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FULL BENCH—Appeals against decision of Commission—

2018 WAIRC 00817

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 2/2018 GIVEN ON 30 MAY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2018 WAIRC 00817
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 26 SEPTEMBER 2018
DELIVERED	:	MONDAY, 29 OCTOBER 2018
FILE NO.	:	FBA 5 OF 2018
BETWEEN	:	DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION Appellant AND FLOYD BEDFORD BROWNE Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Senior Commissioner S J Kenner
Citation	:	[2018] WAIRC 00325; (2018) 98 WAIG 482
File No	:	APPL 2 of 2018

CatchWords	:	Industrial Law (WA) - Appeal against decision made by the Commission - Referral of a decision made under the <i>Public Sector Management (Redeployment and Redundancy) Regulations 2014</i> (WA) pursuant to s 95 of the <i>Public Sector Management Act 1994</i> (WA) - Meaning of 'continuous service in the Public Sector' - Employment in the service of another State - Construction of Wages Employees Long Service Leave General Order of the Commission - Whether the Commission erred in determining that the respondent's service in Western Australia and service in Tasmania constituted continuous service served by an employee in the Public Sector for the purpose of reg 13(2) of the <i>Public Sector Management (Redeployment and Redundancy) Regulations</i>
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Legislation	:	<i>Industrial Relations Act 1979</i> (WA), s 7(1), s 49 <i>Interpretation Act 1984</i> (WA), s 3(1)(c), s 44(1) <i>Public Sector Management Act 1994</i> (WA), s 3(1), s 94(2)(c), s 94(2)(d), s 94(3)(e), s 94(3)(f), s 95, s 95(1) <i>Planning and Development Act 2005</i> (WA) <i>Workers' Compensation and Rehabilitation Act 1981</i> (WA) <i>Public Sector Management (Redeployment and Redundancy) Regulations 2014</i> (WA), reg 3, reg 3(1), reg 5(2)(f), reg 11, reg 13, reg 13(2), reg 13(3), reg 13(5), reg 16, reg 16(3), reg 16(5), reg 17(1), reg 19(1)(a), reg 20(1), reg 26(1), reg 26(4)
Result	:	Appeal upheld and decision at first instance quashed
Representation:		
Appellant	:	Mr R J Andretich, of counsel
Respondent	:	Mr A Drake-Brockman, as agent
Solicitors:		
Appellant	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Australian Unity Property Limited v City of Busselton [2018] WASCA 38
 Baker v Markellos [2012] SASF 112; (2012) 114 SASR 379
 Director General, Department of Education v United Voice WA [2013] WASCA 287; (2013) 94 WAIG 1
 Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue [2011] WASCA 228
 Gentel v Rapps [1902] 1 KB 160
 Gibb v Federal Commissioner of Taxation [1966] HCA 74; (1966) 118 CLR 628
 Hewitt v Benale Pty Ltd [2002] WASCA 163
 Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49
 Martinez v Minister for Immigration and Citizenship [2009] FCA 528; (2009) 177 FCA 528
 Muller v Dalgety & Co Ltd (1909) 9 CLR 693
 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
 The Council of the Shire of Redland v Stradbroke Rutile Pty Ltd (1974) 133 CLR 641
 Van Heerden v Hawkins [2016] WASCA 42

*Reasons for Decision***SMITH AP:****The Appeal**

- This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act). The appeal is against a declaration and order made by the Commission on 30 May 2018:
 - declaring that for the purposes of reg 3 and reg 13(2) of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (the Regulations) 'continuous service' includes service in the employment of the Commonwealth or of another State in accordance with cl's 2, 3 and 16 of the Government Wages Employees Long Service Leave General Order (1986) 66 WAIG 319; and
 - ordering that for the purposes of the calculation of Mr Browne's severance payments under pt 3 of the Regulations, Mr Browne's service in the Public Sector in Western Australia be and is hereby deemed to include the period from 18 September 1991 to the date of the termination of Mr Browne's employment.

Factual Background

- Mr Browne commenced employment in the Public Service in Western Australia with the former Environmental Protection Authority (EPA) on 18 September 1991. Later in May 1995, he was seconded to the Department of Environment and Land Management in Tasmania. A formal secondment agreement was made between the Tasmanian department and the EPA on 1 May 1995. The secondment was to be initially for a period of six months. On 3 June 1997, Mr Browne was appointed on a permanent basis to the Tasmanian Public Service.
- In October 2011, Mr Browne was successful in an application for a position to return to work for the EPA in Western Australia. Mr Browne resigned from the Tasmanian Public Service, effective on 18 October 2011 and commenced employment with the EPA on 24 October 2011. In the five-day period between these dates, which included three working days, Mr Browne packed up his household with his wife and arranged to travel from Tasmania to Perth.
- As a result of machinery of government changes implemented in July 2017, the EPA became part of the Department of Water and Environmental Regulation.

- 5 In October 2017, Mr Browne responded to an expression of interest to participate in the 'Voluntary Targeted Separation Scheme for Public Sector Renewal 2017' (the Scheme) and made enquiries with human resources staff of the appellant. In particular, he made enquiries whether service in other States and in the Commonwealth Public Sector would count as service for the purposes of the Scheme. Mr Browne was provided with information that such service would be portable and reference was made to cl 25(11) of the *Public Service Award 1992* (WA). Following the receipt of this information, Mr Browne expressed an interest in the Scheme on 20 October 2017.
- 6 In mid-November 2017, Mr Browne was informed by his manager at the EPA that his expression of interest to take part in the Scheme had been accepted. Mr Browne understood at that time he would receive the maximum entitlement under the Scheme of 52 weeks' pay. On 24 November 2017, Mr Browne received a letter from the Director General in which an offer of voluntary severance was made and the estimated severance amount referred to in the letter was \$148,479.24 net.
- 7 On 1 December 2017, Mr Browne received a revised severance pay estimate which included his initial period of service in Western Australia from 1991 to 1995. The final net revised amount was \$179,094.40. In email exchanges on that day, Mr Browne was informed that once he accepted and provided a definite termination of employment date, a new letter described as the 'final letter' would be provided to him.
- 8 On 6 December 2017, Mr Browne was informed by email that the Public Sector Commission was investigating the issue of whether 'continuous service' (for the purpose of calculating severance pay) included government service outside of the Western Australian Public 'Service'.
- 9 On 7 December 2017, Mr Brown received a hand-delivered signed copy of the original letter he had previously received dated 22 November 2017. On the letter Mr Browne wrote:
 - (a) he accepted the offer of voluntary severance;
 - (b) the effective date of his resignation would be 20 December 2017; and
 - (c) his last day of employment would be 27 December 2017.
- 10 On 11 December 2017, Mr Browne was informed that following the Public Sector Commission investigation, it had been concluded that 'continuous service' for severance pay purposes did not include any service with another State or the Commonwealth and that only service in the Western Australian Public Sector would be considered. This led to a revised letter of offer dated 11 December 2017 which did not include Mr Browne's service in Tasmania and did not include Mr Browne's service initially with the EPA from 1991 to 1995.
- 11 Mr Browne was aggrieved by the decision of the appellant to reduce the offer of voluntary severance to an amount of \$65,508.92 net and instituted proceedings before the Commission, pursuant to s 95 of the *Public Sector Management Act 1994* (WA) (PSM Act).

Jurisdiction conferred on the Commission to hear and determine the respondent's referral of a decision made under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA)

- 12 Section 95 of the PSM Act confers jurisdiction on an employee aggrieved by a decision made, or purported to be made, under the Regulations as if it were an industrial matter that could be referred under the IR Act. Section 95 also confers jurisdiction on the Commission to hear and determine the matter. Section 95 of the PSM Act provides:
 - (1) In this section —

section 94 decision means a decision made or purported to be made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)).
 - (2) A section 94 decision may be referred to the Industrial Commission —
 - (a) under the *Industrial Relations Act 1979* section 29(1)(a); or
 - (b) by an employee aggrieved by the decision,

as if it were an industrial matter that could be so referred under that Act.
 - (3) A referral under subsection (2) must be made within the period after the making of the decision that is prescribed under section 108.
 - (4) The *Industrial Relations Act 1979* applies to and in relation to a section 94 decision referred under subsection (2) as if the decision were an industrial matter referred to the Industrial Commission in accordance with that Act.
 - (5) In exercising its jurisdiction in relation to a decision referred under subsection (2), the Industrial Commission must confine itself to determining whether or not regulations referred to in section 94 have been fairly and properly applied to or in relation to the employee concerned.
 - (6) The Industrial Commission does not have jurisdiction in respect of a section 94 decision if the employment of the employee concerned is terminated.
- 13 The Regulations are regulations as defined s 95(1) of the PSM Act. Section 94(3)(e) provides for regulations to be made to provide for the terms and conditions (including remuneration) which are to apply to a registered employee who, with the prior approval of the (Public Service) Commissioner, accepts voluntary severance by resigning his or her office, post or position.
- 14 The Senior Commissioner properly characterised the task of the Commission when determining a claim referred under s 95 is to ascertain the statutory rights and obligations between the parties and determine whether the Regulations have been 'fairly and properly applied' [4].

The statutory scheme of voluntary severance including terms and conditions of entitlements (including remuneration) that apply to an employee who accepts an offer of voluntary severance

- 15 The Scheme for offers of voluntary severance, including the terms and conditions of an amount of a severance payment, are provided for in pt 3 of the Regulations - Voluntary severance.
- 16 Regulation 11 provides that registrable employees may be offered voluntary severance by their employing authorities. Regulation 11 provides:
- (1) In this regulation —
notified employee means an employee who has been given notice under regulation 9(1).
 - (2) The employing authority of a notified employee may offer voluntary severance to the employee if the employing authority is satisfied that the employee cannot be transferred within his or her department or organisation.
 - (3) The offer must —
 - (a) specify a period of not less than 8 weeks after the offer is made within which the employee may accept or refuse the offer; and
 - (b) provide for the employee to accept the offer and resign from his or her employment with effect on and from a day that is not later than 4 weeks after the day on which the offer is accepted; and
 - (c) provide for the making of a severance payment under regulation 13 to the employee.
 - (4) The offer must include a notification that refusal to accept the offer may result in the employing authority registering the employee under regulation 18 and that, if the employee is registered and not offered suitable employment, the employee's employment may be terminated under Part 6.
 - (5) An acceptance of an offer must be in writing signed by the employee.
- 17 The amount of a severance payment is to be determined in accordance with reg 13, which provides for the formula of how the calculation is to be made.
- 18 The maximum amount of a severance payment calculated under reg 13 must not exceed 52 weeks' pay. This maximum may only be exceeded where the Minister approves a 'targeted separation scheme', which occurred in this matter pursuant to reg 16.
- 19 The gazettal of the Scheme, as required by reg 16(3), was made on 15 September 2017 (page 4825). Reg 16(5) provides that the amount of severance pay payable under a 'targeted separation scheme' may exceed 52 weeks' pay, in accordance with the relevant provisions of the Scheme.
- 20 Calculation of a severance payment amount to be paid to an individual employee who accepts an offer of voluntary severance under a targeted separation scheme is to be calculated in accordance with reg 13. Pursuant to reg 13(2), (3) and (5), the severance payment is to be calculated by length of service.
- 21 The calculation of the severance payment made to Mr Browne was made pursuant to reg 13(2). Regulation 13(2) of the Regulations provides:
- Subject to subregulations (3), (4) and (5), a severance payment made to an employee is the payment of an amount equal to 3 weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office).
- 22 The central issue in contention between the parties in this appeal and at first instance is the meaning of the words 'continuous service served by the employee in the Public Sector' in reg 13(2).
- 23 The words 'Public Sector' are not defined in the Regulations. In s 3(1) of the PSM Act, 'Public Sector' is defined to mean, unless the contrary intention appears, all agencies, ministerial offices, and non-SES organisations. As the appellant points out in written submissions, pursuant to s 44(1) of the *Interpretation Act 1984* (WA), words and expressions used in subsidiary legislation have the same respective meanings as in the written law under which the subsidiary legislation is made.
- 24 'Continuous service' is defined in reg 3 of the Regulations. Regulation 3(1) provides, in these regulations 'continuous service' has the same meaning as it has in the *Wages Employees Long Service Leave General Order* of the Industrial Commission (the General Order).
- 25 The General Order was made with effect from 1 January 1986: (1986) 66 WAIG 319. The General Order remains in force and prescribes entitlements and conditions attaching to the grant of long service leave for government wages employees employed by a Public Authority.
- 26 The relevant provisions of the General Order, for the purpose of determining the meaning of 'continuous service' for the purposes of the Regulations, are cl's 1, 2, 3 and 16 of the General Order.
- 27 Clause 1 provides for all government wages employees employed by a Public Authority to become entitled to long service leave initially after a period of 10 years 'continuous service' and subsequently after seven years' 'continuous service'.
- 28 Clause 2 of the General Order provides as follows:
- (a) For the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include:-
 - (i) absence of the employee on annual leave or public holidays;
 - (ii) absence of the employee on paid sick leave or on an approved rostered day off;

- (iii) absence of the employee on approved sick leave without pay except that portion of a continuous absence which exceeds three months. Provided that prior to 1 July 1957 only two weeks in any year shall be allowed and provided that prior to 1 April 1974 and after 1 July 1957 only six weeks in any year shall be allowed;
 - (iv) absence of the employee on approved leave without pay, other than sick leave without pay but not exceeding two weeks in any qualifying period;
 - (v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;
 - (vi) absence of the employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;
 - (vii) absence of the employee on long service leave which accrues on or after 1 April 1974;
 - (viii) absence of an employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and
 - (ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.
- (b) The Service of an employee shall be deemed NOT to include:-
- (i) service of an employee after the day on which he has become entitled to 26 weeks' long service leave until the day on which he commences the taking of 13 weeks of that leave;
 - (ii) any period of service with an employer of less than 12 months. Provided where after 1 April 1974 an employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government employer to another; becoming redundant or qualifying for *pro rata* payment in lieu of leave pursuant to Clause 11, then such period of service shall count;
 - (iii) any period during which an employee has been paid as a casual;
 - (iv) any other absence of the employee except such absences as are included in service by virtue of subclause (a) hereof; and
 - (v) any service of an employee prior to 1 April 1974 where that employee was less than 18 years of age.

29 Clause 3 of the General Order provides as follows:

Subject to the provisions of Clause 2 of these conditions the service of an employee shall not be deemed to have been broken –

- (a) by resignation, if he resigns from one Public Authority in this State and commences with another Public Authority in this State within one working week of the expiration of any period for which payment in lieu of annual leave and/or public holidays has been made by the employer from which he resigned, or, if no such payment has been made, within one working week of the day on which his resignation became effective;
- (b) if his employment is ended by his employer for any reason other than serious misconduct, but only if –
 - (i) the employee resumes employment with the Government not later than six months from the day on which his employment was ended; and
 - (ii) payment pursuant to Clause 11 of these conditions has not been made; or
- (c) by any absence approved by the employer as leave whether with or without pay.

30 Clause 16 of the General Order provides as follows:

- (a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:
 - (i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.
 - (ii) Service with the State necessary to complete a qualifying period for an entitlement of long service leave shall be calculated in accordance with the provisions of these conditions.
 - (iii) An employee shall not become entitled to long service leave or payment for long service leave unless he has completed three years' continuous service with the State.
 - (iv) Where an employee would but for the provisions of paragraph (iii) hereof have become entitled to long service leave before the expiration of three years' continuous service with the State, service subsequent to that date of entitlement shall count towards the next grant of long service leave.
- (b) No employee shall be entitled to the benefit of this clause if service with the previous employer was terminated for reasons which would entitle that employer to dismiss the employee without notice.

- (c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.
- (d) Any dispute as to the application of paragraph (i) of subclause (a) hereof or whether the employee was previously engaged in the service of the Commonwealth or another State of Australia shall be determined by the Long Service Leave Appeal Committee.

Reasons for decision by Commission at first instance

31 The Senior Commissioner properly observed that the task of statutory construction begins and ends with the text and had regard to well established principles of construction considered by the Court of Appeal in *Van Heerden v Hawkins* [2016] WASCA 42 [93] - [96].

32 The Senior Commissioner pointed out that the outcome of this matter turns on the proper construction of the Regulations, when read with the relevant terms of the General Order and observed:

- (a) that whilst reg 3 purports to import a 'definition' of 'continuous service' contained in the General Order, it is apparent that there is really no definition, at least expressed as such, in the General Order; and
- (b) what the General Order contains in at least cl's 2 and 3 is the device of deeming. These provisions set out for the purposes of the accrual of long service leave by government wages employees, what is and what is not, deemed service for long service leave benefit purposes.

33 The Senior Commissioner then observed at [40]:

The device of deeming is a common technique in legislative drafting. It is a form of a 'statutory fiction' to extend the meaning of a subject matter beyond the bounds of what it might normally be understood to mean: *Muller v Dalgety Co Ltd* (1909) 9 CLR 639 per Griffith CJ at 696, as cited and discussed in DC Pearce and RS Geddes *Statutory Interpretation in Australia* 8th Edition at par 4.45 (see too par 4.45 generally). The deemed service extends to what one might expect to find in such a provision, such as absences on various types of leave etc, through to military service and controversially in this case, employment in the service of the Commonwealth or another State. Ordinarily, of course, service with another State or the Commonwealth would not be 'service as an employee of a Public Authority', without such deeming.

34 The Senior Commissioner had regard to the contention of the appellant that the reference to 'continuous service' in reg 13(2), when read with the words 'in the Public Sector' (as defined in s 3(1) of the PSM Act), is, on its face, at odds with the concept of recognition of prior service outside the Public Sector. Having found that consideration must be given to the deeming provisions of the General Order and as to what is taken to be 'service' in cl's 2 and 3, he found that the deeming provisions applied to both the General Order when reference is made to 'service as an employee of a Public Authority' and to the words 'continuous service served by an employee in the Public Sector' in the Regulations.

35 The Senior Commissioner had regard to cl 16 of the General Order and found that the definition of 'continuous service' in reg 3(1) is not qualified or restricted in any way and observed that had the draftsman of the definition of 'continuous service' in reg 3(1) wished to exclude prior service of a Public Sector employee with the Commonwealth or another State, or any other absence, it would have been a simple matter to have said so and to insert an exclusion, by explicit reference (to exclude) to cl 2(a)(ix) or any other provision of the General Order.

36 The Senior Commissioner observed that whilst it is the case the mechanism prescribed in cl 16(1)(a) to calculate long service leave for an employee who has had prior service in another State of the Commonwealth is not directly applicable to the method of calculation of severance pay under the Regulations, it is a recognition of the prior service and its 'conversion' into service in the Public Sector that is important.

37 After making these observations, the Senior Commissioner found [46] - [48]:

The Regulations and the General Order must be construed in a common-sense fashion. It could never be credibly argued in my view, that it would be a fair application of the Regulations for the purposes of s 95(5) of the PSM Act, for an employee to benefit from both a severance or like payment arising from prior service with the Commonwealth or another State, as well as receiving a severance payment under the Regulations, which included that very same service. That outcome would be a windfall for the employee. If any such payment has been made in a case, that prior service must be discounted, to enable the Regulations to be fairly applied to the employer. To hold otherwise would be contrary to the Commission's statutory duty to determine matters in accordance with equity, good conscience and the substantial merits of the case under s 26(1)(a) of the *Industrial Relations Act 1979* (WA).

Having considered the matter, the approach adopted by the applicant to the construction of the Regulations and the General Order is to be preferred to that adopted by the respondent. Therefore, the original letter from the respondent to the applicant, dated 22 November 2017, including his initial service in the Western Australian public service and his subsequent service in Tasmania, was correct. For the purposes of s 95(5) of the PSM Act, I consider that the proper application of the Regulations requires the applicant's service in Tasmania to be recognised in the calculation of his severance pay entitlements under Part 3 of the Regulations.

Finally, is the argument that the period of three working days or so, between the dates of 19 October and 23 October 2011, when the applicant resigned his Tasmanian employment and resumed employment in Western Australia, broke his service for benefit purposes. In this respect, cl 3 of the General Order recognises a break in service of a maximum of one working week, where an employee resigns from one position and resumes in another. Clause 16(a) also refers to an employee who 'was, immediately prior to being engaged, in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under clause 3...'. This means therefore, construing the General Order, that a break in service of no more than one working week does not break service for continuity of service

purposes. Furthermore, in any event, even if cl's 3 and 16(a) did not apply in this way, in my view it would not be a fair application of the Regulations, to penalise the applicant by regarding this relatively short period, necessary for him to pack up and travel with his family to Perth, as breaking his continuity of service.

The grounds of appeal

38 The grounds of appeal are as follows:

The Senior Commissioner erred in his decision delivered on 28 May 2018 in:

1. Finding 'continuous service served by the employee in the Public Sector' for the purposes of the Public Sector Management (Redeployment and Redundancy) Regulations 2014 included the Respondent's service in the Tasmanian Public Service when section 3 of the Public Sector Management Act 1994 defines the Public Sector to mean:
 - (a) the agencies, and
 - (b) the ministerial offices, and
 - (c) the non SES organisations.
 2. Deciding the break in service between 19 October and 23 October 2011 should not be considered a break in 'continuous service served by the employee in the Public Sector' for the purpose of the Regulations.
 3. Deciding a fair application of the Regulations required recognition of the Respondent's Tasmanian service in calculating the amount of voluntary severance payable to him under the Regulations when that service was not 'continuous service served by the employee in the Public Sector' for the purpose of Regulation 13(2).
- 39 The appellant did not press ground 3 insofar as it relates to the finding made by the Senior Commissioner that it would not be a fair application of the Regulations to penalise Mr Browne if cl's 3(a) and 16(a) of the General Order were applied to regard the three working days' break in service between Mr Browne ceasing his employment on 19 October 2011 in Tasmania and commencing employment for the EPA on 23 October 2011 when he and his family packed up and travelled to Perth.

Construction

40 As the Senior Commissioner considered in his reasons, the importance of construction of legislation is the text itself. The Court of Appeal recently reiterated this principle in *Australian Unity Property Limited v City of Busselton* [2018] WASCA 38. In that matter, the Court was called upon to construe the provisions of a local planning scheme (which when approved by the relevant Minister has full force and effect as if enacted by the *Planning and Development Act 2005* (WA)). In a judgement of the Court, their Honours observed that the general principles that apply in determining the objective meaning of text starts with the importance of the text. Their Honours said [79] - [81]:

The first aspect is the imperative to give primacy to the language which the legislating body has chosen to use. As the plurality observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

This focus on the statutory text may be seen as an aspect of the rule of law. It recognises and preserves the role of the legislature, acting within constitutional constraints, in identifying the policy which legislation is to pursue by requiring that effect be given to the chosen text. This point was noted by Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:

The danger that lies in departing from the ordinary meaning of unambiguous provisions is that 'it may degrade into mere judicial criticism of the propriety of the acts of the Legislature' ... it may lead judges to put their own ideas of justice or social policy in place of the words of the statute.

Additionally, focus on the statutory text facilitates the comprehension of the meaning of legislation by persons whose conduct it regulates. As French CJ observed in *Alcan*:

The starting point in consideration of the first question is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose. That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill* [(1991) 172 CLR 319 at [340] as: 'dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.' In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy.

41 Their Honours also observed in *Australian Unity Property Limited v City of Busselton* that in construing a planning scheme it is relevant to note that schemes are not usually drafted by Parliamentary counsel and are often expressed in terms which lack the precision of an Act of Parliament [84]. Further, their Honours reiterated that planning schemes should be construed broadly rather than pedantically and with a sensible practical approach. Their Honours reiterated the principle that the exercise remains one of identifying the objective meaning from a consideration of the legislative text, understood as whole and in the context in which and purpose for which it was enacted [84].

- 42 This point applies to the construction of industrial instruments including awards made by the Commission: *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2013) 94 WAIG 1. As Buss J observed in that matter, when considering the principles that apply to the interpretation of an industrial agreement [81] - [82]:

The construction of an industrial agreement involves ascertaining what a reasonable person would have understood the parties to the agreement to mean. The language of the agreement should be understood in the light of its industrial context and purpose. See *Ancor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ & McHugh J).

In *Kucks v CSR Ltd* (1996) 66 IR 182, Madgwick J observed:

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. *And meanings which avoid inconvenience or injustice may reasonably be strained for*. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand (184).

- 43 These observations, in my respectful opinion, have application to the construction of a general order of the Commission.
- 44 In this matter, reg 3(1) of the Regulations defines 'continuous service' as having the same meaning as it does in the General Order.
- 45 In *Australian Unity Property Limited v City of Busselton*, their Honours observed the approach to construction of a statutory definition in respect of an argument whether a drafting error emerged in a definition that the Court must first read the definition into the Act and then to construe the provision in respect of which it is read into. Their Honours said [109]:

It is established that the function of a statutory definition is to provide an aid in construing the statute. Generally, the proper course is to read the words of the definition into the relevant provision and then construe the latter. Undertaking that ordinary process in the present case, having regard to the context and purpose of the legislation, there is no ambiguity. Whether or not an 'obvious drafting error' has occurred in a definitional or a substantive provision, the question is ultimately whether the alleged intended meaning emerges with sufficient clarity from an examination of the legislation considered as a whole in its context, and whether the invited departure from the statutory text is too great.

- 46 In *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228, Buss JA made the same point and explained [150]:

The function of a definition in a statute is not, except in rare cases, to enact substantive law. Rather, its function is to provide aid in construing the substantive enactment that contains the defined term. The meaning of the definition depends on the context, and the purpose or object, of the substantive enactment. See *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216, where McHugh J noted:

Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better - I think the only proper - course is to read the words of the definition into the substantive enactment and then construe the substantive enactment - in its extended or confined sense - in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment [103].

- 47 Murphy JA also made the same point in *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [218] and then went on to set out in his reasons the following observations of the High Court in *Gibb v Federal Commissioner of Taxation* [1966] HCA 74; (1966) 118 CLR 628, wherein the Court said: (635):

The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense - or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way. As was said by Sutherland (*Statutes and Statutory Construction*, 2nd ed., vol. 2, p. 687),

'Such definitions can, in the nature of things, have no effect except in the construction of the statutes themselves.'

- 48 Because 'continuous service' is not defined in one specific clause of the General Order, what constitutes 'continuous service' within the meaning of the General Order must first be ascertained before the definition of reg 3(1) of the Regulations can be read into the substantive provision (reg 13(2)). This is because as the Senior Commissioner pointed out the definition of 'continuous service' is not found within one provision of the General Order. This task requires the whole of cl's 2, 3 and 16 of the General Order to be read in its relevant context, which context includes incorporation by definition into the words 'continuous service' in reg 3(1) of the Regulations. Once the meaning of 'continuous service' in the General Order is ascertained, the meaning of those words are to be read with the definition of 'Public Sector' (in section 3(1) of the PSM Act) and then by reading both of these definitions in the text of reg 13(2) of the Regulations. Regulation 13(2) can then be construed within its context and purpose.

- 49 In particular, the task is to read the definition of 'continuous service' together with the definition of 'Public Sector' in reg 13(2) and then to construe the text 'for each complete year of continuous service served by the employee in the Public Sector' in reg 13(2).
- 50 Regulation 13(2) is made pursuant to the regulation making power in s 94(3)(e) of the PSM Act and provides for a formula for calculating payments which are a term and condition that is to apply to employees who accept voluntary severance (of their employment) in the Public Sector.
- 51 The words 'Public Sector' in reg 13(2) must be construed as, unless the context otherwise requires, to be agencies, ministerial offices and non-SES organisations of the State of Western Australia (s 3(1) of the PSM Act).
- 52 The question is, is the concept of 'service' and 'continuous', to be taken as including certain service and to regard certain matters not to interrupt that service, that would not otherwise be regarded as 'continuous service' in the 'Public Sector' if those words were otherwise not defined in reg 13(2).
- 53 Before construing reg 13(2), the meaning of 'continuous service' in the General Order must first be determined.
- 54 As the Senior Commissioner properly observed, the General Order deems certain service and other matters not to break service for the purposes of the concept of 'continuous' to calculate 'service' for the accrual of long service leave.
- 55 A deeming provision is by its nature a fiction. Deeming provisions in statutory definitions that create fictions are common. For example, deeming provisions have been used for the purposes of creating an offence under occupational health legislation to deem a contractor who has control of a workplace to be a person who is to be treated as an employer: *Baker v Markellos* [2012] SASFC 112; (2012) 114 SASR 379, or for the purposes of workers' compensation legislation: *Hewitt v Benale Pty Ltd* [2002] WASCA 163.
- 56 A statutory deeming provision is to be construed narrowly to achieve the object of its enactment: *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693, 696 (Griffith CJ). That is, the purpose for which the legislature introduced the fiction must be identified: *Muller v Dalgety & Co Ltd* (696) (Griffith CJ); *The Council of the Shire of Redland v Stradbroke Rutile Pty Ltd* (1974) 133 CLR 641, 655 (Gibbs J); *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49, 65 (Windeyer J); *Martinez v Minister for Immigration and Citizenship* [2009] FCA 528; (2009) 177 FCA 528.
- 57 To determine the purpose of a deeming provision requires an assessment of the text and the general purpose and policy of the provision in its context. In *Hewitt v Benale Pty Ltd*, Hasluck J and EM Heenan J (Scott J dissenting) found that when regard was to be had to the policy of the *Workers' Compensation and Rehabilitation Act 1981* (WA) the extended definition of 'employer' (which deemed the principal contractor and sub-contractor to be employers) applied for the purposes of the whole of the Act and not just to the provision of the Act in which the definition was found [72] - [77] and [120] - [123].
- 58 In this matter, the issue is what is the purpose of the definition of 'continuous service' in reg 3(1) of the Regulations, when read into reg 13(2), when regard is had to the provisions of the General Order.
- 59 By importing the concept of 'continuous service' as provided for in cl's 2, 3 and 16 (when read with the reference to 'continuous service' in cl 1 of the General Order), it is clear that it is intended that the meaning of 'continuous service' in reg 3(1) (for the purpose of calculating severance pay whenever the phrase 'continuous service' appears in the Regulations) is to be the same as for the purpose of calculating long service leave for State government wages employees who are employed by Public Authorities (as defined in s 7(1) of the IR Act).
- 60 In the absence of the definition in reg 3(1) of the words 'continuous service', the words 'continuous service served by the employee in the Public Sector' in reg 13(2) would necessarily have to be construed by regard to the ordinary meaning of 'continuous service' when read together with the definition of 'Public Sector' in s 3(1) of the PSM Act. The ordinary meaning of 'continuous' is 'unbroken, uninterrupted in time; without cessation': *Macquarie Dictionary* online. If this definition is applied to reg 13(2) of the Regulations, for service to be counted as 'served by the employee in the Public Sector' would necessarily mean the employee must serve a period of unbroken service in the 'Public Sector' of Western Australia.
- 61 At common law, the performance of work is regarded as 'service'. If no work is performed in the absence of a contractual right to remuneration, an employee's right to payment is abrogated: M Freedland, *The Personal Employment Contract* (2003), 200. It follows, therefore, it is arguable that periods of unpaid leave may constitute at common law a break in service. This principle has no application to the Regulations as 'continuous service' is defined in reg 3(1) and must be given effect in construing reg 13(2) and the definition of 'continuous service' in reg 3(1) must be read into reg 13(2) before it is construed.
- 62 Turning to the construction of 'continuous service' in the General Order, cl 2 of the General Order counts as 'service' absences from service, and thus includes absences which would, but for the definition of 'continuous service' in its ordinary meaning, not otherwise count as service. The absences from service are specified in the circumstances set out in cl 2(a)(i) - 2(a)(viii), such as approved leave without pay in cl 2(a)(iv).
- 63 Clause 2(a)(ix) also counts as 'service' for the purposes of 'continuous service', service of the Commonwealth or another State of Australia, as provided for in cl 16 (which pursuant to cl 16(1)(a) requires that service of the Commonwealth or another State is to be continuous to be counted). This is service that would not otherwise be counted as service in a Public Authority or the 'Public Sector'.
- 64 Clause 3 of the General Order also provides for specified conditions that deem breaks in service not to break the continuity of service. Clause 3 provides, subject to the provisions of cl 2, that service of an employee shall not be deemed to have been broken:
- (a) by resignation, if he resigns from one Public Authority in this State and commences with another Public Authority in this State within one working week;
 - (b) by any absence approved by the employer as leave with or without pay; and

- (c) where employment is terminated by an employer for any reason other than serious misconduct, an employee resumes employment within six months from the date of termination.

65 The appellant contends that whilst cl 2(a)(ix) deems service in the employment of another State to be service as an employee of a Public Authority, this provision is inconsistent with reg 13(2) which enables service to only count in calculating the service severance amount if it is service served 'by the employee in the Public Sector'.

66 It is established that delegated legislation may not include a definition that is repugnant to, or inconsistent with, the Act of Parliament under which it is made: *Gentel v Rapps* [1902] 1 KB 160, 166 (Channell J). However, every endeavour is to be made to save legislation from inconsistency. In *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ observed [70]:

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. 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.

67 Where an Act deals with a topic but does not exhaust all of its aspects, a regulation that deals with another aspect of the matter will not be invalid unless it is clear that it was intended that the Act alone should cover the field: Pearce and Argument, *Delegated Legislation in Australia* (4th ed, 2012) [19.16].

68 I do not agree that a textural inconsistency arises between the definition of 'Public Sector' in s 3(1) of the PSM Act and the provisions of the General Order as read into the definition of 'continuous service' in reg 3(1).

69 There is nothing in the PSM Act that creates a code and covers the field for a formula to be applied when calculating severance pay. To the contrary, s 94(3)(e) of the PSM Act expressly contemplates that regulations are to be made to provide for the terms and conditions (including remuneration) which are to apply to a registered employee who accepts voluntary severance by resigning his or her office, post or position.

70 The effect of the appellant's argument is to read the words 'continuous service' and 'Public Sector' in reg 13(2) disjunctively. However, it is plain the text 'continuous service' and 'served by the employee in the Public Sector' should not be read disjunctively. When the provisions of cl's 2, 3 and 16 of the General Order are read into reg 13(2) by the operation of the definition of 'continuous service' in reg 3(1), together with the definition of 'Public Sector', the effect is that continuous service in the Commonwealth or another State that is (subsequently) continuous with service in the 'Public Sector' is deemed to be 'continuous service served by the employee in the Public Sector' for the purpose of calculating severance pay (and for no other purpose).

71 This construction of the meaning of reg 13(2), when regard is had to the whole of the Regulations, does not extend continuous service in the 'Public Sector' for any other purpose of the Regulations other than for the calculation of severance pay and other remuneration (whether severance is voluntary or not) or the PSM Act. It is notable that s 94(2)(c), (d) and (3)(f) expressly provide that regulations are to be made for the terms and conditions (including remuneration) of employees whose employment is involuntarily terminated or who accepts an offer of employment outside the Public Sector.

72 For these reasons, I am not satisfied that the Senior Commissioner incorrectly interpreted the terms of the Regulations when read with the PSM Act and the General Order. I am also of the opinion that none of the grounds of appeal have been made out and that the appeal should be dismissed.

EMMANUEL C:

73 I have had the benefit of reading a draft of the Acting President's reasons for decision and adopt [1] to [39]. However, I respectfully disagree with her Honour's reasoning in [68] and [70]. Broadly I agree with the reasoning of Matthews C.

