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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Commission in Court Session—

[2019] WASCA 14

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	THE COMMISSIONER OF POLICE -v- FERGUSON [2019] WASCA 14
CORAM	:	BUSS J MURPHY J LE MIERE J
HEARD	:	2 MAY 2018
DELIVERED	:	25 JANUARY 2019
FILE NO/S	:	IAC 3 of 2017
BETWEEN	:	THE COMMISSIONER OF POLICE Appellant AND SHANE MICHAEL FERGUSON Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	P E SCOTT CC T EMMANUEL C D J MATTHEWS C
Citation	:	FERGUSON v THE COMMISSIONER OF POLICE [2017] WAIRC 00832
File Number	:	APPL 109 OF 2015

Catchwords:

Appeal from the Western Australian Industrial Relations Commission - Removal of police officer - Conduct likely to bring discredit on and unbecoming of a member of the Police Force - Loss of confidence by the Commissioner of Police in the police officer - Removal action process not suspended pending the police officer's criminal trial - Appeal against removal - Whether the appeal to this court is competent - Proper construction of s 33W of the *Police Act 1892* (WA) - Whether the Industrial Relations Commission erred in law in their construction of s 33W - Whether considerations of fairness override the operation of s 33W -

Whether the Commissioner of Police denied the police officer procedural fairness by not suspending the removal action process pending the police officer's criminal trial

Legislation:

Police Act 1892 (WA), s 5, s 8, s 33L, s 33P, s 33Q, s 33R, s 33T, s 33U, s 33W

Police Force Regulations 1979 (WA), r 6A02, r 6A03

Industrial Relations Act 1979 (WA), s 90

Result:

Appeal allowed

Declarations and orders made by the Industrial Relations Commission set aside

Order substituted that the respondent's appeal to the Industrial Relations Commission be dismissed

Category: A

Representation:

Counsel:

Appellant : Mr G T W Tannin SC & Mr N T L John

Respondent : Ms M Allars SC

Solicitors:

Appellant : State Solicitor's Office

Respondent : Tindall Gask Bentley Lawyers

Case(s) referred to in decision(s):

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27

Allen v Feather Products Pty Ltd (2008) 72 NSWLR 507

Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 26; (1949) 78 CLR 353

Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384

Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503

Critchley v The State of Western Australia [2013] WASCA 28

Electrolux Home Products Pty Ltd v The Australian Workers' Union [2004] HCA 40; (2004) 221 CLR 309

Ferguson v Commissioner of Police [2017] WAIRC 00832

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

Lee v The Queen [2014] HCA 20; (2014) 253 CLR 455

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd [2005] HCA 9; (2005) 222 CLR 194

Minister for Immigration and Border Protection v SZSSJ [2016] HCA 29; (2016) 259 CLR 180

Minister for Immigration and Border Protection v WZARH [2015] HCA 40; (2015) 256 CLR 326

Minister for Immigration and Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57

Momcilovic v The Queen [2011] HCA 34; (2011) 245 CLR 1

National Companies and Securities Commission v News Corporation Ltd [1984] HCA 29; (1984) 156 CLR 296

Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11; (2006) 228 CLR 529

Northern Territory v Collins [2008] HCA 49; (2008) 235 CLR 619

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31; (2012) 246 CLR 636

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252

Salemi v MacKellar [No 2] [1977] HCA 26; (1977) 137 CLR 396

Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664

Wasfi v Commonwealth of Australia [1998] FCA 639; (1998) 83 FCR 16

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BUSS J:

- 1 The appellant (the Commissioner) has appealed to this court against a decision of the Western Australian Industrial Relations Commission (IRC). My view of the case is different from Le Miere J's view. I would allow the appeal. My reasons are as follows.

The facts and circumstances culminating in the appeal to this court

- 2 On 18 July 2014, the respondent (Mr Ferguson), an off-duty police officer, was involved in a violent altercation.
- 3 On 21 August 2014, Mr Ferguson was charged with criminal offences arising from the incident, namely unlawfully doing grievous bodily harm to Joshua Prime and unlawfully assaulting Hayley Lloyd-Riley. Mr Ferguson pleaded not guilty to the charges.
- 4 On 27 August 2014, Acting Detective Inspector Jackson produced an interim internal investigation report into the incident. The report was prepared after Acting Detective Inspector Jackson had examined the witness statements and other evidence, including CCTV footage and a video and audio recording of the incident made by one of the witnesses on his mobile telephone.
- 5 On 7 November 2014, Inspector Dockery, in his capacity as the review officer appointed under regulation 6A02 of the *Police Force Regulations 1979 (WA)* (the Police Regulations), issued a Summary of Investigation in relation to the incident. See regulation 6A03. He recommended that the Commissioner consider taking removal action against Mr Ferguson under pt IIB of the *Police Act 1892 (WA)* (the Police Act) as a result of the incident. Inspector Dockery

made the recommendation on the ground that Mr Ferguson had acted in a manner that was likely to bring discredit on the Police Force or in a manner that was unbecoming of a member of the Police Force in that he had used excessive force when arresting Gavin Gero; he had assaulted Ms Lloyd-Riley; he had caused serious injury to Mr Prime; and he had been disorderly and assaulted Sam Self.

6 Prior to Mr Ferguson's trial on the charges, the Commissioner decided to take removal action against him under pt IIB of the Police Act.

7 By notice dated 27 November 2014 (the Commissioner's NOITR), the Commissioner informed Mr Ferguson that, 'in the absence of being persuaded otherwise', he intended to recommend to the Minister for Police that she approve Mr Ferguson's removal from the Police Force because the Commissioner had lost confidence in Mr Ferguson's suitability to continue as a member of the Police Force. The Commissioner said that his loss of confidence was based on the matters set out in the Summary of Investigation prepared by Inspector Dockery and, in particular, the four allegations contained in the Summary of Investigation. The Commissioner invited Mr Ferguson to respond to the Commissioner's loss of confidence by making a written submission within 21 days.

8 By letter dated 29 December 2014, Mr Ferguson's solicitor requested that the Commissioner suspend the removal action process until the charges against Mr Ferguson had been resolved in the District Court. The solicitor said it would be unfair to require Mr Ferguson to respond to the four allegations contained in Inspector Dockery's Summary of Investigation because it would affect Mr Ferguson's position and defence to the charges. In particular, the solicitor asserted that '[t]he pressure to respond to the allegations as part of [the] s 33L process may intrude upon [Mr Ferguson's] lawful privilege against self-incrimination'.

9 On an unknown date in December 2014, the Commissioner responded to the letter from Mr Ferguson's solicitor. The Commissioner stated that the criminal proceedings and the removal action process were separate processes and could be considered and resolved independently. He also stated that a criminal conviction or acquittal is not the sole determining factor in the removal action process and that 'what is more important is a comprehensive and fair managerial examination of all the facts in issue'. The Commissioner therefore refused to suspend the removal action process.

