages suggest that their labour is worth less, and this runs counter to the principle of equal remuneration for work of equal value.

56 WACOSS referred to an article by P N Junanker, *The Impact of the Global Financial Crisis on Youth Labour Markets*, (The Economic and Labour Relations Review, Vol 26, No. 2) as support for the proposition that there is no evident correlation between youth unemployment and minimum wage rises in Australia.

57 Junanker notes that the labour market for youth is unique due to a number of factors including school leaving age; education and training options; switching between education and training and work, and the process of finding suitable work. The youth labour market is more volatile than the adult labour market.

58 In the conclusions, Junanker notes:

> We showed that the youth labour market was significantly different from the adult labour market and more likely to be more volatile. Unemployment rates for youths increase more rapidly during a recession due to the fact that many young people are working in cyclically sensitive sectors, working in part-time casual employment. As a result, when a recession hits, employers stop hiring new entrants (the youths) and begin to fire youths as they are in vulnerable employment. We showed that the high youth unemployment could not be explained by high youth wages, by the minimum wage, or by so-called generous unemployment benefits.
>
> If we would like to lower youth unemployment rates it is important to create increased growth, particularly in the industries that are the main employers of young people, namely, construction, manufacturing, retail trade and accommodation and food services for males, and retail trade, accommodation and food services, and health care and social assistance for females. Since manufacturing has been on a declining trend for decades, the main industries that would help young people would be a stimulus to (say) tourism that helps retail trade, accommodation and food services.
>
> …
>
> To summarise, if the growth rate of the economy was stimulated it would decrease youth unemployment rates.
>
> (P N Junanker, The impact of the global financial crisis on youth labour markets (Institute for the Study of Labor Discussion Paper Series, DP No. 8400, August 2014)

Underemployment and under-utilisation

59 Underemployment has increased in recent years but fallen in the past 12 months, from 10.6 per cent in February 2017 to 8.8 per cent in February 2018, seasonally adjusted, and has risen again by 0.2 per cent to March 2018.

60 CCIWA notes that an International Monetary Fund (IMF) working paper in March 2018 (*More Slack Than Meets The Eye? Recent Dynamics in Advanced Economies)* states that nominal wage growth remains markedly slower in most advanced economies than it was before the GFC. IMF research of a range of possible contributing factors identified the bulk of global wage deceleration was to be accounted for by ongoing spare capacity, lower inflation expectations and weak trends in productivity growth.

61 CCIWA also draws attention to the comments of the Reserve Bank of Australia Governor, Philip Lowe, before the Commonwealth Standing Committee on Economics, that Australia is currently 'in a position where there is still spare capacity in the labour market. It's important to have strong employment growth in order for the employed labour to grow stronger than the rate of population, or the rate of the labour force growth, in order that you can start absorbing some of that spare capacity to get to the point at which wage growth starts to pick up'.

62 Mr Lowe added that the most important component is the growth in jobs, and that 'the main thing … to improve income equality is jobs generation … what we can do is promote a strong economy, which promotes strong jobs growth and ultimately wages growth'.

63 In November 2017, Reserve Bank of Australia Assistant Governor (Economics) Luci Ellis said that workforce 'participation can and is increasing average income and living standards'. In *Where is Growth Going to Come From?*, Ms Ellis added:

> It is usually presumed that ageing of the population will reduce participation. Older workers have increased their participation in the workforce as the trend to early retirement has abated. Mixed in with this is the cohort effect related to the increasing participation of women more generally. Each generation of women participates in the workforce at a greater rate than the previous generation at the same age …

64 Importantly, Ms Ellis said 'greater participation raises the level of living standards'.

65 The Western Australian participation rate, a measure of the share of the working age population either working or looking for work, is increasing. Trend participation in Western Australia rose 1.0 per cent to March 2018 to 68.4 per cent, compared with the national increase of 0.8 per cent to 64.8 per cent.

66 The female participation rate in Western Australia of 62.7 per cent is historically high, and is also the highest nationally.

Wage trends – the low wage phenomenon

67 The Minister presented a view of the complex causes and effects of low wages growth which has persisted in developed economies around the world, including Australia. Such factors include spare capacity and labour under-utilisation; the changing nature and structure of the workforce; low inflation and real wages, including that real wages growth has decreased to almost zero; employee bargaining power and pay setting methods, including the erosion of employees' bargaining power; 'flexible' labour market practices; increased award reliance, and replacement enterprise agreements simply replicating existing awards or slightly above award rates.

68 The Minister draws attention to the International Labor Organization's (ILO) *Global Wage Report 2016-17* and its recognition of 'the need to monitor wage trends and implement sustainable wage policies that prevent wage stagnation, raise the levels of pay for millions of working poor around the world, ensure fair distribution, reduce excessive wage and income inequalities, and buttress consumption as a key pillar of sustainable economies' (Minister's submission [148]).

Measures of wages growth

69 UnionsWA maintains that the SMW requires a significant increase to address the reduced 'bite' of average full-time weekly earnings measured by Average Weekly Ordinary Time Earnings (AWOTE). This means that the low paid have experienced a decline in relative living standards. Western Australia's SMW has gone from 49 per cent of AWOTE in 2006 to 40.60 per cent in 2014. It has recovered a small part of that gap to 41.30 per cent in May 2017. UnionsWA says that as the economy recovers, there is a risk that this gap will resume growing.

70 Full-time AWOTE in Western Australia rose 2.3 per cent in the year to November 2017, from $1,703.20 to $1,742.80.

71 It should be noted, though, that Western Australia has the highest AWOTE (for males at $1,883.00 and for females at $1,458.50) of all the states and territories except the Australian Capital Territory. This has persisted even after the end of the resources investment boom in 2014.

72 UnionsWA refers to the AWOTE as being an appropriate measure of wages growth and for comparison purposes in respect of wage inequality.

73 The Commission notes that the FWC's 2018 AWR decision contains *Chart 3.4: Growth in C14 and C10 relative to AWOTE, AWE and WPI, index* ([2018] FWCFB 3500 [315]). This charts the changes in various measures of wages growth between 2009 and 2017. The chart itself demonstrates one of the virtues of the Wage Price Index (WPI), that it is a less volatile measure than the other measures contained in that assessment of wages growth. The Note which follows the chart describes the differences between the various measures.

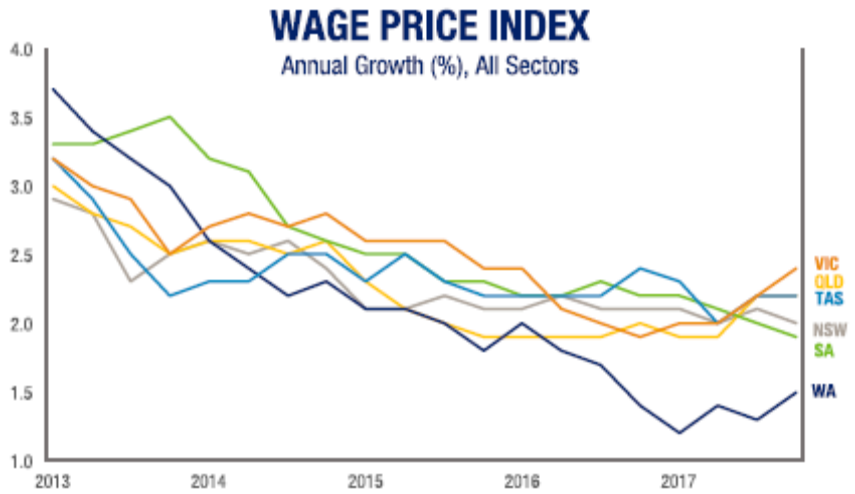
74 In 2012 (*2012 State Wage Case* [2012] WAIRC 00346; (2012) 92 WAIG 557 [50] – [53]), the Commission noted that '[w]e continue to have reservations regarding linking the setting of the minimum wage to Average Weekly Ordinary Time Earnings', and dealt with effects on that measure of an increase in wages in positions in the higher paid industries of mining, oil and gas, which at that time were high and pushing average rates upwards. The Commission said that such 'high-wage sectors such as mining … are not likely to be representative of wages and living standards generally prevailing in the community' [50]. As a consequence, the Commission was not 'persuaded by UnionsWA's submission that the setting of the WA minimum wage should be significantly influenced by its past or present relativity to AWOTE' [52]. The Commission noted also that UnionsWA acknowledged 'that at least the WPI should also be considered in order to give a more complete picture' [53].

75 In 2013, UnionsWA sought that the Commission revisit that conclusion. The matter was considered, and the Commission concluded that '[t]o significantly influence setting of the WA minimum wage by reference to AWOTE to the exclusion of the requirements of s 50A(3) would not properly give effect to the Act': [2013] WAIRC 00347; (2013) 93 WAIG 467 [76].

76 We reaffirmed in 2016 ([2016] WAIRC 00358; (2016) 96 WAIG 636 [167]) and in 2017 ([2017] WAIRC 00330; (2017) 97 WAIG 693 [214]) that the WPI is regarded as less volatile than AWOTE and the most useful indicator of wage inflation. We note, however, that AWOTE plays a part in consideration of wages movement and measures of relative wages.

77 Wages growth has slowed significantly in recent years, both nationally and in Western Australia. The WPI had only a marginal increase of 1.5 per cent in year-end terms in 2017. At a national level, WPI growth was 2.0 per cent. The slowing of growth in the WPI in Western Australia over the last five years coincides with the end of the mining-led investment boom.

78 Western Australia's WPI has declined from being the highest of all states in 2013 to the lowest in 2017-18.



(CCIWA's submission [125]
Chart 11: Wage Price Index – States, All Sectors, 2013 – 2017)

79 The WPI growth in Western Australia reached its lowest level of increase, of 1.0 per cent, in the March and June quarters 2017. It increased to 1.5 per cent in the December quarter 2017. However, it is below the 2.0 per cent recorded in December 2014.

80 Wages growth has varied by industry from a maximum of 2.1 per cent in education and training, with the remaining identified industries (except professional, scientific and technical services at 0.1 per cent) being between 1.1 per cent and 1.7 per cent.

81 Annual average wages growth is expected to be subdued with forecasts of 1.5 per cent and 1.75 per cent in 2017-18 and 2018-19 respectively, and up to 3.0 per cent by 2020-21.

Productivity

82 CCIWA says that wage increases arising from the State Wage Case have exceeded Consumer Price Index (CPI) growth for a number of years. The same applies to wages growth measured by private sector WPI. This has resulted in a real increase in disposable incomes.

83 The Fair Work Commission said in its AWR 2016-17 that it 'continues to support a conclusion that increases in minimum wages are more likely to stimulate productivity measures by some employers directly affected by minimum wage increases rather than inhibit productivity' ([2017] FWCFB 3500 [227]).

84 CCIWA refers to the multifactor measure of productivity recognised by the Productivity Commission. The annual average growth of 0.8 per cent between 2011-12 and 2016-17 is weak. Labour productivity has grown comparatively strongly compared with multifactor productivity from 2011-12 to 2015-16, but both have tapered off in the last year.

85 We conclude from all that we have before us, that an increase of the amount we propose will assist in promoting productivity at least partly for reasons we identify in relation to employers' responses to increases in labour costs.

Other measures

86 CCIWA's March 2018 *Survey of Business Confidence* indicates a continuation of the increasing confidence of Western Australian businesses, with short term (three months) and medium term (12 months) confidence at pre-boom levels.

87 Consumer confidence measured by CCIWA's March 2018 *Survey of Consumer Confidence* shows cautious growth in consumer confidence, being at its highest level in four years.

88 Household consumption growth is subdued. It is expected to remain that way consistent with projections for household income, population growth and spare capacity in the labour market.

89 Business investment continues to fall, predicted to stabilise in 2019-20.

90 Retail sales contracted from March 2017 to March 2018 by 0.5 per cent. Western Australia is the only state or territory with negative growth, although national average growth was less than 1 per cent. CCIWA says this demonstrates the need for caution due to the unstable confidence in this area of the economy.

91 Dwelling investment declined by around 20 per cent in 2016-17, the first such decline since the peak of the resources boom. This is because:

(1) population growth is gradually coming out of a trough;

(2) residential property prices in Perth are still declining; and

(3) interest rates are low.

92 Dwelling investment is forecast to decline by a further 6.25 per cent in the current financial year before returning to modest growth in 2018-19 and beyond.

93 The median house rent has fallen 7.7 per cent and the median unit rent has fallen by 7.1 per cent in the year to March 2018.

94 The excess in housing stocks and high vacancy rates explain these figures.

95 UnionsWA notes that while the labour market in Western Australia has 'moved into the less labour-intensive production phase of the major resource projects, hiring levels have been supported by a growing services sector workforce (with the largest single increase being in the Accommodation and food services industry). This has also been occurring in the context of rising business confidence and job advertisements' (UnionsWA's submission [5.13]).

Operating conditions for Western Australian businesses

96 Employer capacity as a whole to bear the cost increases, and the likely effect on the economy and employment levels, are significant considerations.

97 CCIWA's March 2018 *Survey of Business Confidence* records that the barriers businesses see to their growth are:

(a) rising operating costs (40 per cent);

(b) weak demand (36 per cent); and

(c) foreign and online competitors (36 per cent).

98 The capacity of employers to bear increases in wage and other employment costs is part of balancing the various considerations with a view to setting an appropriate SMW and award wages. We conclude that firstly, it is important that businesses generally are sustainable in the interests of the employees they employ. Although we do not accept that there is generally a risk to employment from moderate and regular increases in the SMW and award wages, as pointed out by Bishop, '[t]here will always be some point at which a minimum wage adjustment will begin to reduce employment' (James Bishop, *the Effects of Minimum Wage Increases on Wages, Hours Worked and Job Loss*, Reserve Bank of Australia RDP 2018-06, 16).

99 Secondly, it is not in the interests of businesses and their owners and operators that otherwise viable businesses be jeopardised, nor that struggling businesses be pushed beyond the brink.

100 Thirdly, it is detrimental to the economy for businesses to fail when reasonable levels of increases in rates would make a difference to their survival.

101 Gross Operating Surplus (GOS) plus Gross Mixed Income (GMI) is used as a proxy for business profitability at the state level. Across all industries GOS and GMI increased by 8.2 per cent in 2016-17, following a decline of 6.3 per cent in 2015-16. However, the results vary across industries.

Industry	Annual Increase (%)
Mining	37.8
Agriculture, forestry and fishing	29.2
Administrative and support services	3.2

Industry	Annual Increase (%)
Retail trade	1.1
Health care and social assistance	1.1
Wholesale trade	0.2
Financial and insurance services	-1.0
Professional, scientific and technical services	-3.0
Education and training	-3.2
Arts and recreation services	-7.9
Electricity, gas, water and waste services	-8.7
Manufacturing	-8.9
Rental, hiring and real estate services	-9.1
Transport, postal and warehousing	-10.9
Information media and telecommunications	-15.0
Public administration and safety	-19.0
Other services	-20.7
Accommodation and food services	-22.4
Construction	-34.3
Total all industries	8.2

(Figures taken from Minister's submission (page 15),
Table 6: Gross Operating Surplus (GOS) and
Gross Mixed Income (GMI) by industry, current prices, 2016 and 2017)

102 This demonstrates that some industries have turned the corner as predicted last year. For example, the Mining and Agriculture, forestry and fisheries industries have gone from -16.9 per cent and -17.6 per cent in 2015-16 to 37.8 per cent and 29.2 per cent respectively in 2016-17.

103 However, this reversal has not found its way into other industries, particularly those where minimum wage and award-reliant employees and employers exist. In 2015-16, the Retail trade showed an increase in GOS and GMI of 2.3 per cent but in 2016-17, it has contracted to 1.1 per cent.

104 The Accommodation and food services industry was -4.7 per cent, but it has contracted significantly since then to -22.4 per cent in 2016-17. Transport, postal and warehousing has gone from 8.0 per cent to -10.9 per cent.

105 The range of change in the previous year was from a maximum of 11.3 per cent to a minimum of -17.6 per cent. In 2016-17, it is 37.8 per cent through to -34.3 per cent.

106 We note, too, that the Retail trade had a contraction in employment of 11.9 per cent in the year ended February 2018, while Accommodation and food services increased at a modest 1.3 per cent. Transport, postal and warehousing contacted by 4.3 per cent.

107 Therefore, it can be seen that some major industries, reliant on the minimum and award wages, may be less able to bear the costs of increases than last year, so caution is required.

108 Further, the increase we are directed by the legislation to determine has a flow-on effect beyond the base rate of wage to other costs, including allowances, superannuation, leave costs and overtime rates.

109 CCIWA says that the trading environment for businesses is highly competitive, with compressed margins and cost management pressures. This is particularly so for those smaller businesses and award reliant employers who operate in the State system and are subject to the State Wage order.

110 CCIWA notes, by reference to ABS, Cat. No. 8165.0, *Counts of Australian Businesses* 2016-17 that Western Australia had 77,846 businesses employing between one and 19 employees, and 6,213 businesses employing between 20 and 199 employees. Small business contributed $39.7 billion to the Western Australian economy in 2014-15, accounting for 19.7 per cent of Western Australia's GSP (*The Engine Room for Growth?* BankWest Curtin Economics Centre, May 2017, viii).

111 Local businesses compete for the low levels of household discretionary spending, not only amongst themselves but with other larger businesses both locally and internationally. Online retailing continues to expand rapidly, increasing by 14.1 per cent last year.

112 CCIWA examined the Australian Bureau of Statistics data relating to small businesses in Australia. It notes their corporate structures, turnover, numbers of employees, survival rates and importance to the economy. Their indebtedness and liquidity, sources of funding, and the operating conditions for small businesses have been extremely challenging due to the economic conditions, as well as competition from within the State, nationally and internationally. International retail businesses are entering the local market more frequently. Those local businesses relying on discretionary household spending are particularly vulnerable to such competition. The rapid expansion of online retailing also threatens small business.

113 The small business sector is the principal provider of entry-level employment opportunities in Western Australia. However, those in the State system have a higher minimum wage than the NMW – it may be more expensive for them to provide jobs.

114 Small businesses have neither the capital nor the ability to absorb costs in the way larger businesses do (ABS, Cat. No. 8167.0, *Selected Characteristics of Australian Business* 2015-16).

115 Survival rates for small businesses are lower than larger businesses, at 69.0 per cent for micro-businesses (employing 1 – 4 persons), 77.8 per cent for businesses with between 5 and 19 persons, and 83.7 per cent for large businesses employing more than 200 persons (ABS Cat. No. 8155, *Australian Industry*, 2015-16).

116 CCIWA says that due to the period of weak trading conditions of the previous four years, small businesses remain cautious in spite of encouraging business conditions. This caution is particularly marked in their engagement of additional labour.

117 CCIWA also notes that Asia-Pacific Economic Cooperation (APEC) has identified small and medium enterprises as the 'engines of growth and innovation' in the APEC region.

118 It also notes that, speaking in February 2018 to the Commonwealth Standing Committee on Economics, Reserve Bank Governor, Philip Lowe, commented that 'strong competition from new entrants and changes in retailing business models are putting downward pressure on prices of many consumer durables and groceries', adding that 'many firms are wary of adding to their cost base in the current environment'.

119 Reserve Bank Assistant Governor (Economic), Luci Ellis, said in a speech in February this year that:

> … even when facing strong demand and rising cost pressures, firms seem reluctant to raise their prices. They appear to believe that competition is so intense that they would lose too much business if they did so. So they are especially reluctant to grant wage rises because this would increase one of their most important costs. … Despite firms' reluctance to raise prices, margins cannot be squeezed forever ... Australia has seen a marked increase in the number of major retail players. Foreign retailers ... [have] also induced the existing players to reduce their cost to stay competitive…

120 CCIWA says that after four years of depressed economic and business trading conditions, small and micro-businesses are not capable of sustaining any significant increase in labour costs to their businesses. It cites the Australian Bureau of Statistics Employee Earnings and Hours (EEH) data from May 2016 as indicating that award reliance has increased and that the small business cohort under the State system are predominantly award-reliant. The reasons why small business paid award rates of pay were 'affordability' (26.2 per cent); 'don't want to pay more' (20.7 per cent); and 'appropriate/fair remuneration' (18.9 per cent).

121 Small businesses reported that their short-term responses to increases in costs would be to implement strategies to manage or reduce their wage bill (69.4 per cent). This included:

(1) reducing hours of casual staff (71.8 per cent);

(2) work more hours themselves (69.3 per cent);

(3) reduce the number of employees by attrition (63.1 per cent);

(4) reduce the length of shifts (54.3 per cent); and

(5) reduce overtime (50.7 per cent).

122 This is consistent with the evidence given to the Commission in 2013 by Professor Rowena Barrett. Other responses related to reducing other business costs.

123 In the cost containment strategies set out above, small business owners may substitute their own labour, reducing staff working hours. This has an impact on the health and wellbeing of those business owners. CCIWA also notes the negative impacts on the physical and mental wellbeing of work-related stress by more than 50 per cent of small business owners.

124 We note the submission of the AHA as to the capacity of the hospitality industry to bear an increase beyond 1 per cent. It refers to findings by the FWC in the *4 Yearly Review of Modern Awards – Penalty Rates* ([2017] FWCFB 1001 [742]) about this industry:

> … that employers were relatively more likely to be characterised by:
>
> - small and medium businesses;
> - lower profit margins;
> - higher wages and salaries as a proportion of total expenses;
> - lower survival rates;
> - strong or intense competition; and
> - operating 7 days a week.

125 According to the AHA, the 'combination of higher levels of Award reliance, long operating hours and small profit margins indicates that anything more than a modest increase in the State minimum wage will place substantial pressure on' its members. This cost pressure is said to be 'likely to lead to lower employment and higher rates of insolvency amongst small business' (AHA's submission [10]).

126 The AHA refers to two particular factors affecting its members covered by the State system, compared with their competitors covered by the national system. The first is that the SMW is higher than the NMW and that the national system employers enjoy lower penalty rates. Penalty rates have a strong impact on its State system members because the hospitality businesses customarily trade at times that attract penalty rates – weekends and public holidays.

127 Secondly, there has been a decline in tourism spending in regional Western Australia where the majority of its State system members operate. Tourism WA's statistics released in March 2018 show a decline in tourism spending in 2017 in the North West by 36.1 per cent, the Goldfields and Greater Southern by 24.4 per cent and the Coral Coast by 1.9 per cent. The number of nights international visitors spend in Western Australia decreased by 7.7 per cent and the amount spent declined by 5.5 per cent.

128 We conclude that the ability of small businesses to absorb increased costs is limited, as is their ability to increase prices in such a highly competitive market.

129 We also note that the GOS plus GMI for the Accommodation and food services industry generally declined by 22.4 per cent in 2016-17, and that employment in that industry for the year ended February 2018 grew by 1.3 per cent, compared with the growth in full-time employment generally to March 2018 of 2.8 per cent and part-time employment by 1.1 per cent. The Accommodation and food services industry is highly award-reliant.

Section 50A(3)(a) considerations

130 These considerations require an assessment of measures of fairness and social inclusion, and to provide means for employees to enjoy fair living standards through income, employment and training opportunities.

131 The particular considerations are a need to ensure an award framework that represents a system of fair wages and conditions of employment. This means fairness to employees in terms of reasonable and equitable recompense for their work, by reference to standards of income and living standards generally. It also means fairness in maintaining and improving employment and training opportunities.

132 There is a need to meet the needs of the low paid. These employees are generally on the SMW and on the lower levels of award and agreement rates.

133 As we noted earlier, it also means fairness to employers in their being able to afford to pay a wage that meets all of the other criteria, without an undue burden or risk to the wellbeing of the business or its owners.

134 UnionsWA notes that a sense of shared prosperity and the avoidance of a wide variance in economic conditions are important. It refers to the Reserve Bank Governor, Philip Lowe's comments on 1 May 2018 that:

> … it is difficult to see how a continuation of 2 per cent growth in wages is compatible with us achieving the midpoint of the inflation target – 2½ per cent – on a sustained basis. So from that perspective alone, a pick-up in wages growth over time would be welcome. Perhaps more importantly, sustained low wages growth diminishes the sense of shared prosperity that we have in Australia.
>
> (UnionsWA's submission [2.5])

135 UnionsWA refers to the Australian Council of Trade Unions' (ACTU) submission to the 2018 AWR which noted the requirements of Article 3 of the 1970 ILO Convention 131 on *Minimum Wage Fixation* which gives consideration to, on one hand, the needs of workers and their families and on the other, economic factors. It goes on to note that these two as competing factors are no longer as important as assessing what is fundamentally about 'the common good'.

136 UnionsWA says that the lowest paid are more likely to be:

(1) in precarious employment; and

(2) in the service industries of retail, accommodation and food services.

137 These employees are said not to have received 'their fair share of WA's recent strong economic growth, nor from its recent economic recovery' (UnionsWA's submission [2.5]). This is said to be demonstrated by measures of inequality such as:

- the gender pay gap;
- the disparity between the SMW and average weekly earnings; and
- household income inequality.

138 UnionsWA challenges the cliché that 'getting a job regardless of pay is better than no job', that 'the best form of welfare is work'. It cites research by Butterworth and others ('*The psychosocial quality of work determines whether employment has benefits for mental health*'), that 'unemployment and inadequate jobs (salary below the poverty line) were associated with significantly greater levels of depression than optimal jobs, so too were poor quality jobs that combined adverse psychosocial (low decision latitude, high job demands, low social support) conditions'. The quality of the job is important for the well-being of workers, not merely being paid enough to cover immediate living costs.

139 UnionsWA urges the Commission to take the lead in reversing what it says is 'the erosion of relative living standards of low wage workers in order to maintain a fair system of wages and conditions', and should inject an increase in aggregate demand into the State economy through an increase in the SMW and award wages of the magnitude it recommends.

140 UnionsWA notes that the WA economy has moved from a labour-intensive phase of major resource projects. However, hiring levels have been supported by significant growth in the services sector, in particular the accommodation and food services industry. This is in the context of rising business confidence and job advertisements.

141 Reference is made to the Deputy Governor of the Reserve Bank of Australia, Guy Debelle's comments in '*The Outlook for the Australian Economy*' (15 May 2018), that current wage outcomes of 2 per cent will remain lower than historical experience would suggest. He noted that the 3 to 4 per cent range in the years 2002 to 2014 are unlikely to return in the near term. He said, '[t]here is a risk that it may take a lower unemployment rate than we currently expect to generate a sustained move higher than the 2 per cent focal point evident in many wage outcomes today'.

142 Without minimum wage increases, UnionsWA says there would be very little pressure for wages growth at all in Australia.

Demand impacts of UnionsWA's claim

143 UnionsWA refers to research undertaken for the FWC AWR 2017-18 that found that half of low-paid adult employees were partners in a couple household, with the next highest proportion being those with a non-dependent child. There were similar proportions of low-paid couples with children under 15 or with no children.

144 The Australian Government's submission to the AWR showed the impact on disposable income for various household types following the 2017 NMW increase of 3.3 per cent. The difference between the households was that the percentage of the increase retained varied based on the type of transfer payments received by the household.

145 The ACTU examined the likely stimulatory effect of the AWR granting the increase proposed by it of $50 per week as being an increase in employment of between 50,000 and 57,000 in the first year after the increase, and 30,000 in the second year after the increase. This is based on calculations of the propensity of low-income households to spend all of the increase rather than save it.

146 While the stimulatory effect on the Western Australian economy is not as readily estimated, UnionsWA says that in principle, this argument supports a stronger real SMW increase.

Minimum wages and monopsonist power

147 In relation to the relationship between minimum wage increases and employment, as in its 2017 State Wage Case submissions, UnionsWA raised the issue of the monopsonist power of employers in the labour market and the impact of any increase in the SMW on monopsonist behaviour. As an overarching submission, UnionsWA contends that 'the WA Commission has been warned year after year about the potentially dangerous impacts on employment of raising the SMW by 'too much'. It says 'these have never come to pass, and are based on seriously outdated economic theories' (UnionsWA submission [5.1]).

148 UnionsWA argues that a labour market characterised by monopsony, as opposed to a competitive labour market, is one in which there may be one or a few employers that dominate the market for labour, as well as for goods and services. It is argues that the theory extends more generally into diverse labour markets, where employers have various sizes and characteristics (See discussion by Kuhn P 'Is Monopsony the Right Way to Model Labour Markets? A Review of Alan Manning's *Monopsony in Motion' Int. J. of the Economics of Business*, Vol.11, No.3, November 2004, 369-378).

149 In a competitive labour market, it is assumed that the price of labour will be a function of the intersection of supply and demand, resulting in the 'equilibrium wage'. Consequently, as the theory goes, an increase in the costs of labour from higher wages will lead to a fall in demand for labour and hence, reduced levels of employment.

150 The monopsonist employer will be a price setter and not a price taker. On this approach, the theoretical underpinning is that the employer, demonstrating monopsonist behaviour, when faced with a job vacancy, due to their superior bargaining power, may choose to not fill it. UnionsWA in its written submissions (at [5.16]), referred to academic commentary and observed that 'Professor Krueger in 'The Rigged Labour Market' (*Milken Institute Review* 28 April 2017), points out that if a government *requires* monopsonist employers to pay an increased wage through a minimum wage increase, the monopsonist's marginal cost of labour (i.e. the change in total labour costs from employing one extra worker) falls, because:

> … without a minimum wage the monopsonist operates with vacancies, unwilling to raise the wage it offers to hire additional workers because it would have to pay that higher wage to existing workers as well. However, with a binding minimum wage – that is, a minimum wage above the rate the monopolist [sic] was already paying – a monopsonist can fill its vacancies without worrying about having to increase everybody else's wages, because that was already required by the minimum wage.'

151 It further contends that there may be an increase in the level of employment in response to an increase in the SMW, under the monopsonist model.

152 In support of its submissions in relation to the employment effect of minimum wage increases, UnionsWA refers to a recent literature review by Belman D and Wolfson P (2014) 'The New Minimum Wage Research' *Employment Research* 21(2):4-5. This review of the literature focusses on research in several countries, but mainly the United States. It found that there were no or only statistically insignificant employment effects of minimum wage increases. In this respect also, UnionsWA referred to the article to the effect that the 'idealised' version of a perfectly competitive labour market, hardly ever corresponds with reality.

153 Additionally, various public statements and commentary from the Reserve Bank of Australia in relation to low wages growth were referred to by UnionsWA in its written submissions. Whilst acknowledging tightening in some sectors of the labour market, UnionsWA contends that without minimum wage increases, there would be little, if any, pressure for wages growth at all.

154 In the 2017 State Wage Case (at [253]), we considered similar arguments, including the approach of Professor Krueger, as to the effect of minimum wage setting in the United States. We concluded on that occasion that the features identified in Professor Krueger's article, that being, widespread collusive practices amongst employers and low minimum wage levels in the United States, made direct comparisons with the Australian and Western Australian contexts problematic. We referred to an article by Manning A 'The Elusive Employment Effect of the Minimum Wage' (2016) June *Washington Centre for Equitable Growth* 14 – 15. In this article, referring principally to United States research, the author noted the position in Australia, that the effect of its unique award wages system is a multitude of minimum wages. Furthermore, it was also noted in the same article that because of the wage setting system in Australia, modelling the employment effects of increases in minimum wages is difficult and the available research was limited.

155 As to the application of the monopsony theory to labour markets generally, we note that the theory itself has not been without its critics (See Kuhn P *op cit*).

156 UnionsWA's submission raises some interesting issues. However, in relation to the application of these principles to the Western Australian labour market specifically, we are cautious in reaching any conclusions, without a more substantial evidentiary case, as to whether employers within the State jurisdiction demonstrate monopsonistic characteristics in the local labour market context.

157 We were also referred by WACOSS in its submissions, and adopted by UnionsWA in its approach, to a research discussion paper by James Bishop referred to earlier. In the paper, the author modelled the impact of minimum wage increases flowing from NMW cases in two sample periods, 1998-2008 and 2002-2008. The focus of the research was on the impact of minimum wage increases on wages, hours of work and job destruction rates. In the concluding section of the paper under the heading 'Discussion', the author notes at pages 15 – 16 as follows (emphasis added):

> There is widespread interest in understanding the effects of minimum wage increases. I add to the evidence base by using an identification strategy uniquely suited to Australia and a dataset that provides several advantages over those used previously in the literature. I provide the first causal estimates of the effect of minimum wages on wages in Australia, and one of the few credible estimates of the effects on hours worked and job loss. *I find that small, incremental adjustments to awards are mostly passed on to wages in award-reliant jobs. These adjustments appear to have little adverse effect on hours worked or job loss. These findings are consistent with the international evidence and the FWC's (2017) current assessment of that evidence base.*
>
> There are several things to keep in mind when interpreting these findings. Firstly, as discussed earlier, my results are for adult employees only and do not include juniors. *Secondly, the results may not necessarily generalise to large, unanticipated changes in award wages. There will always be some point at which a minimum wage adjustment will begin to reduce employment.* Thirdly, my paper studies fairly tight windows around FWC decisions, and thus gives valid estimates of the effect of the minimum wage on hours worked and job loss only if employers take less than six months to adjust to changes in the award wage (Borland 2018). *Finally, although I find no statistically significant evidence of an effect of award adjustments on job destruction, this does not rule out an adverse effect on employment. For instance, the adverse consequences of higher wage floors may be borne by job seekers, rather than job holders.* Evidence from the Productivity Commission tentatively supports this possibility.

158 Overall, based on the materials considered by us in the 2017 State Wage Case; the work undertaken for the Commission by the late Professor David Plowman in 2006, *Report Prepared for the Western Australian Industrial Relations Commission: State Minimum Wage Review, May 2006*; observations of the FWC in its AWRs; and the above research, our opinion remains that moderate, regular increases in the SMW do not lead to negative employment consequences. What is 'moderate' will depend on the circumstances at the time. As we have noted previously, minimum wage increases in the past in this State have exceeded increases in the NMW, in times when the State's economy was very strong and had the capacity to support them. Increases in the SMW over the last five years of between $13 and $20 per week can be considered as moderate. The highest such rise was $29 per week in 2008 during very different economic circumstances. There has been no submission or evidence that any of these increases, in the context of the particular times, have had any adverse employment effects.

Income inequality and living standards

159 WACOSS says that it has been many years since a minimum wage decision delivered a demonstrable improvement in living standards for low-wage employees. It says that this has resulted in those on the lowest wages falling further behind community expectations and standards.

160 WACOSS points to:

- the lack of availability of affordable housing;
- soaring utility prices and disconnections at historically high levels;
- precarious employment;
- household financial hardship;
- flat wages growth for an extended period, and its impact on the health of the economy; and
- expectations of improved business performance into the future.

161 It says that '[i]ncreasing the adequacy of the minimum wage is arguably one of the most effective means of stimulating the economy, reducing inequality within our community, and maintaining community living standards' (WACOSS's submission, page 4).

162 WACOSS provided a detailed submission about the elements of cost of living pressures for families in Western Australia. This included:

(1) Rental affordability based on Anglicare's *2017 WA Rental Affordability Snapshot* and Australian Bureau of Statistics (2017) *Household Expenditure Survey 2015-16.*

(2) Food costs, including that Australian Bureau of Statistics *Household Expenditure Survey 2015-16* data shows that households in the lowest quintile spend an average on $144.15 each week on food and non-alcoholic beverages, that is 23.8 per cent of their income. This is in contrast with those in the third and fourth income quintile spending less than 15 per cent of their income and those in the highest quintile spending less than 10 per cent. Foodbank's *Rumbling Tummies: Child Hunger in Australia 2018* report found that 32 per cent of parents living in food-insecure households are employed full-time and 17 per cent are employed part-time; that is, almost 50 per cent of food-insecure households have full-time or part-time work.

(3) Utilities and household fees, and State Government charges, including fixed electricity charges, have increased well beyond inflation. Residential electricity and gas disconnections increased to the highest levels, as well as significant numbers of households seeking help to pay their bills. Western Australia has gone from having the lowest electricity disconnection rate prior to 2016-17 to having the highest rate.

Low income earners tend to be in households where their accommodation, whether public or private, is not insulated. Households with higher incomes who own their own homes are increasingly investing in solar energy and battery storage to reduce their electricity costs. The electricity network needs to maintain itself and so increases costs to those lower income households who are reliant on the system.

WACOSS also notes the adverse health outcomes for low income earners due to poor nutrition, housing and environment control compared with those who do not endure such conditions.

Increases in water, sewerage and drainage fees, the Emergency Services Levy and motor vehicle fees well beyond the inflation rate disproportionately affect low income households.

(4) Those living in regional Western Australia, particularly in the north of the State, experience higher costs than those in the city in a range of items. Electricity and water costs are particularly higher.

163 WACOSS points out that the community as a whole suffers when those in low income households or in financial trouble cut back on primary health care, having to consume poorer quality food, and cut back on recreational activity. It leads to higher rates of chronic disease, greater demands on hospitals and health care services, reduced productivity and life expectancy.

164 WACOSS refers to various studies on the impact of income equality on society as a whole, such as social cohesion, and on the economy.

165 WACOSS is concerned at the rate of growth between the SMW and median pay levels reflected in AWOTE. Between November 2005 and November 2017, AWOTE has grown by 71.2 per cent while the SMW has increased by only 46 per cent. An increase of $50 per week would bring the SMW up to 43.5 per cent of Western Australian AWOTE, still 2.5 per cent lower as a proportion of AWOTE in November 2005.

166 WACOSS also notes the greater propensity of low-wage earners to spend every extra dollar received. A significant increase in pay for low-wage earners will be spent, thus boosting the economy.

167 WACOSS refers to the commitment made by Australia to the United Nations *Sustainable Development Goals* in 2015. It says this requires progress to achieving and sustaining income growth for the bottom 40 per cent of the population at a higher rate than the national average by 2030 (WACOSS's submission, page 24).

168 WACOSS cites living costs and poverty analysis and reports dealing with the impacts of low income and poverty. Children raised in impoverished households have greater long-term difficulties than others. For example, participation rates for young people who were in poverty while in the family home are lower than their counterparts who do not live in poverty. The probability of them not being in the labour force at 19 years of age is 60 per cent compared to 20 per cent for other households (R Cassell (2018) Economic and Social Outlook for Western Australia, BankWest Curtin Economics Centre (presentation)). Young people in those circumstances are much more likely to receive and rely on 'income from minimum wage positions, often moving in and out of short-term and precarious work' (WACOSS's submission, page 29).

169 WACOSS draws attention to the detailed study it produces in September each year, based on Australian Bureau of Statistics figures, in its *Cost of Living Report 2017*. It says that this report shows 'an appreciable improvement during 2016-17 coming off tougher times associated with the local economic downturn' (WACOSS's submission, page 5). However, WACOSS says the analysis is based on the bare essentials of a basic standard of living. It makes little or no allowance for:

(1) families to save;

(2) for a single parent to undertake training to improve their employment prospects; or

(3) to enable a family to respond to unexpected costs or crises.

170 It assumes a single family does not have any health or home and contents insurance, and makes no provision for birthday presents, school excursions or other non-essential items.

The cost of living in Western Australia

171 We note the submissions of UnionsWA and WACOSS about cost of living issues for the low paid, including increases in utilities charges and issues related to poverty. We must consider the question of the living standards and cost of living generally, and the needs of the low paid. The CPI is the best and most consistent guide to increases in costs.

172 Perth's CPI is the lowest of all capital cities in the year to March 2018, at 0.9 per cent, having had the highest growth of all capitals except Darwin in 2014.

173 We note that CPI involves the collection and assessment of a wide range of costs. The categories are set out in ABS Cat. No. 6461.0 – *Consumer Price Index: Concepts, Sources and Methods*. Those categories are:

- Food and non-alcoholic beverages;
- Alcohol and tobacco;
- Clothing and footwear;
- Housing;
- Furnishings, household equipment and services;
- Health;

- Transport;
- Communications;
- Recreation and culture;
- Education; and
- Insurance and financial services.

174 Each of those categories has sub-groups. For example, the food category includes a range of bread and cereal products, meat and seafood, dairy and related products. An example of the last sub-group includes milk, cheese, ice cream and other dairy products. Eggs are divided into caged and free-range.

175 In the housing category, the sub-groups include rents (including private and government landlords, including housing authorities, and by furnished and unfurnished premises). It includes maintenance and repairs to a range of materials, products and services as well as property rates and charges such as state and council property rates.

176 The utilities category includes water supply and sewerage charges, electricity, mains and bottled gas, and firewood costs.

177 The CPI is a thorough and complex tool for identifying costs and measuring change. The weighting of particular items cannot be subject to particular interests in a particular year.

178 To isolate particular costs in any year would be unhelpful to our overall examination and assessment of the increase in the cost of living. It would encourage arguments based on the increase or decrease of particular items according to the interests of the party making the submission, that is, it would distort a proper consideration of all costs.

179 Therefore, we reiterate our view expressed over a number of years that it is not appropriate to disaggregate the CPI.

Insecure work

180 We note that the Australia Institute, Centre for Future Work, in its 'The Dimensions of Insecure Work: A Factbook' (29 May 2018) says that work is becoming less secure. Part-time work has grown and many part-time workers are underemployed and work very short or irregular hours. Casual employment has grown. Earnings for workers in insecure jobs are low and have declined in real terms. Fewer workers are protected by enterprise agreements, and reliance on modern awards for minimum wages and conditions has expanded. There have been declining opportunities for permanent, stable work and increased insecure work since 2012. Part-time employment grew from 29.7 per cent in 2012 to 31.7 per cent in 2017, the highest level of part-time employment in Australian history. Between 2012 and 2017, 57 per cent of all net new jobs in Australia were part-time. Part-time work has grown twice as fast for men as for women in the five-year period.

181 WACOSS says increasing casualisation, part-time employment and underemployment result in financial hardship, stress and poor mental health, high credit card debt and 'pay day' borrowing at high interest rates. We note these circumstances and include them in our considerations.

Impact on specific cohorts

182 The community sector plays an important role in supporting vulnerable members of the Western Australian community. Many of the sector's own workforce rely on the award system. According to WACOSS, the sector's employees are 'significantly underpaid' compared with public sector employees undertaking similar work. The sector's wages support the Western Australian economy and include the multiplier effect. The industry is also a large provider of employment for women.

183 WACOSS says that investment in the care industry brings significant economic and social benefits by increased employment, social infrastructure including health services, and education. Compared with investment in the construction industry, more jobs are created.

Tax and transfer system

184 CCIWA examines the tax and transfer systems used to redistribute income to support those on low incomes. It cites the Productivity Commission's Working Paper, *Tax and Transfer Incidence in Australia*, October 2015. This noted:

> … in analysing the tax and transfer system as a whole, it is also important to keep in mind that taxes and transfers can have separate and sometimes competing objectives. While the redistribution of income is a key role shared by the tax system and the transfer system, the primary role of the tax system is to raise revenue to fund public expenditure, of which transfer expenditure is just a subset.
>
> (CCIWA's submission [259])

185 The Australian Government's submission to the FWC's 2017-18 AWR notes that 'Government direct transfer payments can account for a significant proportion of a minimum wage household's income' ([2018] FWCFB 3500 [272]).

186 There are variations because of the impact of taxes and transfers targeted at particular types of households arising from the application of government policies. This affects the extent to which any increase in the minimum wage might have a stimulatory effect. The Commission therefore needs to be cautious about making assumptions about the impact of the increase in the SMW due to the different types of households and their disposable income affected by the tax and transfer system.

187 We also note that the FWC in its 2017-18 AWR decision agrees with the Australian Government's submission that '[i]ncreases in the minimum wage are not fully reflected in household disposable income, although it plays a large role in improving household income for low-income, minimum wage families' [297].

188 CCIWA also cites the benefits to low-income earners to be derived from the Low Income Tax Offset announced in the 2018 Federal Budget. We do not think it is appropriate to take this matter into account at this stage. This is because it has yet to be legislated for.

189 CCIWA says that in providing a fair system of minimum wages and conditions that meet the needs of the low-paid, it needs to be borne in mind that employment provides benefits to individuals, their families and communities. The private sector small business employers in Western Australia and their employees are substantially award-reliant. 'The award framework should be appropriate to the circumstances of the small businesses that are award reliant employers' [277].

190 We have considered the issues of income equality and find that the *Household Income and Labour Dynamics Australia* (HILDA) Survey, Australian Bureau of Statistics and the Gini coefficient provide data which demonstrate the level of income inequality in Australia. Together, they show that Australia's income inequality has been relatively stable over at least the last four years.

191 The HILDA Survey shows that from 2001 to 2015, Perth has had the highest growth in median household equivalised income (52.4 per cent) of the capital cities, with Brisbane second (34.8 per cent).

Enterprise bargaining

192 We are required to consider the need to protect employees who are unable to reach an industrial agreement (s 50A(3)(a)(v)) and to have regard to the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises (s 26(1)(d)(vii)).

193 The Commission's records identify that in those areas that are subject to the State Wage order, employers and employees do not generally bargain for an enterprise agreement. Only 53 applications were made to register industrial agreements in the 2016-17 financial year (see Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2016-17, page 17-18):

> … 33 of these relate to independent schools, and the remainder relate to not for profit organisations including political parties and community and legal centres. Three relate to one particular unincorporated private hospital.

194 The trend at the national level and the lack of any real level of agreement-making amongst State system employers and unions confirms the significance of the State Wage order to State system private sector employees.

195 Those covered by awards have not received pay increases through those awards other than from the State Wage order (see the 2016-17 Annual Report of the Chief Commissioner, page 18).

196 UnionsWA says that it is most likely that increases in the SMW will act as a spur to bargaining, particularly for award-free employees where a signal is needed as to what constitutes an acceptable wage. It refers to studies by the Commonwealth Department of Employment and the evidence before us by Professor Rowena Barrett in 2013.

197 In last year's decision ([2017] WAIRC 00330; (2017) 97 WAIG 693), we found that 'in particular industries and industrial pay negotiations, the increases awarded through the State Wage Case are used as guides or signals for increases in rates of pay to significant numbers of employees beyond those directly covered by the State Wage order. In many industries, the award is not merely the safety net above which actual rates of pay are negotiated, but may constitute the actual rates paid' [200]. This situation is reinforced this year, and particularly given the absence of a discernible level of industrial agreement negotiation in the sectors and awards where most low-paid work is found.

198 In light of this material, we conclude that an overwhelming proportion of State system private sector employees receive an increase in their rate of pay only by one of three methods:

(1) the SMW contained in the MCE Act through the State Wage Case;

(2) the increase in award rates of pay through the State Wage order; or

(3) the signalling effect of those increases.

Encouraging ongoing skills development

199 UnionsWA again says that falling commencements in apprenticeships and traineeships is a consequence of the failure to make undertaking training pay off for trainees and apprentices. They need to survive through the period of low pay to be able to obtain the benefits of the training. Many do not complete the training. Award rates for first year apprentices are often below the poverty line. UnionsWA refers to the Final Report of the Expert Panel (January 2011) '*A shared responsibility – Apprenticeships for the 21st Century*', 89) in which nearly half of apprentices said they would not recommend an apprenticeship because of the low level of pay.

200 The Minister refers to data from the Department of Training and Workforce Development regarding apprenticeship and traineeship commencements. It shows a decline of 37.9 per cent in apprenticeship commencements generally between a peak in 2010 (at 10,355) and in 2017 (at 6,431). These included significant drops in those in construction trades; metals manufacturing and services trades, electrical and automotive trades. However, automotive trades, and metals, manufacturing and services trades increased by 22.3 per cent and 18.7 per cent respectively in 2017.

201 Traineeship commencements have declined 44 per cent since 2012, and 10.6 per cent between December 2016 and December 2017.

202 The drivers for these trends are the levels of demand for key trade categories in the industries which benefit and suffer respectively from economic activity, subject to lags in the demand being developed.

203 The overall demand in the resource sector is expected to remain lower for some years than during the peak of the sector's growth five years ago. Those industries not so directly affected by the resource boom's peaks and troughs, such as hospitality and tourism, and primary industry traineeships, have remained steady in recent years.

204 The Minister says there are also many non-economic factors that affect the willingness of employers to put on apprentices and trainees and prospective apprentices/trainees to pursue those paths.

205 One factor referred to by the Minister was the FWC's decision in 2013 to increase the first-year apprentice rate from 42 per cent of the adult rate to 60 per cent (*Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 (*the Apprentices decision*)). It is said to have encouraged prospective apprentices and acted as a disincentive to employers to hire apprentices. However, in its 2018 AWR, the FWC said (at [205]):

> The Panel concluded from this research (Karmel T, *Factors affecting apprenticeships and traineeships, research commissioned by the Fair Work Commission*, Research Report 3/2017, Part II, February, p. 71) that although both the removal of government subsidies and the *Apprentices decision* contributed to a decline in commencement rates, the *Apprentices decision* only had a minor effect. The latter conclusion was supported by the occurrence of over-award payments to apprentices and the lack of uniformity in commencement trends across industries. Nothing advanced in the submissions in this Review would cause us to reach any different conclusion.

206 Studies about the perceptions of apprentices and their families indicate that these play a role in decisions about whether to seek or enter an apprenticeship. Perceptions of such factors as skills shortages; rising tradespersons wages; future potential rates of pay, conditions and career potential; rising apprenticeship vacancies; awareness of rising labour demand resulting from demographic change; job security; the nature of some trades' work, and a lack of knowledge about apprenticeships and traineeships, coloured the views of potential apprentices, trainees and their families.

207 The FWC's *Research Report 3/2017: Factors affecting apprenticeships and traineeships* also identified that stronger economic conditions can also encourage apprentices to exit their training or forego entry into an apprenticeship, to pursue short term financial gains, such as experienced in the Western Australian resource boom period.

208 Lower population growth in the state's 15 to 24 year old cohort between 2014 and 2017 was also a supply side factor.

209 Higher fees and training costs have also acted as a disincentive to potential apprentices and trainees.

210 UnionsWA also refers to the National Centre for Vocational Education Research (NCVER) study (*The Cost of Training Apprentices*, 25) that concluded employers' costs for wages 'effectively being neutralised by apprentice productivity'.

211 CCIWA says apprenticeships and traineeships are important entry points, and are essential to the labour market having the skills needed to support future productivity, sustainability and growth. It is important that they remain a viable option for employers.

212 We conclude from the material before us that the causes of the low commencement and completion rates for apprentices and trainees are multi-faceted and complex. However, we also conclude that it is necessary for the rates of pay of apprentices to:

(a) be sufficient to enable apprentices and trainees to have a reasonable standard of living while they train;

(b) take account of them being trainees requiring supervision and instruction to be provided by other employees; and

(c) make apprenticeships and traineeships attractive to employers, so that they will offer apprenticeships and traineeships, as noted by the FWC's Research Report 3/2017.

213 Apprenticeships and traineeships are important not only to the apprentices and trainees, but also to their employers and their industry, and to the economy as a whole, to ensure that the skills necessary are held by employees.

Equal remuneration for work of equal or comparable value

214 As with previous years, submissions regarding this issue focussed almost exclusively on the gender pay gap. The gender pay gap is the difference between women's and men's average weekly full-time base salary earnings.

215 AWOTE shows a decline in the gender pay in Western Australia of 1.4 per cent and nationally of 0.7 per cent. Western Australia remains the state with the highest gender pay gap of 22.5 per cent compared with the national average of 15.4 per cent.

216 The Minister says women are more reliant on award rates of pay than men, and a high proportion of female employees are currently being paid in accordance with the award, that is in May 2016, 28.9 per cent of female non-managerial employees in Australia were paid in accordance with an award compared to 19.6 per cent of male non-managerial employees.

217 The Minister also refers to the causes of the gender pay gap by reference to the Workplace Gender Equality Agency (WGEA) assessments. Those causes include:

a) a number of interrelated work, family and societal factors, including stereotypes about the work women and men 'should' do, and the way women and men 'should' engage in the workforce;

b) a lack of women in senior positions, and a lack of part-time or flexible senior roles. Women are more likely than men to work part-time or flexibly because they still undertake most of society's unpaid caring work and may find it difficult to access senior roles;

c) women's more precarious attachment to the workforce (largely due to their unpaid caring responsibilities);

d) differences in education, work experience and seniority;

e) discrimination, both direct and indirect.

(Minister's submission [46])

218 The Minister says regular increases to the minimum and award wages play an important role in helping to reduce gender pay inequality, particularly given that awards directly affect a larger proportion of female employees than male employees.

219 *Gender Equity Insights 2017: Inside Australia's gender pay gap*, the WGEA, (BankWest Curtin Economics Centre (2017)) says that:

> At a macroeconomic level, gender pay gaps can depress economic growth and productivity. At an individual level, it slows down the rate of wealth accumulation by women relative to men. The ramifications reverberate across the life course, with women bearing greater exposure to poverty and disadvantage at every age. Within the context of an ageing population in which women are disproportionately represented, gender pay gaps and gender wealth gaps not only pose significant risks for the economic wellbeing of Australian women, they also have important implications for social equity and fiscal sustainability.

220 WACOSS says that while increases in the SMW alone will not fix the gender pay gap, they are an important component in reducing the gap. WACOSS refers to findings by the ILO (Monitoring the effects of minimum wages: Effects on gender pay-gaps (2018)) and research for the Australian Fair Pay Commission that support this proposition.

221 WACOSS also refers to the paper by B Broadway and R Wilkins (2017) 'Probing the Effects of the Australian System of Minimum Wages on the Gender Pay Gap' (Melbourne Institute Working Paper No. 31.17, Melbourne Institute of Applied Economic and Social Research). This paper found that female employees are significantly more likely than men to be paid an award wage (18.5 per cent compared to 12.4 per cent).

222 CCIWA points to data from the WGEA to demonstrate what has occurred in respect of those businesses that are required to report under the *Workplace Gender Equality Act 2012* (Cth). This looks at the variety of mechanisms put in place to address inequity. It notes that the base salary gender pay gap had decreased in Australia by 1.7 per cent in the two years 2015-16 and 2016-17.

223 It also notes that the average gender pay gap in OECD countries is 15.5 per cent. In Australia, the full-time gender pay gap in February 2018 was 15.3 per cent. Western Australia had the largest gap at 22.5 per cent in November 2017, down from 23.9 per cent in November 2016.

224 The widest gap occurs in the three resource sector dominant states, with the mining and construction sectors reflecting the traditionally high earnings and low representation of women.

225 CCIWA also notes that the gender pay gap varies from industry to industry, with the financial and insurance services industry being 26.1 per cent and the retail trade 8.1 per cent.

226 The 'gender pay gap typically increases with occupational hierarchy' as noted by the WGEA Gender Insights 2018 report. However, the gap in all managerial occupations narrowed in the three years to 2016-17.

227 CCIWA says the WGEA data demonstrates the increased focus by business and progress being made on addressing pay equity. However, the data is sourced from medium to large national system employers as they are the business covered by the *Workplace Gender Equality Act*, rather than the private sector employers in the Western Australian system which are small and micro-businesses that are predominantly sole traders, unincorporated partnerships and unincorporated trusts.

228 CCIWA says the WGEA found the gender pay is wider when pay is set by individual agreements compared with pay set by awards or collective agreements. The award system and award classifications are said to 'support and enforce the principle of equal pay for work of equal value'. The Productivity Commission noted that 'awards appear to have reduced gender wage inequality'.

229 The Commission has previously examined the issue of equal remuneration and the gender pay gap. We concluded that an increase in the SMW and award rates will have a limited effect on the gender pay gap but may assist in those industries where women are dependent on minimum award rates. However, the gender pay gap 'is not the same as, or a proxy for, equal remuneration for work of equal or comparable value' ([2016] WAIRC 00358 (2016) 96 WAIG 636 [203]). We maintain this view.

Relevance of the AWR and the national economy

230 Western Australia is the only state not to have referred industrial relations powers for the private sector to the Commonwealth. It is the only state having a minimum wage and award wages applicable to its non-constitutional corporation sector. This is, of course, mainly the small business private sector. Western Australia's small businesses compete with their national system counterparts. In that context, the NMW may have relevance to their costs of labour.