74 In the circumstances of this matter, the amount of a severance payment is worked out in accordance with regulation 13 of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014 (Regulations)*. Regulation 13(2) requires the period of service to be continuous **and** served in the Public Sector. While Mr Browne's employment in Tasmania may have been continuous, in the sense that it did not break continuity of service under the Government Wages Employees Long Service Leave General Order (1986) 66 WAIG 319 (**General Order**), it was not served in the Public Sector. This is because 'Public Sector' is defined in the *Public Sector Management Act 1994 (WA) (PSM Act)* and does not include entities outside Western Australian government.

75 A fair reading of regulation 13(2) does not lead to a conclusion that a reference to continuous service in the General Order is 'a contrary intention' such that Public Sector no longer has the meaning defined in the PSM Act. This is because the reference to 'Public Sector' follows the reference to continuous service, and is inherently at odds with it, leaving no work for 'Public Sector' to do to do if cl 2(a)(ix) of the General Order is read into reg 13(2). The reference to 'Public Sector' in reg 13(2) must qualify and limit the meaning of continuous service in the General Order. For Mr Browne, this means his employment in Tasmania does not count toward his continuous service for the purpose of calculating his entitlement to a severance payment under the Regulations.

76 For these reasons, I would uphold ground one of the appeal. It is not necessary to consider grounds two and three.

77 I would allow the appeal and quash the decision at first instance.

MATTHEWS C:

78 The subregulation requiring construction to determine this appeal, regulation 13(2) *Public Sector Management (Redeployment and Redundancy) Regulations 2014*, provides as follows:

- Subject to subregulations (3), (4) and (5), a severance payment made to an employee is the payment of an amount equal to 3 weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office).
- 79 The appellant says the term "Public Sector" has the same meaning as it does in the *Public Sector Management Act 1994*, where it is a defined term, and that, accordingly, service in government outside of Western Australia does not count in the calculation of the severance payment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*.
- 80 The respondent says that the term "continuous service served by the employee in the Public Sector" must be construed as a whole and that as "continuous service" has the same meaning as it has in the Wages Employees Long Service Leave General Order, and that meaning includes service in government outside of Western Australia, that "Public Sector", by necessary intendment, does not have the same meaning as in the *Public Sector Management Act 1994* and has, as a matter of law, a wider meaning.
- 81 Under the common law statutory construction is a text based endeavour. The common law approach may be affected by legislation dealing with the matter of statutory construction.
- 82 The *Interpretation Act 1984* relevantly provides at section 44(1) that:
Words and expressions used in subsidiary legislation shall have the same respective meanings as in the written law under which the subsidiary legislation is made.
- 83 Section 3(1)(c) *Interpretation Act 1984* provides:
The provisions of this Act apply to every written law, whether the law was enacted, passed, made, or issued before or after the commencement of this Act, unless in relation to a particular written law, in the case of subsidiary legislation, the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application.
- 84 No argument is put that there is anything about the *Public Sector Management Act 1994* which would have the effect that section 44(1) *Interpretation Act 1984* would not apply to the *Public Sector Management Act 1994* and subsidiary legislation made under it.
- 85 The start point is that the term "Public Sector" in regulation 13(2) *Public Sector Management (Redeployment and Redundancy) Regulations 2014* has the same meaning as in the *Public Sector Management Act 1994*.
- 86 The respondent to this appeal did not refer to, and I am unaware of, any authority for a proposition that the executive arm of government in making subsidiary legislation may provide, either expressly or by necessary intendment, for a defined term in an Act of Parliament to have a different meaning in the subsidiary legislation than it has in the Act.
- 87 An analysis of the text of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* shows that, in any event, no such attempt was made by the executive arm of government in this case.
- 88 The term "Public Sector" appears several times in the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*. I refer, for instance, to regulation 5(2)(f), regulation 17(1), regulation 19(1)(a), regulation 20(1), regulation 26(1) and regulation 26(4).
- 89 In each case it is clear that the term "Public Sector" means entities covered by the *Public Sector Management Act 1994*, that is "Public Sector" as defined by the *Public Sector Management Act 1994*.
- 90 It is clear the term "Public Sector" means, in each case, entities within the Western Australian government and no question of whether the *Public Sector Management Act 1994* definition was being applied or not by the drafter would arise in the mind of the reader.
- 91 A text based analysis provides the answer as to the meaning of the term "Public Sector" in regulation 13(2) *Public Sector Management (Redeployment and Redundancy) Regulations 2014*. It is that it has the meaning it has in the *Public Sector Management Act 1994*.
- 92 Even if the executive arm could, by necessary intendment, ignore, extend or expand upon the meaning of Public Sector in the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* it is clear that it has not, given that it uses the term conformably with its *Public Sector Management Act 1994* meaning throughout the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*.
- 93 There is nothing about the phrase "continuous service in the Public Sector" which evidences an overlooking of or expansion or extension of the definition of "Public Sector" in the *Public Sector Management Act 1994* by necessary intendment, even if it were possible for the phrase to have this effect.
- 94 Going to the Wages Employees Long Service Leave General Order, it is clear that it is useful in deciding what is continuous service and what constitutes a break in service in the Public Sector as defined.
- 95 It is not necessary to expand or extend the meaning of Public Sector to give the reference to the Wages Employees Long Service Leave General Order meaning, force and effect.
- 96 Service in the Public Sector must remain the overriding qualification, as provided by the text of regulation 13(2) *Public Sector Management (Redeployment and Redundancy) Regulations 2014*, but, once that qualification is met, the Wages Employees Long Service Leave General Order may be referred to determine what is and what is not continuous service. That is, giving the term "Public Sector" in regulation 13(2) *Public Sector Management (Redeployment and Redundancy) Regulations 2014* its meaning in the *Public Sector Management Act 1994* does not in any way lead to an absurd result.
- 97 Of course, if there was an absurd result this may be indicative of necessary intendment. But there is no such result.

98 This matter is a clear example of the simplicity and desirability of placing primacy upon the text of legislation in the task of statutory construction.

99 I would uphold appeal ground 1. It is therefore not necessary to consider appeal grounds 2 and 3.

100 I would allow the appeal and quash the decision appealed from.

Conclusion - Orders made

101 For the reasons given by Emmanuel and Matthews CC, the appeal should be upheld and the decision in APPL 2 of 2018 given on 30 May 2018 quashed.

2018 WAIRC 00865

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 2/2018 GIVEN ON 30 MAY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2018 WAIRC 00865
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 COMMISSIONER T EMMANUEL
 COMMISSIONER D J MATTHEWS
HEARD : BY WRITTEN SUBMISSIONS - 8 NOVEMBER 2018 AND 12 NOVEMBER 2018
DELIVERED : THURSDAY, 22 NOVEMBER 2018
FILE NO. : FBA 5 OF 2018
BETWEEN : DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL
 REGULATION
 Appellant
 AND
 FLOYD BEDFORD BROWNE
 Respondent

ON APPEAL FROM:

Jurisdiction : **Western Australian Industrial Relations Commission**
Coram : **Senior Commissioner S J Kenner**
Citation : **[2018] WAIRC 00325; (2018) 98 WAIG 482**
File No : **APPL 2 of 2018**

CatchWords : Industrial Law (WA) - Appeal against decision of the Commission - Speaking to the minutes
 - Implied power of the Full Bench to make a consequential order applied

Legislation : *Industrial Relations Act 1979* (WA), s 49(5), s 49(5)(b), s 49(6)

Result : Order made

Representation:

Appellant : Mr R J Andretich, of counsel

Respondent : Mr A Drake-Brockman, as agent

Solicitors:

Appellant : State Solicitor for Western Australia

Case(s) referred to in reasons:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00534; (2014) 94 WAIG 800

The Minister for Health v Australian Nursing Federation, Industrial Union of Workers, Perth [2016] WAIRC 00087; (2016) 96 WAIG 210

Pelechowski v Registrar, Court of Appeal (NSW) [1999] HCA 19; (1999) 198 CLR 435

Grassby v The Queen (1989) 168 CLR 1

*Supplementary Reasons for Decision***THE FULL BENCH:**

- 1 The Full Bench by majority upheld the appeal in its reasons for decision delivered on 29 October 2018 ([2018] WAIRC 00817) and issued a minute of proposed order in the following terms:
 1. The appeal is upheld.
 2. The decision of the Commission in matter No APPL 2 of 2018 given on 30 May 2018 is quashed.
- 2 The appellant sought to speak to the minute and seeks an additional order that APPL 2 of 2018 be dismissed. The grounds upon which an additional order is sought is that by having regard to the way in which the application was argued and the reasons of the majority of the Full Bench for upholding the appeal:
 - (a) it is appropriate not only to quash the decision at first instance but to also order the application be dismissed; and
 - (b) an order dismissing the application is necessary for the Full Bench to effectively exercise its jurisdiction to dispose of the appeal.
- 3 Section 49(5) and (6) of the *Industrial Relations Act 1979* (WA) (the IR Act) provides:
 - (5) In the exercise of its jurisdiction under this section the Full Bench may, by order —
 - (a) dismiss the appeal; or
 - (b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or
 - (c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.
 - (6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied shall be in terms which could have been awarded by the Commission that gave the decision.
- 4 The respondent opposes the additional order and points out that it is well-established the Full Bench has no inherent jurisdiction and argues that insofar as the Full Bench found in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2014] WAIRC 00534; (2014) 94 WAIG 800 (*ARTBIU*):
 - (a) the Commission has implied powers that arise by necessary implication out of the effective exercise of a jurisdiction which is expressly conferred is in error; or alternatively
 - (b) the decision in *ARTBIU* should be confined to its own facts. In particular, the order made by the Full Bench in that matter to dismiss the application on foot in the substantive matter was an order to dismiss an interlocutory application.
- 5 Having considered the written submissions, filed by the parties on 8 November 2018 and 12 November 2018, we are of the opinion that it is open in this appeal to make an order to dismiss APPL 2 of 2018 and that such an order should be made.
- 6 The decision of the Full Bench in *ARTBIU* was comprehensively reconsidered in *The Minister for Health v Australian Nursing Federation, Industrial Union of Workers, Perth* [2016] WAIRC 00087; (2016) 96 WAIG 210 (*Minister for Health*).
- 7 In *Minister for Health*, regard was had to a decision of the High Court in *Pelechowski v The Registrar, Court of Appeal (NSW)* [1999] HCA 19; (1999) 198 CLR 435 (Gaudron, Gummow and Callinan JJ) wherein their Honours referred to the observations of Dawson J in *Grassby v The Queen* (1989) 168 CLR 1, 16 - 17, and found in *Pelechowski* [51]:

The term 'necessary' in such a setting as this is to be understood in the sense given it by Pollock CB in *Attorney-General v Walker* ((1849) 3 Ex 242 at 255-256 [154 ER 833 at 838-839]), namely as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided in Div 4 of Pt 3 of the *District Court Act*. In this setting, the term 'necessary' does not have the meaning of 'essential'; rather it is to be 'subjected to the touchstone of reasonableness' (*State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447 at 452. See also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450; *Proprietors Units Plan No 52 v Gold* (1993) 44 FCR 123 at 126; Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings', *Law Quarterly Review*, vol 113 (1997) 120, at pp 130-131).
- 8 Acting President Smith (with whom Scott ASC and Kenner C agreed) in *Minister for Health* observed [79] - [85], [89] - [90]:
 - 79 In *Pelechowski* a creditor obtained judgment for a liquidated amount against two debtors in the District Court. The judge at first instance ordered that the debtors be restrained from selling or otherwise disposing of their interest in a house property until further order or until payment of the judgment debt. A majority of the High Court found that the remedy of an injunction expressly provided for in s 46 of the *District Court Act 1973* (NSW) was ancillary to the exercise of the District Court's jurisdiction to dispose of actions in the nature of claims for damages specified in s 44 of the *District Court Act*. Justices Gaudron, Gummow and Callinan rejected an argument that there was power to make such an order by implication from the provisions in the *District Court Act* that expressly provided remedies for the enforcement of judgments. Their Honours found that an order providing for an injunction to have effect until further order or payment of the judgment debt could not be found as reasonably required or legally ancillary to the remedies for enforcement provided for in pt 3, div 4 of the *District Court Act* [54]. Thus, they found the order went beyond what was permissible by the implied power.
 - 80 The implied power of the Full Bench to make orders was recently considered by the Full Bench in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of*

Western Australia. In that matter the Public Transport Authority of Western Australia had made an application at first instance that the substantive application be dismissed pursuant to s 27(1)(a) of the Act as it was not in the public interest that the substantive application be heard and determined by the Commission. The Full Bench upheld the appeal. The union sought an order to quash the decision, dismiss the application made by the Public Transport Authority of Western Australia pursuant to s 27(1)(a) of the Act and to remit the matter to the Commission for further hearing and determination. The Full Bench found it could not quash the decision and remit the case, but it was empowered to suspend the matter and remit the case for further hearing.

- 81 The Full Bench applied the observations of Dawson J in **Grassby** and went on to find that:
- (a) in the matter before it in making an order to suspend the decision to dismiss the application and remit for further hearing and determination it was also necessary to dismiss the application made by the Public Transport Authority of Western Australia under s 27(1)(a) of the Act; and
 - (b) making the order to dismiss the application made at first instance arose by necessary implication out of the exercise of the jurisdiction the Full Bench has to hear and determine an appeal. This is because the application made under s 27(1)(a) should not remain on foot in light of the reasons for decision of the Full Bench.
- 82 For those reasons, the Full Bench found in that matter that the order to dismiss was in the circumstances necessary for the effective exercise of the jurisdiction to dispose of the matters raised in the appeal.
- 83 Similar reasoning was applied by Ritter AP in **Pemberton** (with whom I and Harrison C agreed). In **Pemberton** Ritter AP found the appeals of Mr Pemberton and another, Ms McGovern, against orders dismissing their claims, for payment of sums by way of outstanding salary, redundancy pay and a bonus, should be upheld insofar as the orders dismissed the claims for a bonus. Acting President Ritter also was of the opinion that the decision in each case on whether the appellants had been denied an entitlement to a bonus under their contracts of employment should be quashed and remitted to the Commission for determination of the claims to an entitlement to be paid a bonus. In making this finding Acting President Ritter found [345] – [346]:

In my opinion the appeals of both Mr Pemberton and Ms McGovern should be upheld and the decision on whether they have been denied an entitlement to a bonus under their contracts of employment should be quashed and remitted to the Commission for determination. The power to make such an order is not expressly provided for in s49(5) of the Act. Nevertheless as the Full Bench said in *Sealanes (1985) Pty Ltd v Foley and Buktenica* (2006) 86 WAIG 1254 at [36]-[37]:

- '36 ... the Full Bench, as any court of limited jurisdiction, has the jurisdiction necessarily implied to effectively carry out the powers granted to it. (See the reference to the authorities helpfully referred to in *Medical Board (SA) v N, JRP and Another* (2006) 93 SASR 546 at [21]-[23]).
- 37 In this context the reference to jurisdiction which is 'necessary' is a reference to a power to make orders reasonably required or which are legally ancillary. (*Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [51]).'

In my opinion the making of an order of the type contemplated is reasonably necessary for the Full Bench to carry out its appellate function. I do not think the legislature could have intended that where, on appeal, it is established that the decision on one of three aspects of an application is flawed and the Full Bench cannot itself decide that aspect, it would not have the power to quash that part of the decision and order its remittal for determination. To make the order is in my opinion a necessary incident of carrying out the appellate jurisdiction given to the Full Bench.

- 84 The reasoning in **The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia** and **Pemberton** are inconsistent only in one respect and that is in **The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia** it was found that the Full Bench is not empowered to both quash a decision and remit the case to the Commission for further hearing and determination as the power to remit in s 49(5)(c) of the Act is only if the decision is suspended. In the latter matter at [5] - [7] the Full Bench observed:

... This is made clear in a decision of the Industrial Appeal Court in **Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia** (1990) 70 WAIG 2083, 2085. In that matter Justice Brinsden, with whom Rowland J and Nicholson J agreed, held that a decision to make an award contrary to natural justice was void and a nullity. Therefore, the operation of the award could not be suspended because there was nothing to suspend (2085). Consequently, his Honour found that the Full Bench should have upheld the appeal under s 49(5)(b) and quashed the decision of the Commissioner. In that matter the parties wished to have the application for an award reconsidered by the Commission following the appeal being determined by the Industrial Appeal Court. Justice Brinsden found that if an order was made to quash the decision the Full Bench had no power to remit the matter back to the Commission for further consideration, however, it could not be said that the Commission at first instance was functus officio, that is to say the Commissioner was not prohibited from further considering the matters concerned in the award.

In this appeal the decision made by the Commission to dismiss the application in CR 2 of 2013 cannot be said to be void or a nullity because a decision to dismiss is a decision that may be open to the Commission to make after hearing and determining the merits of the application.

For these reasons we are of the opinion that an order should be made to suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

- 85 *Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia* was an appeal against a decision of the Full Bench in which the Full Bench found that a decision at first instance was void and of no effect as it was reached contrary to the principles of procedural fairness. In the reasons of Brinsden J he observed that the Full Bench had concluded that the powers in s 49(5) of the Act were expressed disjunctively and no party before it, and before the Industrial Appeal Court, had argued to the contrary. Consequently, for the purposes of the appeal, Brinsden J proposed to accept that view of s 49(5). This reasoning of Brinsden J in *Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia* was not considered in *Pemberton*. It is notable that in *Pemberton* the decisions to dismiss claims for a bonus were not found to be void. Consequently, it is arguable that an order could have been made in *Pemberton* to suspend the operation of each decision insofar as the decisions purported to determine the bonus claims.
- ...
- 89 In these appeals, if it is accepted that no appeal is sought to be instituted against the decision in respect of order 4 of the order made on 16 October 2014, the principles for determining whether an order could be made to suspend or quash order 4 as an exercise of the implied power of the jurisdiction of the Full Bench in s 49(5) of the Act are well established by the application of the observations of Dawson J in *Grassby* and the majority in *Pelechowski*. This test enunciated in these decisions is irrelevant to any consideration of whether the powers in s 49(5) of the Act are disjunctive. In any event, the observations in these decisions were consistently applied in *Pemberton* and *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*.
- 90 The test established in *Grassby* and *Pelechowski* requires an identification of what orders can be said to be 'reasonably required', or 'legally ancillary' to exercise the jurisdiction of the Full Bench to dispose of an appeal in the circumstances raised in the matter before it.
- 9 Although it could be said, as the appellant does in its alternative submission in this matter, that an order could be made under s 49(5)(b) of the IR Act, to quash the decision and vary it so as to exclude from the calculation of 'continuous service', service by the respondent from 18 September 1991 to 23 October 2011, the Full Bench is not of the opinion that such an order is appropriate. This is because, at the hearing of the appeal, the Full Bench was informed that the appellant may not seek to recover the additional severance pay paid to the respondent in accordance with the first offer.
- 10 In circumstances where the decision of the Full Bench in this matter does not have the effect of disposing of the substantive application in APPL 2 of 2018, it is clear that an order to dismiss the application is an order that is plainly 'reasonably required' or 'legally ancillary' to dispose of the appeal.
- 11 In these circumstances, an order to dismiss the application is not an order that is contrary to the express power conferred by s 49(5)(b). To the contrary, such an order is an order that was open to the Commissioner at first instance and in that respect could be said to be an order authorised by s 49(5)(b) and s 49(5) and (6) of the IR Act.

2018 WAIRC 00864

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION
APPELLANT

-and-

FLOYD BEDFORD BROWNE

RESPONDENT**CORAM**

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

COMMISSIONER T EMMANUEL

COMMISSIONER D J MATTHEWS

DATE

THURSDAY, 22 NOVEMBER 2018

FILE NO/S

FBA 5 OF 2018

CITATION NO.

2018 WAIRC 00864

Result

Appeal upheld and decision at first instance quashed

Appearances**Appellant**

Mr R J Andretich, of counsel

Respondent

Mr A Drake-Brockman, as agent

Order

This appeal having come on for hearing before the Full Bench on 26 September 2018, and having heard Mr R J Andretich, of counsel, on behalf of the appellant, and Mr A Drake-Brockman, as agent, on behalf of the respondent, and reasons for decision having been delivered on 29 October 2018, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is upheld.
2. The decision of the Commission in matter No APPL 2 of 2018 given on 30 May 2018 is quashed.
3. APPL 2 of 2018 is dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2018 WAIRC 00848

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	CELESTE CORPORATION PTY LTD	APPELLANT
	-and-	
	KOGGALA MAHAVIDANELAGE IMALKA VATHSALA SILVA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 14 NOVEMBER 2018	
FILE NO/S	FBA 10 OF 2018	
CITATION NO.	2018 WAIRC 00848	
<hr/>		
Result	Appeal stayed	

Order

WHEREAS on 10 September 2018, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 19 October 2018, the respondent advised by email that an administrator had been appointed to administer the appellant on 17 October 2018; and

WHEREAS on 23 October 2018, the administrator informed the Commission by letter that he would not appear in the hearing before the Full Bench on 22 November 2018 or otherwise continue with the appeal; and

WHEREAS on 23 October 2018, the administrator was informed by letter that unless the administrator contacted the Commission with further instructions within 14 days the Full Bench would make an order staying the appeal and the file would be administratively closed;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders that —

The appeal be and is hereby stayed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00135

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KARRIVIEW MANAGEMENT P/L	APPELLANT
	-and- AMRIT KUMAR GHIMIRE	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 22 FEBRUARY 2018	
FILE NO/S	FBA 16 OF 2017	
CITATION NO.	2018 WAIRC 00135	
Result	Appeal discontinued by leave	

Order

WHEREAS on 7 December 2017, the appellant filed a notice of appeal to the Full Bench; and
 WHEREAS on 5 February 2018, the appellant filed a notice of application for leave to discontinue this appeal;
 NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

[L.S.]

(Sgd.) J H SMITH,
Acting President.

2018 WAIRC 00134

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KARRIVIEW MANAGEMENT P/L	APPELLANT
	-and- FULMAYA SHARMA	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	WEDNESDAY, 22 FEBRUARY 2018	
FILE NO/S	FBA 17 OF 2017	
CITATION NO.	2018 WAIRC 00134	
Result	Appeal discontinued by leave	

Order

WHEREAS on 7 December 2017, the appellant filed a notice of appeal to the Full Bench; and
 WHEREAS on 5 February 2018, the appellant filed a notice of application for leave to discontinue this appeal;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Cancellation of registration—

2018 WAIRC 00881

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-and-

METAL INDUSTRIES ASSOCIATION (INDUSTRIAL UNION OF EMPLOYERS) OF W.A.

RESPONDENT

CORAM

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER P E SCOTT

COMMISSIONER T EMMANUEL

DATE

FRIDAY, 7 DECEMBER 2018

FILE NO/S

FBM 7 OF 2018

CITATION NO.

2018 WAIRC 00881

Result

Order made

Appearances

Applicant

Mr R J Andretich (of counsel) and with him Ms S Kemp

Respondent

No appearance

Order

WHEREAS on 13 August 2018, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act) for the cancellation of the registration of the Metal Industries Association (Industrial Union of Employers) of W.A. (the organisation) on grounds that the organisation is defunct; and

WHEREAS attached to the Form 23 – Application to cancel registration of organisation/association is a statutory declaration made by Susan Ivey Bastian, the Registrar, in which she declares that —

1. By letter dated 22 December 1993, the Registrar was informed by Mr J G Gatt, Secretary of the organisation, that the organisation sought to cancel its registration. The letter advised of a notice of motion at the organisation's annual general meeting on 15 December 1993 that the organisation would be dissolved and the motion was put and carried unanimously; and
2. By letter dated 21 July 1994 to the Registrar, Mr Gatt provided further details as to the status of the organisation including attaching a statutory declaration made by Mr Gatt on 20 July 1994 regarding the passage of the resolution that the organisation be dissolved; that all members of the organisation had been informed; that the Secretary had been instructed to take all action necessary to wind up the organisation; and that there had been no objections from any members to the winding up of the organisation; and
3. File notes signed by former Deputy Registrar, Darryl Buttel, dated 8 July 1997 and 14 August 1997 indicate that further contact was made with Mr Gatt seeking information regarding the organisation's assets; however, there is no record of any response nor any progress on the matter; and
4. There has been no further contact with the organisation; and

WHEREAS the matter was set down for hearing on Friday, 7 December 2018; and

WHEREAS notice of the hearing was published in The West Australian newspaper on 23 November 2018; on the Commission's website from 12 November 2018 and in the Western Australian Industrial Gazette of 28 November 2018; and

WHEREAS at the hearing of the matter on 7 December 2018 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 13 August 2018 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders —

THAT the registration of the Metal Industries Association (Industrial Union of Employers) of W.A. be and is hereby cancelled on and from 7 December 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00883

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	MINING UNIONS ASSOCIATION OF EMPLOYEES OF WESTERN AUSTRALIA (IRON ORE INDUSTRY)	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 7 DECEMBER 2018	
FILE NO/S	FBM 10 OF 2018	
CITATION NO.	2018 WAIRC 00883	
Result	Order made	
Appearances		
Applicant	Mr R J Andretich (of counsel) and with him Ms S Kemp	
Respondent	No appearance	

Order

WHEREAS on 13 August 2018 the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act) for the cancellation of the registration of the Mining Unions Association of Employees of Western Australia (Iron Ore Industry) (the organisation) on grounds that the organisation is defunct; and

WHEREAS attached to the Form 23 – Application to cancel registration of organisation/association is a statutory declaration made by Susan Ivey Bastian, the Registrar, in which she declares that —

1. The Western Australian Industrial Relations Commission's records indicate that the last known address of the organisation is PO Box 6289, East Perth WA 6004. The last correspondence forwarded to the organisation at this address since 2003 has been marked return to sender; and
2. Statutory obligations as prescribed by the Act and the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) by way of annual officers and membership returns and financial returns have not been received by the Commission since at least 1984. Only one officer and membership return was ever received for filing, which was in 1990; and
3. There are no records of financial returns being filed since registration in 1984 and all requests made by the Commission for the organisation to comply with the Act and the Regulations are unanswered; and
4. A series of handwritten notes held in the Commission's records indicate that there were a number of conversations with the former President, Mr Jack Marks, in relation to the filing of returns during the early 1990s. Requests for the filing of returns in 1994 remain unanswered; and
5. It is not known whether the organisation had any assets or financial members at the time it appeared to have ceased operating; and

WHEREAS the matter was set down for hearing on Friday, 7 December 2018; and

WHEREAS the notice of hearing was published in The West Australian newspaper on 23 November 2018; on the Commission's website from 12 November 2018 and in the Western Australian Industrial Gazette of 28 November 2018; and

WHEREAS at the hearing of the matter on 7 December 2018 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 13 August 2018 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders —

THAT the registration of the Mining Unions Association of Employees of Western Australia (Iron Ore Industry) be and is hereby cancelled on and from 7 December 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00880

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	REAL ESTATE SALESPERSONS ASSOCIATION OF WESTERN AUSTRALIA (INC.)	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	CHIEF COMMISSIONER P E SCOTT	
	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 7 DECEMBER 2018	
FILE NO/S	FBM 6 OF 2018	
CITATION NO.	2018 WAIRC 00880	

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

Order

WHEREAS on 29 May 2018, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act) for the cancellation of the registration of the Real Estate Salespersons Association of Western Australia (Inc.) (the organisation) on grounds that the organisation is defunct; and

WHEREAS attached to the Form 23 – Application to cancel registration of organisation/association is a statutory declaration made by Susan Ivey Bastian, the Registrar, in which she declares that —

- The last known address of the organisation is REIWA House, 215 Hay Street, Subiaco WA 6008; and
 - Correspondence sent to the organisation at that address since October 2000 has been unanswered or returned to sender or both; and
- Statutory obligations as prescribed by the Act and the *Industrial Relations Commission Regulations 2005* (WA) by way of annual officers and membership returns and financial returns have not been received by the Commission since 1999, and all attempts by officers of the Commission to follow up with those returns have been unsuccessful; and
- In 2002, enquiries were made of Mr Joseph Chambers, the last registered Secretary of the organisation, at his residential address. Mr Chambers responded advising that he was no longer the Secretary of the organisation, had not been Secretary for four or five years and did not know who was running the organisation; and
- Officers of the Commission attempted contact with the organisation in 2009, 2010 and 2011 through the Real Estate Institute of Western Australia (REIWA) which confirmed that whilst the organisation had previously used the registered address of REIWA, REIWA was not aware of the current office bearers or whether the organisation was still active; and
- On 4 October 2011, the Deputy Registrar wrote to Mr Chambers and to Mr Darcy Taylor, who had been the President of the organisation, at their residential addresses advising that the Registrar was seeking to initiate proceedings to cancel the registration of the organisation and asking questions about the status of the organisation in terms of membership and office bearers. No response was received from either Mr Chambers or Mr Taylor; and

6. The last financial return filed by the organisation indicated that the organisation had a 'cash at bank' balance of \$1,959.77 as at 30 June 1998; and
7. On 13 April 2018, the Registrar attempted to enquire of the auditor of that financial return; however, no response has been received; and

WHEREAS this matter was set down for hearing on Friday, 7 December 2018; and

WHEREAS notice of the hearing was published in The West Australian newspaper on 23 November 2018, on the Commission's website from 12 November 2018 and in the Western Australian Industrial Gazette of 28 November 2018; and

WHEREAS at the hearing of the matter on 7 December 2018 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 29 May 2018 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders —

THAT the registration of the Real Estate Salespersons Association of Western Australia (Inc.) be and is hereby cancelled on and from 7 December 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00885

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	THE AUSTRALIAN COLLIERIES' STAFF ASSOCIATION, WESTERN AUSTRALIAN BRANCH	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 7 DECEMBER 2018	
FILE NO/S	FBM 12 OF 2018	
CITATION NO.	2018 WAIRC 00885	

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

Order

WHEREAS on 13 August 2018, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act) for the cancellation of the registration of The Australian Collieries' Staff Association, Western Australian Branch (the organisation) on grounds that the organisation is defunct; and

WHEREAS attached to the Form 23 – Application to cancel registration of organisation/association is a statutory declaration made by Susan Ivey Bastian, the Registrar, in which she declares that —

1. On 7 February 2018, the Registrar caused to be sent to the Secretary, UnionsWA, a letter seeking available information on a list of organisations who are registered under the Act which appear to have become defunct, including the organisation; and
2. In response to the letter, on 16 March 2018, Alison Phillipson, Executive Coordinator at the Commission, received a telephone call from Adam Guy, Legal Officer at the Association of Professional Engineers, Scientists and Managers, Australian Collieries Staff Division (APESMA) requesting assistance to formally cancel the registration of the organisation; and
3. On 23 March 2018, Ms Phillipson sent to Mr Guy an email outlining the required steps to progress the application for cancellation of the organisation's registration; and

4. On 1 August 2018, a statutory declaration sworn by Catherine Bolger, Director of APESMA, was filed. In it, Ms Bolger states:
 - (a) The organisation was the Western Australian Branch of the federally registered Australian Collieries' Staff Association; and
 - (b) On 1 December 2001, the Australian Collieries' Staff Association amalgamated with APESMA and ceased to exist as a separate entity; and
 - (c) Since at least 2001, employees who were members of the organisation have been members of APESMA and that since at least 27 March 2006, on the commencement of the *Workplace Relations Act 1996* (Cth), if not prior, all employees who were members of APESMA have been subject to the Federal industrial relations system; and
 - (d) As at the date of the declaration, employers of members of APESMA in Western Australia where such members would also be eligible for membership of the organisation include Griffin Coal, Collie and Premier Coal, Collie; and
 - (e) There are currently 11 financial members of the organisation; and
 - (f) To the best of Ms Bolger's knowledge and belief, since 2010 there have been no further elections of office bearers and as such the term of the Committee has expired and the organisation's committee of management does not meet and has not done so since at least 2011; and
5. Attached to the Statutory Declaration is a copy of APESMA's eligibility rule 3.12 which reflects APESMA's ability to enrol members who were previously entitled to membership of the organisation; and
6. A search of the organisation's records held by the Commission indicates that the organisation has failed to comply with its reporting obligations under the Act and the *Industrial Relations Commission Regulations 2005* (WA) since 2002 in that:
 - (a) The organisation last submitted a financial return in 2001 relating to the financial period ending on 30 September 2001. In 2002, a financial return was filed by APESMA; however, it relates to the accounts of APESMA and not the organisation. The accounts include reference to 'Net Cash Acquired' from amalgamated State counterparts was \$70,526 for the organisation; and
 - (b) The last submitted officers and membership return for the organisation was in 2011, at which time there were 39 financial members; and
7. There have been no further elections of officers since 2010; and

WHEREAS the matter was set down for hearing on Friday, 7 December 2018; and

WHEREAS at the hearing of the matter on 7 December 2018 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 13 August 2018 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders —

THAT the registration of The Australian Collieries' Staff Association, Western Australian Branch be and is hereby cancelled on and from 7 December 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00882

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-and-

THE FOOTWEAR REPAIRERS' ASSOCIATION OF W.A. (UNION OF EMPLOYERS)

RESPONDENT

CORAM

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER P E SCOTT

COMMISSIONER T EMMANUEL

DATE

FRIDAY, 7 DECEMBER 2018

FILE NO/S

FBM 9 OF 2018

CITATION NO.

2018 WAIRC 00882

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

Order

WHEREAS on 13 August 2018, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act) for the cancellation of the registration of The Footwear Repairers' Association of W.A. (Union of Employers) (the organisation) on grounds that the organisation is defunct; and

WHEREAS attached to the Form 23 – Application to cancel registration of organisation/association is a statutory declaration made by Susan Ivey Bastian, the Registrar, in which she declares that —

1. The records of the Western Australian Industrial Relations Commission indicate that the last known address for the organisation is PO Box 1073, Osborne Park WA 6017. The last correspondence forwarded to the organisation at this address in 2009 was marked return to sender; and
2. Statutory obligations as prescribed by the Act and the *Industrial Relations Commission Regulations 2005* (WA) by way of annual officers and membership returns and financial returns have not been received by the Commission since 1998 and 1993, respectively; and
3. On 10 July 1998, a letter was received from Mr Rodney Cann, Secretary of the organisation, advising that for some time the organisation had been unable to operate effectively due to a lack of interest and support. Meetings were not able to be held due to the lack of a quorum and no persons would act as office bearers. The letter also advised that a meeting called to pass a resolution to wind up the organisation was ineffective as only two members attended. The letter sought advice as to how the registration of the organisation may be cancelled; and
4. The Commission's records indicate that a meeting between the former Deputy Registrar, Mr Darryl Buttel, and the organisation's representative discussed the winding up of the organisation; and
5. By letter dated 8 March 1999, Mr Cann advised that an application to cancel the registration of the organisation had been made to the Commission. However, a search of the Commission's records does not identify any such application; and

WHEREAS the matter was set down for hearing on Friday, 7 December 2018; and

WHEREAS notice of the hearing was published in The West Australian newspaper on 23 November 2018; on the Commission's website from 12 November 2018 and in the Western Australian Industrial Gazette of 28 November 2018; and

WHEREAS at the hearing of the matter on 7 December 2018 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 13 August 2018 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders —

THAT the registration of The Footwear Repairers' Association of W.A. (Union of Employers) be and is hereby cancelled on and from 7 December 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00884

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	THE WESTERN AUSTRALIAN GOLD AND NICKEL MINES SUPERVISORS ASSOCIATION INDUSTRIAL UNION OF WORKERS	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 7 DECEMBER 2018	
FILE NO/S	FBM 11 OF 2018	
CITATION NO.	2018 WAIRC 00884	

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

Order

WHEREAS on 13 August 2018, the Registrar applied to the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act) for the cancellation of the registration of The Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers (the organisation) on grounds that the organisation is defunct; and

WHEREAS attached to the Form 23 – Application to cancel registration of organisation/association is a statutory declaration made by Susan Ivey Bastian, the Registrar, in which she declares that —

1. The Western Australian Industrial Relations Commission's records indicate that the last known address for the organisation is 18 Sturt Pea Crescent, Kambalda West WA 6444. Correspondence forwarded to the organisation at this address since 1996 has been unanswered; and
2. Statutory obligations as prescribed by the Act and the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) by way of annual officers and membership returns and financial returns have not been received by the Commission since at least 1982; and
3. A letter was sent to the organisation regarding the filing requirements in 1982. A response was received from the Secretary/Treasurer of the organisation, Mr William McAuliffe, stating that the 'Union is at present in recess'. No further correspondence has been received from the organisation.
4. Records of the Commission indicate that an officer of the Commission met with the Secretary of the organisation, Mr Neil Higgins, on 9 August 1995 with a view to Mr Higgins providing further information; and a facsimile was sent by Mr Higgins on 30 August 1995 suggesting he would have access to some records and would send them to the Commission; and
4. There have been no financial records for the organisation filed with the Commission since 1992; and
5. The last financial return filed with the Commission indicates that it had a balance in its bank account as at 3 July 1992 of \$1,314. It remains unclear what happened to the funds thereafter; and

WHEREAS the matter was set down for hearing on Friday, 7 December 2018; and

WHEREAS notice of hearing was published in The West Australian newspaper on 23 November 2018; on the Commission's website from 12 November 2018 and in the Western Australian Industrial Gazette of 28 November 2018; and

WHEREAS at the hearing of the matter on 7 December 2018 there was no appearance for the organisation.