10 On 6 January 2015, Mr Ferguson responded by letter to the Commissioner's NOITR. However, it is apparent from the letter that Mr Ferguson did not wish to, and did not, respond to the four allegations contained in Inspector Dockery's Summary of Investigation or the witness statements about the incident because he did not wish to 'jeopardise the court process'. Mr Ferguson said that he could not 'properly respond to issues that relate directly to the criminal charges against [him] for the reasons' his solicitor had identified in the solicitor's letter dated 29 December 2014.

11 On 21 January 2015, Inspector Dockery issued an analysis of Mr Ferguson's response.

12 By notice dated 10 February 2015, the Commissioner informed Mr Ferguson that he had recommended that the Minister for Police approve Mr Ferguson's removal from office as a member of the Police Force on the basis that the Commissioner had lost confidence in Mr Ferguson's suitability to remain as a member of the Police Force, having regard to Mr Ferguson's integrity, performance and conduct.

13 In the notice the Commissioner stated:

Your subsequent response to the [Commissioner's NOITR] failed to provide sufficient detailed explanation or mitigation for your actions, (despite my attempt to reassure you that one process does not affect the other), so given your lack of detailed explanation or acknowledgement for your conduct therefore, it offers me no comfort that your actions were appropriate, justified or measured.

Other than your denial of unlawfully assaulting the alleged victims and claiming you acted in self-defence, your lack of detail explaining the significant amount of police and independent evidence against you, leaves me very little scope to even consider that your actions may have been justified.

On balance, the evidence clearly reveals (albeit a perhaps well-intentioned, yet misguided attempt by you to intervene in a traffic incident), your subsequent over-zealous response significantly escalated the matter and conduct as alleged. Your failure to specifically respond does not attempt to account for your actions, nor have you recognised that your actions were excessive and disproportionate and you have offered no contrition for your actions to address the serious questions that remain over your integrity, conduct and performance.

14 The Commissioner also stated in the notice dated 10 February 2015 that Mr Ferguson had demonstrated unprofessional conduct during the incident and Mr Ferguson's response to the Commissioner's NOITR did not justify or acknowledge that his actions were inappropriate. Mr Ferguson had failed to accept responsibility, had failed to show contrition for his actions, had exhibited poor judgment and had shown a lack of professionalism.

15 By letter dated 25 February 2015, the Commissioner informed Mr Ferguson that on 23 February 2015 the Minister for Police had approved Mr Ferguson's removal from the Police Force. The Commissioner removed Mr Ferguson from office with effect from 27 February 2015.

16 On 27 March 2015, Mr Ferguson appealed to the IRC under div 3 of pt IIB of the Police Act in relation to the Commissioner's decision to remove him. Mr Ferguson alleged that the Commissioner's decision to take removal action was harsh, oppressive or unfair.

17 When Mr Ferguson instituted his appeal to the IRC, the charges against him had not been determined. The IRC adjourned the appeal proceedings pending the determination of the charges. Mr Ferguson was tried in the District Court before a judge and jury and was acquitted on both charges. The appeal proceedings in the IRC resumed and, after a hearing, the IRC allowed Mr Ferguson's appeal.

18 The IRC declared that the Commissioner's decision to take removal action relating to Mr Ferguson was unfair. The IRC also declared that 'it is impracticable for it to be taken that Mr Ferguson's removal from office is and has always been of no effect'. The IRC ordered the Commissioner to pay Mr Ferguson the amount of \$34,776 as compensation for loss and injury caused by the removal.

19 At the hearing of the appeal to this court, counsel for the Commissioner said that the Commissioner had not paid any amount to Mr Ferguson pursuant to the IRC's order.

The Police Act: the relevant statutory framework

20 Section 5 of the Police Act provides, relevantly, that the Commissioner is charged and vested with the general control and management of the Police Force.

21 Section 8(1) of the Police Act provides, relevantly, that the Commissioner may, from time to time, as he shall think fit, subject to the approval of the Minister, remove any non-commissioned officer or constable. By s 8(2), the powers of removal referred to in s 8(1) can be exercised only if the Commissioner has complied with s 33L and that removal action has not been revoked under s 33N(1).

22 Part II of the Police Act is headed 'As to the regulations, duties and discipline of the Police Force' and comprises s 9 to s 33. Part II deals generally with the regulations, duties and discipline of the Police Force. Section 9 empowers the Commissioner, with the approval of the Minister, to frame rules, orders and regulations for the general government of the members of the Police Force, including 'the control, management, and discipline' of the Police Force.

23 Part IIB of the Police Act is headed 'Removal of members' and comprises s 33K to s 33Z.

24 Section 33L(1) provides that if the Commissioner does not have confidence in 'a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct', the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member's suitability to continue as a member. The term 'member' is defined in s 33K to mean, relevantly, a non-commissioned officer or a constable.

25 By s 33L(2), if a notice is given to a member under s 33L(1), the member may, before the expiration of the period of 21 days after the day on which the notice is given or such longer period as is allowed by the Commissioner, make written submissions to the Commissioner in respect of the grounds on which the Commissioner has lost confidence in the member's suitability to continue as a member.

26 Section 33L(3) provides that after the end of the period referred to in s 33L(2), the Commissioner shall decide whether or not to take 'removal action' (s 33L(3)(a)) and shall give the member written notice of the decision (s 33L(3)(b)). The term 'removal action' is defined in s 33K to mean, relevantly, a recommendation by the Commissioner that the Minister approve the removal of a non-commissioned officer or constable under s 8.

27 By s 33L(4), the Commissioner shall not decide to take removal action unless the Commissioner:

- (a) has taken into account any written submissions received from the member under s 33L(2) during the period referred to in that provision; and
- (b) still does not have confidence in the member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct.

28 Section 33L(5)(a) provides that if the Commissioner decides to take removal action, the notice under s 33L(3)(b) shall advise the member of the reasons for the decision.

29 If removal action has been taken in accordance with s 33L but removal from office has not resulted from it, s 33N empowers the Commissioner, by notice in writing to the Minister, to revoke the removal action.

30 Section 33P(1) provides that a member who has been removed from office, by or as a result of removal action taken in accordance with s 33L, may appeal to the IRC on the ground that 'the decision of the Commissioner ... to take removal action relating to the member was harsh, oppressive or unfair'. By s 33P(2), the appellant shall institute an appeal by notice to the Commissioner stating 'the reasons for the decision the subject of the appeal being harsh, oppressive or unfair' and the nature of the relief sought.

31 Section 33Q(1) provides that on the hearing of an appeal instituted under pt IIB, the IRC shall proceed as follows. First, it shall consider the Commissioner's reasons for deciding to take removal action. Secondly, it shall consider the case presented by the appellant as to why that decision was harsh, oppressive or unfair. Thirdly, it shall consider the case presented by the Commissioner in answer to the appellant's case. By s 33Q(2), the appellant has at all times the burden of establishing that the decision to take removal action was harsh, oppressive or unfair.