231 The *Fair Work Act*'s requirements for the NMW review relate to the national economy. The national economy is a composite of individual state and territory economies. Each has different characteristics including industries, market sectors and labour markets. There are significant disparities between the economic performances of the various states and territories.

232 The Commission is required by the legislation to examine the narrower context of the conditions in Western Australia as well as any relevant decisions of other courts and tribunals, and to the extent that it is relevant, the state of the national economy.

233 The major indicators for the purposes of the Commission's determination are not as advantageous as those for the national average, except AWOTE where Western Australia has remained the highest since 2012.

234 Given the state of the Western Australian economy, and its situation relative to the national economy, the last three State Wage orders have delivered rates of increase lower than the national increases, although the SMW still exceeds the NMW by $14 per week.

235 We note that the increase awarded by the FWC on 1 June 2018 was 3.5 per cent, or $24.30, taking the NMW to $719.20 ([2018] FWCFB 3500 [101]).

Conclusion

236 We conclude that the economic circumstances of Western Australia appear to have reached the bottom of the cycle and there are signs of improvement for the future.

237 As the State Government notes, Western Australia's economy is yet to trough with expected declines in State Final Demand out to 2018-19 mainly due to falls in business investment, and to contract for a fifth consecutive year, and again next year.

238 Western Australia has come back to a more normal and average situation in a number of, but not all, measures since the end of the investment boom four years ago.

239 While employment has risen in Western Australia over the last year, part-time employment continues to outstrip full-time jobs by a significant margin.

240 Inflation is low at 0.9 per cent (March 2018). Gross State Product has improved from -2.7 per cent to 2.5 per cent this year. State Final Demand has also improved from -7.2 per cent to -0.25 per cent.

241 Household consumption is at a low level. Unemployment is improving overall, taking account of the increased participation rate.

242 Therefore, Western Australia's economy is at the point where there is cause for cautious optimism after four years of contraction following the end of the resources investment boom in 2014.

243 Western Australia's small businesses in particular are facing the prospect of improved trading conditions but they have not yet developed. It is these businesses that employ the bulk of the employees covered by the State Wage order and by State awards.

244 The Western Australian economy does not compare favourably with other states and territories, or with its own recent past. The continuing improvement requires a cautious and moderate response to ensure that the improvements become entrenched.

245 We accept that in an environment of such a low wage increases and low household disposable incomes, wage increases to the lowest paid may have a stimulatory effect. However, once again a moderate response is necessary. It cannot be assumed that low income households who receive the greatest benefit from a significant increase to the SMW and award wages will use that increase to boost the turnover and profits of the sector that employs them and needs to have the resources to pay them.

246 In those circumstances, the increase in the SMW and award wages needs to be able to be borne by the private sector small businesses in the State system. It needs to work as a means of enhancing employment and training opportunities, not of threatening them.

247 We conclude that a moderate increase in the SMW and award wages can achieve that balance. It can provide for fairness to both sides and in the interests of the community as a whole.

248 As in previous years, we referred to the WPI as being the best available indicator of wage movements. This is useful for the purpose of considering the relative position of the low paid as an indicator of living standards generally prevailing in the community. It is also relevant to consider the relative position of the SMW and award wages from the perspective of the fairness of the Western Australian system of wages and conditions of employment.

249 The need to improve living standards for employees must be considered. To improve their living standards, employees need fair pay, stable employment and opportunities for training and skills development.

250 We recognise that moderate increases to the SMW and award wages improves the prospects of providing equal remuneration for men and women for work of equal or comparable value as those increases generally favour award-free and low wage, award-reliant employees where women are concentrated.

251 The comparison with the state of the national economy is quite stark. The Fair Work Commission's 2018 AWR decision refers to the national economy and labour market being unequivocally healthy. Full-time employment grew by 3.1 per cent compared with 2.8 per cent in Western Australia. The FWC described business conditions as 'generally robust', compared with Western Australia's economy that is described by Treasury as being in its fifth consecutive year of contraction (Exhibit Minister 1 – Economic Outlook), albeit that it is at a turning point.

252 Some sectors of the economy, particularly the retail trade, where employment has contracted by 11.9 per cent, are not robust, although others such as health care and social assistance which has had employment growth of 15.9 per cent, are doing well.

253 When the circumstances have indicated that it was appropriate, past increases have exceeded the increases in the cost of living by a good margin. Even last year, we awarded an increase which was above the CPI increase.

254 We also note that in assessing the issue of living standards, it is difficult to determine the effect of particular levels of net benefit to particular employees and households due to the effects of the tax and transfer system on different types of households.

255 The higher unemployment rate for youth and the significant decline in apprenticeships and traineeships are of concern. We note the decision of the FWC that significant increases in apprentice wages in 2013 'may have played a role, but it seems that any effect appears minor' ([2018] FWCFB 3500 [204]). There are difficulties both with supply and demand for apprenticeships.

256 It is clear that the decline in apprenticeships and traineeships is not as simple as the rates of pay being unattractive or that life on those rates is unsustainable. It is far more complex than that. However, the rates of pay need be a compromise between there being a wage that sustains the apprentice or trainee and one that is affordable for the employer.

257 The proportion of the adult rates for junior employees are prescribed by MCE Act s 13, and we are not able to adjust them.

258 We are of the view that an increase of $18.00 per week to the SMW will achieve the requirements set out in the Act. It will result in the SMW being $726.90 per week.

259 The increase to be awarded this year is, once again, higher than the Perth CPI. However, on balance, it is a moderate increase that ought to be sustainable for industry as a whole, and not lead to adverse results for employment generally or for employers. It is an increase appropriate to the matters the Act requires to be considered. It takes account of the interests of employees, their employers and the community generally.

260 In comparison with the increase granted by the FWC, dealing with an economic environment quite different to that in Western Australia, it is modest. It also further reduces the difference between the minimum wage applying to employers and employees at State and national level from $14 per week to $7.70 per week.

261 We have determined that a flat dollar increase is appropriate to the SMW and to award wages. We have done so taking account of two particular matters. The first is the need to provide the greatest benefit to the lowest paid. The second is that we awarded a percentage increase to higher level rates last year and while we note the effect of a flat dollar increase on relativities within awards, award wages are increased, as noted earlier, only by the State Wage order. There have been no applications for increases to any awards to overcome any compression of relativities for a number of years.

The Statement of Principles

262 The Commission invited submissions regarding the Statement of Principles as they had not been addressed for some years and there have been significant developments in that time. We received a number of submissions proposing changes, although CCIWA submits that in light of the Ministerial Review of the State Industrial Relations System considering and making recommendations about a number of matters covered by the Statement of Principles, any changes to them ought to await the Review's outcome.

263 The Minister submits that several of the Principles could provide clearer information for employers and employees and better reflect the contemporary safety net that currently exists. The Minister also draws attention to a number of particular matters including:

(a) Equal remuneration. The Minister notes that Principle 10 provides for claims in such matters but that no such claim has yet been brought. Nor is there particular legislative guidance or principles. The Minister supports the inclusion of a particular principle to deal with equal remuneration and would welcome the opportunity to participate in a process to develop such a principle.

According to UnionsWA, it is open to the Commission to develop a principle specifically dealing with equal remuneration for men and women for work of equal or comparable value. This would ensure a clear process for the parties with guides on what the Commission could consider. UnionsWA advocates consideration of the Queensland Equal Remuneration Principle.

We intend to bring on an application of our own motion for the making of a General Order under s 50 of the Act. Its purpose will be to provide a mechanism for the development of a principle dealing with equal remuneration for men and women for work of equal or comparable value. We intend to then convene a conference of the s 50 parties and other interested persons and organisations, with a view to facilitating the development of a principle by agreement.

(b) Principle 8 – Total Minimum Rate Adjustments

This Principle was established some years ago. Many but not all awards have completed the Minimum Rate Adjustments process and have subsequently been amended to consolidate the separate rates into a total rate. Others have not. Where they have not done so, *Principle 4 – Previous State Wage Case Increases* is still available. Alternatively, an amendment can be made to the award without it being above or below the safety net as it would simply be an administrative change for ease of application.

Principle 8 could be deleted without adverse effects because the processes are still available under Principle 4.2.

We intend to amend the Principles by deleting Principle 8 in its entirety, and to make consequential amendments to other Principles.

(c) Principle 9 – Minimum Adult Award Wage

It was agreed amongst the Minister, CCIWA, UnionsWA and WACOSS that this principle ought to be amended in the following ways:

(1) To reflect that the minimum wage employees working under awards that provide for other than a 38 hour week, that the hourly rate is determined by using a divisor of 38, not the number of hours provided in the award;

(2) To clarify that junior employees cannot be paid less than the applicable rate under the MCE Act; and

(3) To replace reference to a specific training program, the Australian Government's 'Jobskills', which no longer exists, with a generic term, 'government approved work placements program'.

264 We agree that these changes are appropriate. The Statement of Principles will be amended accordingly.

Award review and updating

265 The Minister says that s 40B of the Act allows awards to be reviewed at any time and more than once, and that s 40 enables award parties to apply to amend awards to ensure that they remain contemporary and meet the needs of employees and employers.

266 UnionsWA says that a wholesale updating of awards is unnecessary, but that the Commission ought to adopt a targeted approach. UnionsWA says that it is important for many award-free employees in the State to have award coverage. This could be achieved by the extension of the scope and respondency of existing awards, and could be initiated by the Commission of its own motion.

267 CCIWA says that the issue of reviewing and updating awards ought to await the finalisation of the Ministerial Review of the State Industrial Relations System and the Government's consideration of it.

268 We have considered those views. In respect of awaiting the final outcome of the Review, we are of the view that where an issue is raised and the Commission has the capacity to deal with it, the Commission has an obligation to deal with it unless circumstances are against it.

269 In this case, the outcome of the Review is not known. The Government's response and the possible establishment of a new award regime may take considerable time. In the circumstances, we see no good reason to delay.

270 We are of the view that a large number of awards need to be reviewed to deal with discrepancies regarding the 40 hour week.

271 In relation to the 40 hour week issue, rather than deal with the particular awards as part of the State Wage Case, we intend to deal with them pursuant to s 40B. The Commission is able to review awards again even though a number were previously reviewed, or their reviews were discontinued when the union and employer parties found the process of a wholesale review onerous. We do not at this stage intend such a wholesale review, but will adopt a targeted approach to deal with the issue of the 40 hour week.

272 We also note UnionsWA's submission that there are large numbers of employees who are award-free. We observe, though, that to date, no applications have been brought by unions to expand the scope of existing awards to cover award-free employees, but rather it proposes that the Commission deal with this of its own motion. We will deal separately with the question of extending the scope of particular awards to cover award-free employers and employees where appropriate. However, issues of the Commission's powers in dealing with the scope of an award will need attention given the provisions of s 29A, s 36A and s 37 of the Act.

273 For those purposes, as with the issue of an Equal Remuneration Principle, the Commission will call these matters on of its own motion, by separate applications.

EDITOR'S NOTE:

[106] and [223] edited in accordance with Corrigendum 15 June 2017 [2018] WAIRC 00366.

2018 WAIRC 00368

2018 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 15 JUNE 2018
FILE NO.	APPL 1 OF 2018
CITATION NO.	2018 WAIRC 00368

Result 2018 State Wage order issued

Representation

Mr B Entrekin on behalf of the Hon Minister for Commerce and Industrial Relations

Mr K Black on behalf of the Chamber of Commerce and Industry of WA (Inc)

Dr T Dymond on behalf of UnionsWA
Mr C Twomey on behalf of the Western Australian Council of Social Service Inc

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2018 State Wage order and thereby orders as follows:

1. THAT the 2018 State Wage order takes effect on 1 July 2018.

2. THAT the General Order which issued in matter No. APPL 1 of 2017 ([2017] WAIRC 00355; (2017) 97 WAIG 714) is to be of no force and effect on and from the commencement of the first pay period on or after 1 July 2018.

3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be $726.90 per week on and from the commencement of the first pay period on or after 1 July 2018.

Apprentices

4. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:

   (a) In relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.

   (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2018:

	1 July 2018
Four Year Term	
First year	$347.80
Second year	$455.50
Third year	$621.10
Fourth year	$728.70
Three and a Half Year Term	
First six months	$347.80
Next year	$455.50
Next year	$621.10
Final year	$728.70
Three Year Term	
First year	$455.50
Second year	$621.10
Third year	$728.70

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be $621.10 per week on and from the commencement of the first pay period on or after 1 July 2018.

Trainees

6. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship ("trainee") shall be:

   (a) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant award where an employer-employee agreement is in force.

   (b) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the Metal Trades (General) Award contained in Table 1 as follows:

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2018:

Industry/Skill Level A			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	251.00	299.00	368.00
Plus 1 year out of school	299.00	368.00	426.00
Plus 2 years	368.00	426.00	498.00
Plus 3 years	426.00	498.00	569.00
Plus 4 years	498.00	569.00	
Plus 5 years or more	569.00		
Industry/Skill Level B			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	251.00	299.00	359.00
Plus 1 year out of school	299.00	359.00	411.00
Plus 2 years	359.00	411.00	483.00
Plus 3 years	411.00	483.00	551.00
Plus 4 years	483.00	551.00	
Plus 5 years or more	551.00		
Industry/Skill Level C			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	251.00	299.00	357.00
Plus 1 year out of school	299.00	357.00	401.00
Plus 2 years	357.00	401.00	450.00
Plus 3 years	401.00	450.00	505.00
Plus 4 years	450.00	505.00	
Plus 5 years or more	505.00		

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

Australian Qualification Framework (AQF)

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

Part-time and School-Based Trainees

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

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

	Current year of schooling	
Wage levels	Year 11	Year 12
A	$7.87	$9.68
B	$7.87	$9.45
C	$7.87	$9.39

(ii) The minimum hourly rate of pay for part-time trainees shall be calculated by taking the full-time rates expressed in Clause 6(b) Table 1 and dividing that rate by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993* (WA).

(iii) As per the requirement under 60E(1)(iv) of the *Vocational Education and Training Act 1996* (WA), any time spent by a trainee in performing his or her obligations under the training contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer.

(f) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest

weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force.

(g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is entered into and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:

On and from the commencement of the first pay period on or after 1 July 2018:

Industry/Skill Level A	$569.00 per week
Industry/Skill Level B	$551.00 per week
Industry/Skill Level C	$505.00 per week

7. THAT

(a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b).

(i) AWU National Training Wage (Agriculture) Award 1994;

(ii) Food Industry (Food Manufacturing or Processing) Award;

(iii) Furniture Trades Industry Award;

(iv) Licensed Establishments (Retail and Wholesale) Award 1979;

(v) Metal Trades (General) Award;

(vi) Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;

(vii) Printing Award;

(viii) Sheet Metal Workers' Award No. 10 of 1973;

(ix) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;

(x) Soft Furnishings Award; and

(xi) Vehicle Builders' Award 1971.

(b) Trainee rates be adjusted as follows:

(i) Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.

(ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.

(iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the former is adjusted in line with the latter rate in order to maintain consistency.

Award Rates of Pay

8. THAT weekly rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by $18.00 on and from the commencement of the first pay period on or after 1 July 2018 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.

Where wages are expressed as an hourly, fortnightly, annualised or other amount, that rate shall be increased by a relevant amount having regard to the $18.00 per week for full time employees pursuant to the relevant award.

9. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of $18.00 per week to the adult award wage, whichever is applicable, on and from the commencement of the first pay period on or after 1 July 2018.

10. THAT increases under previous State Wage Case decisions prior to 1 July 2018, except those resulting from enterprise agreements, are not to be used to offset the State Wage order increases herein.

11. THAT on and from 1 July 2018 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by deleting the text of that provision and replacing with the following:

MINIMUM ADULT AWARD WAGE

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

The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is $726.90 per week.

The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide $726.90 by 38 and multiply by the number of ordinary hours prescribed for a full time employee under the award.

The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2018.

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

Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

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

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

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

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

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2018 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Adult Apprentices

Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38 hour week is $621.10 per week.

The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide $621.10 by 38 and multiply by the number of ordinary hours prescribed for a full time apprentice under the award.

The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2018.

Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.

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

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

Statement of Principles

12. THAT the Statement of Principles – July 2017 under the General Order in matter No. Appl 1 of 2017 be replaced by the Statement of Principles – July 2018 in Schedule 2.

Publication

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

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] Commission In Court Session.

ATTACHMENT A

INDUSTRY / SKILL LIST (2018)

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

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

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER

Awards that do not contain wages and are therefore excluded:

Alcoa Long Service Leave Conditions Award, 1980

Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991

Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987

The Contract Cleaning (F.M.W.U.) Superannuation Award 1988

Health Care Industry (Private) Superannuation Award 1987

Miscellaneous Government Conditions and Allowances Award No A 4 of 1992

Miscellaneous Workers' (Security Industry) Superannuation Award, 1987

Ngala Superannuation Award, 1989

Printing Industry Superannuation Award 1991

Public Service Allowances (Fisheries and Wildlife Officers) Award 1990

Supported Employees Industry Award

The Swan Brewery Company Limited (Superannuation) Award 1987

West Australian Petroleum Pty Ltd Long Service Leave Conditions Award 1991

Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984

Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks (Racing Industry - Betting) Award 1978 **– Schedule C**

The Iron Ore Production & Processing (Locomotive Drivers) Award 2006 – **Clause 2.1**

Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 **– Clause 6**

Shearing Contractors' Award of Western Australia 2003 **– Clause 4.2**

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

Clothing Trades Award 1973 **– Clause 18**

Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 **– Schedule F**

Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 **– Schedule I**

Egg Processing Award 1978 **– Appendix 4**

Electorate Officers Award 1986 **– Schedule G**

Family Day Care Co-Ordinators' and Assistants' Award, 1985 **- Schedule C**

Government Officers (Social Trainers) Award 1988 **– Schedule K**

Government Officers (Insurance Commission of Western Australia) Award, 1987 **–**

Schedule D

Government Officers Salaries, Allowances and Conditions Award 1989 **- Schedule P**

Juvenile Custodial Officers' Award **– Schedule G**

Public Service Award 1992 **– Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2018

1. Application of the Statement of Principles

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

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

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

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

2. (deleted)

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

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

3.1.1 To include previous State Wage Case increases in accordance with Principle 4.1.

3.1.2 To adjust wages for total minimum rates pursuant to Principle 4.2.

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

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

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

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

4. Previous State Wage Case Increases

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

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

5. Test Case Standards

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

6. Adjustment of Allowances and Service Increments

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

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

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

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

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

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

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

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

7. Work Value Changes

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

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

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

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

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

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

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

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

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

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

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

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

8. (deleted).

9. **Minimum Adult Award Wage**

9.1 A minimum adult award wage clause will be required to be inserted in all new awards.

9.2 The minimum adult award wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

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

The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is $726.90 per week.

The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide $726.90 by 38 and multiply by the number of ordinary hours prescribed for a full time employee under the award.

The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2018.

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

Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

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

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

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

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

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2018 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Adult Apprentices

Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38 hour week is $621.10 per week.

The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide $621.10 by 38 and multiply by the number of ordinary hours prescribed for a full time apprentice under the award.

The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2018.

Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.

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

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

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

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

10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.

10.3 All claims made under this Principle will be referred to the Chief Commissioner for her to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.

11. New Awards (including interim Awards) and Extensions to an Existing Award

11.1 The following shall apply to the making of wages in a new award (including an interim award) and an extension to an existing award:

11.1.1 In the making of wages in an interim award the Commission shall apply the matters set out in section 36A of the Act.

11.1.2 A new award (including an interim award) shall have a clause providing for the minimum award wage [see Principle 9] included in its terms.

11.1.3 In the extension of wages in an existing award to new work or to award-free work the wages applicable to such work shall ensure that any award or order made:

(1) meets the need to facilitate the efficient organisation and performance of work according to the needs of an industry and or enterprises within it, balanced with fairness to the employees in the industry or enterprises; and

(2) sets fair wages.

12. Economic Incapacity

12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application. It will then be a matter for the Chief Commissioner to decide whether it should be dealt with by a Commission in Court Session.

13. Duration

13.1 This Statement of Principles will operate until reviewed under s 50A(1)(d) of the Act.

2018 WAIRC 00366

2018 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	(CORRIGENDUM FRIDAY, 15 JUNE 2018)
FILE NO/S	APPL 1 OF 2018
CITATION NO.	2018 WAIRC 00366

CORRIGENDUM

1. In [106] of the reasons for decision dated 13 June 2018 ([2018] WAIRC 00363), delete '15.8' and insert '11.9' in lieu thereof.

2. In [223] of the reasons for decision dated 13 June 2018 ([2018] WAIRC 00363), delete '23.7' and insert '23.9' in lieu thereof.

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

FULL BENCH—Appeals against decision of Commission—

2018 WAIRC 00330

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 211 OF 2016 GIVEN ON 4 JANUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2018 WAIRC 00330
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL
HEARD	**:**	MONDAY, 30 APRIL 2018
DELIVERED	**:**	WEDNESDAY, 30 MAY 2018
FILE NO.	**:**	FBA 1 OF 2018
BETWEEN	**:**	MR. CHRIS KIOSSES
		Appellant
		AND
		PRESIDIAN MANAGEMENT SERVICES PTY LTD
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner D J Matthews**
Citation	**:**	**[2018] WAIRC 00007; (2018) 98 WAIG 25**
File No	**:**	**B 211 of 2016**

CatchWords	**:**	Industrial Law (WA) - Leave to appeal out of time - Principles for an extension of time considered - Not satisfied appeal has any prospects of success - Leave to extend time to institute an appeal refused - Advice and assistance a self-represented litigant should receive from the Commission considered
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 29(1)(b)(ii), s 32, s 32A, s 49, s 49(4)(a) *Fair Work Act* 2009 (Cth), s 90
Result	**:**	Leave to appeal refused; appeal dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr D McLaughlin (of counsel)
Solicitors:		
Respondent	**:**	Rigby Cooke Lawyers

Case(s) referred to in reasons:

Brailey v Mendex Pty Ltd (1992) 73 WAIG 26

Kinneen v Whelans [2017] WAIRC 00301; (2017) 97 WAIG 589

Kinneen v Whelans Australia Pty Ltd [2018] WASCA 5

Loftus v Australia and New Zealand Banking Group Ltd (No 2) [2016] VSCA 308

Minogue v Human Rights and Equal Opportunity Commission [1999] FCA 85; (1999) 166 ALR 129

Rajski v Scitec Pty Ltd (Unreported, NSWCA, 16 June 1986)

Singh v Dhaliwalz Pty Ltd [2013] WAIRC 00133; (2013) 93 WAIG 197

Tobin v Dodd [2004] WASCA 288

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22

Trkulja v Markovic [2015] VSCA 298

Reasons for Decision

SMITH AP:

Introduction

1 Mr Chris Kiosses (the appellant) seeks to institute an appeal out of time under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision given by the Commission on 4 January 2018 dismissing application B 211 of 2016. Application B 211 of 2016 was a claim of alleged denied contractual benefits, being unpaid commissions, referred to the Commission by the appellant pursuant to s 29(1)(b)(ii) of the Act.

2 The appellant was employed by Presidian Management Services Pty Ltd (the respondent) as an account manager. He was employed to sell what can be described as 'wholesale' warranty insurance packages to car dealers and finance brokers who in turn 'retailed' the insurance to their customers. His main duties were business development, sales and account management.

3 The appellant commenced employment on 7 February 2013. He terminated his contract of employment by letter dated 2 November 2016 by giving four weeks' notice to expire on 30 November 2016 (exhibit 4).

4 At the time the appellant submitted his resignation, the terms and conditions of his employment were set out in a written contract of employment executed as a deed on 2 June 2015 (the 2015 contract) (exhibit 3).

5 The appellant's contact of employment provided for a base annual salary of $43,000 per annum. This amount was supplemented by substantial commission payments on sales. The effect of Item 11 of the schedule to the 2015 contract was that the terms upon which commissions were payable were as provided in sch 1 to a letter of appointment dated 1 March 2014 (the 2014 contract). In sch 1 to the 2014 contract, the appellant's entitlement to payments of commissions were:

> You will be entitled to the following commission, paid on a fortnightly basis.
>
> 10% for new business
>
> 5% for existing/handed business
>
> Policies must be paid for within 60 days to receive commission.
>
> *Please Note: The business reserves the right to review/amend this at any time.*

6 In the 12 months prior to the appellant terminating his employment the appellant earned $503.84 per day in commissions on sales of warranty insurance packages, being a total of $136,037.13 for the 12 month period or, calculated another way, $5,038.41 per fortnight.

The appellant's claim

7 In the appellant's notice of application, he simply made an unparticularised claim of unpaid sales commission.

8 In attachment A to particulars of answer filed on behalf of the respondent, the respondent set out calculations of:

(a) payments of average daily commissions made to the appellant for 12 months up until 10 November 2016;

(b) assessed actual commissions that had been owing and paid to the appellant up until the date of his termination of employment on 30 November 2016; and

(c) amounts paid and invoices created by other account managers whilst the appellant was on 'garden leave' from 10 November 2016 to 30 November 2016.

9 The appellant particularised his claim for commission when the hearing of the appellant's claim proceeded on 23 November 2017. It is clear he formulated his claim by regard to the information contained in attachment A of the respondent's particulars of answer. The particulars of his claim for unpaid commissions are as follows:

(a) $17,503.62 commission earned whilst employed;

(b) $11,785.59 in commissions for the period 8 November 2016 to 30 November 2016, being the period of time the appellant contended he was on 'garden leave'; and

(c) commissions 'due' on unused accrued annual leave payable on the termination of his employment being $503.84 per day x 29.7 days = $14,964.05.

10 The appellant was, however, paid an amount of $13,705.28 as commissions earned and due as at 10 November 2016 (which was the last day he was at work before proceeding on 'garden leave').

11 When the hearing commenced on 23 November 2017, prior to hearing evidence, after the appellant had particularised the amounts he claimed, the Commissioner spent a considerable amount of time asking the parties to explain their calculations. The Commissioner also asked the respondent to explain its defence in respect of each of the claims made by the appellant. Although the respondent had set out detailed particulars of its answer which explained each of its defences to the claims which were made, the Commissioner spent time explaining the points that were made by the respondent to the appellant.

12 After some debate between the parties and as a result of questions asked by the Commissioner, the appellant conceded that the amount of commission which he said was owing to him on work that was performed by him up to the date of his resignation was an amount of $3,798.34 (ts 73). The appellant also conceded, leaving aside his claim for a commission to be paid on accrued annual leave, that if he was not entitled to be paid commission during 'garden leave' for work performed by other account managers earning on his behalf, then his claim for commissions was an amount of approximately $3,800.00 (ts 73).

13 After the concessions were made by the appellant, the Commissioner convened a conciliation conference between the parties. It is clear that to do so was within power, as the Commission is conferred with jurisdiction to exercise a power to conciliate a dispute between parties during the course of a hearing of the substantive matters in dispute. Pursuant to s 32 of the Act, where an industrial matter has been referred to the Commission, the Commission is required, unless it is satisfied that the resolution of the matter would not be assisted by so doing, to endeavour to resolve the matter by conciliation. Section 32A expressly provides that the functions of the Commission under the Act (as to the resolution of matters by conciliation) are to and may be performed at any time (and from time to time as and when their performance is necessary or expedient) and nothing in the Act prevents the performance of conciliation functions merely because arbitration functions are being or have been performed.

14 During the conciliation process in this matter, an agreement was reached between the appellant and the respondent to resolve the claims made by the appellant for commissions earned whilst employed and commissions claimed whilst on 'garden leave'. These are the claims referred to in [8](b) and (c) of these reasons for decision.

15 When the hearing resumed on 23 November 2017, the Commissioner stated on the record of the transcript that (ts 75):

(a) these claims had been compromised between the parties;

(b) there would be no finding on these aspects of the claims;

(c) the settlement did not have underlying it in any way an acceptance by the respondent that the commission was payable in the circumstances claimed;

(d) the compromise would be the subject of a deed of settlement which, subject to the claim relating to the accrued annual leave payment, would end all matters of dispute or potential conflict between the parties; and

(e) the deed would contain a non-disclosure or confidentiality clause.

16 The Commissioner then proceeded to hear and determine whether the appellant had a contractual entitlement to include a component of commissions in the payment made to him on the termination of his employment for accrued (but not taken) annual leave.

The claim for commission payments on accrued annual leave – the evidence

17 Mr Peter Lester Fowler, who was the respondent's group executive of risk, was informed by Mr Brad Smith, who was at that time a state manager of Western Australia and South Australia, that there had been a number of resignations, including the other state manager of Western Australia, Mr Allan Callisto, and the appellant. As a result of this information, Mr Fowler travelled to Western Australia from the Eastern States to speak to the employees who had resigned.

18 Mr Fowler met with the appellant and Mr Callisto. Mr Fowler gave the appellant a document which informed the appellant that he was to commence 'garden leave'. Mr Fowler explained to the appellant what 'garden leave' was and told the appellant that he was still technically employed but he did not have to attend work and that he would be paid as normal.

19 The appellant's evidence was that he was relieved of his duties and more or less to 'down tools'. When he spoke to Mr Fowler, he asked about the annual leave he had accrued because he had quite a bit of that. He asked (ts 80):

> [W]hat happens with that? He said (Mr Fowler), 'Well, you know, we'll – we'll work that out, you'll get paid that'. And I said, 'What about all the commission that I'm due?' And he said, 'Well, we'll just average it out over your past 12 months'.

20 The Commissioner asked the appellant how this evidence related to annual leave and the appellant said he was told an average commission (rate of pay) would be paid on his annual leave.

21 When cross-examined, the appellant gave the following evidence about this conversation (ts 89):

> I didn't ask for average commissions. I had asked his advice because of his position in the company - because his previous position with a major organisation that was the same, ah, position that he held was similar so I asked in innocence his advice, and his advice was what was discussed.

22 The appellant then said, when cross-examined (ts 90):

> Yes. Okay. And so what was the advice you received?---The advice was thinking - what - I - I asked him, 'What happens now?'
>
> Okay. Now, as I had your initial evidence, there was - you said, 'I have a significant amount of annual leave accrued'. And you asked what would happen to that annual leave given that you were being put on garden leave?---Correct.
>
> And Mr Fowler said ,'We'll work it out'?---We'll work it out.
>
> Yes, 'You will get paid your annual leave'?---Correct.
>
> Yes. And you said 'What about commission? Will it be averaged over 12 months'?---No, I didn't. No, I said, 'What about all my commission that is owing?'.
>
> All your commission that is owing?---Mm hmm.
>
> Okay. And he said that would be paid?---He said, 'We'll work it out. We'll average it out over your past 12 months'.
>
> Okay. So that's how that conversation went?---To the best of my knowledge.

23 Shortly after the conversation between the appellant and Mr Fowler, there was an email exchange between Mr Fowler and the appellant. Mr Fowler emailed the appellant attaching an email he had received from another senior manager of the respondent which said nothing about the issue of a payout of accrued annual leave, including a commission component. In response, the appellant emailed Mr Fowler on 10 November 2016 as follows:

> I haven't spoken with Allan as yet about this but I've noticed that there is no mention of a 12 month pay base + commission average being applied for the balance of the annual leave period owing.
>
> Also, that pay was to be calculated as normal (and not a 12 month average) up until the last pay day during the Garden Leave period with the balance (being the 12 month pay/commission average being applied to the annual leave component as promised) to be paid on the 30th of November 2016 as a final lump sum.
>
> I would feel more comfortable for the above adjustments to be made as well as figures to be noted moving forward as discussed.
>
> Can you please organise this ASAP.

24 Mr Fowler responded later the same day as follows:

> Your pay from the day we place you on gardening leave until your final day was to be calculated using your base pay plus the average of your commission over the last 12 months. This was discussed yesterday but I do apologise if this wasn't clear. When I said you would be paid as normal we were talking about pay cycles that fell between these dates.
>
> In relation to the holiday pay I stated that I would absolutely push for that to happen and that is what I am doing and is what I have represented to Stuart and whilst I don't want to get into semantics I did not promise this.
>
> I will reiterate though it is my absolute intent to ensure the right thing happens.

25 Mr Fowler's evidence-in-chief about the conversation he had with the appellant was as follows (ts 99):

> I had a meeting with Chris, ah, by - Mr Kiosses by himself, um, and that's when it - he - it, ah, come to light that he was talking about the - the commission factor. And I said well if we had paid that in the past that - as part of your annual leave, we would absolutely do that again. Um, we - this is not about, um, trying to, ah, short-change anyone. Um, not really understanding I - I guess, given my, ah, short tenure there that - that - how we had treated that in the past but I said we would absolutely - if that's the way it's been done, that's the way we'll represent it. Um, for which, ah - and there was a - a number of other discussions but, um, I at the time wasn't aware of how we treated that.
>
> So you - when you said – I'll just take you back - we would pay it out as normal, did you have - what was your understanding at that stage?---Well, um, my - well, I - I to be honest I didn't have an understanding of how we paid out annual leave. I assumed annual leave is accrued, we would pay it out how we would normally pay out accrued leave.

26 When cross-examined, Mr Fowler was asked about what he meant by stating in the email that he would absolutely push for that to happen, Mr Fowler answered (ts 102):

> [W]hat I mean by that was if we had paid commissions as part of base - um, annual leave in the past, that's what I would represent.

27 Mr Fowler also said that he told the appellant when he spoke to him that he did not know the answers as to whether average commissions would be paid on the annual leave component and he needed 'to check it out'.

28 The effect of Mr Fowler's evidence was that when he spoke to the appellant he had been employed by the respondent for about six weeks, he had not previously been employed in a company where commission payments were the main source of income paid to employees and was unsure of how annual leave payments were to be calculated.

The Commissioner's reasons for decisions

29 After setting out the evidence given by the appellant and Mr Fowler, the Commissioner observed that it seemed that the issue of the payment of commission during periods of annual leave was a subject of the conversation between the appellant and Mr Fowler, and the issue of whether what had happened in the past would impact upon the accrued annual leave payout to the appellant was also discussed [22].

30 The Commissioner importantly found that it was difficult to work out exactly what was discussed and on what basis the parties left the issue at the end of the meeting. He observed that neither party took contemporaneous notes and that the appellant had said in his evidence that his recall was affected by the passage of time [22]. The Commissioner, however, found it was not necessary for him to resolve exactly what was said at the meeting [23].

31 Notwithstanding this finding, the Commissioner then went on to find that if he had to determine what was said:

(a) the email exchange which took place between the appellant and Mr Fowler soon after the meeting suggested that there was discussion about the appellant receiving by way of a payout of his accrued annual leave entitlement the base rate of pay and a payment calculated as an average of commissions [24]; and

(b) the version of events which he considered had a ring of truth about it, was that [26]:

  (i) the appellant brought up the issue of the commissions that might have been paid to him if he had not resigned and also mentioned that he had received commission payments during periods of annual leave in the past, without knowing or explaining the basis for those payments; and

  (ii) it appeared likely that Mr Fowler sought to deal with the issue of commissions that might have otherwise been payable, in light of what he had been told about previous periods of annual leave, by talking about such commissions being incorporated or reflected in some way in the accrued annual leave entitlement payout.

32 Importantly, the Commissioner observed that the conversation was between two people who did not really know what they were talking about, both in terms of the facts or the legalities, about what had happened in the past during annual leave, the appellant's accrued annual leave entitlement and whether commissions would be payable after the end of the appellant's employment. These issues he found became entangled in a way that was now not possible, if it ever was, to disentangle [28].

33 It is plain from these findings made by the Commissioner that if he had determined exactly what was said by whom at the meeting, that he would have found that what was said between the appellant and Mr Fowler was insufficient to find that there had been any promise made by Mr Fowler about the payment of commissions on accrued annual leave.

34 The Commissioner, however, did not make such a finding because he found it was unnecessary to do so. He went on to find that even if he was to take the appellant's case at its highest (by finding as claimed by the appellant that Mr Fowler volunteered a promise that the appellant's annual leave payout would include a commission component calculated by an average daily commission figure) there was clearly no contract entered into between the appellant and the respondent in the terms of the 'promise' [30].

35 The effect of this finding is that even if the evidence given by the appellant was accepted in its entirety, it is clear that the legal incidents for the formation of a legal binding contract were not entered into. The Commissioner explained why this was so as follows [31] - [48]:

> For a contractual entitlement to arise I have to find the following:
>
> (1) the claimant and Mr Fowler were parties capable of making a contract;
>
> (2) the claimant and Mr Fowler had an intention to enter into contractual relations;
>
> (3) there was a valid offer and acceptance; and
>
> (4) there was consideration in the form of mutual promises by the parties.
>
> There is little difficulty for the claimant in relation to (1) above. Mr Fowler had, as a senior manager of the respondent, actual or ostensible authority to agree to pay the claimant a commission payment as part of his accrued annual leave payout.
>
> The claimant however has resoundingly failed to establish (2), (3) and (4) above.
>
> There was nothing 'contractual' about the discussions between the claimant and Mr Fowler.
>
> The claimant had a written contract of employment which made specific reference to the National Employment Standards and which in no way improved upon section 90 *Fair Work Act 2009* (Cth).
>
> By letter dated 2 November 2016 the claimant resigned from his employment with the respondent.
>
> Mr Fowler travelled to Perth and spoke with the claimant about, as the claimant said in evidence in chief, 'what happens now' (ts 79). It was agreed that the main action taken by Mr Fowler was to inform the claimant that he was not required to attend work for the period of notice he had given.
>
> As the claimant put it, what Mr Fowler did was 'essentially…relieve (me) of duties and, um, that's it, more or less down tools.' (ts 80).
>
> The claimant was more or less happy to comply with that direction and did so.
>
> The claimant says himself that he went into the meeting with Mr Fowler seeking 'advice' as to what happens next. This is hardly consistent with entering the discussion viewing it as a contractual negotiation where he had things to trade to achieve an outcome he wanted.
>
> Frankly, it is not believable that in those circumstances the claimant and Mr Fowler would both intend to make further and different agreements to those in the written contract of employment. In circumstances where the claimant was leaving the respondent's employment and was not even being required to provide any further service to the respondent it is objectively unbelievable that the claimant and Mr Fowler had an intention in the discussion to come to a new legally binding contractual agreement.
>
> It is not surprising then that even on the claimant's version of the discussion it is difficult to discern within it a clear offer and acceptance. The claimant raised the issue of 'what would happen next' in relation to his annual leave entitlement. Even if Mr Fowler said that it would include commission in some way this was not an 'offer'. It was, taking the claimant's case at its highest, something that Mr Fowler was saying would happen, not an offer which, in the course of negotiations, he put to the claimant for response. The claimant did not give evidence consistent with him having 'accepted an offer'. The claimant gave evidence consistent with being provided with information and being content with it.
>
> The hopeless nature of the claimant's case becomes particularly clear when I turn to the issue of consideration.
>
> It is necessary, for there to be consideration, for the respondent to have made a promise to benefit the claimant and the claimant to have promised in some way, as a quid pro quo, to benefit the respondent or to forego some detriment or loss he could otherwise cause the respondent to suffer. There has to be mutuality of obligation.
>
> The claimant was unable to point to anything he did or did not do as a result of what he says was promised by Mr Fowler, let alone something that conferred a benefit upon or avoided or potentially avoided a detriment to the respondent.
>
> The best the claimant could do was say that if the promise had not been made he may have sought to rescind his resignation or have sought to rescind his resignation and then take his annual leave.
>
> Giving up or not taking the opportunity to seek an indulgence from another is not consideration.
>
> On any version of events there was no contract between the claimant and the respondent to the effect the claimant claims.

Application to extend time

36 The appellant filed an application for an extension of time to institute an appeal on 5 February 2018. Time to institute an appeal expired on 25 January 2018. The appellant, however, unsuccessfully sought to lodge a notice of appeal from the decision in B 211 of 2016 in the Industrial Appeal Court on 25 January 2018.

37 In these circumstances, but for my findings that the appeal has no prospects of success, I would have granted the appellant an extension of time to institute the appeal as it is clear the appellant took steps (albeit unsuccessful steps) to institute an appeal within the time prescribed.

The appellant's grounds of appeal

38 In the appellant's application for an extension of time, the grounds upon which the application is made is simply stated, '[Y]ou'll see from the attached email I had sent to Commissioner Matthews straight after the hearing I feel I was not given a fair hearing'.

39 The email referred to is attached to the notice of appeal and the application for extension of time. There are otherwise no 'grounds' of appeal attached to the notice of appeal. The email was sent to the associate to Commissioner Matthews after the hearing, but on the same day as the hearing concluded. In this email, the appellant put the following points which could be said to be relevant to the appeal:

(a) His understanding was that the Commission was there to represent, guide and act on his behalf throughout the claim process and then a judgment would be made by a Commissioner once the parties had presented their cases.

(b) He was not aware of any of the requirements expected when submitting a claim, therefore he was not prepared for what eventuated in the hearing (eg calling witnesses, providing evidence, etc). Therefore, he felt that he was not given a fair chance to substantiate his case.

(c) The appellant was offended by a question put to him by the Commissioner as to whether his sales colleagues were his agents during his period of 'garden leave' and he felt shut down and had no option but to agree to strike it from the claim (which he internally did/did not agree with).

(d) Should he have known that he was representing himself from the start, he would have taken a different tact, and sought legal advice, which then would have better prepared him for the hearing, but instead he had no idea as to the protocol and was left bewildered, frustrated and humiliated.

40 At the hearing of the appeal, the appellant was asked to state each of the points he wished to raise. After some explanation by the appellant, the Full Bench understands the point the appellant attempts to put is that the decision of the Commissioner to dismiss his application was in error, as it resulted in a miscarriage of justice, as the hearing was not conducted fairly.

41 The grounds upon which the appellant seeks to claim he was denied a fair hearing appear to be as follows:

(a) He was denied an opportunity of putting before the Commissioner facts, documents and witness evidence about matters relevant to the claims made by him.

(b) He was under duress when he agreed to compromise his claims in respect of commissions due and earned by him whilst he was employed by the respondent and commissions during the period of 'garden leave' and his claim of costs.

(c) He was under a false impression that the Commission would represent him.

The Commission's duty to self-represented litigants

42 The Commission's duty to a self-represented litigant like any court or tribunal is that a Commissioner must do no more than what is required to diminish the disadvantage to a self-represented person. A Commissioner, and the Commission itself, is not to act as a representative of a party. To do more than is required to ensure a fair trial by conferring upon a litigant in person a positive advantage would be unfair to a represented opponent and would jeopardise the appearance of and the requirements of judicial neutrality.

43 In ***Singh v Dhaliwalz Pty Ltd*** [2013] WAIRC 00133; (2013) 93 WAIG 197, Smith AP and Beech CC (Harrison C agreeing) observed [28]:

> As Bell J in ***Tomasevic v Travaglini*** [2007] VSC 337 recently observed, it is the function of a judicial decision-maker to find facts on the basis of the evidence and in doing so is to ensure trial fairness and to elicit relevant evidence [127] - [128]. At [139] - [141] he explained:
>
> 139 Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR [International Covenant on Civil and Political Rights]. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> 140 Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> 141 The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends

> on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

44 The right to a fair hearing does not entitle an unrepresented litigant to unconfined assistance. As Samuels J in ***Rajski v Scitec Corporation Pty Ltd*** (Unreported, NSWCA, 16 June 1986) remarked (14):

> (a) The absence of legal representation on one side ought not to induce a court (or a tribunal) to deprive the other side of one jot of its lawful entitlement.
>
> (b) An unrepresented party is as much subject to the rules as any other litigant. The court (or tribunal) must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status would be unfair to the represented opponent.

45 The aforementioned principles in ***Rajski*** were considered by E M Heenan J (Murray J and Le Miere J agreeing) in ***Tobin v Dodd*** [2004] WASCA 288 [14]. E M Heenan J considered the observations of the Full Court of the Federal Court in ***Minogue v Human Rights and Equal Opportunity Commission*** [1999] FCA 85; (1999) 166 ALR 129. In ***Minogue***, the Full Court had regard to the general principles in ***Rajski*** and also relevantly observed [27].

> In *Abram v Bank of New Zealand* (1996) ATPR 41-507 at 42,347, a Full Federal Court, faced with an unrepresented litigant's claim that the trial judge had not given him appropriate assistance to present his case, made this comment:
>
> > 'What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case.'
>
> We respectfully agree with this observation. Because the duty of the judge varies according to the factors identified by the Full Court in *Abram*, the duty to assist an unrepresented accused in criminal proceedings is likely to be more extensive than that imposed on a judge hearing civil proceedings in which one or more of the parties are not legally represented: cf *MacPherson v R* (1981) 147 CLR 512; 37 ALR 81; D A Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 ALG 365, at 369-70.

46 It is elementary that a court (and a tribunal) ought to ensure that a self-represented litigant understands his or her rights so that he or she is not unfairly disadvantaged by being in ignorance of these rights. Notwithstanding this, the court (and a tribunal) should refrain from advising a litigant as to how or when he or she should exercise these rights: ***Trkulja v Markovic*** [2015] VSCA 298 [39]; ***Loftus v Australia and New Zealand Banking Group Ltd (No 2)*** [2016] VSCA 308 [27] - [28].

47 The appellant appears to be a very successful salesman whose position with the respondent was to sell contracts of insurance in the form of warranties. The appellant agreed that he understood what terms of contracts are because of his work. The appellant is not in the position of many unrepresented persons who file an application in the Commission claiming denied contractual benefits, some of which are persons for whom English is a second language, or who are poorly educated.

48 The appellant is intelligent. In my assessment, it appears he is capable of robust debate. If he thought something was wrong, or unfair, he is capable of complaining about it, as he did so at the hearing at first instance and in this appeal.

Application to admit evidence into the appeal

49 When the appellant was asked what evidence he would have put before the Commission at first instance if he had had the opportunity to do so, the appellant said that he would have adduced evidence from witnesses about two matters:

> (a) his conversation with Mr Fowler to corroborate his evidence about that conversation; and
>
> (b) the fact that whilst he was employed, he was paid commissions when he took annual leave.

50 The appellant did not file any written submissions in the appeal. He did, however, prior to the hearing of the appeal, provide to the Full Bench three statutory declarations. One statutory declaration was made by him. The other two were made by Mr Callisto and another ex-employee of the respondent, Robert Francesca, who appears to have been employed in South Australia. Each statutory declaration was to the same effect.

51 The respondent objected to the admission into evidence in the appeal the statutory declarations on grounds that s 49(4)(a) of the Act provides that an appeal to the Full Bench shall be heard and determined on the evidence and matters raised in the proceedings before the Commission.

52 The Full Bench has a discretion to receive additional evidence in an appeal within strict confines. In ***Kinneen v Whelans*** [2017] WAIRC 00301; (2017) 97 WAIG 589 [9], Smith AP and Scott CC observed evidence can only be admitted in an appeal if:

> The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not 'available to the appellant at the time of the trial' and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached: ***Underdown v Dowford Investments Pty Ltd*** [2005] WAIRC 01243; (2005) 85 WAIG 1437 [8] (Sharkey P and Kenner C); applied in ***Merredin Customer Service Pty Ltd v Green*** [2007] WAIRC 01150; (2007) 87 WAIG 2789 [10]; ***Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health*** [2011] WAIRC 00192; (2011) 91 WAIG 291 [60].

53 On appeal, the Industrial Appeal Court rejected an argument by Mr Kinneen that the Full Bench erred in applying this test or had erred in not admitting the documents sought to be admitted: ***Kinneen v Whelans Australia Pty Ltd*** [2018] WASCA 5 [12] - [15].

54 Having read the transcript of proceedings in this matter at first instance, I am not persuaded that the statutory declarations should be admitted into evidence in the appeal. Nor am I persuaded that the first particular to the appellant's ground of appeal has any merit. When the content of the statutory declarations are read, it is clear the matters stated if admitted could not in any material way bolster the appellant's case.

55 Mr Callisto stated in his declaration:

> It was standard company practice that when an account manager was on annual leave that other account managers were assigned the task to perform all the day to day duties of Christos. Any commissions earned during annual leave was paid to Christos.

56 Mr Francesca stated in his declaration that his package included a base retainer (salary) plus weekly commissions on sales. He also stated:

> The commission we made was 100% rewarded to the manager responsible for the account regardless whether he or she was sick or on leave. This arrangement took place from the beginning to the end of my employment at NWC.

57 Firstly, the appellant was provided considerable assistance by Commissioner Matthews to present his case. The appellant was asked by the Commissioner as to whether he wished to call Mr Callisto to give evidence. The appellant said that he could call him, however, when asked again whether he wished to call any witnesses the appellant declined to do so and said that the only oral evidence he wished to adduce was his own.

58 Secondly, I cannot see how any additional evidence about the conversation that occurred between Mr Fowler and the appellant could assist the appellant's case as the Commissioner, in his reasons for decision, made it plain that he was deciding the appellant's case on the basis that the appellant's case should be considered at its highest - that is, if the evidence given by the appellant was to be accepted entirely. In these circumstances, it is difficult to see how any evidence by any other person present during that conversation would further assist the appellant's case. When this point was put to the appellant at the hearing of the appeal, the appellant said that the other persons present at the meeting with Mr Fowler may have a different recollection of what was said. As members of the Full Bench pointed out to the appellant, if the witnesses have a different recollection from the appellant, that evidence would not corroborate his evidence and could undermine his case.

59 In any event, the statutory declarations about payments made to the appellant and other sales persons employed by the respondent whilst the appellant was employed could be said to be contradictory to the oral evidence given by the appellant in the hearing. The appellant was cross-examined about payments of commissions made to him during a period of annual leave between 9 July 2016 to 22 July 2016. The appellant's payslip for this period was tendered into evidence as exhibit 6. The payslip records that the appellant was paid a base salary during that period together with a commission amount of $4,621.84. When cross-examined about the amount paid to him as commissions in this period, the appellant conceded that the amount were commissions that fell due to be paid during his annual leave (ts 87, 88 and 90).

60 It is clear from this evidence that the payment of commission made to the appellant whilst on annual leave were payments for commissions earned by him prior to going on leave. Pursuant to the terms and conditions of employment providing for the payment of commissions, the appellant was entitled to be paid commissions on new business created by him and for existing business, that were paid by the purchaser within 60 days. When attachment A to the particulars of answer of the respondent is analysed, it is clear that whilst invoices were generated for work (policies that are signed by clients), not all of those policies finally eventuated as policies that entitled the appellant to payment as commission became due on policies that were actually paid within the 60-day period.

61 In any event, it follows that, once a person is relieved from their duties as an employee, from the time the appellant went on 'garden leave' the appellant had ceased to carry out work for the respondent. 'Garden leave' is not annual leave. Further, once on 'garden leave' the appellant ceased to be a manager of accounts.

62 As the Commissioner properly found, the appellant's 2015 contract expressly provided that payment for annual leave was to be calculated as provided for in s 90 of the *Fair Work Act 2009* (Cth) which provides for a base rate of pay. In the absence of any agreement to pay an additional amount that was effective at law, the appellant's claim for a rate of commission to be paid on accrued annual leave was untenable.

Was the appellant denied a fair hearing?

63 I do not accept the appellant's contention that he was under the impression the Commission would represent him. Alternatively, if he had formed such an erroneous opinion, it appears that opinion was brought about by a failure by him to take any reasonable steps to ascertain how he, as an unrepresented litigant, should prepare for a hearing.

64 The appellant said that when he first decided to institute this claim, he sought legal advice but decided it was too expensive and that he had tried to call at least one agency who provides phone advice but no one answered the phone.

65 When asked whether he had looked at the guides for persons who represent themselves on the Commission's website, he stated that he had simply glanced at the website but had not taken any steps to read any of the material. He also said that he had been told by various persons employed by the Commission that they could not provide him with legal advice.

66 During the hearing of the appeal, it was patently clear to the members of the Full Bench that the appellant had not taken any steps to properly prepare for the appeal. Whilst he informed the members of the Full Bench he was now in the position to retain legal representation if the appeal was successful and the matter was remitted for further hearing, other than making a general complaint about not obtaining a fair hearing, he had taken little steps to prepare for the appeal.

67 The appellant was provided with a copy of the transcript of the proceedings at first instance, at no cost to him. This is an unusual step as parties are usually required to pay for a transcript of proceedings before the Commission, or they are to make arrangements to attend the registry of the Commission to inspect a copy of the transcript. A copy of the transcript was directed

to be sent to the parties because the respondent's solicitors are located in Melbourne. In these circumstances, it was unreasonable for the Commission to expect the respondent to take steps to inspect the transcript.

68 When various matters from the transcript of the hearing at first instance were put to the appellant by members of the Full Bench, it was clear he had not read the transcript. When questioned by members of the Full Bench whether he had read the transcript, the appellant simply said that he had glanced at it.

69 When asked about specific findings made by the Commissioner at first instance in the reasons for decision for dismissing the claim, it was clear to the Full Bench that he had simply 'glanced' at those reasons and had not properly read them or considered the points made in the decision.

70 I am not satisfied the Commissioner breached his obligation to give the appellant information and advice as was necessary to ensure that he had a fair trial. The Commissioner asked questions of the appellant to elucidate each of the elements of his claim for commissions.

71 When the transcript of the hearing at first instance is read, it is clear that the Commissioner conducted a fair hearing. He allowed and encouraged the appellant to fully state his case. He explained to the appellant matters of law that were raised by the respondent.

72 The Commissioner asked the appellant if he intended to call any witnesses. The appellant said no. He would rely upon his own evidence. The appellant did not inform the Commissioner that he wished to do so, or that he needed time to contact these witnesses. In these circumstances, the duty to ensure a fair trial did not require the Commissioner to inform the appellant that he could apply for an adjournment to call any other witnesses.

73 The appellant had an opportunity to put before the Commission any evidence he wished to do so in support of his case. He did not do so. It is quite clear the appellant was not denied a fair hearing.

74 The appellant claims that he was denied procedural fairness on grounds that the compromise agreement he entered into with the respondent during the conciliation conference that occurred during the course of the hearing was an agreement reached under duress and should be vitiated, that is, set aside because of duress. When asked by members of the Full Bench why he felt that he was under duress during the conciliation conference, the appellant was reluctant to answer. When pressed, he said he was concerned that if he revealed what was said in a conciliation conference he may be in breach of the law. However, when further pressed, he said that he felt under duress because during the conciliation conference the Commissioner pointed out to him what could be deficiencies in his case. Consequently, he accepted the offer of settlement made to him by the respondent because he thought at the time it was the best resolution he would achieve and he felt under pressure to resolve his claims.

75 When regard is had to these matters, I am not satisfied that the appellant is able to make out a claim that the compromise agreement was entered into by him because of duress on the part of the Commissioner. Plainly, the appellant's case for unpaid commissions had deficiencies.

76 It is plain that the appellant does not appear to appreciate that his case in respect of what he says were unpaid commissions is weak.

77 The claim for commissions to be paid whilst he was on 'garden leave', in addition to the amounts that were paid to him, appears to have no merit whatsoever. The respondent agreed to pay, and did pay, the appellant a nominal amount for commissions, being $503.84 per day for each of the 14 days of 'garden leave'. 'Garden leave' cannot be regarded at law to be annual leave. The direction to the appellant by the respondent to take 'garden leave' was expressly provided for in cl 18 of the appellant's 2015 contract of employment. Clause 18 provided:

> The Company may require you to perform different duties within your capacity and/or not attend at Company premises (Garden Leave) during the notice period (*of when termination of employment is given by notice*). During any period of Garden Leave, you will remain an employee of ours and must not undertake paid employment (including self employment) or provide services under contract to another company or entity. [emphasis in italics]

78 During the period of 'garden leave', the appellant had ceased to carry out any duties which would have awarded him commissions. It was his evidence that:

(a) he was told to 'down tools'. It follows that he was not to perform any further work that could have earned him commissions; and

(b) Mr Fowler had agreed that nominal commissions would be paid to him for that period of leave and this amount would be calculated on the average of the commissions he had earned in the previous 12 months.