NOW THEREFORE, the Full Bench, having considered the statutory declaration of Susan Ivey Bastian of 13 August 2018 and considering the requirements of s 73(12) of the Act, is satisfied that the organisation is defunct and hereby orders —

THAT the registration of The Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers be and is hereby cancelled on and from 7 December 2018.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2018 WAIRC 00890

BUILDING TRADES (CONSTRUCTION) AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

ALL READY SURFACING CO PTY LTD, APOLLO CONSTRUCTION & RENOVATION PTY LTD, ASSOCIATED SHOPFITTERS PTY LTD

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 12 DECEMBER 2018

FILE NO/S

APPL 74 OF 2017

CITATION NO.

2018 WAIRC 00890

Result	Award varied
Representation	
Applicant	Ms K Hunter (of counsel)
Respondent	Mr K Richardson (as agent)

Order

HAVING heard from Ms K Hunter (of counsel) on behalf of the applicant and Mr K Richardson (as agent) on behalf of a respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the Building Trades (Construction) Award 1987 be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after today's date.

Further, the Commission records the following basis for the variations:

1. The Key Minimum Classification in this Award is the classification contained at clause 8(2)(a)(i), being 'bricklayers, stoneworkers, stonemasons, carpenters, joiners, painters, signwriters, glaziers and plasterers roof tile fixers'.
2. For work related allowances, the percentage increase in:
 - Clause 8 – Rates of Pay
 - Clause 9 – Special Rates and Provisions
 - Clause 10 – Multi-Storey Allowance
 - Appendix F – Asbestos Eradication
 - Appendix G – Laser Equipment

is derived from:

- \$29.00 divided by \$622.30 multiplied by 100 equals 4.66 % (2008);
- \$12.30 divided by \$651.30 multiplied by 100 equals 1.89% (2009);
- \$17.50 divided by \$663.60 multiplied by 100 equals 2.64% (2010);
- \$19.90 divided by \$681.10 multiplied by 100 equals 2.92% (2011);
- State wage order increase of 3.40% (2012);
- \$18.20 divided by \$724.80 multiplied by 100 equals 2.51% (2013);
- \$20.00 divided by \$743.00 multiplied by 100 equals 2.69% (2014);
- State wage order increase of 2.10% (2015); and
- \$13.00 divided by \$779.00 multiplied by 100 equals 1.67% (2016):

which is in accordance with Principle 6 – Adjustment of Allowances and Service Increments of the Statement of Principles, specifically 6.4, which states:

In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to working 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 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.

3. For expense related allowances, the percentage increase in:

(I)

- Clause 8(6) – Tool Allowance
- Clause 32(5)(b) – Special Tools and Protective Clothing; and
- Clause 33(2)(a) – Compensation for Clothes and Tools

is derived from the percentage change in the current ABS 6401.0 CPI tables 1 and 2 *Index Numbers; All groups CPI; Australia* for the period of December 2007 to December 2016 giving a percentage increase of 23.46%. That is:

$$= 23.46\%$$

(II)

- Clauses 12A(2), 12A(5) and 12A(11) – Fares and Travelling (Except Plumbers)
- Clauses 12B(2), 12B(3) and 12B(5) – Fares and Travelling (Plumbers Only); and

- Clause 21(6)(a) - Living Away from Home – Distant Work

is derived from the percentage change in the current ABS 6401.0 CPI table 7 *Index Numbers; Transport; Australia* for the period of December 2007 to December 2016 giving a percentage increase of 5.86%. That is:

$$= 5.86\%$$

(III)

- Clause 20 – Metal Allowance; and
- Clause 21(4)(a)(iii) – Living Away from Home – Distant Work

is derived from the percentage change in the current ABS 6401.0 CPI table 7 *Index Numbers; Meals out and take away foods; Australia* for the period of December 2007 to December 2016 giving a percentage increase of 27.73%. That is:

$$= 27.73\%$$

(IV)

- Clause 21(3)(b) – Living Away from Home – Distant Work

is derived from the percentage change in the current ABS 6401.0 CPI table 7 *Index Numbers; Holiday travel and accommodation; Australia* for the period of December 2007 to December 2016 giving a percentage increase of 12.98%. That is:

$$= 12.98\%$$

(V)

- Clause 21(7)(b) – Camping Allowance

is derived from the average of the percentage change in the current ABS 6401.0 CPI table 7 *Index Numbers; Food and non-alcoholic beverages; Australia, Index Numbers; Housing; Australia and Index Numbers; Transport; Australia* for the period of December 2007 to December 2016 giving a percentage increase of 21.82%. That is:

- (i) CPI - *Index Numbers; Food and non-alcoholic beverages; Australia*

(Dec 2007 – 88.9, Dec 2016 - 106.2)

- (ii) CPI - *Index Numbers; Housing; Australia*

(Dec 2007 – 81.3, Dec 2016 – 115.9)

- (iii) CPI - *Index Numbers; Transport; Australia*

(Dec 2007 – 93.9, Dec 2016 – 99.4)

$$= 21.82\%$$

4. For the list of named respondents to the award at Schedule B, the following respondents have changed their business name, or trade under a different name:

Named respondent in Schedule B	Respondent's current name
Belmont Shire Council	City of Belmont
D'Alesio M	M & A D'Alesio
Gill Neil F	Neil Francis Gill
Kalgoorlie Town Council	City of Kalgoorlie-Boulder
Midland Cement Products	Midland Cement Group
Parri Guido	G & M Parri
Perth City Council	City of Perth
Siesta Park Tourist Resort	Siesta Park Holiday Resort
The Blue Army	Blue Army Co-Operative Limited
The Master Plumbers' Association of WA (Union of Employers)	Master Plumbers & Gasfitters Association of Western Australia

5. For the list of named respondents to the award at Schedule B, the following respondents have been deregistered or had their business names removed:

Named respondent in Schedule B	Date of deregistration (where provided to the Commission)
Adsigns Pty Ltd	20/05/2009
Arcus Pty Ltd	04/09/2006

Best and Son Holding Pty Ltd	26/04/2010
Bonanza Reinforcing	19/06/1990
Brambles Manford	-
Bric-Bloc Constructions Pty Ltd	14/12/1992
Busby W F and Co	-
Cataldo	-
Colour Circle Pty Ltd	-
Coogee Painting Services	-
CS Roofing	-
D'Ercole and Co	-
Doro Painting Contractors	-
Doust H A Pty Ltd	21/01/2018
Ellis Concrete Construction	-
Fairway Painting Contractors	-
Forster J V and P A	-
Fremantle Sheeting Piping Contractors	-
G Wickhams	-
Geraldton Building Co (Port Hedland) Pty Ltd	21/12/2003
GKN Lysaght Pty Ltd	-
Henk and Co	-
Interform Pty Ltd	24/06/1993
Interstruct Pty Ltd	25/06/1997
Iris Painting Co Pty Ltd	24/06/1993
J and K Reinforcings Pty Ltd	12/08/2007
J H and A L Mitchell and Co	05/06/2005
Jaco Painting	-
Jason Industries Ltd	13/02/2010
Jeb Scaffolding Co	-
K Vilips and Co Pty Ltd	02/07/1991
M Kilgren and Co	30/03/1995
M Silver and Son Pty Ltd	09/03/1992
Marblecrete Co	-
Maric and Co Painters	-
Mount Lawley Concrete Co Pty Ltd	-
Olsen Constructions	-
Osborne Terrazzo Pty Ltd	07/07/1995
Paul's Outdoor Leisure Centre	-
Peel Estate Builders	-
Peter Excavation and Demolition	-
R and J Roofing and Repairs	-
Regency Décor	-
Road Marking Specialists	-
Sabemo (WA) Pty Ltd	21/02/2011
Shaft Airconditioning Co	-
Squeez Crete Pump Hire	-
Stegbar (WA) Pty Ltd	21/12/2003
Swan Irrigation	-
Swan Plumbing Service Pty Ltd	21/12/1990

Tarten Painting Contractors	-
The Tercon Co Pty Ltd	-
The Patio Makers	-
The Wallpaper House	-
Thompson Watson and Carruthers	-
WA Salvage Demolition Pty Ltd	18/08/1993
Wallpaper World and Furnishing Fabrics	-
Wattle Grove Painting Services	-
West Australian Insulation Co	-
West Swan Formwork Pty Ltd	27/02/1998

6. For the list of named respondents to the award at Schedule B, the following respondents are national system employers for the purposes of the *Fair Work Act 2009* (Cth):

All Ready Surfacing Co Pty Ltd
 Apollo Construction (Apollo Construction & Renovation Pty Ltd)
 Associated Shopfitters Pty Ltd
 Austral Insulation Pty Ltd (Askin (WA) Pty Ltd)
 Baker A J and Sons Pty Ltd
 Bell Brothers Pty Ltd
 Bestobell (Bestobell Developments Pty Ltd)
 Bond Corporation Pty Ltd
 Citra Constructions Pty Ltd
 Civil and Civic Pty Ltd (Lend Lease Building Pty Ltd)
 Clarity Screen Print (Oaktree Nominees Pty Ltd)
 Community Builders Pty Ltd
 Contrax (1945) Pty Ltd
 Crommelin Chemicals Pty Ltd
 DBM Contractors Pty Ltd
 Diploma Homes (Diploma Constructions (WA) Pty Ltd)
 Electric Power Transmission (ABB EPT Construction Pty Ltd)
 Hardie James and Co Pty Ltd (Amaca Pty Ltd)
 Hart S W and Co Pty Ltd
 John Holland (Constructions) Pty Ltd
 Hugall and Hoile Pty Ltd
 Hunter Douglas Ltd
 Hurl J Norman and Co (Aust) Pty Ltd (Hurl Nu-Way Pty Ltd)
 Industrial Roofing Contractors Kounis Pty Ltd (Kounis Metal Industries Pty Ltd)
 Leighton Contractors Pty
 Lidco Distributors (WA) Pty Ltd
 Lyons and Peirce Pty Ltd
 Modular Metals Pty Ltd
 O'Donnell Griffin Pty Ltd (RCR O'Donnell Griffin Pty Ltd)
 Perth Outdoor Centre Pty Ltd
 Roy Galvin and Co Pty Ltd
 Springdale Comfort Pty Ltd (BGC Construction Pty Ltd)
 Stateside Hire and Site Services Pty Ltd (Aramco Pty Ltd)
 Steel Main Pty Ltd
 Thiess Bros Pty Ltd
 Transfield (WA) Pty Ltd
 M T Vocisano Nominees Pty Ltd

WA Gravel and Paving Pty Ltd (Downer EDI Works Pty Ltd)
 Western Irrigation Pty Ltd
 Coote A D and Co (A.D. Coote & Co Pty Ltd)

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

SCHEDULE

1. Clause 8 – Rates of Pay

A. Delete subclause (3) of this clause and insert in lieu the following:

(3) Industry Allowance

The industry allowance at the rate of \$30.00 per week to be paid to each employee is to compensate for the following disabilities associated with construction work:-

- (a) Climate conditions when working in the open on all types of work.
- (b) The physical disadvantage of having to climb stairs or ladders.
- (c) The disability of dust blowing in the wind, brick dust and drippings from concrete.
- (d) Sloppy and muddy conditions associated with the initial stages of the erection of a building.
- (e) The disability of working on all types of scaffolding or ladders other than a swing scaffold, suspended scaffold, or a bosun's chair.
- (f) The lack of the usual amenities associated with factory work (e.g. meal rooms, change rooms, lockers).

B. Delete subclause (6) of this clause and insert in lieu the following:

(6) Tool Allowance

Tool allowances shall be paid to tradesmen as prescribed hereunder:-

	Per Week
	\$
Carpenters, Joiners, Plumbers, Stonemasons, Stoneworkers	31.00
Plasterers, Fixers	25.60
Bricklayers	21.90
Roof Tile Fixers	16.00
Signwriters, Painters, Glaziers	7.50

C. Delete subclause (8) of this clause and insert in lieu the following:

(8) Underground Allowance

- (a) (i) Subject to paragraph (b) hereof, an employee required to work underground shall be paid an allowance of \$14.40 per week in addition to the allowance prescribed in subclause (3) of this clause and any other amount prescribed for such employee elsewhere in this award.
- (ii) Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface.
- (iii) This allowance shall not be payable to an employee engaged upon "pot and drive" work at a depth of 3.5 metres or less.
- (b) Where an employee is required to work underground for no more than four days or shifts in any ordinary week he/she shall be paid an underground allowance in accordance with the provisions of paragraph (t) of subclause (1) of Clause 9. - Special Rates and Provisions in lieu of the allowance prescribed in paragraph (a) hereof.

D. Delete the preamble to subclause (9) of this clause and insert in lieu the following:

(9) Plumbing Trade Allowance

Plumbers shall be paid an allowance at the rate of \$23.70 per week to compensate for the following classes of work and in lieu of the relevant amounts in Clause 9. - Special Rates and Provisions whether or not such work is performed in any one week. When working outside the categories listed hereunder, a plumber shall receive the appropriate rates provided for in the said Clause 9. - Special Rates and Provisions.

E. Delete subclauses (10) to (14) inclusive of this clause and insert in lieu the following:

(10) Leading Hands

- (a) A person specifically appointed to be a leading hand shall be paid at the rate of the undermentioned additional amounts above the rate of the highest classification supervised, or his/her own rate, whichever is the highest, in accordance with the number of persons in his/her charge:-

	Weekly Base Only\$	Rate Per Hour\$
(i) In charge of not more than one person	25.00	0.67
(ii) In charge of two and not more than five persons	42.10	1.14
(iii) In charge of six and not more than ten persons	53.40	1.44
(iv) In charge of more than ten persons	71.20	1.93

(b) The hourly rate prescribed in paragraph (a) hereof is calculated to the nearest cent (less than half a cent to be disregarded) by multiplying the weekly base amount by 52 and dividing the result by 50.4 and by dividing the amount by 38.

(11) Licensed Plumbers Accepting Responsibility

Any licensed plumber called upon by his/her employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any week - \$46.40 for that week.

(12) Plumber Acting on Welding Certificate

A plumber who is requested by his/her employer to hold the relevant qualifications and has obtained a certificate of competency pursuant to procedures as set out by the Standards Association of Australia or other relevant recognised codes, or, who may have to carry out work which is subject to other special tests but not a normal trade test, and is required by his/her employer to act on such qualifications, shall be paid an additional 61 cents per hour for oxyacetylene welding and 61 cents per hour for electric welding for every hour of his/her employment whether or not he/she has in any hour performed work relevant to those qualifications held.

(13) Lead Work

A plumber engaged in leadburning or lead work in connection therewith shall be paid an additional \$2.08 per hour.

(14) Ship's Plumbing

A plumber engaged on plumbing work in connection with ships shall be paid an additional \$1.45 per hour.

2. Clause 9 – Special Rates and Provisions:

A. Delete subclause (1) of this clause and insert in lieu the following:

(1) In addition to the rates otherwise prescribed in this Award, the following rates shall be payable to employees covered by the said Award:

(a) Insulation

An employee handling charcoal, pumice, granulated cork, silicate of cotton, insulwool, slag wool, limpet fibre, vermiculite or other recognised insulating material of a like nature or working in the immediate vicinity so as to be affected by the use thereof 82 cents per hour or part thereof.

(b) Hotwork

An employee who works in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius - 67 cents per hour or part thereof, exceeding 54 degrees celsius - 82 cents per hour or part thereof.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(c) Cold Work

An employee who works in a place where the temperature is lowered by artificial means to less than zero degrees Celsius shall be paid 67 cents per hour.

Where such work continues for more than two hours, the employee shall be entitled to 20 minutes rest after every two hours work without loss of pay, not including the special rate provided by this paragraph.

(d) Confined Space

An employee required to work in a confined space shall be paid 82 cents per hour or part thereof.

("Confined Space" means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.)

(e) Swing Scaffold -

(i) an employee required to work from any type of swing or any scaffold suspended by rope or cable, bosun's chair, or suspended scaffold requiring use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below corresponding to the storey level at which the anchors or bracing, from which the stage is suspended, has been erected.

Such allowance shall be paid for minimum of four hours' work or part thereof until construction work (as defined) has been completed.

Height of Bracing	First Four Hours\$	Each Additional Hour\$
0-15 storeys	4.87	1.02
16-30 storeys	6.28	1.30
31-45 storeys	7.41	1.51
46-60 storeys	12.18	2.50
Greater than 60 storeys	15.49	3.20

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair, and further provided that solid plasterers when working off a swing scaffold shall receive an additional 12 cents per hour.

(f) Explosive Powered Tools

An operator of explosive powered tools, as defined in this award, who is required to use an explosive powered tool, shall be paid \$1.65 for each day on which he/she uses such a tool.

(g) Wet Work

An employee working in any place where water is continually dripping on him/her so that clothing and boots become wet, or where there is water underfoot, shall be paid 67 cents per hour whilst so engaged.

(h) Dirty Work

An employee engaged on unusually dirty work shall be paid 67 cents per hour.

(i) Towers Allowance

An employee working on a chimney stack, spire, tower, radio or television mast or tower, air shaft (other than above ground in a multi-storey building), cooling tower or silo, where the construction exceeds fifteen metres in height shall be paid 67 cents per hour for all work above fifteen metres, and 67 cents per hour for work above each further fifteen metres.

Provided that any similarly constructed building, or a building not covered by Clause 10. - Multi-Storey Allowance, which exceeds 15 metres in height may be covered by this subclause, or by that clause by agreement or where agreement is not reached, by determination of the Commission.

(j) Toxic Substances

(i) An employee required to use toxic substances shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.

(ii) Employees using such materials will be provided with and shall use all safeguards as are required by Clause 29. - Protection of Employees and the appropriate Government authority or in the absence of such requirement such safeguards as are defined by a competent authority or person chosen by the union and the employer.

(iii) Employees using toxic substances or materials of a like nature shall be paid 82 cents per hour. Employees working in close proximity to employees so engaged shall be paid 67 cents per hour.

(iv) For the purpose of this paragraph toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.

(k) Fumes

An employee required to work in a place where fumes of sulphur or other acid or other offensive fumes are present shall be paid such rates as are agreed upon between him/her and the employer; provided that, in default of agreement, the matter may be referred to a Board of Reference for the fixation of a special rate.

Any special rate so fixed shall apply from the date the employer is advised of the claim and thereafter shall be paid as and when the fume condition occurs.

(l) Asbestos

Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority and where such safeguards include the mandatory wearing of protective equipment (i.e. combination overalls and breathing equipment or similar apparatus) shall be paid 82 cents per hour extra whilst so engaged.

(m) Furnace Work

An employee engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work shall be paid \$1.78 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.

- (n) Acid Work
An employee required to work on the construction or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork shall be paid \$1.78 per hour. This additional rate shall be regarded as part of the wage rate for all purposes.
- (o) Cleaning Down Brickwork
An employee required to clean down bricks using acids or other corrosive substances shall be paid 61 cents per hour. While so employed employees will be supplied with gloves by the employer.
- (p) Bagging
Employees engaged upon bagging brick or concrete structures shall be paid 61 cents per hour.
- (q) Bitumen Work
An employee handling hot bitumen or asphalt or dipping materials in creosote shall be paid 82 cents per hour.
- (r) Roof Repairs
Employees engaged on repairs to roofs shall be paid 82 cents per hour.
- (s) Computing Quantities
Employees who are regularly required to compute or estimate quantities of materials in respect to the work performed by other employees shall be paid \$4.85 per day or part thereof.
Provided that this allowance shall not apply to an employee classified as a leading hand.
- (t) Underground Allowance
(i) An employee required to work underground for no more than 4 days or shifts in an ordinary week shall be paid \$2.85 a day or shift in addition to any other amount prescribed for such employees elsewhere in this award.
Provided that an employee required to work underground for more than four days or shifts in an ordinary week shall be paid an underground allowance in accordance with the provisions of subclause (8) of Clause 8. - Rates of Pay.
(ii) Where a shaft is to be sunk to a depth greater than 6 metres the payment of the underground allowance shall commence from the surface.
(iii) This allowance shall not be payable to employees engaged upon "pot and drive" work at a depth of 3.5 metres or less.
- (u) Plumbing
(i) A plumber doing sanitary plumbing work or repairs to sewer drainage or waste pipe services in any of the following places -
(aa) Infectious and contagious diseases hospitals or any block or portion of a hospital used for the care of or treatment of patients suffering from any infectious or contagious disease; or
(bb) Morgues:
shall be paid 61 cents per hour or part thereof.
(ii) A plumber required to enter a well 9 metres or more in depth for the purpose in the first place of examining the pump, pipe or any other work connected therewith shall be paid \$2.88 for such examination and \$1.29 per hour thereafter for fixing, renewing or repairing such work.
(iii) A plumber or an apprentice to plumbing, other than one in his/her first or second year of apprenticeship, on work involving the opening up of house drains or waste pipes for the purpose of clearing blockages or for any other purpose or on work involving the cleaning out of septic tanks or dry wells shall be paid a minimum of \$3.60 per day.
- (v) (a) An employee who:
(i) is appointed by his or her employer to be responsible for carrying out first aid duties as they may arise; and
(ii) holds a recognised first aid qualification (as set out hereunder) from the Australian Red Cross Society, St John Ambulance Association or similar body; and
(iii) is required by his or her employer to hold a qualification at that level; and
(iv) the qualification satisfies the relevant statutory requirement pertaining to the provision of first-aid services at the particular location where the employee is engaged;
(v) those duties are in addition to his or her normal duties, recognising what first aid duties encompass by definition;
shall be paid at the following additional rates to compensate that person for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications;

- (A) an employee who holds the Basic First Aid certificate or equivalent qualification recognised under the Occupational Safety and Health Act 1984 - \$2.80 per day; or
- (B) an employee who holds at least a Senior First Aid certificate, Industrial First Aid certificate or equivalent, or higher qualification recognised under the Occupational Safety and Health Act 1984 - \$4.45 per day.
- (b) In payment of an allowance under this clause, a person shall be paid only for the level of qualification required to be held, and there shall be no double counting for employees who hold more than one qualification.
- (c) An employer shall be under no obligation to provide paid training leave or other payment of any kind to employees to acquire or update first aid qualifications.
- (w) **Heavy Blocks**
 - (i) **Employees lifting other than standard bricks**
An employee required to lift blocks (other than cindcrete blocks for plugging purposes) shall be paid the following additional rates:
Where the blocks weigh over 5.5 kg and under 9 kg - 67 cents per hour.
Where the blocks weigh 9 kg or over and up to 18 kg - \$1.20 cents per hour.
Where the blocks weigh over 18 kg – \$1.70 cents per hour.
An employee shall not be required to lift a building block in excess of 20 kg in weight unless such employee is provided with a mechanical aid or with an assisting employee; provided that an employee shall not be required to manually lift any building block in excess of 20 kg in weight to a height of more than 1.2 metres above the working platform.
Provided that this subclause shall not apply to employees being paid the extra rate for refractory work.
 - (ii) **Stonemasonry Employees**
The employer of stonemasonry employees shall provide mechanical means for the handling, lifting and placing of heavy blocks or pay in lieu thereof the rates and observe the conditions prescribed in paragraph (i) herein.
- (x) **Plaster or Composition Spray**
An employee using a plaster or composition spray shall be paid an additional 67 cents per hour whilst so engaged.
- (y) **Slushing**
An employee engaged at "Slushing" shall be paid 67 cents per hour.
- (z) **Dry Polishing of Tiles**
Employees engaged on dry polishing of tiles (as defined) where machines are used shall be paid 82 cents per hour or part thereof.
- (aa) **Cutting Tiles**
An employee engaged at cutting tiles by electric saw shall be paid 82 cents per hour whilst so engaged.
- (bb) **Second Hand Timber**
Where, whilst working with second hand timber, an employee's tools are damaged by nails, dumps or other foreign matter on the timber he/she shall be entitled to an allowance of \$2.60 per day on each day upon which his/her tools are so damaged, provided that no allowance shall be payable under this paragraph unless it is reported immediately to the employer's representative on the job in order that he/she may prove the claim.
- (cc) **Height Work - Painting Trades**
An employee working on any structure at a height of more than 9 metres where an adequate fixed support not less than 0.75 metres wide is not provided, shall be paid 61 cents per hour in addition to ordinary rates. This subclause shall not apply to an employee working on a bosun's chair or swinging stage.
This provision shall not apply in addition to the Towers Allowance prescribed in paragraph (i) of this subclause.
- (dd) **Brewery Cylinders - Painters**
A painter in brewery cylinders or stout tuns shall be allowed 15 minutes' spell in the fresh air at the end of each hour worked by him/her.
Such 15 minutes shall be counted as working time and shall be paid for as such. The rate for working in brewery cylinders or stout tuns shall be at the rate of time and one-half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns he/she shall, in addition to the overtime rates payable, be paid one half of the ordinary rate payable as provided by Clause 8. - Rates of Pay of this award.

- (ee) Certificate Allowance
A tradesman who is the holder of a scaffolding certificate or rigging certificate issued by the Department of Industrial Affairs and is required to act on that Certificate whilst engaged on work requiring a certificated person shall be paid an additional 67 cents per hour.
Provided that this allowance shall not be payable cumulative on the allowance for swing scaffolds.
- (ff) Spray Application - Painters
An employee engaged on all spray applications carried out in other than a properly constructed booth approved by the Department of Industrial Affairs shall be paid 67 cents per hour extra.
- (gg) Bricklayer Operating Cutting Machine
One bricklayer on each site to operate the cutting machine and to be paid 82 cents per hour or part thereof whilst so engaged.
- (hh) Spray Painting - Painters
- (i) Lead paint shall not be applied by a spray to the interior of any building and no surface painted with lead paint shall be rubbed down or scraped by a dry process.
 - (ii) All employees (including apprentices) applying paint by spraying shall be provided with full overalls and head covering and respirators by the employer.
 - (iii) Where from the nature of the paint or substance used in spraying a respirator would be of little or no practical use in preventing the absorption of fumes or materials from substances used by an employee in spray painting, the employee shall be paid a special allowance of \$1.95 per day.
- (ii) Grindstone Allowance
Where a grindstone or wheel is not made available as required by Clause 32(5)(b) of the award, an allowance of \$7.20 per week shall be paid in lieu of same to each Carpenter or Joiner.

3. Clause 10. – Multi-storey Allowance: Delete subclause (3) of this clause and insert in lieu the following:

(3) Rates For Multi-Storey Buildings

Except as provided for in subclause (4) of this clause, an allowance in accordance with the following table shall be paid to all employees on the building site. The second and subsequent allowance scales shall, where applicable, commence to apply to all employees when one of the following components of the building - structural steel, re-inforcing steel, boxing or walls, rises above the floor level first designated in each such allowance scale.

"Floor Level" means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

From commencement of Building to Fifteenth Floor Level - 53 cents per hour extra;

From Sixteenth Floor Level to Thirtieth Floor Level - 66 cents per hour extra;

From Thirty-first Floor Level to Forty-fifth Floor Level - \$1.02 cents per hour extra;

From Forty-sixth Floor Level to Sixtieth Floor Level - \$1.29 per hour extra;

From Sixty-first Floor Level Onwards – \$1.61 per hour extra.

The allowance payable at the highest point of the building shall continue until completion of the building.

The allowance payable at the highest point of the building shall continue until completion of the building.

4. Clause 12A – Fares and Travelling (Except Plumbers)

A. Delete subclause (2) of this clause and insert in lieu the following:

(2) Perth Metropolitan Radial Area

When employed on work located within a radius of 50 kilometres from the G.P.O. Perth - \$16.55 per day.

B. Delete subclause (5) of this clause and insert in lieu the following:

(5) Travelling Outside Radial Areas

Where an employee travels daily from inside any radial area mentioned in subclauses (2), (3) or (4) of this clause to a job outside that area, he/she shall be paid :-

- (a) the allowance prescribed in subclause (2) of this clause;
- (b) in respect of travel from the designated radius to the job and return to that radius -
 - (i) the time outside ordinary working hours reasonably spent in such travel calculated at ordinary hourly "on site" rates to the next quarter of an hour with a minimum payment of one-half an hour per day for each return journey;
 - (ii) any expenses necessarily incurred in such travel, which shall be 48 cents per kilometre where the employee uses his/her own vehicle.

C. Delete subclause (11) of this clause and insert in lieu the following:**(11) Transfer During Working Hours**

An employee transferred from one site to another during working hours shall be paid for the time occupied in travelling and, unless transported by the employer, shall be paid reasonable cost of fares by most convenient public transport between such sites.

Where an employer requests an employee to use his/her own vehicle to effect such a transfer and the employee agrees to do so the employee shall be paid an allowance at the rate of 90 cents per kilometre.

5. Clause 12B – Fares and Travelling – Plumbers Only**A. Delete subclause (2) of this clause and insert in lieu the following:****(2) Travel beyond defined radius**

When working on jobs beyond the defined radius from the centre (as defined) the fares as defined and one quarter of an hour travelling time plus an allowance for travelling time calculated at the ordinary time rate of pay for the time required to travel to the job site and back from and to the defined radius and calculated at a speed not exceeding the legal speed limit and with a minimum payment of a quarter of an hour for each such journey.

Where an employee provides his/her own transport, an additional allowance of 48 cents per kilometre shall be payable for the distance involved in travelling beyond the defined radius and return thereto, which shall compensate for any fares incurred by public transport

B. Delete subclause (3) of this clause and insert in lieu the following:**(3) Transport During Working Hours**

Where an employee is required by an employer to travel to any other job site during the course of his/her daily engagement he/she shall be paid all fares necessarily incurred except where transport is provided by the employer to and from such site, and all time spent in such travel shall be regarded as time worked.

Provided that where an employer requests an employee to use his/her own car to effect such a transfer and such employee agrees to do so the employee shall be paid an allowance at the rate of 90 cents per kilometre.

C. Delete subclause (5) of this clause and insert in lieu the following:**(5) Definitions:****(a) Radius and Fares:-**

The radius shall be 50 kilometres and the fares shall be \$10.80 per day.

(b) Centre for Employment:

(i) The employer's normal base establishment or workshop; or

(ii) The G.P.O. Perth for all employers whose base establishment or workshop is within the defined radius from the said G.P.O.; or

(iii) The local Post Office closest to the employer's establishment or workshop beyond the defined radius of the G.P.O. Perth.

(iv) In the case of an employee sent to distant work (as defined) the place at which such employee is domiciled with the approval of their employer, for that distant work.

(v) An employer having selected (i), (ii) or (iii) hereof as the centre shall not change that centre without one month's prior notice to each employee.

6. Clause 20 – Meal Allowance: Delete this clause and insert in lieu the following:

An employee required to work overtime for at least one and a half hours after working ordinary hours inclusive of any time worked for accrual purposes as prescribed in clauses 13(1) or 18(4) shall be paid by his/her employer an amount of \$14.70 to meet the cost of a meal.

Provided that this clause shall not apply to an employee who is provided with reasonable board and lodging or who is receiving a distant work allowance in lieu thereof as provided for in subclause (3) of Clause 21. - Living Away From Home - Distant Work and is provided with a suitable meal.

7. Clause 21 – Living Away From Home – Distant Work:**A. Delete subclause (3) of this clause and insert in lieu the following:****(3) Entitlement**

Where an employee qualifies under subclause (1) of this clause the employer shall either:-

(a) Provide the employee with reasonable board and lodging; or

(b) Pay an allowance of \$454.40 per week of seven days but such allowance shall not be wages. In the case of broken parts of the week occurring at the beginning or ending of employment on a distant job the allowance shall be \$65.00 per day.

Provided that the foregoing allowances shall be increased if the employee satisfies the employer that he/she reasonably incurred a greater outlay than that prescribed. In the event of disagreement the matter may be referred to a Board of Reference for determination; or

- (c) in circumstances prescribed in subclause (7) of this clause, provide camp accommodation and messing constructed and maintained in accordance with subclause (10) of this clause.

"Reasonable board and lodging" shall mean lodging in a well kept establishment with three adequate meals each day, adequate furnishings, good bedding, good floor coverings, good lighting and heating and with hot and cold running water, in either a single room or a twin room if a single room is not available.

B. Delete subclause (4) of this clause and insert in lieu the following:

(4) Travelling Expenses

An employee who is sent by his/her employer or selected or engaged by an employer or agent to go to a job which qualifies him/her to the provision of this clause shall not be entitled to any of the allowances prescribed by Clause 12A. - Fares and Travelling (Except Plumbers) covered by this Award, and Clause 12B. - Fares and Travelling Time - Plumbers Only, of this award for the period occupied in travelling from his/her usual place of residence to the distant job, but in lieu thereof shall be paid:

(a) Forward Journey -

- (i) For the time spent in so travelling, at ordinary rates up to a maximum of eight hours per day for each day of travel (to be calculated as the time taken by rail or the usual travelling facilities).
- (ii) For the amount of a fare on the most common method of public transport to the job (bus, economy air, second class rail with sleeping berths if necessary, which may require a first class rail fare), and any excess payment due to transporting his/her tools if such is incurred.
- (iii) For any meals incurred while travelling at \$14.75 per meal.

Provided that the employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues his/her employment within two weeks of commencing on the job and who does not forthwith return to his/her place of engagement.