32 Section 33R makes provision for new evidence to be tendered to the IRC during the hearing of an appeal instituted under pt IIB, as follows:

- (1) New evidence shall not be tendered to [the IRC] during a hearing of an appeal instituted under this Part unless [the IRC] grants leave under subsection (2) or (3).
- (2) [The IRC] may grant the Commissioner of Police leave to tender new evidence if -
 - (a) the appellant consents; or
 - (b) it is satisfied that it is in the interests of justice to do so.
- (3) [The IRC] may grant the appellant leave to tender new evidence if -
 - (a) the Commissioner of Police consents; or
 - (b) [the IRC] is satisfied that -

- (i) the appellant is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information;
 - (ii) the new evidence might materially have affected the Commissioner of Police's decision to take removal action; or
 - (iii) it is in the interests of justice to do so.
- (4) In the exercise of its discretion under subsection (3) [the IRC] shall have regard to -
- (a) whether or not the appellant was aware of the substance of the new evidence; and
 - (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access,
- before his or her removal from office.
- (5) If the Commissioner of Police is given leave to tender new evidence under subsection (2), [the IRC] shall give the appellant a reasonable opportunity to consider the new evidence and the appellant may tender new evidence without the leave of [the IRC] under this section in response to the new evidence tendered by the Commissioner.
- (6) If the appellant is given leave to tender new evidence under subsection (3), [the IRC] shall give the Commissioner a reasonable opportunity to consider the new evidence.
- (7) If, having considered any new evidence, the Commissioner of Police revokes the removal action under section 33N(2), the Commissioner shall give [the IRC] notice of the revocation and the hearing of the appeal is discontinued when [the IRC] receives the notice.
- (8) If the Commissioner of Police does not give notice under subsection (7), the hearing of the appeal shall continue but the Commissioner of Police may -
- (a) reformulate his or her reasons for not having confidence in the appellant's suitability to continue as a member, having regard to the appellant's integrity, honesty, competence, performance or conduct; and
 - (b) tender new evidence without the leave of [the IRC] under this section in response to the new evidence tendered by the appellant.
- (9) Reasons reformulated under subsection (8)(a) may differ from, or be additional to, the reasons given to the appellant under section 33L(5)(a).
- (10) If the Commissioner of Police reformulates reasons under subsection (8)(a) -
- (a) the Commissioner shall give [the IRC] and the appellant notice in writing of the reasons before the resumption of the hearing of the appeal; and
 - (b) [the IRC] shall consider the reasons as if they had been reasons given to the appellant under section 33L(5)(a).
- (11) In this section -
- new evidence** means evidence other than evidence of -
- (a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;
 - (b) the notice given under section 33L(1);
 - (c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);
 - (d) the notice given under section 33L(3)(b); and
 - (e) a notification of the removal from office.

33 Section 33T is concerned with the adjournment of an appeal before the IRC if the appellant has been charged with an offence. It provides:

- (1) If an appellant has been -
 - (a) charged with an offence relating to any matter, act or omission that was taken into account by the Commissioner of Police in deciding that he or she did not have confidence in the appellant's suitability to continue as a member; and
 - (b) the charge has not been finally determined by a court or otherwise disposed of,
 the Commissioner or the appellant may apply to [the IRC] for an adjournment of the hearing of the appeal.
- (2) If an application is made by the Commissioner of Police, [the IRC] may adjourn the hearing of the appeal if it considers that it is in the interests of justice to do so.
- (3) If an application for an adjournment is made by the appellant, [the IRC] shall adjourn the hearing of the appeal.
- (4) An adjournment under subsection (3) shall be for such period not exceeding 12 months as is requested by the appellant.

- (5) If the charge is finally determined by a court or otherwise disposed of before the expiration of the period of the adjournment, the Commissioner of Police or the appellant may apply to [the IRC] for the hearing of the appeal to be resumed on a date specified by [the IRC].
- (6) Before the expiration of any period of adjournment under this section, the Commissioner of Police or the appellant may apply to [the IRC] for a further adjournment under this section and, if it is in the interests of justice to do so, [the IRC] may grant a further adjournment for a period specified by it.
- (7) Subsection (2) and (b) do not affect any other power of [the IRC] to grant an adjournment.

34 Section 33U applies if the IRC decides on an appeal that the Commissioner's decision to take removal action relating to the appellant was harsh, oppressive or unfair. Section 33U specifies the relief which the IRC may grant to a successful appellant.

35 Section 33W contains a declaration as follows:

To avoid doubt, it is declared that if a member -

- (a) has been charged with committing an offence; or
- (b) has been acquitted of an offence,

that charge, the existence of proceedings relating to that charge or the acquittal does not preclude the Commissioner of Police from taking any action under this Part in relation to any matter, act or omission relating to or being an element of the offence.

Extrinsic material relating to pt IIB of the Police Act

36 Part IIB of the Police Act was inserted by the *Police Amendment Act 2003* (WA). The relevant provisions of the amending Act came into operation on 27 August 2003.

37 The Clause Notes accompanying the Bill which upon enactment became the *Police Amendment Act 2003* (WA) said, in the context of the procedure set out in s 33L for the removal of a member, that the criteria in s 33L(1), to which the Commissioner must have regard in determining whether he or she has lost confidence in a member (that is, the member's integrity, honesty, competence, performance or conduct), were 'sufficiently broad to ensure that the Commissioner retain[ed] a wide managerial discretion to cause members to be removed where their suitability is in question'.

38 The Clause Notes made these comments about s 33L(2):

The member is required to be given a written notice of the grounds of the Commissioner's loss of confidence and at least 21 days to provide a written submission to the Commissioner in relation to the grounds on which the Commissioner has lost confidence. This affords the member procedural fairness by giving the member a reasonable opportunity to respond to the Commissioner's concerns. The time frame also reflects the intention that the process be expeditious due to its managerial nature.

39 The Clause Notes stated, in relation to a member's right of appeal to the IRC under div 3 of pt IIB, that:

While [the appeal process] has certain similarities to unfair dismissal claims for employees the process has been modified to reflect the special nature and importance of the Commissioner of Police's power of removal and the importance of ensuring that the highest standards and public confidence are maintained in the police force.

40 The Clause Notes contained the following comments on the declaration in s 33W:

[Section 33W] [c]larifies that the Commissioner is entitled to take action to remove a member irrespective of whether the member has been charged with a related criminal offence or has been acquitted of an offence. This recognises the managerial and summary nature of the Commissioner's decision and [the] importance that he or she be able to act promptly to remove unsuitable officers and not be required to await the outcome of any criminal proceedings.

41 The Minister for Police and Emergency Services made the following observations, in her second reading speech on the Bill, about the proposed amendments to s 8 and the proposed s 33W¹:

The Police Amendment Bill has a number of key components. It principally amends section 8 of the Police Act and introduces a new part IIB into the Act. It introduces a requirement that before a police officer can be removed from office under section 8 the commissioner must have lost confidence in the officer's suitability to continue as a police officer, having regard to the officer's integrity, honesty, competence, performance or conduct. These criteria are very broad. They ensure that the commissioner retains a wide managerial right to summarily remove unsuitable officers. This is consistent with the need identified by Justice Wood following the NSW police royal commission. In the absence of such authority, the community would understandably have grave concerns about the risk to the integrity of, and public confidence in, the Police [Force]. It is important that the commissioner not be impeded from efficiently and effectively removing those officers whose integrity, honesty, competence, performance or conduct he considers to be wanting. ...

...