79 In these circumstances, the appellant's claim for any additional payments whilst on 'garden leave' was unmeritorious.

80 As to the remaining claim that formed part of the compromise agreement, the appellant conceded that the amount he claimed for outstanding commissions was an amount of $3,798.34. The respondent's defence to this claim is that payments made to the respondent on policies that are paid (by the purchaser) outside the 60-day period, which were payments received after the appellant's employment was terminated on 30 November 2016, did not accrue to the appellant as his employment had ceased (ts 71).

81 This explanation was provided by the respondent in a discussion between the parties prior to the Commissioner convening a conciliation conference.

82 Whilst the appellant complained in the email attached to his notice of appeal that he had an unaddressed claim for costs for parking, transport and mental health support services, such claims would not usually be successful in any proceeding before the Commission. The general policy of the Commission is that costs ought not to be awarded, except in extreme cases: ***Brailey v Mendex Pty Ltd*** (1992) 73 WAIG 26, 27; see also ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22, 27.

83 The appellant also complained in the email that he had an unaddressed claim for interest. However, the Commission has no power to award interest in any matters before it.

84 In circumstances where the appellant's claim for additional commissions to be paid on garden leave was entirely absent of merit and the respondent had an arguable defence to the appellant's claim for outstanding commissions in the sum of $3,798.34, it cannot be maintained that it was unfair for the appellant as an unrepresented party to enter into an agreement that compromised an aspect of, or put another way, part of his claim for commissions.

Leave to appeal refused

85 As the appeal has no prospects of success, leave to extend time to appeal should be refused and the appeal should be dismissed.

SCOTT CC

86 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.

EMMANUEL C:

87 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.

2018 WAIRC 00326

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR. CHRIS KIOSSES
	APPELLANT
	-and-
	PRESIDIAN MANAGEMENT SERVICES PLY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 30 MAY 2018
FILE NO/S	FBA 1 OF 2018
CITATION NO.	2018 WAIRC 00326

Result	Leave to appeal refused; appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr D McLaughlin (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 30 April 2018, and having heard the appellant on his own behalf, and Mr D McLaughlin (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 30 May 2018, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. Leave to appeal is refused.
2. The appeal be dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2018 WAIRC 00334

APPEAL AGAINST AN ORDER OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 77 OF 2016 GIVEN ON 8 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2018 WAIRC 00334
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS
HEARD	**:**	BY WRITTEN SUBMISSIONS DATED 24 APRIL 2018, 7 MAY 2018 AND 14 MAY 2018
DELIVERED	**:**	THURSDAY, 31 MAY 2018
FILE NO.	**:**	FBA 2 OF 2018
BETWEEN	**:**	G&R ROSSEN PTY LTD Appellant AND PETA BUCHANAN Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Magistrate's Court
Coram	**:**	Industrial Magistrate M Flynn
File No	**:**	M 77 of 2016

CatchWords	**:**	Industrial Law (WA) - Appeal against interlocutory decision of industrial magistrate's court discontinued on grounds no jurisdiction to hear and determine the appeal - Application for legal costs - Whether proceedings instituted frivolously or vexatiously
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 7(1), s 84, s 84(1), s 84(2), s 84(4)(c), s 84(5), s 86(2), s 90
Result	**:**	Leave granted to discontinue the appeal - Respondent's application for legal costs be dismissed

Case(s) referred to in reasons:

Anderson v Pope (1986) 66 WAIG 1563

Barrett v The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (1998) 78 WAIG 2340

Chubb Security Australia Pty Ltd v Danson (2000) 81 WAIG 783

G Parri and M Parri v The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (1998) 78 WAIG 586

General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125

McCorry v Como Investments Pty Ltd (1989) 70 WAIG 658

Nicoletti v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1998) 86 IR 97; (1998) 78 WAIG 4316

The Commissioner of Police of Western Australia v AM [2010] WASCA 163(S); (2011) 91 WAIG 6

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22

Reasons for Decision

SMITH AP:

Background

1 Pursuant to s 84 of the *Industrial Relations Act 1979* (WA) (the Act), on 1 March 2018 the appellant instituted an appeal against a decision of the industrial magistrate's court to refuse an application to stay proceedings in M 77 of 2016.

2 On 22 March 2018, the appeal was listed for hearing before the Full Bench on 23 April 2018.

3 Practice Note 1 of 2008 required the appellant to file and serve its submissions in the appeal on 17 April 2018.

4 On 18 April 2018, by email to the Commission, the appellant's solicitors at 9.39 am informed the Commission, and the respondent's solicitors, that the appellant intended to seek leave to discontinue the appeal. An application seeking leave to discontinue the appeal was filed shortly thereafter on the same day.

5 The reason why the appeal was discontinued was that in preparing for the drafting of submissions in support of the appeal, senior counsel for the appellant, Mr M Ritter SC, ascertained the Full Bench did not have jurisdiction to hear the appeal against the order of the industrial magistrate's court, as the legal effect of the order was interlocutory.

6 The respondent does not object to the appellant being granted leave to discontinue the appeal, but seeks an order that her legal costs of the appeal proceedings be paid by the appellant.

Power to institute an appeal against a decision of the industrial magistrate's court

7 Pursuant to s 84(2) of the Act, an appeal lies to the Full Bench from 'any decision of an industrial magistrate's court'. Section 84(1) expressly defines for the purposes of s 84 a 'decision' to include a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court. Section 7(1) of the Act provides that, unless the contrary intention appears, 'decision' includes an award, order, declaration or finding. A 'finding' is defined in s 7(1) to mean a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate (which would include an interlocutory decision of the industrial magistrate's court).

8 The definition in s 7(1) of the Act of 'decision' has been found not to apply to s 84 of the Act.

9 In ***Anderson v Pope*** (1986) 66 WAIG 1563, the Industrial Appeal Court held that the words used to define 'decision' in s 84(1) demonstrate a contrary intention, sufficient to indicate that the definition of 'decision' in s 7(1) has no application in the construction of s 84. In these circumstances, their Honours found that an appeal against a 'decision' of an Industrial Magistrate only lies against a final determination of the substantive application before the Industrial Magistrate.

10 Thus, no appeal lies under s 84 to the Full Bench of the Commission against a decision of an interlocutory order made in the course of proceedings.

11 As Mr Ritter SC points out in written submissions on behalf of the appellant, the decision in ***Anderson v Pope*** is binding upon the Full Bench and has been consistently applied since 1986 in ***Barrett v The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers*** (1998) 78 WAIG 2340; ***G Parri and M Parri v The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers*** (1998) 78 WAIG 586; ***Nicoletti v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch*** (1998) 86 IR 97; (1998) 78 WAIG 4316; ***McCorry v Como Investments Pty Ltd*** (1989) 70 WAIG 658; ***Chubb Security Australia Pty Ltd v Danson*** (2000) 81 WAIG 783.

The power of the Full Bench to award costs

12 On the hearing of an appeal, s 84(4)(c) empowers the Full Bench to make an order as to costs, subject to s 84(5) of the Act, as the Full Bench considers appropriate.

13 Section 84(5) of the Act provides:

> In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

14 Consequently, the Full Bench may only make an order requiring a party to an appeal to pay another party's legal costs if the Full Bench forms the opinion that the proceedings have been frivolously or vexatiously instituted or defended.

15 Insofar as the respondent appears to include in its application for costs to the Full Bench to seek costs in defending the application in PRES 2 of 2018 for a stay of the orders made by the industrial magistrate's court in M 77 of 2016, I am of the opinion that the Full Bench has no power to make any award of costs in respect of that application. The reasons why I am of this opinion are as set out in my reasons for decision in PRES 2 of 2018: ***G&R Rossen Pty Ltd v Buchanan*** [2018] WAIRC 00332. To the extent that it is necessary, I adopt and apply the findings made in that matter in these reasons.

Reasons why the appellant was late in seeking leave to discontinue the appeal

16 In an affidavit sworn by the appellant's solicitor, Tully James Carmady, on 7 May 2018, Mr Carmady states that:

(a) junior counsel, Ms M Saraceni, had been engaged to argue the stay application before the industrial magistrate's court. After considering the matter, including the transcript of the hearing on 8 February 2018, Ms Saraceni prepared the grounds of appeal filed in FBA 2 of 2018 on 1 March 2018;

(b) on 28 March 2018, he was instructed by the appellant to engage senior counsel in relation to the appeal;

(c) on 15 April 2018, in the course of preparing submissions in support of the appeal, Mr Ritter SC brought to his attention the series of cases commencing with ***Anderson v Pope***; and

(d) after consideration of ***Anderson v Pope*** and the subsequent authorities and discussion with Mr Ritter SC, he was instructed by the appellant, late on 17 April 2018, to seek leave to discontinue the appeal.

Was the institution of the appeal frivolous or vexatious?

17 The power of the Industrial Appeal Court to make an order for costs is provided for in s 86(2) of the Act in materially the same terms as s 84(5) of the Act.

18 In ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163(S); (2011) 91 WAIG 6, the Industrial Appeal Court considered an application by AM that the Commissioner of Police pay his costs of the appeal after the Industrial Appeal Court held it had no jurisdiction to entertain any of the grounds of the appeal before it.

19 In ***AM***, Buss J (with Pullin and Le Miere JJ agreeing) pointed out the words 'frivolous' and 'vexatious' have been considered extensively in the context of the exercise by the courts of their summary powers to strike out a pleading, or an action or defence, on the ground that the pleading, action or defence is frivolous or vexatious [30].

20 In considering the meaning of 'frivolous' and 'vexatious' Buss J had regard to the observations made by Barwick CJ in ***General Steel Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125 in which the Chief Justice considered the power of a court to summarily dismiss a plaintiff's writ and statement of claim on grounds that the case or the action was shown by the pleadings to be frivolous or vexatious. In that matter, Barwick CJ observed (129):

> The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
>
> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'.

21 In ***AM***, Buss J made a number of general observations about the court's power to order an unsuccessful party to an appeal to pay the costs of the other party for the services of any legal practitioner of that party. These were [25]- [29]:

> First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party.
>
> Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. See ***Heidt v Chrysler Australia Ltd*** (1976) 26 FLR 257, 275 (Northrop J); ***Hatchett v Bowater Tutt Industries Pty Ltd (No 2)*** (1991) 28 FCR 324, 326 (von Doussa J).
>
> Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. See ***Re Vernazza*** [1960] 1 QB 197, 208 (Ormerod LJ); ***Hutchison v Bienvenu*** (Unreported, HCA, 19 October 1971) 11 (Walsh J); ***Jones v Skyring*** (1992) 109 ALR 303, 309 - 310 (Toohey J).
>
> The words 'frivolously' and 'vexatiously', in the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), are adverbs. They relate to the verbs 'instituted' or 'defended'. The Act does not define 'frivolously' or 'vexatiously'.
>
> The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. See the *Shorter Oxford English Dictionary*, (5th ed) 1038, 3529; ***Mudie v Gainriver Pty Ltd (No 2)*** [2002] QCA 546; [2003] 2 Qd R 271 [35] - [37] (McMurdo P & Atkinson J), [59] - [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.

22 His Honour also observed in ***AM*** [35]:

> As Kennedy, Rowland & Nicholson JJ noted in ***Tip Top Bakeries***, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In ***Clark***, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).

23 Buss J also made it plain that not every appeal which is determined to be without merit, either because the court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously [36]. In particular, something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be said to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90 [36].

24 As the Industrial Appeal Court pointed out in ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22, 27 the award of costs is a discretionary matter and even where an appeal is found to be untenable it does not necessarily follow that an award of costs will be made. Their Honours pointed out the discretion conferred by s 84(2) has to be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs in proceedings instituted under the Act (27).

25 The respondent contends that the appellant was obligated to take reasonable steps to ascertain whether the grounds of appeal, as raised, justified the step of initiating the appeal.

26 The respondent points out that the appellant has been represented by very competent counsel, including Mr Carmady, Ms Saraceni and Mr Ritter SC. It is said that it is inconceivable that the appellant, being so represented, was unaware of the incompetence of the appeal. In particular, it is said that whilst Ms Saraceni may be a 'junior' barrister, it can hardly be said, and is not so said, that she lacks significant experience in this jurisdiction.

27 Whilst it is clear that the Full Bench does not have jurisdiction to determine the appeal, I do not agree that an order that the appellant pay the respondent's legal costs should be made.

28 Although it is unfortunate that the respondent incurred costs in preparing to defend the appeal, I agree that once it was brought to Mr Carmady's attention that there was no jurisdiction to support the appeal and that it should be discontinued it was appropriate that Mr Carmady considered the issue for himself and then take instructions from Mr Greg Rossen to discontinue the appeal. Whilst there was a delay, I also agree that Mr Rossen, on behalf of the appellant, acted responsibly and appropriately in the circumstances by providing instructions to discontinue the appeal.

29 In this matter, whilst it could be said that the appeal was untenable, I am not of the opinion that an award of costs should be made because this is not one of the very rare cases where a costs order should be made. The definition of 'decision' in s 7(1) of the Act, when read with the definition of 'decision' in s 84(1), could be construed to contemplate that an appeal lies against an interlocutory decision of an industrial magistrate's court. Although that is clearly not the law, it is notable that the binding line of authorities which commenced in ***Anderson v Pope*** in 1986, has not been considered since 2000. Without regard to the binding line of authority it may not be clear that no appeal lies against a decision of the industrial magistrate's court that does not finally determine the substantive application before it. It also appears from the respondent's submissions that when the respondent made her application for legal costs and filed her written submissions in support of her claim, the respondent's solicitors were unaware of the line of authorities that commenced with ***Anderson v Pope***.

30 Further, whilst it is unfortunate that the respondent's solicitors had commenced preparing their submissions in response to the appeal prior to being notified that the appeal was to be discontinued, I would not characterise the appellant's late notice of discontinuance as being an appeal that was frivolously or vexatiously instituted on this ground.

31 Accordingly, I am of the opinion that orders should be made:

(a) to grant leave to the appellant to discontinue the appeal; and

(b) to dismiss the respondent's application for costs.

SCOTT CC

32 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.

MATTHEWS C

33 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.

2018 WAIRC 00333

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	G&R ROSSEN PTY LTD
	APPELLANT
	-and-
	PETA BUCHANAN
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 31 MAY 2018
FILE NO/S	FBA 2 OF 2018
CITATION NO.	2018 WAIRC 00333

Result Orders made

Order

Having heard the parties by written submissions, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. Leave is granted to the appellant to discontinue the appeal.
2. The respondent's claim for costs be dismissed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Cancellation of registration—

2018 WAIRC 00350

APPLICATION TO CANCEL THE REGISTRATION OF THE BOOT TRADE OF WESTERN AUSTRALIA UNION OF WORKERS, PERTH

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2018 WAIRC 00350
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 30 MAY 2018
DELIVERED	**:**	THURSDAY, 7 JUNE 2018
FILE NO.	**:**	FBM 2 OF 2018
BETWEEN	**:**	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND THE BOOT TRADE OF WESTERN AUSTRALIA UNION OF WORKERS, PERTH Respondent

CatchWords	**:**	Industrial Law (WA) - Application by the Registrar to cancel the registration of an organisation on grounds the organisation is defunct
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 53, s 54, s 73, s 73(12), s 73(12)(b), s 73(12a), s 73(13) *Industrial Relations Commission Regulations 2005* (WA), reg 37, reg 76, reg 76(3)
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr R J Andretich (of counsel) and with him Ms S Kemp
Respondent	**:**	No appearance
Solicitors:		
Applicant	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers [2004] WAIRC 11936; (2004) 84 WAIG 2190

Reasons for Decision

THE FULL BENCH:

The application and the requirements of the Act

1 This is an application to cancel the registration of The Boot Trade of Western Australia Union of Workers, Perth (the union). The application was brought by the Registrar before the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act).

2 After hearing from counsel on behalf of the Registrar on 30 May 2018, the Full Bench was satisfied that an order should be made to cancel the registration of the union. These reasons for decision set out the reasons why the Full Bench made the order.

3 Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise than under s 73.

4 Where the Full Bench is satisfied on the application of the Registrar that an organisation is defunct and the application has been brought in the manner prescribed, the Full Bench is required by s 73(12) of the Act to cancel the registration of the organisation. The provision is not discretionary, the provision is mandatory where the Full Bench is satisfied of the requisite matters: ***The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers*** [2004] WAIRC 11936; (2004) 84 WAIG 2190.

5 Consequently, s 73(12) of the Act requires the Full Bench to cancel the registration of an organisation if it is satisfied on the application of the Registrar that:

(a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under s 53 or s 54 as the case may be; or

(b) the organisation is defunct; or

(c) the organisation has, in the manner prescribed, requested that its registration be cancelled.

6 Whilst the application does not specify as to which sub-paragraph of s 73(12) of the Act the application is made, the evidence set out in the statutory declaration made by the Registrar, Susan Ivey Bastian, on 28 March 2018, and the submissions made on her behalf by Mr Andretich, make it plain that the application is made pursuant to s 73(12)(b) of the Act.

7 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:

(1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.

(2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.

(3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.

(4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.

(5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.

(6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.

8 As required by reg 76, the Registrar filed an application to cancel the registration of the union on 28 March 2018, together with a statutory declaration made by her which sets out the grounds and the facts upon which the application is made.

9 Whilst reg 76(3) of the Regulations requires that the application be served on the organisation the registration of which is sought to be cancelled, it is apparent from the matters set out in the statutory declaration of the Registrar, together with the correspondence and other documents on the Commission file, that although the organisation's registration is current, it has no officers or members nor an office upon which the Registrar could serve a copy of the application.

10 In these circumstances, the Full Bench is of the opinion that the requirement to serve the application on the organisation should be waived pursuant to reg 37 of the Regulations.

11 The Full Bench also made directions for the service of the application to be made on the national secretary of the Federally registered Construction, Forestry, Maritime, Mining and Energy Union of Australia (CFMEU) whose organisation has constitutional coverage of persons who may be employees who would have been covered by the union in Western Australia. Directions were also given that the notice of hearing be published in a Western Australian newspaper, on the website of the Commission and published in the Western Australian Industrial Gazette.

12 In accordance with the directions made by the Full Bench, a notice of hearing was published in the West Australian Newspaper on Saturday, 19 May 2018, on the Commission website, and published in the Western Australian Industrial Gazette on 23 May 2018 ((2018) 98 WAIG 252).

13 The grounds upon which the Registrar formed the view that the union is defunct are set out in her statutory declaration as follows:

(a) The Commission records indicate that the last known address for the union was 110 Charles Street, Perth WA 6000. Correspondence forwarded to the union at this address from the Commission since as early as 1990 has been unanswered and/or returned to sender.

(b) The last annual officers and membership returns and financial returns for the union have not been received by the Commission since 1987.

(c) In April 1992, a letter was received by the Commission from Mr John van Dolderen, the then national secretary of the Amalgamated Footwear and Textiles Workers' Union of Australia, who advised that the union went out of existence in 1987 following an amalgamation with the 'Textile Union'. No information can be located to suggest this process was formalised. In his letter, Mr van Dolderen requested that a formal application be made to cancel the registration of the union.

(d) In July 1992, a letter was received from barrister and solicitor D H Schapper, who at that time was acting for The Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth (the Clothing Trades' Union). In his letter, Mr Schapper advised the Commission that the Clothing Trades' Union intended to alter its eligibility rule to cover boot trades workers. However, it appears that the amalgamation process did not proceed.

(e) In March 1997, Mr Joe Bullock, who was at that time, the secretary of The Shop, Distributive and Allied Employees' Association of Western Australia, informed the Commission that an amalgamation with the Clothing Trades' Union was being considered. In May 1998, Mr Bullock informed the Commission that he believed the union did not have any current members.

(f) On 24 April 1996, an application was filed by the then secretary of the union and the Clothing Trades' Union for the registration of a new organisation which was in effect to amalgamate the union and the Clothing Trades' Union (APPL 650 of 1996). APPL 650 of 1996 contains a memorandum to the President of the Commission from a Deputy Registrar, dated 12 June 1996, stating that at that time there were approximately 571 members, 109 from the union and 462 from the Clothing Trades' Union.

(g) On 25 July 1996, the Full Bench refused to register the amalgamated organisation on grounds that there were unsatisfactory amendments in the proposed new rules, with respect to the eligibility of membership of the new organisation and the omission of clauses relating to elections for office.

(h) On 6 February 2018, the Commission made enquiries of the national office of the Textile Clothing and Footwear Union of Australia as to the current status of the union. In an email received by the Commission on 14 March 2018, Ms Vivienne Wiles, the national industrial officer of the Textile Clothing and Footwear Union of Australia, informed the Commission the union is effectively defunct, and has been so for a considerable period of time.

(i) The last financial statements filed on behalf of the union indicate that as at 30 June 1986, there was a general fund balance of $7,191. In the minutes of a meeting held by the Amalgamated Footwear and Textile Workers' Union of Australia (Western Australia Branch) it is recorded that the balance of the State funds had been transferred to the accounts of the Federally registered union. That was the Amalgamated Footwear and Textile Workers' Union of Australia (Western Australia Branch).

14 The Textile Clothing and Footwear Union of Australia subsequently amalgamated with the CFMEU.

15 Having regard to the matters set out in the statutory declaration of the Registrar, the Full Bench was satisfied that the union has been effectively carried out at the Federal level for some years and through the history of numerous amalgamations in the industry at the Federal level there is no available evidence to substantiate what occurred in respect of the balance of the funds in the accounts of the union. Having regard to these circumstances, the Full Bench was satisfied that the union is defunct.

16 After hearing from Mr Andretich on behalf of the Registrar, the Full Bench made an order that 'the registration of The Boot Trade of Western Australia Union of Workers, Perth be and is hereby cancelled on and from the 30th day of May 2018'.

2018 WAIRC 00323

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION **APPLICANT** **-and-** THE BOOT TRADE OF WESTERN AUSTRALIA UNION OF WORKERS, PERTH **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 30 MAY 2018
FILE NO/S	FBM 2 OF 2018
CITATION NO.	2018 WAIRC 00323

Result	Order made
Appearances	
Applicant	Mr R J Andretich (of counsel) and with him Ms S Kemp
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on 30 May 2018, and having heard Mr R J Andretich (of counsel) and with him Ms S Kemp on behalf of the applicant, and there being no appearance on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the registration of The Boot Trade of Western Australia Union of Workers, Perth be and is hereby cancelled on and from the 30th day of May 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00352

APPLICATION TO CANCEL THE REGISTRATION OF MASTER PLASTERERS' ASSOCIATION OF WESTERN AUSTRALIA UNION OF EMPLOYERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2018 WAIRC 00352
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 30 MAY 2018
DELIVERED	**:**	THURSDAY, 7 JUNE 2018
FILE NO.	**:**	FBM 3 OF 2018
BETWEEN	**:**	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND MASTER PLASTERERS' ASSOCIATION OF WESTERN AUSTRALIA UNION OF EMPLOYERS Respondent

CatchWords	**:**	Industrial Law (WA) - Application to cancel the registration of an organisation on grounds the organisation is defunct
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 53, s 54, s 73, s 73(12), s 73(12)(b), s 73(12a), s 73(13) *Industrial Relations Commission Regulations 2005* (WA), reg 37, reg 76, reg 76(3)
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr R J Andretich (of counsel) and with him Ms S Kemp
Respondent	**:**	No appearance
Solicitors:		
Applicant	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers [2004] WAIRC 11936; (2004) 84 WAIG 2190

Reasons for Decision

THE FULL BENCH:

The application and the requirements of the Act

1 This is an application to cancel the registration of the Master Plasterers' Association of Western Australia Union of Employers (the union). The application was brought by the Registrar before the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act).

2 After hearing from counsel on behalf of the Registrar on 30 May 2018, the Full Bench made the order cancelling the registration of the union. These reasons for decision set out the reasons why the Full Bench made the order.

3 Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise under s 73.

4 Where the Full Bench is satisfied on the application of the Registrar, in the manner prescribed, that the registration of an organisation be cancelled, the Full Bench is required by the use of the mandatory word 'shall' in s 73(12) to cancel the registration of the organisation: ***The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers*** [2004] WAIRC 11936; (2004) 84 WAIG 2190.

5 Thus, where the Full Bench forms the requisite opinion that the following matters have been satisfied, the Full Bench is required to cancel the registration of an organisation:

(a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under s 53 or s 54, as the case may be; or

(b) the organisation is defunct; or

(c) the organisation has, in the manner prescribed, requested that its registration be cancelled.

6 Whilst the grounds attached to the application state that the application is made pursuant to s 73(12) of the Act, it is clear that the application is brought pursuant to s 73(12)(b) on grounds that the organisation is defunct.

7 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:

(1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.

(2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.

(3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.

(4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.

(5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.

(6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.

8 As required by reg 76, the Registrar (Susan Ivey Bastian) filed the application on 13 April 2018, together with a statutory declaration made by her. The Registrar's statutory declaration sets out the grounds and facts upon which the application is made.

9 Whilst reg 76(3) of the Regulations requires that the application be served on the organisation the registration of which is sought to be cancelled, it is apparent from the matters set out in the statutory declaration of the Registrar, together with the correspondence and other documents on the Commission file, that although the organisation's registration is current, it has no officers or members nor an office upon which the Registrar could serve a copy of the application.

10 In these circumstances, the Full Bench was of the opinion that the requirement to serve the application on the organisation should be waived pursuant to reg 37 of the Regulations.

11 In the statutory declaration, the Registrar sets out the steps that have been taken over several years to ascertain whether there are any current or past officers of the union upon which service of the application could be effected. These enquiries were fruitless. Consequently, directions were given by the Full Bench that notice of the application be published in the Western Australian Industrial Gazette, a Western Australian newspaper and be placed on the website of the Commission.

12 In accordance with the direction, a notice of hearing was published in the West Australian Newspaper on Saturday, 19 May 2018, placed on the Commission website and published in the Western Australian Industrial Gazette on 23 May 2018 ((2018) 98 WAIG 252).

13 The Registrar in her statutory declaration sets out the following facts upon which she formed the opinion that the union is defunct:

(a) The union was dormant for a period of time, from 1989 to 1997. In May 1997, elections of the union were held and new office bearers were elected.

(b) Mr Kenneth Spalding was elected as secretary and Mr Barry Egan was elected as president of the union. In a letter from Mr Spalding to the Commission dated 16 March 1998, it was advised that the union had been re-established.

(c) Records held by the Commission indicate that the union had been compliant with its obligations under the Act until 1999 following its re-establishment.

(d) The union has failed to comply with its reporting obligations under the Act and the Regulations for many years, in that:

(i) the union last submitted a financial return in 1999. That financial return relates to the financial period commencing on 1 July 1998 and ending on 30 June 1999; and

(ii) the union last submitted an officers and membership return in 2004.

(e) In April 2008, the Commission records indicate that Deputy Registrar Sue Hutchinson had both email and telephone communications with Mr Egan, in relation to elections for office bearers. It was determined that after review of the rules of the union, the provision for elections were outdated and not in accordance with the Act.

(f) Following the discussion with Mr Egan, the Deputy Registrar contacted the Western Australian Electoral Commission for their advice on how it would deal with such matters, and it was determined that the rules of the union were outdated and the union should conduct its own internal elections. Once office bearers were elected, it was anticipated that resolutions could be passed to alter the rules of the union to make accurate provision in terms of elections.

(g) Mr Egan advised that he would progress the matter at a future meeting of the union. However, no further requests for information or assistance was subsequently received by the Commission.

(h) Correspondence addressed to the union at their last known address, Post Office Box 374, South Perth, has been returned since August 2008. Correspondence was subsequently forwarded to the residential address of Mr Spalding in September 2009. However, this was also returned.

(i) On 13 November 2014, an email was sent to Mr Egan, using the email address held in the Commission records, requesting that he contact the Commission in relation to the status of the union. This email was returned marked 'undeliverable'.

(j) On 13 November 2014, correspondence from the Commission was again forwarded to Mr Spalding at his last known address, requesting that he contact the Commission in relation to the status of the union. No response was received.

(k) In February 2018, enquiries were made of Mr Michael McLean, executive director of The Master Builders' Association of Western Australia (Union of Employers), Perth about the union. Mr McLean advised that he was unaware that the union had any members or that their office bearers continue to meet.

(l) On 13 February 2018, an online search was conducted by Commission officers of the union and information was provided by Yellow Pages Online, that the current address for the union was 38 Bessell Avenue, Como 6152. A letter was sent to the secretary of the union care of this address. As at 29 March 2018, no response to this letter had been received by the Commission.

(m) The last annual financial return filed by the union was for the financial year ended 30 June 1999. This return reported an asset total of $6,368. On 21 March 2018, an email was sent to the last known auditor of the union, KHT Accounting (formerly Heal & Brandli), seeking information regarding the assets of the union. On 22 March 2018, the practice manager of KHT Accounting, Ms Tracey Allmark, advised the Commission that all historical records from 1999 have been destroyed and there are no electronic records available.

14 In these circumstances, whilst it is unknown what happened to any assets of the union, it is the opinion of the Full Bench that, given the number of unsuccessful attempts made by officers of the Commission to contact any past or present office bearers of the union and the information provided by the last known auditors, it is clear the union is defunct.

15 After hearing from Mr Andretich on behalf of the Registrar, the Full Bench made an order that 'the registration of the Master Plasterers' Association of Western Australia Union of Employers be and is hereby cancelled on and from the 30th day of May 2018'.

2018 WAIRC 00324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-and-

MASTER PLASTERERS' ASSOCIATION OF WESTERN AUSTRALIA UNION OF EMPLOYERS

RESPONDENT

CORAM FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER P E SCOTT

SENIOR COMMISSIONER S J KENNER

DATE WEDNESDAY, 30 MAY 2018

FILE NO/S FBM 3 OF 2018

CITATION NO. 2018 WAIRC 00324

Result	Order made
Appearances	
Applicant	Mr R J Andretich (of counsel) and with him Ms S Kemp
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on 30 May 2018, and having heard Mr R J Andretich (of counsel) and with him Ms S Kemp on behalf of the applicant, and there being no appearance on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the registration of the Master Plasterers' Association of Western Australia Union of Employers be and is hereby cancelled on and from the 30th day of May 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Matters dealt with—

2018 WAIRC 00332

A stay of operation of the Order in matter No. M 77 of 2016 which is the subject of FBA 2 of 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2018 WAIRC 00332
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	BY WRITTEN SUBMISSIONS WEDNESDAY, 21 MARCH 2018; MONDAY, 9 APRIL 2018
DELIVERED	**:**	THURSDAY, 31 MAY 2018
FILE NO.	**:**	PRES 2 OF 2018
BETWEEN	**:**	G&R ROSSEN PTY LTD
		Applicant
		AND
		PETA BUCHANAN
		Respondent

CatchWords	**:**	Industrial Law (WA) - Application for stay of interlocutory orders of industrial magistrate's court - Hearing of application vacated - Applicant concedes beyond power to make order sought - Application for costs by respondent - Application for stay not proceedings under s 84 of the Industrial Relations Act 1979 (WA) - No power to award costs pursuant to s 84(5) - Power to award costs conferred by s 27(1)(c) and s 27(1)(o) to be read together - No power to award costs for services of legal practitioner in interlocutory proceedings - In any event not satisfied costs order should be made
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 14(1), s 27(1), s 27(1)(c), s 27(1)(o), s 83C(2), s 84, s 84(2), s 84(4), s 84(5), s 84A(6), S 86(2)
		Industrial Relations Commission Regulations 2005 (WA), reg 102(6), reg 102(13)
		Industrial Relations Commission Regulations 1985 (WA), reg 29(13)
Result	**:**	Order made to dismiss applications for stay and costs

Case(s) referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd [2002] WAIRC 04656; (2002) 82 WAIG 222

Brailey v Mendex Pty Ltd (1993) 73 WAIG 26

Cousins v YMCA of Perth [2001] WASCA 374; (2001) 82 WAIG 5

Crown Scientific Pty Ltd v Clarke [2007] WAIRC 00334; (2007) 87 WAIG 598

The Commissioner of Police of Western Australia v AM [2010] WASCA 163(S); (2011) 91 WAIG 6

Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 58 IR 22

Worthington v Falkirk Nominees Pty Ltd [2003] WAIRC 08605; (2003) 83 WAIG 1830

Reasons for Decision

Background

1 On 1 March 2018, the applicant instituted an appeal in FBA 2 of 2018 against orders made by the industrial magistrate's court on 8 February 2018 in proceedings M 77 of 2016.

2 The orders made by the industrial magistrate's court were as follows:

> 1. The respondent's application lodged on 3 November 2017:
>
> a. for a stay of the proceedings, is dismissed;
>
> b. for discovery, is granted. The claimant is directed to:
>
> i. give further discovery on or before 28 February 2018 by way of an affidavit that identifies records that are discovered under the following headings:
>
> (1) Paragraph 20 of the response:
>
> (2) Paragraphs 22, 27 - 29 of the response;
>
> (3) Paragraphs 23 - 25 of the response;
>
> ii. complete inspection by 4 March 2018.
>
> 2. The claimant's application for default judgment lodged on 7 December 2017 is dismissed.
>
> 3. The court gives the following directions:
>
> a. The respondent shall lodge and serve any witness statement upon which it intends to rely on or before 18 April 2018;
>
> b. The claim is adjourned to a directions hearing on 3 May 2018 (noting that 13 and 14 June 2018 have been reserved for the trial of the claim).

3 On 1 March 2018, the applicant also filed an application in PRES 2 of 2018 for an order that the orders made by the industrial magistrate's court be wholly stayed pending the hearing and determination of the appeal in FBA 2 of 2018.

4 On 7 March 2018, I issued directions for the hearing and determination of the application for a stay in PRES 2 of 2018 that included directions that:

> 1. The application be set down for hearing before the Acting President at 111 St Georges Terrace, Perth, in Hearing Room 3 (Floor 18) on Wednesday, 21 March 2018 at 9.30 am.
>
> …
>
> 3. If the respondent intends to oppose the application then before 11.00 am on Wednesday, 14 March 2018 they file and serve their answer.
>
> 4. Any evidence in support of or in opposition to the application is to be by way of affidavit filed and served by the relevant party by 4.00 pm on Friday, 16 March 2018.
>
> 5. Notice of any intention to seek leave to cross-examine the deponent of any affidavit is to be provided by 10.00 am on Tuesday, 20 March 2018.
>
> 6. Written submissions and a list of authorities be filed and served by all parties by 10.00 am on Tuesday, 20 March 2018.

5 In accordance with the directions, the respondent filed a notice of answer on 13 March 2018. Among other matters the respondent pleaded:

> 2. In answer to the application, the Respondent says:
>
> (a) The *Industrial Relations Act 1979* (the Act) in express terms confers no power or jurisdiction on the Commission however constituted to order the stay of operation of the decision made at first instance by the Industrial Magistrate's Court pursuant to s.83 of the Act pending the hearing and determination of an appeal against that decision under s.84 of the Act or at all.
>
> (b) There is no power or jurisdiction expressly conferred on the Commission constituted by the President by the Act to order the stay of the operation of the decision of an Industrial Court, whilst an appeal is to be heard and determined, or at all.
>
> (c) An application to stay an order made by an Industrial Magistrate, which was the subject of appeal under s.84 of the Act, is incompetent.

6 On 15 March 2018, the associate to the President sent an email to the parties' solicitors attaching a decision made by Sharkey P in ***Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd*** [2002] WAIRC 04656; (2002) 82 WAIG 222 in which it was found there was no power or jurisdiction conferred on the Commission, constituted by the President, to order the stay of the operation of a decision of an industrial court, pending an appeal [18].

7 Whilst the direction required that any affidavit in opposition to the application for a stay was to be filed and served by 4.00 pm on 16 March 2018, at 10.15 am on 16 March 2018 the respondent's solicitors filed an affidavit sworn by the respondent in support of her opposition to the application.

8 On the same day at 11.26 am, the applicant's solicitors sent an email to the associate to the President (and a copy to the respondent's solicitors) in which it was stated that '[I]n light of the authority attached to your email of 15 March 2018 the applicant will not be proceeding with the stay application currently listed before the President on 21 March 2018'.

9 Consequently, the hearing of the application for a stay was duly vacated and the respondent subsequently made an application that the applicant pay her costs and expenses in defending the application for a stay.

Is there power to award costs to the respondent in circumstances where there is no power to hear and determine an application?

10 The respondent contends that the President has power to make an order for costs in her favour pursuant to s 27(1)(o) of the *Industrial Relations Act 1979* (WA) (the Act) (when read with s 14(1) of the Act). In the alternative, the respondent contends that the President, as a member of the Full Bench in FBA 2 of 2018, is conferred with the power to make an order for costs in her favour pursuant to s 84(5) of the Act.

11 Given that the applicant instituted an appeal and an application for an order to stay the decision of the industrial magistrate's court, it is appropriate to firstly consider if the power of the Full Bench to award costs in s 84(4) and s 84(5) of the Act can be relied upon to confer power upon the President to award costs to the respondent in respect of the getting up for a hearing of the stay application.

Can the application for a stay be characterised as 'proceedings under' s 84 of the Act?

12 Section 14(1) of the Act provides:

> The President has the jurisdiction expressly conferred on him by this Act and in the exercise of that jurisdiction he constitutes the Commission and he has and may exercise such powers of the Commission as may be necessary or appropriate thereto.

13 The stay application was, by its nature and filing in conjunction with the appeal, an interlocutory application.

14 Section 84 of the Act provides:

> (1) In this section ***decision*** includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
>
> (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.
>
> (3) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted by any party to the proceedings wherein the decision was made.
>
> (4) On the hearing of the appeal the Full Bench —
>
> (a) may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal; and
>
> (b) may remit the matter to the industrial magistrate's court or to another industrial magistrate's court for further hearing and determination according to law; and
>
> (c) subject to subsection (5), may make such order as to costs as the Full Bench considers appropriate.
>
> (5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

15 The first issue to be determined is what 'proceedings under this section' are for the purposes of s 84(5) of the Act. Mr M Ritter SC properly points out on behalf of the applicant that the construction of these words is governed by s 84(2) of the Act which confers power on a party to institute an appeal 'from any decision of an industrial magistrate's court'.

16 It is also submitted on behalf of the applicant that whilst it could be argued that s 84 has no application to an application for a stay of orders of a decision of an industrial magistrate's court, the better view is that the stay application, although flawed, is an application that is made 'in proceedings under this section' for the purposes of s 84(5) and thus any application for costs of this application is limited by s 84(5) of the Act.

17 With respect, I do not agree. The term 'proceedings' is not defined in the Act. However, it is apparent from the context in which the word appears that it is to bear its usual meaning, which is to encompass the steps taken within an appeal and the conduct of an appeal, that is instituting the appeal, the hearing of the appeal and the delivering of a decision in the appeal.

18 The constituent authorities of the Commission, including the President and the Full Bench, can only exercise the powers and functions expressly conferred on it by the Act. The Commission has no inherent jurisdiction. Its jurisdiction is limited to what is expressly provided for in the Act. Section 84 confers a right upon parties to a decision of the industrial magistrate's court to institute an appeal and confers power on the Full Bench to hear and determine 'appeal proceedings' brought before it that has been instituted under this provision. Section 84 confers no other power to deal with any other proceedings. Consequently, 'proceedings' referred to in s 84 of the Act can only be proceedings to institute an appeal before the Full Bench and the power to award costs in s 84(4) and s 84(5) is to be read as confined to referring to 'proceedings' in the appeal proper.

19 It also follows that proceedings instituted under s 84 can only be dealt with and determined by the Full Bench.

20 The application for a stay was not made within the proceedings instituted under s 84 of the Act. It was made as a separate application to the President alone and not to the Full Bench.

21 It follows, therefore, that any application for costs in defending the application for a stay of the orders made by the industrial magistrate's court under s 84(5) of the Act must necessarily fail.

Power to make an award of costs pursuant to s 27(1)(c) and s 27(1)(o) of the Act

22 Section 27(1)(c) and s 27(1)(o) of the Act provide:

> Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> …
>
> (c) order any party to the matter to pay to any other party such costs and expenses including expenses of witnesses as are specified in the order, but so that no costs shall be allowed for the services of any legal practitioner, or agent; and
>
> …
>
> (o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings, the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing; and

23 The President as a member of the Commission has the power and a duty like any other court or tribunal to decide whether he or she has jurisdiction to hear and determine any application brought before him or her: ***Crown Scientific Pty Ltd v Clarke*** [2007] WAIRC 00334; (2007) 87 WAIG 598 [96] - [97].

24 Consequently, the President of the Commission has power to determine whether there is jurisdiction to hear an application for a stay of orders made by the industrial magistrate's court. In these circumstances, I am of the opinion that the application for a stay is a matter (whilst beyond the jurisdiction of the President to determine on the merits of the application) in relation to which the President is empowered by the operative effect of s 14(1) of the Act to exercise the powers conferred in s 27(1) of the Act as a matter before the Commission.

25 The respondent submits that an order can be made in her favour for her costs of the application pursuant to s 27(1)(o) of the Act and that the costs may take the form of expenses incurred including the costs and expenses for the services of a legal practitioner. The respondent says that providing that the Commission is satisfied that it is just to make such an order the order should be made. With respect, I do not agree.

26 In my opinion, s 27(1)(c) and s 27(1)(o) must be read in context together, and together with the provisions of the whole of the Act.

27 Section 27(1)(c) prohibits an order for costs for the services of a legal practitioner. While s 83C(2) (which confers power to make costs orders by the industrial magistrate's court), s 84(5) and s 84A(6) (which confers power to make costs orders by the Full Bench) and s 86(2) (which confers power to make costs orders by the Industrial Appeal Court) confer a discretion to make orders as to costs, which allow for a cost order to be made for the services of a legal practitioner, the pre-condition in each case is that an opinion must first be found that the proceedings have been frivolously or vexatiously instituted, or defended by the party to whom a costs order is to be made against.

28 It would result in an odd construction of s 27(1)(o) of the Act if this provision is construed as a broad power to award costs in all interlocutory proceedings that is only confined by the making of a requisite opinion that to make such an order is, in the circumstances, just, without regard to the prohibition in s 27(1)(c) that applies to an award of costs in the substantive matter.

29 As Beech SC observed in ***Worthington v Falkirk Nominees Pty Ltd*** [2003] WAIRC 08605; (2003) 83 WAIG 1830 [89], it would be unusual for a litigant not to retain the same representative in an interlocutory matter and the hearing of the substantive matter. If the construction of s 27(1)(o) put forward on behalf of the respondent is accepted it could result in a successful party:

> (a) being entitled to costs of the services of a legal practitioner in all interlocutory steps taken before the hearing if such an order can be regarded as 'just'; and
>
> (b) not being entitled to claim costs of the services of a legal practitioner in defending a substantive matter.

30 Consequently, when regard is had to the general scheme for the award of costs for the services of a legal practitioner found in s 27(1)(c), s 83C(2), s 84(5), s 84A(6) and s 86(2) of the Act, it is plain that s 27(1)(o) should not be read as a power conferred on the Commission to make orders for the services of legal practitioners in interlocutory proceedings.

31 As Beech SC found in ***Worthington***, s 27(1)(o) simply empowers the Commission to deal with a claim for costs in interlocutory proceedings separate from, or in advance of, a hearing on the substantive merits of a matter [89].

32 Further, I also do not agree that the Commission has power to award any or all costs or expenses incurred by a party to proceedings under s 27(1)(c) of the Act even when those costs or expenses can be properly said to not be costs for the services of a legal practitioner.

33 In an affidavit sworn by the respondent on 29 March 2018, the respondent itemises her claim for costs and expenses as follows:

(a)	Parking fees for three separate meetings at my solicitors offices to: (i) Confer and provide instruction on the Stay Application; (ii) Attend to finalise the Answer (iii) Attend to finalise and swear my Affidavit	$10.20
(b)	My own time. I am the sole director of a business which I operate on at least 6 days of the week. I have had to take time away from my business for: (i) Reviewing the Stay Application, including the supporting affidavit (1 Hour); (ii) Conferring with and considering the advice of my solicitors (several hours); (iii) Providing instruction to my solicitors (say 1 hour); (iv) Communications with my solicitors (several hours); (v) Preparing my Answer (several hours); (vi) Attending the offices of my solicitors to finalise my Answer (1.5 hours); (vii) Preparing my affidavit, including a review of past correspondences between the parties in both the Industrial Magistrates Court and the Supreme Court and Orders from those Courts (5 hours); (viii) Attending the offices of my solicitors to finalise my Affidavit (1.5 hours); (ix) Conferring with my solicitors on the issue of my costs and expenses in dealing with the Stay Application (several hours); (x) Attending the offices of my solicitors to finalise this affidavit (1.5 hours). Overall, I estimate that I have spent approximately 10 hours dealing with all the issues for the Stay Application. I charge my time for clients at $60.00 per hour.	$600.00
(c)	Printing. I have printed copies of most of the documents and correspondences with my solicitors. This is near 200 pages, each of the Appeal and Stay Application being more than 60 pages.	$20.00
(d)	Solicitors costs.	$3,625.00

34 In ***Brailey v Mendex Pty Ltd*** (1993) 73 WAIG 26, the Full Bench explained what is meant by 'costs and expenses' in s 27(1)(c) of the Act. The Full Bench explained (27):

> 'Costs' includes fees, charges, disbursements, expenses and remuneration (see Halsbury's Laws of England (4th Edition), vol 37, para 712). Costs chargeable under party and party taxation are all that are necessary to enable the adverse party to conduct the litigation and no more (see Smith v. Buller (1875) LR 19 Eq 473 at 475).
>
> The general policy in industrial jurisdictions is that costs ought not to be awarded, except in extreme cases.
>
> In this case, we are concerned with s.27(l)(c) of the Act. S.27(l)(c) gives a discretion to the Commission clearly conferred by the use of the word 'may' (see s.3 and s.56 of the Interpretation Act 1984) to order any party to the matter to pay to any other party costs and expenses, including expenses of witnesses as are specified in the order. No costs are to be allowed for the services of any legal practitioner or agent.
>
> The question is what does the phrase 'costs and expenses' mean? 'Costs', as defined above, includes all of the expenses. No costs are allowed for the services of a legal practitioner or agent. Thus, the professional costs element is eliminated.
>
> So then what are costs? It would seem to us that 'costs and expenses' must, without the distinguishing ingredient of legal or professional costs, be read as a phrase which means all of the cost and expense which the applicant under s.27(l)(c) is entitled to claim. It seems to us that this can only be done on a party and party basis.
>
> The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not to be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see Hospital and Benevolent Homes Award (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order).

> That occurred in this case, notwithstanding an inquiry of the appellant as to whether the matter was proceeding made in June 1992, as we have observed above.
>
> It would be a proper exercise of discretion, in the circumstances of this matter, to make an order for costs to be paid by the appellant for that reason, having regard, too, to the fact (although not essentially) that there were early proceedings before Negus C which were sought to be renewed by proceedings before Beech C.
>
> Before us, Counsel represented the respondent, instructed by Solicitors. That was so, too, before Beech C at first instance when he held that it was not in the public interest that the claim proceed, a decision in effect borne out by what the appellant now seeks to do.
>
> That brings us to the claim for costs themselves. The only competent claim relates to the period after the decision and order at first instance issued, (ie) on and after 16 March 1992. All other claims are not matters for the Full Bench.
>
> There is certainly an entitlement to some expense for witnesses attending, if the witness were a Director of the respondent.
>
> However, if one examines the Supreme Court Scale of Costs, 4th Schedule, Civil Procedure Western Australia, vol 1 by Seaman J, 50,0367, there is no provision for expenses of litigants instructing one's Solicitor and Counsel.

35 Consequently, there is no power under s 27(1)(c) of the Act to make an order for costs to a party for the cost of work carried out by a party to instruct solicitors.

36 In this matter, the only cost the respondent itemises in her list that perhaps could properly not be regarded as a cost for instructing her solicitors is the cost of printing documents for the appeal and the stay, in an amount of $20.

37 I am not, however, satisfied that an order should be made for printing costs. Firstly, the expenses are not confined to expenses incurred solely in respect of the preparation of defending the stay application.

38 In ***Brailey***, an application was made under s 27(1)(c) of the Act for costs in the appeal. Costs were also sought in respect of costs incurred in the proceedings at first instance. However, that application was rejected by the Full Bench. The Full Bench found (27):

> The jurisdiction of the Full Bench on appeal is purely a jurisdiction under s.49 of the Act on appeal, and, in the absence of any appeal against any decision of the Commission as to costs, we have no jurisdiction to make any order as to costs claimed in relation to any matter before the Commission at first instance.
>
> If it is competent to order costs, it is in relation only to the appeal in these proceedings.

39 The respondent in her affidavit makes no distinction between the printing costs incurred in preparing documents for the appeal and the application for the stay. In these circumstances, the information provided to the Commission in respect of that claim is too vague to be entertained for an order for costs in the amount sought.

40 Secondly, I am not satisfied that this is an extreme case that would warrant an award of costs in this matter.

41 There is no evidence that the applicant has acted unreasonably in this matter. The applicant's solicitors acted promptly in seeking to discontinue the application for a stay once it was brought to their attention that the Commission has no jurisdiction to stay an order made by the industrial magistrate's court, pending an appeal.

In the event s 84(5) could be relied upon, should an order for costs for the services of a legal practitioner be made in favour of the respondent?

42 Even if I was persuaded that it could be properly found that the President has power to award costs pursuant to s 84(5) of the Act in respect of a stay application made pending the hearing and determination of an appeal, I am not satisfied that the discretion conferred by s 84(5) of the Act should be exercised in this matter to make any award for costs.

43 As set out in ***Brailey***, although in legal proceedings in a court the usual rule for costs is that costs follow the event, it is well established that awards for costs for proceedings instituted in the Commission will be rarely made. In ***Brailey***, the Full Bench made the point that the general policy is that costs ought not to be awarded, except in extreme cases (27).

44 In ***Cousins v YMCA of Perth*** [2001] WASCA 374; (2001) 82 WAIG 5, Kennedy J (Scott and Parker JJ agreeing) observed that it is only in special circumstances in proceedings before the Commission that costs will be ordered to be paid by a party [92]. To award costs for the services of any legal practitioner or agent of a party a requisite opinion must be made that the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

45 In ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163(S); (2011) 91 WAIG 6, Buss J (with whom Pullin and Le Miere JJ agreed) considered the test for enlivening the discretion of the Industrial Appeal Court's power to order the payment of legal costs. In that matter, the Industrial Appeal Court had held it had no jurisdiction to entertain any grounds of the appeal before it and dismissed the appeal. AM then sought an order that the Commissioner of Police pay his costs of the appeal.

46 The Industrial Appeal Court's jurisdiction with respect to costs is provided for in s 86(2) of the Act which is materially in the same terms as s 84(5).

47 In ***AM***, Buss J made a number of general observations about the Court's power under s 86(2) to order an unsuccessful party to an appeal to pay the costs of any other party for the services of any legal practitioner of that party. His Honour observed [25] - [29]:

> First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party.

> Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. See ***Heidt v Chrysler Australia Ltd*** (1976) 26 FLR 257, 275 (Northrop J); ***Hatchett v Bowater Tutt Industries Pty Ltd (No 2)*** (1991) 28 FCR 324, 326 (von Doussa J).
>
> Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. See ***Re Vernazza*** [1960] 1 QB 197, 208 (Ormerod LJ); ***Hutchison v Bienvenu*** (Unreported, HCA, 19 October 1971) 11 (Walsh J); ***Jones v Skyring*** (1992) 109 ALR 303, 309 - 310 (Toohey J).
>
> The words 'frivolously' and 'vexatiously', in the expression 'the proceedings have been frivolously or vexatiously instituted or defended' in s 86(2), are adverbs. They relate to the verbs 'instituted' or 'defended'. The Act does not define 'frivolously' or 'vexatiously'.
>
> The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim. The ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. See the *Shorter Oxford English Dictionary*, (5th ed) 1038, 3529; ***Mudie v Gainriver Pty Ltd (No 2)*** [2002] QCA 546; [2003] 2 Qd R 271 [35] - [37] (McMurdo P & Atkinson J), [59] - [61] (Williams JA). It is apparent from the ordinary meaning of these words that 'frivolous' is, in substance, a subset of 'vexatious'.

48 After considering the ordinary meaning of 'frivolous', his Honour then went on to set out the test to be applied in proceedings before the court in considering whether pending proceedings before it are vexatious [33]:

> As I have mentioned, the word 'vexatious', in its ordinary meaning, has a broader connotation than the word 'frivolous'. This is reflected in the authorities concerned with the summary termination of pending proceedings. In ***Re Williams and Australian Electoral Commission*** (1995) 21 AAR 467, the Administrative Appeals Tribunal (Mathews J (President), Hill & Beaumont JJ (Presidential Members)) said that the test to be applied in determining whether pending proceedings are vexatious can be expressed either subjectively or objectively, depending upon the head of 'vexatiousness' under consideration (474 - 475). Their Honours referred to this statement of Roden J in ***Attorney-General v Wentworth*** (1988) 14 NSWLR 481-:
>
> > It seems then that litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms:
> >
> > 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
> > 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.
> > 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless (491).

49 Buss J then observed that it has been unnecessary in past decisions of the Industrial Appeal Court to consider the broader connotation of 'vexatiously', compared with 'frivolously'. His Honour then went on to find [35] - [36]:

> As Kennedy, Rowland & Nicholson JJ noted in ***Tip Top Bakeries***, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In ***Clark***, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).
>
> It is plain from the earlier decisions of this court to which I have referred that something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. So, relevantly to the present case, not every appeal which is determined to be without merit, either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

50 These observations make the point plain that the fact that an appeal or application fails for want of jurisdiction may not be material. It is notable in ***AM***, that the appeal was dismissed for a lack of jurisdiction.

51 It is also notable in the decision of the Industrial Appeal Court in ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 58 IR 22 that the Industrial Appeal Court refused to exercise its discretion to make an award of costs pursuant to s 86(2) after finding that the appeal in that matter was untenable.

52 As Buss J observed in ***AM***, the test for enlivening the discretion to order payment of costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious.

53 In the present case, no material has been put by the respondent that the application to stay the order in the industrial magistrate's court was instituted with the intention of annoying, embarrassing or for any admissible collateral purpose.

54 The respondent's claim for costs appears to rely upon the fact that the:

(a) applicant's application has failed because it conceded that the Commission has no jurisdiction to make an order staying the order of the industrial magistrate's court pending an appeal; and

(b) respondent has incurred costs and expenses in preparation to oppose the application.

55 The respondent puts forward no other relevant matters in support of her claim for costs.

56 None of the circumstances raised on behalf of the respondent raises any basis for a claim that the applicant has instituted the application for a stay to annoy or embarrass her or has been brought for a collateral purpose.

57 Whilst it might be properly said that when regard is had to the decision of Sharkey P in ***Burswood Resort*** the application for a stay is untenable, it cannot be said that the point that the President of the Commission has no jurisdiction to make an order to stay a decision made by the industrial magistrate's court is so obviously untenable from a reading of provisions of the Act and the *Industrial Relations Commission Regulations 2005* (WA). Regulation 102(6) prescribes that a person with a sufficient interest may make an application to the President of the Commission for an order staying the whole or in part of a decision pending the hearing and determination of an appeal. Regulation 102(13) provides that the regulations relating to appeals from a decision of the Commission apply, so far as practicable as are necessary, to and in relation to appeals to the Full Bench from a decision of an Industrial Magistrate. At first blush, without considering the point in a comprehensive way, it could be said that reg 102(6) confers a power on the President to make an order to stay a decision of the industrial magistrate's court. However, in ***Burswood Resort***, Sharkey P found in the absence of an express power in the Act for the President to order the stay of operation of orders of industrial courts, reg 29(13) of the *Industrial Relations Commission Regulations 1985* (WA) (now repealed and re-enacted as reg 102(13) of the *Industrial Relations Commission Regulations 2005* (WA)) could not be construed to confer power to order a stay [18] - [36].