C. Delete subclause (6) of this clause and insert in lieu the following:

- (6) (a) Weekend Return Home: An employee who works as required during the ordinary hours of work on the working day before and the working day after a weekend and who notifies the employer or his/her representative, no later than Tuesday of each week, of his/her intention to return to his/her usual place of residence at the weekend and who returns to his/her usual place of residence for the weekend, shall be paid an allowance of \$33.60 for each occasion
- (b) Paragraph (a) of this subclause shall not apply to an employee who is receiving the payment prescribed in subclause (3) of this clause in lieu of board and lodging being provided by the employer or who is receiving a camping allowance as prescribed in paragraph (b) of subclause (7) of this clause.
- (c) When an employee returns to his/her usual place of residence for a weekend or part of a weekend and does not absent himself/herself from the job for any of the ordinary working hours, no reduction of the allowance prescribed in paragraph (b) of subclause (3) of this clause shall be made.

D. Delete subclause (7) of this clause and insert in lieu the following:

(7) Construction Camps

(a) Camp Accommodation

Where an employee is engaged on the construction of projects which are located in areas where suitable board and lodging as defined in subclause (3) of this clause is not available, or where the size of the workforce is in excess of the available accommodation or where continuous concrete pour requirements of the project or the working shifts necessitate camp accommodation and where, because of these circumstances, it is necessary to house the employees in a camp, such camp shall be constructed and maintained in accordance with subclause (10) of this clause.

- (b) Camping Allowance: An employee living in a construction camp where free messing is not provided shall receive a camping allowance of \$194.70 for every complete week he/she is available for work. If required to be in camp for less than a complete week he/she shall be paid \$27.95 per day including any Saturday or Sunday if he/she is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance shall not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance shall not be payable for the Saturday or Sunday.

(c) Camp Meal Charges

Where a charge is made for meals in a construction camp, such charge shall be fixed by agreement between the parties.

8. Clause 32 – Special Tools and Protective Clothing: Delete subclause (5) of this clause and insert in lieu the following:

(5) Carpenters and Joiners

(a) The employer shall provide the following tools when they are required on the job:

Dogs and cramps of all descriptions, bars of all descriptions, augers of all sizes, bits not ordinarily used in a brace, all hammers except claw hammers, glue pots and brushes, dowel plates, trammels, hand and thumb screws, soldering irons, spanners from 19mm upwards, and all power driven tools and machines on construction jobs.

(b) The employer shall make available, during working hours, a suitable grindstone or wheel together with power (hand or mechanically driven) for turning it. If a grindstone or wheel is not made available the employer shall pay to each carpenter or joiner \$6.80 per week in lieu of same.

9. Clause 33 – Compensation for Clothes and Tools: Delete subclause (2) of this clause and insert in lieu the following:

(2) (a) An employee shall be reimbursed by his/her employer to a maximum of \$1,795.00 for loss of tools or clothes by fire or breaking and entering whilst securely stored at the employer's direction in a room or building on the employer's premises, job or workshop or in a lock-up as provided in this award or if the tools are lost or stolen whilst being transported by the employee at the employer's direction, or if the tools are accidentally lost over water or if tools are lost or stolen during an employee's absence after leaving the job because of injury or illness.

Provided that an employee transporting his/her own tools shall take all reasonable care to protect those tools and prevent theft or loss

(b) Where an employee is absent from work because of illness or accident and has advised the employer in accordance with Clause 23.- Sick Leave the employer shall ensure that the employee's tools are securely stored during his/her absence.

10. Appendix F – Asbestos Eradication: Delete the text of clause 5 of this Appendix and insert in lieu the following:

In addition to the rates prescribed in this award, an employee engaged in asbestos eradication (as defined) shall receive \$2.25 per hour worked in lieu of Special Rates prescribed in Clause 9(1) with the exception of subclauses (b), (c), (e), (x), (ab) and (af).

11. Appendix G – Laser Equipment: Delete the text of clause 4 of this Appendix and insert in lieu the following:

Where an employee has been appointed by his employer to carry out the duties of a laser safety officer he shall be paid an allowance of \$2.75 per day or part thereof whilst carrying out such duties. The allowance shall be paid as a flat amount without attracting any premium or penalty.

12. Schedule B – Respondents: Delete the text of this schedule and insert in lieu the following:

Aurora Painting

Belmont Salvage Yard

Bergen C and Co

Blue Army Co-Operative Limited

Chiricosta C and T

City of Belmont

City of Kalgoorlie-Boulder

City of Perth

City of Stirling

Construction Contractors Association of Western Australia

Crystal Plumbing

De Santis T and R

G & M Parri

M & A D' Alesio

Midland Cement Group

Neil Francis Gill

Scotch Signwriting Service

Siesta Park Holiday Resort

Spectrum Painting Service

St James Painting Service

Subiaco Painting Service

The Master Builders' Association of WA (Union of Employers)

The Master Painters', Decorators' and Signwriters' Association of WA, Industrial Union of Employers

The Master Plasterers' Association of WA (Union of Employers)

The Master Plumbers and Gasfitters Union of Western Australia

INDUSTRIAL MAGISTRATE—Claims before—

2018 WAIRC 00886

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2018 WAIRC 00886
CORAM : INDUSTRIAL MAGISTRATE M. FLYNN
HEARD : WEDNESDAY, 18 APRIL 2018, THURSDAY, 19 APRIL 2018, ON THE PAPERS
DELIVERED : WEDNESDAY, 12 DECEMBER 2018
FILE NO. : M 111 OF 2016
BETWEEN : ANTONINO STAGNITTA

CLAIMANT

AND

BECHTEL CONSTRUCTION (AUSTRALIA) PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – Construction of enterprise agreement - Entitlement to 'tradespersons allowance' – Jurisdiction of Industrial Magistrates Court to determine contractual claim for a tradespersons allowance and to apply equitable doctrine of rectification in a contractual claim – Meaning of 'under the Act' as it appears in section 545(3) of the *Fair Work Act 2009* (Cth) - 'Safety net contractual entitlement'

Legislation : *Fair Work Act 2009* (Cth)
Electricity Licensing Regulations 1991 (WA)
Industrial Relations Act 1979 (WA)
Evidence Act 1906 (WA)
Fair Work Act 1994 (SA)
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)
Judiciary Act 1903 (Cth)

Instrument : *Bechtel Construction (Australia) Pty Ltd Wheatstone Project Agreement 2013*
John Holland Pty Ltd Wheatstone Project Agreement 2012
CBI Constructors Pty Ltd – AMWU – Gorgon Project – Barrow Island Greenfields Agreement 2010

Case(s) referred to in reasons : *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377
Qube Ports Pty Ltd v Maritime Union of Australia [2018] FCAFC 72
Re Harrison; Ex Parte Hames [2015] WASC 247
RCR Tomlinson Ltd v Russell [2015] WASCA 154
Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350
Cuzzin Pty Ltd v Grnja [2014] SAIRC 36
Jones v Dunkel (1959) 101 CLR 298
Australian Education Union v State of Victoria (Department of Education and Early Childhood Development) (2015) 255 IR 341
BHP Billiton Iron Ore v The National Competition Council [2007] FCAFC 157
Nezovic & Anor v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1263
Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878
Perera v Playkidz Enterprises Pty Ltd [2016] FCCA 2478
Ultrarad Pty Ltd v Health Insurance Commission [2005] FCA 816
Toll (FGCT) Pty Limited v Alphapharm Pty Limited [2004] HCA 52
Taylor v Johnson [1983] HCA 5

Result : Judgment for the respondent

Representation:

Claimant : Ms K. Pedersen of Quayside Chambers as instructed by Fogliani Lawyer

Respondent : Mr R. Wade as instructed by Ashurst Australia

REASONS FOR DECISION

Introduction

- 1 The claimant (Mr Stagnitta) is a qualified fitter and turner.¹ He worked for the respondent (the Company) as a pipe fitter on a remote site (known as ‘the Wheatstone Project’) between 11 June 2015 and 9 October 2016. His employment was subject to a contract of employment (the Employment Contract). There is a dispute about the terms of the Employment Contract. Mr Stagnitta says that the terms are found in one or other of identical written offers of employment from the Company and signed by him, respectively, on 27 May 2015 (First Offer Letter) and 29 May 2015 (Second Offer Letter). Those letters provide for Mr Stagnitta to be paid a tradespersons allowance of \$1.97 per hour. The Company says that the terms are found in a written offer of employment from the Company and alleged to have been signed by Mr Stagnitta on 11 June 2015 (Third Offer Letter). This letter states that a tradesperson allowance was not applicable to Mr Stagnitta. Alternatively (and following Mr Stagnitta denying that he signed the Third Offer Letter), the Company says that the terms are found in the Second Offer Letter subject to the equitable remedy of rectification, resulting in an employment contract that does *not* provide for payment of a tradesperson allowance. Mr Stagnitta’s employment was also regulated by an enterprise agreement made under the *Fair Work Act 2009* (Cth) (FW Act), namely the *Bechtel Construction (Australia) Pty Ltd Wheatstone Project Agreement 2013* (the Agreement). The Agreement makes provision for a tradesperson’s allowance of \$1.97 per hour payable to an employee who is engaged at ‘Tradesperson level’ and who has a trade qualification and who is required to perform the full range of duties of a tradesperson.² Mr Stagnitta was not paid a tradespersons allowance. The Company view, expressed in a letter to Mr Stagnitta dated 31 August 2015, was that a pipe fitter was not entitled to a tradesperson’s allowance under the Agreement and that the Employment Contract did not provide for him to be paid a tradespersons allowance. Two issues arise for my determination.
- 2 First, it will be necessary determine whether, on the proper construction of the Agreement, Mr Stagnitta was entitled to the tradesperson allowance.³ For the reasons set out below under the heading, ‘Issue 1: Enterprise Agreement Claim: Entitlement to a Tradespersons Allowance’, I conclude that the failure of the Company to pay the tradesperson allowance to Mr Stagnitta was not a contravention of cl 10 of Appendix 2 of the Agreement.
- 3 Secondly (and alternatively), it will be necessary to resolve the dispute about the content of the terms of the Employment Contract. It will also be necessary to address jurisdictional objections raised by each party regarding the Employment Contract. The Company, relying upon observations in *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 on the proper construction of s 323(1) of the FW Act, contends that this court does not have jurisdiction to order payment of any amount owed to Mr Stagnitta by reason only of a breach of the Employment Contract. Mr Stagnitta maintains that this court has jurisdiction to make the orders sought. However, he disputes that this court has jurisdiction to entertain the equitable doctrine of rectification raised by the Company. For the reasons set out below under the headings, ‘Issue 2(a) Employment Contract Claim: Jurisdictional Issues’ and ‘Issue 2(b) Employment Contract Claim: the Merits’, I conclude that this court has jurisdiction to determine the claim by Mr Stagnitta based upon the Employment Contract. However, I also conclude that the Company has satisfied me that the doctrine of rectification is to be applied with the result that Mr Stagnitta is not entitled to payment of a tradesperson allowance under the Employment Contract.
- 4 My findings of fact relevant to determining the issues in this claim is undertaken below.

The Facts

- 5 The basis for my findings of fact are:
 - (1) The statement of agreed facts (exhibit 1);
 - (2) The contents of the ‘Consolidated Exhibit Book’ relating to the claim (exhibit 2);
 - (3) The affidavit of Mr Stagnitta sworn 19 June 2017 (exhibit 4) and his evidence at trial⁴;
 - (4) The affidavit of Ms Tracy Quick, an administrative officer employed by the Company, sworn 11 August 2017 (exhibit 9) and her evidence at trial;⁵
 - (5) The affidavit of Mr Leigh Cocks, (at the relevant time) a piping superintendent employed by the Company, sworn 5 August 2017 (exhibit 13) and his evidence at trial;⁶
 - (6) The affidavits of Mr Daniel Lee sworn 21 November 2017⁷ (exhibit 11) and Mr Warren Edwards sworn 21 November 2017⁸ (exhibit 7).
- 6 In a schedule to these reasons I address the issue of the application of rules of evidence to these proceedings and give my rulings on objections made to the admissibility of certain evidence of Mr Stagnitta, Ms Quick and Mr Cocks.
- 7 In the construction industry the term ‘tradesperson’ is applied to a list of occupations for which there exist uniformly recognised qualifications, including completion of an apprenticeship (a Recognised Tradesperson). Examples of Recognised Tradespersons include: plumbers, carpenters, boilermakers, fitters, machinists, fitter/machinists, fitter & turners and mechanical fitters.⁹ Mr Stagnitta, a qualified fitter and turner, is a Recognised Tradesperson.
- 8 In the period 2014 to 2016, Ms Quick was one of a small team of three-four staff who was involved in recruiting construction employees to work for the Company on the Wheatstone Project. Her duties included administering the employment of pipe fitters. Ms Quick gave evidence, not contradicted and which I accept, of her beliefs of the Company’s position on the entitlement of a pipe fitter to a tradesperson allowance under the Agreement. The Company position, until the middle of 2014, was that a pipe fitter was not entitled to a tradespersons allowance. In the second half of 2014, the Company position changed with the result that a tradespersons allowance was paid if (and only if) a pipe fitter held a qualification of the level, ‘Certificate III in Engineering-Fabrication Trade’. Mr Stagnitta has never held this particular qualification.

- 9 On 1 April 2015, some months after Mr Stagnitta used the web site of the Company to submit a registration of interest in working for the Company, Ms Quick and Mr Stagnitta had a telephone conversation about the prospects of Mr Stagnitta working for the Company as a pipe fitter.¹⁰ There is a dispute about the content of the conversation. Ms Quick gave evidence that this conversation included a discussion about whether Mr Stagnitta would be paid a tradesperson allowance. Her evidence was that she made it clear to Mr Stagnitta that, notwithstanding his qualifications as a fitter and turner, the Company's position was that he was not entitled to a tradespersons allowance when working as a pipefitter because he did not possess a Certificate III in Engineering-Fabrication Trade.¹¹ Mr Stagnitta's evidence was that he was never informed of the Company's position on the payment of a tradesperson allowance to a pipefitter, either in this conversation or any subsequent conversation.¹² For reasons set out below in the last paragraph of this section, I am satisfied that Ms Quick's evidence on the content of this conversation is accurate and is to be preferred over the evidence of Mr Stagnitta.
- 10 Mr Stagnitta forwarded to the Company, immediately after his conversation with Ms Quick on 1 April 2015, copies of documents relevant to his application to work for the Company. Under cover of an email from Mr Stagnitta stating that he 'would like to apply for the position as a Mechanical Fitter, Pipefitter, or Hydrotester for any upcoming work', he included including a copy of a trade course certificate stating he had completed a fitting and turning trade course in 1979.¹³ Under cover of another email on the same day, Mr Stagnitta stated, 'Here is a list of my references for my pipefitting application'.
- 11 On 22 April 2015, Mr Stagnitta was interviewed for a position as a pipe fitter with the Company. The interview was by way of a three-way telephone conversation between Ms Quick, Mr Corey Van Wyngaarden (a piping superintendent of the Company at the Wheatstone Project) and Mr Stagnitta. There is a dispute about the content of the conversation. Ms Quick states that she heard Mr Van Wyngaarden explain to Mr Stagnitta that the Company's view was that he was not entitled to a tradespersons allowance because he did not possess a Certificate III in Engineering-Fabrication Trade and that she heard Mr Stagnitta indicate that he understood and agreed to abide by the Company's position.¹⁴ Mr Stagnitta's evidence was there was no discussion of entitlements.¹⁵ Ms Quick kept notes of the conversation by completion of a template 'Workforce Interview Guide'. However, the document does not make reference to any conversation about the tradesperson allowance. The Company did not call Mr Van Wyngaarden to give evidence. This omission was not explained. I infer that his evidence would not have assisted the case for the Company.¹⁶ I am unable to make a finding that Ms Quick's evidence on the content of the conversation is to be preferred over the evidence of Mr Stagnitta. To be clear, I am also not positively satisfied as to the account of Mr Stagnitta. It is implausible that a job interview would not include *some* mention of remuneration. I am unable to make a finding on what, if anything, was said during this telephone conversation about payment of tradespersons allowance.
- 12 In mid May 2015, Mr Stagnitta successfully completed a pre-employment medical assessment and 'verification of competency test' to verify that he possessed the skills necessary for the position of pipe fitter.
- 13 On 27 May 2015, Ms Quick telephoned Mr Stagnitta to inform him that his application to work for the Company was successful and to offer a position as a pipe fitter.¹⁷ Ms Quick does not recall the conversation other than to state her usual practice was to 'run through a script' document in front of her, including making reference to eligibility (or not) of the new employee to a tradespersons allowance.¹⁸ Mr Stagnitta does not refer to this telephone call in his evidence.¹⁹ The 'offer script' is in evidence and does not identify who is entitled to a tradespersons allowance other than re-state the relevant words of the Agreement, i.e. engaged at 'Tradesperson level' and who has a trade qualification and who is required to perform the full range of duties of a tradesperson.²⁰ I accept that Ms Quick understood the Company position to be that this clause would result in Mr Stagnitta not being paid the allowance. However, given the equivocal content of her 'script', I cannot be satisfied of anything specific being said to Mr Stagnitta as to his entitlement to a tradesperson's allowance during this conversation.
- 14 On 28 May 2015, Ms Quick sent the First Offer Letter by email to Mr Stagnitta. The First Offer Letter:
- contained an offer of employment to Mr Stagnitta as a 'Fulltime Pipefitter Trade Qualified';
 - stated that 'employment conditions will be in accordance with the' Agreement;
 - stated that wages and allowances applicable to Mr Stagnitta's classification were to be paid in accordance with the Agreement; and
 - stated that wages and allowances applicable to Mr Stagnitta's classification were to be paid in accordance with the Agreement.
- 15 The letter included a table with rows for each payment type and an adjacent column of an amount payable 'Upon Commencement'. For example, the payment type of 'Wage payment per hour' appears in a row with the amount \$47.27 in the adjacent column. Relevantly, the payment type of 'Tradespersons Allowance per hour' appears in the fourth row with the amount \$1.97 in the adjacent column. Mr Stagnitta signed the First Offer Letter, indicating his acceptance of that offer.
- 16 On 29 May 2015, Ms Quick initiated a telephone call to Mr Stagnitta. I am satisfied that the motivation for her telephone call was the discovery by Ms Quick that the content of the First Letter Offer sent on the previous day did *not* reflect the position of the Company that a tradespersons allowance was not payable to a pipe fitter. She was resilient in cross-examination on the reliability of her evidence on this issue. There is a dispute about the content of the conversation. Ms Quick gave evidence of informing Mr Stagnitta that the First Offer Letter incorrectly stated that a tradespersons allowance would be paid to him and that a revised offer would be sent to him.²¹ Ms Quick stated that Mr Stagnitta responded with words to the effect that he accepted that there had been an error and that he would accept the Company offer of employment *without* the tradesperson allowance being paid. Mr Stagnitta gave evidence of Ms Quick, without explanation, telling him to ignore the First Offer Letter; she was going to send an amended offer.²² For reasons set out below in the last paragraph of this section, I am satisfied that Ms Quick's evidence on the content of this conversation is accurate and is to be preferred over the evidence of Mr Stagnitta.

- 17 After her telephone conversation, Ms Quick attached the Second Offer Letter to an email to Mr Stagnitta. The email of 29 May 2015 stated, 'Revised Letter of Offer attached as discussed.' Ms Quick intended the Second Offer Letter to be an amended version of the First Offer Letter, omitting reference to a pipefitter being a 'trade' and omitting reference to an entitlement to a tradespersons allowance.²³ However, in error, the Second Offer Letter was identical to the First Offer Letter. Soon after receipt, Mr Stagnitta signed the Second Offer Letter, incorrectly recording the signed date as 27 May 2015, and sent the signed offer to the Company. The date of signing must have been on or after the date that Ms Quick sent the Second Offer Letter which was 29 May 2015. Ms Quick did not become aware of the error until after this claim had been filed in this court.
- 18 On 11 June 2015, Mr Stagnitta attended the Company premises in Kewdale to complete his induction as a new employee. Among a group of 13 new employees of the Company, Mr Stagnitta signed documents presented to him in a 'payroll pack'. It is agreed that the payroll pack included payroll, taxation and superannuation records.²⁴ There is a dispute about whether the payroll pack included the Third Offer Letter and whether that letter was signed by Mr Stagnitta during the induction. The Third Offer Letter was identical to the First Offer Letter except omitting reference to a pipefitter being a 'trade' and explicitly stating that Mr Stagnitta was not entitled to a tradespersons allowance. Ms Quick stated that the usual practice of the Company was to include in the payroll pack a copy of an employee's (most recent) offer letter for re-signature and for her to sight each employee's signed documents, including the offer letter, at the end of the induction session.²⁵ Ms Quick produced, from the Company records, the signed documents from the payroll pack, including the Third Offer Letter apparently signed by Mr Stagnitta, albeit dated 10 June 2015.²⁶ Mr Stagnitta stated that he had no recollection of sighting or signing the Third Offer Letter during the induction session.²⁷ For the reasons stated in the following paragraph: I am satisfied that Mr Stagnitta signed the Third Offer Letter during the induction session; and I am not satisfied that Mr Stagnitta read the document or was given an adequate opportunity to consider the contents of the document prior to being asked to sign it.
- 19 Ms Quick gives plausible and uncontradicted evidence of the following events and I am satisfied as to the reliability of her evidence in this regard:
- creating the Third Offer Letter after her telephone conversation with Mr Stagnitta on 29 May 2019;
 - saving the Third Offer Letter in the Company records;
 - mistakenly sending the Second Offer Letter to Mr Stagnitta on 29 May 2019;
 - the Company practice of including an employee offer letter in each induction payroll pack for the purpose of updating Company records with an offer letter containing a 'wet signature' of each new employee;
 - attending the induction session of Mr Stagnitta;
 - her practice of checking that each employee signed all documents in the each payroll pack, including each offer letter; and
 - having no recollection of Mr Stagnitta omitting to sign any document included in his payroll pack.²⁸
- 20 Mr Stagnitta agreed that the Third Letter Offer in the Consolidated Exhibit Book²⁹ contained a signature that was the same as his own signature. It is implausible that an unknown third party has forged the signature of Mr Stagnitta. I am satisfied that Mr Stagnitta signed the Third Offer Letter during the induction session on 11 June 2015, mistakenly recording the date as 10 June 2015. The payroll pack contained payroll, taxation and superannuation documents in addition to the Third Offer Letter.³⁰ The pack was presented to Mr Stagnitta at the commencement of a 'signing' session early on the induction day of the 11 June 2015. He was expected to sign the documents and move on to the next session. There is no evidence on the time available to Mr Stagnitta to consider the contents of the pack before he was expected to attend the following session. Mr Stagnitta did not initial each page of the Third Letter Offer. I would not infer that Mr Stagnitta was given an opportunity to read the contents of the pack. Mr Stagnitta may, truthfully, not have recalled sighting and signing the Third Offer Letter because it was one of a number of documents that he signed at the same time.
- 21 On 11 June 2015, Mr Stagnitta commenced work for the Company as a pipe fitter. Given the references in the three offer letters to the Agreement and particularly to the 'Pipe Fitter' classification and the Tradespersons Allowance, it is convenient to set out the text of cl 9(1) of the Agreement on Wage Rates and cl 10 of Appendix 2 of the Agreement on Special Allowances (the Tradesperson Allowance Clause):

9 WAGE RATES

WAGE AND CLASSIFICATION STRUCTURE

- (1) *The classification structure in this Agreement is set out below. Indicative tasks undertaken by various levels within the classification structure is described in detail in Appendix 1 Classification Structure of this Agreement.*

Employees must be prepared to perform all tasks as required of their classification level or any lower level for which they have the required skills and competence provided that the intention of this provision is not to promote the de-skilling of classifications, but to recognise and make use of the full range of skills and competence held by the workforce.

Employees covered by this Agreement shall be classified at a level as specified by this clause and Appendix 1 based on their skills, qualifications, experience, competency and training provided that the Company has the need for such skill and competence. Each Employee's classification level will be specified in their letter of appointment. Employees may be required to carry out work either individually or as part of a work group. Employees are responsible for carrying out work in a safe manner and for the quality of their work. Employees at all levels shall carry out all duties which are:

- (a) *incidental or peripheral or ancillary to their main tasks or functions, and/or*

- (b) within their skill, competence and training, and/or
- (c) routine functions.

An Employee, engaged in writing, for more than two hours, during one day on duties carrying a higher rate than the Employee's Ordinary Classification, shall be paid the higher rate for the whole day. Otherwise the employee shall be paid the higher rate for the time so worked

The following are the minimum hourly wage rates payable to Employees for working Ordinary Hours under the classifications described. Civil/Structural classifications are described in Appendix 1 - Classification Structure of this Agreement.

...

CIVIL/STRUCTURAL

...

TRADE & TECHNICAL CLASSIFICATIONS

	\$ from commencement
Extra Low Voltage Installer/Communication Technician	39.20		
Welder Pipe Fitter Boilermaker Mechanical Fitter Carpenter Painter Refractory Tradesperson Sheetmetal Worker (1 st class) Sprinkler Plumber Communications Tradesperson Tradesperson - other	40.84		
... Licensed Plumber Welder Special Class Mechanical Tradesperson Special Class	42.88		
... Instrument Tradesperson ...	44.92		
Electronics Tradesperson	46.97		

CRANE CLASSIFICATIONS

...

APPENDIX 2: SPECIAL ALLOWANCES

...

TRADESPERSON ALLOWANCE

- (10) An employee who is engaged at Tradesperson level or higher, holding a current tradesperson certificate or tradespersons rights recognition who is required to perform the full range of duties of a Tradesperson, shall be paid an hourly all purpose allowance in accordance with the table below:

...

22 Mr Stagnitta was not paid a tradespersons allowance. In August 2015, he complained in writing that he was not being paid the tradespersons allowance and specifically adverted to the content of the First Offer Letter and the Second Offer Letter.³¹ The Company's reply, by letter dated 31 August 2015 from project superintendent, Mr George Kerr, was to the effect that he had twice been informed that he had not entitlement to the allowance: adverted to Ms Quick's version of the telephone conversation with Mr Stagnitta of 29 May 2015 (outlined above) and also to the Second Offer Letter, incorrectly assuming that the First Offer Letter had been amended.³² Mr Stagnitta did not reply to the letter, plausibly explaining in cross-examination that he determined to ask his union to pursue the issue on his behalf.³³ In the period November 2015 to January 2016, Mr Stagnitta raised with Mr Leigh Cocks, a piping superintendent with responsibility for supervision of Mr Stagnitta, his concern about the non-payment of the tradesperson allowance. Mr Cocks considered and discussed the issue with other supervisors. There was no resolution of Mr Stagnitta's complaint until, on 10 October 2016, he was re-classified and commenced a new role as a mechanical fitter.

- 23 Mr Stagnitta's work as a pipe fitter between 11 June 2015 and 9 October 2016 required him to undertake the full range of duties of a pipe fitter, including, with respect to pipes: cutting, preparing for welding, grinding, sanding, aligning, measuring, cleaning and hand facing and reading drawings. He was also required, occasionally and incidental to his work as a pipefitter, to perform other duties: bolt up flanges and valves, bolt pipe spools and (as one of a team) certain high-tension work. Mr Stagnitta's training and experience as a fitter and turner was relevant and helpful to his work as a pipe fitter.
- 24 The duties performed by a pipe fitter require skill and expertise. However, a pipe fitter is not a Recognised Tradesperson; a pipe fitter is not within the list of occupations for which exist uniformly recognised qualifications recognised in the construction industry. In the construction industry, the position of pipe fitter is filled by any person with the necessary skills and expertise. It is not *necessary* for a pipe fitter to be a Recognised Tradesperson. However, a pipe fitter may, in addition to having the skill and expertise necessary to be a pipe fitter, also be a Recognised Tradesperson. In fact, many persons working for the Company as a pipe fitter were also a Recognised Tradesperson, having a qualification such as boilermaker, plumber or a fitter and turner. The same observations may also be made of a 'Welder'. A welder is not a Recognised Tradesperson. The position is filled by any person with the necessary skills and expertise. A welder may, in addition to having the skill and expertise necessary to be a welder, also be a Recognised Tradesperson.
- 25 A mechanical fitter is a Recognised Tradesperson. On the Wheatstone Project, mechanical fitters regularly work alongside pipe fitters. Certain specialised tasks must be undertaken by a mechanical fitter and may not be undertaken by a pipe fitter: testing (except of hand torquing joints); and responsibility for bolted joints and inline mechanical components (as required by drawings).³⁴
- 26 In addition to the Agreement, other enterprise agreements made under the FW Act cover other parties engaged in construction on the Wheatstone Project (e.g. the first such agreement was the *John Holland Pty Ltd Wheatstone Project Agreement 2012*) or parties engaged in related construction projects (e.g. *CBI Constructors Pty Ltd – AMWU – Gorgon Project – Barrow Island Greenfields Agreement 2010*).
- 27 In respect of the following conversations between Mr Stagnitta and Ms Quick on 1 April 2015 and 29 May 2015, I have concluded (above) that I am satisfied as to the reliability of the account of each conversation given by Ms Quick. My reasons for this conclusion are as follows:
- (1) I have made a finding (above) that Ms Quick created the Third Offer Letter after her conversation with Mr Stagnitta on 29 May 2015. The contents of the Third Offer Letter are consistent with her account of the conversation with Mr Stagnitta on 29 May 2015.
 - (2) The Company letter of 31 August 2015, drafted after consultation with Ms Quick³⁵, is consistent with Ms Quick's account of the conversation with Mr Stagnitta on 29 May 2015 being repeated by her to the author of the letter of 31 August 2015.
 - (3) In cross-examination, Ms Quick was directly responsive to questions including questions where the answers did not assist the case for the Company. She promptly agreed that: her notes of conversations with Mr Stagnitta do not mention the 'tradesperson allowance'; and that she had no recollection of the conversation of 27 May 2015 in which she made an offer of employment. Ms Quick's account of some of her conversations with Mr Stagnitta included specific details about what was stated and comments on distinctive aspects of Mr Stagnitta's personality.
 - (4) I have considered the submissions made on behalf of Mr Stagnitta questioning the accuracy and reliability of the evidence of Ms Quick.³⁶ Ms Quick's affidavit was prepared over two years after the critical conversations. She had dealt with many, many prospective employees of the Company before, during and after the period that she was dealing with Mr Stagnitta. She had no recall at all of the content of some of her interactions with Mr Stagnitta, for example, arranging pre-employment logistics or the telephone conversation advising him of his successful application (after the interview of 22 April 2015). Her notes of conversation of 1 April 2015 did not confirm her oral evidence.³⁷ Ms Quick was unable to explain 'how she made the mistakes' that resulted in the First Offer Letter and the Second Offer Letter containing errors. There is force in each submission. However, taking into account these points, individually and collectively, I remain satisfied as to Ms Quick's account of the conversations of 1 April 2015 and 29 May 2015. The *fact* of a telephone conversation between Ms Quick and Mr Stagnitta on 29 May 2015 is not in dispute. Nor is it in dispute that the subject matter of the conversation was Ms Quick's desire to replace the First Offer Letter with new written offer for Mr Stagnitta to sign. *Some* explanation was required. The true explanation (of an error in the First Offer Letter) is consistent with the position of the Company on tradesperson allowances at that time. The content of Ms Quick's record of the 1 April 2015 conversation does not *contradict* her oral evidence. Her inability to recall certain events is to be expected given the passage of time.
 - (5) I would not (as urged by submissions on behalf of the Company) draw any inferences from the absence of a replying affidavit by Mr Stagnitta. However, the brief recollections of his conversations with Ms Quick that appear in his affidavit, were not supplemented by Mr Stagnitta during cross-examination. He had limited recall of detail of the topics discussed on 1 April 2015 and the fact of the telephone conversation on 27 May 2015. Mr Stagnitta was also unhelpfully defensive. For example, Mr Stagnitta testified by way of evidence in chief (in his affidavit) that in the telephone conversation of 29 May 2015, Ms Quick stated that she was going to send an *amended* offer. When pressed to explain his understanding of the proposed *amendment*, Mr Stagnitta countered that Ms Quick may have stated that she going to send *another* offer. Whether Ms Quick promised an 'amended offer' or 'another offer' is less significant than Mr Stagnitta's attempts to avoid directly answering questions going to the reliability of his evidence in chief. I do not agree with the Company's submission that I should infer that Mr Stagnitta was an untruthful witness by reason of his conduct after he commenced employment and

arguing for a tradesperson allowance.³⁸ However, I was left questioning the reliability of the evidence of Mr Stagnitta on the content of the conversations of 1 April 2015 and 29 May 2015.

- (6) I have been unable to resolve disputes concerning certain peripheral facts and those disputes have played no part in making my findings above. Assertions about those facts have not been relied upon in reaching my conclusion. For example: whether Mr Stagnitta or Ms Quick initiated the telephone call of 1 April 2015; and whether Mr Stagnitta mentioned Mario Cavuto or Rick Reece to Ms Quick.

Issue 1: Enterprise Agreement Claim: Entitlement to a Tradespersons Allowance

28 I respectfully adopt the observations made in *Re Harrison; Ex Parte Hames* [2015] WASC 247 [50] (Beech J) on the approach to be taken by a court when interpreting a legal instrument:

1. *The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;*
2. *It is the objectively ascertained intention of the parties as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;*
3. *The objectively ascertained purpose in object of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;*
4. *The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence from the surrounding circumstances;*
5. *An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However it must be brought in mind that business common sense may be a topic upon which minds may differ; and*
6. *An instrument should be construed as a whole a construction that makes the various parts of an instrument harmonious is preferable if possible, each part of an instrument should be construed so as to have some operation.*

29 When interpreting legal instruments of the nature of industrial awards and agreements, some emphasis has been placed on the need to have regard to the fact that such instruments are commonly drafted by lay persons. In *Qube Ports Pty Ltd v Maritime Union of Australia* [2018] FCAFC 72 [64] – [65], White J states:

There are well developed principles concerning the construction of industrial awards and agreements which take account of the fact that they are commonly drafted by lay persons and lack the precision and clarity to be expected in commercial contracts.

*The principles were reviewed recently by Tracy J in *Transport Workers Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829 at [29]. It is not necessary to repeat the principles in detail in these reasons. It is sufficient to say that the court will seek to identify, in an objective way, the meaning intended by the parties to the agreement having regard to the language they have used and in doing so avoid a narrow or pedantic approach. In particular, the court takes account of the circumstance of the drafters of the agreement when likely of a 'practical bent of mind' and likely to have been concerned when expressing their intentions in ways understood in the context of the relevant industry and industrial relations environment. As with commercial contracts, the court will prefer a construction which gives effect to the presumed purpose of the parties.*

The Agreement

30 It is apparent that whether or not Mr Stagnitta is entitled to the tradespersons allowance requires construction of Tradesperson Allowance Clause in light of the Agreement (including Appendix 2) as a whole.

31 The Agreement commenced in December 2013. The Agreement is divided into sections and appendices that regulate:

- (1) the coverage of the Agreement (section 1);
- (2) calculating the income of employees (section 2);
- (3) working hours, including time considered to be eligible for overtime payments (section 3);
- (4) paid and unpaid leave for specified purposed (section 4);
- (5) miscellaneous topics: casual employment, termination, payment of wages, cyclone procedure, etc. (section 5);
- (6) detailed descriptions of the occupation of each 'Civil/Structural' classification listed in clause 9 (appendix 1(1));
- (7) detailed descriptions of the qualifications and role of select 'Trade & Technical' classifications: 'Electrician – Special Class'; 'Instrument/Electrical Grade 1' and 'Electronics Tradesperson' (appendix 1(2));
- (8) criteria for payment of (special) allowances to employees and the rate of payment: (appendix 2);
- (9) criteria for payment to employees of travel expenses or a subsidy for living locally and the rate of payment (appendices 3 and 4); and
- (10) consultation on major change (appendix 5).