Under the changes introduced by the Bill the process leading up to a police officer's removal has been streamlined and an officer will be removed from office before any appeal occurs. ...

¹ Western Australia, Parliamentary Debates, Legislative Assembly, 13 November 2002, 3072 - 3073.

...

The Bill also clarifies that the Commissioner of Police is entitled to take action to remove a police officer, irrespective of whether the officer has been charged with or acquitted of a criminal offence. This recognises the managerial nature of the commissioner's decision. It also reflects the importance that the commissioner be able to act promptly to remove unsuitable officers. The commissioner should not be required to await the outcome of any pending criminal proceedings.

The appeal to the IRC: Mr Ferguson's grounds of appeal

42 Mr Ferguson relied on three grounds of appeal in his appeal to the IRC. The grounds read:

1. The findings that [Mr Ferguson], on 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in [a] manner that is unbecoming of a member of the force cannot be a basis for the [Commissioner] to have lost confidence in [Mr Ferguson's] suitability to continue as a member of the WA Police [Force] having regard to his honesty, integrity and conduct because:
 - 1.1. the findings were entirely based on findings that [Mr Ferguson's] conduct as alleged constituted criminal offences contrary to the Criminal Code WA;
 - 1.2. as at the date of the Removal, [Mr Ferguson] had been charged with criminal offences arising from the same conduct and findings as alleged by the [Commissioner] (criminal charges);
 - 1.3. as at the date of the Removal, the criminal charges had not been dealt with by a court.
2. [Mr Ferguson] was denied a fair go all round because the [Commissioner]:
 - 2.1. unreasonably refused [Mr Ferguson's] request dated 29 December 2014 (via his legal representative) to suspend the loss of confidence process under section 33L of the Police Act 1892 (WA) (Act) until after the determination of the criminal charges;
 - 2.2. failed to take into account [Mr Ferguson's] right to claim the privilege against self-incrimination whilst the criminal charges remained undetermined by concluding that [Mr Ferguson's] failure to provide a detailed explanation for, or acknowledgment of, his conduct on 18 July 2014 left the [Commissioner] with very little scope to even consider that [Mr Ferguson's] actions may have been justified;
 - 2.3. denied [Mr Ferguson] the benefit of the privilege against self-incrimination;
 - 2.4. in denying [Mr Ferguson] the benefit of the privilege against self-incrimination, thereby:
 - 2.4.1. denied [Mr Ferguson] the right to be heard in response pursuant to section 33L(2) of the Act; and/or
 - 2.4.2. failed to properly consider whether [Mr Ferguson] had committed the conduct as alleged.
3. The [Commissioner] failed to properly take into account the effect of [Mr Ferguson's] written submissions in response to the [Commissioner's] Notice of Intention to Remove and therefore took removal action contrary to section 33L(4) of the Act.

The appeal to the IRC: the IRC's determination of Mr Ferguson's grounds of appeal

43 The IRC dismissed ground 1 of Mr Ferguson's appeal. Their reasoning was as follows:

- (a) The Commissioner is able 'to make findings about conduct, which might also constitute criminal conduct, as a step towards deciding whether to lose confidence in an officer, in the absence of a criminal court deciding the matter' [63].
- (b) The Commissioner may decide that 'an officer has conducted himself or herself in a way that might also constitute an offence under the criminal law, but which for the Commissioner's purposes of managing the officer, constitutes conduct that is likely to bring discredit on the Force and is unbecoming' [65].
- (c) Although 'the same conduct can constitute misconduct or conduct unbecoming, as well as being criminal conduct ... they can be separate matters' [67].
- (d) Mr Ferguson was not removed because he had broken the law, but because 'the Commissioner decided that his conduct, found on [a] lesser standard of proof, was likely to bring discredit on the Force or was unbecoming of a member of the Force' [69].
- (e) The Commissioner is not obliged 'to await the criminal trial to see if any additional information or evidence is led that might assist him in making his decision' [73]. However, that is 'a matter for the Commissioner in considering whether it is appropriate to proceed or not' [73]. The IRC elaborated:

In this case, the reason why Mr Ferguson wanted a delay was so that he would not compromise his rights at the criminal trial. It is up to the Commissioner whether or not he wished to delay so that he could either take account of the acquittal or conviction, or take account of any additional information or evidence that was led at the trial. In this case, he decided not to. That does not assist the appellant in this particular case.

Merely because the Commissioner decided [in other cases] not to proceed pending the outcome of the trials in those cases does not mean he is obliged to do so in other circumstances. In fact, s 33T of the *Police Act* envisages that the Commissioner may proceed on the [loss of confidence] process and act in the face of unresolved criminal charges [74] - [75].

44

The IRC upheld ground 2 of Mr Ferguson's appeal. Their reasoning was as follows:

- (a) The Commissioner refused to defer the loss of confidence process, saying that 'the two processes were unrelated' [81]. The Commissioner then made his decision. In his notice of 10 February 2015, the Commissioner told Mr Ferguson that his failure 'to specifically respond does not attempt to account for your actions, nor have you recognised that your actions were excessive and disproportionate and you have offered no contrition for your actions to address the serious questions that remain over your integrity, conduct and performance' [81].
- (b) The IRC stated that it was 'this exact opportunity, to respond by giving an account of his actions, either recognising that they were excessive and disproportionate or of justifying and explaining them, or of offering contrition, that Mr Ferguson was denied because he sought to preserve, and not potentially compromise, his rights in the criminal trial' [82]. Mr Ferguson's failure to address those things in his response to the Commissioner was 'understandable and reasonable in the circumstances' [83].
- (c) Mr Ferguson gave a very detailed account of the events in question at the managerial interview on 29 July 2014. The duration of the interview was 2 hours 9 minutes and the transcript of the interview occupied more than 36 closely typed pages. The interview occurred before Mr Ferguson was charged with the criminal offences and he was compelled to answer questions in the interview. The IRC was of the view that 'at the end of the process, Mr Ferguson did not have a proper opportunity to respond to all of the evidence and the analysis of it that was finally before the Commissioner' [92]. Those matters were 'ultimately ... put to him in [the Commissioner's NOITR]' [92].
- (d) The Commissioner's refusal to defer the loss of confidence process until the conclusion of the criminal trial 'cannot now be cured by the hearing' before the IRC [93].
- (e) It will never be known what Mr Ferguson would have said to the Commissioner had the loss of confidence process been deferred until the criminal trial had been concluded and the charges dismissed, and it will never be known what attitude the Commissioner would have taken to Mr Ferguson's submissions in those circumstances [98].
- (f) Mr Ferguson did not apply to the IRC, pursuant to s 33R of the *Police Act* (which makes provision for new evidence to be tendered to the IRC during the hearing of an appeal instituted under pt IIB), to tender new evidence. The IRC said that, consequently, they must consider 'the fairness of the Commissioner acting as he did, when he did'. The IRC added that, in their view, s 33R of the *Police Act* '[did] not cure the denial of procedural fairness in this case' [101].
- (g) The IRC recorded the Commissioner's argument that 'any officer, faced with a criminal charge arising from the same conduct as gave rise to the [loss of confidence] process, could rely on the right to silence to avoid responding until criminal charges were dealt with', but 's 33W [of the *Police Act*] says [the Commissioner] does not have to wait' [102]. The IRC did not accept the Commissioner's argument:

We are not convinced that this will apply in all cases. The circumstances of this case indicate that fairness overrides s 33W [102].
- (h) The IRC concluded:

It was unfair of the Commissioner to proceed with the Part IIB process over Mr Ferguson's request that it be stayed and to then rely upon what may very well have been a product of refusing the stay, namely a response that was not detailed and did not admit fault and express contrition.