58 The Commission records indicate that the applicant properly and promptly abandoned the application for a stay after the decision in ***Burswood Resort*** was brought to the attention of the applicant's instructing solicitor.

59 Having regard to these matters, even if empowered to do so, I would not exercise the discretion conferred under s 84(4) and s 84(5) of the Act to make an award of costs in the favour of the respondent in defending the application for a stay.

60 For these reasons, I intend to make orders that:

(a) the application for a stay of the orders of the industrial magistrate's court made on 8 February 2018 in M 77 of 2016 be dismissed; and

(b) the respondent's claim for costs be dismissed.

2018 WAIRC 00331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	G&R ROSSEN PTY LTD
	APPLICANT
	-and-
	PETA BUCHANAN
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 31 MAY 2018
FILE NO/S	PRES 2 OF 2018
CITATION NO.	2018 WAIRC 00331

Result Orders made

Order

Having heard the parties by written submissions, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

1. The application for a stay of the orders of the industrial magistrate's court made on 8 February 2018 in M 77 of 2016 be dismissed.

2. The respondent's claim for costs be dismissed.

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

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2018 WAIRC 00309

HOSPITAL WORKERS (GOVERNMENT) AWARD NO. 21 OF 1966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

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 SERVICES BOARD, THE PEEL HEALTH SERVICES BOARD AND THE WA COUNTRY HEALTH SERVICES BOARD, HON. MINISTER FOR HEALTH, THE BOARD OF MANAGEMENT SIR CHARLES GAIRDNER HOSPITAL

RESPONDENTS

CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 14 MAY 2018
FILE NO/S	APPL 11B OF 2018
CITATION NO.	2018 WAIRC 00309

Result	Award varied
Representation	
Applicant	Ms N Kefford of counsel
Respondent	Mr B Chapman of counsel and with him Ms R Sinton

Order

HAVING heard Ms N Kefford of counsel on behalf of United Voice WA and Mr B Chapman of counsel and with him Ms R Sinton for the respondents, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Hospital Workers (Government) Award No. 21 of 1966 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 14 May 2018.

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

SCHEDULE

Delete all of clause 3 – Area and Scope and insert the following in lieu thereof:

3. – AREA AND SCOPE

This Award will apply throughout the State of Western Australia to:

(1) All health service providers established pursuant to section 32(1)(b) of the Health Services Act 2016, including the Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services, North Metropolitan Health Service, South Metropolitan Health Service and WA Country Health Service; and

(2) All authorised hospitals under the Mental Health Act 2014.

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2018 WAIRC 00312

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MARIO GEORGIOU

APPELLANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT

CORAM	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
DATE	THURSDAY, 17 MAY 2018
FILE NO.	APPL 4 OF 2017
CITATION NO.	2018 WAIRC 00312

Result Order issued

Order

1. This is an appeal pursuant to s 33P of the *Police Act 1892* against a decision of the Commissioner of Police to take removal action, referred to the WAIRC on 4 January 2017.
2. By order dated 21 March 2018 [2018] WAIRC 00194, the WAIRC issued the following direction and order:
    1. THAT the appellant is to comply with reg 92 of the *Industrial Relations Commission Regulations 2005* by no later than **4.30 pm** on **Thursday, 17 May 2018**.
    2. THAT if the appellant does not comply with reg 92 by 4.30 pm on Thursday, 17 May 2018, the appeal be, and is thereby taken to have been withdrawn.
3. The appellant had not complied with reg 92 by 4.30 pm on Thursday, 17 May 2018.

Therefore, the WAIRC hereby orders:

THAT the appeal is taken to have been withdrawn.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00322

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LARA DOWDALL

APPLICANT

-v-

CREDI PTY LTD (ACN 609 482 331)

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE WEDNESDAY, 30 MAY 2018
FILE NO/S U 33 OF 2018
CITATION NO. 2018 WAIRC 00322

Result Discontinued by leave
Representation
Applicant No appearance
Respondent No appearance

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2018 WAIRC 00105

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00105
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	THURDAY, 25 JANUARY 2018, THURSDAY, 1 FEBRUARY 2018, THURSDAY, 8 FEBRUARY 2018
DELIVERED	**:**	WEDNESDAY, 14 FEBRUARY 2018
FILE NO.	**:**	U 93 OF 2016
BETWEEN	**:**	BARRY LANDWEHR Applicant AND MS SHARYN O'NEILL DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Industrial law (WA) – Claim of unfair dismissal – Remitted by Full Bench for further hearing and determination – Scope of remittal – Process for further hearing – New evidence relating to mitigation of loss since first hearing – Alternative issues for further hearing to be heard concurrently – Avoidance of delay – Minimum legal form
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 6(c) *School Education Regulations 2000* (WA) reg 38
Result	**:**	Decision issued
Representation:		
Counsel:		
Applicant	**:**	Mr M D Cox of counsel
Respondent	**:**	Mr J Carroll of counsel
Solicitors:		
Applicant	**:**	MDC Legal
Respondent	**:**	State Solicitor's Office

Reasons for Decision

1 The Full Bench suspended the order of 26 April 2017 ([2017] WAIRC 00234; (2017) 97 WAIG 551) and remitted this matter for further hearing and determination ([2017] WAIRC 00879; (2017) 97 WAIG 1689). The Honourable Acting President wrote the main reasons for decision. Acting Senior Commissioner Kenner agreed and Commissioner Emmanuel agreed with all but one aspect of her Honour's reasons.

2 The parties disagree on the scope of the issues and the evidence to be called for further hearing and determination. I have examined the Full Bench's decision and heard from the parties. For the following reasons, I conclude that there is to be a single-stage hearing. It will deal with all matters including those that may require consideration if I take a different view of Mr Landwehr's use of force, referred to in ground 1(b) of the appeal and commented on by Smith AP at [83] and also the matters at [88]. The further hearing and determination is to provide for:

(a) any application by Mr Landwehr to call new evidence regarding:

(i) mitigation of loss since the decision at first instance;

(ii) any consideration of the issues relating to the Teacher Registration Board of Western Australia (Teacher Registration Board);

(b) cross-examination and re-examination of Mr Landwehr as to his state of mind regarding provocation in the second incident; and

(c) submissions as to:

(i) the matters set out in (a) and (b) above;

(ii) exculpation and mitigation relating to the conduct;

(iii) should they arise:

- mitigating factors referred in ground 1(b) of the appeal;
- any material differences as to the circumstances of the first and second incidents; and
- mitigation of loss since the decision at first instance.

Mitigation

3 To avoid confusion, I should point out that the term 'mitigation' arises in a number of separate contexts in this case. The first is in relation to Mr Landwehr's conduct, whether, amongst other things, the student's conduct was provocation which is exculpatory or mitigatory of that conduct.

4 Secondly, it relates to whether Mr Landwehr's circumstances at the time, being the matters set out in ground 1(b) of the appeal, mitigate against dismissal.

5 The third use of the term 'mitigation' is what Mr Landwehr has done to mitigate his loss arising from the dismissal.

Provocation

6 In respect of ground 1(a), it was argued before the Full Bench that the issue of Mr Landwehr's loss of self-control was a consequence of the student's conduct. It is said that this provocation resulted in Mr Landwehr responding in an impulsive and instinctive way to the genuine threat to his health by the student's conduct. As the Full Bench noted, this issue, while not expressly and clearly articulated in the hearing of first instance, was the subject of evidence contained within the documents ([63] and following).

7 As the Acting President noted at [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.

8 Therefore, the appeal in respect of ground 1(a) particulars (i) and (v) was upheld. Smith AP expressed the opinion that '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' and that it necessarily encompassed the particulars in (ii), (iii), (iv) and (vi) of ground 1(a) [73].

9 My understanding is that the Full Bench said that, in his written response to the Director General, Mr Landwehr expressed his state of mind regarding the loss of self-control due to provocation. Should she wish to do so, the respondent should now have an opportunity to cross-examine him on these matters. For the purposes of the remittal, that is all the evidence that is required. Other evidence may be required depending on my conclusion, that is whether the issues of mitigation referred to in ground 1(b) arise.

10 Smith AP, while dismissing ground 1(b) found that if I take a different view in relation to Mr Landwehr's state of mind, provocation and use of force in the second incident, then it is open to the parties to put to me that I should reconsider those matters of mitigation [83].

11 Therefore, the parties may put submissions on that matter.

12 Grounds 2 and 3 of the appeal relate to the distinction between the circumstances relating to the first and second incidents, that they were each fundamentally different [85]. This had consequences for whether Mr Landwehr should have learned from the training, counselling and reprimand he received from the first incident [87].

13 Her Honour said at [88] that in light of her reasons for upholding ground 1(a), in so far as particularised in (i) and (v):

> [I]t 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.

14 The remainder of the task, then, requires scrutiny of the evidence already received. There is no requirement or need for further evidence. Rather, it is for me to scrutinise what is in the documents as part of the evidence before me at first instance but which was not referred to in any significant way by the parties at the time. Part of my scrutiny will involve hearing the parties' submissions about that material.

15 The following issues then arise for consideration:

(a) Regarding provocation:

(i) whether the actions of the student in the second incident and all the circumstances caused the applicant's loss of control;

(ii) whether the applicant's use of force occurred in a state of his loss of control;

(iii) whether it was unreasonable to expect the applicant to act with composure in the circumstances;

(iv) whether the circumstance of provocation was exculpatory, that is a complete excuse. In that case, there is no further question; Mr Landwehr should not have been dismissed;

(v) alternatively, if the provocation was not exculpatory, was it mitigatory; and

(vi) the extent of force used weighed against the extent of any provocation.

(b) The difference between the circumstances relating to the first and second incidents. Smith AP and Kenner ASC expressed the view that the issue of horseplay was not a relevant factor and was not a matter taken into account by the Director General ([95] and [102]). Therefore, that is a matter which I should not take into account in the further determination of this matter.

16 I may then need to consider whether, in all of the circumstances, the dismissal was proportionate to the conduct. In that respect, grounds 3, 4(a) and 4(b) of the appeal need to be considered in respect of the proportionality of dismissal.

17 If dismissal was disproportionate and unfair then remedy is to be considered. If reinstatement is impracticable, then compensation is a consideration. That raises the question of what Mr Landwehr has done to mitigate his loss since the first instance decision. I have not at this stage considered the significance or otherwise to the question of the Teacher Registration Board and will address it later.

Cross-examination of the investigator

18 The applicant wishes to cross-examine the investigator.

19 As I understand it, this issue arises from the investigator's analysis of all of the material in the investigation report. That material included Dr Lai's report and the statements made by students. The investigator found that 'Mr Landwehr's concern for life is questionable' (Investigation Report, Agreed document 8, [3.19]) and the actions of the student 'were not to the severity that Mr Landwehr later claims'. The Full Bench held that those findings by the investigator ought to have been scrutinised by me before they were accepted [71].

20 Therefore, what is required is that I examine those findings in light of the other material. That scrutiny may be assisted by the parties' submissions. However, further evidence by way of cross-examination of the investigator is not required by the Full Bench's decision. In any event, the respondent does not propose to call the investigator so if the applicant sought to call the investigator himself, his questioning would be by examination-in-chief, not cross-examination.

Regulation 38

21 The issue regarding regulation 38 of the *School Education Regulations 2000* is not for consideration as it was not a matter that the Full Bench concluded was live [53]. The issues that arise are consequential upon Mr Landwehr's acceptance that his use of force was excessive and inappropriate. The question that follows from that is if the applicant was provoked, was it exculpatory or mitigatory?

Mitigation of loss

22 Any further evidence in relation to Mr Landwehr's mitigation of his loss is to be limited to what Mr Landwehr has done since the first hearing. I note that there was very little before me at the first hearing. It seems that, having inadequately argued that matter at first instance through his previous counsel, he is not entitled to seek to rectify these inadequacies under the current circumstances. Therefore, any evidence about mitigation of loss can relate only to what has occurred since I dealt with the matter on the first occasion.

Teacher Registration Board

23 The decision of the Teacher Registration Board is said to be a matter which would be consequential upon the conclusions that I might reach. In the circumstances, it seems that this is a matter which may require evidence depending upon my conclusions. If so, then as with the matter of mitigation, it is appropriate that that evidence be dealt with as part of a one-stage process.

Two-stage process

24 It is clear from Smith AP's reasons that if I now take a different view of Mr Landwehr's conduct in the second incident, it is open to the parties to put that I should reconsider certain matters put in mitigation in light of the findings about the seriousness of the second incident. Those issues were set out in ground 1(b) of the appeal.

25 If the course suggested by her Honour in [83] is followed, then a two-stage process would be required, the second stage occurring only after the hearing and determination of the first and subject to a particular conclusion.

26 The Commission is required to act expeditiously and with the minimum of legal form and technicality (*Industrial Relations Act 1979* s 6(c)). In those circumstances and for the sake of convenience to the parties and the Commission, and to avoid further delay, a single hearing will now be convened. It will deal with all matters including any application to bring fresh evidence referred to above and the parties' submissions on all matters including those in anticipation of my taking a different view of Mr Landwehr's conduct in light of provocation and Mr Landwehr's mitigating circumstances.

2018 WAIRC 00320

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00320
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 7 MAY 2018
DELIVERED	**:**	TUESDAY, 29 MAY 2018
FILE NO.	**:**	U 93 OF 2016
BETWEEN	**:**	BARRY LANDWEHR
		Applicant
		AND
		MS SHARYN O'NEILL
		DIRECTOR GENERAL,
		DEPARTMENT OF EDUCATION
		Respondent

CatchWords	:	Industrial law (WA) – Unfair dismissal – Remitted by the Full Bench for further hearing and determination – Dismissal of a teacher for physical contact with student – Applicant's state of mind when he had physical contact with a student – Whether circumstances of provocation were exculpatory – Dangers of compressed air – Teacher provoked by dangerous act by student – Subsequent conduct mitigated by context of conduct and the employee's personal circumstances – Dismissal was harsh – Reinstatement – Teacher reinstated – Loss of trust and confidence not credibly or rationally based – Deduction of income earned subsequent to dismissal
Legislation	:	*Industrial Relations Act 1979* (WA) s 23A(3), s 23A(5)
Result	:	Claim upheld
Representation:		
Counsel:		
Applicant	:	Mr M Cox of counsel and with him Ms R Collins of counsel
Respondent	:	Mr J Carroll of counsel
Solicitors:		
Applicant	:	MDC Legal
Respondent	:	State Solicitor's Office

Reasons for Decision

1 This matter was remitted for further hearing and determination by the Full Bench (***Landwehr v Sharyn O'Neill, Director General, Department of Education*** [2017] WAIRC 00866; (2017) 97 WAIG 1671 (***Landwehr***); order [2017] WAIRC 00879; (2017) 97 WAIG 1689).

2 The issues concern what is referred to as 'the second incident' on 13 August 2015, in which Mr Landwehr grabbed and pushed a student. There is also reference to 'the first incident', which is when Mr Landwehr pushed a student on 29 October 2014.

The Full Bench decision

3 In the decision of the Full Bench, the Hon. Acting President, with whom Acting Senior Commissioner Kenner and Commissioner Emmanuel generally agreed in this regard, said that the matters requiring consideration relate to the dangers of the misuse of compressed air and whether Mr Landwehr's response to being sprayed by compressed air was impulsive and instinctive, that is, that his response was to provocation by the student. This involves an examination of Mr Landwehr's state of mind.

4 Her Honour noted that these matters were raised in the material put by Mr Landwehr at first instance but not in arguments put by his then-counsel on his behalf. Her Honour said provocation was not expressly pleaded as a general plea. She noted that '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' [53].

5 The Full Bench found that although Mr Landwehr did not raise directly in his response to the Director General or before me at first instance that he lost self-control as an exculpatory or mitigatory circumstance, that he ought to now be able to raise that matter.

6 The Full Bench said that the circumstances where Mr Landwehr did not seek to bring further evidence on those matters was 'one of the exceptional matters where the interests of justice would allow these issues to be put on behalf of Mr Landwehr' [74].

7 The Acting President also commented that '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' [74].

8 In the subsequent hearing before me, Mr Landwehr gave evidence, however, the Director General chose not to cross-examine Mr Landwehr on his state of mind, nor did she seek to call any further evidence. In those circumstances, I intend to treat the material which supports Mr Landwehr's contention as being uncontested. The material which contains those matters is Mr Landwehr's interview with the investigator and his correspondence to the Director General. In addition, the records of the interviews with students present at the incident provide useful insight.

9 Therefore, the issues for consideration relate to the danger involved and whether Mr Landwehr was responding instinctively and impulsively in a state of fear and shock to a provocation which placed his life at risk. Mr Landwehr's state of mind and response to being assaulted by the student are then to be considered as to whether it was exculpatory or at least an extenuating and mitigating circumstance.

10 The remainder of the matters flow from what I decide in those first aspects set out above:

1. If I find that the circumstances were not exculpatory, was the provocation mitigatory to his conduct, rendering summary dismissal disproportionately harsh?

2. The weight to be attributed to the disciplinary findings in the first incident and possible reconsideration of whether, even though the conduct in both cases was similar, the circumstances were materially different.

3. Whether the circumstances of the second incident mean that Mr Landwehr should have learnt from the training, counselling and reprimand he received as a result of the first incident. This is because in the second incident his loss of control was said to be impulsive and instinctive and that a controlled response was not to be expected in spite of his having learned from the previous incident. In these circumstances, it is said that summary dismissal was not proportionate to the conduct.

4. Mr Landwehr's personal circumstances at the time and whether they mitigate against dismissal.

11 In a dismissal, the conduct complained of must be judged on its merits. Issues such as provocation, and whether any response to it was reasonably proportionate or not, will be relevant considerations (per Smith AP at [41] by reference to ***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).

12 In a case of summary dismissal, the employer has an evidentiary burden to show that there is sufficient evidence to raise the factual matters upon which the employer relies as the reason to dismiss an employee. Once the employer establishes those matters, the onus moves to the employee to show that the dismissal for that reason was harsh, oppressive or unfair (***The Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 [65] – [67] (Smith AP and Beech CC)).

The danger and Mr Landwehr's response

13 In this case, there is no dispute that Mr Landwehr grabbed and pushed the student. It is now for the applicant to demonstrate that the dismissal was harsh, oppressive or unfair. The first issue to be considered is the danger of the misuse of compressed air.

14 I have considered Dr Lai's report and the case study attached to it (Investigation Report, Attachment 4). It provides information to enable the conclusion that the application of compressed air close to the anus or 'through clothes at a distance from the anus' can cause life-threatening internal injuries. The respondent does not challenge this information. I draw that conclusion.

15 Mr Landwehr was well versed in those dangers and he had instructed his students on them (Letter from Mr Landwehr to Director General (8 April 2016) [4] – [7]). Mr Landwehr expressed to the Director General his 'trepidation and concern' about being sprayed with compressed air (Letter from Mr Landwehr to Director General (8 April 2016)). Therefore, Mr Landwehr was entitled to be in fear for his safety if compressed air was directed towards him as he bent over.

16 Mr Landwehr says that provocation is to be viewed in the broad sense, that it 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.

Was the provocation exculpatory or mitigatory?

17 Were the actions of the student, which caused Mr Landwehr's loss of control, exculpatory or mitigatory?

18 Mr Landwehr referred to a number of authorities dealing with fighting in the workplace, although he acknowledges there is a difference in these circumstances.

19 I would distinguish between circumstances where fellow employees engage in a fight, one of them in response to the provocation by the other employee, and the circumstances of a teacher engaging in physical contact with or restraint of a student where the student has provoked the teacher. I do so for a number of reasons.

20 Firstly, a teacher has a particular duty of care towards a student. Secondly, the teacher is under direction from policies as to the appropriate circumstances in which to have physical contact with or restrain a student (Department of Education, *Behaviour Management in Schools*). The policy says the degree of physical contact must be proportionate 'to the seriousness of the behaviour or the circumstances it is intended to prevent or manage'. The teacher will have been trained in the application of such a policy. A teacher is also a mentor and exemplar to the students of appropriate behaviour and self-control. In his interview with the investigator, Mr Landwehr said, 'I am there as a role model to try and teach them' (Investigation Report, 11).

21 Mr Landwehr appears to accept that there is a difference in how students under the care of a teacher ought to be treated compared with a workplace situation. He said in the interview with the investigator '[i]n a work situation, I tell you now, if he did that to another person, he wouldn't have been standing probably. I'll be honest; they would have just turned around and thumped him' (Investigation Report, 10).

22 Therefore, the issue of provocation of a teacher by a student is not, in my view, to be seen in the same way as provocation between fellow employees.

23 I need to consider whether Mr Landwehr's use of force as a teacher against a student, normally regarded as excessive and inappropriate, and accepted by him as such, can be excused because he is said to have been in a state of extreme fear for his physical safety.

24 In his interview with the investigator and his letter to the Director General, Mr Landwehr described his response to being sprayed with compressed air by the student. It was to:

1. think that the student's actions 'could kill me, or has killed me';

2. grab and push the student backwards until the student hit the wall a couple of metres behind him during which time the student dropped the hose; and

3. yell at the student that the student could have killed him.

25 In Mr Landwehr's interview with the investigator, he makes clear that his reaction to feeling the compressed air was that it could have killed him. He grabbed the student and pushed him backwards. The student dropped the hose. Mr Landwehr continued to push the student, for a total distance of about two metres. He let him go when the student hit the wall or the side of the roller door. He says that he does not know why he grabbed the student. He went on to say that having been educated in the industry for many years, he was aware that compressed air is dangerous and can kill you and 'not to put [it] near your anus. And then something like that happens and I don't know, maybe something takes over' (Investigation Report, 10).

26 Mr Landwehr then says he settled down, that it did shake him up for a while, at least three or four minutes. He says, 'I started to get my composure back. … At the beginning, when it first happened, I thought I was going to be killed' (Investigation Report, 10).

27 Mr Landwehr said later in the interview, 'I thought I was in danger and I just grabbed the student. … I believe that in this situation when I grabbed [the student] that I was removing the risk. … When I grabbed [the student], he dropped the air hose.'

- By grabbing [the student], he dropped the hose. With the hose gone, it was now safe.
- [The student] dropped the hose as soon as I grabbed him.
- I can't answer why I continued to hold [the student] and push him into the wall after he dropped the air compressor hose.
- I believe that my actions were to re-establish order in the classroom.
- I'll be honest; my mind wasn't really as clear as it could have been at the time. Lots of things were going through my mind at the time of the incident.

...

- As I said to the kids later, maybe I might have pushed it a bit too much, it definitely didn't kill me of course, but at the time I thought my life was under threat and I thought [the student] could have killed me.

(Investigation Report, 13)

28 In this interview, Mr Landwehr responded to the particulars of the allegations that were made against him (Investigation Report, 13). Those particulars were set out in the letter to Mr Landwehr dated 1 September 2015 that:

> **1. On 13 August 2015, at Western Australian College of Agriculture – Harvey, you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994* in that you committed an act of misconduct.**
>
> **Particulars**
>
> a. You are employed by the Department of Education as a Teacher at the Western Australian College of Agriculture – Harvey.
>
> b. On the afternoon of 13 August 2015, you were teaching Building and Construction.
>
> c. [The student], Year 11 Student, Western Australian College of Agriculture – Harvey, using the compressed air hose, sprayed a shot of air in the vicinity of your buttocks.
>
> d. You grabbed [the student] and pushed him backwards into a wall.
>
> e. You then grabbed [the student] on the top of his shoulder whilst yelling at him.
>
> f. The physical contact you made with [the student] was not reasonable or necessary to manage the student.
>
> (Letter from Mr Cullen to Mr Landwehr, 15 September 2015)

29 Mr Landwehr agreed with particular 'c'. He said that at the time he thought his life was under threat and he thought the student could have killed him.

30 He agreed with particular 'd', that he grabbed hold of the student's arms and did yell at him and say he had put his life at risk.

31 Mr Landwehr did not agree with particular 'e'. He said he never changed his hold on the student. In respect of particular 'f', he said that he 'thought in the scheme of things, [it] was not excessive force', that if 'people understood the background of compressed air', they would see it in a different context, that '[i]t can be fatal'.

32 Mr Landwehr's response to particular 'e' suggests that he did not see this particular as relating to a second and separate grabbing of the student. That is, after Mr Landwehr grabbed and pushed the student, and after the student hit the wall, Mr Landwehr released the student. Then Mr Landwehr started back towards the class. The student made a comment. Mr Landwehr turned back again and grabbed the student and pushed downwards. It appears that Mr Landwehr assumed that the reference to grabbing the student at the top of his shoulder whilst yelling at him is part of the first occasion upon which he grabbed the student and pushed him back against the wall, as opposed to that second occasion.

33 In their interviews with the investigator, the students present during the incident recorded that while in class:

1. Mr Landwehr was sprayed by compressed air as he bent over. His first response was to verbally direct that it stop because it was dangerous (Investigation Report, 3, 5).
2. The student or another student sprayed him a second time (Investigation Report 3, 5).
3. Mr Landwehr 'turned around and said not to do it. He said it was dangerous and could kill you.' '[H]e turned around and went crazy' (Investigation Report, 3).

> This student also recorded that after Mr Landwehr grabbed him and pushed him against the wall, Mr Landwehr then started to walk away. The student made a comment, protesting that he had not squirted Mr Landwehr a second time. At this, Mr Landwehr 'turned around, grabbed me again and pushed me back down … saying, 'You could have killed me'.'
>
> The student described Mr Landwehr as being 'really angry' (Investigation Report, 3).

4. Another student, S, said Mr Landwehr was sprayed once. He said Mr Landwehr grabbed and pushed the student against the wall, held him there for about 15 seconds, released him, then starting to walk back to class. Mr Landwehr then grabbed the student around the neck and yelled at him (Investigation Report, 4).

5. Another student, D, described the initial incident that Mr Landwehr 'got mad and pushed [the student] up against the wall and said, 'You put my life at risk, I could have died from that'.' He described how Mr Landwehr then 'started to walk away and got halfway back to our group. … [The student] said something', and student D described that 'Mr Landwehr asked [the student] what he said however he never repeated himself … It was something smartarse. Mr Landwehr walked back to [the student] and grabbed him between the shoulder and the neck … [and] gave [the student] a little bit of a push downwards and held him there for about 5 to 6 seconds.'

34 Therefore, the students' recitations of the incident confirm Mr Landwehr's assertions about his fear for his safety and even his life. They confirm that he told the student 'you could have killed me', 'you put my life at risk', and 'I could have died from that'.

35 I find that Mr Landwehr's state of mind arose from a genuine fear of the danger of what had just been done to him by the student. I find too that his response to that fear was impulsive. He lost self-control, as the student said in the interviews that 'he turned around and went crazy', he was 'really angry'.

36 This was not merely a loss of temper due to students being rude, inattentive or cheeky.

What was the severity of the response?

37 Mr Landwehr's actions were to grab and push the student twice. Although the student was pushed up against a wall, Mr Landwehr did not strike the student. The student said in the interview that 'the right side of [his] head hit the brick wall and [he] got a graze just below [his] eye.' He said his back along his spine near his lungs hurt for about a week. He was in shock and 'was really freaked out' (Investigation Report, 3).

38 This is to be seen in the context of a potentially life-threatening injury to Mr Landwehr.

Can provocation ever be exculpatory?

39 In the appeal in this matter, the Acting President found that:

> 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.
>
> (***Landwehr*** [53])

40 The respondent questions whether provocation can ever be exculpatory for the physical contact by a teacher with a student. That is, can it ever be a complete excuse, freeing the teacher from blame?

41 I conclude that in circumstances where the actions of a student are likely to cause harm and potentially catastrophic injury to another person, whether intentionally or not, a teacher may be excused from that physical contact in the circumstances. However, because a teacher has been provoked, it does not mean that any particular level of force is excusable. Rather, it depends on the circumstances.

42 There were two instances in which Mr Landwehr had unauthorised physical contact with the student. The first was when he grabbed and pushed the student into the wall. The respondent accepts that, given the student's actions, it was unreasonable to expect Mr Landwehr to act with composure. However, the respondent says the extent of Mr Landwehr's use of force means that the provocation by the student provides little by way of mitigation, that is, the extent of his use of force was excessive in the circumstances and dismissal is still appropriate.

43 As to the second grab and push, the respondent says there was no further conduct by the student after Mr Landwehr had released him that could be relied on to support an argument of provocation for the second grab. This is because Mr Landwehr had released the student and started to walk away. In this circumstance, Mr Landwehr had sufficiently regained his self-control so the loss of self-control in response to the threat to his safety cannot constitute provocation justifying the second grab.

44 Taking account of all of the circumstances, I find that in grabbing and pushing the student until the student hit the wall, Mr Landwehr acted in fear, possibly fear for his life. His response to the student's action towards him was instinctive and impulsive. He was unable to explain it except that he was in fear.

45 Had the provocation been cheekiness, taunting or some other similar conduct by the student, the conduct would not have been excusable. However, being sprayed towards the buttocks with compressed air was a reasonable cause for fear and panic. It is also arguable, and I find, that it would take longer than a few seconds or even a minute for someone in fear and panic to accept that the threat had passed, immediately release the student and not continue to push until the student hit the wall. In those circumstances, it is reasonable to conclude that this response and conduct is exculpatory – it is excused.

The second contact not exculpatory?

46 The applicant says the grabbing of the student a second time can be explained by Mr Landwehr's lack of composure very quickly after the first assault on him, in the circumstances where Mr Landwehr was genuinely in fear for his life. The respondent says that even if one accepts that grabbing the student and pushing him against the wall constitutes one act of grabbing the student, and that this might have been undertaken in exculpatory or mitigatory circumstances, the second occasion of grabbing the student is not able to be excused.

47 Did Mr Landwehr have an opportunity to regain his composure before the student protested that he did not spray Mr Landwehr with compressed air a second time or made some clever comment, which provoked Mr Landwehr to grab the student a second time?

48 Grabbing the student the second time would appear to have occurred within a matter of seconds after grabbing the student the first time. Is it fair to assess Mr Landwehr's response to the student by reference to his state of fear and agitation that led to his explosive conduct only seconds before, or was it to be viewed as a separate incident? On one hand, it is arguable that the two occasions of grabbing the student are part of the one course of conduct under extreme provocation and that Mr Landwehr had not fully recovered from being in a state of panic and fear.

49 Mr Landwehr said that he calmed down or composed himself after the incident but he says it took him three or four minutes to do so.

50 I find that the second instance was in the circumstances of Mr Landwehr having initially grabbed and pushed the student, instinctively and impulsively, in genuine fear for his life. He was not in sufficient control to release the student when the student dropped the hose. The second impermissible physical contact must be seen in this context. It was only a matter of an extremely short time before that Mr Landwehr had been in fear and panic. He was still in the process of calming down and it could, in those circumstances, hardly be expected that he would be anywhere near in full control of his emotions or reaction. I find that the second grab was part of the same contact and was mitigated by the circumstances.

51 I also conclude that, while with the benefit of hindsight, it is possible to say Mr Landwehr's conduct ought to have been composed and calm, human emotions are not so easily controlled.

52 Quite apart from the actual provocation, it needs to be borne in mind that Mr Landwehr was under the stress of his father's ill health and imminent death. In his letter to the Director General of 8 April 2016 at [8], Mr Landwehr said he had a number of family matters occurring at the time that put him on edge. They involved his father's illness and eventual death. He said he was very stressed.

53 I have taken account of the decision of von Doussa J in ***Puccio v Catholic Education Office*** (1996) 68 IR 407 (at 417), in which his Honour said:

> It cannot be doubted that to dismiss a school teacher with 13 years experience on the ground of serious misconduct is a matter likely to cause considerable hardship to him and indirectly to his family, and to impair, if not destroy, his future prospects for employment as a teacher. Those are matters appropriately to be weighed, and they were, in my view, given serious consideration by the respondents. On the other hand the care, safety and well-being of students is a matter also entitled to great weight. Where a teacher commits a clear breach of a direction squarely related to safety and welfare issues after due warning, the school, generally speaking, will be left with no option but to terminate the services of the teacher. To allow the teacher to continue would be to allow a foreseeable risk of further transgression by the teacher to occur. The school has a clear duty at law to take steps to guard its students against foreseeable risks adverse to their safety and welfare and will be held liable if it fails to do so and a claim is made against the school. So important is the duty of care resting on an employer where safety issues are involved, that the employer may have a valid reason relating to an employee's capacity or conduct within the meaning of s 170DE(1) of the [*Industrial Relation Act 1988* (Cth)] to dismiss an employee even where reported misconduct is disputed by the employee …

54 This authority is supported by the decision of the Fair Work Commission Full Bench in ***King v Catholic Education Office Diocese of Parramatta T/A Catholic Education Diocese of Parramatta*** [2014] FWCFB 2194 [34].

55 However, neither of these cases relates to a threat to the teacher's safety or life. They relate to entirely different circumstances.

Training and education

56 It is reasonably arguable that training and education, unless it is intensive, will not prevent the overflow of fear that a threat to health or life will engender, resulting in loss of self-control.

Loss of trust and confidence

57 The respondent also says she has lost trust and confidence in Mr Landwehr, and that alone justifies dismissal. The reasons for her loss of trust and confidence is because this is the second incident of Mr Landwehr having inappropriate physical contact with a student. This is said to justify genuinely and reasonably held fears about his future conduct.

58 A loss of trust and confidence must be arrived at objectively. In ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australia Branch v Public Transport Authority of Western Australia*** [2017] WASCA 86; (2017) 97 WAIG 431, the Industrial Appeal Court approved of the approach taken by the plurality of the Full Bench in the matter below. In the Full Bench's consideration of the issue of the employer's opinion about whether there was the necessary level of trust and confidence in an employee to allow reinstatement to be practicable, Smith AP and I found that the employer's opinion about that matter must be 'genuine, credible and rationally based'. It also requires consideration of whether the attitudes expressed have a reliable foundation and the nature of the functions and duties of the employee.

59 With respect, the respondent's views on Mr Landwehr's actions and whether she can have the necessary level of trust and confidence in him are based on an investigation report which has now been demonstrated to have attributed matters and behaviour to Mr Landwehr that further inquiry has demonstrated to not be as portrayed.

60 The Director General is entitled to require a high level of trust and confidence in the behaviour of a teacher. This is reflected in ***Puccio*** and in ***King***. However, a proper examination of Mr Landwehr's conduct in the second incident has demonstrated that his behaviour was in circumstances where his safety was put at risk. He was also vulnerable due to the stress of his personal circumstances. His behaviour is either excused or mitigated due to those factors.

61 In those circumstances, the respondent's concerns about trust and confidence in Mr Landwehr, while they may have been genuine, are no longer credibly and rationally based. The situation is now that Mr Landwehr has a finding of one breach of discipline in relation to the first incident, and he has been penalised for that conduct. He otherwise has over nine years of uncontroversial service with the respondent, and over a decade as a teacher.

62 The second reason is that the respondent says Mr Landwehr was unable to accept the inappropriateness of his conduct. This was based on Mr Landwehr saying during the disciplinary process to the effect that he either thought the conduct was appropriate or that he did not know what is appropriate physical contact with a student.

63 In respect of the first of those two objections, Mr Landwehr said he did not think grabbing the student was pertinent, rather the student's act was pertinent. In the context of his actions being in response to potentially life-threatening provocation by the student, Mr Landwehr was correct, although his response is also relevant.

64 Mr Landwehr said he did not believe he used excessive force, and that he could not answer what excessive force is, and that it depends on the way you are looking at it. If what he meant was that what constitutes excessive force must be viewed from all of the circumstances, he is also correct. However, his response that 'pushing somebody back is not really excessive force' is clearly problematic.

65 However, I note that Mr Landwehr acknowledged through his counsel that he used unreasonable force in the second incident and that the use of force by a teacher against a student is not acceptable. Absent the particular provocation, it was culpable and inexcusable, and would justify dismissal. If Mr Landwehr did not know this at the time of the second incident, he knows it now.

66 Therefore, I find that Mr Landwehr had physical contact with a student that was not reasonable but which was in exceptional and exculpatory circumstances. In those circumstances, the dismissal was harsh.

Remedy

67 The only argument against reinstatement has been the issue of the loss of trust and confidence which I have dealt with as a second ground for the dismissal. Otherwise, there is no reason to not reinstate Mr Landwehr. In accordance with s 23A(3) of the *Industrial Relations Act 1979*, I intend to order that Mr Landwehr be reinstated. In accordance with s 23A(5), I intend to order that his service be deemed continuous and that he be paid the remuneration lost subject to the deduction of the income he has earned since the dismissal.

2018 WAIRC 00335

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRY LANDWEHR
	APPLICANT
	-v-
	MS SHARYN O'NEILL DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 31 MAY 2018
FILE NO/S	U 93 OF 2016
CITATION NO.	2018 WAIRC 00335

Result Claim upheld

Order

HAVING heard Mr M Cox of counsel and Ms R Collins of counsel on behalf of the applicant and Mr J Carroll of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby –

1. DECLARES that Mr Barry Landwehr was harshly dismissed from his employment with the respondent.
2. ORDERS –
   (a) THAT the respondent reinstate Mr Landwehr to his former position on conditions at least as favourable as the conditions on which he was employed immediately before the dismissal.
   (b) THAT Mr Landwehr's employment be deemed to be continuous.
   (c) THAT the respondent pay Mr Landwehr the remuneration he lost because of the dismissal. Such payment is to take into account the income he earned following his dismissal.
   (d) THAT the respondent comply with Orders (a), (b) and (c) within 21 days from the date of this Order.

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

2018 WAIRC 00338

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MISS JASIE MICHELLE MILLS

APPLICANT

-v-

MRS GILLIAN ROBB, CEO
TRAINING FOR ME PTY LTD

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE TUESDAY, 5 JUNE 2018
FILE NO/S B 115 OF 2017
CITATION NO. 2018 WAIRC 00338

Result Application discontinued
Representation
Applicant In person
Respondent N/A

Order

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

AND WHEREAS on 8 May 2018 Ms Mills wrote to the Commission and informed it that she was paid out when the respondent went into liquidation and that this file is now closed;

AND WHEREAS on 10 May 2018 Commissioner Emmanuel's Associate wrote to Ms Mills, requesting that she file and serve a *Form 14 – Notice of discontinuance* (**Form 14**);

AND WHEREAS Ms Mills has not filed a Form 14 or contacted the Commission since 8 May 2018;

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, discontinued.

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

2018 WAIRC 00308

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KORIE MONTEBELLO
	APPLICANT
	-v-
	DAVE BAILEY
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 14 MAY 2018
FILE NO/S	U 29 OF 2018
CITATION NO.	2018 WAIRC 00308

Result	Dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance required

Order

THERE having been no appearance on behalf of the applicant and there being no compulsion for the respondent to attend, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

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

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

2018 WAIRC 00310

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID FRANCIS MULCAHY
	APPLICANT
	-v-
	DEPARTMENT OF LOCAL GOVERNMENT, SPORT AND CULTURE INDUSTRIES SPORT AND RECREATION (WA)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 15 MAY 2018
FILE NO/S	U 162 OF 2017
CITATION NO.	2018 WAIRC 00310

Result	Application dismissed

Order

1. This is a claim of unfair dismissal referred to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* on 14 December 2017.
2. The Commission convened a conciliation conference on 2 February 2018.
3. On 14 May 2018, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of this matter.

The Commission is satisfied that further proceedings are not necessary or desirable in the public interest and orders –

THAT this matter be, and is hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Cody Sheridan	Warren Oliver, Julie Kelly & Doug Kelly t/as Busselton Discount Drug Store (ABN 59 741967169)	U 20/2018	Commissioner T Emmanuel	Discontinued
Hugh Owens	Mr Tom Clarkson and Miss Georgina Rowett Directors of Open Systems Support	B 27/2018	Commissioner T Emmanuel	Discontinued

CONFERENCES—Matters referred—

2018 WAIRC 00329

DISPUTE RE UNION MEMBER'S EMPLOYMENT STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00329
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 20 MARCH 2018, WEDNESDAY, 21 MARCH 2018, TUESDAY, 10 APRIL 2018 AND MONDAY, 23 APRIL 2018
DELIVERED	**:**	WEDNESDAY, 30 MAY 2018
FILE NO.	**:**	PSACR 16 OF 2017
BETWEEN	**:**	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED Applicant AND EAST METROPOLITAN HEALTH SERVICE Respondent

CatchWords	**:**	Mode of employment – Ongoing or maximum term employment - Interaction between industrial agreement and contract of employment – Effect of s 114 on the contract of employment – Whether employment was on a series of maximum or fixed term contracts – Appointed by operation of law
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 41(4), s 83, s 114, s 114(1)
Result	**:**	Declaration and order issued
Representation:		
Applicant	**:**	Ms J Auerbach (as agent)
Respondent	**:**	Mr D Anderson (of counsel) and Ms J Vincent (of counsel)

Cases referred to in reasons:

Ansett Transport Industries (Operations) Proprietary Limited v Wardley (1980) 142 CLR 237

Automatic Fire Sprinklers Pty Ltd v Watson [1946] HCA 25; (1946) 72 CLR 435

Barnett v Territory Office Insurance [2011] FCA 968; (2011) 196 FCR 116

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

Carr v Blade Repairs Australia Pty Ltd (No 2) [2010] FCA 688; 197 IR 307

Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; 149 CLR 337

Commonwealth Bank of Australia v Barker [2014] HCA 32, (2014) 253 CLR 169

Dadey v Edith Cowan University (1996) 70 IR 295

Quickenden v Commissioner, Australian Industrial Relations Commission (2001) 109 FCR 243

Re Mahmoud v Ispahani [1921] 2 KB 716

Shop, Distributive and Allied Employees' Association v Karellas Investments Pty Ltd (No 2) [2007] FCA 1425, (2007) 166 IR 51

The Chief Executive Officer Department of Agriculture and Food v John Martin Wall [2011] WAIRC 00263; [2011] 91 WAIG 443

The St Cecilia's College School Board v Carmelina Grigson [2006] WAIRC 05293; (2006) 86 WAIG 3146

Reasons for Decision

1 Dr Sieunarine has been employed by East Metropolitan Health Service (**EMHS**) and its predecessors as a vascular surgeon at Royal Perth Hospital since January 1997. In 2016 Dr Sieunarine was told his contract of employment was due to expire on 20 January 2017 and no further contract would be offered. EMHS later told Dr Sieunarine his contract would end on 17 November 2017.

2 This is a dispute about whether Dr Sieunarine is a permanent employee, in the sense of his employment being ongoing, or whether he was employed on a series of four consecutive five-year maximum term contracts, the last of which EMHS says expired on 17 November 2017. The parties were unable to resolve the matter through conciliation and it was referred for hearing and determination.

3 The Australian Medical Association (**AMA**) says Dr Sieunarine was appointed in 1997 and 2000 as a permanent employee and there is no basis on which to find that Dr Sieunarine was offered, and accepted, a contract for a maximum term ending in November 2017. The AMA asks that I declare that Dr Sieunarine is a permanent employee and order EMHS to do all things necessary so that Dr Sieunarine's employment records reflect his status as a permanent employee.

4 EMHS relies on the appointment clauses in the various industrial agreements that have applied since 1997. They broadly provide that all appointments will be on five-year maximum term contracts unless the parties reach a written agreement to the contrary. EMHS says it did not reach a written agreement to the contrary with Dr Sieunarine and, to the extent that I find Dr Sieunarine was appointed on a permanent basis at common law, I must find that the industrial agreements' appointment clauses prevail over any term to the contrary at common law. It argues any purported appointment of Dr Sieunarine on a permanent basis is 'null and void' in accordance with s 114 of the *Industrial Relations Act 1979* (WA) (**IR Act**).

5 EMHS says as a matter of law Dr Sieunarine's appointment in November 1997 was for a five-year maximum term contract and he has since been reappointed on a series of three consecutive five-year maximum term contracts. It asks that I declare that Dr Sieunarine's contract of employment is a five-year maximum term contract, which expired on 17 November 2017.

What must I decide?

6 I must decide whether Dr Sieunarine was an ongoing or maximum term employee as at 6 July 2017, the date the matter was referred for hearing. To do that, I will need to answer the following questions:

a. Was Dr Sieunarine employed on an ongoing or maximum term basis in November 1997?

b. Did the parties enter into a new contract in November 2000?

c. Was Dr Sieunarine employed on a series of five-year maximum term contracts?

d. If Dr Sieunarine was employed on an ongoing basis, do the industrial agreements' appointment clauses 'override' Dr Sieunarine's ongoing employment contract?

Language used

7 At the hearing and in their written submissions, the parties used the following words interchangeably, intending them to have the same meaning and effect:

a. 'fixed term' and 'maximum term';

b. 'permanent', 'ongoing' and 'indefinite' employment; and

c. 'appointment' and 'engagement'.

8 Although the industrial agreements refer to 'fixed term' appointments, the parties agree that what is actually contemplated in the industrial agreements are maximum term appointments, because either party can terminate employment by giving three months' notice.

9 In this matter, the relevant distinction is between employment that is for a maximum term and employment that is ongoing until one of the parties gives notice of termination.

10 In these reasons, a reference to EMHS is also a reference to its predecessors where relevant.

Industrial agreements

11 The parties agree that the following industrial agreements applied to Dr Sieunarine at the relevant times:

a. the *Western Australian Government Health Industry Medical Officers and Medical Practitioners Agreement 1996* (**1996 Industrial Agreement**);

b. the *Metropolitan Health Service Board AMA Medical Practitioners Agreement 1999* (**1999 Industrial Agreement**);

c. the *Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2002* (**2002 Industrial Agreement**);

d. the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2004* (**2004 Industrial Agreement**);

e. the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2007* (**2007 Industrial Agreement**);

f. the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011* (**2011 Industrial Agreement**); and

g. the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (**2013 Industrial Agreement**).

Circumstances leading up to the dispute

12 By letter dated 18 November 1997, EMHS offered Dr Sieunarine an appointment as a full-time vascular surgeon with the Department of Vascular Surgery at Royal Perth Hospital (**1997 Letter**):

> Dear Mr. Sieunarine
>
> On behalf of the Board of Management, I am pleased to offer you an appointment as Vascular Surgeon (fulltime) in the Department of Vascular Surgery.
>
> Employment will be under the terms and conditions of the WA Government Health Industry Medical Officers & Medical Practitioners Agreement, 1996, a copy of which is enclosed. Alternatively you may wish to be employed under the WA Government Health Industry & AMA Medical Practitioners Collective Workplace Agreement, 1996 and information regarding this may be obtained from the Manager, Department of Human Resources.
>
> The annual salary range under the Medical Practitioners Agreement is Levels 15 to 22 and the amount paid will depend on the private practice option chosen, as follows:
>
> | | |
> |---|---|
> | Arrangement A | $107,123 - $129,878 |
> | Arrangement B | $92,348 - $111,964 |
> | Arrangement C | $85,699 - $103, 903 |
> | Arrangement D | $73,878 - $89,572 |
>
> The starting level will be Level 15 with an increment to Level 16 on 20th January, 1998.
>
> The date of commencement of employment in this position will be 17th November, 1997.
>
> The appointment will be subject to a probationary period of six months, and will embrace service as necessary at both the Wellington Street and Shenton Park campuses. Confirmation of appointment will take place at the end of the probationary period, subject to satisfactory service.
>
> The appointment can be terminated by three months' notice on either side.
>
> All appointees to the Hospital staff are expected to abide by the Standing Orders of the Board of Management. Copies of these are available in Clinical Services or the department.
>
> Further, in addition to normal clinical duties, all appointees to the Clinical Staff are required to undertake teaching duties to both graduates and undergraduates and to make a commitment to ongoing education and quality assurance.
>
> The WA Government provides indemnity for consultants for that portion of time and for those services rendered to public patients **only** who are treated in the course of their employment by Royal Perth Hospital unless they have elected to be employed under Arrangement A of the rights of private practice in which case the indemnity covers both public and private patients. The indemnity does not cover doctors who provide services as employees of an incorporated medical practice.
>
> Medical fitness is also a necessary condition of employment. For this purpose, a medical certificate (form attached) as to the state of your general health is required at an early date.
>
> When taking up this appointment, it will be necessary for you to attend at the office of the Director of Clinical Services for completion of documentation. At that time you will be required to produce evidence of current registration with the Medical Board of Western Australia. You will need a Medicare provider number for Royal Perth Hospital and details of this should also be provided at that time.
>
> Please accept my personal congratulations on this offer of appointment. I would appreciate early advice of your acceptance.
>
> Yours sincerely,
>
> J. V. BURNS
>
> Acting Chief Executive Officer

13 On its face, the 1997 Letter relevantly provides:

a. a start date;

b. no maximum term;

c. a probationary period;

d. either party may terminate the appointment by giving three months' notice of termination; and

e. employment will be under the terms and conditions of the relevant industrial agreement.

14 Dr Sieunarine's evidence is that he accepted EMHS' offer of employment and started to work on that basis.

15 On 25 November 1997, an administrative assistant completed a 'change advice form' for Dr Sieunarine. That document shows a change of status, effective from 17 November 1997, namely 'new status: permanent'.

16 The parties disagree about whether Dr Sieunarine was offered a new contract (and therefore a new appointment) for four sessions per week or whether his existing contract was merely varied as a result of a letter dated 13 November 2000 (**2000 Letter**) which states:

> Dear Mr Sieunarine
>
> I am pleased to offer you an appointment as Consultant (4 sessions per week) in the Department of Vascular Surgery.
>
> Employment will be under the terms and conditions of the Metropolitan Health Service Board – AMA Senior Medical Practitioners Collective Agreement 1999. A Workplace Agreement is also available.
>
> The annual salary range under the Agreement is between Levels 15 to 23, i.e. $219.98 - $277.94 per session. 7% non-contributory superannuation, and a loading for private rooms is also payable.
>
> The starting level will be Level 18 ($246.92 per session) with an annual increment to Level 19 in January 2001.
>
> The date of commencement of employment in this position will be by arrangement with the Director of Clinical Services and you should contact him as soon as possible to arrange this.
>
> The appointment will be subject to a probationary period of six months, and will embrace service as necessary at both the Wellington Street and Shenton Park campuses. Confirmation of appointment will take place at the end of the probationary period, subject to satisfactory service.
>
> The appointment can be terminated by three months' notice on either side.
>
> All appointees are expected to abide by the Hospital's Standing Orders. Copies of these are available in Clinical Services or the department.
>
> Further, in addition to normal clinical duties, all appointees to the Clinical Staff are required to undertake teaching duties to both graduates and undergraduates and to make a commitment to ongoing education and quality assurance.
>
> The WA Government provides indemnity for consultants for that portion of time and for those services rendered to public patients **only** who are treated in the course of their employment by Royal Perth Hospital unless they are fulltime, and have elected to be employed under Arrangement A of the rights of private practice in which case the indemnity covers both public and private patients. The indemnity does **not** cover doctors who provide services as employees of an incorporated medical practice.
>
> Medical fitness is also a necessary condition of employment. For this purpose, a medical certificate (form attached) as to the state of your general health is required at an early date.
>
> As you are probably aware, those who have worked in a hospital outside Western Australia during the twelve months prior to appointment are required to produce evidence of negative methicillin-resistant staphylococcus aureus (MRSA) swabs. Swabs must be taken at Royal Perth Hospital at least three days prior to starting work. To comply with the Hospital's Tuberculosis Policy, a mantoux test may be required.
>
> In addition, you will be subject to a criminal record check as detailed in the information provided to you when you applied for the position. Please note that previous criminal conviction or pending charges will not necessarily preclude employment.
>
> When taking up this appointment, it will be necessary for you to attend at the office of the Director of Clinical Services for completion of documentation. At that time you will be required to produce evidence of current registration with the Medical Board of Western Australia. You will need a Medicare provider number for Royal Perth Hospital and details of this should also be provided at that time.
>
> Please accept my personal congratulations on this offer of appointment. I would appreciate early advice of your acceptance.
>
> Yours sincerely
>
> Dr Gareth J Goodier
>
> Chief Executive

17 Like the 1997 Letter, on its face the 2000 Letter relevantly provides:

a. a start date;

b. no maximum term;

c. a probationary period;

d. either party may terminate the appointment by giving three months' notice of termination; and

e. employment will be under the terms and conditions of the relevant industrial agreement.

18 In the statement of agreed facts, the parties refer to the 2000 Letter as 'offer[ing] an appointment' and 'the contract offer', however at the hearing EMHS submitted that the 2000 Letter constituted a mere variation.

19 Dr Sieunarine has continued to work at Royal Perth Hospital since his appointment in 1997. Since then, he and EMHS have agreed to a number of contract variations, dated:

a. 1 February 2001;

b. 31 August 2001;

c. 9 February 2005;

d. 10 September 2009; and

e. 14 October 2009.

20 Those five contract variations were agreed and confirmed in writing. Three of the confirmation letters include words to the effect that other than the particular variation, 'your contract remains unchanged' and the other two confirmation letters say 'the terms and conditions of your contract remain as set out in the [2000 Letter].'

21 A letter on Dr Sieunarine's personnel file dated 20 March 2003 provides:

> In accordance with the terms of the Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2002, and earlier agreements, your five year contract of employment at Royal Perth Hospital was due for renewal on 17/11/2002. I write to advise that the hospital will be renewing your contract for a further five years, from 19/11/2002 to 17/11/2007. The terms and conditions set out in your original letter of appointment, and any subsequent contract variations remain unchanged.

22 Dr Sieunarine gave evidence that he does not remember receiving this letter and no other reappointment letters were sent to him.

Evidence

23 The gist of Dr Sieunarine's evidence was that in 1997 he applied for the position of full-time vascular surgeon. He was one of two applicants interviewed by a panel. Dr Sieunarine was offered and accepted the position. He received a letter of appointment from the CEO. Dr Sieunarine's evidence was that he had no discussion with anyone about the possibility of his appointment being for a maximum term or that there may be a need to reapply or go through a process to extend his appointment beyond five years. After six months Dr Sieunarine received verbal and written confirmation that he had successfully completed his six-month probation period.

24 Dr Sieunarine said he negotiated the creation of a new vascular surgeon position on a sessional basis because of the resources available to the vascular surgery department. Dr Sieunarine applied for that position, went through a process and was appointed to the position in November 2000, when he received the 2000 Letter. Dr Sieunarine said this was a new appointment and the sessions from his 1997 appointment were absorbed 'back into the system'. Again, at no time was there any mention of his appointment being for a maximum term.

25 In 2001 Dr Sieunarine was appointed Head of Department for three years. He was reappointed Head of Department in 2004 for another three years plus a short extension to 2007.

26 Dr Sieunarine gave evidence that his 2000 contract was varied several times in relation to the number of sessions he worked. Those variations were agreed and confirmed in writing, with no reference to any maximum term of his contract. He also said he had sporadic performance appraisals during the course of his employment, and there was never any discussion about maximum terms or his contract coming up for renewal.

27 Dr Sieunarine gave evidence that the first time EMHS raised with him that he was on a five-year contract was when he received a letter dated 22 February 2016. It said 'I refer to your contract of appointment which specified that your contract ceases on 20 January 2017. A decision will be made in the coming months as to whether a further offer of employment will be made to you and you will be advised accordingly.' Prior to that letter, at no time since 1997 had Dr Sieunarine ever had a discussion about being employed, or received anything in writing from EMHS to the effect that he was employed, on a maximum term contract. He always understood that he had been appointed on an ongoing basis. After receiving the 22 February 2016 letter, Dr Sieunarine contacted the AMA for advice.

28 I find Dr Sieunarine to be a reliable witness. His evidence was not materially disturbed in cross-examination. I accept Dr Sieunarine's evidence.