32 The Agreement binds employees of the Company working in on-site construction work for the Wheatstone Project and employed in 'classifications set out in' cl 9 of the Agreement.

33 Clause 9 of the Agreement serves three related functions. First, it lists the occupation of each employee of the Company bound by the Agreement and creates a 'classification structure' of those occupations. This is done by allocating each occupation into

a group and creating a hierarchy of groups, called 'classification levels'. The levels are set out under three headings: 'Civil/Structural', 'Trade & Technical' and 'Crane'. Secondly, it provides a mechanism for the allocation of employees into classification levels, namely, as specified in the 'letter of appointment' of the Company. Clause 9 of the Agreement states that the allocation must reflect the skills and competency possessed by the employee as needed by the Company. It may be observed that cl 9 of the Agreement provides for allocation to a 'level' comprising multiple occupations and not to a single occupation named within the level. No doubt, the level is dictated by the particular occupation required by the Company on appointment and for which the employee has the requisite skills and competence. However, it is evident from the requirement of cl 9 of the Agreement that employees be 'prepared to perform all tasks required of their classification level or any lower level'. That appointment is to a level and not to an occupation. The third function of cl 9 of the Agreement is to specify, by nominating the minimum hourly wage rates payable for each classification level, a basis for calculating the wages and certain other entitlements of employees of the Company.

- 34 In addition to clause 9 on wage rates, section 2 of the Agreement contains: clause 10 on the site allowance payable to each employee; clause 11 on the allowance payable to 'a leading hand appointed in writing as such' by the Company; clause 12 on the allowance payable to an employee holding a first aid qualification and appointed in writing by the Company; clause 14 on the income protection insurance provided to each employee; and clause 15 on the payment to each employee of superannuation as required by law.

Appendix 2 – Special Allowances.

- 35 Section 2 of the Agreement also contains clause 13, stating that, 'where relevant, an employee shall be paid the special allowance applicable to *the work being performed* by them as specified by Appendix 2 – Special Allowances of this agreement'. The emphasised words of cl 13 of the Agreement directs attention to an allowance being paid for work having a particular quality as defined in the appendix. Appendix 2 makes provision for 10 special allowances.
- 36 In the case of nine of the 10 special allowances, the identity of the eligible employee is unambiguous. Four allowances are payable to *every* employee who works in a specified physical environment: on preheated steel (2(2)); within pipes (2(3)); welding work within pipes (2(4)); and on a barge (2(6)). Three allowances are payable to *an employee whose occupation is specified* by reference to a description corresponding to an occupation that appears in the classification structure in cl 9 of the Agreement and where the employee meets additional criteria. A 'welder' is entitled to a payment for the time involved in pre-employment competency testing (2(1)). A 'welder special class' is entitled to a special allowance 'when carrying out the full range of duties involved in specialist welding work' as described in the appendix (2(5)). A 'refractory tradesperson' is entitled to a special allowance if the employee's major and substantial work is in a refractory (2(7)). Two allowances are payable to a 'tradesperson' (and an assistant) who holds and may be required to use a particular qualification under the *Electricity Licensing Regulations 1991 (WA)* (2(8) and 2(9)). The effect of the statutory qualification requirement is to render the reference to 'tradesperson' otiose. A person holding a stated qualification under the *Electricity Licensing Regulations 1991 (WA)* is a Recognised Tradesperson.³⁹

Tradespersons Allowance Clause

- 37 It is convenient to identify (and label) the three distinct elements of the Tradesperson Allowance Clause. Firstly, an employee must be '*engaged at Tradesperson level or higher*' (the Engaged Element). Secondly, the employee must '*hold a current tradesperson certificate or tradespersons rights recognition*' (the Qualification Element). Thirdly, the employee must be '*required to perform the full range of duties of a tradesperson*' (the Performance Element).
- 38 Mr Stagnitta submits that the Engaged Element is satisfied upon an employee being classified by the Company to any level in the classification structure appearing under the heading, 'Trade and Technical Classifications'. On this view, Mr Stagnitta was 'engaged at tradesperson level or higher' because he was engaged as a 'Pipe Fitter' and thus to a level in the classification structure under the heading, 'Trade and Technical Classifications'. Mr Stagnitta argues that the Qualification Element is satisfied by an employee being a Recognised Tradesperson. I have already made a finding that Mr Stagnitta is a Recognised Tradesperson by reason of his qualifications as a fitter and turner. Finally, Mr Stagnitta submits that the Performance Element is satisfied by an employee who performs the full range of duties required of the occupation that resulted in the employee being classified under the heading, 'Trade and Technical Classifications'. Mr Stagnitta was classified under the heading 'Trade and Technical Classifications' by reason of being engaged as a pipe fitter and, throughout his employment performed the full range of duties of a pipe fitter. It follows, argues Mr Stagnitta, that he has performed the full range of duties of a tradesperson.
- 39 The Company takes a different view of the Engaged Element. The Company submits that the Engaged Element is only satisfied upon an employee being classified by the Company on the basis of an occupation of a Recognised Tradesperson. For example (from the list in the Facts above which is not exhaustive), classification on the basis of the following occupations may result in an allowance being payable: plumber, carpenter, boilermaker, mechanical fitter and painter. Mr Stagnitta was engaged (and classified) by the Company as a pipe fitter. A pipe fitter is not a Recognised Tradesperson. On this view, Mr Stagnitta does not satisfy the Engaged Element. The Company argues that in construing the Engaged Element in this manner informs the meaning to be ascribed to the remaining two elements. The Qualification Element is satisfied by an employee being a Recognised Tradesperson in the classified occupation. The Performance Element is satisfied by the employee performing the full range of duties relevant to the occupation which resulted in the employee being classified by the Company on the basis of an occupation of a Recognised Tradesperson. For example, an employee classified to a level on the basis of being engaged as a Mechanical Fitter and who is a Recognised Tradesperson in the field of a Mechanical Fitter and who performs the full range of duties of a Mechanical Fitter is entitled to the allowance.
- 40 My view is that, for the reasons that follow, the interpretation suggested by the Company is correct.

- 41 Mr Stagnitta's submission requires the word 'tradesperson' in the Qualification Element to be ascribed a different meaning to the word 'tradesperson' in the Engaged and Performance Elements. The Company suggests a consistent interpretation linked to the skills, qualifications and duties of a Recognised Tradesperson. Consistency of interpretation is preferable, particularly within a single clause.
- 42 Mr Stagnitta's submission requires the word 'tradesperson' in the Qualification Element and the Performance Element to be ascribed a meaning other than the ordinary meaning of the word. It ascribes a meaning by calling in aid a list in cl 9 of the Agreement. The submission is not without force insofar as the phrase 'Tradesperson level' and the word 'engaged' in the Engaged Element invite comparison with the text of cl 9 of the Agreement containing references to 'a classification level specified in a letter of appointment' and to the classification structure heading 'Trade & Technical'. I have also noted that the effect of cl 9 of the Agreement is to provide for allocation of an employee to a 'level' comprising multiple occupations and not to a single occupation named within the level. However, recalling my earlier observations on the functions performed by cl 9 of the Agreement, I do not agree that the meaning of 'Tradesperson level' in the Engaged Element is assisted by noting a heading 'Trades & Technical' in a classification structure that contains occupations of Recognised Tradespersons (e.g. mechanical fitter) *and* occupations that are not of Recognised Tradespersons (e.g. pipe fitter, welder).
- 43 An implication of the interpretation of the Engaged Element urged by Mr Stagnitta is that a Recognised Tradesperson will be entitled to an allowance notwithstanding appointment on the basis of skills not required of a Recognised Tradesperson (e.g. appointment of a pipe fitter or a welder). An implication of the suggested interpretation of the Performance Element is that a Recognised Tradesperson will be entitled to an allowance notwithstanding the duties being performed by the employee are unrelated to the particular trade of the Recognised Tradesperson. These implications are, objectively, unlikely to have been intended by the parties. Further, the implications are inconsistent with my observation (above) that cl 13 of the Agreement suggests a special allowance is for work *performed*.
- 44 Finally, I address some specific submissions made by Mr Stagnitta:
- (a) It does not follow from the fact that some or many pipe fitters (or welders) are Recognised Tradespersons that the Qualification Element is satisfied by each occupation on a list that includes pipe fitter, welder and a number of occupations of Recognised Tradespersons.
 - (b) I would not infer that from a reference to 'Tradesperson-other' at the end of a list of occupations that each occupation in the list is that of a 'Tradesperson'. The context is also consistent with a 'Tradesperson-other' being the occupation of Recognised Tradesperson not otherwise appearing in the list.
 - (c) It is not 'meaningless or confusing' to prefer the interpretation suggested by the Company over the interpretation suggested by Mr Stagnitta. I am unable to ascribe any significance to the use of a capital 'T' when interpreting the Qualification Element.
 - (d) The proportion of pipe fitters employed by the Company (or generally) who are Recognised Tradespersons is not significant when construing the Tradesperson Allowance Clause. It may be accepted that many if not most pipe fitters are Recognised Tradespersons. However, even if *every* pipe fitter employed by the Company was a Recognised Tradesperson, the question remains whether the effect of the Tradesperson Allowance Clause is to confer upon a pipe fitter an entitlement to the allowance.

Issue 2(a): Employment Contract Claim: Jurisdictional Issues

- 45 This court, constituted by an Industrial Magistrate, is created by s 81 of the *Industrial Relations Act 1979* (WA) (IR Act). It exercises the jurisdiction conferred by sections 81A and 81AA of the IR Act (and other Western Australian statutes). Nothing in the IR Act (or any other Western Australian statute) confers jurisdiction on this court to determine a dispute concerning the Employment Contract. However, s 77(iii) of the Constitution empowers the Commonwealth Parliament to invest any court of a state with federal jurisdiction with respect to, inter alia, 'any matter arising under the any laws made by the Parliament'. The FW Act invests certain state courts, defined as an 'eligible State or Territory court', with the jurisdiction specified in the FW Act. This court, being constituted by an Industrial Magistrate, is an 'eligible State or Territory court',⁴⁰ and is invested with the jurisdiction specified in the FW Act.
- 46 The jurisdiction of this court under the FW Act is primarily defined by three provisions, discussed in more detail below:
- (1) section 539 which identifies the civil remedy provisions of the FW Act which may be the subject of an application to an eligible state or territory court;
 - (2) section 545(3) which describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of civil remedy provision; and
 - (3) section 546(1) which concerns the making of pecuniary penalty orders upon the contravention of a civil remedy provision.
- 47 Section 539 of the FW Act identifies, from among the several civil remedy provisions of the FW Act, the particular civil remedy provisions for which application may be made to an eligible state or territory court 'for orders in relation to a contravention of the provision'.⁴¹ The provision also identifies, for each civil remedy provision, the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.⁴² Relevant to Mr Stagnitta's claim in this court, s 539 of the FW Act provides for an application to this court by an employee for orders in relation to a contravention of civil remedy provision created by s 323(1) of the FW Act. Section 323(1) of the FW Act provides that 'an employer must pay an employee amounts payable to the employee in relation to the performance of work ...in full'. Mr Stagnitta alleges that it was a term of the Employment Contract that the Company pay him the tradesperson allowance specified in the First Offer Letter or the Second Offer Letter. The failure to pay the allowance is alleged by Mr Stagnitta, adopting the language of s 323(1) of the FW Act, to be a failure to 'pay an amount payable (under the Employment Contract)

to an employee in relation to the performance of work'. Section 544 of the FW Act states that an application for an order must be made within six years of the contravention. Mr Stagnitta's claim is made within six years of the alleged contravention commencing in June 2015.

- 48 Section 545(3) of the FW Act provides that an eligible state or territory court 'may order an employer to pay an amount to an employee if the court is satisfied' of two criteria. First, the employer must have an obligation, 'under the Act or under a fair work instrument' (e.g. a modern award or an enterprise agreement) to pay the relevant amount. The meaning of 'under the Act' as it appears in s 545(3) of the FW Act was the subject of examination in *Sharrock*, discussed below. Secondly, the failure to pay the relevant amount must be a contravention of a civil remedy provision.
- 49 Section 546(1) of the FW Act provides that 'an eligible State or Territory Court' may order a person who has contravened a civil remedy provision to pay a pecuniary penalty that the court considers appropriate.
- 50 At issue before Scaddan IM in *Sharrock* was the power of this court, in a claim attracting the small claims procedure under s 548 of the FW Act, to make an order that an employer (Downer EDI Mining Pty Ltd) pay the amount of \$7,569.83 to an employee (Sharrock) upon an allegation of a breach of an employment contract. The claim was calculated by reference to the difference between employee entitlements of \$42.17 per hour, alleged to be a term of the employment contract, and employee entitlements of \$39.65 per hour, alleged (by the employer) to be a term of an enterprise agreement. Two relevant issues were addressed by Scaddan IM.
- 51 First, after reviewing relevant cases, Scaddan IM concluded (at [29]) that the failure to make a payment provided for in an employment contract was a contravention of s 323(1) of the FW Act:
- [A] failure to pay a contractual entitlement is capable of contravening s 323 of the FWA. Given such a contravention of s 323 is capable of being heard and determined in an eligible state or territory court as a civil remedy provision, it follows that it is open for an application for an order relevant to a contravention of s 323 (as it relates to a breach of a contractual entitlement) to be made to eligible state or territory court (the Industrial Magistrates Court).*
- 52 Secondly, Scaddan IM concluded (at [73] – [76]) that the contractual obligation to make a payment is not, *by reason of section 323(1)*, an obligation 'under the Act':
- [73] *The words required to pay the amount 'under this Act' in s 545(3) of the FWA must have work to do or meaning in the context of the amount required to be paid by the employer. These words in effect qualify what amount the employer is required to pay. Otherwise the section could merely have referred to any amount the employer might be required to pay without reference to the FWA or any other federal instrument.*
- [74] *Therefore, Mr Sharrock's claim needs to be referable to another section of, or obligation under, the FWA over and above the legal obligation to pay in full in s 323 in order for any amount sought to be paid by Downer EDI Mining. No other section or requirement has been established by Mr Sharrock.*
- [75] *The IMC is not empowered under s 545(3) or s 548(1A) to make an order for compensation and the order sought by Mr Sharrock is an amount for damages for an alleged breach of contract and not one which is referable to any amount required to be paid by Downer EDI Mining under the FWA.*
- [76] *While s 323 of the FWA opens the door to a claim under the FWA by placing a legal obligation on the employer to pay in full amounts owed, it does not, of itself, empower the IMC to make the order sought by Mr Sharrock by: (1) providing a remedy; or (2) specifying an obligation on the employer as to what the employer is required to pay under the FWA.*
- 53 In a claim to which the small claim procedure applies, s 548 and s 548(1A)(a)(i) of the FW Act limits the power of this court to making an order for an employer to pay an amount required to the paid 'under the Act'. It followed, in *Sharrock*, this court lacked the power to make the order that was sought by the employee.
- 54 Relevant to Mr Stagnitta's claim in this court, s 545(3) of the FW Act limits the power of this court in precisely the same language as s 548(1A)(a)(i) of the FW Act. If the reasoning in *Sharrock* is applied to s 545(3) of the FW Act, it will be necessary for Mr Stagnitta to identify a provision of the FW Act *other than* section 323(1) which has the effect of creating an obligation to pay the amount claimed pursuant to the Employment Contract.
- 55 The Company submits that the reasoning in *Sharrock* applies to Mr Stagnitta's claim with the result that 'in the event that Mr Stagnitta is successful in establishing his contractual claim, the extent of any underpayment would not be recoverable on account of lack of jurisdiction'.⁴³
- 56 Mr Stagnitta's submission on *Sharrock* makes three points.⁴⁴ First, it argued that *Sharrock* should be distinguished on the basis that it was a case concerned with a small claim proceeding.⁴⁵ The argument does not engage with the similarity of language in s 548(1A) (on small claims) and s 545(3) of the FW Act (relevant to Mr Stagnitta's claim) and is not persuasive. Secondly, it is argued by reference to the text of relevant provisions of the FW Act⁴⁶ and the failure to give weight to cases that emphasise the 'stand-alone' nature of the obligation created section 323(1),⁴⁷ that the reasoning in *Sharrock* is wrong. As a matter of judicial comity, an Industrial Magistrate will follow earlier decisions of the Industrial Magistrates Court unless the Magistrate is of the view that the earlier decision is plainly wrong.⁴⁸ It has been said the principle is apt for application to questions of statutory construction where courts are often faced with a choice of possible interpretations.⁴⁹ The submissions on behalf of Mr Stagnitta has not led me to conclude that the reasoning in *Sharrock* is plainly wrong. A textual analysis of the FW Act results in a range of plausible outcomes on the meaning of the phrase 'under the Act' in s 545(3) of the FW Act, including the outcome favoured in *Sharrock*. The relevant jurisprudence of the Federal Court on the significance of the s 323(1) of the FW Act was not overlooked in *Sharrock*.⁵⁰

57 The third argument made in Mr Stagnitta's submission is to observe that, consistent with the reasoning in *Sharrock*,⁵¹ this court has power to make the order sought by Mr Stagnitta if he is able to identify a provision of the FW Act other than section 323(1) which has the effect of creating an obligation to pay the amount he claims pursuant to the Employment Contract. Mr Stagnitta nominates s 542(1) of the FW Act on safety net contractual entitlements as such a provision. I agree with this submission. Section 542(1) of the FW Act provides that 'a safety net contractual entitlement' has effect as an entitlement of an employee under the FW Act. A 'safety net contractual entitlement' is defined in s 12 of the FW Act to mean an entitlement under a contract between an employee and an employer that relates to any of a list of subject matters that include, by reference to s 139(1)(g)(ii) of the FW Act, allowances for skills that are not taken into account in rates of pay.⁵² The Second Offer Letter, identifying a 'wage payment per hour' and a separate 'tradespersons allowance per hour', makes provision for payment of an allowance for the skill of a tradesperson that is not taken into account in the rate provided for a wage payment. If the Second Offer Letter evidences the terms of the Employment Contract (discussed below), the tradespersons allowance in the Employment Contract is a safety net contractual entitlement which, as a result of s 542(1) of the FW Act, casts an obligation upon the Company to pay the allowance. The fact that, as a result of s 543 of the FW Act, *this court* would not have jurisdiction to entertain a claim by Mr Stagnitta in reliance on s 542(1) of the FW Act, does detract from the obligation upon the Company under s 542(1) to pay the allowance. The fact that, as a result of s 542(2) of the FW Act, the safety net contractual entitlement is 'subject to any modifications by the Agreement' and the Agreement makes provision for a tradesperson allowance, does not detract from the obligation of the Company under s 542(1) of the FW Act to make a payment under the Employment Contract that 'is in excess of any basic entitlement under the Agreement'.⁵³

58 If the Company has an obligation to pay the tradespersons allowance as a result of the Employment Contract (discussed below), Mr Stagnitta will have satisfied the two conditions in s 545(3) of the FW Act for an order that the Company pay the allowance to him:

- (1) the allowance is an entitlement under the FW Act, namely under s 542(1) and s 542; and
- (2) the failure to pay the allowance is a contravention of a civil remedy provision, namely s 323(1) of the FW Act.

59 Mr Stagnitta and the Company have made competing submissions on the issue of whether this court has the jurisdiction to consider the equitable doctrine of 'rectification' (relied upon by the Company) in determining whether, because of the Employment Contract, the Company has an obligation to pay the allowance. The submissions assume that the issue requires consideration of the text of s 323(1) of the FW Act.⁵⁴ In fact, as discussed in the previous two paragraphs, the issue requires consideration of the text of s 545(3) and s 542(1) of the FW Act. Those provisions, and the definition of 'safety net contractual entitlement' found in s 12 of the FW Act combine to confer on this court the power to make an order for payment of an amount that is an 'entitlement under a contract between' Mr Stagnitta and the Company relating to the tradespersons allowance.⁵⁵ There is no express or implied limitation on the power of this court suggested by ordinary meaning of the phrase 'entitlement under a contract' or by the ordinary meaning of the single words, 'entitlement', 'under' and 'contract'. The ordinary meaning of the word 'contract' in a statute invites attention to the concept of a legally enforceable agreement, with an inquiry into the enforceable rights and obligations of the parties.⁵⁶ I see no reason to exclude consideration of any principle of law – from statute, common law or equity – in order to determine the rights and obligations of the parties to the Employment Contract. The written submissions of Mr Stagnitta with respect to the effect of s 323(1) of the FW Act, do not persuade me to the contrary; authority on the non-federal jurisdiction of this court is distinguishable.⁵⁷

Issue 2(b): Employment Contract Claim: the Merits

60 The Third Letter Offer states that a tradespersons allowance is not payable to Mr Stagnitta. I have found that Mr Stagnitta signed the Third Letter Offer on 11 June 2015. The signing of a written offer by the offeree is (almost always) compelling evidence of acceptance of an offer, irrespective of whether the offeree has read the written offer.⁵⁸ However, it remains open for a party who has signed an offer to demonstrate that the circumstances of signing reveal that the offeror would not reasonably understand the offeree's signature to be a manifestation of intent to assent to the terms of the offer.⁵⁹ In my findings of fact above I describe the circumstances in which Mr Stagnitta signed the Third Letter Offer. He was with a group of other employees when they were ushered into a room as part of an induction process. They were requested to sign documents in a 'pack' of documents before proceeding to the next stage of their induction. The Third Letter Offer was included among other documents in the 'pack'. Numerous documents were to be signed. In a practical sense, Mr Stagnitta did not have an opportunity to depart from the Company premises *before* he signed the Third Letter Offer. In all of those circumstances, the Company could not reasonably understand that his signature was an assent to the terms of the Third Letter Offer. My view is that the terms of the Employment Contract are *not* to be found in the Third Offer Letter, notwithstanding my finding above that the Third Offer Letter was signed by Mr Stagnitta on 11 June 2015.

61 The Second Offer Letter set out the wages and allowances to be paid to Mr Stagnitta in a tabular form, including a payment type of 'Tradespersons Allowance per hour' in the fourth row with the amount \$1.97 in the adjacent column. The Company mistakenly included this payment type in the Second Offer Letter. It is not in dispute that the Second Offer Letter was signed by Mr Stagnitta on 29 May 2015 and forwarded by him to the Company. The objective theory of contract precludes the Company from reliance upon its mistake to deny the creation of a contract upon Mr Stagnitta signing the letter and communicating his acceptance to the Company.⁶⁰ Subject to the application of the equitable doctrine of rectification, the terms of the Employment Contract are to be found in the Second Offer Letter.

62 For present purposes, the law on rectification as stated in *RCR Tomlinson Ltd v Russell* [2015] WASCA 154 [49] – [54] may be adopted.⁶¹ There is a presumption that the terms of an instrument, signed by the parties, reflects the common intention of the parties to the agreement. The object of rectification is to reform an instrument that does not reflect the intention of the parties. The onus is upon a party seeking rectification to displace the presumption in favour of the terms of an instrument by proving that the written terms do not reflect the true agreement of the parties. The evidence necessary to discharge the onus must be clear and convincing. The common intention must be sufficiently clear and well-defined so as to be incorporated into the instrument.

- 63 I have made findings (above) that Ms Quick and Mr Stagnitta engaged in two conversations about whether or not the Company would pay Mr Stagnitta a tradespersons allowance if he was to be engaged as a pipe fitter. In the conversation on 1 April 2015, Ms Quick was unequivocal. The Company would not pay the allowance and Mr Stagnitta should not proceed with his application if this was not acceptable to him. In the conversation on 29 May 2015, Ms Quick was also unequivocal. She told him that the First Offer Letter mistakenly provided for payment to Mr Stagnitta of the tradespersons allowance and the Company would not pay the allowance to Mr Stagnitta. Mr Stagnitta said, in effect, that he would accept the Company offer of employment *without* the tradesperson allowance being paid. The Second Offer Letter signed by Mr Stagnitta shortly after this conversation with Ms Quick did not reflect their common intention. I am confident that the clarity of the common position reached in the conversation of 29 May 2015 because it followed an exchange of views on the same topic on 1 April 2015 and because Ms Quick identified the mistake in the First Offer Letter.
- 64 I am satisfied as to the requirements for rectification of clear and convincing evidence of a well-defined term. The terms of the Employment Contract are to be found in the Second Offer Letter, rectified by the substitution of the words ‘not applicable’ in place of the figure ‘\$1.97’ adjacent to the payment type, ‘Tradespersons Allowance per hour’.
- 65 In the result, while the Company has an obligation under s 542(1) of the FW Act on safety net contractual entitlements to pay any allowance provided for in the Employment Contract, the Company has satisfied me that the Employment Contract does not provide for a tradespersons allowance to be paid to Mr Stagnitta.

Conclusion

- 66 Mr Stagnitta has been unsuccessful with his claim for payment of a tradespersons allowance during the period he worked for the Company as a pipefitter. I have considered and rejected the claim based upon the construction of the Agreement and, alternatively, based upon the terms of the Employment Contract.

M. FLYNN

INDUSTRIAL MAGISTRATE

¹ The trial in M 111/2016 Stagnitta v Bechtel Construction (Australia) Pty Ltd and M 163/2016 Wright v Bechtel Construction (Australia) Pty Ltd was conducted jointly and the reasons for judgment will be published at a joint hearing. There is sufficient overlap in issues that arise in each case for it to be expedient, where relevant, to use the same language in each judgment. Obviously (and as will be apparent), the case of *Stagnitta* is determined on the basis of evidence admitted in that case and the case of *Wright* is determined on the basis of evidence admitted in that case.

² The Agreement, Appendix 2, clause (10).

³ It follows from sections 50, 51, 539(1) and 545(3) of the FW Act that a contravention of the Agreement is also the contravention of a civil remedy provision of the FW Act and this court may make orders for the Company to pay to Mr Stagnitta amounts owed to him under the Agreement. It follows from the section 546 of the FW Act that this court may also order the Company to pay pecuniary penalty for contravention of the civil remedy provision.

⁴ Transcript, ts 18 – 44 (18 April 2018).

⁵ Transcript, ts 60 – 80 (18 April 2018).

⁶ Transcript, ts 100 – 107 (19 April 2018).

⁷ Noting the agreement of the parties to paragraphs of the affidavit to be omitted from evidence.

⁸ Noting the agreement of the parties to paragraphs of the affidavit to be omitted from evidence and additional agreed facts.

⁹ Exhibit 11, affidavit of Daniel Lee; exhibit 13, affidavit of Leigh Cocks, paragraph [35].

¹⁰ Mr Stagnitta does not recall whether the identity of his interlocutor on 1 April 2015: Exhibit 4, paragraph 4; Transcript, ts 23 (18 April 2018). Ms Quick’s identification of herself as the author of the ‘screening questionnaire’ of 1 April 2015 (tab 3 of the ‘Consolidated Exhibit Book’) satisfies me that the parties to the conversation were Ms Quick and Mr Stagnitta.

¹¹ Exhibit 9 at paragraphs [46] – [62].

¹² Exhibit 4, paragraph 4; Transcript, ts 23 (18 April 2018).

¹³ Tab 4 of the ‘Consolidated Exhibit Book’.

¹⁴ Exhibit 9, paragraph [76].

¹⁵ Exhibit 4, paragraph [8]; Transcript, ts 24 (18 April 2018).

¹⁶ *Jones v Dunkel* (1959) 101 CLR 298 [320]; J D Heydon AC, *Cross on Evidence*, 10th edn, 2014, LexisNexis, Sydney at [1215].

¹⁷ Exhibit 9 at paragraphs [81] – [82].

¹⁸ Exhibit 9 at paragraph [82].

¹⁹ Exhibit 4, paragraph [8] concerns 22 April 2015 and paragraph [9] concerns 28 May 2015.

²⁰ The Agreement, Appendix 2, clause (10).

²¹ Exhibit 9 at paragraphs [90] – [92].

²² Exhibit 4, paragraph [12].

²³ Exhibit 9, paragraph [93].

²⁴ Compare exhibit 4 paragraph [15] and exhibit 9 paragraph [98].

²⁵ Exhibit 9 paragraph [102].

- ²⁶ ‘Consolidated Exhibit Book’ at tab 18.
- ²⁷ Exhibit 4, paragraph [15], Transcript, ts 31-33 and 43 (18 April 2018).
- ²⁸ Exhibit 9 at paragraphs [90] – [105].
- ²⁹ At page 279 of the ‘Consolidated Exhibit Book’.
- ³⁰ ‘Consolidated Exhibit Book’, pages 270 – 287.
- ³¹ ‘Consolidated Exhibit Book’, tab 20 – 21.
- ³² ‘Consolidated Exhibit Book’, tab 22.
- ³³ Transcript, ts 36 – 38 (18 April 2018).
- ³⁴ Exhibit 13, affidavit of Leigh Cocks, para [33] – [35].
- ³⁵ Transcript, ts 79 (18 April 2018).
- ³⁶ ‘Claimants’ Closing Submissions’ (23 May 2018) at [59] – [66] and see also submissions on the evidence at [23] – [58].
- ³⁷ See the ‘screening questionnaire’ of 1 April 2015 (tab 3 of the ‘Consolidated Exhibit Book’).
- ³⁸ ‘Respondents’ closing submissions’ (8 June 2018) at [23] – [29]. See the ‘Claimants’ closing submissions in reply’, especially at [14], [20] and [21].
- ³⁹ See reg 67 of the *Electricity Licensing Regulations 1991* (WA) and predecessor regulations concerning ‘Grade A’ and ‘Grade B’.
- ⁴⁰ This result follows from the definitions of ‘eligible State or Territory court’, and ‘magistrates court’ in s 12 of the FW Act.
- ⁴¹ See s 539(2) and Column 3 of the table headed, ‘Standing, Jurisdiction and maximum penalties’.
- ⁴² See s 539(2) and Columns 2 and 4 of the table headed, ‘Standing, Jurisdiction and maximum penalties’.
- ⁴³ ‘Respondent’s Supplementary (Written) Submissions’ re *Sharrock* (6 July 2018) at [5].
- ⁴⁴ ‘Claimants’ (Written) Submissions’ about *Sharrock* (6 July 2018).
- ⁴⁵ ‘Claimants’ (Written) Submissions’ about *Sharrock* (6 July 2018) at [5] – [6].
- ⁴⁶ ‘Claimants’ (Written) Submissions’ about *Sharrock* (6 July 2018) at [18] – [23] on the significance of the word ‘amount’; [24] – [27] on the text of sections 545(1) and (2) compared to section 545(3); [28] on section 545(3); [34] – [38] on the words ‘must pay’ in section 323(1).
- ⁴⁷ ‘Claimants’ (Written) Submissions’ about *Sharrock* (6 July 2018) at [14] – [15]; [29] – [33] on *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341.
- ⁴⁸ *BHP Billiton Iron Ore v The National Competition Council* [2007] FCAFC 157 [88] – [89].
- ⁴⁹ *Nezovic & Anor v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1263 [206] (French J).
- ⁵⁰ *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 [23].
- ⁵¹ *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 [60] – [61].
- ⁵² See *Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited* [2014] FCA 878 [19]ff per Buchanan J, especially at [22]: ‘[N]either the particular terms of a minimum standard, nor the necessity to engage the terms of a particular modern award, are necessary to the existence of the statutory obligation which now exists to observe the terms of a safety net contractual obligation.’
- ⁵³ *Perera v Playkidz Enterprises Pty Ltd* [2016] FCCA 2478 [2].
- ⁵⁴ ‘Claimant’s Outline of Submissions and List of Authorities’ (28 March 2018) at [108]; ‘Claimant’s Closing Submissions’ (23 May 2018) at [2] – [14]; ‘Respondent’s closing submissions’ (8 June 2018) at [7] – [22]; ‘Respondent’s Further Submissions’ (in reply) at [2] (26 June 2018).
- ⁵⁵ Provided that the court is satisfied that the Company has contravened a civil remedy provision by failing to pay the amount: s 545(3)(b) FW Act.
- ⁵⁶ *Ultramad Pty Ltd v Health Insurance Commission* [2005] FCA 816; (2005) 143 FCR 526 (French J) at [50] – [51].
- ⁵⁷ ‘Claimant’s Closing Submissions’ (23 May 2018) at [12] – [13].
- ⁵⁸ See *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52 [45]: ‘[T]o sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents...’.
- ⁵⁹ *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52 [63]: ‘There could also be circumstances in which one party would not reasonably understand another party’s signature to a document as a manifestation of intent to enter into legal relations, or of assent to its terms.’
- ⁶⁰ *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422 at 429 (Mason ACJ, Murphy and Deane JJ).
- ⁶¹ ‘Claimant’s Outline of Submissions’ (28 March 2018) at [107].

Schedule: Ruling on Objections to Evidence

- 1 Section 551 of the FW Act provides that ‘a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention’. There is authority for the proposition that the effect of the provision is that an ‘eligible State or Territory Court’ is required to apply the rules of evidence found in the common law and relevant state legislation (e.g. *Evidence Act 1906* (WA)) when a claim concerns the contravention of a civil remedy provision of the FW Act: **Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd** [2008] WAIRComm 350; **Cuzzin Pty Ltd v Grnja** [2014] SAIRC 36 [14].
- 2 In **Qube Ports Pty Ltd v Maritime Union of Australia** [2018] FCAFC 72 [94] – [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings before a state court of South Australia, the former Industrial Relations Court of South Australia (IRCSA). The IRCSA was created by South Australian legislation, the *Fair Work Act 1994* (SA). It is convenient to set out s 154 of the *Fair Work Act 1994* (SA) which has the effect of excluding the rules of evidence and, for comparison, extracts of s 81CA of the IR Act (WA) which is to be read with reg 35(4) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (also set out below):

Section 154 of the Fair Work Act 1994 (SA)**154—General principles affecting exercise of jurisdiction**

- (1) *In exercising its jurisdiction, the Court or the Commission—*
- (a) *is governed in matters of procedure and substance by equity, good conscience, and the substantial merits of the case, without regard to technicalities, legal forms or the practice of courts; and*
- (b) *is not bound by evidentiary rules and practices but may, subject to subsection (2), inform itself as it thinks appropriate.*
- (2) *The Court and the Commission must observe the rules of natural justice.*

Section 81CA of the Industrial Relations Act 1979 (WA)**81CA. Procedure etc. of industrial magistrate’s courts**

...

- (2) *Except as otherwise prescribed by or under this Act or another law —*

- (a) *the powers of an industrial magistrate’s court; and*
- (b) *the practice and procedure to be observed by an industrial magistrate’s court,*

...

- (5) *When exercising prosecution jurisdiction an industrial magistrate’s court constitutes a court of summary jurisdiction and the Criminal Procedure Act 2004 applies.*

...