In coming to this conclusion, we have also taken account of the provisions of s 33T and s 33W of the *Police Act*. These provisions merely say that the Commissioner is not precluded from proceeding with the [loss of confidence] process. It does not oblige him to proceed. In this particular case, it was unfair that the Commissioner did not grant Mr Ferguson's request for a deferral to ensure that his rights were not negated [103] - [104].

45

The IRC, in dealing with ground 3 of Mr Ferguson's appeal, stated:

This ground of appeal relates to the Commissioner's final decision which stated that Mr Ferguson's response did not explain or acknowledge his conduct, and gave no real response to the evidence against him. Yet the Commissioner's comments reflect that he did not accept and take account of what Mr Ferguson had said to him. That is, that he could not address those things without compromising his rights in the criminal trial.

We conclude that this ground is merely consequential on the finding that ground 2 is made out [106] - [107].

46

The IRC said in conclusion:

It is in the public interest that public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force is maintained. However, in the Commissioner deciding to take removal action, he must do so in a way that is fair. The denial of a real opportunity to respond to the detail of the evidence and, if appropriate, to express contrition in a meaningful way about particular

matters is a matter of unfairness. It was denied by the insistence on a response which might have compromised Mr Ferguson's rights.

We would uphold the appeal and find that, in the circumstances, the decision to take removal action was unfair [109] - [110].

The appeal to this court: s 33S of the Police Act

47 The effect of s 33S of the Police Act is that s 90(1) of the *Industrial Relations Act 1979* (WA) applies to a decision of the IRC, on an appeal under pt IIB of the Police Act, as if s 90(1) read:

Subject to this section, an appeal lies to the Court in the manner prescribed from a decision of [the IRC] under section 33U of the *Police Act 1892* –

- (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter; or
- (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
- (c) on the ground that the appellant has been denied the right to be heard, but upon no other ground.

The appeal to this court: the Commissioner's ground of appeal

48 The sole ground of appeal relied on by the Commissioner in his appeal to this court alleges that the IRC erred in law in their construction of s 33W of the Police Act in finding that 'considerations of fairness overrode the operation of section 33W' and consequently upholding ground 2 and ground 3 of Mr Ferguson's appeal.

The appeal to this court: the Commissioner's submissions

49 Counsel for the Commissioner submitted that the Commissioner is entitled under s 33W to take action under pt IIB of the Police Act to remove a police officer, notwithstanding that:

- (a) the officer has been charged with committing an offence or has been acquitted of an offence; and
- (b) the ground on which the Commissioner proposes to take action under pt IIB concerns a matter, act or omission relating to or being an element of the offence of which the officer has been charged (and the criminal proceedings in respect of the charge have not been completed and the outcome of the charge has not yet been determined) or has been acquitted.

50 It was submitted that it cannot be 'unfair', for the purposes of pt IIB, for the Commissioner to take removal action in respect of the police officer because s 33W declares that the Commissioner is not precluded from taking removal action in those circumstances.

51 Counsel noted that the Commissioner had never submitted to the IRC that he was obliged to take removal action against Mr Ferguson. The Commissioner's argument was that he was not precluded from proceeding with removal action.

52 Counsel accepted that a police officer charged with a criminal offence may be reticent to respond to a notice of intention to remove (NOITR) which alleges matters related to the offence with which he or she is charged. However, counsel contended that s 33R confers on the officer 'an avenue to revisit [the opportunity of responding to a NOITR] via "new evidence" once the [charge had been] determined'.

53 Counsel clarified in his oral submissions that the Commissioner's contention in the appeal was, in essence, that:

- (a) the IRC had misconstrued s 33W by finding that considerations of fairness overrode the operation of s 33W; and
- (b) the IRC had misconstrued s 33W 'by introducing into [s 33W] an overriding notion of fairness' that is not expressly or impliedly embodied in the text of s 33W or pt IIB as a whole (appeal ts 3).

54 Counsel argued that, by virtue of s 33W, properly construed, the Commissioner may take removal action against a member summarily in the circumstances mentioned in s 33W. If a member is removed from office by or as a result of removal action, the member may challenge the removal action before the IRC on the basis that the removal action was harsh, oppressive or unfair, but not because the Commissioner proceeded in accordance with the declaration in s 33W.

The appeal to this court: Mr Ferguson's submissions

55 Counsel for Mr Ferguson submitted that this court's jurisdiction under s 90(1)(b) of the *Industrial Relations Act*, as applied and modified by s 33S of the Police Act, was not enlivened in the present case because the Commissioner's sole ground of appeal and the submissions made in support of the ground did not identify, relevantly, an error by the IRC in their construction of s 33W of the Police Act.

56 It was submitted that the IRC referred to s 33T and s 33W of the Police Act and to common law principles. After a detailed consideration of the common law principles relating to procedural fairness, the IRC referred to s 33W for the purpose of addressing the Commissioner's submission that 's 33W says he does not have to wait'. The IRC concluded that in the present case the Commissioner's refusal of a suspension or an adjournment involved a denial of procedural fairness. However, in its reasons, the IRC did not construe s 33W in order to determine whether the observance of the principles of procedural fairness was an implied requirement in the removal action process. There was no occasion for the IRC to examine s 33W to determine whether that provision expressly and unambiguously excluded procedural fairness. The Commissioner did not raise that issue. In any event, the language of s 33W contains no suggestion of such a legislative intention. Counsel contended that the implication of procedural fairness in the removal action process was 'a matter of common law principle'.

57 Counsel argued that the IRC had accepted that s 33W empowers the Commissioner to take removal action even where criminal proceedings are pending and does not impose upon the Commissioner a duty to await the outcome of those criminal proceedings. According to counsel, the Commissioner's real complaint in the present case is not about the IRC's construction of s 33W, but rather about the IRC's conclusion as to what procedural fairness required in the circumstances of the present case. Counsel argued that the IRC stated that it was 'the circumstances of the case' which indicated that Mr Ferguson's application for a suspension or an adjournment should have been granted. The IRC did not state a rule for all cases. The IRC's conclusion as to the content of procedural fairness in Mr Ferguson's case did not involve a question as to the proper construction of s 33W.

58 Counsel then made submissions on the premise that, contrary to her contention, the appeal to this court is competent and the IRC's conclusion as to the content of procedural fairness in Mr Ferguson's case did involve the proper construction of s 33W.