29 EMHS summoned Dr Beresford to give evidence at the hearing. Dr Beresford was the Director of Clinical Services at Royal Perth Hospital at the time Dr Sieunarine was appointed. However, EMHS asked that the summons be set aside because it became apparent to EMHS shortly before the hearing that Dr Beresford, who is in his 80s, has no recollection of the circumstances surrounding Dr Sieunarine's appointment and his memory is such that he cannot assist. I do not draw any *Jones v Dunkel* inference in relation to Dr Beresford.

30 The AMA tendered various documents that EMHS objects to on the grounds of relevance and hearsay. On their face, generally those documents appear to suggest that Dr Sieunarine was not, in fact, reappointed on a series of maximum term contracts. I agree with EMHS that most of those documents have very limited probative value. In any event, I do not understand EMHS' case to be that Dr Sieunarine was, in fact, appointed on a series of maximum term contracts. I understand EMHS' case to be that by operation of law, Dr Sieunarine was appointed on a series of maximum term contracts.

Was Dr Sieunarine employed on an ongoing or maximum term basis in November 1997?

31 Refuting EMHS' argument that the 1997 Letter is 'merely [a recitation] of the terms contained in the applicable industrial instrument', the AMA says the 1997 Letter was intended by Dr Sieunarine and EMHS to evidence their contractual relations, and is necessary because:

a. it is not possible for ***all*** terms and conditions in the industrial agreements to apply indiscriminately and simultaneously to Dr Sieunarine's employment given that some of their terms apply to the exclusion of others (for example, part-time and full-time employment); and

b. plainly the appointment letters contained terms about matters that are not prescribed in the relevant industrial agreement, and that are of a contractual nature (for example, that 'Medical fitness is…a necessary condition of employment' and 'when taking up this appointment, it will be necessary for you to attend at the office…for completion of documentation').

32 The AMA says this is consistent with the well-established principle that awards and industrial agreements operate to lay down minimum conditions of employment. It is not necessary for a contract of employment to provide for matters already covered by industrial instruments, because there is no need to convert those rights and obligations to contractual rights and obligations: ***Byrne v Australian Airlines Limited*** [1995] HCA 24; (1995) 185 CLR 410 at (424).

33 The AMA says the 1997 Letter amounts to a written contract of employment between Dr Sieunarine and EMHS. It stipulates a number of significant terms and conditions, including probationary period, start date, starting level, payment options available, insurance, medical fitness, documents required and notice of termination of the contract. It is silent on any end date, which is consistent with an ongoing appointment.

34 The AMA says the Arbitrator should focus on the words used in the 1997 Letter to ascertain 'what a reasonable person would understand by the language in which the parties have expressed their agreement.' If there is obvious ambiguity, the Arbitrator may look at what the parties have said or done before making the contract, and have regard to the factual matrix. The AMA also argues that while the employment contract should be construed practically, any ambiguities in a written contract prepared by an employer should be resolved in favour of the employee: ***Carr v Blade Repairs Australia Pty Ltd (No 2)*** [2010] FCA 688; 197 IR 307 at [32], [45].

35 The AMA says the three-month notice provision in the 1997 Letter must be read in the context of the letter as a whole. This means reading the three-month notice provision with the two paragraphs before it which deal with start date and confirmation of the appointment after successful completion of the probationary period. Read in the context of the letter as a whole, the AMA says the only reasonable meaning that can be attributed to '[t]he appointment can be terminated by three months' notice on either side' is that it 'represents the express term dealing with the way by which the appointment may be brought to an end.'

36 The AMA says there is otherwise no need to incorporate a contractual term in relation to notice of termination because the parties already have an express agreement about notice of termination. There is also no need to imply any term in the way contended by EMHS at [50]. It says '[t]he terms of the contract are clear, sufficient, unambiguous, and well understood in the industrial arena. Any reasonable person considering the contract would understand it to be continuing until such time as either party gives the prescribed notice.'

37 The AMA argues the only reasonable finding open to the Arbitrator is that the 1997 Letter evidences the parties' agreement for the employment to be an ongoing basis terminable by giving three months' notice.

38 The AMA says prior to the 1996 Industrial Agreement, consultants were regularly employed on a permanent basis. EMHS and Dr Sieunarine never discussed that Dr Sieunarine's appointment would be temporary. If EMHS intended to appoint Dr Sieunarine on a temporary basis, it should have discussed that with him and the contract should have reflected such an agreement between the parties.

39 Though the AMA says there is no ambiguity, it says if I find ambiguity exists, I can look to the factual matrix. It says this is evidenced through a number of documents which were on Dr Sieunarine's personnel file and are accordingly admissible as business records that are 'mutually known or notorious objective facts': ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** [1982] HCA 24; 149 CLR 337 at (352).

40 The AMA says the factual matrix comprises:

a. the common knowledge of how senior practitioners were to be engaged after having fully qualified as specialists of a particular craft group;

b. the way Dr Sieunarine's earlier locum appointments were 'fully documented with a fixed duration' and did not replicate any notice provisions from the relevant industrial agreement;

c. reference in an internal memorandum dated 5 May 1997 from Dr Khangure to Dr Beresford on Dr Sieunarine's personnel file to '[m]y understanding is that Mr Sieunarine will almost certainly end up as a permanent appointment after his tenure as a locum has been completed';

d. the administrative form that confirmed Dr Sieunarine's appointment as a locum was 'temporary'; and

e. the 'change advice form' in [15] confirming Dr Sieunarine's status changed to 'permanent'.

41 The AMA says Dr Sieunarine understood at the time of his appointment that his appointment would be ongoing unless he engaged in serious misconduct or posed a serious risk to patients.

42 The AMA submits that EMHS' conduct after Dr Sieunarine's appointment in November 1997 indicates that EMHS treated Dr Sieunarine as though he were a permanent employee. For example:

a. after Dr Sieunarine completed his probationary period, his appointment was confirmed with no mention or discussion of his appointment being temporary;

b. Dr Sieunarine had regular performance appraisals and received annual increments without discussions about his employment being temporary or the need for his contract to be renewed beyond a maximum term;

c. in support of Dr Sieunarine's application for a home loan, Royal Perth Hospital provided a letter confirming Dr Sieunarine's employment without reference to any end date for his appointment;

d. in an email dated 28 January 2009, EMHS' Senior Administrative Assistant (Medical) sent an email request to grant Dr Sieunarine clinical privileges at Sir Charles Gardiner Hospital. Her email states 'I confirm that Mr Sieunarine's substantive appointment at RPH is permanent'; and

e. Dr Sieunarine continued to work for and be paid by EMHS without any subsequent discussions or agreements about contract renewals, even though a number of discussions were had and agreements were reached about contract variations (see [19]), all of which were documented appropriately.

43 At the hearing, EMHS submitted that the contract needs a term in relation to duration and the law will imply one where the parties have not agreed one, whereas in its supplementary submissions EMHS says instead that mode of employment is not an essential element of a contract of employment.

44 EMHS says a term that specifies a mode of employment is 'an entirely different species' to a term dealing with circumstances in which employment can be terminated, for example by the giving of notice. It argues the 1997 Letter deals with notice only and there is no express term in relation to mode. To be an express term, the parties needed to have turned their minds to the mode of Dr Sieunarine's employment and have reached an agreement. EMHS says the only finding available to the Arbitrator is that the parties simply did not turn their minds to mode, because there is no evidence that:

a. the parties reached any written agreement as to mode (in that Dr Sieunarine was not expressly engaged on, for example, a 'permanent' or 'maximum term' basis); or

b. the parties reached a verbal agreement as to mode. Dr Sieunarine's evidence was clear – the parties did not discuss an end date or whether Dr Sieunarine was engaged on a permanent or maximum term basis.

45 EMHS says mere omission or silence without more is insufficient to establish that Dr Sieunarine was employed on an ongoing or maximum term basis. Dr Sieunarine's subjective intentions or expectations are not relevant, nor are the other documents that the AMA says bear upon the contractual relationship between the parties.

46 In the event that the Arbitrator finds that termination and mode are synonymous, EMHS says the term in the 1997 Letter that provides for three months' notice does not have contractual effect. EMHS says that term is not a contractual term and the 1997 Letter is not a contractual document, in that it was not mutually intended by the parties to have legal effect, because:

a. the 1997 Letter is incomplete and references the 1996 Industrial Agreement, which would govern the terms and conditions of Dr Sieunarine's employment;

b. the 1997 Letter provides some of the important terms that would later govern the relationship between the employee, including annual salary, a six-month probation period and a three-month notice period. Apart from the salary, these mirror the terms in the 1996 Industrial Agreement; and

c. it follows that where EMHS breaches one of these terms, the only remedy available to Dr Sieunarine is a claim for breach of the 1996 Industrial Agreement with the Industrial Magistrate's Court. The terms by themselves have no contractual effect whatsoever.

47 Consequently, EMHS says there is no express contractual term as to mode.

48 Further, EMHS argues the industrial agreements (including the appointment clauses) applied to Dr Sieunarine by virtue of s 41(4) of the IR Act. Those industrial agreements require five-year maximum term appointments. Therefore by automatic operation of the appointment clauses in the industrial agreements, Dr Sieunarine was employed pursuant to a series of four five-year contracts of employment.

49 If the Arbitrator finds that the parties did not expressly agree about the mode of Dr Sieunarine's employment, EMHS says the industrial agreements applied by force of the IR Act and by stipulating the mode of employment, left no room for the implication of a term of permanency either by fact or law.

50 EMHS argues the onus is on the AMA to establish that a term of permanency could be implied by law or fact into the contract of employment. It cites the observations of French CJ, Bell and Keane JJ in ***Commonwealth Bank of Australia v Barker*** [2014] HCA 32, (2014) 253 CLR 169 saying that:

> An implication in law may have evolved from repeated implications in fact… that the 'more general considerations' informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of 'necessity'… The requirement that a term implied in fact be necessary 'to give business
>
> efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. [28]

51 It says a term implied by law or fact may be excluded by:

a. an express term that evidences a clear intention to the contrary; or

b. a statutory provision or provision of an industrial agreement.

52 EMHS says the search is for 'an expression of contrary intent', however described.

53 Whether the appointment clauses exclude the implication of a term of permanency depends on whether such a term was 'necessary' (by law) or 'necessary to give business efficacy to the contract' (by fact). The question to be asked is whether the subject matter dealt with by the industrial instrument and the proposed implied term is the same (**Subject Matter Question**). If it is, then the industrial agreement covers the field and there is no gap to be filled or no room for the proposed term to be implied. If the subject matter is not the same, there may be room for implication of the proposed term, if it is necessary by law or fact.

54 EMHS says the Subject Matter Question is the only one to be asked. However, if the Arbitrator finds that the Subject Matter Question is not the only question that must be asked, then if the subject matter is the same, a second question should be asked: are the clause in the industrial instrument and the proposed implied term inconsistent? EMHS says it is a question of construction whether the parties objectively intended the clauses in the industrial agreement to be comprehensive or exhaustive, such that the proposed implied term would be inconsistent with them.

55 EMHS argues that the subject matter is the same because the appointment clauses and the proposed implied term of permanency both deal with duration of employment. There is no gap to be filled. A term of permanency is not necessary to make the contract effective.

56 Further, EMHS says the appointment clauses in the industrial agreements and the proposed implied term of permanency are inconsistent. This is because the industrial agreements applied to Dr Sieunarine, the appointment clauses are obligatory in nature and require EMHS to engage Dr Sieunarine on a maximum term basis and they do not prescribe a minimum fixed term. The clauses are in absolute terms.

57 EMHS adds for completeness that any argument for implied permanency by fact fails because, due to the appointment clauses in the industrial agreements, it could not be said that implication of a term of permanency would have been accepted by the contracting parties as a matter so obvious as to 'go without saying'.

Consideration

58 I do not accept EMHS' argument that the 1997 Letter was incomplete. Reference in a contract to an industrial agreement is common. It does not mean the 1997 Letter was incomplete. EMHS says in its further submissions that the essential elements to form a contract of employment are the identity of the parties, the position, commencement date and remuneration. The 1997 Letter has those elements. Further, as EMHS conceded, it is not necessary for an employment contract to expressly or impliedly deal with mode.

59 I do not accept that the parties did not mutually intend the 1997 Letter to have legal effect. On the contrary, I think an employer and an employee would reasonably expect that a written offer of employment that sets out the matters outlined at [13], drafted in the way that this letter has been, that an employee accepts, *would* have legal effect.

60 Neil I and Chin D, authors of the *Modern Contract of Employment* (2nd Ed, 2017), state: '[t]he fundamental question, whatever the circumstances of the parties, is whether in the situation in which they were, did their words and conduct objectively assessed, evince an intention that they intended to assume legally binding contractual obligations to each other?' [3.71]. On its face and objectively evident from a plain reading, the 1997 Letter was intended, upon acceptance, to lead to a concluded contract. It was a written offer of employment and one Dr Sieunarine accepted. At the hearing EMHS said 'so in essence we're saying there's a written contract or at least an agreement, evidenced in writing, in 1997'.

61 The parties agree that the terms of the industrial agreement are not automatically incorporated into the contract. EMHS does not argue that the terms of the industrial agreement were incorporated into Dr Sieunarine's contract of employment.

62 An express term of Dr Sieunarine's contract was that employment could be terminated by either of the parties giving three months' notice. There is no evidence that the parties even contemplated, let alone discussed and agreed, that Dr Sieunarine's employment would be for a maximum term. Reading the 1997 Letter as a whole, consistent with an orthodox approach to contractual interpretation, I find the parties have agreed to something quite other than a five-year maximum term contract. Mode of employment and notice of termination are not necessarily synonymous. However, objectively considering the circumstances of this matter, I find a reasonable person would have understood the parties to have agreed that the duration of the contract will be for as long as it takes for one of the parties to give three months' notice of termination. In effect, they have agreed that the contract will be ongoing until notice is given. There is no ambiguity. There is no room to imply a term because there is no gap to be filled.

63 I do not accept EMHS' submission that an industrial instrument will always prevail over a contract of employment to the extent of inconsistency. In this case, it is the effect of s 114 of the IR Act that must be considered, which I deal with from [101] – [108].

64 The very notion of a maximum term contract does not fit with the facts of this case. By its nature, a maximum term contract comes to an end, not because one party terminates it, but in accordance with what the parties to the contract have agreed. Here, EMHS and Dr Sieunarine did not agree to the contract being for a maximum term.

65 Consistent with the reasoning of Brennan CJ, Dawson and Toohey JJ in ***Byrne v Australian Airlines Limited*** at (420), an industrial agreement creates statutory rights that can be enforced under s 83 of the IR Act, but the IR Act and industrial agreement do not create contractual rights.

66 As Brennan CJ, Dawson and Toohey JJ (quoting from ***Automatic Fire Sprinklers Pty Ltd v Watson*** [1946] HCA 25; (1946) 72 CLR 435, 465) state, 'the fact that a statute prohibits the doing of an act under penalty does not show that the act cannot be done.' That an employer appointed an employee on an ongoing basis, perhaps contrary to an industrial agreement, does not mean that employee was appointed on a five-year maximum term.

67 I find Dr Sieunarine was employed in 1997 on an ongoing basis.

Did the parties enter into a new contract in November 2000?

68 The AMA says Dr Sieunarine entered into a new contract in November 2000, while EMHS says the contract was merely varied. This issue is significant for a number of reasons, including because, as EMHS acknowledged at the hearing, on its argument if there was a new contract in November 2000 then the latest maximum term contract began in November 2015 (rather than 2012) and ends in November 2020 (rather than 2017).

69 Dr Sieunarine gave evidence that the 2000 Letter was the result of him having participated in a competitive selection process. The AMA tendered the advertisement for the role and Dr Sieunarine's written application for it, both documents being relevant and admissible. Dr Sieunarine said:

> **EXAMINATION BY MS AUERBACH**
>
> **…**
>
> I went through the same process again, um, had a slight – or a committee meeting, application, had a discussion, they went out of the room and a day or two later I got told that I had the position.
>
> Okay. And did you accept this appointment?---Um, yes, I - I started working four sessions a week.
>
> Okay. And what happened to your 1997 appointment?---I - well, I presume they absorbed the sessions back into the system to use for other sessional knowledge - - -
>
> Did you continue to work under your 1997 terms?---No, I was working under this new appointment.
>
> Okay. And with this new appointment that you were given did you have any discussions whatsoever about a particular term of the appointment?---Ah, similarly to the 1997, there was no discussion at all. There was no mention of a five-year contract and I can tell you, these - the - I know they said that they have given this workplace agreement thing to read, ah, but these documents are quite large. I mean, I must confess I have never, ever read any of those documents in detail. Um, to - to read the content of those documents, ah - all I wanted to do was do the job, stay out of trouble, ah, make sure I didn't cause any, um, concerns that would cause me to get dismissed because that's the only - um, only method I thought I would actually leave the health system.
>
> Have you since - since this appointment, have you had - any other appointments ever been discussed with you?---No, and they have continued that appointment…

70 Dr Sieunarine said he accepted the offer set out in the 2000 Letter.

71 Notwithstanding that it was an agreed fact that '[b]y letter dated 13 November 2000, Dr Sieunarine was offered an appointment as a consultant vascular surgeon at RPH for four sessions per week' and that the 2000 Letter was a 'contract offer', EMHS says the parties did not enter into a new contract in November 2000. Rather they agreed to vary the contract by changing the number of sessions Dr Sieunarine worked. EMHS suggests the 2000 Letter was created in error and the result of poor record keeping.

Consideration

72 I find Dr Sieunarine's contract was not merely varied in November 2000. Rather, he was appointed at that time following a competitive selection process. This was quite unlike the number of variations which were confirmed in writing and note that in all other respects the contract remains unchanged. The 2000 Letter is a written offer of employment which Dr Sieunarine accepted. I find the parties entered into a new contract in November 2000 that is evidenced in writing.

73 The 2000 Letter was essentially the same as the 1997 Letter and I apply the reasoning from [58] to [67] in relation to it. I find that when Dr Sieunarine accepted the new contract in November 2000, he was employed on an ongoing basis.

Was Dr Sieunarine employed on a series of five-year maximum term contracts?

74 Dr Sieunarine's evidence is that he was never employed on a maximum term contract, let alone a series of five-year maximum term contracts. As set out from [31] to [42], the gist of the AMA's argument is that Dr Sieunarine was not employed on a series of five-year maximum term contracts, in fact or at law.

75 The AMA says if EMHS had intended for either the 1997 or 2000 appointment to be for a maximum term, EMHS should have confirmed either:

a. the 2000 contract was in force only for the remainder of Dr Sieunarine's original appointment from 1997 to 2002; or

b. the 2000 contract was for a period of five years in accordance with the 1999 Industrial Agreement.

76 It says the lack of any agreed end date is tantamount to written confirmation that the parties agreed to the appointment being ongoing.

77 The AMA says there is no evidence of Dr Sieunarine being reappointed every five years. A contract offer cannot be accepted unless the employee has knowledge of it and appointments cannot occur without the parties in some way turning their minds to it.

78 The AMA says the only evidence before the Public Service Arbitrator is that the 1997 appointment ended when it was replaced with the 2000 appointment. That Dr Sieunarine continued to work for EMHS from 2000 until 2017 without any discussions about contract renewal, in circumstances where the parties turned their minds to and documented several contract variations, head of department appointments and performance appraisals, and EMHS continued to pay Dr Sieunarine 'is clear evidence of an ongoing open-ended employment relationship, which did not require the parties to turn their minds to the need for any subsequent appointments'.

79 The AMA called Ms Longley to give evidence about EMHS' payroll system. Ms Longley gave evidence that the letter 'S' under status on the system means 'substantive'. It shows that an employee is permanent because he or she is given a start date but no end date which 'can be termed as an open-ended contract'. Ms Longley said the letter 'T' under status means 'temporary', which shows an employee is employed on a fixed term. The system records put to Ms Longley in relation to Dr Sieunarine show status as 'substantive' before 1 January 2011 and 'temporary' from 1 January to 20 January 2017.

80 However in cross-examination Ms Longley gave evidence that a permanent employee could be held against a substantive position or a temporary position. Equally, a fixed term employee could be held against a substantive position or a temporary position. Her evidence in cross-examination was that it is not possible to tell from the payroll system if an employee is employed on permanent or fixed term basis.

81 EMHS did not lead any evidence about this issue or any other issue.

Consideration

82 Ms Longley's evidence does not assist the AMA. It leads me to conclude that whether the payroll system's status shows the letter 'S' or 'T' sheds little light on whether Dr Sieunarine was employed on a permanent or maximum term basis.

83 That said, I have no difficulty finding on the evidence that, as a matter of fact, Dr Sieunarine was not employed on a series of five-year maximum term contracts. I accept Dr Sieunarine's evidence and find that he was appointed in 1997 and again in 2000 on an ongoing basis. At no stage did the parties agree that Dr Sieunarine's appointment would be for a maximum of five years. EMHS has not put any evidence before me that contradicts this finding.

84 However, I must consider whether, as a matter of law, Dr Sieunarine was employed on a series of five-year maximum term contracts.

If Dr Sieunarine was employed on an ongoing basis, do the industrial agreements' appointment clauses 'override' Dr Sieunarine's ongoing employment contract?

85 The AMA says the industrial agreements that apply to Dr Sieunarine throughout the course of his employment do no more than 'underpin' the employment. While terms and conditions may be prescribed in awards or industrial agreements, they do not determine the contractual relationship between the parties. The provisions of the 1996 (and presumably 1999) Industrial Agreements are minimum conditions only. While an employer cannot contract below those conditions, they can agree to more favourable ones. The AMA argues '[a]s a general principle, an enterprise agreement will prevail over a contract unless the contract is more beneficial to the employee': ***Shop, Distributive and Allied Employees' Association v Karellas Investments Pty Ltd (No 2)*** [2007] FCA 1425, (2007) 166 IR 51 at [36].

86 The AMA says the appointment clauses 'provide nothing more than a prima facie right to a five-year contract unless the parties agree to vary this term to a shorter or longer period. It is not synonymous with a prescriptive and non-negotiable term or condition that is automatically applied'.

87 The AMA argues that, in any event, since Dr Sieunarine was not a 'new' appointment because he had been employed on various contracts since 1989, the clause in both the 1996 and 1999 Industrial Agreements does not apply to him. The AMA did not elaborate on why it says this. Its argument seems to be that appointment would only be 'new' if the employee had not been previously appointed.

88 Section 114(1) of the IR Act provides:

> **114. Contracting out from awards etc. prohibited**
>
> (1) Subject to this Act, a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award, industrial agreement or order of the Commission, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled.

89 The AMA says s 114 of the IR Act is not invoked by Dr Sieunarine's contracts with EMHS because it only applies where there are 'absolute obligations and which are sought to be varied or annulled by inconsistent contractual terms.' The industrial agreements' appointment clauses:

> [do] nothing more than stipulate that an employer shall, as a starting point, offer five-year appointments, but at the same time [leave] it open to the parties to agree in writing on a shorter or longer term. Accordingly, a contract which provides for a term longer than five years is not inconsistent with cl 3.2 of the 1996 Industrial Agreement, which provides that longer or shorter terms may be agreed upon. This allows the parties to agree on a contract term of indefinite duration, terminable only by three months' notice.

90 EMHS takes a different view. It says the appointment clauses prevail over any term(s) to the contrary at common law. It cites the following as authority for that proposition:

Mansfield J in ***Barnett v Territory Office Insurance*** [2011] FCA 968; (2011) 196 FCR 116:

> If relevant statutory provisions or instruments such as an award or enterprise agreement sourced from a workplace law or the NES, are superimposed over that contract of employment, the agreed terms of the contract are either suppressed or unlawful to that extent. [24]

Black CJ and French J's observation in ***Quickenden v Commissioner, Australian Industrial Relations Commission*** (2001) 109 FCR 243 (***Quickenden v O'Connor)*** that an enterprise agreement provides terms and conditions that:

> … could operate in addition to the rights and obligations under his contract and, where inconsistent, no doubt displace them. [69]

Wilson J synthesising the prevalence of enterprise agreements (as creatures of statute) over 30 years earlier in ***Ansett Transport Industries (Operations) Proprietary Limited v Wardley*** (1980) 142 CLR 237:

> It will generally be a case of specific provisions which will, of course, have the effect of rendering inoperative any provisions of subordinate law, whether common law or statutory, touching that employment with which they are inconsistent. (287)

Madgwick J in ***Dadey v Edith Cowan University*** (1996) 70 IR 295:

> The better view probably is that absent express contractual incorporation of its terms, the award has the effect of rendering inoperative certain terms of the contract as against the employee, but the terms of the award do not themselves become terms of the contract (***Byrne v Australian Airlines Limited***), nor, in my opinion, do the terms made inoperative cease to be *terms of the contract*. (297)

91 EMHS says these settled principles have been applied authoritatively by the Commission and do not derogate from the proposition that a contract of employment may contain conditions which are superior to those contained in an award or industrial agreement. Importantly, EMHS argues an orthodox application of these settled principles lead to the conclusion that the appointment clauses operate to 'displace' or 'suppress' any term of permanency to the contrary that the AMA contends might arise at common law.

92 Further, EMHS argues that s 114 of the IR Act renders 'null and void' any verbal or implied term of a common law contract of employment between Dr Sieunarine and EMHS to the effect that Dr Sieunarine was engaged on an ongoing basis.

93 It cites Kenner C in ***The Chief Executive Officer Department of Agriculture and Food v John Martin Wall*** [2011] WAIRC 00263; [2011] 91 WAIG 443:

> 180. The effect of s 114(1) of the Act on the terms of a contract of employment that is at variance to and purports to vary or annul the terms of an award or industrial agreement, is to make the relevant provision of the contract concerned 'null and void'. Consistent with the above analysis, the language of s 114(1) is clear and unambiguous and a strong statement of Parliamentary intention, as an expression of public policy. Furthermore, the existence of the penalty provisions in s 83 of the Act, where a contravention or failure to comply with an industrial instrument is established, lends support to invalidity as the intended effect: ***Re Mahmoud v Ispahani*** [1921] 2 KB 716.
>
> 181. It is reasonably apparent that the terms of s 114(1) of the Act when read with the terms of the Act as a whole, express a Parliamentary intention, as a matter of public policy, that obligations contained in awards and industrial agreements made by the Commission under the Act, are to be observed and mechanisms for enforcement of the same are prescribed. It is not open for a person, by purported contract, to avoid or to alter the rights and obligations so prescribed in an award or industrial agreement.

94 EMHS says s 114 of the IR Act is enlivened because the appointment clauses impose an obligation on EMHS to offer Dr Sieunarine employment on a 'five-year contract' unless a written agreement to the contrary was reached with Dr Sieunarine. The contention that Dr Sieunarine was engaged by EMHS on an indefinite basis at common law 'annuls' or 'varies' the operation of the appointment clauses in the industrial agreements, which oblige EMHS to engage Dr Sieunarine on a maximum term basis for five years.

95 In this matter, EMHS says the effect of s 114 is to render 'null and void' any clause in the common law contracts underpinning Dr Sieunarine's appointments that Dr Sieunarine was employed by EMHS on an ongoing basis. This is because the appointment clauses operated at all relevant times to prevent an employer and employee entering into a contract of employment or a shorter or longer period than five years without first reaching a mutual agreement to elect in writing to vary the employee's right to a five-year contract for a shorter or longer period.

96 EMHS says the appointment clauses intend to protect the employer and employee's interests in the absence of a mutually agreed election in writing to vary what is otherwise by default a maximum term appointment for a period of five years. However the obligation to obtain mutual agreement in writing to vary the employee's statutory right to a five-year maximum term is an obligation only on the part of the employer, whether or not the employee stands to benefit from a longer or shorter period of employment.

97 EMHS argues the existence of a contractual (or statutory) right to terminate the contract of employment by giving notice is not evidence of a mutually agreed election in writing to vary the statutory right to a five-year maximum term.

98 EMHS concedes that a contractual right of termination allows the employment contract to function absent any agreed mode or specified duration of employment. However it says the reference to a right of termination in the 1997 Letter and 2000 Letter is not a contractual term. It is merely the author of the letter drawing attention to the termination right as it appears in the relevant industrial agreements. Consequently the right of termination is not contractual.

99 EMHS says there is no evidence of a mutually agreed election to vary the employee's statutory right to a five-year maximum term, so if any term were to be implied to vary that right, it would be void for illegality.

Consideration

100 Contrary to EMHS' argument, an industrial agreement will not always prevail over a contract of employment to the extent of inconsistency. As Neil and Chin succinctly put it in *The Modern Contract of Employment*:

> What is the legal status of a contractual term that differs in content from a provision of a statute or award dealing with the same subject matter? Loose language is rife: for example, the authorities speak of awards rendering 'inoperative' [***Ansett Transport Industries (Operations) Pty Ltd v Wardley*** at (287) – (288); and ***Dadey v Edith Cowan University***] or 'unlawful' [***Barnett v Territory Insurance Office*** at [24]], 'displacing' [***Quickenden v O'Connor*** at [69]], 'modifying' [***Quickenden v O'Connor***] or 'suppressing' [***Barnett v Territory Insurance Office***] contractual provisions dealing with

> the same subject matter. And, more insidiously, authorities, texts and commentary frequently describe the relationship between awards and contracts by conclusory statements expressed in terms that suggest they are universally and inherently true. In fact, these statements merely state the relationship between some awards and contracts, having regard to the effect of the particular statutes that support those awards. The correct position is that there is no universally necessary or true answer to the question with which this paragraph began: the answer, in every case, depends on the express or imputed effect of the relevant statute. [5.76]

101 Neil and Chin cite the same four authorities that EMHS relies on, set out at [90], but conclude the opposite of EMHS' submission. I respectfully prefer the learned authors' analysis. In this case, whether the industrial agreements' appointment clauses 'override' Dr Sieunarine's ongoing employment contract depends on the effect of s 114 of the IR Act.

102 Section 114 of the IR Act is about whether a right given by statute can be foregone by contract. At its heart, the section is about preventing parties, in particular employees, from surrendering their statutory rights, which set a safety net of minimum conditions and entitlements of employment. In my view, the agreement reached between Dr Sieunarine and EMHS for an ongoing employment contract does not attempt to deny Dr Sieunarine an entitlement under the industrial agreement. It does not enliven s 114 of the IR Act.

103 The 1996 Industrial Agreement that applied when Dr Sieunarine was appointed in 1997 provided at cl 3.2(1)(e):

> … all new appointments will be 5 year fixed term contracts for full time, modified full time, and sessional medical practitioners. Provided that the employer and employee may, by mutual agreement, elect in writing to vary the employee's right to a five (5) year contract for a shorter or longer period.

That is not an obligation of the kind contemplated by s 114. And even if it were, on the evidence I find that EMHS and Dr Sieunarine did, by mutual agreement, elect in writing to vary Dr Sieunarine's right to a five-year contract for a shorter or longer period, by EMHS providing Dr Sieunarine with the offer of employment in the1997 Letter which he accepted.

104 The 1999 Industrial Agreement that applied when Dr Sieunarine was appointed in 2000 provided at cl 20(1):

> All new appointments shall be:
>
> a) on 5 year fixed term contracts (unless there is written agreement to the contrary between the employer and employee); or
>
> b) for specific purposes approved by the Medical Advisory Committee or other appropriate committee.

On the evidence there was a written *offer* to the contrary, evidenced in writing, that Dr Sieunarine accepted. I'm not sure that amounts to a 'written *agreement* to the contrary'. However, I do not consider that the clause refers to an obligation of the kind contemplated by s 114.

105 I do not consider that either of the employment contracts Dr Sieunarine entered into in 1997 or 2000 purports to annul or vary the industrial agreements so as to free or discharge EMHS from an obligation, if it had one, to have appointed Dr Sieunarine on a maximum term contract.

106 Dr Sieunarine's ongoing contract of employment does not, in my view, amount to an attempt to contract out of the industrial agreements. Though the industrial agreement refers to a fixed term contract, in reality it provides for a maximum term contract with the ability for either party to terminate earlier by giving three months' notice. In those circumstances, Dr Sieunarine's ongoing contract provides 'an additional benefit' in the sense contemplated by ***Byrne v Australian Airlines Limited*** at (421), referring to ***Kilminster v Sun Newspapers Ltd*** [1931] HCA 37; (1931) 46 CLR 284. What EMHS did was offer Dr Sieunarine a more beneficial term of employment, being the possibility that the employment relationship could continue beyond the five years provided for in the industrial agreement. Dr Sieunarine accepted that more beneficial term when he accepted the contract. This is consistent with the reasoning of the Full Bench: 'There is nothing to prevent a contract of employment being entered into which contains conditions which are superior to those contained in an award or industrial agreement. This commonly occurs with respect to the payment of wages.': ***The St Cecilia's College School Board v Carmelina Grigson*** [2006] WAIRC 05293; (2006) 86 WAIG 3146, 3156.

107 Section 114 of the IR Act should not be interpreted to prevent parties from contracting on superior terms. If it did, parties would be prevented from agreeing to higher pay rates than those contained in an award or industrial agreement. An ongoing contract of employment is plainly superior to a maximum term contract, in circumstances where both contracts include a three-month notice period. EMHS conceded as much at the hearing.

108 It would seem a very curious and undesirable result if s 114 prevented parties from striking their own superior bargain, such that an otherwise valid contract that is intended by the parties be ongoing comes to an end after five years, regardless of the parties' wishes and in direct conflict with the bargain they struck.

109 If I am wrong about this issue, and in 2000 Dr Sieunarine was appointed on a five-year maximum term contract for the reasons contended by EMHS, which I do not find, that maximum term contract came to an end in November 2005. At that time, the relevant industrial agreement was the 2004 Industrial Agreement. It provided:

> All new appointments shall **usually** be on 5 year contracts (unless there is written agreement to the contrary between the Employer and practitioner). [Emphasis added]

110 I do not consider that wording leads to the conclusion EMHS would have me reach. It is a general principle of statutory construction that all words must be given meaning and effect. This principle is more compelling where the word in question has been added by amendment: Pearce DC and Geddes RS *Statutory Interpretation in Australia* (8th Ed. 2014), 2.26. The addition of the word 'usually' does not mean Dr Sieunarine could only be employed on a five-year maximum term contract. Even on EMHS' arguments, if Dr Sieunarine had a five-year maximum term contract that ended in November 2005, there was no requirement for him to be employed on a maximum term contract when he continued to work for EMHS past that point. It

is clear from the facts that the parties did not agree to his employment in November 2005 being for a maximum term. The industrial agreement is not worded in such a way that the law operates to impose such a term. If Dr Sieunarine had a maximum term contract under the 1999 Industrial Agreement, it was replaced with an ongoing contract of employment when Dr Sieunarine continued to work past November 2005, one which would not have expired and led to any more 'appointments' under the industrial agreements.

Is EMHS estopped or otherwise prevented from maintaining that Dr Sieunarine is a maximum term employee?

111 In its outline of submissions under the heading 'Unconscionable behaviour and estoppel', the AMA suggests it would be unconscionable for EMHS to resile from its consistent representations that Dr Sieunarine was employed on a permanent basis. When pressed at the hearing about whether it asked the Arbitrator to consider an estoppel argument, which I indicated I did not consider had been put, I understood the AMA to abandon arguments about unconscionability and estoppel.

Conclusion

112 Just because an act ought to be done under an award or industrial agreement does not mean that it was done. Here EMHS asks me to declare that Dr Sieunarine was appointed on a series of maximum term contracts in circumstances where there is no evidence that occurred in fact and I do not consider that it occurred by operation of the law.

113 Under the relevant industrial agreements, perhaps EMHS should have offered Dr Sieunarine a five-year maximum term contract in 1997 and 2000 when he was appointed. It did not. Instead it offered Dr Sieunarine an ongoing employment contract. He accepted that offer. EMHS appears not to have complied with the industrial agreements in this regard. But that does not mean that Dr Sieunarine must have been or was employed on a series of five-year maximum term contracts. He simply was not. Dr Sieunarine has been continuously employed by EHMS for over 20 years, first on an ongoing contract formed in 1997 and then on an ongoing contract formed in 2000.

114 I find that at no time since 1997 has Dr Sieunarine been employed by EMHS on a maximum term contract.

115 For these reasons, I will declare that Dr Sieunarine was an ongoing employee as at 6 July 2017 and order that EMHS withdraw its letters dated 1 March, 16 June and 14 November 2016 and ensure that Dr Sieunarine's personnel records reflect his status of an ongoing employee.

2018 WAIRC 00337

DISPUTE RE UNION MEMBER'S EMPLOYMENT STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 5 JUNE 2018
FILE NO.	PSACR 16 OF 2017
CITATION NO.	2018 WAIRC 00337

Result	Declaration and order issued
Representation	
Applicant	Ms J Auerbach (as agent)
Respondent	Mr D Anderson (of counsel) and Ms J Vincent (of counsel)

Declaration and Order

HAVING heard Ms J Auerbach as agent on behalf of the applicant and Mr D Anderson of counsel and Ms J Vincent of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby –

(1) DECLARES that Dr Sieunarine was an ongoing employee as at 6 July 2017.

(2) ORDERS that the respondent withdraw its letters dated 1 March, 16 June and 14 November 2016 and ensure that Dr Sieunarine's personnel records reflect his status of an ongoing employee.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	The North Metropolitan Health Service	Emmanuel C	PSAC 18/2017	04/10/2017	Dispute re union member's leave entitlements	Discontinued
Australian Medical Association (WA) Incorporated	The WA Country Health Service	Emmanuel C	PSAC 8/2017	08/05/2017 23/10/2017	Dispute re employment status	Discontinued
Health Services Union of Western Australia (Union of Workers)	North Metropolitan Health Services	Emmanuel C	PSAC 22/2017	22/11/2017	Dispute re alleged unfair treatment of union member and possible termination	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	Child and Adolescent Health Service	Emmanuel C	C 12/2018	13/04/2018 13/04/2018	Dispute re union member's employment	Discontinued
The Civil Service Association of Western Australia (Incorporated)	Commissioner of Corrective Services	Matthews C	PSAC 9/2017	22/05/2017 26/05/2017 13/10/2017	Dispute re return to work of union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Western Australia Police	Kenner SC	PSAC 14/2017	21/06/2017 09/10/2017 23/03/2018	Dispute re employment status	Discontinued
The Civil Service Association of Western Australia Incorporated	Dr Adam Tomison Director General Department of Justice	Matthews C	PSAC 4/2018	N/A	Dispute re non-custodial staff not included in PSC exemption	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, Department of Education	Matthews C	C 25/2017	06/09/2017 12/10/2017	Dispute re alleged unfair disciplinary process	Discontinued
Western Australian Police Union of Workers	Commissioner of Police	Kenner SC	PSAC 12/2017	21/06/2017	Dispute re rostering practices	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00327

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2018 WAIRC 00327
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 22 MAY 2018
DELIVERED	**:**	WEDNESDAY, 30 MAY 2018
FILE NO.	**:**	APPL 86 OF 2017
BETWEEN	**:**	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
		Applicant
		AND
		SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH
		Respondent

CatchWords	:	Intervener – Application to dismiss substantive application – Scope of intervention
Legislation	:	*Industrial Relations Act 1979* (WA) s 26(1), s 27(1)(a), s 27(1)(a)(iv), s 27(1)(j), s 46, s 83
Result	:	Intervener's application dismissed
Representation:		
Applicant	:	Mr D Rafferty (of counsel)
Respondent	:	Mr N Tindley (of counsel)
Intervener	:	Mr A Drake-Brockman (as agent)

Case(s) referred to in reasons:

Collie District Deputies' Union of Workers v Coal Miners' Industrial Union of Workers of Western Australia; Griffin Coal Mining Company Limited and Western Collieries Limited (1988) 68 WAIG 1708

Re Ludeke; Ex parte Customs' Officers Association of Australia, Fourth Division (1985) 155 CLR 513

Reasons for Decision

1 The Shop, Distributive and Allied Employees' Association of Western Australia (**SDA**) filed a notice of application for a declaration that the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (**Shop Award**) applies to all workers employed in the pharmacy and chemist shop industry. That application is APPL 86 of 2017.

2 Mr Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth filed a notice of answer to APPL 86 of 2017, saying the award does not apply to pharmacy assistant employees.

3 The Commission granted the Pharmacy Guild of Western Australia Organisation of Employers (**PGWA**) leave to intervene in APPL 86 of 2017 because its members are affected by, and have sufficient interest in, these proceedings. Leave was granted so that the PGWA be given a full and fair opportunity to be heard. The terms of the intervention are further set out in the directions issued on 14 February 2018 (and amended on 4 May 2018) (**Directions**), which include the PGWA filing a notice of answer, outlines of evidence, documents and outlines of written submissions.

4 The SDA and the PGWA have been negotiating since 2014 for a proposed award that would apply to pharmacy assistants. In May 2014 the PGWA filed a notice of application for a new award to be known as the 'Western Australian Pharmacy Assistants Award 2014'. That application is A 1 of 2014. The SDA's notice of answer opposed A 1 of 2014 on the basis that the Shop Award already covers pharmacy assistants.

5 The PGWA wrote to the Commission in January 2018 to ask that the Commission deal with A 1 of 2014 before APPL 86 of 2017. The parties to A 1 of 2014 provided the Commission with their views about that request. The Commission considered those views and informed the parties that, in the circumstances, the Commission considered it appropriate to deal with APPL 86 of 2017 before A 1 of 2014. The PGWA asked for written reasons to be provided. My Associate informed the PGWA that reasons for decision would be provided if it made a formal application.

6 In April 2018, the PGWA made an application as an intervener in APPL 86 of 2017 for orders that APPL 86 of 2017 be 'dismissed or alternatively be adjourned sine die' (**PGWA's Application**).

7 In summary, the SDA says the Commission should dismiss the PGWA's Application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) because it is outside the terms on which leave to intervene was granted.

What must be decided

8 I must decide whether to hear the PGWA's Application or dismiss it.

The PGWA's arguments

9 The PGWA says it seeks to raise important preliminary issues. Even though the PGWA is not a party to the matter, it has a direct and sufficient interest. It says the SDA has demonstrated no unfairness or prejudice and the authorities cited by the SDA are not relevant.

10 The PGWA argues there is no rule that an intervener must run the same case as a party or raise the same issues.

11 The PGWA says the Commission's power under s 46 of the IR Act is a discretionary power and it is for the SDA to satisfy the Commission that it should exercise its jurisdiction to make the declaration sought. The PGWA argues that the declaration sought by the SDA in APPL 86 of 2017 would go 'behind the plain words of the provisions of the current award, and beyond the jurisdiction conferred by s 46 [of the IR Act].'

12 The PGWA says as a matter of industrial fairness the Commission should dismiss or adjourn APPL 86 of 2017 for two reasons. First, the dispute in APPL 86 of 2017 relates to a particular employee and her rate of pay. The PGWA says that 'the determination of whether a particular employee has an entitlement pursuant to the provisions of an award is an issue of enforcement. The Industrial Magistrate has exclusive jurisdiction to determine issues concerning enforcement, pursuant to the powers conferred by s 83 [of the IR Act].' Because of that, the question about the true interpretation of the Shop Award should not be dealt with under s 46 of the IR Act. Second, the PGWA says the negotiations in the related application, A 1 of 2014, were 'pre-emptively terminated' by the SDA because of the dispute in APPL 86 of 2017.

13 The PGWA asks that APPL 86 of 2017 be dismissed or adjourned sine die to give the PGWA the opportunity to 'apply for relief in an appropriate court' in relation to the issues outlined at [11] and [12].

14 The PGWA argues a full and fair opportunity to be heard in APPL 86 of 2017 includes making the PGWA's Application. It would be inappropriate to leave preliminary issues to a substantive hearing where, if the PGWA's Application is upheld, there would be no need for a substantive hearing. In short, the PGWA says APPL 86 of 2017 seeks an interpretation of the IR Act and enforcement of a particular employee's entitlements, both of which are outside the power conferred on the Commission by s 46 of the IR Act. The Commission should therefore dismiss APPL 86 of 2017.

The SDA's arguments

15 The SDA says the PGWA was joined to APPL 86 of 2017 as an intervener on the basis that it be given a full and fair opportunity to be heard. However, the SDA says the PGWA now seeks to depart from its role of intervener and is purporting to act as a party principal to the application. Because the PGWA did not seek leave to make its application, the SDA says the PGWA's Application should be summarily dismissed pursuant to s 27(1)(a)(iv) of the IR Act.

16 The SDA says leave was granted to the PGWA to intervene because of its knowledge of the retail pharmacy industry in Western Australia and because its members may be affected by the outcome of APPL 86 of 2017.

17 According to the SDA, it did not oppose the PGWA's request to intervene because the PGWA said it was seeking a 'full and fair opportunity to be heard'. The SDA says it had understood the scope of such intervention to be limited to the Directions, under which the PGWA was given the opportunity to a file:

a. a notice of answer to the substantive application;

b. an outline of evidence and documents; and

c. written submissions.

18 The SDA says a generous interpretation of the Directions means the Commission also contemplates the PGWA participating in the preparation of any statement of agreed facts and bundle of agreed documents, as well as appearing at any hearing listed in APPL 86 of 2017. The Commission has not, however, granted the PGWA leave to make an application in relation to APPL 86 of 2017.

19 The SDA, relying on ***Collie District Deputies' Union of Workers v Coal Miners' Industrial Union of Workers of Western Australia; Griffin Coal Mining Company Limited and Western Collieries Limited*** (1988) 68 WAIG 1708, says that while a party has the right to invoke the jurisdiction of a tribunal, an intervener only has the right to be heard once the jurisdiction has been invoked: '…the latter, who was granted a right to be heard so that the Tribunal may inform itself, remains an intervener, unless joined to proceedings by specific statutory provision.'

20 The SDA says the PGWA is not a party to the proceedings in APPL 86 of 2017 because it has not been joined as a party pursuant to s 27(1)(j) of the IR Act.

21 Therefore, the SDA says the PGWA's participation in the proceedings of APPL 86 of 2017 should be confined to participating and being heard in accordance with the Directions. Given the PGWA has not sought leave to make its application of 4 April 2018, the SDA says it should be summarily dismissed.

22 Further and alternatively, the SDA says the PGWA's Application should be summarily dismissed because it has no reasonable prospects of success.

23 While the SDA acknowledges APPL 86 of 2017 arose out of the alleged underpayment of a particular employee, the SDA says that since then it has become clear that this is a potentially widespread issue across all Chemist Warehouse stores in Western Australia. Therefore, this is a matter of public interest that requires an interpretation under s 46 of the IR Act.

24 The PGWA's Application suggests that the declaration sought by the SDA in APPL 86 of 2017 would require going beyond the plain words of the provisions of the current Shop Award, and it says that 'when the meaning of language read in its ordinary and natural sense is clear, it is neither necessary, nor even permissible to look to the intention (subjective or objective) of the parties.'

25 The SDA says the issues raised by the PGWA in relation to s 46 and s 83 of the IR Act should properly be dealt with as part of the substantive proceedings of APPL 86 of 2017. It says the purpose of intervention is to 'ensure that all interested parties will participate in a single resolution of a controversy instead of being relegated to a resolution of the controversy in several proceedings.' (***Re Ludeke; Ex parte Customs Officers' Association of Australia, Fourth Division*** (1985) 155 CLR 513, 527). Dealing with the PGWA's concerns as part of an interlocutory application would cause the substantive proceedings to be broken into parts, which is 'inefficient, burdensome and unnecessary.'

26 Finally, the SDA says the PGWA's submission that it would like the opportunity to 'apply for relief in an appropriate court in relation to the matters raised' should be disregarded because there are no other proceedings on foot.

27 The SDA says the Commission has given the PGWA reasonable opportunities to present its case. The Commission can and should protect the primacy of the parties to these proceedings by summarily dismissing the PGWA's Application which was made without leave.

Consideration

28 The PGWA is not a party to these proceedings. It is an intervener. Leave to intervene in APPL 86 of 2017 was granted on the basis that the PGWA be afforded a full and fair opportunity to be heard. The opportunity to be heard is in relation to the SDA's application for a declaration. I have already directed how that will occur and it is as set out in the Directions. Those are the terms of the PGWA's intervention. Participation outside of those terms would require leave, which was not sought before making the application.

29 I am not persuaded that leave should now be granted to hear the PGWA's Application.

30 In essence, the PGWA argues that the matters it raises are preliminary ones and should be dealt with first, because if the PGWA is successful, there will be no need for further hearing.

31 That the circumstances leading to the SDA making its application under s 46 of the IR Act for an interpretation of the Shop Award happen to relate to a particular employee does not necessarily mean that the SDA's application is a claim for enforcement that ought to have been made under s 83 of the IR Act. I consider that the matters the PGWA seeks to raise in relation to s 46 and s 83 of the IR Act are inexorably part of the substantive matter. It is appropriate for the expeditious and just hearing of APPL 86 of 2017 to consider those matters at the substantive hearing. The PGWA will have a full and fair opportunity to be heard in accordance with the terms on which intervention was granted.

32 For these reasons, and taking into account the obligation to exercise the Commission's jurisdiction in accordance with s 26(1) of the IR Act, I will dismiss the PGWA's application to dismiss or adjourn APPL 86 of 2017.

2018 WAIRC 00336

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 1 JUNE 2018
FILE NO/S	APPL 86 OF 2017
CITATION NO.	2018 WAIRC 00336

Result	Intervener's application dismissed
Representation	
Applicant	Mr D Rafferty (of counsel)
Respondent	Mr N Tindley (of counsel)
Intervener	Mr A Drake-Brockman (as agent)

Order

HAVING heard Mr D Rafferty on behalf of the applicant, Mr N Tindley on behalf of the respondent and Mr A Drake-Brockman on behalf of the intervener, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the Pharmacy Guild of Western Australia Organisation of Employers' application for orders that APPL 86 of 2018 be dismissed or adjourned sine die be, and by this order is, dismissed.

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

2018 WAIRC 00314

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 22 MAY 2018
FILE NO/S	APPL 86 OF 2017
CITATION NO.	2018 WAIRC 00314

Result	Order issued
Representation	
Applicant	Mr D Rafferty (of counsel)
Respondent	Mr N Tindley (of counsel)
Intervener	Mr A Drake-Brockman (as agent)
Minister for Commerce and Industrial Relations	Mr R Andretich (of counsel)

Order

WHEREAS the Shop, Distributive and Allied Employees' Association of Western Australia filed a notice of application on 3 November 2017 for a declaration that the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (**Award**) applies to all to retail pharmacy workers employed in any callings mentioned in the Award;

AND WHEREAS Mr Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth filed a notice of answer saying the Award does not apply to retail pharmacies or their employees;

AND WHEREAS on 12 December 2017 the Pharmacy Guild of Western Australia Organisation of Employers (**Intervener**) was granted leave to intervene;

AND WHEREAS on 17 May 2018 the Minister for Commerce and Industrial Relations (**Minister**) gave notice of his intention to intervene to the Registrar under s 30(1) of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS the Minister seeks to leave to intervene because he says this application raises a significant issue about the effect, if any, of a change of respondency to an award and the principles to be applied when considering that issue. The outcome of the decision in this matter will potentially affect the application of other awards. Further, the Minister is responsible for the department that provides advice in relation to awards and prosecutes breaches of awards. The Minister is also responsible for the administration of the IR Act. Unlike the parties and the Intervener, the Minister is not partisan and merely seeks an opportunity to be heard in relation to the proper principles to be considered by the Commission in this matter. Accordingly, the Minister says he has an interest in the proceedings and should be granted leave to intervene;

AND WHEREAS the applicant does not oppose the Minister's intervention, the respondent says it is not clear why the Minister would have an interest in the proceedings and the Intervener opposes the Minister's intervention because it says the Minister lacks a direct interest in the proceedings;

AND WHEREAS the Commission accepts the Minister's submissions and in the circumstances and given the Minister's responsibilities, the Commission is satisfied that the Minister has an interest in the proceedings;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders -

THAT the Minister for Commerce and Industrial Relations be granted leave to intervene on behalf of the State in application APPL 86 of 2017.

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

2018 WAIRC 00360

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA **APPLICANT** **-v-** SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH **RESPONDENT**
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 13 JUNE 2018
FILE NO.	APPL 86 OF 2017
CITATION NO.	2018 WAIRC 00360

Result	Correction order issued
Representation	
Applicant	Mr D Rafferty (of counsel)
Respondent	Mr N Tindley (of counsel)
Intervener	Mr A Drake-Brockman (as agent)

Correction Order

WHEREAS on 1 June 2018, [2018] WAIRC 00336 was deposited in the Office of the Registrar;

AND WHEREAS the Commission has identified a typographical error in the document;

AND WHEREAS the parties and intervener have agreed in writing that an error was made;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), substitutes the words

'*APPL 86 of 2017*' for the words '*APPL 86 of 2018*' in [2018] WAIRC 00336.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Dental Health Services - Dental Technicians - CSA Industrial Agreement 2018 PSAAG 4/2018	05/28/2018	North Metropolitan Health Service	The Civil Service Association of Western Australia Incorporated	Commissioner T Emmanuel	Agreement registered
Electorate and Research Employees CSA General Agreement 2017 PSAAG 7/2018	06/12/2018	The President of the Legislative Council	(Not applicable)	Commissioner D J Matthews	Agreement registered
Main Roads - CSA - Enterprise Agreement 2018 PSAAG 5/2018	06/08/2018	Commissioner of Main Roads, Main Roads Western Australia, The Civil Service Association of Western Australia Incorporated	(Not applicable)	Commissioner T Emmanuel	Agreement registered
Main Roads AWU Enterprise Bargaining Agreement 2018 AG 7/2018	06/14/2018	Commissioner of Main Roads	(Not applicable)	Commissioner D J Matthews	Agreement Registered
Parliamentary Employees General Agreement 2017 PSAAG 3/2018	05/09/2018	The President of the Legislative Council and the Speaker of the Legislative Assembly, Civil Service Association of Western Australia Incorporated, United Voice	(Not applicable)	Senior Commissioner S J Kenner	Agreement registered
School Education Act Employees' (Teachers and Administrators) General Agreement 2017 - The AG 10/2018	06/13/2018	Director-General, Department of Education	State School Teachers' Union of W.A. (incorporated)	Commissioner D J Matthews	Agreement Registered

NOTICES—Appointments—

2018 WAIRC 00347

APPOINTMENT

PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of The Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(3) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Acting Senior Commissioner SJ Kenner to be the Public Service Arbitrator for a period of two years from 27 June 2018.

Dated the 6 June 2018.