Regulation 35 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)**35. Conduct of trial**

- (1) *A trial must be conducted in public unless the Court is of the opinion that the interests of justice will be better served by conducting the trial in private.*
- (2) *A Court may hear a trial at any time or place the Court thinks fit.*
- (3) *A Court hearing a trial may adjourn the trial to a fixed date as the Court thinks fit.*
- (4) *Except as provided in these regulations, a Court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.*

- 3 The conclusion reached by White J in **Qube Ports Pty Ltd v Maritime Union of Australia** [2018] FCAFC 72, [105] – [108] was as follows:

[105] *It is apparent that s 551 [FW Act] does require the rules of evidence and procedure for civil matters to be applied by courts hearing proceedings relating to contraventions of a civil remedy provision. It is also apparent that s 551 must contemplate that the rules of evidence and civil procedure will vary from court to court. That is because s 546(1) of the FW Act vests jurisdiction to order the payment of pecuniary penalties in eligible State and Territory courts as well as in the Federal Court and the Federal Circuit Court. When the latter two courts are exercising the jurisdiction, the Evidence Act 1995 (Cth) applies. By reason of s 4 of the Evidence Act 1995 and the definition of ‘federal court; in the dictionary, the Evidence Act does not apply to proceedings in State and Territory courts. Section 79(1) of the Judiciary Act 1903 (Cth) identifies the evidentiary and procedural regime to be applied by a State or Territory court when exercising federal jurisdiction: Rizeq v Western Australia [2017] HCA 23; (2017) 344 ALR 421 at [42], [58][63]. It provides: The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*

[106] *This means that in those States and Territories which have a counterpart to the Evidence Act 1995, it is that counterpart which will supply the evidentiary rules to be applied. South Australia has not enacted a counterpart to the Evidence Act 1995. The laws relating to evidence in South Australia are, subject to modification by a particular statute, found in the common law and in the Evidence Act 1929 (SA).*

...

[108] *Prima facie*, s 154 of the *Fair Work Act 1994 (SA)* is a law of the State of South Australia relating to procedure and evidence and, accordingly, was to be applied by the *Industrial Magistrate* in this case. However, account had to be taken of the stipulation in s 79(1) [of the *Judiciary Act 1903 (Cth)*] that the laws relating to evidence and procedure of a State or Territory are binding “except as otherwise provided by ... the laws of the Commonwealth”. Is s 551 to be regarded as such a law? Can a provision that a court is not bound by the rules of evidence but may, subject to compliance with the rules of natural justice, inform itself as it thinks appropriate, be regarded as a rule of evidence for the purpose of s 551? The parties’ submissions did not address these issues. That suggests that it would be undesirable for the Court presently to be expressing concluded views about them.

- 4 The effect of reg 35(4) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)*, provided for s 81CA of the *IR Act (WA)*, is that when exercising non-federal jurisdiction this court is ‘not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit’. The effect of the regulation is that when exercising non-federal jurisdiction this court is not required to apply laws concerning evidence that would otherwise be required to be applied i.e. the laws concerning evidence contained in the *Evidence Act 1906 (WA)* and the common law.¹ Absent s 551 of the *FW Act*, the effect of s 79(1) of the *Judiciary Act 1903 (Cth)*, would be to apply reg 35(4) of *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)* to this court when exercising federal jurisdiction. However, s 79(1) of the *Judiciary Act 1903 (Cth)* is qualified. State laws on procedure and evidence are applied when exercising federal jurisdiction, *except as otherwise provided by a law of the Commonwealth*. The question for determination in this case is whether, properly construed, s 551 of the *FW Act* is a law of the Commonwealth that ‘otherwise provides’ for the application of particular laws relating to procedure and evidence. Section 551 of the *FW Act* states that ‘a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention’. Comparison may be made with provisions of the *FW Act* expressly providing for the *non-application* of ‘the rules of evidence and procedure’ to small claims proceedings before the Federal Circuit Court or a magistrates court (s 548(3) of the *FW Act*) or in matters before the Fair Work Commission (s 591 of the *FW Act*). The comparison suggests a legislative intention of a qualitative distinction between the rules of evidence to be applied, on the one hand, by a court (including a state court) determining contravention proceedings and, on the other hand, by a court determining a small claims proceeding.
- 5 The use of the definite article ‘the’ and the preposition ‘for’ in the text of s 551 of the *FW Act* is significant: ‘the rules of evidence and procedure for civil matters’. Grammatically, those words suggest the existence of a single body of rules in connection a category of cases (civil matters). The phrase ‘the rules of evidence and procedure’ has an accepted ordinary technical meaning; it comprises the law on evidence and procedure contained in statute and the common law as applied in judicial proceedings.² Similarly, the phrase ‘civil matter’ has an accepted ordinary technical meaning as comprising all matters other than criminal matters.³ The legislative intention identified in the previous paragraph would be promoted if the ‘rules of evidence and procedure for civil matters’ required to be applied by s 551 of the *FW Act* was construed to mean the law of evidence and procedure applied by a court of *general* jurisdiction when exercising jurisdiction in non-criminal matters. This intention would be defeated if the ‘rules of evidence and procedure for civil matters’ required to be applied by s 551 of the *FW Act* was construed to mean the law of evidence and procedure applied by *this* court when exercising non-federal jurisdiction in non-criminal matters. My view is that, having regard to the grammatical structure of the section, s 551 of the *FW Act* bears the former construction and is to be preferred as a construction that promotes the intention of the legislature.
- 6 In the result it is necessary to apply the laws of evidence contained in the *Evidence Act 1906 (WA)* when assessing the objections made to the admissibility of evidence in this case.
- 7 My ruling on the objections of the Company, stated in a document filed on 10 April 2018, to the admissibility of the evidence of **Mr Stagnitta** is as follows:
 - [19] Objection upheld insofar as reference to a ‘mechanical fitter’. Irrelevant.
 - [20] Objection overruled. Evidence is of witness’ observations.
 - [21] – [26] Objection overruled. Relevant only to rebut attack on credit.
- 8 My ruling on the objections of Mr Stagnitta, stated in the Claimants’ Closing Submissions of 23 May 2018, to the admissibility of the evidence of **Ms Quick** is as follows:
 - [23] Objection overruled. Witness belief as to the Company interpretation of the Agreement relevant only to explanation of her motive for impugned conduct.
 - [24] Objection upheld. Irrelevant.
 - [25] Objection overruled. Witness belief as to the Company interpretation of the Agreement relevant only to explanation of her motive for impugned conduct.
 - [39] Objection overruled. Relevant.
 - [46] Objection overruled.
 - [47] Objection overruled. Evidence is of witness’ observations.
 - [55] Objection overruled. Quotation explains basis for opinion.
 - [59] Objection overruled.
 - [78] – [79],[82] Objection overruled. Evidence of habit from which an inference *may* be drawn is relevant.
 - [93] Objection overruled. Relevant. Weight is a matter for the court.
 - [101] Objection upheld with respect to second sentence.

[102] Objection overruled. Matters raised properly addressed in cross-examination.

[105] Objections overruled. Evidence is of witness' observations and of observed habit of other staff from which inference *may* be drawn.

9 My ruling on the objections of Mr Stagnitta, stated in the claimants' 'Closing Submissions' of 23 May 2018, to the admissibility of the evidence of **Mr Cocks** is as follows:

[30] Objection overruled. Evidence is of witness' observations.

[31] – [33] Objection overruled. Evidence is of witness' observations.

[34], [35] – [38] Objection overruled. Relevant.

[39] Objection overruled. Evidence taken to be of witness' observations.

[40](b), (e) and (f) Objection overruled. Evidence taken to be of witness' observations. Weight is a matter for the court.

¹ The laws concerning evidence and the laws concerning procedure that would otherwise be required to be applied are those laws that apply to a 'case' under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA(3) of the IR Act.

² See J D Heydon *Cross on Evidence* (10th Australian ed, 2015), [1020] – [1025].

³ See J D Heydon *Cross on Evidence* (10th Australian ed, 2015), [1030].

2018 WAIRC 00887

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2018 WAIRC 00887
CORAM : INDUSTRIAL MAGISTRATE M. FLYNN
HEARD : WEDNESDAY, 18 APRIL 2018, THURSDAY, 19 APRIL 2018, ON THE PAPERS
DELIVERED : WEDNESDAY, 12 DECEMBER 2018
FILE NO. : M 163 OF 2016
BETWEEN : WILLIAM WRIGHT

CLAIMANT

AND

BECHTEL CONSTRUCTION (AUSTRALIA) PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – Construction of enterprise agreement - Entitlement to 'tradespersons allowance' - Jurisdiction of Industrial Magistrates Court – Contractual claim - 'Safety net contractual entitlement' – Jurisdiction of Industrial Magistrates Court to consider defences of acquiescence, waiver and estoppel – Whether acquiescence, waiver or estoppel by delay in complaint

Legislation : *Fair Work Act 2009* (Cth)
Electricity Licensing Regulations 1991 (WA)
Industrial Relations Act 1979 (WA)
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)
Evidence Act 1906 (WA)
Judiciary Act 1903 (Cth)
Fair Work Act 1994 (SA)

Instrument : *Bechtel Construction (Australia) Pty Ltd Wheatstone Project Agreement 2013*
John Holland Pty Ltd Wheatstone Project Agreement 2012
CBI Constructors Pty Ltd – AMWU – Gorgon Project – Barrow Island Greenfields Agreement 2010

Case(s) referred to in reasons : *Qube Ports Pty Ltd v Maritime Union of Australia* [2018] FCAFC 72
Re Harrison; Ex Parte Hames [2015] WASC 247
Sharrock v Downer EDI Mining Pty Ltd [2018] WAIRC 377
Brogden v Metropolitan Railway Co (1877) 2 App Cas 666
Commonwealth v Crothall Hospital Services (1981) 36 ALR 567
MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd [2005] NSWCA 39
Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350
Cuzzin Pty Ltd v Grnja [2014] SAIRC 36
Australian Education Union v State of Victoria (Department of Education and Early

Childhood Development) (2015) 255 IR 341
BHP Billiton Iron Ore v The National Competition Council [2007] FCAFC 157
Nezovic & Anor v Minister for Immigration and Multicultural and Indigenous Affairs
 [2003] FCA 1263
Perera v Playkidz Enterprises Pty Ltd [2016] FCCA 2478
Ultrarad Pty Ltd v Health Insurance Commission [2005] FCA 816
Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878

Result : Judgment for the claimant
Representation:
 Claimant : Ms K. Pedersen of Quayside Chambers as instructed by Fogliani Lawyer
 Respondent : Mr R. Wade as instructed by Ashurst Australia

REASONS FOR DECISION

Introduction

- 1 The claimant (Mr Wright) is a qualified plumber.¹ He worked for the respondent (the Company) as a pipe fitter on a remote site known as 'the Wheatstone Project', starting on 11 December 2014 and ending on 7 October 2017. His employment was subject to a contract of employment (the Employment Contract) evidenced by a written offer of employment by the Company dated 3 December 2014 (the Contract Letter). His employment was also regulated by an enterprise agreement made under the *Fair Work Act 2009* (Cth) (FW Act), namely the *Bechtel Construction (Australia) Pty Ltd Wheatstone Project Agreement 2013* (the Agreement). The Contract Letter stated that Mr Wright's wages and allowances were to be in accordance with the applicable classification in the Agreement, namely 'Pipe Fitter', and also stated that a tradespersons allowance of \$1.97 per hour was applicable. The Agreement makes provision for a tradesperson's allowance payable to an employee who is engaged at 'Tradesperson level'. Mr Wright was paid in accordance with the Contract Letter from 11 December 2014 until, commencing 4 January 2015, the Company stopped paying the tradesperson allowance. The Company view, expressed in a letter to Mr Wright dated 25 December 2014, was that continued payment of the tradesperson allowance was 'not in line with' the Agreement. The Company maintained that, properly construed, the Agreement did not provide for a tradesperson allowance to be payable to Mr Wright in circumstances where, notwithstanding his qualification as a plumber, he was employed by the Company as a pipe fitter and, unlike a plumber, a pipe fitter is not a recognised *trade*. Before commencing this claim on 15 November 2016, Mr Wright took issue with the Company's position by way of written communications in November 2015 and January 2016. Two issues arise for my determination.
- 2 First, it will be necessary determine whether, on the proper construction of the Agreement, Mr Wright was entitled to the tradesperson allowance.² For the reasons set out below under the heading, 'Issue 1: Enterprise Agreement Claim: Entitlement to a Tradespersons Allowance', I conclude that the failure of the Company to pay the tradesperson allowance to Mr Wright from 4 January 2015 was not a contravention of cl 10 of Appendix 2 of the Agreement.
- 3 Secondly (and alternatively), it will be necessary to determine whether, as alleged by Mr Wright, the failure to pay the tradesperson allowance was a breach of the Employment Contract. It will also be necessary to address jurisdictional objections raised by each party regarding the Employment Contract. Mr Wright contends that the failure to pay the tradesperson allowance stated in the Contract Letter was breach of the Employment Contract and that it follows from s 323(1) of the FW Act that the breach was also a contravention of a civil remedy provision of the FW Act. Mr Wright, relying upon s 545(3) and s 323(1) of the FW Act, seeks orders for payment of amounts payable to him under the Employment Contract and, relying upon s 546 of the FW Act, seeks an order that the Company pay a penalty for contravention of a civil remedy provision i.e. s 323(1) of the FW Act. The Company answers the allegation of breach of the Employment Contract by contending that the delay of Mr Wright to respond to the withdrawal of the tradesperson allowance founds successful defences of acquiescence, waiver and estoppel. The Company, relying upon observations in *Colin Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 on the proper construction of s 323(1) of the FW Act, also contends that, in any event, this court does not have jurisdiction to order payment of any amount owed to Mr Wright by reason only of a breach of the Employment Contract. Mr Wright maintains that this court has jurisdiction to make the orders sought. However, he disputes that this court has jurisdiction to entertain the defences of acquiescence, waiver and estoppel raised by the Company. For the reasons set out below under the headings, 'Issue 2(a) Employment Contract Claim: Jurisdictional Issues' and 'Issue 2(b) Employment Contract Claim: the Merits', I conclude that: this court has jurisdiction to determine the Employment Contract; the Company has an obligation under s 542(1) of the FW Act on safety net contractual entitlements to pay the allowance; and the Company has contravened the civil remedy provision found in s 323(1) of the FW Act by failing to pay the allowance.
- 4 My findings of fact relevant to determining the issues in this claim is undertaken below.

The Facts

- 5 The basis for my findings of fact are:
 - a. The statement of agreed facts (exhibit 1);
 - b. The contents of the 'Consolidated Exhibit Book' relating to the claim (exhibit 3);
 - c. The two affidavits of Mr Wright sworn 13 September 2017 (exhibit 5), 14 November 2017 (exhibit 6) and his evidence at trial;³
 - d. The affidavit of Mr Adam Leary, an 'employment relations' manager of the Company based at the Wheatstone Project, sworn 24 November 2017 (exhibit 10) and his evidence at trial;⁴ and

- e. The affidavits of Mr Daniel Lee sworn 21 November 2017⁵ (exhibit 12) and Mr Warren Edwards sworn 21 November 2017⁶ (exhibit 8).
- 6 In a schedule to these reasons I address the issue of the application of rules of evidence to these proceedings and give my rulings on objections made to the admissibility of certain evidence of Mr Wright and Mr Leary.
 - 7 In August 2014, the Company was recruiting pipe fitters that it required to work on the Wheatstone Project. Mr Wright applied for a position with the Company. He possessed relevant formal qualifications including, in June 1995, having been certified by the Scottish Qualifications Authority in 'Mechanical Engineering Services: Plumbing (Level 3)' and, in September 2007, having been assessed by the Australian Government's Department of Employment and Workplace Relations as a 'General Plumber'. His work experience as a plumber included the development of skills relevant to pipe fitting: aligning pipes, cutting pipes, butting pipes together and reading relevant drawings.
 - 8 In the construction industry the term 'tradesperson' is applied to a list of occupations for which there exist uniformly recognised qualifications, including completion of an apprenticeship (a Recognised Tradesperson). Examples of Recognised Tradespersons include: plumbers, carpenters, boilermakers, mechanical fitters and painters.⁷ Mr Wright, a qualified plumber, is a Recognised Tradesperson.
 - 9 The duties performed by a pipe fitter require skill and expertise. However, a pipe fitter is not a Recognised Tradesperson; a pipe fitter is not within the list of occupations for which exist uniformly recognised qualifications recognised in the construction industry. In the construction industry, the position of a pipe fitter is filled by any person with the necessary skills and expertise. It is not necessary for a pipe fitter to be Recognised Tradesperson. However, a pipe fitter may, in addition to having the skill and expertise necessary to be a pipe fitter, also be a Recognised Tradesperson. In fact, many persons working for the Company as a pipe fitter were also a Recognised Tradesperson.
 - 10 The observations in the previous paragraph may also be made of a 'Welder'. A welder is not a Recognised Tradesperson. The position is filled by any person with the necessary skills and expertise. A welder may, in addition to having the skill and expertise necessary to be a welder, also be a Recognised Tradesperson.
 - 11 In November 2014, the Company arranged for Mr Wright to undertake a 'verification of competency test in pipe fitting'. The test had a theoretical component and a practical component. Mr Wright passed the test.
 - 12 On 3 December 2014, the Company sent an email to Mr Wright. The email attached an offer of employment to a position as a pipe fitter. The relevant parts of the email state:

Congratulations on your appointment to the Wheatstone Project. Attached is your Letter of Offer of Employment to join Bechtel's Wheatstone ISBL Team in Onslow. We confirm you have been offered a role as a fulltime Pipe Fitter. Your start date is the 11th December 2014. You will be required to attend a Bechtel Orientation ... on this date. ...

You have 2 working days to accept this offer by reply email, however your earliest response would be appreciated.

- 13 The Contract Letter (noted in the introduction above) is the 'letter of offer of employment' referred to in the Company's email of 3 December 2014. The Contract Letter makes an offer of employment on conditions in accordance with the Agreement and provides for 'wages and allowances' in accordance with a classification in the Agreement as a 'Pipefitter'. The Contract Letter states that the 'wages and allowances' of Mr Wright include a Tradespersons Allowance of \$1.97 per hour is noted. The relevant parts of the Contract Letter state:

Dear William,

*On behalf of Bechtel Construction (Australia) Pty Ltd ('Bechtel'), we confirm our offer of employment as a **Fulltime Pipefitter** and welcome you to join Bechtel's Wheatstone ISBL team, on this LNG construction project.*

...

Details of our offer of employment are as follows.

...

C. Employment conditions

- 1 *Your employment conditions will be in accordance with the Bechtel Construction (Australia) Pty Ltd Wheatstone Agreement (the 'AGREEMENT'), a copy of which was provided as part of the Mobilisation process, copies are available on site on request. The AGREEMENT prescribes the wage rates and employment conditions which all parties are bound to comply with.*
- 2) *Your primary employment designation is: **Pipefitter Classification the AGREEMENT**. In addition to performing any duties with your assigned classification group you will perform any duties in groups below that assigned, provided that such duties are within your skills, competence, qualifications and training, and are consistent with occupational health and safety and statutory requirements.*
- 3) *Under the terms of the AGREEMENT, you will be initially engaged for a five week probationary period. This initial period may be extended under specific circumstances.*

...

J. Wages and Allowances

- 1) *Wages and allowances applicable to your Classification are paid in accordance with the AGREEMENT and set out below:*

<i>Pipefitter Classification</i>	<i>Fulltime Pipefitter (PF-TTFB)</i>	
<i>Payment Type</i>	<i>Upon Commencement</i>	<i>Next payment escalation applies</i>
<i>Wage payment for Avg. 36 hr. week</i>	\$1701.72	<i>1st Sept 2015</i>
<i>Wage payment per hour</i>	\$47.27	
<i>Site Allowance per hour</i>	\$7.91	
<i>Tradespersons Allowance per hour</i>	\$1.97	

...

R. Offer of Employment

- 1) *This Offer of Employment supersedes any previous offer that may have been made to you, either verbally or in writing, perceived or implied.*
- 2) *Prior to signing, please read this letter and the attachments carefully to ensure you have a full understanding of the terms and conditions contained therein and your responsibilities and obligations.*

This Offer of Employment is conditional upon:

- *Your acceptance of the conditions set out in this Letter of Offer*
- *Any craft tickets, trades licenses or rights to work you have relied upon to gain this position being current and valid;*
- *Your acceptance of the terms and conditions set out in the Bechtel Construction (Australia) Pty Ltd Wheatstone Agreement (the 'AGREEMENT');*

...

- 14 Given the references in the Contract Letter (and subsequent correspondence below) to the Agreement and particularly to the 'Pipe Fitter' classification and the Tradespersons Allowance, it is convenient to set out the text of cl 9(1) of the Agreement on Wage Rates and cl 10 of Appendix 2 of the Agreement on Special Allowances (the Tradesperson Allowance Clause):

9 WAGE RATES**WAGE AND CLASSIFICATION STRUCTURE**

- (1) *The classification structure in this Agreement is set out below. Indicative tasks undertaken by various levels within the classification structure is described in detail in Appendix 1 Classification Structure of this Agreement.*

Employees must be prepared to perform all tasks as required of their classification level or any lower level for which they have the required skills and competence provided that the intention of this provision is not to promote the de-skilling of classifications, but to recognise and make use of the full range of skills and competence held by the workforce.

Employees covered by this Agreement shall be classified at a level as specified by this clause and Appendix 1 based on their skills, qualifications, experience, competency and training provided that the Company has the need for such skill and competence. Each Employee's classification level will be specified in their letter of appointment. Employees may be required to carry out work either individually or as part of a work group. Employees are responsible for carrying out work in a safe manner and for the quality of their work. Employees at all levels shall carry out all duties which are:

- (a) *incidental or peripheral or ancillary to their main tasks or functions, and/or*
- (b) *within their skill, competence and training, and/or*
- (c) *routine functions.*

An Employee, engaged in writing, for more than two hours, during one day on duties carrying a higher rate than the Employee's Ordinary Classification, shall be paid the higher rate for the whole day. Otherwise the employee shall be paid the higher rate for the time so worked

The following are the minimum hourly wage rates payable to Employees for working Ordinary Hours under the classifications described. Civil/Structural classifications are described in Appendix 1 - Classification Structure of this Agreement.

...

CIVIL/STRUCTURAL

...

TRADE & TECHNICAL CLASSIFICATIONS

	\$ from commencement
<i>Extra Low Voltage Installer/Communication Technician</i>	39.20		
<i>Welder Pipe Fitter Boilermaker Mechanical Fitter Carpenter Painter Refractory Tradesperson Sheetmetal Worker (1st class) Sprinkler Plumber Communications Tradesperson Tradesperson - other</i>	40.84		
<i>... Licensed Plumber Welder Special Class Mechanical Tradesperson Special Class</i>	42.88		
<i>... Instrument Tradesperson ...</i>	44.92		
<i>Electronics Tradesperson</i>	46.97		

CRANE CLASSIFICATIONS

...

APPENDIX 2: SPECIAL ALLOWANCES

...

TRADESPERSON ALLOWANCE

(10) *An employee who is engaged at Tradesperson level or higher, holding a current tradesperson certificate or tradespersons rights recognition who is required to perform the full range of duties of a Tradesperson, shall be paid an hourly all purpose allowance in accordance with the table below:*

...

- 15 Mr Wright worked as a pipe fitter for the Company between 11 December 2014 and 7 October 2017. His work involved the full range of duties of a pipe fitter, including: interpreting drawings, preparation and installation of pipes, working with flanges and carrying out relevant inspections. Mr Wright's training and experience as a plumber was relevant to his work as a pipe fitter. As a plumber, Mr Wright acquired technical skills in aligning pipes in the correct position and in the management of leaks. These same skills were used by Mr Wright in his work as a pipe fitter for the Company. Mr Wright also found that the exacting and professional approach required of his work as a plumber was also required of his work as a pipe fitter.
- 16 By a letter dated 25 December 2014 and received by Mr Wright in mid January 2015 at the Wheatstone Project site, the Company advised Mr Wright that the tradesperson allowance referred to in the Contract Letter would no longer be paid to him. The letter states:

Notification of Overpayment

Dear William,

Please be advised that a recent audit of Letters of Offer indicated that you have been receiving a Tradesperson Allowance of \$1.97 per hour since your engagement as part of your wages structure. This is not in line with the Bechtel Construction Australia Wheatstone Agreement that restricts these allowances to those that hold a current Tradesperson Certificate specific to each Trade Classification. Accordingly, this allowance will be removed from your wages payment structure from the pay week commencing Monday, December 28, 2014.

As it is understood that this overpayment is not the result of any action of your own, be advised that on this occasion the company does not intend to pursue any repayment for the amount that has been overpaid.

We thank you for your understanding in this matter and look forward to working with you on the remainder of the Project.

- 17 In early 2015, Mr Wright spent three months working on night shift.
- 18 By way of written communications to the Company dated 13 November 2015, 13 January 2016 and 16 January 2016, Mr Wright took issue with the Company decision to cease payment to him of the tradesperson allowance.⁸ Relevant extracts from those communications are quoted below.

13 November 2015: Letter Mr Wright to Construction Manager for [the Company]:

***Your Correspondence “Notice of Overpayment” dated 25/12/14
Tradesperson Allowance per hour \$1.97***

Dear Sir/Madam

I wish to advise that the above mentioned allowance which has been withheld from me from the 28 December 2014 constituted an integral and conclusive ‘allowance’ (term) and condition in your letter ‘Offer of Employment’ which commenced 11th December 2014 (Pg 4 Payment Entitlements).

...

A binding contract inclusive of all terms and conditions was created at that exact point in time.

...

Your retraction of my tradesperson allowance of \$1.97 per hour would constitute a breach of CONTRACT.

...

I trust that the above mentioned entitlement/allowance be back paid to date and continue through the entirety of our contract

...

13 January 2016: Email Mr Wright to Mr Leary [of the Company]:

Subject: William Wright right of representation

To Whom it may Concern,

[At a meeting in November 2015] Mr Leary stated that they have no record of my Trades Certificate to assess the payment level and then he requested a further copy of my Qualifications. ... Nothing was resolved during this meeting and I now find that I have no further option but to nominate A.M.W.U to represent me in my claim to have my original pay grade reinstated and to have monies back paid to me...

16 January 2016: Bechtel Employee Relations Query Form

Query: As per email sent to A. Leary on the 13 January 2016 please note letter of right to represent for W. Wright, regarding allowance dispute representation to be by A.M.W.U.

- 19 Mr Wright’s complaint about not being paid the tradesperson allowance by his letter of 13 November 2015 was the subject of the meeting in November 2015 between Mr Wright, Mr Saul Simpson (supporting Mr Wright), and Mr Leary (adverted to in Mr Wright’s letter of 13 January 2016). In the meeting, Mr Leary suggested that Mr Wright submit evidence directly to him in support of his claim. Mr Leary also confirmed that Mr Wright was not required to invoke any formal dispute resolution procedure.
- 20 In addition to the Agreement, other enterprise agreements made under the FW Act cover other parties engaged in construction on the Wheatstone Project (e.g. the first such agreement was the *John Holland Pty Ltd Wheatstone Project Agreement 2012*) or parties engaged in related construction projects (e.g. *CBI Constructors Pty Ltd – AMWU – Gorgon Project – Barrow Island Greenfields Agreement 2010*).

Issue 1: Enterprise Agreement Claim: Entitlement to a Tradespersons Allowance

- 21 I respectfully adopt the observations made in *Re Harrison; Ex Parte Hames* [2015] WASC 247 [50] (Beech J) on the approach to be taken by a court when interpreting a legal instrument:
- (1) *the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;*
 - (2) *it is the objectively ascertained intention of the parties as it is expressed in the instrument, that matters; not the parties’ subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;*
 - (3) *the objectively ascertained purpose in object of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context;*
 - (4) *the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence from the surrounding circumstances;*
 - (5) *an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However it must be brought in mind that business common sense may be a topic upon which minds may differ; and*
 - (6) *an instrument should be construed as a whole a construction that makes the various parts of an instrument harmonious is preferable if possible, each part of an instrument should be construed so as to have some operation.*
- 22 When interpreting legal instruments of the nature of industrial awards and agreements, some emphasis has been placed on the need to have regard to the fact that such instruments are commonly drafted by lay persons. In *Qube Ports Pty Ltd v Maritime Union of Australia* [2018] FCAFC 72 [64] – [65], White J states:

There are well developed principles concerning the construction of industrial awards and agreements which take account of the fact that they are commonly drafted by lay persons and lack the precision and clarity to be expected in commercial contracts.

The principles were reviewed recently by Tracy J in Transport Workers Union of Australia v Linfox Australia Pty Ltd [2014] FCA 829 at [29]. It is not necessary to repeat the principles in detail in these reasons. It is sufficient to say that the court will seek to identify, in an objective way, the meaning intended by the parties to the agreement having regard to the language they have used and in doing so avoid a narrow or pedantic approach. In particular, the court takes account of the circumstance of the drafters of the agreement when likely of a 'practical bent of mind' and likely to have been concerned when expressing their intentions in ways understood in the context of the relevant industry and industrial relations environment. As with commercial contracts, the court will prefer a construction which gives effect to the presumed purpose of the parties.

The Agreement

- 23 It is apparent that whether or not Mr Wright is entitled to the tradespersons allowance requires construction of Tradesperson Allowance Clause in light of the Agreement (including Appendix 2) as a whole.
- 24 The Agreement commenced in December 2013. The Agreement is divided into sections and appendices that regulate:
- a. the coverage of the Agreement (section 1);
 - b. calculating the income of employees (section 2);
 - c. working hours, including time considered to be eligible for overtime payments (section 3);
 - d. paid and unpaid leave for specified purposes (section 4);
 - e. miscellaneous topics: casual employment, termination, payment of wages, cyclone procedure, etc. (section 5);
 - f. detailed descriptions of the occupation of each 'Civil/Structural' classification listed in clause 9 (appendix 1(1));
 - g. detailed descriptions of the qualifications and role of select 'Trade & Technical' classifications: 'Electrician – Special Class'; 'Instrument/Electrical Grade 1' and 'Electronics Tradesperson' (appendix 1(2));
 - h. criteria for payment of (special) allowances to employees and the rate of payment (appendix 2);
 - i. criteria for payment to employees of travel expenses or a subsidy for living locally and the rate of payment (appendices 3 and 4); and
 - j. consultation on major change (appendix 5).
- 25 The Agreement binds employees of the Company working in on-site construction work for the Wheatstone Project and employed in 'classifications set out in' cl 9 of the Agreement.
- 26 Clause 9 of the Agreement serves three related functions. First, it lists the occupation of each employee of the Company bound by the Agreement and creates a 'classification structure' of those occupations. This is done by allocating each occupation into a group and creating a hierarchy of groups, called 'classification levels'. The levels are set out under three headings: 'Civil/Structural', 'Trade & Technical' and 'Crane'. Secondly, it provides a mechanism for the allocation of employees into classification levels, namely, as specified in the 'letter of appointment' of the Company. Clause 9 of the Agreement states that the allocation must reflect the skills and competency possessed by the employee as needed by the Company. It may be observed that cl 9 of the Agreement provides for allocation to a 'level' comprising multiple occupations and not to a single occupation named within the level. No doubt, the level is dictated by the particular occupation required by the Company on appointment and for which the employee has the requisite skills and competence. However, it is evident from the requirement of cl 9 of the Agreement that employees be 'prepared to perform all tasks required of their classification level or any lower level' that appointment is to a level and not to an occupation. The third function of cl 9 of the Agreement is to specify, by nominating the minimum hourly wage rates payable for each classification level, a basis for calculating the wages and certain other entitlements of employees of the Company.
- 27 In addition to cl 9 of the Agreement on wage rates, section 2 of the Agreement contains: clause 10 on the site allowance payable to each employee; clause 11 on the allowance payable to 'a leading hand appointed in writing as such' by the Company; clause 12 on the allowance payable to an employee holding a first aid qualification and appointed in writing by the Company; clause 14 on the income protection insurance provided to each employee; and clause 15 on the payment to each employee of superannuation as required by law.

Appendix 2 – Special Allowances

- 28 Section 2 of the Agreement also contains clause 13, stating that, 'where relevant, an employee shall be paid the special allowance applicable to *the work being performed* by them as specified by Appendix 2 – Special Allowances of this agreement'. The emphasised words of cl 13 of the Agreement directs attention to an allowance being paid for work having a particular quality as defined in the appendix. Appendix 2 makes provision for ten special allowances.
- 29 In the case of nine of the ten special allowances, the identity of the eligible employee is unambiguous. Four allowances are payable to *every* employee who works in a specified physical environment: on preheated steel (2(2)); within pipes (2(3)); welding work within pipes (2(4)); and on a barge (2(6)). Three allowances are payable to *an employee whose occupation is specified* by reference to a description corresponding to an occupation that appears in the classification structure in cl 9 of the Agreement and where the employee meets additional criteria. A 'welder' is entitled to a payment for the time involved in pre-employment competency testing (2(1)). A 'welder special class' is entitled to a special allowance 'when carrying out the full range of duties involved in specialist welding work' as described in the appendix (2(5)). A 'refractory tradesperson' is entitled to a special allowance if the employee's major and substantial work is in a refractory (2(7)). Two allowances are payable to a 'tradesperson' (and an assistant) who holds and may be required to use a particular qualification under the *Electricity Licensing Regulations 1991* (WA) (2(8), (9)). The effect of the statutory qualification requirement is to render the reference to

'tradesperson' otiose. A person holding a stated qualification under the *Electricity Licensing Regulations 1991* (WA) is a Recognised Tradesperson.⁹

Tradespersons Allowance Clause

- 30 It is convenient to identify (and label) the three distinct elements of the Tradesperson Allowance Clause. Firstly, an employee must be '*engaged at Tradesperson level or higher*' (the Engaged Element). Secondly, the employee must '*hold a current tradesperson certificate or tradespersons rights recognition*' (the Qualification Element). Thirdly, the employee must be '*required to perform the full range of duties of a tradesperson*' (the Performance Element).
- 31 Mr Wright submits that the Engaged Element is satisfied upon an employee being classified by the Company to any level in the classification structure appearing under the heading, 'Trade and Technical Classifications'. On this view, Mr Wright, was 'engaged at tradesperson level or higher' because he was engaged as a 'Pipe fitter' and thus to a level in the classification structure under the heading, 'Trade and Technical Classifications'. Mr Wright argues that the Qualification Element is satisfied by an employee being a Recognised Tradesperson. I have already made a finding that Mr Wright is a Recognised Tradesperson by reason of his qualifications as a plumber. Finally, Mr Wright submits that the Performance Element is satisfied by an employee who performs the full range of duties required of the occupation that resulted in the employee being classified under the heading, 'Trade and Technical Classifications'. Mr Wright was classified under the heading 'Trade and Technical Classifications' by reason of being engaged as a pipe fitter and, throughout his employment performed the full range of duties of a pipe fitter. It follows, argues Mr Wright, that he has performed the full range of duties of a tradesperson.
- 32 The Company takes a different view of the Engaged Element. The Company submits that the Engaged Element is only satisfied upon an employee being classified by the Company on the basis of an occupation of a Recognised Tradesperson. For example (from the list in the Facts above which is not exhaustive), classification on the basis of the following occupations may result in an allowance being payable: plumber, carpenter, boilermaker, mechanical fitter and painter. Mr Wright was engaged (and classified) by the Company as a pipe fitter. A pipe fitter is not a Recognised Tradesperson. On this view, Mr Wright does not satisfy the Engaged Element. The Company argues that in construing the Engaged Element in this manner informs the meaning to be ascribed to the remaining two elements. The Qualification Element is satisfied by an employee being a Recognised Tradesperson in the classified occupation. The Performance Element is satisfied by the employee performing the full range of duties relevant to the occupation which resulted in the employee being classified by the Company on the basis of an occupation of a Recognised Tradesperson. For example, an employee classified to a level on the basis of being engaged as a carpenter and who is a Recognised Tradesperson in the field of carpentry and who performs the full range of duties of a carpenter is entitled to the allowance.
- 33 My view is that, for the reasons that follow, the interpretation suggested by the Company is correct.
- 34 Mr Wright's submission requires the word 'tradesperson' in the Qualification Element to be ascribed a different meaning to the word 'tradesperson' in the Engaged Element and Performance Element. The Company suggests a consistent interpretation linked to the skills, qualifications and duties of a Recognised Tradesperson. Consistency of interpretation is preferable, particularly within a single clause.
- 35 Mr Wright's submission requires the word 'tradesperson' in the Qualification Element and the Performance Element to be ascribed a meaning other than the ordinary meaning of the word. It ascribes a meaning by calling in aid a list in cl 9 of the Agreement. The submission is not without force insofar as the phrase 'Tradesperson level' and the word 'engaged' in the Engaged Element invite comparison with the text of cl 9 of the Agreement containing references to 'a classification level specified in a letter of appointment' and to the classification structure heading 'Trade & Technical'. I have also noted that the effect of cl 9 of the Agreement is to provide for allocation of an employee to a 'level' comprising multiple occupations and not to a single occupation named within the level. However, recalling my earlier observations on the functions performed by cl 9 of the Agreement, I do not agree that the meaning of 'Tradesperson level' in the Engaged Element is assisted by noting a heading 'Trades & Technical' in a classification structure that contains occupations of Recognised Tradespersons (e.g. carpenter) *and* occupations that are not of Recognised Tradespersons (e.g. pipe fitter, welder).
- 36 An implication of the interpretation of the Engaged Element urged by Mr Wright is that a Recognised Tradesperson will be entitled to an allowance notwithstanding appointment on the basis of skills not required of a Recognised Tradesperson (e.g. appointment of a pipe fitter or a welder). An implication of the suggested interpretation of the Performance Element is that a Recognised Tradesperson will be entitled to an allowance notwithstanding the duties being performed by the employee are unrelated to the particular trade of the Recognised Tradesperson. These implications are, objectively, unlikely to have been intended by the parties. Further, the implications are inconsistent with my observation (above) that cl 13 of the Agreement suggests a special allowance is for work *performed*.
- 37 Finally, I address some specific submissions made by Mr Wright:
- (a) It does not follow from the fact that some or many pipe fitters (or welders) are Recognised Tradespersons that the Qualification Element is satisfied by each occupation on a list that includes pipe fitter, welder and a number of occupations of Recognised Tradespersons.
 - (b) I would not infer from a reference to 'Tradesperson-other' at the end of a list of occupations that each occupation in the list is that of a 'Tradesperson'. The context is also consistent with a 'Tradesperson-other' being the occupation of Recognised Tradesperson not otherwise appearing in the list.
 - (c) It is not 'meaningless or confusing' to prefer the interpretation suggested by the Company over the interpretation suggested by Mr Wright. I am unable to ascribe any significance to the use of a capital 'T' in 'Tradesperson' when interpreting the Engaged Element.