59 It was submitted that it was open to the IRC to conclude that the Commissioner's decision to take removal action in relation to Mr Ferguson was 'unfair', within the expression 'harsh, oppressive or unfair' in s 33P(1). Counsel contended that the word 'unfair' has 'a broader compass than a denial of procedural fairness at common law, but includes a denial of procedural fairness'. The IRC was correct to conclude that the Commissioner had denied Mr Ferguson procedural fairness. No provision of the Police Act or the Police Regulations excludes procedural fairness in the removal action process. Also, the common law privilege against self-incrimination is not abrogated by the Police Act or the Police Regulations.

60 Counsel argued that the Commissioner has an implied discretionary power to suspend or adjourn the removal action process. Although, in the present case, the Commissioner invited Mr Ferguson to make a submission under s 33L(2), the Commissioner failed to afford him the required content of procedural fairness. Mr Ferguson was not afforded a real or meaningful opportunity to make written submissions. The pending criminal proceedings concerned the same conduct and incident that was the subject of the removal action process. Mr Ferguson had no real chance to present his case on a range of matters, without waiving his right to silence in the criminal proceedings. By refusing Mr Ferguson a suspension or an adjournment until he could make written submissions unimpeded by the pending criminal trial, the Commissioner denied Mr Ferguson procedural fairness. The IRC's statement in its reasons that 'the circumstances of this case indicate that fairness overrides s 33W' was merely a shorthand way of expressing the proposition that s 33W does not exclude procedural fairness, which is implied in the removal action process. Procedural fairness supplements the procedure in the Police Act and the Police Regulations in relation to the removal action process and that supplementation is done without departure from the requirements of s 33W.

The appeal to this court: the issues for decision

61 The issues for decision raised by the ground of appeal and the submissions of the parties are these. First, is the appeal to this court competent? Secondly, if the appeal is competent, did the IRC make an error in the construction or interpretation of s 33W of the Police Act? Thirdly, if the appeal is competent, was it open to the IRC to conclude that the Commissioner's decision to take removal action in relation to Mr Ferguson was 'unfair', within the expression 'harsh, oppressive or unfair' in s 33P(1), in that the Commissioner denied Mr Ferguson procedural fairness by refusing to adjourn the removal action process? I will address each of those issues in turn.

The appeal to this court: is the appeal competent?

62 Section 90(1)(b) of the *Industrial Relations Act*, as applied and modified by s 33S of the Police Act, provides, relevantly, that subject to s 90, an appeal lies to this court from a decision of the IRC under s 33U of the Police Act on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act in the course of making the decision appealed against.

63 In the present case, the decision appealed against is the IRC's decision under s 33U of the Police Act that the Commissioner's decision to take removal action in relation to Mr Ferguson was 'unfair', within the expression 'harsh, oppressive or unfair' in s 33P(1).

64 Section 33W of the Police Act declares, to avoid doubt, relevantly, that if a member has been charged with committing an offence, that charge or the existence of proceedings relating to that charge does not preclude the Commissioner from taking any action under pt IIB in relation to any matter, act or omission relating to or being an element of the offence.

65 The critical passages in the IRC's reasons, for present purposes, read:

The Commissioner argues that any officer, faced with a criminal charge arising from the same conduct as gave rise to the [removal action] process, could rely on the right to silence to avoid responding until criminal charges were dealt with, and that s 33W says he does not have to wait. We are not convinced that this will apply in all cases. The circumstances of this case indicate that fairness overrides s 33W.

It was unfair of the Commissioner to proceed with the Part IIB process over Mr Ferguson's request that it be stayed and to then rely upon what may very well have been a product of refusing the stay, namely a response that was not detailed and did not admit fault and express contrition.

In coming to this conclusion, we have also taken account of the provisions of s 33T and s 33W of the Police Act. These provisions merely say that the Commissioner is not precluded from proceeding with the [removal action] process. It does not oblige him to proceed. In this particular case, it was unfair that the Commissioner did not grant Mr Ferguson's request for a deferral to ensure that his rights were not negated [102] - [104]. (emphasis omitted)

66 I am satisfied that, on a fair reading of those critical passages as a whole, the IRC construed s 33W in the course of making their decision that the Commissioner's decision to take removal action in relation to Mr Ferguson was 'unfair'.

67 The IRC held, in effect, that the declaration in s 33W (namely, that if a member has been charged with committing an offence, that charge or the existence of proceedings relating to that charge does not preclude the Commissioner from taking removal action under pt IIB in relation to any matter, act or omission relating to or being an element of the offence) is subject to an implied limitation; in particular, that the Commissioner will be precluded from commencing or continuing with removal action under pt IIB if the commencement or continuation of that action is, in all of the circumstances of the case, 'unfair' to the member.

68 In my opinion, the ground of appeal, as developed by counsel for the Commissioner in his submissions at the hearing of the appeal, asserts, in effect, that the IRC's decision under s 33U is erroneous in law in that the IRC made an error in the construction of s 33W in the course of making that decision; in particular, the IRC impermissibly read into s 33W an unexpressed condition, based on fairness, in relation to the operation of the declaration. The ground of appeal, as developed, is therefore within s 90(1) of the *Industrial Relations Act* as applied and modified by s 33S of the *Police Act*. The appeal to this court is competent.

The appeal to this court: did the IRC make an error in the construction or interpretation of s 33W of the Police Act?

69 I will begin my consideration of whether the IRC made an error in the construction or interpretation of s 33W of the *Police Act* by summarising the relevant principles of statutory construction.

70 In *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd*,² French CJ, Hayne, Crennan, Bell and Gageler JJ observed:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39].

See also *Saeed v Minister for Immigration and Citizenship*;³ *Thiess v Collector of Customs*.⁴

71 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the existing state of the law, the history of the legislative scheme and the general purpose and policy of the provision (in particular, the mischief it is seeking to remedy). See *CIC Insurance Ltd v Bankstown Football Club Ltd*;⁵ *Project Blue Sky Inc v Australian Broadcasting Authority*;⁶ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.⁷

72 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross*.⁸ The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*.⁹

73 As Crennan J noted in *Northern Territory v Collins*,¹⁰ [s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (*Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2006] HCA 11), not least because such material may confuse what was "intended ... with the effect of the language which in fact has been employed" (*Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC) [99]. That statement of principle applies to extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act 1984* (WA). In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount. See *Nominal Defendant v GLG Australia Pty Ltd*.¹¹

74 I will now summarise the relevant law concerning the rules of procedural fairness.

² *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503.

³ *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 [31] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ).

⁴ *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 [22] (French CJ, Hayne, Kiefel, Gageler & Keane JJ).

⁵ *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).

⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ).

⁷ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan & Kiefel JJ).

⁸ *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [26] (French CJ & Hayne J).

⁹ *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

¹⁰ *Northern Territory v Collins* [2008] HCA 49; (2008) 235 CLR 619.

¹¹ *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529 [22] (Gleeson CJ, Gummow, Hayne & Heydon JJ).