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

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

2018 WAIRC 00356

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. *A S Built Constructions Industrial Agreement*
2. *A.B. Tilbury Pty Ltd Enterprise Bargaining Agreement 2004 – 5*
3. *ABB Installation and Service Pty Limited Railway Pedestrian Crossings Installation Project Agreement 1995*
4. *ABB Installation and Service Pty Ltd (Western Region) Enterprise Bargaining Agreement*
5. *ABB Transmission and Distribution Limited, Distribution Transformer Division, WA Operations (Enterprise Bargaining Agreement 1996)*
6. *ACI Plastics Packaging Welshpool Enterprise Agreement 2002*
7. *Action Ceilings Industrial Agreement*
8. *Activ Foundation Inc (Enterprise Agreement) 1994*
9. *Activ Foundation Supported Employees Wages Agreement 2004*
10. *Advance Ceilings Industrial Agreement*
11. *Advantage Glass Industrial Agreement*
12. *Alan Croll Roofing Industrial Agreement*
13. *All Personnel - TWU Enterprise Bargaining Agreement 2001*
14. *Amatek Ltd Enterprise Agreement 1996*
15. *AMEC Australia Pty Ltd Enterprise Agreement 1996*
16. *Arnott's Biscuits S.D.A. – TWU Agreement 2003*
17. *Association for Christian Education Inc. (Enterprise Bargaining) Agreement 1998*
18. *Association of Independent Schools of Western Australia Clerical Officers (Enterprise Bargaining) Agreement 1998*
19. *Australasian Foundries Pty Ltd Enterprise Bargaining Agreement No. 125 of 1994*
20. *Australian Municipal, Administrative, Clerical and Services Union of Employees – Western Australian Clerical and Administrative Branch and Bakewell Foods Pty Ltd Supported Wages System Agreement 2002*
21. *Australian Red Cross (Western Australian Division) Headquarters Enterprise Agreement 1996*
22. *AWU - Fremantle Bowling Club Enterprise Bargaining Agreement 1995*
23. *AWU Jobskills "K" newgrowth Agreement 1995, No. AG 2 of 1995*
24. *AWU Jobskills Trainee Agreement 1995*
25. *B & L Formwork Industrial Agreement*
26. *B. Kernaghan & Co Industrial Agreement*
27. *Bains Harding Industries (Western Power - Muja) Enterprise Bargaining Agreement 1998*
28. *Bakewell Foods Pty Ltd-ALHMWU Supported Wages System Agreement 2003*
29. *Beaufort College Enterprise Bargaining Agreement 1998*
30. *Beenyup WWTP, (O'Donnell Griffin) Certified Agreement 2003*
31. *Bells Thermalag & Industrial Services Asbestos Eradication Industrial Agreement*
32. *Benem Cabinet Industrial Agreement*
33. *Bentley Crane Hire / BLPPU & CMETU Collective Agreement 2001*
34. *Berri Limited (Balcatta Plant) Enterprise Agreement 2004*
35. *Beton Contractors Industrial Agreement*
36. *BHP Building Products Myaree Enterprise Agreement 2000/2001*
37. *BHP Cadjebut Enterprise Bargaining Agreement 1993*
38. *BHP Steel Transport & Logistics, Kwinana Logistics Terminal Enterprise Agreement 2003*
39. *Bindoon Tiling Industrial Agreement*
40. *Blowflex Moulding PTY LTD, Western Australian Enterprise Bargaining Agreement 2001*
41. *Blue Steel / BLPPU and the CMETU Collective Agreement 2001*
42. *Bluescope Steel Myaree Service Centre Closure Agreement 2004-7*
43. *BMB Scaffold Industrial Agreement*
44. *BOC Limited Perth Operations Centre (Canning Vale) Agreement (2004)*
45. *Boodarie Iron - Port Hedland Operations Industrial Agreement 2003*
46. *Boral Building Services Industrial Agreement*

47. *Boral Quarries (Enterprise Bargaining) Consent Agreement,1994*
48. *Boral Resources (WA) Ltd (Trading as Boral Quarries) Enterprise Bargaining Agreement 1999*
49. *Boral Transport Mechanics Enterprise Bargaining Agreement 2003*
50. *BP Refinery Kwinana Pty Ltd Site Agreement 1994*
51. *Brad Brick Bricklaying Industrial Agreement*
52. *Bradken Perth, Western Australian Enterprise Bargaining Agreement 1995*
53. *Bradken Perth, Western Australian Machineshop (Enterprise Bargaining) Agreement No AG 69 of 1993*
54. *Bradken Resources Pty Ltd - Western Australia-Welshpool Enterprise Bargaining Agreement 2006*
55. *Brady's Building Products (Enterprise Bargaining) Agreement 1999*
56. *Brambles Western Australia - Placer (Granny Smith) Operation Gold Mining and Processing Agreement 1996*
57. *Bridge House - Salvation Army Agreement 2002*
58. *Brightwater Care Group Incorporated Hospital Salaried Officers Enterprise Agreement 2004*
59. *Bristile Clay Tiles Enterprise Agreement 1995*
60. *Bristile Clay Tiles Maintenance Enterprise Agreement 1994*
61. *Bristile Clay Tiles Production Enterprise Agreement 1994*
62. *Brownbuilt Metalux Industries Redundancy Agreement 1998-1999*
63. *Brownbuilt Pty Ltd, Welshpool, WA Agreement 2006*
64. *Brownes Dairy North Perth (Enterprise Bargaining) Agreement 1996*
65. *Brownes Dairy North Perth Clerical (Enterprise Bargaining) Agreement No. AG 193 of 1994*
66. *BT Tritech Electrical Enterprise Bargaining Agreement 2005*
67. *Building Security Management Services Enterprise Bargain Agreement 2005*
68. *Bulong Nickel Project Construction Agreement 1997-1998 (AFMEPKIU/CEPU)*
69. *Bunbury Cathedral Grammar School (Non-Teaching Staff Enterprise Bargaining) Agreement 2004*
70. *Bunnings Forest Products Pty Ltd (Enterprise Bargaining) Agreement 1998*
71. *Burswood Resort Casino (Electronic Servicepersons) Enterprise Agreement No. AG 1 of 1993*
72. *Burswood Resort Casino (Maintenance Employees) Enterprise Agreement No. AG 2 of 1993*
73. *Buttercup Bakeries (WA) Enterprise Agreement 1997*
74. *Buttercup Bakeries Malaga (WA) Breadroom, Distribution and Maintenance Enterprise Agreement 2005*
75. *C & S Perrot Industrial Agreement*
76. *C S Perrott Industrial Agreement*
77. *Cambridge Private Hospital HSOA Enterprise Agreement 2003*
78. *Capel Dairy Co. Enterprise Agreement 1994*
79. *Cargill Australia Limited Enterprise Bargaining Agreement 1993*
80. *Cargill Salt (A Department of Cargill Australia Limited) Enterprise Bargaining Agreement 1999*
81. *Carrier-apac Manufacturing (WA) Enterprise Bargaining Agreement 2003*
82. *Cascade Services Pty Ltd Industrial Agreement*
83. *Cavlec Electrical Engineering Services Pty Ltd Enterprise Bargaining Agreement*
84. *Cawse Nickel Project Construction Agreement 1997-1998*
85. *CBH North Fremantle Maintenance Employees Partnership (Enterprise Bargaining) Agreement 1996*
86. *CBI Constructors Pty Ltd - Kwinana (Enterprise) Industrial Agreement 1996*
87. *CC Cabling Pty Ltd Enterprise Bargaining Agreement 2004*
88. *CCA (WA) Operations (Kewdale) Enterprise Agreement*
89. *Celtic Scaffolding/BLPPU Collective Agreement 2000*
90. *Centre Ceilings Wall and Ceiling Industrial Agreement*
91. *Cerebral Palsy Association of Western Australia Ltd. Salaried Staff Enterprise Agreement 2004*
92. *Cerebral Palsy Association of Western Australia Ltd. Supported Employees Industrial Agreement 2004*
93. *Cervantes Electrics Pty Ltd (Maintenance Operations) Enterprise Bargaining Agreement 1997*
94. *Cervantes Electrics Pty Ltd Enterprise Bargaining Agreement*
95. *Challenge Cabinets/BLPPU and the CMETU Collective Agreement 2001*
96. *Chiquita Mushrooms Pty Ltd Western Australian Mushroom Production Agreement 2004*
97. *City of Cockburn (Building & Engineering) Enterprise Agreement 1997*
98. *City of Perth (Outside Workforce) Agreement 2005*
99. *City of Perth Combined Trades Area Enterprise Agreement*
100. *City of Stirling Transport Sections Consent Agreement 1994*
101. *City of Swan (Trades) Enterprise Bargaining Agreement*
102. *City of Wanneroo Fleet Maintenance Unit Consent Agreement 1996*
103. *City of Wanneroo, Fleet Maintenance Services Bargaining Agreement 2001-2004*

104. *Cityfleet Employees Industrial Agreement Number (3)*
105. *Cleanaway Technical Services Forrestdale Enterprise Bargaining Agreement 1994 – The*
106. *Clear Cut Chasing Pty Ltd/CFMEUW Industrial Agreement 2002-2005*
107. *Clerks' (Commercial, Retail, Wholesale, Hotels and Motels Clerical Industrial Traineeships) Agreement, AG 7 of 1988*
108. *Clerks' (Commercial, Retail, Wholesale, Hotels and Motels Clerical Industrial Traineeships) Agreement, AG 8 of 1988*
109. *Clerks' (Commercial, Social and Professional Services) Award Industrial Agreement*
110. *Clerks' (Wholesale & Retail Establishments) Award Industrial Agreement Clerks' Grain Handling Enterprise Agreement 1996*
111. *Clough WA (Kewdale) Enterprise Bargaining Agreement No. AG 282 of 1998*
112. *Coates Hire Enterprise Bargaining Agreement 2000*
113. *Coca-Cola Bottlers, Perth (Performance Improvement) Enterprise Bargaining Agreement 1992 No. AG 3 of 1993*
114. *Cockburn Cement Limited (Enterprise Bargaining) Agreement 1998*
115. *Cockburn Cement Limited (Enterprise Bargaining) Agreement (November) 2004*
116. *Cockburn Hire Transport Enterprise Agreement*
117. *Coflexip Stena Offshore Asia Pacific Pty Ltd Industrial Agreement 1997*
118. *Co-Generation Power Station Project Agreement 1995*
119. *Co-Generation Power Station Project Agreement 1995, AG 86 of 1996*
120. *Collect Electrical Construction Division Enterprise Bargaining Agreement 2004*
121. *ColourPress Electrical and Engineering Employees (Enterprise Bargaining) Agreement 2003*
122. *Com A1 Windows Pty Ltd Agreement 1999*
123. *Commercial Tile Contractors/CFMEUW Industrial Agreement 2002-2005*
124. *Community Newspaper Group Ltd Editorial Enterprise Agreement 1999*
125. *Conduct Electrical Pty Ltd Enterprise Bargaining Agreement 2004*
126. *Construction Worker Level 1 (Structures) Swan Valley Nyungah Community Traineeship Agreement 1997*
127. *Cooktown Constructions Industrial Agreement*
128. *Co-operative Bulk Handling Limited District Maintenance Employees Enterprise Partnership Agreement 2003*
129. *Co-Operative Bulk Handling Limited Roving Crew Maintenance Enterprise Partnership Agreement 2003*
130. *Cornerstone Cartage Pty Ltd and Transport Workers Union Enterprise Agreement 2004*
131. *Coventry Group Ltd trading as Hot Mix or Bitumen Emulsions Cannington (Enterprise Bargaining) Agreement 2002*
132. *Coventrys - Transport Division Enterprise Bargaining Agreement 2002*
133. *Creative and Therapy Activities Disabled Group Inc Enterprise Bargaining Agreement 2002*
134. *Creative and Therapy Activities Disabled Group Inc. Enterprise Bargaining Agreement 2000*
135. *CSR Building Products (WA) Enterprise Agreement 2003*
136. *CSR Gyprock Bradford Ltd (WA) Enterprise Agreement,1995*
137. *CSR Humes Welshpool Enterprise Agreement November 1994/1995*
138. *CTC Electrical & Security Enterprise Bargaining Agreement 2004*
139. *CTS Mechanical and Electrical Enterprise Bargaining Agreement 2002*
140. *Culunga Aboriginal Community School (Enterprise Bargaining) Agreement 2004*
141. *CVP Electrical Co Ltd Enterprise Bargaining Agreement 2004*
142. *D & G Projects Asbestos Eradication Industrial Agreement*
143. *D.P. Mckenna Pty Ltd Construction Division Enterprise Bargaining Agreement 2004-2005*
144. *Dairy Industry Authority of Western Australia Enterprise Agreement 1997*
145. *Data Cabling Systems WA Pty Ltd Construction Division Enterprise Bargaining Agreement 2004-2005*
146. *Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Agreement 1996 Amendment Agreement 2001*
147. *Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 1996 Amendment Agreement 2001(A)*
148. *Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 1996 Amendment Agreement, 1999*
149. *Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 1996 Amendment Agreement, 1998*
150. *Dawson AOC Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement, 1996*
151. *Deep Green/CFMEUW Industrial Agreement 2005 – 2008*
152. *Delta Corporation Ltd, Enterprise Bargaining Agreement 1996*
153. *DESAIR & AMWU, Malaga, Sheet Metal Enterprise Bargaining Agreement 2006*
154. *Direct Engineering Services, Malaga, Sheet Metal Enterprise Bargaining Agreement 2003*
155. *Distribution Technology Systems Pty Ltd Enterprise Bargaining Agreement 2004-2005*
156. *Djooraminda Cottage Carers' Industrial Agreement 2004*

157. *DMR Plastering Contractors Industrial Agreement*
158. *Dongara Cockburn Cement Enterprise Bargaining Agreement 2004*
159. *Dongara Demolition Industrial Agreement*
160. *Dorma Auto Door Systems Enterprise Bargaining Agreement 2005*
161. *DR & J Building Industrial Agreement*
162. *Du Feu Metal Enterprise Bargaining Agreement 1995*
163. *Dudley Agreement (Industrial Agreement) 1995*
164. *Dyno Industries (WA) Pty Ltd (DIWA) Enterprise Bargaining Agreement 1999*
165. *Dyno Industries (WA) Pty Ltd (DIWA) Enterprise Bargaining Agreement 2001*
166. *E. D. Oates Pty Ltd Brushware Manufacturing Enterprise Bargaining Agreement 2005*
167. *E.P.T. Pty Ltd Nelson Point Development Project (Enterprise Bargaining) Agreement AG 18 of 1993*
168. *East Spar Project (Varanus Island) Agreement 1996*
169. *Eastport / BLPPU and the CMETU Collective Agreement 2001*
170. *Easypave Pty Ltd Industrial Agreement*
171. *Edge Maintenance Services Pty. Ltd. Industrial Agreement*
172. *Edgell-Birds Eye Manjimup Production Centre (Enterprise Bargaining) Agreement 1992*
173. *Electrical Construction and Maintenance Australia Pty Ltd Enterprise Bargaining Agreement*
174. *Electro Acoustic Construction Division Enterprise Bargaining Agreement 2004*
175. *Electrolux Home Products - Spare Parts and Service Belmont W.A. Enterprise Agreement 2001*
176. *Elevator Technologies Australia Pty Ltd Enterprise Agreement 2001*
177. *Eltech Services Pty Ltd Enterprise Bargain Agreement 2005-2006*
178. *Eltin Boddington Gold Mine Agreement 1999*
179. *Eltin Hedges Gold Mine Agreement 1997*
180. *Eltin Limited Hedges Gold Mine Maintenance Agreement*
181. *Email Limited (Major Appliance Consumer Service Division WA) Enterprise Agreement 1992*
182. *Email Limited Major Appliance Division Consumer Service Division (WA) Redundancy Agreement 1998*
183. *Email Major Appliances- Belmont Service Clerical and Shop Assistants Enterprise Agreement 2000*
184. *Enrolled Nurses and Nursing Assistants (Next Step Specialist Drug and Alcohol Services) Enterprise Agreement 1999*
185. *Ensign Customer Service Representative 2004-2006*
186. *Ethnic Child Care Resource Unit (ECCRU) Enterprise Bargaining Agreement 2004*
187. *Everett-Smith & Co Enterprise Bargaining Agreement*
188. *Executive Paving Industrial Agreement*
189. *Faulding Healthcare (Western Australia) Clerical & Administrative Agreement 1999*
190. *Festive Poultry Limited Enterprise Bargaining Agreement 1996*
191. *Fill-Crete WA/BLPPU and the CMETU Collective Agreement 2000*
192. *Firemain Co Contracting Commercial Building Sector Enterprise Agreement 2004*
193. *Firemain Electrical Service Enterprise Agreement – Perth*
194. *Fleet Maintenance Services Certified Agreement 2004*
195. *Floripa Technologies Construction Division Enterprise Bargaining Agreement 2004*
196. *Foodland Associated Limited Cold Store Maintenance Employees Enterprise Bargaining Agreement 1995, No. AG 138 of 1995*
197. *Forrestfield CBH Grain Silo Construction Project Agreement 1996*
198. *Foster's Australia North Fremantle Agreement 2006*
199. *FPU and Peters (WA) Ltd Balcatta Production Employees' Traineeship Agreement, No 262 of 1996*
200. *Frank Peter Longshaw Industrial Agreement*
201. *Fred Mason Contract Bricklayers Industrial Agreement*
202. *Fusion Recruitment Group - TWU Enterprise Bargaining Agreement 2006*
203. *G Construction Engineering Industrial Agreement*
204. *G.N. Conform Industrial Agreement*
205. *Gadsden Rheem (W.A.) Enterprise Agreement*
206. *Garland Ellas Taylor Pty Ltd Enterprise Bargaining Agreement.*
207. *Gascoyne Trading Workshop Enterprise Bargaining Agreement 1994*
208. *GEC Avery Australia Limited Enterprise Bargaining Agreement 1995*
209. *Geraldton Brickworks Pty Ltd Enterprise Agreement 2000*
210. *Geraldton Harbour Master-Marine Pilots Salary Agreement 1996 – The*
211. *Gilbarco Aust. Ltd (Perth) Agreement 1994*
212. *Gilbarco Aust. Ltd. (Western Australian Branch) Registered Agreement 1998*

213. *Global Electrontech Constructions Pty Ltd Commercial Enterprise Bargaining Agreement 2003*
214. *Golden Egg Farms' (Food Preservers) Agreement 2005*
215. *Goninan WA Division Bassendean Enterprise Bargaining Agreement No. AG 48 of 1993*
216. *Good Samaritan Industries (State) Industrial Agreement 2003*
217. *Good Samaritan Industries Supported Employees Industrial Agreement of 2004*
218. *Goodman Fielder Consumer Foods Ltd (Western Australia) Enterprise Agreement 2004*
219. *Graceville Women's Centre - Salvation Army Industrial Agreement 2002*
220. *Grain Handling (Maintenance Workers) Enterprise Agreement 1994*
221. *Grant Electrical Industries Pty Ltd Enterprise Bargaining Agreement No. AG 60 of 1993*
222. *Greenbushes Mine Maintenance (Enterprise Bargaining) Industrial Agreement 1993*
223. *Gromark Packaging Pty Ltd Kewdale Plant Enterprise Agreement 1995*
224. *Group Training-Perth (Inc) Agreement 1998*
225. *Guildford Grammar School Enterprise Bargaining Agreement 1996*
226. *Gunns Limited Enterprise Agreement 2004*
227. *Hairdressing SDA - Carl Ridolfo Pty Ltd T/A Carl Ridolfo Hair Design Enterprise Agreement 2000*
228. *Hairdressing SDA - Cheveux by Anthony Pty Ltd T/A Cheveux by Anthony Enterprise Agreement 2000*
229. *Hairdressing SDA - Coffiano Holdings Pty Ltd T/A Studio Picasso Enterprise Agreement 2000*
230. *Hairdressing SDA - Grand Court Corp Pty Ltd Enterprise Agreement 2000*
231. *Hairdressing SDA - Joanne Steel T/A Jo's for Hair Enterprise Agreement 2000*
232. *Hairdressing SDA - Judith Clarke t/a Distinctions Hair Design Enterprise Agreement 2000*
233. *Hairdressing SDA - Luciano's Hair Fashion for Men Enterprise Agreement 2000*
234. *Hairdressing SDA - Starra Pty Ltd T/A Diva Hair Studio & Sinatra's for Hair*
235. *Halliburton KBR Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 2002*
236. *Hammer Outdoor Design Industrial Agreement*
237. *Hardie Iplex Pipeline Systems - Osborne Park (Enterprise Bargaining) Agreement 1993*
238. *Healthcare Linen Pty Ltd Engineering Enterprise Agreement 1996*
239. *Heat Containment Industries Enterprise Agreement 1993*
240. *Hedland Bus Lines Enterprise Agreement 1994*
241. *Hi Tec Demolition Industrial Agreement*
242. *Hollywood Private Hospital (HSOA) Enterprise Agreement 2000*
243. *Horticultural Career Start Traineeship Industrial Agreement 1995*
244. *Hospital Salaried Officers (Attadale Hospital) Enterprise Bargaining Agreement 1997*
245. *Hospital Salaried Officers (Mayne WA Hospitals) Enterprise Bargaining Agreement 2003*
246. *Hospital Salaried Officers Joondalup Health Campus Enterprise Bargaining Agreement 1996*
247. *Hospitality Industry - Australian Hotels Association (WA Branch - Accommodation Division) Industrial Agreement 2000*
248. *Hot Briquetted Iron Project Agreement*
249. *Howard Porter Pty Ltd Enterprise Bargaining Agreement 2001*
250. *Huhtmaki Australia Limited - Western Australian Site Enterprise Agreement 2005*
251. *Iluka Resources Limited Industrial Agreement 2004*
252. *Improved Concrete Pumping Services (WA) Pty Ltd/CFMEUW Industrial Agreement 2005 – 2008*
253. *Improved Concrete Pumping Services/CFMEUW Industrial Agreement 2002-2005*
254. *Independent Pump Hire Industrial Agreement*
255. *Independent Wool Dumpers Pty Ltd Agreement 1999*
256. *Industrial Personnel - TWU Enterprise Bargaining Agreement 2001*
257. *Inform Construction Industrial Agreement*
258. *Inform Construction Industrial Agreement*
259. *Ingal EPS Enterprise Bargaining Agreement 2003*
260. *Inghams Enterprises Pty Limited (Maintenance Department) Enterprise Bargaining Agreement 1997*
261. *Inghams Thornlie (WA) Agreement 1999*
262. *Innes Transport Pty Ltd and The Transport Workers Union Enterprise Bargaining Agreement 1998*
263. *Integrated Power Services Industrial Agreement 2003 AG 88 of 2003*
264. *Integrated Power Services Pty Ltd Collie Basin Coal Infrastructure Operations and Maintenance Enterprise Agreement 1999*
265. *Integrated Workforce - TWU Enterprise Bargaining Agreement 2005*
266. *Interlec (WA) Pty Ltd Enterprise Bargaining Agreement 2004-2005*
267. *Intework Supported Employees Wages Agreement 2004*
268. *J & K Hopkins Enterprise Agreement 2005*

269. *Jadsco Pty Ltd Maintenance Contracts Enterprise Bargaining Agreement 1996, No. AG 145 of 1996*
270. *James Hardie Australia Pty Ltd. Rutland Avenue, Welshpool, Agreement, 1999*
271. *James Hardie Pipelines - Osborne Park (Enterprise Bargaining) Agreement 1995*
272. *Jandakot Wool Washing Pty Ltd Agreement 2003*
273. *JFM Electrical Pty Ltd Enterprise Bargain Agreement 2004*
274. *Jobskills Trainee (Hospitality Industry) Agreement 1995*
275. *Jobskills Trainee (School Employees - Teachers Aide) Catholic Education Commission Agreement, 1994*
276. *John Holland Construction and Engineering Pty Ltd (Nelson Point Development Project) Enterprise Bargaining Agreement No. AG 49 of 1993*
277. *Jones & Rickard Service (W.A.) Enterprise Bargaining Agreement 1995*
278. *Jones & Rickard Service (WA) Enterprise Bargaining Agreement 1997*
279. *K Mart Armadale Rostering Agreement 1994*
280. *Kalamunda District Community Hospital (Hospital Assistants) Agreement*
281. *KBR Water Services Pty Ltd Mechanical and Electrical Maintenance Enterprise Bargaining Agreement 2006*
282. *Kiam KNR Plant Enhancement Kwinana Works Agreement 2001*
283. *Kilpatrick Green Pty Ltd Nelson Point Development Project (Enterprise Bargaining Agreement) AG 22 of 1993*
284. *Kilpratrick Green Pty Ltd (WA) Agreement*
285. *Kirin Australia (Fitters') Enterprise Agreement 2002*
286. *Kirin Australia (MP) Enterprise Agreement 2006-8*
287. *Kirin Australia (MPO) Enterprise Agreement 2003-5*
288. *KLM Electrical Contracting (WA) Pty Ltd Enterprise Agreement 1996*
289. *KLM Group Construction Division Enterprise Bargaining Agreement 2004*
290. *K-Mart Food Services (Wages) Agreement 1994*
291. *Komatsu Australia Perth (Service Department) Enterprise Agreement 2001*
292. *Komatsu Australia Perth (Service Department) Enterprise Agreement 2005*
293. *KRM Pty Ltd t/a Kitec Electrical Services Enterprise Bargaining Agreement 2004*
294. *KSE Steel Team Enterprise Bargaining Agreement*
295. *Kwinana Industries Council Engineering Traineeship Agreement 1997*
296. *Kwinana Oil Refinery Site Maintenance And Modification Contractors Agreement 1997*
297. *Kwinana Water Reclamation Project, Electrical Agreement 2003*
298. *Leader Construction Cabling Commercial Enterprise Bargaining Agreement 2003*
299. *Ledger Engineering Pty Ltd (Receiver and Manager Appointed) Enterprise Bargaining Agreement 1996*
300. *Ledger Engineering Pty Ltd Enterprise Bargaining Agreement*
301. *Leighton Contractors Pty Limited Agreement 1994 For Construction Of The Wandoo Concrete Gravity Structure.*
302. *Leisk, Jenkins Eltech Pty Ltd (LJE) Enterprise Bargaining Agreement 2002*
303. *Les Wainwright and Transport Workers Union Enterprise Agreement 2004*
304. *LG International Security Services Enterprise Bargaining Agreement 2005*
305. *LHMU - Buttercup Bakery Malaga (WA) Bakehouse Enterprise Agreement 2005*
306. *LHMU - Challenge Australian Dairy Pty Ltd - Job Security & Union Recognition Agreement 2005*
307. *LHMU - Iplex Pipelines (Manufacturing) Union Recognition Agreement 2005*
308. *LHMU - PB Foods Limited Beverage Production (Balcatta) Enterprise Agreement 2005-2008*
309. *LHMU iPlex Pipeline (Warehouse) Union Recognition Agreement 2005*
310. *Lidco Aluminium Windows Pty Ltd Agreement 1995*
311. *Lomondside Enterprises/CFMEUW Industrial Agreement 2002-2005*
312. *Lutheran Schools WA (Enterprise Bargaining) Agreement 2005*
313. *Lysaght Building Industries Myaree Performance Related Payments Scheme (Enterprise Bargaining) Agreement AG 29 of 1993*
314. *M & D Vujacic Industrial Agreement*
315. *M&J Mitchell Enterprise Agreement 1997*
316. *Maico Electrical Enterprise Bargain Agreement 2004-2005*
317. *Maico Pty Ltd Enterprise Bargaining Agreement 2005-2008*
318. *Masters Dairy Enterprise Bargaining Agreement 1995, No. AG 125 of 1995*
319. *McDonald & Mavric Bricklaying Services Industrial Agreement*
320. *MDR Construction Hire Industrial Agreement*
321. *Meadow Lea Foods Ltd (Palmyra and Canningvale Sites) Enterprise Agreement 1998*
322. *Mercy Hospital Mt Lawley, Maintenance Staff Enterprise Bargaining Agreement 2004*
323. *Methodist Ladies' College (Enterprise Bargaining) Agreement 2005*

324. Methodist Ladies' College (Non-Teaching Staff - Building Trades) Enterprise Bargaining Agreement 1998
325. Methodist Ladies' College Non-Teaching Staff (Enterprise Bargaining) Agreement 2005
326. Metro Brick (Cardup) (Enterprise Bargaining) Agreement 1994
327. Metro Brick Armadale (Enterprise Bargaining) Agreement 1994
328. Metro Meat International Limited, Katanning Division Maintenance Employees Enterprise Agreement
329. Metro Meat International Limited, Linley Valley Division Maintenance Employees Enterprise Agreement
330. Metrobus Engineering and Maintenance Engineering Agreement 1995
331. MetroBus Engineering Employees Closedown Enterprise Bargaining Agreement 1997
332. Metso Minerals (Wear Protection) Maintenance Agreement 2005
333. Midland Brick Enterprise Agreement (WA) 2004
334. Minesite Personnel Pty Ltd Certified Agreement 1999
335. Mizco Construction Electrical Certified Agreement 2003
336. Moerlina School (Enterprise Bargaining) Agreement 2003
337. Mofflyn - LHMU, (State) Industrial Agreement 2004
338. Mr Formwork / BLPPU and the CMETU Collective Agreement 2000
339. MRC Contracting Pty Ltd/CFMEUW Industrial Agreement 2005-2008
340. Myer Stores Limited Distribution Centre Carousel Road Cannington Site Clerical Agreement 1994
341. Nannup Timber Processing Pty Ltd Enterprise Agreement 2001
342. Nannup Timber Processing Pty Ltd Enterprise Agreement 2003
343. National Foods Milk Limited and Liquor, Hospitality and Miscellaneous Union Western Australia State Industrial Agreement 2004
344. National Training Wage Traineeship (Hospitality Industry) Agreement 1995, No. AG 211 of 1995.
345. Nazareth House Salaried Officers Enterprise Agreement 2005
346. Nelson Point and Finucane Island Capacity Expansion Project - Port Hedland Agreement 1997 – 1998, No. AG 113 of 1997
347. Nelson Point and Finucane Island Capacity Expansion Project - Port Hedland Agreement 1997 – 1998, No. AG 166 of 1997
348. Nelson Point and Finucane Island Capacity Expansion Project - Port Hedland Agreement 1997-1998, No. AG 321 of 1997
349. Nilsen Electric (WA) Pty Ltd Enterprise Agreement 1996
350. NS Komatsu Perth (Service Department) Enterprise Agreement 1999
351. Nyindamurra Family School (Enterprise Bargaining) Agreement 1997
352. Ocean Legend Agreement 2003
353. Ocean Legend Agreement 2003 Amendment Agreement 2005
354. O'Donnell Griffin (Maintenance Operations) Port Hedland Enterprise Bargaining Agreement 1997
355. O'Donnell Griffin Nelson Point Development Project (Enterprise Bargaining) Agreement AG 20 of 1993
356. O'Donnell Griffin Nelson Point Development Project (Enterprise Bargaining) Agreement Phase II, No. AG 28 of 1993
357. Oil Bunkering (Fremantle) Limited Enterprise Bargaining Agreement 2005
358. Olympic Fine Foods Enterprise Agreement 1995
359. Otis Australia - Western Australian Construction & Service Employees Certified Agreement 1997
360. Otis Building Technologies - Western Australia Elevator Division Certified Agreement 1996.
361. OTRACO Earthmover Tyre Fitter's Enterprise Agreement 1998
362. P & C Industrial Installations and Maintenance Industrial Agreement
363. P & O Towage Services Small Craft Crews Enterprise Agreement 1993
364. P&O Towage Services Small Craft Crews Enterprise Agreement 1996
365. Pacific Industrial Company (WA) Pty Ltd Transport Drivers' Certified Agreement
366. Pacific Industrial Company Enterprise Bargaining Agreement 2000
367. Pacific World Packaging (WA) Enterprise Agreement 1995
368. Paraplegic-Quadriplegic Association of Western Australia (Inc) Supported Employees' Wages Agreement 2005
369. PB Foods Limited Operations Enterprise Agreement 2005
370. PB Foods Ltd Balcatta Security Officers Enterprise Agreement 2005
371. PB Foods Ltd Brunswick (Enterprise Bargaining) Agreement 2005
372. PB Foods Ltd Country Distribution Depots (Enterprise Bargaining) Agreement 2000
373. Peel Community Living (Inc) ALHMUW State Industrial Agreement 2002
374. Peel Laundry (Transport Workers) Enterprise Agreement, 1996
375. Penrhos College Non-Teaching Staff (Enterprise Bargaining) Agreement 2002
376. Pepsi Cola Bottlers Western Australian Enterprise Agreement 1996
377. Perth Montessori School (Enterprise Bargaining) Agreement 2004

378. Peters (W.A.) Limited (Balcatta Operations) Enterprise Bargaining Agreement 1994 No.2
379. Peters (WA) Ltd Country Distribution Depots (Enterprise Bargaining) Agreement 1996, No. AG 170 of 1996
380. Peters Creameries (WA) Pty Ltd (Enterprise Bargaining) Agreement 1994, No. AG 112 of 1995
381. Peters Poultry Suppliers Agreement 1994
382. Peters Poultry Suppliers Enterprise Agreement 1996
383. Pilbara 4-Wheel Drive and Mine Services Agreement 1997
384. Pilkington (Australia) Operations Limited, Myaree Wholesale (Stage IV, 20000 Enterprise Agreement
385. Pilkington (Australia) Operations Limited, Myaree Wholesale (Stage II 1995) Enterprise Agreement
386. Pilkington (Australia) Operations Limited, Myaree Wholesale (Stage III 1998) Enterprise Agreement
387. Pilkington (Australia) Operations Ltd, Myaree Enterprise Agreement 1993
388. Pioneer Concrete (WA) Pty Ltd Bunbury Quarry (Enterprise Bargaining) Agreement 1996.
389. Pioneer Concrete (WA) Pty Ltd Herne Hill Quarry (Enterprise Bargaining) Agreement 1996
390. Pioneer Construction Materials Agitator Truck Drivers' Agreement 2004
391. Pioneer Construction Materials Pty Ltd Byford Quarry (Enterprise Bargaining) Agreement 2004
392. Pioneer Construction Materials Pty Ltd Red Hill Quarry (Enterprise Bargaining) Agreement 2004
393. Pioneer Construction Materials Tip Truck and Tanker Drivers Agreement 2004
394. Polarcup Australia - Perth Enterprise Agreement 1999
395. Port Hedland Visitors Centre (Inc) Agreement 2002
396. Precise Drilling & Sawing Industrial Agreement
397. Premier Coal Development Project Agreement 1997
398. Printing (Community Newspaper Group) Production Employees (Enterprise Bargaining) Agreement 2006
399. Prok Group Enterprise Bargaining Industrial Agreement 1999
400. Prospector and Avon Link on Train Customer Service Officers Enterprise Agreement 2006
401. Protech International Group Enterprise Bargaining Agreement 2004
402. PVS / Auto Services / Jobskills Agreement, No. AG 283 of 1995
403. PVS / Auto Services / Jobskills Agreement, No. AG 336 of 1995
404. PVS / Auto Services / Jobskills Agreement, No. AG 4 of 1996
405. PVS / Auto Services / Jobskills Agreement, No. AG 111 of 1996
406. PVS / Auto Services / Jobskills Agreement, No. AG 156 of 1996
407. PVS / Auto Services / Jobskills Agreement, No. AG 158 of 1996
408. PWD Construction Pty Ltd Industrial Agreement
409. Pyrotronics Fire Protection Pty Ltd ABN 73 102 333 899 Enterprise Bargaining Agreement 2003
410. R & C Rossi Industrial Agreement
411. R.A.C. (WA) Redundancy Agreement
412. R.A.C. of W.A. (Inc.) Fleet Maintenance Workshop Enterprise Bargaining Agreement 1997 – The
413. RAC - Assistance Centre, Enterprise Agreement 2002
414. RAC Motoring Services Enterprise Bargaining Agreement 2004
415. Ralph M Lee (WA) Pty Ltd Enterprise Bargaining Agreement 1994
416. Ralph M Lee (WA) Pty Ltd Enterprise Bargaining Agreement 1996
417. Ralph M Lee Pty Ltd (Maintenance Operations) Port Hedland Enterprise Bargaining Agreement 1997
418. Ranwell Pty Ltd / CFMEUW Collective Agreement 2002
419. Rapid Metal Developments Enterprise Bargaining Agreement 1999
420. RCR Engineering Enterprise Agreement
421. RCR Engineering Ltd (Bunbury Operations) Enterprise Agreement 1996.
422. RCR Tomlinson Ltd (Bayswater and Welshpool) Enterprise Agreement 2002
423. RCR Tomlinson Ltd (Bayswater and Welshpool) Enterprise Agreement 2004
424. RCR Tomlinson Ltd (Bunbury Operations) Enterprise Agreement 2001 – 2003
425. RCR Tomlinson Ltd (Perth Engineering) Enterprise Agreement 1998
426. Readymix - Port Headland Concrete Plant (Enterprise Bargaining) Agreement 1996 – The
427. Readymix (Mandurah and Gosnells) Transport, (Enterprise Bargaining) Agreement 1995 – The
428. Readymix Albany Quarry (Enterprise Bargaining) Consent Agreement 1994
429. Readymix Gosnells Quarry (Enterprise Bargaining) Consent Agreement 1993 – The
430. Readymix Gosnells Quarry and Central Workshops (Enterprise Bargaining) Consent Agreement 1995 – The
431. Readymix Metropolitan Concrete (Enterprise Bargaining) Consent Agreement 1993 – The
432. Readymix Quarries Gosnells Operations 1995 Redundancy Agreement
433. Real Estate WA (REWA) Agreement 2004
434. Red Australia Equipment Pty Ltd

435. *Redundancy Due to ANI Bradken South Fremantle Plant Closure*
436. *River Rooster Australia, SDA Enterprise Agreement 2001*
437. *River Rooster Boulder, SDA Enterprise Agreement 2001*
438. *River Rooster Bridgetown, SDA Enterprise Agreement 2001*
439. *River Rooster Harvey, SDA Enterprise Agreement 2001*
440. *River Rooster Maddington, SDA Enterprise Agreement 2001*
441. *River Rooster Mandurah, SDA Enterprise Agreement 2001*
442. *River Rooster Margaret River, SDA Enterprise Agreement 2001*
443. *River Rooster Pinjarra, SDA Enterprise Agreement 2001*
444. *River Rooster Warnbro, SDA Enterprise Agreement 2001*
445. *Riverton Engineering Enterprise Bargaining Agreement 2000*
446. *Rocket Couriers and the Transport Workers Union Enterprise Agreement 1998*
447. *Rokla Pty Ltd Industrial Agreement*
448. *Roofmart Certified Agreement 2005*
449. *Roving Crew Partnership Agreement 1997*
450. *Royal Automobile Club of W.A. (Incorporated) Enterprise Bargaining Agreement 1993, No. AG 21 of 1992 – The*
451. *Salaried Officers Mayne Diagnostic Imaging (Joondalup) Western Australian Enterprise Agreement 2003*
452. *Salvation Army Property Trust (Western Australia) Hospital Salaried Officers Association Enterprise Agreement 2003*
453. *Samcon WA Industrial Agreement*
454. *Sandvik Materials Handling Enterprise Bargaining Agreement 2003*
455. *Sandvik Materials Handling Pty Ltd Bayswater Components Agreement 2004-2007*
456. *Scaffidi Developments Pty Ltd Industrial Agreement*
457. *Schindler Lifts Australia Pty Ltd (Western Australia) Enterprise Agreement 2003*
458. *Schweppes Cottee's (Osborne Park) Enterprise Bargaining Agreement No. AG 198 of 1994*
459. *SDA and DWA Jobskills Number 1 Warehouse Employees' Agreement, No. AG 213 of 1996*
460. *Security Monitoring Centres (Control Room Operators) Agreement 1998*
461. *Serco Australia Pty Belmont Enterprise Bargaining Agreement 1998*
462. *Serco Australia Pty Limited Enterprise Bargaining Agreement 1997, No. AG 104 of 1997*
463. *Shire of Albany Certified Enterprise Bargaining Agreement Depot Staff 1997*
464. *Shire Of Bridgetown-Greenbushes Enterprise Agreement 1996*
465. *Shire of Busselton Certified Enterprise Bargaining Agreement*
466. *Shire of Collie Enterprise Bargaining Agreement (Metal Trades General Employees) 1997*
467. *Shire of Greenough Maintenance Agreement 1996*
468. *Shire of Swan (Building Operations) Enterprise Bargaining Agreement*
469. *Shop Distributive and Allied Employees' Association of Western Australia Pizza Hut Agreement 1998*
470. *Shop, Distributive and Allied Employees Association of Western Australia and PVS Jobskills No. 1 Retail Employees Agreement, No. AG 208 of 1995 – The*
471. *Shop, Distributive and Allied Employees Association of Western Australia and PVS Jobskills No. 3 Retail Employees Agreement – The*
472. *Shop, Distributive and Allied Employees Association of Western Australia and PVS Jobskills No.2 Retail Employees Agreement – The*
473. *Shop, Distributive and Allied Employees' Association of Western Australia and Perth ITEC Pty Ltd JobSkills No. 214 of 1996 – The*
474. *Shop, Distributive and Allied Employees' Association of Western Australia and PVS Jobskills No.4 Retail Employees' Agreement, No. AG 212 of 1996 – The*
475. *Showbits Perth and SDA Agreement 2003*
476. *Simon Carves Electrical Services (Maintenance Operations) Enterprise Bargaining Agreement 1997*
477. *Simon-Carves Electrical Services Enterprise Agreement 1996.*
478. *Simsmetal Limited (Production and Maintenance) Enterprise Bargaining Agreement*
479. *Simsmetal Limited (Production and Maintenance) Enterprise Bargaining Agreement No. AG 134 of 2003*
480. *Simsmetals Limited (Production and Maintenance) Enterprise Bargaining Agreement No. AG 45 of 2005*
481. *SJM Electrical Enterprise Bargaining Agreement 1998*
482. *SJM Electrical Enterprise Bargaining Agreement 2000*
483. *Skilled Engineering Ltd (CBH Kwinana) Maintenance Agreement 2000*
484. *Skilled Group Ltd (CBH) Maintenance Agreement 2005*
485. *Smith's Snackfood Company Limited (Western Australia) Enterprise Agreement 2004*
486. *Smorgon ARC Welshpool Enterprise Bargaining Agreement 1993 No. Ag 26 of 1992*
487. *Solahart, Welshpool, Manufacturing Enterprise Bargaining Agreement 2004*

488. *Sotico Pty Ltd Bunbury Port (Enterprise Bargaining) Agreement 2000*
489. *Southcorp Packaging I.P.D. Fremantle Enterprise Agreement 2000*
490. *Southcorp Packaging, Gadsden Carton System In-Plant Team Bentley-WA Enterprise Agreement 2000*
491. *Southern Cross Electrical Engineering Pty Ltd Enterprise Bargaining Agreement*
492. *Southern Cross Electrical Engineering Pty Ltd Western Australian Industrial Operations Certified Agreement 2003*
493. *Southern Processors Ltd (Albany) Enterprise Agreement 1992*
494. *Spearwood Workshop and Commercial Services Employees Enterprise Partnership Agreement 1996*
495. *SR2 Construction Project Agreement 1996*
496. *St John Ambulance Communication Centre Enterprise Agreement 1994*
497. *St John Ambulance Deputy Superintendents' Enterprise Agreement 1994*
498. *St John of God Health Care Murdoch AMA Medical Practitioners Industrial Agreement 2005*
499. *St John of God Health Care Subiaco (HSOA) Caregiver Agreement 2001*
500. *St John of God Health Care Subiaco (HSUA - Pharmacy) Agreement 2004*
501. *Royal WA Institute for the Blind Employees Wage Agreement – The*
502. *St John of God Health Care Subiaco Maintenance Agreement 2004*
503. *St John of God Hospital Subiaco (Enrolled Nurses) Agreement 1994*
504. *St John of God Hospital Subiaco (Maintenance) Agreement 1995*
505. *St John of God Hospital Murdoch Caregiver Agreement 1994*
506. *St John of God Pathology Enterprise Agreement 2004*
507. *Standre Industrial Agreement*
508. *State School Teachers' Union of WA Clerical Staff Agreement of 2001*
509. *Statewide Demolition Industrial Agreement*
510. *Stegbar Pty Ltd (Wangara WA) Enterprise Agreement 2006*
511. *Steggles Engineering Site Agreement 1996, No. AG162 of 1996*
512. *Steggles Enterprise Bargaining Agreement 1995, No. AG 59 of 1996*
513. *Steggles Limited (Maintenance Division) Enterprise Agreement 1998*
514. *Stirling Stainless Steel Enterprise Agreement 2004*
515. *Stork Electrical (WA) Enterprise Agreement*
516. *Stork Electrical Pty Ltd Enterprise Agreement 1996*
517. *Stork ICM Australia Pty Ltd (Rockingham Workshop and Operations) Agreement No 157 of 1999*
518. *Stork ICM Australia Pty Ltd (Rockingham Workshop and Operations) Agreement No AG 5 of 1999*
519. *Stramit Building Products (Maddington) Western Australia Enterprise Bargaining Agreement 2005/2008*
520. *Stramit Building Products Western Australia Enterprise Bargaining Agreement 2003*
521. *Stramit Industries, Maddington, Western Australia Enterprise Bargaining Agreement 1996*
522. *Stramit Industries, Maddington, Western Australia Enterprise Bargaining Agreement 1998*
523. *Stream Tiling Industrial Agreement*
524. *Structural Marine Enterprise Bargaining Agreement 2002*
525. *Stylewoods/BLPPU and the CMETU Collective Agreement 1999*
526. *Summit Ceilings Wall and Ceiling Industrial Agreement*
527. *Sunlite Australia / CFMEUW Industrial Agreement 2005 – 2008*
528. *Support Services & Enrolled Nurses (Mercy Hospital & LHMU) Union Recognition & Job Security Agreement 2005*
529. *Swan Brewery and Combined Unions (Enterprise Agreement) 1992*
530. *Swan Brewery Enterprise Agreement 2003*
531. *Swan Christian Education Association Inc. (Enterprise Bargaining) Agreement 2002*
532. *Swan Christian Education Association Inc. (School's Non-Teaching Employee Enterprise Bargaining) Agreement 2001*
533. *Swan Lagging Industrial Agreement*
534. *Swan Portland Cement Ltd, Burswood Site, Enterprise Bargaining Agreement 1994*
535. *Swan Portland Cement Ltd, Burswood Site, Enterprise Bargaining Agreement 1995*
536. *Swan Portland Cement Ltd Clinker Grinding Plant - Kwinana Project Agreement 1996*
537. *Swan Portland Cement Ltd Redundancy Agreement 1995*
538. *Swire Cold Storage Pty Ltd Employer, Employee Agreement 2004*
539. *Swire Cold Storage Pty Ltd Transport Workers Enterprise Agreement 2004*
540. *Swispec Pty Ltd Enterprise Agreement 1996*
541. *TAB Racing Radio Employees General Agreement 2003*
542. *Telfer Gold Mine Enterprise Agreement 1993*
543. *Thomson Cleaning Company Industrial Agreement*
544. *Thorn Mechanical Pty Ltd Enterprise Bargaining Agreement 2004*

545. *Tip Top Bakeries (Canning Vale) and Transport Workers' Union Industrial Agreement 2005*
546. *Tip Top Bakeries (Canning Vale) Industrial Agreement No. AG 82 of 1997*
547. *TMS Electrical Pty Ltd Enterprise Bargaining Agreement 2004-2006*
548. *Total Corrosion Control (Metal Workers) Enterprise Bargaining Agreement 1997*
549. *Total Marine Service Geraldton Dredging Workshop Agreement 2002*
550. *Total Tilt-Up Industrial Agreement*
551. *Town of Albany Outside Workers (Carpenters & Metal Trades) Certified Agreement 1996*
552. *Town of Kwinana (WA) Enterprise Agreement, 1996*
553. *Town of Port Hedland Enterprise Agreement (Trades Employees) 2002*
554. *Transfield - A.S.I. (Enterprise Bargaining) Consent Agreement 1993*
555. *Transfield Construction Pty Ltd W.A. Division Alcoa Kwinana B-30 Project Enterprise Bargaining Agreement*
556. *Transfield Construction Pty Ltd WA Division Workshops (Kwinana) Enterprise Bargaining Agreement No. AG 11 of 1993*
557. *Transfield Maintenance HBI Agreement 2000*
558. *Transfield Pty Ltd, Transfield Coatings (WA) Industrial Agreement 1998*
559. *Transport Workers' (Eastern Goldfields Transport Board) Agreement 2005*
560. *Transport Workers South West Express Enterprise Agreement 2004*
561. *Trendwest Painting Industrial Agreement*
562. *Trinity Building Group/BLPPU Collective Agreement 1999*
563. *Trinity Demolition Industrial Agreement*
564. *Troy Development Corporation Pty Ltd trading as Masterfloors/BLPPU and the CMETU Collective Agreement 1999*
565. *Tubemakers Kwinana Pipe Plant Joint Enterprise Development Agreement*
566. *Tubemakers Kwinana Pipe Plant Joint Enterprise Development Agreement, No. AG 139 of 1995*
567. *Tubemakers of Australia Limited, Steel Pipelines, Kwinana (Enterprise Bargaining) Agreement No. AG 2 of 1992*
568. *Turbine Components Australia Pty Ltd Redundancy Agreement*
569. *Tyco Services Industrial Agreement*
570. *Tyco Water Pty Ltd, ACN 087 415 745 Steel Pipeline Systems, Kwinana Manufacturing Joint Enterprise Development Agreement - July 1999 to June 2001*
571. *Tyco Water Pty Ltd, Kwinana Pipe Plant, Enterprise Bargaining Agreement 2006*
572. *Ulta Speed Rigging & Construction Industrial Agreement*
573. *United Construction Alcoa (Kwinana and Pinjarra Refineries) Local Service Contracts Enterprise Bargaining Agreement 1995*
574. *United Construction Alcoa Kwinana Core Crew Enterprise Agreement 1993*
575. *United Construction Alcoa Operations Local Services Contracts and Associated Projects Enterprise Bargaining Agreement 1996*
576. *United Construction Alcoa Pinjarra Core Crew Enterprise Agreement 1993*
577. *United Construction Argyle Area Maintenance Agreement 1995*
578. *United Construction Argyle Maintenance Core Crew Enterprise Agreement 1993*
579. *United Construction BHP Petroleum Griffin Venture Remediation Project Agreement 1997*
580. *United Construction BHP Titanium Minerals Project Enterprise Based Agreement 1996*
581. *United Construction CBH Project (Geraldton) Enterprise Agreement 1994*
582. *United Construction Coogee Chemicals Sulphuric Acid Handling Facility, Enterprise Based Agreement 1996*
583. *United Construction HIsmelt Maintenance Core Crew Enterprise Agreement 1994, No. AG 23 of 1994*
584. *United Construction HIsmelt Maintenance Core Crew Enterprise Agreement 1994, No. AG 282 of 1995*
585. *United Construction Kwinana Fabrication Facilities Ltd Enterprise Bargaining Agreement 1996*
586. *United Construction Kwinana Nickel Refinery Maintenance Enterprise Based Agreement 1996*
587. *United Construction Kwinana Supply Services Enterprise Bargaining Agreement 1996*
588. *United Construction Ord Sugar Mill Maintenance Agreement 1996, No. AG 176 of 1996*
589. *United Construction Pty Ltd (Alcoa Kwinana B-30 Project) Enterprise Bargaining Agreement*
590. *United Construction Pty Ltd Enterprise Agreement for HIsmelt Services 1996*
591. *United Construction Pty Ltd Nelson Point Development Project (Enterprise Bargaining) Agreement AG 19 of 1993*
592. *United Construction Pty Ltd Nelson Point Development Project (Enterprise Bargaining) Agreement Phase II AG 37 of 1993*
593. *United Construction Supplementary Workforce BP Oil Kwinana Refinery Enterprise Bargaining Agreement 1996, No. AG 153 of 1996*
594. *United Group Rail Services Limited Bassendean Enterprise Agreement 2006*
595. *United Maintenance Pty Ltd HBI Agreement 2000*
596. *Universal Fasteners Enterprise Bargaining Agreement 1996, No. AG 178 of 1996*
597. *Untex Textured Coating Industrial Agreement*

598. *V & L Carlino Industrial Agreement*
599. *Van Leer Australia Pty Limited - Perth Enterprise Bargaining Agreement 2000*
600. *Van Leer Australia Pty Limited - Perth Enterprise Bargaining Agreement 2001*
601. *Vandertang Concrete Industrial Agreement*
602. *Vaughan Castings Enterprise Agreement 2000*
603. *Vax Appliances Enterprise Bargaining Agreement 1999*
604. *Vinidex Pty Ltd (Maintenance Section - Perth Site) Enterprise Bargaining Agreement 2003*
605. *Vinidex Pty Ltd (Maintenance Section Perth Site Enterprise Bargaining Agreement 2005*
606. *Vinidex Tubemakers Pty Ltd (Maintenance Section) Enterprise Bargaining Agreement 1994*
607. *Vinidex Tubemakers Pty Ltd (Maintenance Section) Enterprise Bargaining Agreement 1996*
608. *Vinidex Tubemakers Pty Ltd (Maintenance Section - Perth Site) Enterprise Bargaining Agreement 1998*
609. *Viscount Plastics (WA) Pty Limited Enterprise Bargaining Agreement 2001*
610. *Viscount Plastics (WA) Pty Limited Enterprise Bargaining Agreement 2003*
611. *Visy Industrial Fremantle Enterprise Agreement 2003*
612. *Visy Industrial Plastics Welshpool Enterprise Bargaining Agreement 2005*
613. *Visypak Carton Systems In-Plant Team Bentley - WA Enterprise Agreement 2004*
614. *Volgren Australia Pty Ltd Enterprise Agreement 2004*
615. *WA Ceiling Industries Subiaco Grandstand Construction Project Agreement 1994*
616. *W.A. Rewind Company (Western Australia) Training and Skills Program (TASK) Agreement 1994*
617. *WA Shell Sands Pty Ltd (Enterprise Bargaining) Agreement, November 2004*
618. *Walsh's Glass Industrial Agreement*
619. *Waratah Wire Products - Kwinana Wiremill Performance Improvement Recognition Payment System Agreement No. Ag 46 of 1993*
620. *Watsons Foods, Metal Trades Enterprise Agreement 1996*
621. *Webforge (WA) Enterprisse Bargaining Agreement 2003*
622. *Weir Engineering Pty Ltd Enterprise Bargaining Agreement*
623. *Wembley Cement Industries (Enterprise Bargaining) Consent Agreement No. AG 56 of 1993*
624. *Wembley Cement Industries, Gnangara, Agreement 1995 – The*
625. *Wes Trac (Service Operations) Enterprise Agreement 2005*
626. *Wescan Enterprise Bargaining Agreement 1997/98*
627. *Wesco Electrics Pty Ltd Construction Division Enterprise Bargaining Agreement 2004-2005*
628. *Wesfarmers Kleenheat Gas (Metal Trades) Enterprise Agreement 1995*
629. *Wesfarmers Transport Limited 1999 Workshop Enterprise Agreement*
630. *Wesfarmers Wool Store Operation Employees Enterprise Agreement 1994*
631. *Wesfarmers Wool Store Operation Employees Enterprise Agreement 1996*
632. *Wesfi Manufacturing Pty Ltd (Cullity Timbers Country Stores) Enterprise Bargaining Agreement 2001 – 2003*
633. *Wesfi Manufacturing Pty Ltd, Dardanup, (Wesboard Particleboard and LPM Division - Enterprise Bargaining) Agreement 1996*
634. *Wesfi Manufacturing Pty Ltd Dardanup, (Wesboard) Particleboard and LPM Division) Enterprise Bargaining Agreement 1998 – The*
635. *Wesfi Manufacturing Pty Ltd Dardanup, (Wesboard Particleboard and LPM Division) Enterprise Bargaining Agreement 2000 – The*
636. *Wesfi Manufacturing Pty Ltd, MDF Division Enterprise Bargaining Agreement (CEPU version) 1998-2000*
637. *Wesfi Manufacturing Pty Ltd, MDF Division Enterprise Bargaining Agreement (CEPU version) 2000 – 2002*
638. *Wesfi Manufacturing Pty Ltd Victoria Park Enterprise Bargaining Agreement 1998*
639. *Wesfi Manufacturing Pty Ltd, Welshpool (Weswood MDF Division - Enterprise Bargaining) Agreement 1996*
640. *Wesfi Pty Ltd Particleboard and Low Pressure Melamine Manufacturing Divisions-Dardanup (Enterprise Bargaining) Agreement 1993*
641. *Wesfi Pty Ltd Particleboard and Low Pressure Melamine Manufacturing Divisions - Dardanup (Enterprise Bargaining) Agreement 1995*
642. *Wesley College (Enterprise Bargaining) Agreement 2004*
643. *Wespine Industries Pty Ltd Classification Agreement 1998*
644. *Wespine Industries Pty Ltd (Dardanup Site) Enterprise Bargaining Agreement 1997*
645. *Wespine Industries Pty Ltd (Dardanup site) Enterprise Bargaining Agreement 1999*
646. *Wespine Industries Pty Ltd (Enterprise Bargaining) Agreement 1993*
647. *Wespine Industries Pty Ltd (Enterprise Bargaining) Agreement 1994*
648. *West Australian (Christmas Agreement) 2004*
649. *West Australian Newspaper Clerks (Enterprise Bargaining) Agreement 1994, No. AG 66 of 1994*

650. *West Australian Newspaper Production Employees (Enterprise Bargaining) Agreement 2000*
651. *West Australian Newspaper Production Employees (Enterprise Bargaining) Rollover Agreement 2005*
652. *West Australian Newspapers Christmas Agreement 1993*
653. *West Australian Newspapers (Christmas Agreement) 1999*
654. *West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 1998*
655. *West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 2001*
656. *West Australian Newspapers Clerks (Enterprise Bargaining) Agreement 2004*
657. *West Australian Newspapers (Composing Room - Redundancy and Training) Industrial Agreement 1996*
658. *West Australian Newspapers (Enterprise Bargaining) Agreement 1992*
659. *West Australian Newspapers (Enterprise Bargaining) Security Officers and Cleaners Agreement 1992*
660. *West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 1993*
661. *West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 1995*
662. *West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 1997*
663. *West Australian Newspapers Production Employees (Enterprise Bargaining) Agreement 2003*
664. *West Australian Newspapers Security Officers (Enterprise Bargaining) (Interim) Agreement 1999*
665. *West Australian Newspapers Security Officers and Cleaners (Enterprise Bargaining) Agreement 2000*
666. *West Australian Newspapers Security Officers and Cleaners (Enterprise Bargaining) Agreement 1997*
667. *West Australian Water Proofing Industrial Agreement*
668. *West Coast Coreing & Sawing/BLPPU Collective Agreement 1999*
669. *Westcan (Enterprise Bargaining) Agreement 1993*
670. *Westcare Disabled Employees Wages Agreement No.2*
671. *Westcare Supported Employees Wages Agreement 2004*
672. *Westerfeld Engineering (Nelson Point Development Project) Enterprise Bargaining Agreement No. AG 35 of 1993*
673. *Western Australia Armaguard Clerical Enterprise Agreement III. Stuart Street Perth*
674. *Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 4 of 1994*
675. *Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 6 of 1996*
676. *Western Australian Catholic Schools (Enterprise Bargaining) Agreement No. 14 of 2000*
677. *Western Australian Grain Handling Salaried Officers' Enterprise Agreement 1993*
678. *Western Australian Grain Handling Salaried Officers' (Union of Workers) Enterprise Agreement 1996*
679. *Western Australian Meat Marketing Co-Operative Limited Katanning Division Maintenance Employees Enterprise Agreement*
680. *Western Australian Mint Production Agreement 2002*
681. *Western Australian Mint Security Agreement 1996*
682. *Western Australian Mint Security Officers' Agreement 2002*
683. *Western Australian Specialty Alloys Pty Ltd Foundry Enterprise Bargaining Agreement 2004*
684. *Western Construction (Alcoa Minor Projects) Enterprise Bargaining Agreement No. AG 138 of 1996*
685. *Western Construction Co CSBP Sodium Cyanide Solids Project Enterprise Bargaining Agreement 2001*
686. *Western Construction Co Workshop Enterprise Bargaining Agreement 1999*
687. *Western Construction Co Workshop Enterprise Bargaining Agreement 2002*
688. *Western Construction Enterprise Bargaining Agreement 1998 No. AG 256 of 1998*
689. *Western Mechanical & Electrical Pty Ltd Enterprise Bargaining Agreement 2005*
690. *Western Quarries (Enterprise Bargaining) Consent Agreement 1995*
691. *Western Quarries Pty Ltd (Enterprise Bargaining) Consent Agreement, 1992*
692. *Westmix Pty Ltd Enterprise Bargaining Agreement 1994*
693. *Weston Milling (WA.) Transport Workers Productivity Improvement Agreement 1996*
694. *WesTrac Equipment (Service Department) Enterprise Bargaining Agreement 1994*
695. *WesTrac Equipment (Service Operations) Enterprise Agreement 1999*
696. *WesTrac Equipment (Service Operations) Enterprise Agreement 2001*
697. *Westrail Freight Terminal Services Agreement 2000*
698. *Whittakers Timber Products Enterprise Bargaining Agreement*
699. *Whittakers Timber Products Enterprise Bargaining Agreement 2003*
700. *Williams Electrical Service Pty Ltd Enterprise Bargaining Agreement 1995*
701. *Woodroffe Industries Limited (Osborne Park) Enterprise Bargaining Agreement 1996*
702. *Wooldumpers Australia (Fremantle) Pty Limited Enterprise Agreement 1995*
703. *Wooldumpers Australia (Fremantle) Pty Ltd Enterprise Agreement 1997*
704. *Woolworths Distribution Centre Agreement 1993*
705. *Woolworths (WA) Pty Ltd Clerical Enterprise Agreement 1996*

706. Workpower Inc Supported Employees Wages Agreement 2004
707. Workpower Incorporated Salaried Officers' Industrial Agreement 2002
708. Wormald Service Enterprise Agreement, Perth 2003
709. Wormald Systems Contracting Commercial Building Sector Enterprise Agreement 2003
710. Worsley Expansion Project Partnership Agreement No. AG 16 of 1998
711. Worsley Expansion Project Partnership Agreement No. AG 264 of 1998
712. Wreckair Hire (WA) Enterprise Agreement
713. Wreckair Hire (WA) Enterprise Agreement- Branches Employees – The
714. Wroxton/BLPPU and the CMETU Collective Agreement 1999
715. Wundowie Foundry Pty Ltd Enterprise Agreement 1998
716. Wundowie Foundry Pty Ltd Enterprise Agreement 2001
717. Yiyili Community School (Enterprise Bargaining) Agreement 1997

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

Any person who has a sufficient interest in the matter may, by close of business 30th July 2018, object to the Commission making such order.