- (d) The proportion of pipe fitters employed by the Company (or generally) who are Recognised Tradespersons is not significant when construing the Tradesperson Allowance Clause. It may be accepted that many if not most pipe fitters are Recognised Tradespersons. However, even if *every* pipe fitter employed by the Company was a Recognised Tradesperson, the question remains whether the effect of the Tradesperson Allowance Clause is to confer upon a pipe fitter an entitlement to the allowance.
- (e) Neither the John Holland Agreement nor the CBI Gorgon Agreement provides insight into the meaning of the Tradesperson Allowance Clause. The content of the John Holland Agreement is sufficiently similar to the Agreement to reveal (without answer) the same issues as raised in this case. The content of Schedule A of the CBI Gorgon Agreement is sufficiently different to Clause 9 of the Agreement to limit the utility of any inferences to be drawn from any conclusion as to the effect of the CBI Gorgon Agreement.

Issue 2(a): Employment Contract Claim: Jurisdictional Issues

- 38 This court, constituted by an Industrial Magistrate, is created by s 81 of the *Industrial Relations Act 1979* (WA) (IR Act). It exercises the jurisdiction conferred by s 81A and s 81AA of the IR Act (and other Western Australian statutes). Nothing in the IR Act (or any other Western Australian statute) confers jurisdiction on this court to determine a dispute concerning the Employment Contract. However, s 77(iii) of the Constitution empowers the Commonwealth Parliament to invest any court of a state with federal jurisdiction with respect to, inter alia, 'any matter arising under the any laws made by the Parliament'. The FW Act invests certain state courts, defined as an 'eligible State or Territory court', with the jurisdiction specified in the FW Act. This court, being constituted by an Industrial Magistrate, is an 'eligible State or Territory court',¹⁰ and is invested with the jurisdiction specified in the FW Act.
- 39 The jurisdiction of this court under the FW Act is primarily defined by three provisions, discussed in more detail below: (1) s 539 of the FW Act which identifies the civil remedy provisions of the FW Act which may be the subject of an application to an eligible state or territory court; (2) s 545(3) of the FW Act which describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of civil remedy provision; and (3) s 546(1) of the FW Act which concerns the making of pecuniary penalty orders upon the contravention of a civil remedy provision.
- 40 Section 539 of the FW Act identifies, from among the several civil remedy provisions of the FW Act, the particular civil remedy provisions for which application may be made to an eligible state or territory court 'for orders in relation to a contravention of the provision'.¹¹ The provision also identifies, for each civil remedy provision, the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.¹² Relevant to Mr Wright's claim in this court, s 539 of the FW Act provides for an application to this court by an employee for orders in relation to a contravention of civil remedy provision created by s 323(1) of the FW Act. Section 323(1) of the FW Act provides that 'an employer must pay an employee amounts payable to the employee in relation to the performance of work ...in full'. Mr Wright alleges that it was a term of the Employment Contract that the Company pay him the tradesperson allowance specified in the Contract Letter. The failure to pay the allowance from January 2015 is alleged by Mr Wright, adopting the language of s 323(1) of the FW Act, to be a failure to 'pay an amount payable (under the Employment Contract) to an employee in relation to the performance of work'. Section 544 of the FW Act states that an application for an order must be made within six years of the contravention. Mr Wright's claim, filed on 15 November 2016, is made within six years of the alleged January 2015 contravention.
- 41 Section 545(3) of the FW Act provides that an eligible state or territory court 'may order an employer to pay an amount to an employee if the court is satisfied' of two criteria. First, the employer must have an obligation, 'under the Act or under a fair work instrument' (e.g. a modern award or an enterprise agreement) to pay the relevant amount. The meaning of 'under the Act' as it appears in s 545(3) was the subject of examination in *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377, discussed below. Secondly, the failure to pay the relevant amount must be a contravention of a civil remedy provision.
- 42 Section 546(1) of the FW Act provides that 'an eligible State or Territory Court' may order a person who has contravened a civil remedy provision to pay a pecuniary penalty that the court considers appropriate.
- 43 At issue before Scaddan IM in *Sharrock* was the power of this court, in a claim attracting the small claims procedure under s 548 of the FW Act, to make an order that an employer (Downer EDI Mining) pay the amount of \$7,569.83 to an employee (Sharrock) upon an allegation of a breach of an employment contract. The claim was calculated by reference to the difference between employee entitlements of \$42.17 per hour, alleged to be a term of the employment contract, and employee entitlements of \$39.65 per hour, alleged (by the employer) to be a term of an enterprise agreement. Two relevant issues were addressed by Scaddan IM.
- 44 First, after reviewing relevant cases, Scaddan IM concluded (at [29]) that the failure to make a payment provided for in an employment contract was a contravention of s 323(1) of the FW Act:
- [A] failure to pay a contractual entitlement is capable of contravening s 323 of the FWA. Given such a contravention of s 323 is capable of being heard and determined in an eligible state or territory court as a civil remedy provision, it follows that it is open for an application for an order relevant to a contravention of s 323 (as it relates to a breach of a contractual entitlement) to be made to eligible state or territory court (the Industrial Magistrates Court).*
- 45 Secondly, Scaddan IM concluded (at [73] – [76]) that the contractual obligation to make a payment is not, *by reason of section 323(1)*, an obligation 'under the Act':
- [73] The words required to pay the amount 'under this Act' in s 545(3) of the FWA must have work to do or meaning in the context of the amount required to be paid by the employer. These words in effect qualify what amount the employer is required to pay. Otherwise the section could merely have referred to any amount the employer might be required to pay without reference to the FWA or any other federal instrument.*

- [74] *Therefore, Mr Sharrock's claim needs to be referable to another section of, or obligation under, the FWA over and above the legal obligation to pay in full in s 323 in order for any amount sought to be paid by Downer EDI Mining. No other section or requirement has been established by Mr Sharrock.*
- [75] *The IMC is not empowered under s 545(3) or s 548(1A) to make an order for compensation and the order sought by Mr Sharrock is an amount for damages for an alleged breach of contract and not one which is referable to any amount required to be paid by Downer EDI Mining under the FWA.*
- [76] *While s 323 of the FWA opens the door to a claim under the FWA by placing a legal obligation on the employer to pay in full amounts owed, it does not, of itself, empower the IMC to make the order sought by Mr Sharrock by: (1) providing a remedy; or (2) specifying an obligation on the employer as to what the employer is required to pay under the FWA.*
- 46 In a claim to which the small claim procedure applies, s 548(1A)(a)(i) of the FW Act limits the power of this court to making an order for an employer to pay an amount required to be paid 'under the Act'. It followed, in *Sharrock*, this court lacked the power to make the order that was sought by the employee.
- 47 Relevant to Mr Wright's claim in this court, s 545(3) of the FW Act limits the power of this court in precisely the same language as s 548(1A)(a)(i) of the FW Act. If the reasoning in *Sharrock* is applied to s 545(3) of the FW Act, it will be necessary for Mr Wright to identify a provision of the FW Act *other than* s 323(1), which has the effect of creating an obligation to pay the amount claimed pursuant to the Employment Contract.
- 48 The Company submits that the reasoning in *Sharrock* applies to Mr Wright's claim with the result that 'in the event that Mr Wright is successful in establishing his contractual claim, the extent of any underpayment would not be recoverable on account of lack of jurisdiction'.¹³
- 49 Mr Wright's submission on *Sharrock* makes three points.¹⁴ First, it argued that *Sharrock* should be distinguished on the basis that it was a case concerned with a small claim proceeding.¹⁵ The argument does not engage with the similarity of language in s 548(1A) (on small claims) and s 545(3) of the FW Act (relevant to Mr Wright's claim) and is not persuasive. Secondly, it is argued by reference to the text of relevant provisions of the FW Act¹⁶ and the failure to give weight to cases that emphasise the 'stand-alone' nature of the obligation created s 323(1),¹⁷ that the reasoning in *Sharrock* is wrong. As a matter of judicial comity, a judge will follow earlier decisions of single judges of a court unless the judge is of the view that the earlier decision is plainly wrong.¹⁸ It has been said the principle is apt for application to questions of statutory construction where courts are often faced with a choice of possible interpretations.¹⁹ The submissions on behalf of Mr Wright have not led me to conclude that the reasoning in *Sharrock* is plainly wrong. A textual analysis of the FW Act results in a range of plausible outcomes on the meaning of the phrase 'under the Act' in s 545(3), including the outcome favoured in *Sharrock*. The relevant jurisprudence of the Federal Court on the significance of the s 323(1) of the FW Act was not overlooked in *Sharrock*.²⁰
- 50 The third argument made in Mr Wright's submission is to observe that, consistent with the reasoning in *Sharrock*,²¹ this court has power to make the order sought by Mr Wright if he is able to identify a provision of the FW Act other than s 323(1) which has the effect of creating an obligation to pay the amount he claims pursuant to the Employment Contract. Mr Wright nominates s 542(1) of the FW Act on safety net contractual entitlements as such a provision. I agree with this submission. Section 542(1) of the FW Act provides that 'a safety net contractual entitlement' has effect as an entitlement of an employee under the Act. A 'safety net contractual entitlement' is defined in s 12 of the FW Act to mean an entitlement under a contract between an employee and an employer that relates to any of a list of subject matters that include, by reference to s 139(1)(g)(ii) of the FW Act, allowances for skills that are not taken into account in rates of pay.²² The Contract Letter, identifying a 'wage payment per hour' and a separate 'tradespersons allowance per hour', makes provision for payment of an allowance for the skill of a tradesperson that is not taken into account in the rate provided for a wage payment. The tradespersons allowance in the Employment Contract is a safety net contractual entitlement which, as a result of s 542(1) of the FW Act, casts an obligation upon the Company to pay the allowance. The fact that, as a result of s 543 of the FW Act, *this court* would not have jurisdiction to entertain a claim by Mr Wright in reliance on s 542(1) of the FW Act, does not detract from the obligation upon the Company under s 542(1) to pay the allowance. The fact that, as a result of s 542(2) of the FW Act, the safety net contractual entitlement is 'subject to any modifications by the Agreement' and the Agreement makes provision for a tradesperson allowance, does not detract from the obligation of the Company under s 542(1) to make a payment under the Employment Contract that 'is in excess of any basic entitlement under the Agreement'.²³
- 51 *If* the Company has an obligation to pay the tradespersons allowance as a result of the Employment Contract (discussed below under the heading Issue 2(b)), Mr Wright will have satisfied the two conditions in s 545(3) of the FW Act for an order that the Company pay the allowance to him: (1) the allowance is an entitlement under the FW Act, namely under s 542(1); *and* (2) the failure to pay the allowance is a contravention of a civil remedy provision, namely s 323(1) of the FW Act.
- 52 Mr Wright and the Company have made competing submissions on the issue of whether this court has the jurisdiction to consider issues of acquiescence, waiver and estoppel (relied upon by the Company) in determining whether, because of the Employment Contract, the Company has an obligation to pay the allowance. The submissions assume that the issue requires consideration of the text of s 323(1) of the FW Act.²⁴ In fact, as discussed in the previous two paragraphs, the issue requires consideration of the text of s 545(3) and s 542(1) of the FW Act. Those provisions, and the definition of 'safety net contractual entitlement' found in s 12 of the FW Act combine to confer on this court the power to make an order for payment of an amount that is an 'entitlement under a contract between' Mr Wright and the Company relating to the tradespersons allowance.²⁵ There is no express or implied limitation on the power of this court suggested by ordinary meaning of the phrase 'entitlement under a contract' or by the ordinary meaning of the single words, 'entitlement', 'under' and 'contract'. The ordinary meaning of the word 'contract' in a statute invites attention to the concept of a legally enforceable agreement, with an inquiry into the enforceable rights and obligations of the parties.²⁶ I see no reason to exclude consideration of any principle of law - from statute, common law or equity - in order to determine the rights and obligations of the parties to the Employment Contract.

The written submissions of Mr Wright, with respect to the effect of s 323(1) of the FW Act, do not persuade me to the contrary; authority on the non-federal jurisdiction of this court is distinguishable.²⁷

Issue 2(b): Employment Contract Claim: the Merits

- 53 For present purposes, the Company's recitation of the following legal principles (in written submissions) may be accepted.²⁸
- *Variation* of a contract may be inferred from the words or conduct of the parties indicating an agreement to vary the contract.²⁹
 - *Waiver* of the right of one party to enforce a term of a contract may be inferred from the words or conduct of that party.³⁰
 - *Estoppel* of the right of one party to assert a contractual right arises where the words or conduct of that party constitute a representation that the right will not be enforced and the other party has (detrimentally) relied upon the representation.³¹
- 54 I would make two observations on these formulations of legal principle.
- 55 First, I agree with submissions of the Company to the effect that variation, waiver or estoppel may, depending on the circumstances of a case, be inferred from the conduct of a party and, depending on the circumstances of the case, relevant conduct may take the form of an omission by a party to assert the existence of a right conferred by contract.
- 56 Secondly, the objective theory of contract requires consideration of what a reasonable person in the circumstances would have made of the conduct of Mr Wright in determining whether or not to draw an inference of: an agreement to a variation; the waiver of a right to enforce a contractual term; or a representation that a contractual right will not be enforced.³²
- 57 The Company's submission on the factual findings relevant to this issue³³ is not different to my findings of fact above (under the heading, 'The Facts'), save that I would add reference to a meeting between Mr Wright and Mr Leary in November 2015 and to the 'Employee Relations Query Form' submitted by Mr Wright on 16 January 2016.
- 58 The relevant primary facts may be shortly re-stated. In response to a Company letter dated 25 December 2014 asserting the right to cease payment of the tradesperson allowance and ceasing payment from 4 January 2015, Mr Wright's written and verbal response between November 2015 and January 2016 was to unequivocally assert, by express reference to the Employment Contract, his right to the continued payment of the tradespersons allowance and to backpay from 4 January 2015.
- 59 A reasonable observer might not know what to make of Mr Wright's inaction in the period from December 2014 to January 2015, until November 2015 to January 2016. However, his conduct by omission during this eleven month period, without more, is equivocal. It is not a basis upon which to infer an agreement between the parties or the waiver of a contractual right enjoyed by Mr Wright or the making of a representation by Mr Wright.
- 60 The relevant circumstances of this case include, in the period between November 2015 to January 2016, Mr Wright's written demand, in unequivocal terms and by express reference to the Employment Contract, that the tradespersons allowance payment to him be reinstated with backpay from 4 January 2015. Objectively, Mr Wright's conduct in the period between November 2015 to January 2016 is clearly inconsistent with the existence of an agreement or waiver or estoppel arising during that period. Subsequent conduct of Mr Wright must also be assessed in light of his conduct in that November 2015 to January 2016 period.
- 61 Again, the reasonable observer might not know what to make of Mr Wright's further inaction for eleven months from January 2016 until his claim in this court was filed on 15 November 2016. However, again, such equivocal behaviour is not a basis upon which to infer an agreement or waiver or estoppel, particularly in light of Mr Wright's unequivocal conduct in the November 2015 to January 2016 period.
- 62 The cases relied upon by the Company are, on their facts, distinguishable from this claim. *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 held that a contract had been formed when, notwithstanding agreement as to price and subject matter being inferred from conduct over a period of years, the parties had not reached agreement on the identity of an arbiter in the event of a dispute. The case does not assist the Company; there is no analogy with the facts of this claim. *Commonwealth v Crothall Hospital Services* (1981) 36 ALR 567 concerned an agreement to variation of a contract price, held to result from one party engaging in conduct, over a period between 1967 and 1973 of making regular 'above contract' price payments. Mr Wright has not engaged in (positive) conduct over a period of years that is clearly consistent with variation of the Employment Contract. *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 concerned an estoppel that was held may arise from the conduct of parties to a building contract making plans for future building work while their respective lawyers exchanged letters about the alleged breach of contract. Again, the conduct of Mr Wright is not comparable to the conduct of the parties in *MK & JA Roche Pty Ltd*.

Conclusion

- 63 I will hear from the parties on the orders to be made following my conclusion that the Company has an obligation under s 542(1) of the FW Act to pay the allowance provided for in the Employment Contract and has contravened the civil remedy provision found in s 323(1) of the FW Act by failing to pay the allowance.

M. FLYNN

INDUSTRIAL MAGISTRATE

¹ The trial in M 111/2016 *Stagnitta v Bechtel Construction (Australia) Pty Ltd* and M 163/2016 *Wright v Bechtel Construction (Australia) Pty Ltd* was conducted jointly and the reasons for judgment will be published at a joint hearing. There is sufficient overlap in issues that arise in each case for it to be expedient, where relevant, to use the same language in each judgment.

Obviously (and as will be apparent), the case of *Stagnitta* is determined on the basis of evidence admitted in that case and the case of *Wright* is determined on the basis of evidence admitted in that case.

² It follows from sections 50, 51, 539(1) and 545(3) of the FW Act that a contravention of the Agreement is also the contravention of a civil remedy provision of the FW Act and this court may make orders for the Company to pay to Mr Wright amounts owed to him under the Agreement. It follows from the s 546 of the FW Act that this court may also order the Company to pay a pecuniary penalty for contravention of the civil remedy provision.

³ Transcript, ts 45 – 57 (18 April 2018).

⁴ Transcript, ts 84 – 95 (19 April 2018).

⁵ Noting the agreement of the parties to paragraphs of the affidavit to be omitted from evidence.

⁶ Noting the agreement of the parties to paragraphs of the affidavit to be omitted from evidence and additional agreed facts.

⁷ Exhibit 12, affidavit of Daniel Lee at paragraph [36] and [49] – [52].

⁸ See ‘Consolidated Exhibit Book’ at pages 232 – 235.

⁹ See reg 67 of the *Electricity Licensing Regulations 1991* (WA) and predecessor regulations concerning ‘Grade A’ and ‘Grade B’.

¹⁰ This result follows from the definitions of ‘eligible State or Territory court’, and ‘magistrates court’ in s 12 of the FW Act.

¹¹ See s 539(2) of the FW Act and Column 3 of the table headed, ‘Standing, Jurisdiction and maximum penalties’.

¹² See s 539(2) of the FW Act and Columns 2 and 4 of the table headed, ‘Standing, Jurisdiction and maximum penalties’.

¹³ ‘Respondent’s Supplementary (Written) Submissions’ regarding *Sharrock v Downer EDI Pty Ltd* (6 July 2018).

¹⁴ ‘Claimants’ (Written) Submissions’ about *Sharrock v Downer EDI Pty Ltd* (6 July 2018).

¹⁵ ‘Claimants’ (Written) Submissions’ about *Sharrock v Downer EDI Pty Ltd* (6 July 2018) at [5] – [6].

¹⁶ ‘Claimants’ (Written) Submissions’ about *Sharrock v Downer EDI Pty Ltd* (6 July 2018) at [18] – [23] on the significance of the word ‘amount’; [24] – [27] on the text of s 545(1) and s 545(2) compared to s 545(3); [28] on s 545(3); [34] – [38] on the words ‘must pay’ in s 323(1).

¹⁷ ‘Claimants’ (Written) Submissions’ about *Sharrock v Downer EDI Pty Ltd* (6 July 2018) at [14] – [15]; [29] – [33] on *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 255 IR 341.

¹⁸ *BHP Billiton Iron Ore v The National Competition Council* [2007] FCAFC 157 [88] – [89].

¹⁹ *Nezovic & Anor v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1263 [206] (French J).

²⁰ *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 [23].

²¹ *Sharrock v Downer EDI Mining Pty Ltd* [2018] WAIRC 377 [60] – [61].

²² See *Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited* [2014] FCA 878 [19]ff per Buchanan J, especially at [22]: ‘[N]either the particular terms of a minimum standard, nor the necessity to engage the terms of a particular modern award, are necessary to the existence of the statutory obligation which now exists to observe the terms of a safety net contractual obligation.’

²³ *Perera v Playkidz Enterprises Pty Ltd* [2016] FCCA 2478 [2].

²⁴ ‘Claimant’s Outline of Submissions and List of Authorities’ (20 March 2018) at [123]; ‘Claimant’s Closing Submissions’ (23 May 2018) at [2] – [14]; ‘Respondent’s closing submissions’ (8 June 2018) at [7] – [22]; ‘Respondent’s Further Submissions’ (in Reply) at [2].

²⁵ Provided that the court is satisfied that the Company has contravened a civil remedy provision by failing to pay the amount: s 545(3)(b) FW Act.

²⁶ *Ultrarad Pty Ltd v Health Insurance Commission* [2005] FCA 816 [50] – [51]; (2005) 143 FCR 526 (French J).

²⁷ ‘Claimant’s Closing Submissions’ (23 May 2018) at [12] – [13].

²⁸ ‘Respondent’s Outline of Submissions’ (10 April 2018) at [10] – [23].

²⁹ ‘Respondent’s Outline of Submissions’ (10 April 2018) at [10] – [13].

³⁰ ‘Respondent’s Outline of Submissions’ (10 April 2018) at [15] – [17].

³¹ ‘Respondent’s Outline of Submissions’ (10 April 2018) at [19] – [21].

³² *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 219 CLR 165 at [38] – [41].

³³ Respondent’s closing submissions (8 June 2018) at [48] adopting the ‘Respondent’s Outline of Submissions’ (10 April 2018) at [7].

Schedule: Ruling on Objections to Evidence

1 Section 551 of the FW Act provides that ‘a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention’. There is authority for the proposition that the effect of the provision is that an ‘eligible State or Territory Court’ is required to apply the rules of evidence found in the common law and relevant state legislation when determining a claim that concerns the contravention of a civil remedy provision of the FW Act: *Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd* [2008] WAIRComm 350; *Cuzzin Pty Ltd v Grnja* [2014] SAIRC 36 [14].

2 In *Qube Ports Pty Ltd v Maritime Union of Australia* [2018] FCAFC 72 [94] – [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings under the FW Act before a state court of South Australia, the former Industrial Relations Court of South Australia (IRCSA). The IRCSA was created by South Australian legislation, the *Fair Work Act 1994* (SA). It is convenient to set out s 154 of the *Fair Work Act 1994* (SA) which has the effect of excluding the rules of evidence and, for comparison, extracts of s 81CA of the IR Act which is to be read with reg 35(4) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) (also set out below):

Section 154 Fair Work Act 1994 (SA)

154 – General principles affecting exercise of jurisdiction

- (1) In exercising its jurisdiction, the Court or the Commission – (a) is governed in matters of procedure and substance by equity, good conscience, and the substantial merits of the case, without regard to technicalities, legal forms or the practice of courts; and (b) is not bound by evidentiary rules and practices but may, subject to subsection (2), inform itself as it thinks appropriate.
- (2) The Court and the Commission must observe the rules of natural justice.

Section 81CA Industrial Relations Act 1979 (WA)

81CA Procedure etc. of industrial magistrate’s courts

...

- (3) Except as otherwise prescribed by or under this Act or another law — (a) the powers of an industrial magistrate’s court; and (b) the practice and procedure to be observed by an industrial magistrate’s court, when exercising general jurisdiction are those provided for by the Magistrates Court (Civil Proceedings) Act 2004 as if the proceedings were a case within the meaning of that Act.

...

- (5) When exercising prosecution jurisdiction an industrial magistrate’s court constitutes a court of summary jurisdiction and the Criminal Procedure Act 2004 applies.

...

Regulation 35 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (WA)

35 . Conduct of trial

- (1) A trial must be conducted in public unless the Court is of the opinion that the interests of justice will be better served by conducting the trial in private.
- (2) A Court may hear a trial at any time or place the Court thinks fit.
- (3) A Court hearing a trial may adjourn the trial to a fixed date as the Court thinks fit.
- (4) Except as provided in these regulations, a Court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

- 3 The conclusion reached by White J in *Qube Ports Pty Ltd v Maritime Union of Australia* [2018] FCAFC 72 [105] – [108] was as follows:

[105] It is apparent that s 551 [FW Act] does require the rules of evidence and procedure for civil matters to be applied by courts hearing proceedings relating to contraventions of a civil remedy provision. It is also apparent that s 551 must contemplate that the rules of evidence and civil procedure will vary from court to court. That is because s 546(1) of the FW Act vests jurisdiction to order the payment of pecuniary penalties in eligible State and Territory courts as well as in the Federal Court and the Federal Circuit Court. When the latter two courts are exercising the jurisdiction, the Evidence Act 1995 (Cth) applies. By reason of s 4 of the Evidence Act 1995 and the definition of “federal court” in the dictionary, the Evidence Act does not apply to proceedings in State and Territory courts. Section 79(1) of the Judiciary Act 1903 (Cth) identifies the evidentiary and procedural regime to be applied by a State or Territory court when exercising federal jurisdiction: *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421 at [42], [58][63]. It provides: The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

[106] This means that in those States and Territories which have a counterpart to the Evidence Act 1995, it is that counterpart which will supply the evidentiary rules to be applied. South Australia has not enacted a counterpart to the Evidence Act 1995. The laws relating to evidence in South Australia are, subject to modification by a particular statute, found in the common law and in the Evidence Act 1929 (SA).

...

[108] Prima facie, s 154 of the Fair Work Act 1994 (SA) is a law of the State of South Australia relating to procedure and evidence and, accordingly, was to be applied by the Industrial Magistrate in this case. However, account had to be taken of the stipulation in s 79(1) [of the Judiciary Act 1903 (Cth)] that the laws relating to evidence and procedure of a State or Territory are binding “except as otherwise provided by ... the laws of the Commonwealth”. Is s 551 to be regarded as such a law? Can a provision that a court is not bound by the rules of evidence but may, subject to compliance with the rules of natural justice, inform itself as it thinks appropriate, be regarded as a rule of evidence for the purpose of s 551? The parties’ submissions did not address these issues. That suggests that it would be undesirable for the Court presently to be expressing concluded views about them.

- 4 The effect of reg 35(4) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA), provided for by s 81CA of the IR Act, is that when exercising non-federal jurisdiction this court is ‘not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit’. The effect of the regulation is that when exercising non-federal jurisdiction this court is not required to apply laws concerning evidence that would otherwise be required to be applied i.e. the laws concerning evidence contained in the *Evidence Act 1906* (WA) and the common law.¹ Absent s 551 of the FW Act, the effect of s 79(1) of the *Judiciary Act 1903* (Cth), would be to apply reg 35(4) of *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) to this court when exercising federal jurisdiction. However, s 79(1) of the *Judiciary Act*

1903 (Cth) is qualified. State laws on procedure and evidence are applied when exercising federal jurisdiction, *except as otherwise provided by a law of the Commonwealth*. The question for determination in this case is whether, properly construed, s 551 of the FW Act is a law of the Commonwealth that ‘otherwise provides’ for the application of particular laws relating to procedure and evidence. Section 551 of the FW Act states that ‘a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention’. Comparison may be made with provisions of the FW Act expressly providing for the *non-application* of ‘the rules of evidence and procedure’ to small claims proceedings before the Federal Circuit Court or a magistrates court (s 548(3) of the FW Act) or in matters before the Fair Work Commission (s 591 of the FW Act). The comparison suggests a legislative intention of a qualitative distinction between the rules of evidence to be applied, on the one hand, by a court (including a state court) determining contravention proceedings and, on the other hand, by a court determining a small claims proceeding.

- 5 The use of the definite article ‘the’ and the preposition ‘for’ in the text of s 551 of the FW Act is significant: ‘*the* rules of evidence and procedure *for* civil matters’. Grammatically, those words suggest the existence of a single body of rules in connection to a category of cases (civil matters). The phrase ‘the rules of evidence and procedure’ has an accepted ordinary technical meaning; it comprises the law on evidence and procedure contained in statute and the common law as applied in judicial proceedings.² Similarly, the phrase ‘civil matter’ has an accepted ordinary technical meaning as comprising all matters other than criminal matters.³ The legislative intention identified in the previous paragraph would be promoted if the ‘rules of evidence and procedure for civil matters’ required to be applied by s 551 of the FW Act was construed to mean the law of evidence and procedure applied by a court of *general* jurisdiction when exercising jurisdiction in non-criminal matters. This intention would be defeated if the ‘rules of evidence and procedure for civil matters’ required to be applied by s 551 of the FW Act was construed to mean the law of evidence and procedure applied by *this* court when exercising non-federal jurisdiction in non-criminal matters. My view is that, having regard to the grammatical structure of the section, s 551 of the FW Act bears the former construction and is to be preferred as a construction that promotes the intention of the legislature.
- 6 In the result it is necessary to apply the laws of evidence contained in the *Evidence Act 1906* (WA) when assessing the objections made to the admissibility of evidence in this case.
- 7 My ruling on the objections of the Company, stated in a document filed on 10 April 2018, to the admissibility of the evidence of **Mr Wright** is as follows:
- [3] Objection upheld. Irrelevant.
 [20] Objection overruled. Relevant.
 [25] Objection upheld. Irrelevant.
- 8 My ruling on the objections of Mr Wright, stated in the Claimants’ Closing Submissions of 23 May 2018, to the admissibility of the evidence of **Mr Leary** is as follows:
- [13] Objection upheld. Irrelevant.
 [14] Objection upheld. Hearsay.
 [15]-[17] Objection overruled regarding [15] (relevant observation) and objection upheld regarding [16]-[17] (irrelevant).
 [28] Objection upheld regarding first 11 words (opinion) and objection overruled as to balance of sentence.
 [35] Objection upheld. Irrelevant.
 [39] Objection overruled.

¹ The laws concerning evidence and the laws concerning procedure that would otherwise be required to be applied are those laws that apply to a ‘case’ under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA(3) of the IR Act (WA).

² See J D Heydon *Cross on Evidence* (10th Australian ed, 2015), [1020] – [1025].

³ See J D Heydon *Cross on Evidence* (10th Australian ed, 2015), [1030].

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2018 WAIRC 00895

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DOROTHY ELLIES

APPLICANT

-v-

CROSSLINKS INC

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

FRIDAY, 14 DECEMBER 2018

FILE NO/S

U 123 OF 2018

CITATION NO.

2018 WAIRC 00895

Result	Application discontinued
Representation	
Applicant	In person
Respondent	N/A

Order

WHEREAS this is an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS on 17 October 2018, the applicant filed a Form 14 – Notice of withdrawal or discontinuance;
 NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
 THAT this application be, and by this order is, discontinued.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.**2018 WAIRC 00896**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	SCOTT WILKINS	
	-v-	
	BUSSELTON STEEL	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT	
DATE	FRIDAY, 14 DECEMBER 2018	
FILE NO/S	B 147 OF 2018	
CITATION NO.	2018 WAIRC 00896	

Result	Application dismissed
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Order

1. The applicant claimed that he had been denied a benefit under his contract of employment, and referred the claim to the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* on 30 November 2018.
 2. On 11 December 2018, the applicant advised that the matter had resolved.
 3. On 13 December 2018, the applicant filed a *Form 14 – Notice of withdrawal or discontinuance*.
- 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.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.**2018 WAIRC 00894**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	ASHLINNE LORRAINE ZORANICH	
	-v-	
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 14 DECEMBER 2018	
FILE NO/S	U 205 OF 2015	
CITATION NO.	2018 WAIRC 00894	

Result Application discontinued
Representation
Applicant Mr A Gill (of counsel)
Respondent N/A

Order

WHEREAS this is an application under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS on 17 October 2018, the applicant filed a Form 14 – Notice of withdrawal or discontinuance;
 NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
 THAT this application be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Colin Sharrock	Downer EDI Mining Pty Ltd	B 83/2018	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Nursing Federation Industrial Union of Workers Perth	WA Country Health Service	Emmanuel C	C 20/2018	25/06/2018 25/06/2018	Dispute re return to work of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00889

DISPUTE RE RECOMMENCEMENT OF DISCIPLINARY PROCEEDINGS AGAINST UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE WEDNESDAY, 12 DECEMBER 2018
FILE NO/S C 40 OF 2018
CITATION NO. 2018 WAIRC 00889

Result Order made
Representation
Applicant Mr J Theodorsen as agent
Respondent Ms J Vincent of counsel

Order

HAVING had Mr J Theodorsen as agent for the applicant and Ms J Vincent of counsel for the respondent appear before me at a conference between the parties on Wednesday, 12 December 2018;

AND WHEREAS the applicant sought an order that no further action be taken by the respondent against its member in relation to the disciplinary process commenced by letter dated 14 November 2018 until its application for a “permanent stay” of those proceedings is heard and determined;

AND WHEREAS the stage the disciplinary proceedings have reached is that the respondent is awaiting a response from the applicant's member, having completed her investigation into the matter;

AND WHEREAS no prejudice will be suffered by the respondent if there is a moderate delay given that the matter has taken 18 months to reach this stage;

AND WHEREAS the applicant's member could suffer prejudice if the disciplinary process were completed before the substantive application is determined;

AND WHEREAS there are clearly serious issues to be tried, being whether the Western Australian Industrial Relations Commission has power to "permanently stay" disciplinary proceedings and whether it should do so where the respondent is alleged to be having "a second bite of the cherry" in relation to the allegations put to the applicant's member;

AND WHEREAS I have decided not to hear the substantive matter and to seek reallocation of it to another Commissioner;

AND WHEREAS, accordingly, I have no power over the substantive matter being heard and determined urgently but am confident it can be heard and determined without too much delay;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order that the respondent take no further action against the applicant's member in relation to the disciplinary process commenced by letter dated 14 November 2018 until the applicant's application for a "permanent stay" of that process is heard and determined.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2018 WAIRC 00867

**DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS
AND PARENT HELPERS) AWARD 1990**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES BEING THE DIRECTOR
GENERAL OF THE DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT

DATE MONDAY, 26 NOVEMBER 2018

FILE NO/S P 10 OF 2018

CITATION NO. 2018 WAIRC 00867

Result Order and Direction issued

Order

1. This is an application referred to the Commission pursuant to s 40 of the *Industrial Relations Act 1979* on 22 November 2018 to vary the *Government Officers (Social Trainers) Award 1988* (the Award) in relation to the respondent of the Award and other matters.
2. On 22 November 2018, the applicant applied to the Commission for substituted service in relation to the respondent to the Award to the Department of Mines, Industry Regulation and Safety, which holds a standing warrant in respect of the respondent.
3. The Commission is of the opinion that it is appropriate to grant the applicant's application for substituted service.