75 The implication of the rules of procedural fairness in a statute is arrived at by a process of construction. In *Saeed*, French CJ, Gummow, Hayne, Crennan and Kiefel JJ said the implication proceeded upon 'the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the kind referred to in *Annetts v McCann (Salemi v MacKellar [No 2])* (1977) 137 CLR 396 at 401 per Barwick CJ, at 451 per Jacobs J; [1977] HCA 26' [12]. This assumption is derived from the principle of legality referred to by Gleeson CJ in *Electrolux Home Products Pty Ltd v The Australian Workers' Union*.¹² See also *Momcilovic v The Queen*.¹³

76 The principles and presumptions of statutory construction, to the extent they are not qualified or displaced by an applicable interpretation statute, are part of the common law of Australia. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,¹⁴ Gummow, Hayne, Crennan and Bell JJ explained:

It is in this sense that one may state that 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100 - 101 [39] - [41]). If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive [97].

77 When deciding whether the exercise of a statutory power is conditioned by the rules of procedural fairness, it is necessary to take into account the practical context in which the decision-maker must consider whether to exercise the power. See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.¹⁵

78 Procedural fairness is concerned with procedures rather than with outcomes. See *Minister for Immigration and Border Protection v WZARH*.¹⁶

79 Brennan J emphasised in *Kioa v West*¹⁷ that the presumption that the rules of procedural fairness condition the exercise of a statutory power applies to 'any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public' (619). However, his Honour then qualified that statement as follows:

Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is to be exercised. Thus in *Pearlberg v Varty* ([1972] 1 WLR 534; [1972] 2 All ER 6), when a commissioner gave leave ex parte to raise an assessment to tax, the taxpayer challenged the decision although his legal rights were unaffected by it. The decision was held to be valid. The text of the statute, the kind of limited interest that was affected and the statutory provision allowing the taxpayer a full opportunity to challenge his liability to tax at a later stage displaced the presumption (619 - 620). (emphasis added)

80 When it is asserted that the rules of procedural fairness do not condition the exercise of a statutory power, the question is whether the legislation, on its proper construction, displays a legislative intention to exclude the rules. See *Re Refugee Review Tribunal; Ex parte Aala*;¹⁸ *Ex parte Miah* [53], [90], [126] - [127].

81 As Merkel J noted in *Wasfi v Commonwealth of Australia*,¹⁹ a legislative intention to exclude the rules of procedural fairness may arise where compliance with the rules in respect of the exercise of a statutory power will 'necessarily frustrate or be inconsistent with the exercise of the power' (28).

82 *Plaintiff S10/2011* was concerned with the proper construction of cognate provisions of the *Migration Act 1958* (Cth) which conferred upon the Minister powers (but not duties) that were exercisable by the Minister personally and, if exercised, those powers dispensed with requirements of the Act. The plaintiffs argued that in deciding whether to consider the exercise of the relevant powers and, also, in deciding whether to exercise those powers, the Minister was bound to observe the rules of procedural fairness to any moving party. The High Court held that the dispensing provisions of the Act were not conditioned on observance of the rules of procedural fairness.

83 Gummow, Hayne, Crennan and Bell JJ said in *Plaintiff S10/2011* that the question for decision was 'whether or not, upon their proper construction, the dispensing provisions with which these cases are concerned are conditioned upon observance of the requirements of natural justice in favour of persons in the position of the plaintiffs' [98]. After examining the dispensing provisions in the context of the Act as a whole, their Honours reasoned:

Upon their proper construction and in their application to the present cases, the dispensing provisions are not conditioned on observance of the principles of procedural fairness. In particular, there was no requirement to provide to the plaintiffs the opportunities to be heard which they assert in their

¹² *Electrolux Home Products Pty Ltd v The Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 [21].

¹³ *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 [43] (French CJ).

¹⁴ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636.

¹⁵ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57 [31] (Gleeson CJ & Hayne J).

¹⁶ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 [55] (Gageler & Gordon JJ).

¹⁷ *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550.

¹⁸ *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 [41] (Gaudron & Gummow JJ).

¹⁹ *Wasfi v Commonwealth of Australia* [1998] FCA 639; (1998) 83 FCR 16.

submissions. The use in the provisions of the Act in question here of language emphatic both of the distinctive nature of the powers conferred upon the Minister (as personal, non-compellable, 'public interest' powers), and of the availability of access to the exercise of those powers only to persons who have sought or could have sought, but have not established their right to, a visa is of determinative significance. It reveals the 'necessary intendment' referred to in the *Offshore Processing Case* ((2010) 243 CLR 319 at 352 [74]) that the provisions are not attended by a requirement for the observance of procedural fairness [100].

84 If observance of the rules of procedural fairness is a condition of the grant of a statutory power, and governs the exercise of the power, a failure to comply with the rules will render any decision made, in purported exercise of the power, invalid. See *Salemi v MacKellar [No 2]*;²⁰ *Saeed* [13].

85 The law of procedural fairness is, of course, concerned not only with whether a decision-maker is obliged to accord procedural fairness, but also with what is necessary, in the circumstances of the particular case, for compliance with an obligation to accord procedural fairness and with whether, in the circumstances of the particular case, any such obligation has been met.

86 In *Minister for Immigration and Border Protection v SZSSJ*,²¹ French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ made these comments as to what is generally required by procedural fairness in the context of the exercise of a statutory power to conduct an inquiry:

[C]ompliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached, and jurisdictional error thereby occurs, if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a 'practical injustice' (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; [2003] HCA 6 as explained in *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25 at 33 [36], 36 [57]; 326 ALR 1 at 9, 12-13; [2015] HCA 40).

Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32] quoting *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95-96 [14]-[17]; [2005] HCA 72 explaining *Kioa v West* (1985) 159 CLR 550 at 629; [1985] HCA 81). Ordinarily, there is no requirement that the person be notified of information which is in the possession of, or accessible to, the repository but which the repository has chosen not to take into account at all in the conduct of the inquiry [82] - [83].

87 The content of a decision-maker's obligation to accord procedural fairness will be informed by the statutory context; in particular, the terms of the statute which creates the decision-maker's function, the nature of the function and the administrative framework in which the statute requires the function to be performed. See *National Companies and Securities Commission v News Corporation Ltd*.²² The statute, on its proper construction, may confine or limit the content of the rules of procedural fairness.

88 I turn now to the proper construction of s 33W of the Police Act and whether the IRC made an error in the construction or interpretation of s 33W.

89 As I have mentioned, s 33W declares, *to avoid doubt*, that if a member of the Police Force has been charged with committing an offence, that charge or the existence of proceedings relating to that charge *does not preclude* the Commissioner from *taking any action* under pt IIB in relation to any matter, act or omission relating to or being an element of the offence.

90 The apparent doubt, to which the declaration in s 33W is directed, is whether, relevantly, the Commissioner may commence or continue with removal action under pt IIB in relation to a member of the Police Force in the circumstances specified in s 33W.

91 The word 'preclude', within the expression 'does not preclude' in s 33W, connotes 'prevent'. The words 'taking any action' in s 33W include action which continues removal action. The effect of the phrase 'does not preclude the Commissioner of Police from taking any action' in s 33W, in the context of pt IIB as a whole, is that the Commissioner is not prevented from commencing or continuing with removal action under pt IIB in relation to a member of the Police Force in the circumstances specified in s 33W.