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

Dated at Perth this 7th day of June 2018

(Sgd.) S BASTIAN,
[L.S.] Registrar.

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 23/2018	N/A	N/A	Emmanuel C	Request for mediation	02/05/2018	Concluded

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2017 WAIRC 00367

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES ALCOA OF AUSTRALIA LIMITED

APPLICANT

-v-

ANDREW CHAPLYN
STATE MINING ENGINEER
DEPARTMENT OF MINES AND PETROLEUM

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 26 JUNE 2017
FILE NO. OSHT 3 OF 2017
CITATION NO. 2017 WAIRC 00367

Result Directions issued
Representation
Applicant Mr R Wade of counsel
Respondent Mr L Nixon of counsel

Directions

HAVING heard Mr R Wade of counsel on behalf of the applicant and Mr L Nixon of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984 hereby directs –

(1) THAT each party shall give an informal discovery by serving its list of documents by 10 July 2017.

(2) THAT inspection of documents shall be completed by 17 July 2017.

(3) THAT evidence in chief in this 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 Tribunal.

(4) THAT the respondent file and serve any signed witness statements upon which he intends to rely no later than 28 days prior to the date of hearing. Copies of documents referred to in the witness statement should be annexed.

(5) THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely no later than 14 days prior to the date of hearing. Copies of documents referred to in the witness statement should be annexed.

(6) THAT the respondent file and serve upon the applicant any further signed witness statements in reply upon which he intends to rely no later than seven days prior to the date of hearing. Copies of documents referred to in the witness statement should be annexed.

(7) THAT the parties give notice to one another of witnesses they require to attend at the proceeding for the purposes of cross-examination no later than seven days prior to the date of hearing.

(8) THAT the parties confer and prepare an indexed and paginated exhibit book of documents which are not annexed to any witness statements upon which the parties intend to rely and file same by no later than seven days prior to the date of hearing.

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

(10) THAT the matter be listed for hearing on dates to be fixed.

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

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

2017 WAIRC 00727

REVIEW OF IMPROVEMENT NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALCOA OF AUSTRALIA LIMITED
	APPLICANT
	-v-
	ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 14 AUGUST 2017
FILE NO.	OSHT 3 OF 2017
CITATION NO.	2017 WAIRC 00727

Result	Direction issued
Representation	
Applicant	Mr R Wade of counsel
Respondent	Mr L Nixon of counsel

Direction

HAVING heard Mr R Wade of counsel on behalf of the applicant and Mr L Nixon of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984 hereby directs –

(1) THAT the respondent file and serve any expert reports upon which it intends to rely by no later than 21 August 2017.

(2) THAT the matter be listed for further directions on 24 August 2017.

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

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

2017 WAIRC 00753

REVIEW OF IMPROVEMENT NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALCOA OF AUSTRALIA LIMITED
	APPLICANT
	-v-
	ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 24 AUGUST 2017
FILE NO.	OSHT 3 OF 2017
CITATION NO.	2017 WAIRC 00753

Result	Directions issued
Representation	
Applicant	Mr R Wade of counsel
Respondent	Mr L Nixon of counsel

Directions

HAVING heard Mr R Wade of counsel on behalf of the applicant and Mr L Nixon of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984 hereby directs –

(1) THAT paras 5 – 11 of the Commission's directions of 26 June 2017 be and are hereby revoked.

(2) THAT the applicant file and serve upon the respondent any signed witness statements, including expert reports, upon which it intends to rely by no later than 30 September 2017. Copies of documents referred to in the witness statement should be annexed.

(3) THAT the respondent file and serve upon the applicant any signed witness statements in reply, upon which it intends to rely by no later than 13 October 2017. Copies of documents referred to in the witness statement should be annexed.

(4) THAT to the extent relevant, the parties' expert witnesses confer between the period 29 September 2017 to 6 October 2017 with a view to identifying those aspects of the respondent's expert evidence in respect of which the parties are agreed and those on which no agreement could be reached.

(5) THAT the parties give notice to one another of witnesses they require to attend at the proceeding for the purposes of cross examination by no later than seven days prior to the date of hearing.

(6) THAT the parties confer and prepare an indexed and paginated exhibit book of documents which are not annexed to any witness statements upon which the parties intend to rely and file the same by no later than seven days prior to the date of hearing.

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

(8) THAT the matter be listed for hearing on dates to be fixed.

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

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

2017 WAIRC 00856

REVIEW OF IMPROVEMENT NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALCOA OF AUSTRALIA LIMITED
	APPLICANT
	-v-
	ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 5 OCTOBER 2017
FILE NO.	OSHT 3 OF 2017
CITATION NO.	2017 WAIRC 00856

Result	Directions issued
Representation	
Applicant	Ms M Foley of counsel
Respondent	Mr L Nixon of counsel

Directions

HAVING heard Ms M Foley of counsel on behalf of the applicant and Mr L Nixon of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Occupational Safety and Health Act, 1984 hereby directs –

(1) THAT paras 2 – 7 of the Tribunal's directions of 24 August 2017 be and are hereby revoked.

(2) THAT the applicant file and serve upon the respondent any signed witness statements, including expert reports, upon which it intends to rely by no later than 20 October 2017. Copies of documents referred to in the witness statement should be annexed.

(3) THAT the respondent file and serve upon the applicant any signed witness statements in reply, upon which it intends to rely by no later than 3 November 2017. Copies of documents referred to in the witness statement should be annexed.

(4) THAT to the extent relevant, the parties' expert witnesses confer between the period 20 October 2017 to 3 November 2017 with a view to identifying those aspects of the respondent's expert evidence in respect of which the parties are agreed and those on which no agreement could be reached.

(5) THAT the parties give notice to one another of witnesses they require to attend at the proceeding for the purposes of cross examination by no later than 9 January 2018.

(6) THAT the parties confer and prepare an indexed and paginated exhibit book of documents which are not annexed to any witness statements upon which the parties intend to rely and file the same by no later than 9 January 2018.

(7) THAT the parties file and serve an outline of submissions and any authorities upon which they intend to rely by no later than 11 January 2018.

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

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

2018 WAIRC 00268

REVIEW OF IMPROVEMENT NOTICE
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2018 WAIRC 00268
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 23 JUNE 2017, MONDAY, 14 AUGUST 2017, THURSDAY, 24 AUGUST 2017, TUESDAY, 16 JANUARY 2018, WEDNESDAY, 17 JANUARY 2018, FRIDAY, 19 JANUARY 2018
DELIVERED	**:**	THURSDAY, 26 APRIL 2018
FILE NO.	**:**	OSHT 3 OF 2017
BETWEEN	**:**	ALCOA OF AUSTRALIA LIMITED Applicant AND ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM Respondent

Catchwords	**:**	*Industrial Law (WA) - Occupational Safety and Health Tribunal - Review of State Mining Engineer's decision to affirm prohibition notice - Principles applied - Decision affirmed with modifications*
Legislation	**:**	*Mines Safety and Inspection Act 1994* (WA) *Mines Safety and Inspection Regulations 1995* (WA) *Occupational Safety and Health Act 1984* (WA) *Occupational Health and Safety Act 2004* (Vic) *Criminal Code Act 1924* (Tas)
Result	**:**	Decision affirmed with modifications

Representation:

Counsel:		
Applicant	:	Mr R Wade of counsel
Respondent	:	Mr L Nixon of counsel
Solicitors:		
Applicant	:	Ashurst
Respondent	:	Department of Mines, Industry Regulation and Safety

Case(s) referred to in reasons:

Boughey v R (1986) 65 ALR 609

Bull v Attorney-General (NSW) (1913) 17 CLR 370

Exhaust Control Industries Pty Ltd v Lex McCulloch WorkSafe Western Australia Commissioner [2017] WAIRC 00375; (2017) 97 WAIG 1373

George v Rockett and Anor (1990) 93 ALR 483

Gray Bruni Constructions v Victorian WorkCover Authority (Occupational and Business Regulations) [2006] VCAT 1969

Kaokula v The State of Western Australia [2016] WASCA 198

The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273

Waugh v Kippen (1986) 160 CLR 156 at 166

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1992) 74 WAIG 2

Case(s) also cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) HCA 41; 239 CLR 27

Allesch v Mauntz (2000) HCA 401 203 CLR 172

Attorney-General for the State of New South Wales v Winters [2007] NSWSC 1071

Australian Building and Construction CMR v Construction, Forestry, Mining and Energy Union [2017] FCA 197

Australian National Railways Commission v Rutjens (1996) 66 1R 237

Australian Telecommunications Commission v Krieg Enterprise Pty Ltd (1976) 14 SASR 303

Basser v Medical Board of Victoria [1981] VR 953

Builders Licensing Board v Sperway Constructions (Syd) Ltd [1976] HCA 62; 14 ALR 174

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47

Dare v Dietrich (1979) 26 ALR 18; 37 FLR 175

Pace Farm Egg Products Pty Ltd v Newcastle City Council [2006] NSWCCA 403

Park Engineering Pty Ltd [2005] WAIRC 01634

Perkins (WA) Pty Ltd (ACN 008 844 862) v WorkSafe Western Australia Commissioner [2005] WAIRC 02820

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28

R v Hung [2012] QCA 341

Re ANI Corporation Ltd, T/as Ani Engineering (1987) 24 IR 119

Reece Pty Ltd v The WorkSafe Western Australia Commissioner [2015] WAIRC 00397

Rice v Henley (1914) 19 CLR 19

RJE v Secretary to the Department of Justice [2008] VSCA 265

Sheen v Fields Pty Ltd (1984) 51 ALR 345; 58 ALJR 93

Southern Golf Pty Ltd Trading as Sanctuary Golf Resort v Lex McCulloch, WorkSafe Western Australia Commissioner Dept of Commerce [2014] WAIRC 01186

Strange-Muir v Corrective Services Commission of NSW (1986) 5 NSWLR 234

Tillman v Attorney General for the State of New South Wales [2007] NSWCA 327

Tsintris v Roads and Traffic Authority of NSW (1991) 25 NSWLR 68

Turnbull v New South Wales Medical Board [1976] 2 NSWLR 281

Wayne Vigar Sheetmetal Pty Ltd [2005] WAIRC 01869

Reasons for Decision

The application and brief overview

1 Asbestos and asbestos containing materials were widely used in the construction and maintenance of major plant and infrastructure in Australia up until its use was prohibited on 31 December 2003. Chrysotile (or white) asbestos is well known for its thermal insulation and heat resistant properties. However, Chrysotile asbestos, being a hazardous substance, was declared by the National Occupational Health and Safety Commission as a Class 1 carcinogen. Chrysotile asbestos has been linked to various cancers, mesothelioma and asbestosis. Its use in industry until it was prohibited, was extensive and was contained in products such as gaskets; asbestos cement sheeting, piping and panelling; various kinds of insulation products; and in products used in the motor vehicle industry such as clutch linings, brake pads etc.

2 In this case, the use of asbestos at the Pinjarra Refinery operations of Alcoa Australia has attracted the attention of the Mines Inspectorate. An Inspector issued a prohibition notice under subdivision 2 of Division 3 of Part 3 of the *Mines Safety and Inspection Act 1994* (WA) ("the MSI Act") on 10 February 2017. The prohibition notice is wide in scope and whilst its terms will be examined in more detail later in these reasons, prohibits any person being at any place within the Refinery where they might be exposed to any asbestos "that is being disturbed, abraded or otherwise contacted in any manner."

3 On 17 February 2017 Alcoa referred the prohibition notice to the State Mining Engineer for review under s 31AY of the MSI Act. On 23 May 2017, the State Mining Engineer affirmed the prohibition notice and rejected Alcoa's grounds for review. In accordance with s 31BA of the MSI Act, Alcoa seeks a further review of the State Mining Engineer's decision by the Tribunal. As with the application to review before the State Mining Engineer, pending the decision of the Tribunal, as provided by s 31BC of the MSI Act, the operation of the prohibition notice continues. Alcoa seeks an order that the prohibition notice be cancelled.

The prohibition notice and its issuance on 10 February 2017

4 As set out in the Notice of referral to the Tribunal the circumstances of the issuance of the notice are as follows:

> **Prohibition Notice**
>
> On 10 February 2017, Inspector Craig Cullen **(Inspector)** of the Department and (sic) Mines and Petroleum **(DMP)** issued Alcoa of Australia Limited **(Alcoa)** with Prohibition Notice NP-372-223057 **(Prohibition Notice) .** A copy of the Prohibition Notice is provided as **Attachment 1.**
>
> (a) Prohibition
>
> The Prohibition Notice applies to Alcoa's Pinjarra Refinery **(Refinery)** and provides that, pursuant to sections 3lAC, 3lAD and 3lAE of the *Mines Safety and Inspection Act 1994* (WA) **(Act),** from the date of issue of the Prohibition Notice, Alcoa is required (subject to certain exceptions) to:
>
> *... refrain from permitting any person to be at any place within the [Refinery] where they might be exposed to any asbestos that is being disturbed, abraded or otherwise contacted in any manner ...*
>
> (b) Opinion of Inspector
>
> The Prohibition Notice states that it was issued on the basis that the Inspector formed the opinion under section 3lAB of the Act that Alcoa had:
>
> *contravened Regulation 7.28 of the Mines Safety and Inspection Regulations 1995 in circumstances that make it likely that the contravention will continue or be repeated and the above matter or activity occasioning the contravention constitutes or is likely to constitute a hazard to any person.*
>
> (c) Grounds of Inspector's Opinion
>
> Two grounds for the Inspector's opinion are provided, namely:
>
> (i) Alcoa has not taken all practicable steps to ensure that persons at the Refinery have not been exposed to asbestos at the Refinery, in circumstances that indicate that such exposure will continue or be repeated; and
>
> (ii) further, and in any event, asbestos at the Refinery is likely to become dangerous so as to constitute a hazard to a person working there.
>
> In support of these grounds, the Prohibition Notice relies on two particulars of instances where contractors have been exposed to damaged and/or degraded asbestos containing material at the Refinery, namely:
>
> (iii) an incident between July and October 2014 where employees of Transfield Services (Australia) and PASE Services Pty Ltd were (allegedly) exposed to damaged and/or degraded asbestos containing material at the Refinery **(2014 Incident)**; and
>
> (iv) an incident between 7 July and 16 July 2016 where employees of United Group Limited were (allegedly) exposed to damaged asbestos containing material at the Refinery **(2016 Incident).**

The application to the State Mining Engineer to review

5 The basis for Alcoa's application to review the prohibition notice to the State Mining Engineer and his decision is set out in the Notice of referral to the Tribunal in some detail. The grounds also to an extent, take the form of submissions. The following is a summary of the grounds of review.

6 The first ground maintains that there were no reasonable grounds for the Inspector's opinion. Alcoa had complied with reg 7.28 of the Regulations. Further, the incidents referred to were outdated and could not reasonably support the opinion formed.

The second ground is that the prohibition notice was not in accordance with s 31AD(2)(a) of the MSI Act as it did not require the removal of a hazard. It was contended that s 31AD(2)(b) was not complied with as the prohibition notice did not impose any additional requirements on Alcoa before the Inspector could be satisfied that the hazard has been removed. The third ground is that in any event, the use of a prohibition notice was inappropriate because there was no demonstrated immediate hazard in the form of disturbed asbestos. Further, that it was inappropriate because of the absence of specific additional requirements to be complied with by Alcoa.

7 Whilst holding that the Inspector could not rely on a contravention of reg 7.28, and therefore, his opinion was insufficient for the purposes of s 31AB(a) of the MSI Act, the State Mining Engineer otherwise upheld the prohibition notice. As to the first ground he held that there were reasonable grounds for the Inspector's opinion. The State Mining Engineer held the Inspector accurately stated the ground for his opinion that asbestos which is damaged and/or degraded is likely to result in the inhalation of airborne respirable asbestos fibres, leading to disease. Also, that the incidents cited by the Inspector were sufficient to ground his opinion that asbestos at the Refinery was likely to become a hazard and Alcoa had failed to maintain a system to prevent persons from being exposed to damaged or degraded asbestos containing material (ACM).

8 As to the second ground, the State Mining Engineer concluded that for the purposes of s 31AD(2)(a) of the MSI Act, the removal of the relevant hazard was achieved by keeping persons at a safe distance from respirable asbestos fibres released from ACM. Further, that for the purposes of ss 31AD(2)(b) and 31AE, the word "may" in s 31AE means that an inspector has a discretion to impose requirements.

9 As to ground three, the State Mining Engineer concluded there is no need in every case for an immediate hazard to exist. Section 31AB(b) contemplates there may be a situation justifying the issuance of a prohibition notice when a future potential hazard arises. It was contended the State Mining Engineer did not address the second part of Alcoa's ground that the prohibition notice did not specify any additional requirements the Inspector had to be satisfied of for the relevant matters to be remedied.

Application for review to the Tribunal

10 In the application for review to the Tribunal, Alcoa largely repeats and relies upon the same grounds of review to the State Mining Engineer.

Approach of the Tribunal to the review

11 In a recent decision of the Tribunal in *Exhaust Control Industries Pty Ltd v Lex McCulloch WorkSafe Western Australia Commissioner* [2017] WAIRC 00375; (2017) 97 WAIG 1373, as to the approach to adopt in a review application, I said at par 49:

> 49 In accordance with s 61A(3) of the OSH Act, the Tribunal is required to "inquire into the circumstances relevant to the decision" of WorkSafe. This involves, analogously with reviews of improvement and prohibition notices, the Tribunal assessing whether, in view of the material before it, WorkSafe was justified in making the decision it did. This requires the Tribunal to investigate for itself the circumstances giving rise to the decision and the validity of the conclusions reached: *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1992) 74 WAIG 2; *The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273; (2007) 88 WAIG 22.

12 Both parties referred to the decisions cited in *ECI, Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1992) 74 WAIG 2 and *The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273. It was common ground that the Tribunal should approach the present matter as a hearing de novo. At par 14 of the respondent's initial written outline of submissions, these decisions were summarised in the following terms:

> 14 The following principles that apply to the conduct of the review process were stated in *Wormald Security Australia* at pp 9-10 and *Worksafe Commissioner v Original Croissant Gourmet Pty Ltd 2007 WAIRC 01273* at [85] to [95] and [99] to [101]:
>
> (a) The Tribunal is to inquire into the circumstances relating to the notice to see if the Respondent's decision about the justifiability of the inspector forming the opinion he did is in turn justified.
>
> (b) The Tribunal's inquiry is not limited to the scope of the inquiry conducted by the inspector.
>
> (c) However, the Tribunal is not permitted to consider at large the facts and circumstances that give rise to the issue of prohibition notices and make any order it sees fit with respect to workplace safety.
>
> (d) The Tribunal must approach the facts and circumstances as found by it on its inquiry as if it were the inspector determining whether, on those facts and circumstances, it could reasonably form the opinion formed by the Inspector of the particular activity, having regard also to the reasons and matters set out in the notice. If so, it affirms the notice. If not, depending on the opinion formed by it as to such matters, it either affirms it with modifications or cancels it as is appropriate.
>
> (e) There is no onus on the party seeking the review to establish that the notice should not have been issued in the form in which it was, or at all, although evidence may be adduced to that effect.
>
> (f) The Tribunal must inquire into and determine for itself whether or not the circumstances validate the Respondent's affirmation of the Prohibition Notice.

13 The Tribunal will adopt and apply this approach in determining the present application.

Objections to evidence

14 Both parties filed objections to some of the content of the witness statements of Inspector Cullen and Mr Obal. To the extent the objections went to matters such as relevance and unsubstantiated opinion, the Tribunal informed counsel they would be considered as matters of weight. Furthermore, after Mr Obal's evidence was led, there was an amendment proposed to his witness statement at par 156. The State Mining Engineer did not object nor seek to recall Mr Obal for further cross-examination. The Tribunal accepted the amendment as proposed.

Asbestos generally and hazards and risks of ACM at the Refinery

15 There is no safe level of exposure to asbestos. That was the evidence of the subject matter expert called by the State Mining Engineer in these proceedings, Dr Glossop.

16 Dr Glossop was retained by the State Mining Engineer to provide a report on "the hazard and risk to people working on structures and equipment at an alumina refinery that has asbestos containing materials (ACM)". Dr Glossop has a Bachelor of Science with Honours with a double major in inorganic and physical chemistry and organic chemistry and a Doctor of Philosophy in physical chemistry, both conferred by the University of Western Australia. He was formerly a Certified Industrial Hygienist with the American Board of Industrial Hygiene, is a Certified Occupational Hygienist with the Australian Institute of Occupational Hygienists and is a Full member and Fellow of the Institute.

17 In addition to his academic qualifications, Dr Glossop was an occupational hygienist for 12 years and the Manager of the Occupational Hygiene and Noise Branch of the former Department of Occupational Health, Safety and Welfare of Western Australia. In this capacity, Dr Glossop was involved extensively in assessing incidents of asbestos in the workplace and in the development of regulations for the management of asbestos. Additionally, Dr Glossop was the primary author of two national codes of practice; the Code of Practice for the Safe Removal of Asbestos 2nd Edition [NOHSC: 2002 (2005)] and the Code of Practice for the Management and Control of Asbestos in Workplaces [NOHSC: 2018 (2005)]. Over the last 16 years or so, Dr Glossop has been engaged in consultancy work for mining companies in Australia and overseas, in assessing employee exposure to asbestos.

18 For the purposes of the preparation of a Subject Matter Report, a copy of which was tendered as exhibit R5 (TB 420-433) Dr Glossop was invited, by letter dated 11 August 2017, from the State Mining Engineer's counsel Mr Nixon, to express his professional opinion in relation to certain matters. As cited in his Report, excerpts of the letter from Mr Nixon to Dr Glossop relevantly provided as follows:

> On the 11th August 2017, Mr Nixon wrote a letter to Laurie Glossop requesting a Subject Matter Expert Report "*for the purposes of proceedings in the Industrial Relations Commission, sitting as the OSH Tribunal (the Tribunal), involving the review of a Prohibition Notice (the Prohibition Notice) issued under section 31AB of the Mines Safety and Inspection Act 1994 to Alcoa of Australia Ltd in respect of its Pinjarra Alumina Refinery (the Refinery). The Prohibition Notice concerns asbestos hazards. An issue that the Tribunal will need to consider for the purpose of its review is the circumstances in which asbestos containing material (ACM) may result in injury to a person or harm to a person's health*".
>
> You provided the following "*a brief description of some relevant features of the Refinery, and a question for you to answer. Please explain the reasons for your answer, including reference to any applicable principles, observations and matters of professional experience or judgement.*
>
> *We request that you set out your answer in a written report, which should also set out your qualifications, study and experience in your relevant field of expertise*".
>
> In your letter you also had the following information:
>
> "*The Refinery was originally constructed in 1972. It comprises a variety of thermal and chemical processing vessels, pipe circuits, electrical equipment, buildings, workshops, machinery and infrastructure.*
>
> *Common items containing asbestos at the Refinery include sheeting, cladding, floor tiles, asphalt wrapping, lagging, insulation, gilsomastic, Coro-kote paint, and gaskets.*
>
> *In addition to routine alumina refining operations, the activities carried on at the Refinery from time to time include construction work, electrical maintenance and installation, shutdown and general plant maintenance, refurbishment and replacement of parts and equipment*".
>
> You asked the following question:
>
> "*The question that you are asked to answer is this:*
>
> *Under what conditions does ACM have the potential to result in injury to a person or harm to a person's health?*
>
> *Please include in your answer:*
>
> *(a) an explanation as to how asbestos related diseases result from exposure to ACM;*
>
> *(b) a description of any particular state or condition of the ACM necessary for exposure to result in a risk of harm, and as to how each such state or condition may be produced;*
>
> *(c) a description of any particular types of interaction or activity involving ACM that has the potential to result in harmful exposure.*
>
> *Where appropriate, please include examples of the conditions for harmful exposure to ACM that might typically arise in the context of the features of the Refinery described above*".

19 For the purposes of understanding the background and context of this case, the following is a summary of Dr Glossop's Report in relation to the matters upon which his opinion was sought. I will also deal with specifically, aspects of Dr Glossop's oral evidence relevant to the issues to be determined.

Hazard from exposure to respirable asbestos fibres

20 Dr Glossop makes the point that asbestos is probably one of the most researched hazardous substances ever to exist. A reason suggested for this, is the respiratory diseases caused by it; mesothelioma and asbestosis. About 650 people die each year in Australia from mesothelioma. The latency period for the disease is about 40 years which means that cases of mesothelioma will continue to occur given that strict restrictions on asbestos were not introduced in Western Australia until the late 1980s. Dr Glossop says the incidence rate of asbestos related diseases in Australia is one of the highest in the world. Despite it being banned from use in 2004, given the very long latency period for the emergence of asbestos related diseases, Dr Glossop indicates the legacy of asbestos related diseases will continue decades into the future.

21 As to the structure of asbestos, the smallest component of asbestos is a fibril. This has a very small diameter of about 0.1µm or less. When fibrils are grouped together they form an asbestos fibre. A respirable asbestos fibre, which is the most dangerous form, has a diameter of less than 3µm, a length greater than 5µm and a length to width aspect ratio of greater than 3:1. The grinding of asbestos fibres can separate them into smaller fibres and finally into individual fibrils. Respirable asbestos fibres can also separate into individual fibrils within a person's lung.

22 The principal diseases caused by respirable asbestos fibres result from inhalation of the fibres deep into the lungs. Diseases which are caused by this include mesothelioma, lung cancer, asbestosis and pleural plaques. Mesothelioma is a disease which is largely fatal and there is no current treatment that is successful. Mesothelioma has a very long latency period of about 40 years from the first exposure to respirable asbestos fibres. In the case of lung cancer, the latency period is about 30 years plus from first exposure. Asbestosis, whilst not a cancer, is a form of lung fibrosis. Whilst the latency for this disease can be as short as five years, it is generally much longer.

23 In his Report, Dr Glossop makes the following observations in relation to the levels of potency of various types of asbestos to cause disease. On p 7 he says:

> The evidence about the "potency" of asbestos to cause disease is summarised below:
>
> - Amphibole types of asbestos (crocidolite, amosite, actinolite, tremolite and anthophyllite) have much greater potential to cause all of the asbestos diseases than serpentine asbestos (chrysotile).
> - The amphiboles essentially remain in the lungs for life whereas the evidence for chrysotile is that it can be dissolved in the lung in maybe as short as a year. The time taken to dissolve in the lung is called biopersistence.
> - The order of disease potential for the amphiboles is crocidolite > amosite > tremolite, actinolite and anthophyllite which is much greater than the serpentine chrysotile.
> - Crocidolite has the thinnest fibrils, followed by amosite and then tremolite, actinolite and anthophyllite.
> - The thinnest fibrils have the greatest potential to cause mesothelioma.
> - Fibres/fibrils longer than 5µm are more potent than fibres/fibrils shorter than 5µm.
> - The greater the aspect ratio (length to width) the more potent to cause disease.
>
> In Australia crocidolite was used in the late 1940s, 50s and 60s, amosite in the 60s, 70s and possibly early 80s and, chrysotile in the 40s, 50s, 60s, 70s, 80s, and 90s.

24 Dr Glossop makes the point that the level of the hazard from asbestos is directly related to the extent to which airborne respirable asbestos fibres occur. There are two broad categories of asbestos containing materials. Friable ACMs mean asbestos fibres or fibrils that can be broken up and crushed by hand. Dr Glossop cites examples of this type of asbestos such as lagging insulation, some kinds of insulation board and sprayed limpet asbestos used for fire rating purposes. Non-friable asbestos on the other hand, is normally contained in something else such as asbestos cement, adhesives embedded in gaskets and vinyl floor tiles. In the case of non-friable asbestos, their hazard level is generally low, except in cases where they are subject to aggressive treatment such as cutting or grinding with power tools, or drilling holes through products containing asbestos. Because of the different hazards involved, friable asbestos may only be removed by an unrestricted licenced removalist. In the case of non-friable asbestos, this can be removed by someone with a restricted licence to remove.

The risk of disease from exposure to respirable asbestos fibres

25 Dr Glossop discusses, based upon research evidence, incidence rates of mesothelioma based on age. Given the very long latency period for the emergence of the disease, below the age of 55 there is little or no incidence of mesothelioma observed in the research evidence. The incidences accelerate very significantly from age 70 up to age 84, meaning the disease only emerges well after retirement age.

26 Dr Glossop refers to and relies upon a paper dealing with the risk of developing an asbestos related disease: Hodgson JT and Darton A *The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure* Ann. occup.Hyg, Vol. 44, No. 8 pp. 565-601, 2000. In the paper, a table is produced estimating the risk of disease based on cumulative exposure measured as "f/mL.yr". This measure is the cumulative exposure unit called fibres/mL.years representing the total lung burden from asbestos exposure. For example, 25 f/mL.yr is an exposure equal to 25 years at 1 fibre /mL or 10 years at 2.5 fibres /mL etc. Thus, the degree of risk of cancer from asbestos exposure, depending upon the type, is relative to the cumulative exposure to the fibres. This is set out in detail at Table 11 on p 9 of the Report.

27 There is a Workplace Exposure Standard which is adopted in regulations. The standard currently is 0.1 f/mL as a Time Weighted Average. Dr Glossop makes the point however, that this standard is not totally protective. He says that if a person was exposed to this amount of asbestos fibres for 10 years being equivalent to 1 f/mL.yr then from Table 11 in his Report, there exist positive risks for that cumulative exposure of mesothelioma and lung cancer, depending upon the type of asbestos fibre ingested.

Who is currently getting mesothelioma in Australia?

28 Dr Glossop refers to information contained in the national Australian Mesothelioma Register which has been reporting the incidence of mesothelioma by occupation since 2010. Reproduced at p 12 of the Report is Table 4.4, which sets out the incidence of mesothelioma in the period 2010 to 2012, across various industry and occupational groups. From the table, by far the highest incidence rate occurred amongst trades people. It is also Dr Glossop's observation from his own experience, that tradespeople undertaking maintenance work on plant and equipment that involves ACMs, are exposed through disturbance of that material, to respirable asbestos fibres. The level of exposure would be much higher in the case of friable ACMs than non-friable ACMs.

29 As to the latter point, Dr Glossop also observes that the state of ACMs can change over time. In the case of friable ACMs, material which acts as a binder to the asbestos may deteriorate over time resulting from heat, moisture, vibration and other chemicals, which makes them more fragile and increases the risk of release of a larger number of asbestos fibres when they are disturbed. This includes the deterioration of protective coatings resulting from sunlight, which exposes the friable asbestos under the coating. Dr Glossop has observed this occurring with bitumastic coating.

30 In relation to non-friable ACMs, Dr Glossop says they can also deteriorate over time. He cites the example of asbestos cement sheets used in roofing. Over time the cement in the sheeting can be worn away by acid rain, frost and lichen etc, which can leave bare asbestos fibres protruding from the sheeting by up to three to four millimetres. On occasions, fibres can break away completely from the sheeting.

Potential exposure at an alumina refinery built in 1972

31 From the terms of Mr Nixon's letter setting out the date of construction and the essential processes and ACMs present, combined with the nature of the activities undertaken at the Refinery, including various kinds of construction and maintenance work, Dr Glossop comments on potential exposure. He notes that of the ACMs that would be present at the Refinery, some would be friable and others non-friable. Dr Glossop is not aware whether all friable ACMs have been removed from the Refinery but if not, they will have the highest potential to cause harm and will need the highest level of controls in place to manage them.

32 As to the non-friable ACMs, Dr Glossop refers to his earlier comments in the Report that activities such as grinding, sanding, cutting and drilling and other forms of abrasion, can still lead to a significant risk of the release of respirable asbestos fibres. On this point, Dr Glossop says at pp 13-14:

> It is my experience that people performing maintenance work in mining processing plants and refineries as stated in the activities above are the most likely to have significant exposure. The reason for this is that these maintenance workers have to disturb the ACMs. It is also difficult during maintenance type work to have engineering controls in place. This is the likely reason why we see tradespeople getting asbestos diseases. There are many published journal papers about oil refinery workers getting asbestos related diseases.

33 Finally, Dr Glossop refers to a recent journal article by employees of Alcoa dealing with the occupational risk of mesothelioma at the company's alumina refineries: Donoghue M, Frisch N and Olney D *Bauxite Mining and Alumina Refining: Process Description and Occupational Health Risks* Journal of Occupational Environmental Medicine May 2014 56(5Suppl): S12-S17.A. In the paper, reference is made to the incidence of mesothelioma at the Alcoa refineries as being low. Dr Glossop comments however, that with very long latency periods of a median of about 42 years, this does not preclude the incidence of mesothelioma in the future. Furthermore, Dr Glossop is unaware whether the research undertaken included contractors and subcontractors as it is this group, engaging in construction and maintenance and various removal work, which is most often exposed to asbestos fibres.

Alcoa Pinjarra Refinery operations

Overview

34 Alcoa Australia mines bauxite and refines aluminium in Australia. In Western Australia, Alcoa operates three refineries at Pinjarra, Kwinana and Wagerup. The Pinjarra Refinery is situated on a large site approximately 10 kilometres from the town of Pinjarra in the Peel region of the State. The Refinery employs approximately 1,030 employees and contractors. The Refinery was commissioned in 1972. It is one of the largest bauxite refineries in the world and occupies a site of some 6,500 hectares. The Refinery is surrounded by a buffer zone largely comprising farmland. The essentials of the Refinery involve physical and chemical processes being applied to bauxite to produce smelter-grade alumina. At TB 628-629 is a map in outline form of the Refinery site.

35 An overview of the production process of the Refinery was given in the evidence of Mr Obal, the Refinery's Health and Safety Manager. The first location is the stockpile. Crushed bauxite is transported to the location by a conveyor and is then stockpiled. The stockpiled bauxite is then crushed in a large ball mill and thereafter is conveyed through numerous processes from which the bauxite slurry is ultimately converted to alumina hydrate. Following a calcination process, the alumina hydrate is then converted to alumina. From the final production phase, the alumina is then transported by train to the Bunbury or Kwinana ports to be shipped to Victoria for smelting or shipped overseas for the export market.

ACMs

36 Given the date of construction of the Refinery and the fact that ACMs were not at that time prohibited from use in industry, ACMs are very prevalent at the Refinery. Mr Obal testified that ACMs are present throughout the Refinery in the form of protective coatings, claddings, floor tiles, sheeting, asphalt wrapping, different types of lagging and insulation, electrical switchboards and gaskets, amongst many other examples. It was not disputed by Alcoa that ACMs are all over the Refinery site.

37 In his testimony, Mr Obal said the "safe and efficient management of ACMs and any associated hazards represents a massive challenge at the Refinery": par 23 exhibit A1. In this context, Mr Obal referred to the extensive network of piping as an example of this challenge. Many sections of piping at the Refinery are covered with ACM and house many thousands of gaskets which are used throughout the Refinery.

38 Another point made by Mr Obal was the extensive use of "paint type protective coatings" in use throughout the Refinery. Such protective coatings containing ACMs, are used as coatings on structures and to protect girders, beams, handrails and other structures. Mr Obal identified specific and commonly encountered ACMs at the Refinery which include vinyl floor tiles extensively used throughout Refinery buildings; thousands of gaskets used in piping; various types of coatings and insulation with trade names "Galbestos; Gilsamastic; Coro-Kote and Flamastic"; some roofing materials; asphalt wrap on piping for insulation; refractory materials; calcium silicate insulation plaster and asbestos cement.

39 In terms of the stability of the ACMs at the Refinery, Mr Obal testified that most of the ACM is non-friable. What remains of the friable material, has either been or is planned to be contained, by being encased in a metal wrap or other type of containment, in accordance with accepted and approved practices.

Management of asbestos

40 Alcoa has a program of asbestos remediation and removal in place at the Refinery. Whether ACM is removed or remediated, will depend on the risk level the ACM poses and the practicality of its removal, as opposed to its remediation. A significant budget allocation is made available for remediation and removal projects.

41 As required by the national Code of Practice for the Management and Control of Asbestos in Workplaces (NOHSC: 2018 (2005)) Alcoa has an Asbestos Register which records and keeps up to date, a record of all identified ACM on the Refinery site. Mr Obal said that the Asbestos Register, a copy of which was annexure AO-18 to his witness statement (TB 343-375), records both ACM that is still "active", as being onsite, and ACM that has already been removed. Several things are recorded on the Asbestos Register. These include the location of the ACM; how much is present; what it is; the condition of the ACM and when it was last inspected and surveyed. The survey is conducted on a three-year cycle, by the Refinery's dedicated removalist, Cape Australia, which has an office on the Refinery's site. Mr Obal testified that Cape are active on the site and engage personnel on ACM remediation and removal work. This is done in accordance with onsite protocols and involves the authorisation of an "Alcoa responsible person". I also note Mr Obal's evidence was that the Asbestos Register is available online to all Alcoa employees at the Refinery, but only to contractors who are at a supervisor or higher level.

42 As part of Alcoa's management of asbestos at the Refinery, in conjunction with the Asbestos Register, is the "Strategic Asbestos Management Plan," which details the company's plan for the safe removal of asbestos on the Refinery site. A copy of the management plan was annexure AO-16 and AO-19 to Mr Obal's witness statement (TB 300-342). The plan is reviewed after the site ACM survey is completed, to keep it up to date. The plan for ACM removal is prioritised according to risk, following a risk assessment.

43 In addition to these steps, Alcoa has its own suite of policies and procedures in relation to managing and working with asbestos at the Refinery site. I do not propose to refer to them all. They are set out at annexures AO-12 to AO-15 and AO-20 to AO-23 of Mr Obal's witness statement (TB 280-299 and 376-419).

44 Part of the management of asbestos at the Refinery involves the training of employees and contractors known as "asbestos awareness", which covers a range of topics including the nature and risks of asbestos; personal protective equipment; who can lawfully remove/remediate asbestos and what to do if asbestos is discovered on site. This training includes information on the Asbestos Register. I note from Mr Obal's evidence, that insofar as contractors are concerned, the awareness training was only made mandatory after the BOD line incident in 2014, which I will refer to shortly.

45 The body with day to day management of asbestos at the Refinery, is the Asbestos Sub-committee, which in addition to Mr Obal, comprises representatives from Alcoa, Cape, and two employee representatives from the two main unions on the site. This committee meets regularly and generally will discuss ACM incidents on the Refinery site; update the various registers; discuss the progress of remediation or removal works and planning and budgetary issues.

Maintenance work

46 Mr Obal gave evidence as to the steps to manage risks in relation to ACMs where maintenance, repair and cleaning work is undertaken at the Refinery. In the case of work planned in advance, Mr Obal testified that any ACM identified in work to be performed, is arranged so as to minimise the risk of exposure to hazards. For unplanned work, a job safety analysis will be required, which will identify hazards associated with the performance of the work, including ACMs or suspected ACMs.

47 For work involving contractors, a different process applies. The contractor concerned and an Alcoa employee must both sign an "Authority to Proceed" form. An example was annexure AO-23 to Mr Obal's witness statement (TB 415-419). An attachment to this document, requires both parties to identify whether any ACM may be encountered on the work concerned. If so, they are required to review the Asbestos Register to confirm whether any ACM will be present and if so, to take steps to control the risk. This may involve engaging Cape to remediate or remove the ACM as the case requires.

48 Once these steps have been undertaken, and the work is to proceed, it is undertaken with the oversight by contractor supervision, not Alcoa. I will return to this issue when discussing the BOD line incident specifically and the role of contractors generally at the Refinery, later in these reasons.

Facts relied upon to issue the prohibition notice

49 The terms of the prohibition notice and the grounds stated in support of its issuance are set out above. Evidence as to the incidents leading to the prohibition notice was led primarily from Inspector Cullen. Inspector Cullen holds a Bachelor of Science in Environmental Health, a Postgraduate Diploma in Occupational Health and Safety and a Master of Business Administration, in addition to other health and safety qualifications.

50 Prior to his current position of Senior Investigator with the Department of Mines, Industry Regulation and Safety ("DMIRS"), Inspector Cullen was a Special Inspector of Mines under the MSI Act. Inspector Cullen has also held inspectorial and managerial positions with WorkSafe and the Department of Environment and Conservation. From the positions he has held and from his qualifications, Inspector Cullen has obtained expertise in health and safety issues in relation to asbestos in the workplace.

BOD line incident

51 Inspector Cullen testified that in 2014 he was working in the "plant team" of the Mines Safety Branch. He was responsible for occupational health and safety regulation of complex processing plant, which included Alcoa's three alumina refineries. In October 2014 an incident occurred at the Refinery involving black pipe lagging that was said to contain asbestos materials. The pipe lagging, which was attached to a very extensive network of piping, was directly adjacent to work being undertaken by contractors to Alcoa, Transfield Services (Australia) Pty Ltd and a subcontractor; PASE Services Pty Ltd, for a replacement Biological Oxalate Destruction line which commenced in August 2014. It was alleged that up to 12 personnel may have been exposed to asbestos.

52 A prohibition notice issued on 21 October 2014, stopping the work on the BOD line project. The notice was lifted on 14 November 2014, following the Inspectorate being satisfied that the work could safely proceed. Additionally, improvement notices also issued in relation to these works in May 2015. Inspector Cullen prepared an Investigation Factual Report into the BOD line incident, which was dated 20 November 2015 and was annexure CPC-1 to his witness statement (TB 26-94). The following summary of the incident, the facts of which were not generally contentious, is taken from the Report.

53 Complaints were received by the Mines Inspectorate from employees working on the BOD line replacement, that some of them had been exposed to asbestos. As a result, inspectors attended the site on 21 October 2014 to conduct inspections and to commence an investigation. The summary to the Report succinctly describes the initial involvement of the Inspectorate and the outcome of the investigation in the following terms at TB 27:

> **Summary**
>
> On Friday 17 October 2014 an investigation was initiated by the Mines Safety Branch in response to complaints received that employees had been potentially exposed to asbestos containing materials (ACM) at the Alcoa Pinjarra Refinery.
>
> On the afternoon of Tuesday 21 October 2014, Special Inspectors of Mines Phillip Bryant and Jose Sanchez attended the Alcoa Pinjarra Refinery site to commence inquiries and inspect the work site in question.
>
> It was discovered that Transfield Services (Australia) Pty Ltd had been contracted by Alcoa to undertake piping work in relation to the replacement of an existing Biocide Destruction (BOD) line which commenced in August 2014. Workers employed on the task included employees from Transfield and subcontractors to Transfield including employees of PASE Services Pty Ltd.
>
> The BOD line works were directly adjacent to black lagged piping which allegedly contained asbestos material.
>
> An investigation was subsequently commenced on 22 October 2014 by Special Inspectors of Mines Craig Cullen and Stephen Smith and found that:
>
> - Due to the BOD line showing evidence of corrosion Alcoa engaged Fluor to conduct a feasibility project for the replacement of the BOD line. The contract was later awarded to Transfield Services.
> - Risk assessments conducted by Fluor, Alcoa and Transfield did not identify that asbestos was present in adjacent asphalt wrapped pipework to the BOD line. Alcoa has known about the asbestos since November 1998 and this is recorded in an asbestos register for the mine.
> - Inspections by Fluor, IMS, Transfield and Alcoa representatives failed to identify the potential of workers engaged in the construction project to interact with asphalt wrapped piping.
> - Licenced asbestos removalists capable of doing the job safely were available and are located on site at the Pinjarra Refinery.
> - The asphalt wrapping on the pipe was deteriorated and the insulation exposed. Pieces of asphalt wrap and insulation were found on the ground beneath the pipe rack. Laboratory analysis confirmed the presence of asbestos in the wrapping.
> - Workers were unaware of the asbestos hazard being present in the asphalt wrap.
> - There was no signage warning of the hazards of asbestos being present in the pipe rack.

- Work was not stopped following suspicions raised by Transfield's supervisor.
- Transfield and Alcoa personnel were unable to navigate the asbestos register to find whether the pipework contained asbestos.
- A sample of that suspect lagging was not taken prior to commencement of the project's stage 3 area contrary to Alcoa procedures.
- Between July and October 2014 workers employed by Transfield and PASE disturbed the asphalt wrapping that contained asbestos. Potentially up to twelve (12) personnel were exposed.

54 Following a detailed chronology of the incident and an analysis of Alcoa's asbestos management system, key findings of the Report, which again are not in dispute, are set out at TB 71-72 in the following terms:

5 Findings

- The pipe rack and pipes including the BOD line and asphalt wrapped pipes are the property of Alcoa of Australia and under its control.
- Alcoa has established an asbestos register at the site which details the known asbestos at its mine. This is supposed to be updated every 5 years or as changes occur.
- The last inspection of the condition of asphalt wrap on site is reported as occurring in September 2013. The condition of the asphalt wrap was described as fair in the site asbestos register.
- Due to the BOD line showing evidence of corrosion Alcoa engaged Fluor to conduct a feasibility project for the replacement of the BOD line.
- Alcoa approved the project by awarding this to Transfield following Fluor's feasibility work. This was for the complete replacement of the BOD line.
- The Scope of Work, PEHSRS, and qualitative risk assessment did not identify asbestos as a hazard that workers would be exposed to during the construction project.
- There was an absence of induction and training for contractors in asbestos management at the mine.
- Inspections by Fluor, IMS, Transfield and Alcoa representatives failed to identify the potential for workers engaged in the construction project to interact with asphalt wrapped piping. Numerous inspections were done of the pipe rack and asbestos was not identified as a hazard that employees would be exposed to during the construction phase of the project.
- Construction Coordinators could not conduct inspections at height due to Alcoa restrictions on them working from EWPs.
- Construction Coordinators though they had access to the asbestos register did not refer to it at any time during project.
- Construction Coordinators had the capacity to stop work on the BOD line project.
- Work could not commence on BOD line project until an Authority to Proceed and a JSA was approved by an Alcoa representative and the Contractor.
- Authority to proceed and JSAs did not identify asbestos as a hazard to which employees were exposed.
- Licenced asbestos removalists (Cape) who were capable of doing the job safely were available and are located on site at the Pinjarra Refinery.
- On inspection the condition of the asphalt wrap asbestos installed on the asphalt wrapped pipe was deteriorated and the insulation exposed.
- Pieces of asphalt wrap and insulation were found on the ground beneath the pipe rack.
- Workers were unaware of the asbestos hazard being present in the asphalt wrap.
- There was an absence of signage warning of the hazards of asbestos being present in the pipe rack.
- Work was not stopped following suspicions raised by Mr Dolan that the pipe lagging would be in vicinity of the planned BOD line Stage 3 and looked like it contains asbestos.
- Once notified of this Ms Ladlow and Mr Williams were unable to navigate the asbestos register to find whether lagging contained asbestos.
- According to Alcoa procedures a sample of suspect lagging was proposed to be taken by Cape and arranged by Transfield but this was not done due to a dispute about costs for the use of a EWP.
- Between July and October 2014 workers employed by Transfield and PASE intersected with asphalt wrapped WOFR piping in a number of ways:
    - Contact between the elevating work platform and the asphalt wrap;
    - Contact between welding leads and the asphalt wrap;
    - Contact between tag lines and the asphalt wrap during crane lifts;
    - Contact between gas plugs and rope installed in the new pipe for coded welding and the asphalt wrap.
- A sample of the asphalt wrap was taken on 10 October 2014 and was confirmed through laboratory analysis as containing chrysotile asbestos.

- Workers were informed of the presence of asbestos on 14 October 2014 and the work then stopped.
- The site of the incident was not secured or barricaded following suspected asbestos required by the site procedure for friable asbestos.
- Further samples taken from the WOFR pipes in the northwest section of the pipe rack, as directed by Inspector Cullen, were all positive for asbestos.
- Two of the three rockwool samples taken from the WOFR pipes in the northwest section of the pipe rack were positive for asbestos.
- One ground sample from the northwest section of the pipe rack was positive for asbestos.
- Further inspections by Inspectors Cullen and Smith in May 2015 revealed that damaged pipes had not been enclosed following incident, and that asbestos signage and labelling had not been installed. Further to this suspect asbestos remained on the ground had not been sufficiently decontaminated or removed. Three improvement notices were issued to control these asbestos hazards.
- Until DMP intervention the asphalt wrapping was planned to be only encapsulated by December 2020.
- Following the incident Alcoa has encapsulated some piping with a Dulux roof sealant.
- Following the incident Alcoa have enclosed most of the damaged asphalt wrap in the BOD line pipe rack with a zincalume cladding.
- Following the incident Alcoa have provided signage and labelling to identify the hazard of asbestos potentially present in the piper ack (sic).
- Following the incident only Transfield employees have been trained in asbestos awareness.
- Alcoa One induction process does not contain an asbestos awareness component and has not changed since the incident.
- There remains a substantial amount of asbestos remaining at the Pinjarra Refinery.

55 I accept that as Mr Obal said in his evidence, remedial steps were taken after this incident such as re-cladding the entire BOD line, not just the affected area. However, on any view of the events, this was a serious incident. In all fairness to Alcoa, this was not disputed. Degraded and broken pipe lagging exposing asbestos insulation, some of it in friable condition, close to employees of Alcoa contractors, led to a serious risk of exposure to asbestos fibres over a lengthy period. Alcoa's Asbestos Register had described the pipe lagging at this location as in "fair" condition, as at September 2013. However, not long after, in 2014, it was found to be in a seriously degraded state, with broken pieces on the ground, exposing asbestos insulation, close to employees of contractors to Alcoa, working on the BOD line project. Of equal concern, was the failure to identify the presence of ACMs in the risk assessments done for the project. Nor did the inspections undertaken by contractor supervision and Alcoa representatives, identify the risk of exposure of asbestos on the project. This was a serious and somewhat inexplicable omission.

56 Pre-commencement, the Alcoa procedures are designed to ensure that as far as practicable, asbestos risks are identified and managed. This process clearly failed for this project. The Asbestos Register was not accessed and even when some concerns were raised by an employee, work continued for some time. Employees of the contractors concerned, had not received instruction and training in asbestos management.

57 In my view, this incident is a graphic example of the type of incidents referred to in the evidence of Dr Glossop, where contractors performing construction and maintenance work on aging plant and equipment, are at the greatest risk of exposure to asbestos.