Pursuant to the powers conferred by the *Industrial Relations Act 1979*, I hereby order –

THAT, subject to s 29A(2) of the *Industrial Relations Act 1979*, there be substituted service on the respondent to the *Government Officers (Social Trainers) Award 1988* by service on the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations branch.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2018 WAIRC 00899

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES, BEING THE DIRECTOR
GENERAL OF THE DISABILITY SERVICES COMMISSION**RESPONDENT****CORAM**

CHIEF COMMISSIONER P E SCOTT

DATE

(CORRIGENDUM MONDAY, 17 DECEMBER 2018)

FILE NO/S

P 10 OF 2018

CITATION NO.

2018 WAIRC 00899

CORRIGENDUM

The heading of the Order issued in this matter by the Commission on Monday, 26 November 2018 ([2018] WAIRC 00867), 'DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS AND PARENT HELPERS) AWARD 1990' is to be substituted with 'GOVERNMENT OFFICERS' (SOCIAL TRAINERS) AWARD 1988'.

(Sgd.) P E SCOTT,
Chief Commissioner.

[L.S.]

2018 WAIRC 00893

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 14 DECEMBER 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LYNETTE ANN CALVERT

APPELLANT

-v-

PATHWEST

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

FRIDAY, 14 DECEMBER 2018

FILE NO

PSAB 25 OF 2018

CITATION NO.

2018 WAIRC 00893

Result Order issued**Representation****Appellant** In person**Respondent** Mr J Carroll (of counsel)*Order*WHEREAS this is an appeal to the Public Service Appeal Board (**Board**) under the *Industrial Relations Act 1979* (WA);

AND WHEREAS at a directions hearing on 11 December 2018 the parties asked the Public Service Appeal Board to amend the name of the respondent;

AND HAVING heard from the parties, the Public Service Appeal Board is of the opinion that it is appropriate to amend the name of the respondent;

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

THAT the name of the respondent be amended to ‘PathWest Laboratory Medicine WA’.

(Sgd.) T EMMANUEL,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Waroona Outside Staff Collective Enterprise Agreement 2018 AG 19/2018	12/14/2018	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Waroona	Commissioner D J Matthews	Registration of Agreement

PUBLIC SERVICE APPEAL BOARD—

2018 WAIRC 00871

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 OCTOBER 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LUKE KRISTIAN DYMOCK

APPELLANT

-v-

LANDGATE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR GAVIN RICHARDS
MR NEIL WITKOWSKI

DATE

THURSDAY, 29 NOVEMBER 2018

FILE NO

PSAB 21 OF 2017

CITATION NO.

2018 WAIRC 00871

Result	Appeal dismissed
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Order

WHEREAS this appeal was set down for hearing from 26 to 28 November 2018;

AND WHEREAS the appellant sent an email to the Chairman’s Chambers on 21 November 2018 informing that he wished to “withdraw my application”;

AND WHEREAS the Chairman’s Associate discussed the matter with the appellant by telephone on 22 November 2018;

AND WHEREAS the appellant sent a further email to the Chairman’s Chambers on 22 November 2018 informing that “I seek a full withdrawal of the appeal hearing and the trial and consider the matter closed”,

THEN pursuant to regulation 17(5) *Industrial Relations Commission Regulations 2005* the appeal is dismissed.

(Sgd.) D J MATTHEWS,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Matters dealt with—

2018 WAIRC 00737

REFERRAL OF EMPLOYMENT DISPUTE**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2018 WAIRC 00737
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	TUESDAY, 31 JULY 2018
DELIVERED	:	WEDNESDAY, 12 SEPTEMBER 2018
FILE NO.	:	APPL 55 OF 2018
BETWEEN	:	MR JASON BUCKLEY Applicant AND TOWN OF CAMBRIDGE Respondent

Catchwords	:	Referral of employment dispute - Whether employer had a contractual right to require attendance for medical examination in the circumstances – In all of the circumstances right existed - Turns on own facts
Legislation	:	<i>Employment Dispute Resolution Act 2008</i>
Result	:	Matter determined
Representation:		
Counsel:		
Applicant	:	Mr W Milward of counsel
Respondent	:	Mr M Cox of counsel
Solicitors:		
Applicant	:	Warren Milward
Respondent	:	MDC Legal and later Mills Oakley

Reasons for Decision

- 1 This matter is referred to the Western Australian Industrial Relations Commission under the *Employment Dispute Resolution Act 2008*.
- 2 The applicant and respondent are parties to a contract of employment executed on 6 October 2014.
- 3 Clause 6 of that contract of employment is as follows:
 - 6 MEDICAL ASSESSMENTS**
 - 6.1 The Council may require the CEO to submit to an examination and assessment (including a test for a Drug) of his physical and/or mental fitness for work. An assessment of the CEO's "fitness for work" includes, without limitation, consideration of any impact the CEO's attendance at work may have on any of his co-workers.
 - 6.2 The examination and assessment will be undertaken by the Council's choice of medical practitioner(s), and at the Town's expense.
 - 6.3 The CEO must:
 - (a) co-operate with the Council and the medical practitioner(s) appointed to examine and/or assess his fitness for work, in relation to arrangements for, and the administration of, any medical examination and assessment to which the Council requires the CEO to submit; and
 - (b) irrevocably authorise the examining medical practitioner and any other medical practitioner involved in either an examination or an assessment of the CEO's fitness for work, to provide to the Council any information relevant to the assessment of the CEO's fitness for work.
- 4 The applicant has attended two examinations pursuant to requirements made under clause 6 but has not authorised the medical practitioner to provide to the respondent "information relevant to the assessment of [his] fitness for work".
- 5 The applicant is awaiting my decision on whether the respondent had a contractual right to require him to attend the two examinations before giving that authorisation.

- 6 The background facts are that the applicant took personal leave from his employment on 9 April 2018. On 10 April 2018 the respondent resolved to suspend the applicant on full pay for reasons unrelated to his absence from work.
- 7 The applicant obtained medical certificates for the period 9 April 2018 to 7 May 2018. During this period the respondent tried to advance a process relating to the matter in relation to which it had suspended the applicant but was informed by the applicant that he was medically unfit to participate.
- 8 The respondent sent a letter to the general practitioner who had provided the medical certificates seeking more information about the applicant's medical condition and whether it impacted on the applicant's ability to participate in the process referred to above.
- 9 Soon after having received a letter in response from the general practitioner, the respondent decided to invoke clause 6 of the contract of employment and, on 2 May 2018, that is at a time when the applicant was still on personal leave covered by a medical certificate, the respondent wrote to the applicant, invoking clause 6 of the contract of employment, requiring him to see a specialist.
- 10 On 3 September 2018 the respondent did the same thing.
- 11 As noted above the applicant attended both appointments.
- 12 The applicant says a reasonable person, that person being the appropriate interpreter of a contract, would not understand clause 6 to mean "the respondent could implement a decision, made one working day after the applicant had answered the respondent's questions seeking greater detail from his medical practitioner regarding his fitness for work, and direct the applicant to undertake a psychiatric review when there were no unusual circumstances which warranted the respondent disregarding the medical evidence which had been supplied".
- 13 The above is a reference to the letter from the general practitioner dated 20 April 2018 and the decision of the respondent soon after to invoke clause 6 of the contract of employment.
- 14 I am content to confine myself to the specific circumstances that arose as the applicant invites me to do rather than to try and assess the outer bounds of the operation of clause 6 of the contract of employment.
- 15 As at 19 April 2018 the applicant was on personal leave and had provided various "bare" medical certificates from his general practitioner. The respondent understandably, and sensibly as a next action, asked the general practitioner for more information about the applicant's condition and how long he was likely to be unfit for work against a background, to which the respondent referred in its letter to the general practitioner, of it wanting to progress an important process in relation to the applicant.
- 16 The general practitioner's response was that the applicant "has an adjustment reaction with anxiety and stress/distress [and] is unfit for work and remains so until at least 7 May 2018". In answer to questions as to whether the applicant was fit to participate in a meeting or provide something in writing relating to the process referred to above, and what accommodations might be made to enable that participation, the general practitioner answered "no" and "nil, see above".
- 17 The report of the general practitioner would have invited questions in the mind of a reasonable reader.
- 18 The report is extremely short.
- 19 The "diagnosis" may presumably be interpreted to mean that the applicant has "reacted" to something requiring "adjustment" and his reaction has included "anxiety" and "stress/distress". However, in the circumstances, I think the reasonable reader would find this vague.
- 20 No real attempt is made by the general practitioner to say how long the "condition" may be expected to continue. That it will affect the applicant until "at least May 7 2018" is unhelpful. Does this mean it is likely to resolve soon after 7 May 2018 or that the general practitioner does not know when it might resolve?
- 21 Important questions about the possibility of the process being advanced appear to have been dismissed out of hand by the general practitioner.
- 22 I note the report states that it was prepared quickly because the author was about to go on leave. That may explain its lack of detail but I do not think the respondent is far wrong in describing it, as it does in its written submissions, as "perfunctory".
- 23 I consider that a reasonable reader of the report, in the shoes of an employer wanting good information on the applicant's fitness for work, would think obtaining a specialist's opinion a very sound idea.
- 24 I do not consider that a reasonable reader would conclude that the general practitioner's short report provided the information an employer might reasonably desire in relation to an employee's fitness for work.
- 25 In the circumstances of this case the reasonable reader would quickly conclude both that clause 6 of the contract of employment is perfectly suited to obtaining an assessment of the applicant's fitness for work and that this would be an appropriate occasion for its invocation.
- 26 The idea that, in the circumstances of this case, the short report of the general practitioner would be the end of the story is unreasonable.
- 27 The applicant is the Chief Executive Officer of a local government entity. It is not credible to suggest that clause 6 does not allow that entity to get comprehensive information in relation to the fitness for work of the person holding that important position where that issue is a live one but the only information available is a short and vague report from a general practitioner.
- 28 Given that by September 2018 the respondent still did not know what the specialist thought in May 2018 I also consider that a reasonable person would consider it entirely appropriate for the respondent to have the applicant see the specialist again in September in the hope that my decision, if in its favour, would be handed down quickly enough to make the information in the September report current.

- 29 The decision is in the respondent's favour and I am hopeful the information in the September report will be current when it is provided.
- 30 I deal with a few of the applicant's other arguments briefly, given the need for expedition in this matter and my substantive view on the reasonableness of invocation of clause 6 of the contract of employment in the circumstances of this case.
- 31 The use of clause 6 of the contract of employment, in the circumstances of this case, does not offend common sense. I find that it is reasonable, for the reasons given above, and entirely consistent with good sense.
- 32 The invocation of clause 6 of the contract of employment is not in any way limited to circumstances where the respondent is concerned for the safety or wellbeing of other employees. Clause 6 of the contract of employment contains no such condition.
- 33 That an employee is on personal leave for sickness at the time the assessment is required is not, without more, material. Being on personal leave for sickness, even where that leave is covered by medical certificates, is not necessarily a barrier to the appropriate invocation of clause 6 of the contract of employment. This case ought make that clear.
- 34 The background of the issue of the applicant's fitness for work apparently arising out of the applicant's ability or otherwise to participate in the process referred to above is not as relevant as the applicant imagines.
- 35 The applicant's fitness for work did, in fact, arise as an issue, regardless of the background. The respondent's attempts to gain information from the applicant's general practitioner resulted in a report the appropriate response to which was clearly referral to a specialist.
- 36 It is not necessary to decide whether clause 6 of the contract of employment gives the respondent an "unfettered" right. The applicant asks me to confine myself to the circumstances of this case and I am content to do this.
- 37 I determine that the applicant should authorise release of any information prepared by the consultant psychiatrist Dr Tony Mander in relation to him.

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 54/2018	N/A	N/A	Emmanuel C	Referral of employment dispute	29/08/2018	Discontinued

RECLASSIFICATION APPEALS—

2018 WAIRC 00897

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00897
CORAM : PUBLIC SERVICE ARBITRATOR
 COMMISSIONER T EMMANUEL
HEARD : TUESDAY, 20 NOVEMBER 2018, THURSDAY, 20 JULY 2018
DELIVERED : FRIDAY, 14 DECEMBER 2018
FILE NO. : PSA 1 OF 2017
BETWEEN : ANTONIA WONG
 Applicant
 AND
 NORTH METROPOLITAN HEALTH SERVICE
 Respondent

CatchWords : Advanced clinical skills – Specialised clinical skills – Work value – Increase in administrative work and work load
Legislation : *Industrial Relations Act 1979* (WA) s 80E(2)
Result : Application dismissed
Representation:
Applicant : In person
Respondent : Mr J Ross (as agent)

Case(s) referred to in reasons:

Hospital Salaried Officers Association of Western Australia (Union of Workers) v Hon Minister for Health and others [2006] WAIRC 03473; (2006) 86 WAIG 279

The Board of Management, Royal Perth Hospital and Others v Hospital Salaried Officers of W.A. (Union of Workers) (1992) 72 WAIG 614

The Minister for Health in his Incorporated Capacity under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals Formerly Comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00836; (2013) 93 WAIG 1565

Willers v Workcover [2010] WAIRC 00183; (2010) 90 WAIG 333

Reasons for Decision

- 1 Ms Wong appeals the Health Service's decision not to reclassify the position of Senior Pharmacist P-2 at King Edward Memorial Hospital (**KEMH**) to level P-3. The review position was last reclassified in 2010, changing from level P-1 to level P-2.
- 2 The parties agree the relevant period for this reclassification appeal is September 2013 to September 2014, being the period considered in Ms Wong's first reclassification appeal for the review position in 2014.
- 3 Ms Wong says the review position's work value has increased. This is because of extra management and administrative duties in the Dispensary, increased complexities in clinical trials and the added responsibility of running the Drug Information Service. Ms Wong also says the review position was responsible for human resources duties. These additional duties and responsibilities require specialised skills and knowledge and were allocated to the review position during the relevant period. She says many of these duties were previously done by a level P-3 position and they were reallocated to her on what was intended to be a permanent basis. The review position reported directly to the Chief Pharmacist and liaised with level P-3 pharmacists as peers.
- 4 The Health Service says work value has not increased. It says the work value increase in relation to clinical trials that Ms Wong discusses was taken into account during her successful reclassification application in 2010. The other duties that she claims have increased the review position's work value were temporary, were rotated between staff and are duties expected of a level P-2. During the relevant period, Ms Wong did not work at the specialised clinical practice level of P-3. Even if it is accepted that Ms Wong performed extra duties at the level of a P-3, she did not perform those duties for the required 12 months before making her reclassification application at the Commission.
- 5 I must decide whether there has been a significant net increase in the review position's work value, arising from changes to the work, skill, responsibility or conditions.

Principles

- 6 To succeed under s 80E(2) of the *Industrial Relations Act 1979* (WA), Ms Wong must establish there has been a significant net increase in the review position's work value which arises from changes to the review position's work, skill, responsibility or conditions under which the work is performed.
- 7 The test the Public Service Arbitrator applies when considering work value changes is set out in the Statement of Principles of the State Wage Order [2018] WAIRC 00368:

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 The Public Service Arbitrator applies the test strictly.

Ms Wong’s case

Witnesses

9 Mr Yapp gave evidence for Ms Wong. He has been the Chief Pharmacist at KEMH since 1975. Ms Wong also gave evidence.

Additional duties

Dispensary

10 Ms Wong and Mr Yapp say the review position has been in charge of the Dispensary since 2009 and has been responsible for the following additional duties since 2011:

- reviewing and updating policies;
- participating in national initiatives;
- reviewing and updating guides and training tools;
- data collection and analysis;
- education and training;
- quality improvement; and
- research activities.

11 Since 2011, the review position is the first point of contact and is in charge of the Resident Medical Officer (**RMO**) orientations. It is also the site supervisor and system administrator of iPharmacy dispensing software.

12 Ms Wong says these Dispensary duties are managed by level P-3 staff in other tertiary hospitals.

Clinical Trials Service

13 Ms Wong, again supported by Mr Yapp, says since 2009 the review position has been responsible for dispensing clinical trials. Since 2011, it has been in charge of these trials and Ms Wong was appointed as a Scientific Advisory Subcommittee representative. In 2010, the review position was allocated more clinical trial responsibilities including increased participation in clinical governance for clinical research.

14 Ms Wong says the review position is the first point of contact for any queries about clinical trial pharmacy services at KEMH. Most clinical trials at KEMH are not sponsored, which means they require more pharmacy involvement than sponsored trials.

15 According to Ms Wong, the additional clinical trial duties are:

- managing the clinical trial service and making independent decisions;
- dealing with complex patients and clinical trials;
- developing and participating in education programs;
- compiling and analysing reports and statistics;
- regularly reporting directly to the Chief Pharmacist;
- supervising and training staff;
- ensuring compliance with policies and procedures;
- developing and reviewing procedures and manuals;
- determining and implementing pharmacy strategic and operational plans and policies; and
- being a member of the Scientific Advisory Subcommittee.

- 16 Ms Wong says these extra duties mean the review position generally has more responsibility and independence because of the increased complexity of clinical trials.

Clinical ward duties

- 17 The review position has been rotated onto wards and has been performing ward duties since 2011.

Human resources duties

- 18 In 2013 the review position was allocated a number of human resources duties, including overseeing the Drug Information Service and pharmacy newsletter. From March 2013 to October 2014 the review position was the sole editor of the newsletter.

Drug Information Service

- 19 This was allocated to the review position during the relevant period. Its core responsibilities were to provide expert and specialised advice. It required the review position to provide autonomous service delivery and education and training to staff.

Skills and responsibilities

Decision making

- 20 Ms Wong says the review position has a high level of autonomy, makes independent decisions and is the first point of contact for the Dispensary and Clinical Trials Service.

Communication

- 21 Ms Wong frequently contacts a wide range of stakeholders. The review position must communicate with other members of hospital staff to make sure the correct drug stock levels are maintained. It is involved with research and invoicing so must coordinate with other professionals.

Knowledge and skills

- 22 Ms Wong says the review position must have knowledge of current hospital trends, standards, policies and practices in KEMH and WA Health. Ms Wong says to perform the review position, she has a sound understanding of how KEMH departments operate. She has an in-depth knowledge of clinical research, clinical research governance, standards, guidelines and legal requirements.

- 23 The review position must give specialised advice because of the nature of KEMH services.

Coordination

- 24 The review position manages day to day operations of the Dispensary, Clinical Trials and the Drug Information Service. In this position, Ms Wong says she liaises with two level P-3 pharmacists as peers. All pharmacists and technicians are rotated through these sections and are supervised by her during their rotations. Her position has a professional leadership role. It is responsible for maintaining staffing levels.

Provision of specialised services

- 25 KEMH is a specialised hospital because it is the only referral centre for complex pregnancies in WA. Ms Wong says that the person in the review position must have advanced relevant clinical pharmacy knowledge and experience in this specialty area. Ms Wong says she is the department advisory representative for the Dispensary and Clinical Trials Service and is consulted about pharmacy policies and guidelines under the Chief Pharmacist's supervision.

Coordination of service development and planning

- 26 In the review position, Ms Wong collects, analyses and reports on data relating to service delivery including key performance indicators and quality assurance and improvement. She actively participates and assists in planning future strategies.

Net addition to work value

- 27 Ms Wong says both work value and work load have increased since the review position was last reclassified in 2010. It has evolved from being in charge of the Dispensary alone to also coordinating the Clinical Trial Service and Drug Information Service during the relevant period. The increase in work value and work load is because of the added managerial responsibilities and the complexity of duties resulting from the review position's increased participation in clinical research.

Comparative JDFs

- 28 The Health Service reclassification officer compared the review position to four level P-3 job description forms (**JDFs**) at different public hospitals and concluded that the review position makes independent decisions only for non-sterile dispensing, the remaining duties are largely administrative and the position does not require specialist knowledge.

- 29 Ms Wong says the Health Service reclassification officer incorrectly assumed the Dispensary included non-sterile and sterile dispensing. The first two comparative JDFs also managed non-sterile dispensing only. The Health Service reclassification officer also incorrectly thought that the position would be in charge of sterile and non-sterile once reclassified to level P-3, but that has never been part of the application.

- 30 The reviewer assumed the second JDF [P-3 PMH (Supervisor Pharmacist) 00005208] would likely include human resources duties, contribute to strategic projects and improve customer focus although these were not in the JDF.

- 31 The reviewer said that the position in the fourth JDF [P-3 RPH (Supervisor Pharmacist 104142)] was 'in charge' of dispensing particular drugs, assuming it was a more complex position. However, the JDF says 'supervise', not 'in charge'.

- 32 Ms Wong says the Health Service reclassification team appears to consider that the number of pharmacists being supervised is the main determinant of complexity and work value, yet it argued that a level P-3 position at Fiona Stanley Hospital [Supervisor Pharmacist (Investigational Drugs) 114590] is an expert resource despite only supervising a level P-1 and level G-3.
- 33 The Health Service reclassification team did not recognise the specialised skills and knowledge required for the position in managing Dispensary and Clinical Trials and the increased work value due to the additional responsibilities and duties.
- 34 Dispensary and clinical trials are separately managed by individual level P-3 staff members in other tertiary hospitals.

Flow-on

- 35 Ms Wong disagrees with the Health Service that if the review position is reclassified there will be flow-on to other positions.
- 36 Ms Wong says flow-on should not be considered in her claim because the responsibilities, skills and knowledge required for her position are very different to other positions.

BIPERS

- 37 Ms Wong says the BIPERS score is too low because the review officer assessed BIPERS for 'Influence on Results' to be five (in charge of a small team in Dispensary) based on false assumptions. The team within Dispensary is not small, and the position is also in charge of the Clinical Trials Service. The review officer's assessment of 'Personnel Supervised' and 'Subordination Level' is similarly flawed.

The Health Service's case

Witnesses

- 39 Mr Petrovski is the Acting Chief Pharmacist for Women and Newborn Health Service and is substantively employed as a level P-3 Supervisor Pharmacist Operations. Ms Lebedevs is a Senior Pharmacist level P-3. They gave evidence for the Health Service.

Increase in work value

- 40 The Health Service disagrees Ms Wong was responsible for managing the Dispensary, Clinical Trials Service and Drug Information Service and says any additional duties she may have done during the Relevant Period were of level P-2 work value. The Health Service accepts that at times Ms Wong was required to coordinate the day to day running of those three key KEMH pharmacy areas, but says that this was a requirement for all level P-2 positions.
- 41 The Health Service says only the Chief Pharmacist can 'manage' and this cannot be delegated. Both level P-2s and P-3s are expected to 'coordinate'. Coordination of the Dispensary, Clinical Trial Service and Drug Information Service were not allocated to any one position but were rotated between positions. There was therefore no work value increase for the review position in relation to these areas because that responsibility remained with the level P-3 staff and Chief Pharmacist.
- 42 The review position's role does not include the responsibility and accountability for the areas of 'Pharmacy and Dispensary'.
- 43 The Classification Review Committee unanimously decided in the original and reconsideration applications that Ms Wong was performing the duties expected of a level P-2. The management roles Ms Wong describes are inherent in her current level P-2 role and do not meet the specialised level of clinical practice management required in a level P-3 position.
- 44 The duties Mr Yapp describes Ms Wong as doing are all coordination duties expected of a level P-2.
- 45 Until December 2015 there was a temporary dual reporting structure where staff reported to Mr Petrovski and the Chief Pharmacist, while Ms Kristensen's level P-3 position was vacant. The Health Service says that although Ms Wong reported directly to the Chief Pharmacist in that time, it did not mean her work value had increased to that of a level P-3 pharmacist.
- 46 The Health Service says the main factor in assessing work value in classifying Health Professionals is clinical practice. A level P-2 is a Health Professional with advanced clinical skills, providing advanced services for patients with acute conditions or complex needs. These services are provided in a field recognised by the industry as requiring advanced professional and clinical practices. At level P-2, advanced clinical duties and lower level administrative duties are expected.
- 47 At level P-3, specialised clinical duties in a specialised area of clinical practice are expected and are significantly above level P-2. Any administrative or coordination duties required to be performed by these positions would be at a lower classification level than level P-2.
- 48 The Health Service's view is that the additional duties in relation to the Dispensary, Clinical Trials Service and Drug Information Service that Ms Wong raises are all administrative, therefore do not add work value to the review position: *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Hon Minister for Health and others* [2006] WAIRC 03473; (2006) 86 WAIG 279 and *The Board of Management, Royal Perth Hospital and Others v Hospital Salaried Officers of W.A. (Union of Workers)* (1992) 72 WAIG 614.
- 49 It also says that even if these additional duties were of an increased work value, Ms Wong did not perform them for 12 months before making her reclassification application, as required by the *Public Sector Commission's Approved Procedure 1 – Approved Classification System and Procedures*.
- 50 Overall, the relevant period was a transitional period for the KEMH pharmacy and the duties assigned to the review position were temporary. These additional duties were also rotated through other pharmacist positions of both level P-2 and level P-3.

Dispensary

- 51 Ms Wong did not supervise a large team in the Dispensary. Rather, she supervised one level P-1 and one or two technicians. However, the technical staff rotate and are also supervised by other level P-2 and P-3 staff. Ms Lebedevs and Mr Petrovski gave evidence that Ms Wong did not supervise level P-3 staff.
- 52 The RMO orientation duty is shared by two level P-2 pharmacists and is also supervised by a level P-3 pharmacist.

Clinical Trials Service

- 53 The Health Service says Ms Wong is asking the Public Service Arbitrator to consider work value it has already considered. This is because in her 2010 reclassification claim, Ms Wong said she was responsible for clinical trials but she now says she was not in charge of the Clinical Trial Service until 2011.
- 54 Mr Petrovski gave evidence that the level P-3 has overall responsibility for clinical trials. Ms Wong's duties in clinical trials are of level P-2. Not all clinical trials are administered by a level P-3. Even at major teaching hospitals, level P-1 and P-2 positions administer clinical trials of lower complexity.
- 55 Ms Wong uses clinical trials at Fiona Stanley Hospital and Royal Perth Hospital as comparisons, but the Health Services says these comparisons are inappropriate. The clinical trials at these hospitals are wider in scope and more complex. Fiona Stanley Hospital does about 200 clinical trials each year at all levels. KEMH only does three to four clinical trials each year at the lower levels and therefore cannot be compared with other tertiary hospital pharmacies.
- 56 It is common for a pharmacy like KEMH's pharmacy to receive clinical trial support from level P-2 positions instead of level P-3 positions.
- 57 Ms Wong's clinical trial duties have not changed much from 2010 to 2014. Ms Wong has not provided any evidence to show extra skill, accountability or responsibility.
- 58 Her reference to changes to clinical governance, reporting regimes and improved processes do not increase her position's work value because these apply to all pharmacists performing clinical trials. These changes are similar to technological or legislative changes referred to by Scott ASC (as she was then) in *The Minister for Health in his Incorporated Capacity under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals Formerly Comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers)* [2013] WAIRC 00836; (2013) 93 WAIG 1565.

Clinical ward duties

- 59 The Health Service says for the majority of the relevant period, Ms Wong was a senior level P-2 pharmacist working on the wards on a rotational basis.

Human resources duties

- 60 Mr Petrovski gave evidence that when Ms Kristensen (whose position was level P-3) retired, her human resources duties were temporarily allocated to level P-2 positions (including the review position) until the vacated level P-3 position was filled. This occurred when Mr Petrovski was appointed level P-3 and since this time, the review position has not been responsible for any human resources duties.
- 61 These duties were all level P-2 or lower and included the Drug Information Services line, being a Scientific Advisory Subcommittee representative, looking after the iPharmacy software and editing the newsletter.
- 62 The only level P-3 duties Ms Wong did were when she was acting level P-3, so the level P-3 duties were not ongoing. They were not permanently assigned to her. Ms Wong was paid a higher duties allowance for acting as a level P-3 so these duties should be excluded from the claim.
- 63 KEMH currently has enough level P-3 staff to take on all the level P-3 duties. There are no ongoing level P-3 roles for Ms Wong to do.

Drug Information Service

- 64 The parties used the terms 'Drug Information Service' and 'Medicines Information' interchangeably. The Health Service says being in charge of the Drug Information Service is not a dedicated position and is not permanently assigned. Ms Wong had this duty from 2013 to 2014 and worked on reports, statistics, quality assurance and data. Since then the duty has been allocated to a level P-2 and a level P-3.

Skills and responsibilities

- 65 Mr Petrovski gave evidence that as part of a skillset diversification strategy, all level P-1, P-2 and G-3 staff rotate duties, which are never assigned to a particular position. All level P-2 staff are expected to perform duties of other staff during absences or as rotations.
- 66 The level P-2 pharmacists always act under supervision and their duties can include coordinating the Dispensary and administering clinical trials. Ms Mukadam, who works in the other level P-2 position, has the same duties as those required in the review position.
- 67 The Scientific Advisory Subcommittee is part of the Women and Newborn Health Service Ethics Committee. Several level P-2 staff members from KEMH's pharmacy have been representatives on this subcommittee. Ms Wong was the representative from June 2011 to October 2013.
- 68 The Clinical Services Framework (CSF) defines the levels of clinical practice within KEMH. In this framework, KEMH is rated as a level five pharmacy and does not provide for specialised levels of clinic practice suggested by Ms Wong.

- 69 The specialised practice streams identified as requiring level P-3 positions start in a level six pharmacy under the CSF.
- 70 A CSF level five pharmacy, like the one at KEMH, only requires an advanced (not specialised) level of practice. This equates to level P-2 under the CSF.
- 71 The Health Service, supported by Mr Petrovski, says there is no evidence that Ms Wong is working at a higher level of clinical services expertise. It says that although she may be performing duties that were once performed by a level P-3 position, that does not mean the duties have level P-3 work value.
- 72 In any event, the Health Service says the Dispensary, Clinical Trials Service and Drug Information Service areas all involved level P-2 duties. They did not require 'specialist advice' as defined in the CSF, therefore the associated duties do not attract a 'specialist classification' (level P-3).
- 73 The clinical rating of the KEMH pharmacy and the complexity and volume of the clinical trials show that the KEMH pharmacy does not require a specialised level of clinical practice. Therefore, the Health Service says the knowledge and skills required for the review position are at level P-2.
- 74 The Health Service says level P-3 pharmacists develop policies and frameworks whereas level P-2 pharmacists assist in developing standard operating processes, procedures, training, statistics, key performance indicators and reports. Ms Wong did not contribute to policy development and the work she did was consistent with level P-2 work.

Flow-on

- 75 The Health Service says there would be significant flow-on effects if this claim were successful. All other level P-2 pharmacists who participate in job rotation could apply for reclassification, as they have the same duties. There would also be major disruption to the classification of all Health Professionals and others classified based on the level of clinical practice as defined in the CSF.

BIPERS

- 76 The Health Service stands by its BIPERS assessment, endorsed by the North Metropolitan Health Services Classification Review Committee. It is an indicative tool and it indicated a classification consistent with the work value assessment.

Consideration

- 77 From the parties' submissions and the evidence, it is clear Ms Wong has contributed to KEMH's pharmacy. She brings advanced clinical skills and dedication to the review position. However, for the review position to be reclassified there must be a significant net addition to work value.
- 78 I accept the review position coordinated the Dispensary, Clinical Trials Service and Drug Information Service at various times during the relevant period. While I do not find Ms Wong developed policies, I find that in the review position Ms Wong did many administrative tasks including data analysis, training and education, ensuring compliance with policies and procedures and handling patient enquiries.
- 79 Similarly, I accept that many of these duties were allocated to the review position on a temporary basis because of the retirement of a level P-3 pharmacist towards the start of the relevant period.
- 80 These duties increased the review position's work load. But increased work load is not the same as increased work value. Based on the evidence, I find the additional duties from the vacant level P-3 position in the areas of the Dispensary, Clinical Trials Service and Drug Information Service were assigned to various positions on a rotation basis and were generally not of the specialised clinical nature required for a position to be given a level P-3 classification. These additional duties done by Ms Wong, though they may have been demanding, were not at a higher level than the duties expected of a level P-2 pharmacist.
- 81 Ms Wong also took on human resources duties. However I accept they were only temporarily assigned to the review position and were handed back once the level P-3 position was filled.
- 82 Overall I am not persuaded that the review position is required to perform level P-3 duties and work at a P-3 level on an ongoing basis.
- 83 I find that during the relevant period, the review position oversaw the day to day operations of the Drug Information Service, Clinical Trials Service and Dispensary but, consistent with a level P-2 classification, ultimately the accountability and responsibility for these services was with the level P-3 pharmacists and the Chief Pharmacist. I consider that the administrative duties the review position did in these areas are consistent with the requirements of a level P-2 position under the CSF.
- 84 Ms Wong disputes the BIPERS score. As has been noted in many reclassification decisions, an assessment tool is a guide and not an absolute determinative tool: *Willers v Workcover* [2010] WAIRC 00183; (2010) 90 WAIG 333 [151]. The work value assessment done by the Health Service is consistent with classification principles. It found, as I have, that work value has not increased enough to justify reclassifying the position.
- 85 Ms Wong also says her employer used inappropriate comparators when considering her reclassification claim. While it is understandable that employees may focus on similarities to other positions, comparisons only become relevant after a significant increase in work value is established.
- 86 Ms Wong is a dedicated employee who is keen to contribute to the Health Service. But overall the work, skill, responsibility and conditions under which the work is performed have not significantly changed. There has not been a significant increase in work value to warrant reclassification.
- 87 The application must be dismissed.
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2018 WAIRC 00898

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANTONIA WONG	APPLICANT
	-v-	
	NORTH METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL	
DATE	FRIDAY, 14 DECEMBER 2018	
FILE NO	PSA 1 OF 2017	
CITATION NO.	2018 WAIRC 00898	

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr J Ross (as agent)

Order

HAVING heard from the applicant in person and Mr J Ross (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

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

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

[L.S.]