Coro-Kote incident

58 Not long after the BOD line incident, on 19 December 2014, Inspector Cullen testified that he was directed by his supervisor to investigate a further potential asbestos exposure incident at the Refinery. This resulted from an Alcoa initiated incident report, referring to the work of an employee of a contractor, Transfield, who between 16 September 2014 and 24 November 2014, was engaged in oxy-acetylene gas cutting work of steel walkway platforms, coated in Coro-Kote, an ACM, in Building 45 at the Refinery.

59 Inspector Cullen said that he and another inspector, Inspector Smith, visited the Refinery on 5 May 2015. They inspected the precipitation tank area of the Refinery where the Coro-Kote incident took place. Inspector Cullen testified that the Coro-Kote on the walkways was "flaking off". He took some photographs. On speaking with the Registered Manager of the Refinery, Inspector Cullen was informed that Alcoa considered this type of ACM as low risk. The Alcoa incident report for this matter, prepared by Mr Obal, was annexure CPC-5 to Inspector Cullen's witness statement (TB 186-203).

60 At TB 188, the "Executive Summary" and "Background" of Inspector Cullen's report into this incident stated as follows:

> ***1.0 <u>Executive Summary</u>***
>
> Transfield Services (Australia) Pty Ltd (TSL) contractors were potentially exposed to asbestos fibers (sic) when they employed oxy-acetylene cutting steelwork coated with Cora-Kote.
>
> The TSL work team performing the cutting was not provided with the Alcoa scope of work by TSL that identified the asbestos hazard associated with the steelwork and nor the information about a method to safely remove the steelwork.
>
> TSL did not have management processes that required a scope of work to be used in development of JSA / SWI.

2.0 Background

2.1 Coro-Kote

Coro-Kote has historically been applied to structural steel at the Pinjarra Refinery. It is a bitumastic paint applied to structural steel as a corrosion protection coating. It contains up to 12% asbestos by weight.

2.1. TSL

TSL are contracted to Alcoa of Australia Limited (Alcoa), with core services including, but not limited to, scaffolding, electrical and mechanical services. They are an "embedded contractor group", meaning they had a full time presence at the Pinjarra refinery, which included onsite facilities.

2.2. Installation of B45 Walkway Bridges Project

The scope of B45 Walkway Bridges Project included:

- Removal of 7 existing walkway-bridges
- Installation of 7 new (Alcoa) supplied walkway bridges
- Supply and fit of galvanised pipe, cable brackets, clamps and U-bolts
- Installation of supports and cleats on the existing walkway between tanks 13 and 14

The scope for the project was documented in two scoping documents. The first prepared by Mark Jura of Fluor covered the removal and installation of walkway bridges, and the second by Calan Dumbrell (Alcoa Precipitation Engineer) covered the installation of supports and cleats on the new walkway.

61 Asbestos warning signage was present on the left entrance at the bottom and top floors of Building 45. Both signages refer to the presence of Coro-Kote asbestos. After concluding the investigation, Alcoa observed that although it has mandated training for contractors, asbestos awareness training was not part of this process. The Alcoa investigation report concluded at TB 198-199 as follows:

7.06. Error Analysis

Performance Mode

The Generic Error Modelling System recognises three performance modes in which errors may occur (Centre for Chemical Process Safety, 1994). The performance mode is determined by the individual's familiarity with the task be (sic) performed and the degree of conscious control exercised by the individual. The three performance modes are skill-based, rule-based, and knowledge-based.

Skill-based performance mode is characterised by automated routines requiring little conscious attention. Typically the person completing the task is skilled in the task and has undertaken it regularly over an extended period of time (i.e. at least 50 - 100 times over approximately a 3 month period).

Rule-based performance mode is characterised by behaviour that is enacted when an appropriate rule is applied. For example, if X occurs then do Y.

Knowledge-based performance mode is characterised by novel situations, requiring conscious thought.

The three performance modes (skill-based, rule-based and knowledge based) can co-exist at the same time for a single activity (Reason, 1997).

A review of the incident suggests that the TSL personnel may have initially been in knowledge-based performance mode. With lack of guidance on the correct removal method of the walkways and the asbestos hazard they engaged in problem solving.

This changed (sic) came after they became aware of the asbestos hazard. TSL have stated verbally that the TSL Planner, prior to the completion of the project, informed the supervisor and a boilermaker that they were to cease cutting because of asbestos. Work is believed to have continued after this instruction was given. At this point the actions of the boilermaker are best classified as a violation.

Violations are deliberate deviations from rules, procedures or instructions.

- Increase routine monitoring to detect violations
- Explain the rationale behind a rule to make it relevant
- Increased supervision

Error Traps

Despite requests, the TSL boilermakers and TSL supervisor have not been made available by TSL for interview. There is not sufficient information to identify all human performance error traps; although it is likely vague work guidance, poor communication and assumptions may have contributed to the incident.

8.0 Most Probable Causes

The TSL employees were potentially exposed to asbestos fibers (sic) because they employed oxy-acetylene cutting to remove steelwork coated with Cora-Kote (sic). This method had the potential to disturb asbestos.

The work team was not provided with the scope of work by TSL which identified the asbestos hazard associated with the steelwork. TSL did not have management processes that require the scope of work to be used in development of its own

JSA / SWI. This represented a failure of TSL to understand, and/or recognize the risks of asbestos hazards and to properly instruct its personnel in relation to those risks.

9.0 Contributing Factors

The following factors may have contributed to the incident:

1. Asbestos awareness training is not mandated for contractors
2. The potential asbestos hazard was not identified as a risk in the Authority to Proceed form because it does not contain a prompt to check the Asbestos Register
3. Scope of works that impact on structural steelwork do not include a requirement to consult the Asbestos Register

10.0 Other Safety Issues

The investigation identified that some TSL employees continued to undertake cutting of steelwork after they were instructed to cease work. This is considered a violation.

11.0 Corrective Actions

Refer to **Table 1** for a list of corrective actions that will reduce the likelihood of a reoccurrence of a similar incident.

62 Corrective actions were recommended in the investigation report in relation to contractor management. These included:

(a) amending Alcoa's Authority to Proceed form, with a prompt to require specific consideration of asbestos hazards and to cross-check the Asbestos Register if work is being performed on plant that may potentially contain ACMs;

(b) expand the induction process to include reference to examples of ACMs;

(c) require asbestos awareness training for "embedded contractors", who are likely to work on potential ACMs;

(d) Transfield be required to introduce management systems that require the scope of work to be used when developing job safety analysis and safe work instructions with increased supervision; and

(e) amend the scope of work template to require consultation with the Asbestos Register.

63 Sometime later, in about September 2015, Inspector Cullen said that he obtained a copy of the Injury Free Events Log ("IFEL") for the Refinery. This covered the period from July to November 2014. This records safety related events that occurred at the Refinery over the relevant period. Inspector Cullen testified that this listed some 21 asbestos related events. Most events were of a "marginal' degree of severity and one was "critical". In his cross-examination, Inspector Cullen said that he did not rely on the IFEL as a ground to issue the prohibition notice and no reference is made to it in the notice. What he did say was that the content of this record formed part of the background and context for his decision. He also accepted that none of the incidents reported in the IFEL were reportable ACM events, that Alcoa was required to report to the Mines Inspectorate. I also accept as Mr Obal indicated, many of the entries in the IFEL are based on "self-reporting" by individuals of what they may believe or suspect to be ACMs and may not reflect the presence of ACMs, as a matter of fact.

Switchgear incident

64 In July 2016, Inspector Cullen testified that the Mines Inspectorate received a report from Alcoa of an incident at the Refinery substation 1, concerning the removal of old switchgear equipment. Inspector Cullen, in the company of another inspector, attended the Refinery, undertook an investigation and prepared a preliminary report. A copy of Inspector Cullen's preliminary report was annexure CPC-9 to his witness statement (TB 105-110). The investigation into this incident was transferred to another inspector, Inspector Mitchell.

65 Inspector Mitchell is a Special Inspector of Mines under the MSI Act and he has held this position since mid-2015. His area of expertise is electrical work. Inspector Mitchell holds trade qualifications in electrical fitting and has a Bachelor of Applied Science in Energy Studies. In September 2016 Inspector Mitchell was seconded to the DMIRS Investigation Services Branch.

66 Inspector Mitchell testified that on 16 July 2016, an employee of Alcoa at the Refinery had reported seeing broken pieces of fibre board material on the floor of substation 1. It was suspected that this was ACM. The suspicion was that the fibre board had broken off decommissioned electrical switchgear, that had been stored in the substation. The switchgear work had been undertaken by a contractor at Alcoa, UGL Operations and Maintenance Pty Ltd ("UGL"). The work was part of an upgrade to the electrical equipment at the substation. It was observed that some of the switchgear components had been damaged. An Investigation Factual Report prepared by Inspector Mitchell, was annexure WLM-1 to his witness statement (TB 138-182).

67 The scope of work for the switchgear upgrade involved UGL removing the old switchgear from the substation, which had been decommissioned. Whilst ACM had been identified in the scope of work, it was intended that the fibre board material would be removed in situ by Cape, Alcoa's licenced asbestos removalist. However, access difficulties meant the work procedure was changed, so that the old switchgear was to be removed by UGL employees first. It was to be stacked to one side of the substation and Cape would then remove the ACM. However, in the dismantling and removal of the old switchgear, by UGL employees, several of the fibre board panels were broken and damaged. In addition, ACM in the form of damaged floor tiles, were also observed in the substation.

68 Following interviews with witnesses, requests for production of documents and an analysis of the management and supervision of the work, Inspector Mitchell came to a conclusion based on his investigation. This was expressed in the "findings" section of his Report at TB 175-176 in the following terms:

6 Findings

1. Alcoa is the principal employer at, and the operator of, the Pinjarra Alumina Refinery.

2. UGL were contracted by Alcoa to carry out electrical work in S01 in accordance with the scope of works "*PIN-005117-000 - Substation 01 Specification for Electrical Installation"*. A portion of this work involved the removal of a redundant main switchboard and cabling from S01.
3. ACM components of the switchgear were damaged. Insufficient effective controls were put in place to prevent workers from being exposed to the risk of harm from airborne respirable asbestos fibres that may have been released as a result of this damage.
4. The ACM components attached to the switchgear contained both chrysotile and amosite asbestos. The ACM was contained in a well-bonded cement sheet form, and would not be classified as being friable.
5. The UGL Project Team Leader (PTL), Mr Keith Allen, was aware that the switchgear contained ACM components, prior to the commencement of works. Mr Allen gained this awareness from his previous experience in supervising a number of similar switchgear upgrades at the Alcoa Pinjarra site. Further to this, the project Scope of Works specifically stated that ACM existed in both the switchgear, and in flame retardant coatings applied to cables. The Scope of Works specified that the ACM must be removed and disposed of in accordance with the Alcoa asbestos removal procedure *(AUACDS-2045-14)*. This procedure was not followed.
6. A licensed asbestos removal specialist (Cape), was present at the Pinjarra Refinery site to supervise the safe removal and handling of asbestos.
7. Cape personnel supervised the removal of ACM components from some of the switchgear in S01, on the morning of 8 July 2016. Later that day the work method was altered, such that Cape personnel were no longer present to supervise the removal of ACM components from the switchgear. This was in contravention of the Alcoa Authority to Proceed, which was conditional on adherence to the work methods outlined in Job Hazard Analysis (JHA) documents agreed to and authorised by Alcoa ARPs, and UGL and Cape supervisors.
8. The UGL PTL failed to ensure that a risk assessment was carried out before an alteration was made to the agreed work method. No revision or reassessment of the JHA for the task was carried out.
9. The UGL JHA was deficient in that it did not identify airborne respirable asbestos fibres as presenting a hazard to workers in S01. This deficiency was not identified by either the UGL PTL, or the Alcoa Responsible Person (ARP).
10. The UGL PTL had not received training in the safe handling or removal of asbestos materials. He was therefore not adequately equipped to identify that the altered work method might expose workers to the risk of harm from airborne respirable asbestos fibres.
11. The UGL workers tasked with removing the switchgear under the revised work method had not received training in the safe handling or removal of asbestos materials. These workers were therefore not adequately equipped to identify that the revised work method might result in exposure to a risk of harm from airborne respirable asbestos fibres.
12. Alcoa contractor managers (ARPs) were not sufficiently aware of the progress of works, to identify that the agreed work method had been altered. They may not have been aware that workers were exposed to a risk of harm from airborne respirable asbestos fibres.
13. UGL workers at the site did not have access to the Asbestos Register, or other Alcoa policies and procedures relevant to asbestos at the mine.

As a result of the electrical upgrade works in S01, workers were exposed to the risk of harm from airborne respirable asbestos fibres.

It not (sic) possible to determine whether any respirable asbestos fibres were released into the atmosphere of S01, either at the time the ACM components were damaged, or during their subsequent movement and storage within the substation.

In the event that airborne respirable asbestos fibres were released, it is not possible to determine whether workers in S01 inhaled such fibres.

It is therefore not possible to determine whether workers in S01 were harmed by a release of respirable asbestos fibres into the atmosphere.

69 Again, as with the two prior incidents set out above, the switchgear substation 1 incident highlighted problems with contractor management, supervision and control in relation to the identification and safe management of ACMs on the Refinery site. This is so, despite changes made to Alcoa's procedures in relation to the approval of work undertaken by contractors and their training in asbestos awareness and safe handling in the workplace, following the Coro-Kote incident in 2015. Whilst as Mr Obal indicated, corrective measures appeared to have been taken by UGL after the switchgear incident, he was reliant on the contractor to supply this information.

70 Two further matters came to Inspector Cullen's attention in late 2016 and early 2017. On 27 October 2016, Inspector Cullen became aware of a complaint in relation to work performed by an employee of a contractor, Transpacific, in the Kelly Filter Press in Building 35 of the Refinery. The issue reported was the use of high pressure water jetting inside a vessel that Cape had previously identified as potentially containing ACMs. Inspector Cullen testified that he was aware from discussions directly with a Cape supervisor, that despite this, the work continued.

71 Whilst samples later obtained from inside the vessel confirmed there were no asbestos fibres present, had there been, the use of high pressure water jetting would have disturbed them and would be contrary to the Code of Practice and applicable legislation.

72 Finally, on 3 February 2017, Mr Obal telephoned Inspector Cullen to report an asbestos related incident that had occurred on the day prior. This involved a contractor who had cut the underside of a steel stiffener, which was known to possibly contain an ACM "Gilsomastic". Inspector Cullen said the ACM had not been identified by Alcoa before the work had commenced and was only discovered after the job had been completed. A Cape supervisor raised the concern. The potential presence of Gilsomastic was identified on Alcoa's Asbestos Register. In this instance, the contractor employee had been wearing a respirator. In his explanation of this incident following his investigation, Mr Obal said the contractor UGL, was aware of the presence of Gilsomastic on and above the steel stiffener. Once identified, before the job commenced, Cape had removed it. However, it was discovered there had been overspray of the ACM under the stiffener, that had not been earlier identified, which led to the incident. Whilst not considering the incident serious in his view, Mr Obal did not dispute Inspector Cullen's opinion that it was a potentially serious occurrence and that it should be reported.

73 From these various incidents, a review of Alcoa's Asbestos Register and from his own knowledge of asbestos and the risks it may pose from workplace exposure, Inspector Cullen formed the opinion that there was asbestos at the Refinery that was dangerous or likely to become dangerous, constituting a hazard to persons. From his review of the Asbestos Register, Inspector Cullen calculated that by area, there was approximately 42,794 square metres of ACMs present on the Refinery site. Inspector Cullen came to the following conclusions, as expressed at par 41 of his witness statement, as follows:

> 41. Through my investigations and inquiries connected with asbestos incidents at the Refinery I formed the opinion that asbestos is likely to become dangerous at Refinery (sic) because:
>
> (a) I am aware from my knowledge gained in my role, in particular from site visits and investigations, that activities at the Refinery likely to result in the disturbance or abrasion of asbestos include but are not limited to construction work, electrical maintenance and installation work, shutdown and general plant maintenance, refurbishment or replacement of parts and equipment.
>
> (b) Alcoa regularly engages contractors to do this type of work in the Refinery. These workers may never have worked with asbestos and may be unfamiliar with the sites (sic) procedures and requirements. I found that the incidents the Department is aware of involved contractors who were not aware of asbestos hazards. There were contractors working on or in the vicinity of asbestos at the Refinery who were not provided or given access to adequate information about the hazard such as that contained in the Asbestos Register, and who were not wearing adequate PPE.
>
> (c) I concluded that appropriate identification of the asbestos hazard, adequate risk assessments and suitable control measures were not put in place. For those incidents where an adequate risk assessment was done, the disturbance of the asbestos was not prevented through adequate supervision. My conclusions were based on the fact that there had been repeated examples where persons, particularly contractors, were put at risk of exposure to asbestos.
>
> (d) Alcoa is in control of its contractors and the work they perform at the Refinery. Contractors are not allowed to commence work unless a written authority to proceed is signed off by an Alcoa representative. Contractors are required to follow Alcoa procedures relating to asbestos when they work at the Refinery.
>
> (e) Alcoa is in control of the asbestos register and decides who has access to the information. This is provided electronically through their document control system.
>
> (f) Cape Onshore Pty Ltd is a company with an office and workshop located at the refinery. Cape is contracted by Alcoa to provide consultative advice on asbestos and full time licensed asbestos removalist services, as required. Though Cape personnel were present at the Refinery, they were not present at the locations where contractors disturbed asbestos in the incidents I am aware of.
>
> (g) The Injury Free Events Log showed regular asbestos incidents over a significant period, in some cases being at least one event every few weeks.

74 Subject to the qualification concerning the IFEL, it was these events and the conclusions he reached, that led Inspector Cullen to issue the prohibition notice which is the subject of the challenge in these proceedings.

Issues for determination

75 In my view, in this case, four issues fall to be determined. They are:

(a) how should the relevant provisions of the MSI Act regarding the issuance of prohibition notices be interpreted?

(b) whether, in the context of (a), the opinion formed by Inspector Cullen that ACMs at the Refinery are dangerous or likely to become dangerous, so as to constitute a hazard to any person, was based on reasonable grounds on the evidence;

(c) whether the prohibition notice otherwise complied with the requirements of the MSI Act; and

(d) subject to (a) to (c), whether the prohibition notice was adequately framed and if not, should it be modified and if so how?

Construction of the legislation

76 As set out in the application to review, Alcoa challenges the State Mining Engineer's decision on grounds including that the terms of relevant provisions of the MSI Act, applicable to the issuance of prohibition notices, were not complied with. Prohibition notices are dealt with in Part 3 Subdivision 2 of Division 3. Alcoa maintained that the State Mining Engineer misapplied s 31AD(2)(a) because this requires the "removal" of a hazard. The restricting of access of employees from certain areas of an employer's premises because of the presence of a hazardous substance, does not comply with this requirement, on Alcoa's submissions. This is said to be confirmed by the language of s 31AD(2)(b) which enables a prohibition notice to impose requirements on a principal employer under s 31AE. The use of the word "until", on Alcoa's submissions, creates a

temporal connection. Alcoa submitted that it is not a valid exercise of power under s 31AD(2), for a prohibition notice to require a principal employer to refrain from doing something indefinitely.

77 Furthermore, Alcoa contended that the State Mining Engineer misconstrued s 31AD(2)(b) read with s 31AE. Alcoa contended that s 31AD(2)(b) obliges an Inspector to impose requirements on a principal employer under s 31AE, to achieve the purpose for which a prohibition notice is issued. As the submission went, it is not open to an Inspector, as was held by the State Mining Engineer, to have a discretion whether to impose s 31AE measures or not.

78 As to the basis for the exercise of an Inspector's discretion to issue a prohibition notice under s 31AB, Alcoa submitted that for the purposes of par (b)(ii) "likely" means "having a high probability of occurring or being true". A distinction must be drawn between a "probability" and a "possibility" of something occurring. In this respect, cases were referred to by Alcoa as to the meaning of "likely". It seems clear from the cases however, as with a statutory interpretation generally, that the meaning of a word or a phrase in a statute, is to be considered in the context in which it appears.

79 It is trite to observe that statutory interpretation is a text based activity which begins and ends with the text. Additionally, a purposive approach is to be adopted and context is important. In *ECI*, the Tribunal said:

> ***Principles of interpretation***
>
> 50 The general approach to the construction of statutes, legislative instruments and other documents that may have legislative or regulatory effect, and contracts, is to construe the instrument as a whole. In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, in the joint judgment of McHugh, Gummow, Kirby and Hayne JJ at par 69-70 and 78, it was said as follows:
>
> 69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In *Commissioner for Railways (NSW) v Agalianos*[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].
>
> 70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> …
>
> 78. However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In *Statutory Interpretation*, Mr Francis Bennion points out[57]:
>
> > "The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with." (footnotes omitted)

80 The MSI Act in s 3, sets out the objects of the legislation. Section 3(a) specifies that it is an object of the Act "to promote, and secure the safety and health of persons engaged in mining operations". Further by s 3(b), it is stated that the Act is to "assist employers and employees to identify and reduce hazards…". Importantly too for present purposes, is s 3(c) which says that the Act is "to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them".

81 Terms are defined as set out in s 4. Some are relevant for present purposes. "hazard" is defined to mean:

> ***hazard*** in relation to a person, means anything that may result in injury to the person or harm to the health of the person;

82 Furthermore, "risk" is defined to mean:

> ***risk*** in relation to any injury or harm, means the probability of that injury or harm occurring;

83 Corresponding terms in the *Occupational Safety and Health Act 1984* (WA) ("the OSH Act") have the same meaning. In neither the MSI Act nor the OSH Act, is there any definition of the phrase "harm to health" of a person. There could be no doubt however, on the evidence of Dr Glossop, that the presence of asbestos in a workplace, may constitute a "hazard" as defined.

84 By s 9 the general duties of an employer under the MSI Act are set out. Relevant for present purposes is s 9(1)(a) to (d) which is in the following terms:

> **9. Employers, duties of**
>
> (1) An employer must, so far as is practicable, provide and maintain at a mine a working environment in which that employer's employees are not exposed to hazards and, in particular, but without limiting the generality of that general obligation, an employer must —
>
> (a) provide and maintain workplaces, plant, and systems of work of a kind that, so far as is practicable, the employer's employees are not exposed to hazards; and
>
> (b) provide such information, instructions and training to and supervision of employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards; and
>
> (c) consult and cooperate with safety and health representatives, if any, and other employees at the mine where that employer's employees work, regarding occupational safety and health at the mine; and
>
> (d) where it is not practicable to avoid the presence of hazards at the mine, provide employees with, or otherwise provide for the employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees; and…

85 It is clear, from the combined effects of s 9(1) above, when read with the objects of the MSI Act in s 3, that the focus of the legislation is on the elimination or minimisation of exposure of employees to hazards in the workplace. It is only in circumstances where such avoidance is not practicable, can resort be had to other control measures such as personal protective clothing etc.

86 As I have already mentioned, the terms of the MSI Act in relation to prohibition notices are set out in Division 3 of Part 3, specifically Subdivision 2. The grounds for a prohibition notice are set out in s 31AB which provides:

> **31AB. Grounds for prohibition notice**
>
> This Subdivision applies where an inspector is of the opinion that —
>
> (a) a contravention of any provision of this Act —
>
> (i) is occurring at a mine; or
>
> (ii) has occurred at a mine in circumstances that make it likely that the contravention will continue or be repeated,
>
> and any matter or activity occasioning the contravention constitutes or is likely to constitute a hazard to any person; or
>
> (b) a mine, or any plant, mining practice or hazardous substance at or related to a mine —
>
> (i) is dangerous; or
>
> (ii) is likely to become dangerous,
>
> so as to constitute a hazard to any person.

87 Section 31AB(a) refers to the issue of a prohibition notice for a breach of the MSI Act. That is now not relied on in this case. Section 31AB(b) is relied on in this case. It deals with in part, the presence of a "hazardous substance". This brings into play s 31AD. It is in the following terms:

> **31AD. Issue of prohibition notice for other hazards**
>
> (1) Where section 31AB(b) applies, the inspector may issue a prohibition notice —
>
> (a) to the person who has, or may be reasonably presumed to have, control over the plant, mining practice or hazardous substance concerned (which may be the principal employer or the manager); and
>
> (b) in every case to the principal employer or the manager.
>
> (2) The notice is to —
>
> (a) require the person referred to in subsection (1)(a) to remove the hazard or likely hazard; and
>
> (b) in accordance with section 31AE, impose requirements to be complied with by the principal employer or the manager until an inspector is satisfied that the hazard or likely hazard has been removed.

88 There is no doubt that asbestos is a "hazardous substance" for the purposes of reg 1.3 and Part 7 Division 3 of the *Mines Safety Inspection Regulations 1995* (WA). In circumstances where s 31AB(b) applies, as in the present case, the terms of s 31AD(2)

require the notice to satisfy both subpars (a) and (b). That is, the notice issued by an Inspector must first, require the removal of the relevant hazard or likely hazard. Second, the notice must impose such of the requirements of s 31AE as may be relevant to the circumstances of the case.

89 This is so because as Alcoa correctly submitted in my view, as a matter of construction, the language of s 31AD(2), where it is specified that the notice "is to," imposes an obligation on an Inspector to take steps in s 31AE to address the particular hazard to which the notice relates. This is not discretionary. This interpretation is reinforced by the introductory words in s 31AE which provide "In exercise of the powers conferred by sections 31AC(2)(b) and 31 AD(2)(b)". When read together with s 31AD(2), the imposing of "requirements", is mandatory. This necessarily follows in my view, from the nature of a prohibition notice and the circumstances of a dangerous situation that is necessary to address, to avoid injury or harm to health.

90 The relevant opinion formed by Inspector Cullen as specified in the prohibition notice, was that Alcoa had "contravened Regulation 7.28 of the *Mines Safety and Inspection Regulations 1995* in circumstances that make it likely that the contravention will continue or be repeated and the above matter or activity occasioning the contravention constitutes or is likely to constitute a hazard to any person". Regulation 7.28 deals with means of reducing the risk of exposure to hazardous substances. Regulation 7.28(1) requires each responsible person at a mine "meaning the principal employer and any other employer and manager" to "as far as practicable, reduce the risk of a person being exposed to a hazardous substance at the mine by means of preventing exposure to the substance". As an aside, this aspect of the prohibition notice was not upheld by the State Mining Engineer in his decision. The prohibition notice did not specify any reasonably practicable steps which could have been taken by Alcoa, but which were not taken. The State Mining Engineer considered however, that compliance with reg 7.28 was not determinative of whether asbestos at the Refinery was dangerous or likely to become dangerous, to constitute a hazard. He therefore concluded that this defect in the prohibition notice was not material to Inspector Cullen's formation of an opinion on reasonable grounds, as specified by s 31AB of the MSI Act. Whilst these are not appeal proceedings, to the extent that it is relevant to do so, I agree with those views.

91 Section 31AB(b)(i) and (ii) refer to the hazardous substance … being "dangerous" or "likely to become dangerous". "Dangerous" is not otherwise defined in the MSI Act and I see no reason to not give the word its ordinary and natural meaning. In the *Shorter Oxford Dictionary* "dangerous" is defined to include "fraught with danger or risk; perilous, hazardous, unsafe …"

92 As to the meaning of "likely", despite the grounds of Alcoa's review application initially adopting a somewhat higher threshold as to its meaning, the written submissions of the parties seemed to coalesce on this point. Both parties appeared to support the approach to the meaning of "likely" as discussed and applied in *Boughey v R* (1986) 65 ALR 609. In that case, the High Court considered the meaning of the phrase "likely to cause death" in s 157 of the *Criminal Code Act 1924* (Tas). In the judgement, Mason, Wilson and Deane JJ said at 617-618:

> It is obvious that the word "not", where first appearing in the above passage, is the result of either a typographical error or a slip of the tongue. No complaint is, or could properly be, made about that, however, since his Honour's intended meaning is quite clear. Otherwise, it appears to us that the above passage contained helpful and correct guidance for the jury about the expression "likely to cause death" in s 157(1) of the Code. His Honour's comments clearly and properly made the point that, whatever may be the difficulties of precise definition, the expression "likely to cause death" in s 157(1) is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility: "a good chance that it will happen"; "something that may well happen"; something that is "likely to happen". In our view, those comments went as far as was desirable in the circumstances of the case. His Honour was correct in not introducing an added requirement either that the applicant directed his mind to, or attempted to calculate, the degree of mathematical probability that his acts would cause death in the circumstances or that the applicant knew or ought to have known that it was "more likely than not" or an "odds on chance" that his actions would cause death in the circumstances.

93 In a separate but concurring judgement, Gibbs CJ said at 611:

> It is trite to say that the meaning of a word will be influenced by the context in which it appears. In my opinion the word "likely" in ss 156 and 157 of the Criminal Code Act means "probable" and not "possible". That is its natural meaning. It is the meaning which a draftsman, familiar with the common law rules regarding malice aforethought, might be expected to attribute to it. In any case, if the expression were thought to be ambiguous, the doubt should be resolved in favour of the liberty of the subject. If "likely" in s 157(1)(c) were regarded as meaning "possible", that provision would have a very drastic operation, since it would treat as murder a culpable homicide caused by any unlawful act which the offender knew would possibly cause death. A death in those circumstances might understandably be regarded as manslaughter, but it would be draconian to call it murder.

94 (See also *Waugh v Kippen* (1986) 160 CLR 156 at 166; *Kaokula v The State of Western Australia* [2016] WASCA 198 at par 14).

95 Thus, when taken together as a composite phrase, "likely to become dangerous", may be taken to mean "a substantial or real and not remote chance that a "hazardous substance" will become fraught with danger, or risk, be perilous, hazardous or unsafe." Irrespective of this however, the ultimate opinion that must be formed by an Inspector, based on the presence of danger or something that has a substantial chance of becoming dangerous, is the presence of a hazard to a person, as defined in s 4 of the MSI Act. It is thus not entirely clear why Parliament chose to insert reference to "dangerous" etc in s 31AB(b)(i) and (ii), as these words would not appear to add much to the requirement on an Inspector to have the required opinion, formed on reasonable grounds, that a circumstance constitutes a "hazard".

96 Thus, from the terms of s 31AB, the precondition to the exercise of the power to issue a prohibition notice is the formation of the required opinion, reasonably based. If an Inspector has formed such an opinion, on reasonable grounds, then, under ss 31AC and 31AB, the Inspector may, but is not required to, issue a prohibition notice. If a prohibition notice is to be issued,

there are requirements that it must meet, as set out in s 31AF. First, by s 31AF(a), the relevant opinion needs to be stated, as being under either s 31AB(a) or (b). That appears to have been done in this case. Second, "reasonable grounds" for the opinion are to be stated in the notice, under s 31AF(b). In circumstances where "reasonable grounds" must exist for a state of mind, in this case an opinion, this "requires the existence of facts which are sufficient to induce that state of mind in a reasonable person": *George v Rockett and Anor* (1990) 93 ALR 483 at 488. This refers in the case of s 31AF(b), to the state of mind of the Inspector. Thirdly, the prohibition notice then needs under s 31AF(c), to specify, either the relevant provision of the MSI Act or the mine, plant, mining practice or hazardous substance in relation to the opinion held by the Inspector.

97 Having dealt with these statutory requirements for a valid prohibition notice, I now return to a central issue agitated by Alcoa, that being the combined effect of ss 31AD(2)(a) and 31AE and the contention that these provisions must require the "removal" of a hazard and a notice may not, in effect, have an indefinite duration. That is, on Alcoa's contention, there is a temporal connection between the imposition of measures under s 31AE and the removal of the hazard as contemplated by s 31AD(2)(b).

98 The terms of ss 31AD(2)(b) and 31AE must be construed in the context of Subdivision 2 of Division 3 of Part 3 and the MSI Act a whole, having regard to the purposes and objects of the legislation. The MSI Act was enacted for the purposes of promoting and securing the safety and health of persons engaged in mining operations. Mining operations, whether they be open cut, underground or minerals processing, are a high-risk activity. The regulatory scheme, including the terms of the statute, the Regulations, Codes of Practice, Guidance Notes and the qualification regime in place for key position holders and the management of mine requirements as set out in Part 4 of the MSI Act, are a clear indication of Parliament's intention that mines and mining operations, in all its facets, remain as safe and free from hazards as is practicable.

99 Furthermore, the MSI Act draws a distinction between an "employer" and the "principal employer" in s 4 and for the purposes of Part 4. By s 13 the role of the principal employer and manager of mines are specifically identified. Also, by s 32(2), a principal employer is required to ensure there is adequate financial and other provisions made to ensure compliance with obligations under the legislation. Both ss 13 and 32(2) taken together, are a clear indication of Parliament's intention that a principal employer may not avoid obligations by the making of statutory appointments under the MSI Act and that compliance with the law must be fully facilitated by the availability of all necessary resources.

100 When read with other provisions of the MSI Act, taken as a whole, and having regard to the hazards inherent in the mining industry, which are well known and understood, and the purpose of the MSI Act being to eliminate, avoid or otherwise minimise exposure to hazards, I consider that a broad and not narrow approach to the construction of the legislation should be adopted.

101 When considering those provisions of the MSI Act specifically directed at the removal and/or mitigation of risks and exposure to hazards, and the protection of employees and other persons in a workplace, they should be construed to give "the fullest relief which the fair meaning of its language will allow": *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384 as cited in *Waugh* at 164. Consistent with this approach to the construction of the legislation, I consider that the State Mining Engineer's interpretation of the provisions of the MSI Act in relation to the issuance of prohibition notices and their role more generally, as advanced in these proceedings, is to be preferred. That is, as submitted by the State Mining Engineer, the purpose of a prohibition notice is in substance, directed towards the removing of a relevant hazard or a likely hazard in the workplace. When viewed in this light, and given a broad and flexible operation, s 31AD(2)(a) and (b), when read with s 31AE, support the terms of a prohibition notice that directs an employer to ensure that persons are removed from an area of a workplace to remove the risk of exposure to a hazard (in this case asbestos; specifically, the emission of respirable asbestos fibres from ACMs). This constitutes the relevant "removal of the hazard or likely hazard" of which s 31AD(2)(a) speaks. To achieve this objective, one or a combination of the measures in s 31AE(a) to (c), may be required to be imposed.

102 There is nothing in the language of these provisions, construed broadly as I consider it should be, that suggests a time limit applies. Whilst Alcoa focussed attention on the word "until" in s 31AD(2)(b), it is to be accepted that the power to issue prohibition notices and their operation be broad and flexible. It may well be, as the State Mining Engineer accepted in argument, that the prohibition stays in place until all asbestos is removed from the Refinery. This may be the conclusion open if one focusses on the word "until", as does Alcoa. However, this does not detract from the main purpose and effect of these provisions which is to enable a prohibition notice, as an enforcement measure, to be deployed to eliminate the risk of exposure to a likely hazard.

103 If Alcoa's view of the need for the physical removal of a hazard, that being one that is essentially a transient but tangible object or substance, were to prevail, some major hazards in the mining industry may not be able to be adequately addressed. For example, as was also touched on in the submissions in argument, two of the most dangerous aspects of underground mining, water inrush and rock falls, are largely forces of nature. Water cannot be removed from an underground mine. It is nearly always present. Another is the risk of rock fall. Whilst roof support is used as a part and parcel of underground mining operations, the hazard of rock fall is always present. A control measure, and legitimate use of a prohibition notice, is the removal of employees or other persons from the areas of a mine of the highest risk of exposure to these hazards. In my view, that would be a proper and legitimate exercise of relevant statutory powers in those circumstances.

The opinion formed by the Inspector

104 As I have discussed above, the formation of Inspector Cullen's opinion that asbestos at the Refinery was likely to become dangerous, must be based on reasonable grounds. Reasonable grounds for the formation of Inspector Cullen's opinion, require the existence of "facts which are sufficient to induce that state of mind in a reasonable person": *George* at 488. In the context of this case on review, as a hearing de novo, the question is whether, on the evidence before the Tribunal, Inspector Cullen was justified in forming the opinion he did in support of his issuing the prohibition notice. For the following reasons, I am satisfied that the evidence before the Tribunal would be sufficient to induce that state of mind in a reasonable person in Inspector Cullen's position.

105 As mentioned at the outset of these reasons, it was common ground that being a major and complex processing plant built in the early 1970s, the presence of ACMs is very widespread at the Refinery. The Alcoa Asbestos Register and Asbestos Management Plan, make it demonstrably clear that ACMs are found throughout the Refinery site. The ACM as contained in the Asbestos Management Plan ranges in description as to its condition from "good" and "fair" to "poor". As mentioned earlier, the status of the condition of the ACM in the Asbestos Register and the Asbestos Management Plan, is reviewed in a survey by Cape on a three-yearly cycle. As a part of this process, an Inspection and Risk Evaluation Manual (TB 630-693) as prepared by an external consultant to Alcoa, is used to "rate" various ACMs. As neither Cape nor the consultants concerned gave evidence, it was not clear to the Tribunal, quite how this assessment process takes place.

106 From an examination of the Asbestos Register, and as accepted by Mr Obal in his evidence, a lot of the ACM is recorded as in a "fair" condition. Mr Obal also accepted that in the case of "poor" and "fair" assessments, it was likely that there had already been some deterioration in the condition of the ACM. These classifications of ACM as set out in the Asbestos Management Plan, extend all over the Refinery. According to the Inspection and Risk Evaluation Manual, various types of ACM are prioritised, from highest to lowest. Spray lagging, insulation plaster and other types of wrapping and sheeting are amongst the highest priority. Bituminous and other types of coatings are more medium level priority, with various types of linings and vinyl floor tiles at the lower end of the scale.

107 Given their extensive presence on the Refinery site, the State Mining Engineer referred to gaskets, as noted in the Inspection and Risk Evaluation Manual (at TB 665-667). Gaskets are only described as in "good" condition if unused. "Fair" condition gaskets are those found in situ, seated between two surfaces with the edges "slightly friable". Given the extensive use of gaskets at the Refinery, and the evidence suggested there are thousands of them, they must be in a constant state of gradual deterioration, as a matter of logic and common sense. On the general point, Mr Obal did accept that the greater the degree of deterioration in ACMs on site, meant an increased likelihood that they were hazardous. This is consistent with the terms of the Code, which provides that "if the asbestos or ACM has deteriorated, has been disturbed, or if asbestos-contaminated dust is present, the likelihood that airborne asbestos will be released into the air is increased" (TB 457). It is the consequence of deterioration that is key. That is, the likelihood of respirable fibres being present. The Code also makes it clear, as does Dr Glossop, that any ACMs can produce asbestos fibres if they are disturbed (TB 458).

108 The replacement or remediation of ACM, is, as already noted, prioritised in Alcoa's Asbestos Management Plan. Thus, some degraded ACM may be in that state potentially for a considerable time. The prioritisation process is undertaken by Cape, as part of its risk assessment process. Overall, the Asbestos Register and the Asbestos Management Plan are subject to oversight by the Asbestos Sub-committee, referred to earlier in these reasons. Subject to the three-yearly review by Cape, the Asbestos Register is otherwise only adjusted as and when ACMs are encountered in the plant through self-reporting by employees and contractors.

109 A factor of significance to Inspector Cullen, in the formation of his opinion, and on the evidence before the Tribunal, has related to the presence and activities of contractors on the Refinery site and the occurrence of asbestos exposure incidents involving them. It was common ground that as an aging and very large plant, there was and is, a substantial presence of contractors at the Refinery, engaged in a variety of maintenance work. On Mr Obal's testimony, substantial maintenance projects are planned to take place in 2018. These include calciner maintenance; presses maintenance; valve changes; the "Split Fee Project" and from time to time, a major plant shutdown will be required.

110 It is significant to observe that the incidents to which Inspector Cullen directly referred to in his evidence, and the two cited on the prohibition notice itself, involve the use of contractors and their potential exposure, at least in some of the cases, to degraded or damaged ACMs. Without repeating them as most have been dealt with in some detail earlier in these reasons, these include the BOD line incident in September 2014; the walkways incident in September to November 2014; the switchgear incident in July 2016; the metal stiffener incident in February 2017; and the items identified by Inspector Cullen in the Injury Free Events Log, which he inspected and about which he gave some evidence. Additionally, after the prohibition notice was issued by Inspector Cullen, another incident with a contractor involving asbestos, occurred in the latter part of 2017. This involved the presence of ACM in valves in the Refinery lay down area. The asbestos had not been previously identified.

111 Whilst I accept that Alcoa has comprehensive policies and procedures in place for asbestos management for its own employees, there have been problems with contractor management. Some changes were made to the approvals process after the BOD line incident, but this was after the event. In that case, whilst one certainly hopes not, exposure to respirable asbestos fibres could well have occurred. With the length of latency periods, the outcome of that incident may not be ultimately known for decades. The asbestos in that case was undoubtedly friable.

112 A point to be made in this context is supervision. Contractor employee supervision is independent of Alcoa, on the evidence. Access to occupational health and safety assistance is provided as may be requested by a contractor. The evidence of Mr Obal was that he would expect contractors to consult with Alcoa's health and safety staff. Contractors are ultimately responsible for the performance of the work they are contracted to perform, and are required to have their own policies and procedures, broadly in line with Alcoa's policies and procedures.

113 In the absence of evidence from a contractor(s) it is difficult for the Tribunal to assess how they may manage these issues day to day, apart from Mr Obal's testimony as to steps taken by Alcoa to overcome some problems identified in the past. The fact remains however, that there is widespread use of contractors on the Refinery site. The type of work undertaken by them, which as Dr Glossop made clear, involves the highest risk category of work which can include tasks such as drilling, grinding, cutting and other potentially aggressive disturbance of ACMs. This is a significant factor influencing the likelihood of ACMs constituting a future hazard at the Refinery in my view.

114 The fact of the number of contractor incidents with asbestos on the Refinery site, despite Alcoa's comprehensive suite of policies and work procedures, which involved a departure from established or planned work systems, and without Alcoa's awareness, is a factor in support of the reaching of an opinion, that persons are likely to be exposed to asbestos, which might be put in a dangerous state through disturbance or abrading, which in turn is likely to expose persons to a hazard.

115 Another consideration in reaching this view, is the extent to which ACMs at the Refinery may be exposed to environmental factors, such as heat and ultra violet radiation. This was also dealt with in Dr Glossop's Report and in his testimony. Both friable and non-friable ACMs may deteriorate over time, when exposed to heat and sunlight. Friable ACM coatings may breakdown over time. Bitumastic coatings was an example cited by Dr Glossop in this respect.

116 Asphalt wrap, a product extensively used by Alcoa on its large network of piping etc, is another example of material of this kind that may become degraded due to environmental conditions. From the Asbestos Register and the Asbestos Management Plan, both make numerous reference to pipe wrapping of this kind. The BOD line incident involved this type of ACM. Some of it had weathered over time, as was acknowledged by Mr Obal. Some of this material is described in the Asbestos Management Plan as being in "fair" condition, which implies a degree of degradation in the material. Importantly also, when considering references to material in these documents, taking the evidence in its totality, neither the Asbestos Register nor the Asbestos Management Plan maintained by Alcoa, can be regarded as entirely failsafe as a guarantee of the accuracy of the state of ACM throughout the Refinery site.

117 In addition to the foregoing, specific challenges were maintained by Alcoa to Inspector Cullen's formation of the relevant opinion, for the purposes of s 31AB(b) of the MSI Act. It was contended that the two specific incidents referred to in the prohibition notice, the BOD line incident and the switchgear incident, being some two years apart, were insufficient for Inspector Cullen to conclude that asbestos at the Refinery was likely to become dangerous in the future. Alcoa said that just because of these two incidents, there was no sound basis to contend that such incidents were likely to reoccur in the future.

118 I am not persuaded that the opinion formed by Inspector Cullen is required to be based on or confined to only the two examples set out in the prohibition notice. Grounds 1 and 2 in the prohibition notice are broadly framed. This is necessarily so because there is a vast amount of ACM at the Refinery. It would be impracticable and I suggest almost impossible, for the prohibition notice to itemise each piece/type of ACM that was or is susceptible of exposing persons to a hazard. Whilst Inspector Cullen only referred to the two incidents in pars 2(a) and (b) of the grounds, in my view, they are to be taken to be illustrative of the events as existing facts, sufficient to induce the relevant state of mind in Inspector Cullen leading to him issuing the prohibition notice. There is no requirement in the MSI Act for a prohibition notice to set out or otherwise contain examples of all incidents leading to an opinion. What is required is an opinion based on reasonable grounds. These two incidents, serious in and of themselves, were two of several incidents that came to Inspector Cullen's attention, as demonstrated in the evidence before the Tribunal.

119 Alcoa also maintained that in relation to the switchgear incident specifically, it could not have foreseen that the contractors concerned would have departed from the established procedures and therefore, Alcoa should not be held liable for this. Whilst one can readily understand the rationale for Alcoa's contention in this regard, essentially as one being based on an "accident/incidents do happen" type of argument, this does not and cannot detract from the fact that such an incident, can legitimately add to the factual context inducing Inspector Cullen's state of mind at the material time, leading to the opinion that he formed.

120 When this is considered in the context of all of the other evidence in the possession of Inspector Cullen, and before the Tribunal, including the extensive use of ACMs at the Refinery, a considerable amount of it likely to be degraded to some extent; the other specific incidents Inspector Cullen investigated or became aware of; the extensive use by Alcoa of contractors on site; the breakdown in contractor management of asbestos on site; the fact that Alcoa has an extensive program of maintenance and refurbishment ahead which will involve contractors; and that tradespeople, engaged on maintenance and refurbishment of aging plant as an occupational group, being the most likely to suffer asbestos exposure hazards by reason of the nature of their work, it is almost inevitable that Inspector Cullen came to the conclusions that he did.

121 Alcoa also contended that there was no evidence that either the 2014 or 2016 incidents were not addressed, such that there would be a likelihood of a recurrence of such incidents in the future. However, despite changes made by Alcoa after these incidents, other events took place involving contractors. I have already noted them earlier, including an incident that took place after the issuance of the prohibition notice in February 2017.

Compliance otherwise

122 As to compliance with reg 7.28 of the Regulations, this aspect of the prohibition notice was not upheld by the State Mining Engineer. Thus, I am not persuaded that consideration of the arguments in grounds advanced by Alcoa on this issue, aid in the determination of the review. Compliance or otherwise with reg 7.28, as the State Mining Engineer rightly concluded, is not determinative as to whether asbestos and ACMs present on the Refinery site are likely to become a hazard in the future.

123 A further point argued by Alcoa was that the terms of the prohibition notice are insufficiently precise to enable Alcoa to know how to properly respond. It was contended that the use of the word "might" in the prohibitions section of the notice, was incapable of being complied with. This was submitted to go beyond the scope of the MSI Act in terms of what hazards or likely hazards should be subject to regulation. Reference was made to a decision of the Victorian Civil and Administrative Tribunal in *Gray Bruni Constructions v Victorian WorkCover Authority (Occupational and Business Regulations)* [2006] VCAT 1969. In this case, an application to review a prohibition notice under the *Occupational Health and Safety Act 2004* (Vic) was before the Tribunal. Under s 112(b) of the statute, an inspector may issue a prohibition notice if they believe that "an activity may occur at a workplace that, if it occurs, will involve an immediate risk to the health and safety of a person…." Macnamara DP held at par 82 that "may" in this context, means that "something more than the mere possibility of occurrence must be made out".

124 The legislation under consideration in that case is materially different to the MSI Act and each case will turn on its own facts. Thus, such comparisons are of limited value. However, in any event, I am not satisfied that the use of the word "might" in the prohibition notice is inappropriate or inconsistent with the statutory scheme in this jurisdiction. It means no more than and is conformable with the notion that there is something more than a mere possibility of an occurrence, in terms of a real or substantial chance. There is little difference in meaning between "may" and "might" in this context.

125 It was also contended by Alcoa that based on Mr Obal's evidence, as at the time of these proceedings, there had not been identified any friable or non-friable asbestos that posed a present and immediate risk to any person at the Refinery. The import of this seemed to be that if this is so, the basis for the issuance of the prohibition notice was in some way undermined or was an inappropriate use of a notice. I do not accept this contention. Firstly, it is contrary to the broad construction of the MSI Act provisions that I consider should be adopted, as set out above, when considered in the context of the formation of Inspector Cullen's opinion in view of the evidence before the Tribunal. Secondly, there is nothing in the relevant provisions of the statute that require that any risk be imminent. The language of s 31AB(b) of the MSI Act is quite different to the language of s 49(1) of the OSH Act, which empowers an inspector to issue an improvement notice under that legislation. The terms of s 49(1) refer to an inspector having an opinion that an "activity is occurring or may occur…. involves or will involve a risk of imminent and serious injury to, or imminent and serious harm to the health of, any person…" There is no corresponding requirement of a risk of "imminent" injury etc under the MSI Act. The issue is the "likelihood", in terms of it being more probable that not, of a substance becoming a hazard.

126 It was also contended by Alcoa that the prohibition notice is vague and imprecise. The submission was that as the notice is directed at all ACM on the Refinery site and no specific additional requirements are imposed on Alcoa, an exposure incident may place Alcoa in breach. Furthermore, that the prohibition may even discourage the taking of action under the Code to remediate asbestos because of the risk of an unwitting breach.

127 Subject to what I say below as to its framing, I do not think the prohibition notice is vague and ambiguous. It contains a clear statement of the hazard and the opinion Inspector Cullen formed. The basis for that opinion is quite clearly set out in some detail. The statement in the grounds, as to the consequences of exposure to damaged or degraded asbestos, is an accurate representation of the known risk of asbestos fibres likely being released in those circumstances. The prohibition clearly states the requirement that persons not be at any place at the Mine where they might, because of the prohibited activity, be exposed to asbestos. There are then specified the exceptions from the prohibition that can be categorised into safe removal of asbestos by qualified persons; testing for the presence of asbestos; where the presence of asbestos could not reasonably be anticipated and where an exemption is obtained on the basis that the State Mining Engineer is satisfied any ACM is not hazardous.

Was the prohibition notice adequately framed?

128 As to this issue, I accept the contentions of Alcoa that on Dr Glossop's evidence, mere "contact" with asbestos cannot pose a hazard as it is the release of respirable fibres that can cause disease. Whilst mere incidental contact with one's hand for example, may not have been what Inspector Cullen had in mind when using this word, especially in the context of the BOD line incident, some modification is necessary. The State Mining Engineer accepts that it is damage, deterioration and disturbance that can render asbestos hazardous. Accordingly, the reference to "contact" in the prohibition notice should be removed and it should be modified accordingly. I also consider that in exception 4 in the prohibition, the reference to "competent expert" should be modified to "competent person", to be consistent with the meaning of that term in the Code.

Conclusions

129 For the forgoing reasons, in accordance with s 102AA(4)(b) of the MSI Act the prohibition notice is affirmed with modifications.

130 Finally, I wish to acknowledge the helpful assistance of counsel, Mr Nixon for the State Mining Engineer and Mr Wade for Alcoa, in terms of both the content and conduct of their respective cases before the Tribunal.

2018 WAIRC 00269

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ALCOA OF AUSTRALIA LIMITED
	APPLICANT
	-v-
	ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 26 APRIL 2018
FILE NO/S	OSHT 3 OF 2017
CITATION NO.	2018 WAIRC 00269

Result	Prohibition notice affirmed with modifications
Representation	
Applicant	Mr R Wade of counsel
Respondent	Mr L Nixon of counsel

Order

HAVING heard Mr R Wade of counsel on behalf of the applicant and Mr L Nixon of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the *Mines Safety and Inspection Act 1994*, hereby orders –

(1) THAT prohibition notice NP-372-223057 be and is hereby modified by:

(a) In the prohibitions by deleting the words "that is being disturbed, abraded or otherwise contacted in any manner" and inserting in lieu thereof the words "that is or has been damaged and/or disturbed and/or has deteriorated in any manner"; and

(b) In the exceptions in par 4 delete the words "competent expert" and insert in lieu thereof the words "competent person".

(2) THAT otherwise prohibition notice NP-372-223057 be and is hereby affirmed.

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

NOTICES—Award/Agreement matters—

2018 WAIRC 00346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 8 of 2018

APPLICATION FOR A NEW AGREEMENT TITLED

"SHIRE OF MURRAY (OUTSIDE WORKFORCE) ENTERPRISE BARGAINING AGREEMENT 2018"

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

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

4 Definitions

…

(a) "**Award**" means the relevant Award that the officer or employee is employed under.

…

(c) "**Officer or Employee**" means an officer or an employee of the Shire employed under this Agreement.

…

...

5 Incidence and Parties Bound

(a) This Agreement will commence operation on 1 July 2018 for a period of three years and the nominal expiry date will be 30 June 2021.

This Agreement shall continue to operate beyond the nominal expiry date and apply to employees beyond the nominal expiry date until a replacement enterprise agreement is made or this Agreement is terminated in accordance with the Industrial Relations Act 1979.

(b) In the event of a Boundary Change or Amalgamation, Clause 11(4) of the Local Government Act 1995 which states "A contract of employment … is not to be terminated or varied as a result (wholly or partly) of an order under section 2.1 so as to make it less favourable to that person unless – compensation acceptable to the person is made; or a period of at least 2 years has elapsed since the order had effect" is to apply for the life of the Agreement.

(c) This agreement shall be read and interpreted wholly in conjunction with the Municipal Employees (Western Australia) Interim Award 2011, Metal Trades (General) Award and the Building Trades Award 1968 as they stand at the date of registration of this Agreement, and/or it's [sic] successors, and where there is any inconsistency between the terms and conditions of this Agreement, and the terms and conditions of the Award, the terms and conditions of this Agreement shall prevail over the Award.

(d) This Agreement shall apply in the state of Western Australia to approximately 35 employees.

(e) The parties to this Agreement shall be the Shire of Murray ("the Shire") and the Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union of Workers Perth ("the Union")

and those staff who are members of, or are eligible to be members of the Union and whose terms and conditions are under the:

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

(f) The salaries prescribed by this Agreement shall not apply to officers whose salaries are negotiated annually with the Shire and who are employed by the Shire under maximum term contracts, and those officers designated by Council as Senior Employees under Section 5.73 of the Local Government Act 1995, provided that employees who have negotiated salaries as over Award payments shall still be covered by the salary scales prescribed by this Agreement.

(g) The parties to this Agreement acknowledge that this Agreement can be varied by consent of all parties, and subject to approval by the Western Australian Industrial Relations Commission ("the Commission") at any time during its operation.

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

(Sgd.) S BASTIAN,
[L.S.] Registrar.

17 May 2018

2018 WAIRC 00381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. APPL 32 of 2018

APPLICATION FOR VARIATION OF AWARD
"RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000"

NOTICE is given that an application has been made to the Commission by the *Director General, Department of Biodiversity, Conservation and Attractions* under the *Industrial Relations Act 1979* for variation of the area and scope clause of the above named Award.

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

3. - AREA AND SCOPE

This Award shall apply to employees employed in classifications described in clause 17. - Wages of this Award, who are employed in the State of Western Australia.

5. – DEFINITIONS

…

(4) "Employer" means the Chief Executive Officer (Executive Director) of the Department of Biodiversity, Conservation and Attractions.

…

17. - WAGES

(1) …

Classifications

Ranger's Assistant Year 1 Year 2 Year 3 Year 4 Year 5	Ranger Grade 2 Year 1 Year 2 Year 3 Year 4 Year 5	Senior Ranger Grade 4 Year 1 Year 2
Ranger Grade 1 Year 1 Year 2 Year 3 Year 4 Year 5	Senior Ranger Grade 3 Year 1 Year 2 Year 3	

SCHEDULE A - PARTIES TO THE AWARD

The following are parties to this award:

The Chief Executive Officer (Executive Director) of the Department of Biodiversity, Conservation and Attractions.

United Voice WA

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

(Sgd.) S BASTIAN,
[L.S.] Registrar.

22 June 2018