92 In the present case, the declaration in s 33W was relevant because Mr Ferguson had been charged with committing offences and the grounds on which the Commissioner had lost confidence in his suitability to continue as a

²⁰ *Salemi v MacKellar [No 2]* [1977] HCA 26; (1977) 137 CLR 396, 401 (Barwick CJ).

²¹ *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; (2016) 259 CLR 180.

²² *National Companies and Securities Commission v News Corporation Ltd* [1984] HCA 29; (1984) 156 CLR 296, 326 (Brennan J).

member of the Police Force, within s 33L(1), included matters, acts or omissions relating to or being elements of the alleged offences.

93 A corollary of the declaration in s 33W, properly construed, and its relevance in the present case, is that the Commissioner was entitled to commence and continue with removal action under pt IIB in relation to Mr Ferguson, notwithstanding that Mr Ferguson had been charged with committing offences and notwithstanding that the grounds on which the Commissioner had lost confidence in his suitability to continue as a member of the Police Force, within s 33L(1), included matters, acts or omissions relating to or being elements of the alleged offences.

94 The Commissioner has an express power under s 33L(2) to grant a member of the Police Force a longer period than 21 days after the date on which the NOITR is given to make written submissions to the Commissioner in respect of the grounds on which the Commissioner has lost confidence in the member's suitability to continue as a member. The effect of granting an extension of time under s 33L(2) is to suspend the removal action process for the duration of the extension.

95 I accept that the procedure for the removal action process as stipulated in pt IIB is, in general, supplemented by the rules of procedural fairness.

96 However, I am of the opinion, for the following reasons, that:

- (a) the Commissioner was not obliged, upon receipt of the request from Mr Ferguson's solicitor for a suspension of the removal action process, to grant an extension of time, pursuant to s 33L(2), to enable Mr Ferguson to respond to the Commissioner's NOITR after the charges had been resolved in the District Court;
- (b) the content of the rules of procedural fairness did not oblige the Commissioner to grant Mr Ferguson a suspension or an adjournment of the removal action process until after the charges had been resolved; and
- (c) the Commissioner did not act unfairly in connection with the removal action process merely by refusing to extend time pursuant to s 33L(2) or merely by refusing to suspend or adjourn the process because Mr Ferguson did not wish to respond in full to the Commissioner's NOITR until after the charges had been resolved.

97 First, the purpose or object of the removal action process, as revealed by the statutory text, is to enable the Commissioner, with the Minister's approval, promptly to remove a member from the Police Force (in particular, a non-commissioned officer or constable) if the Commissioner has lost confidence in the member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct. Parliament has conferred on the Commissioner a broad power, of a managerial nature, summarily to remove members in whose suitability the Commissioner has lost confidence.

98 Secondly, s 33L of the Police Act does not expressly state the matters which the Commissioner is entitled or obliged to take into account in deciding whether to grant an extension of time under s 33L(2) and, if so, the length of the extension. The factors which the Commissioner is entitled or obliged to take into account are to be ascertained by implication from the subject matter, scope and purpose of the provisions of pt IIB in the context of the Police Act as a whole. See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.²³ I am satisfied that the Commissioner, in deciding whether to grant an extension of time and, if so, the length of the extension, is entitled to take into account the strong public interest in the Commissioner maintaining the faith of the community in the integrity of the Police Force by removing promptly a member in whom he or she has lost confidence and the declaration in s 33W. The Commissioner is not confined or limited in deciding whether to grant an extension of time and, if so, the length of the extension, to a consideration of any prejudice to the member if the extension or the length of the extension sought by the member were to be refused. The Commissioner is not bound to grant the member an extension of time until after the determination of any pending criminal proceedings against the member if the grounds on which the Commissioner has lost confidence in the member include matters, acts or omissions relating to or being elements of the alleged offences.

99 Thirdly, s 33T of the Police Act contains extensive provisions with respect to the adjournment of an appeal before the IRC if the appellant has been charged with an offence relating to any matter, act or omission that was taken into account by the Commissioner in deciding that he or she did not have confidence in the appellant's suitability to continue as a member of the Police Force and the charge has not been finally determined by a court or otherwise disposed of. In those circumstances, an application for an adjournment may be made to the IRC by the Commissioner or the appellant. If the application for an adjournment is made by the appellant, the IRC must adjourn the hearing of the appeal for such period, not exceeding 12 months, as is requested by the appellant. Before the expiration of any such period of adjournment, the appellant may apply to the IRC for a further adjournment under s 33T and, if it is in the interests of justice to do so, the IRC may grant a further adjournment for a period specified by it. By contrast, consistently with the summary and managerial character of the Commissioner's broad power to remove members in whose suitability the Commissioner has lost confidence, pt IIB contains no provisions with respect to an adjournment of a removal action process before the Commissioner (apart from the express power under s 33L(2) to grant an extension of time to make written submissions).

100 Fourthly, as I have mentioned, s 33W of the Police Act, properly construed, entitles the Commissioner to commence and continue with removal action under pt IIB in relation to a member, notwithstanding that the member has been charged with committing an offence and notwithstanding that the grounds on which the Commissioner has lost confidence in the member's suitability to continue as a member of the Police Force, within s 33L(1), include matters, acts or omissions relating to or being elements of the alleged offence. Section 33W recognises, in effect, the summary and managerial character of the Commissioner's decision, in the context of the removal action process, and the importance of

²³ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 40 (Mason J).

the Commissioner being able to act promptly to remove a member in whom the Commissioner has lost confidence without awaiting the outcome of any pending criminal proceedings.

101 Fifthly, s 33W does not contain, by implication, an unexpressed condition, based on fairness, in relation to the operation of the declaration. I accept that the Commissioner is entitled, but not bound, to commence and continue with removal action under pt IIB in relation to a member, notwithstanding the existence of pending criminal proceedings against the member. However, the Commissioner's entitlement to commence and continue with removal action in those circumstances is not confined or limited by a requirement that the Commissioner must suspend or adjourn the process at the request of the member because the member asserts that he or she does not wish to respond to the NOITR from the Commissioner, either fully or at all, until after the determination of the pending criminal proceedings (including because the member asserts that he or she does not want to make any admissions against interest which may be used against him or her in the pending criminal proceedings or otherwise prejudice his or her defence of the charge).

102 Sixthly, any admissions against interest made by a member in the context of responding to a NOITR issued by the Commissioner would not be admissible in evidence against the member in the pending criminal proceedings. The trial judge would be bound to exclude the admissions against interest in accordance with the definite rule that a confessional statement cannot be voluntary if it is induced by a fear of prejudice or a hope of advantage exercised or held out by a person in authority. See *Critchley v The State of Western Australia*.²⁴

103 Seventhly, if the Commissioner were to be impliedly obliged by the rules of procedural fairness to grant a member a suspension or an adjournment of the removal action process until after the completion of the member's pending criminal trial, where the member has been charged with an offence relating to any matter, act or omission that was taken into account by the Commissioner in deciding that he or she did not have confidence in the member's suitability to continue as a member of the Police Force, that obligation would be inconsistent with and undermine the express scheme of pt IIB, as revealed by the statutory text. In particular, the implication of the obligation would be inconsistent with and undermine the summary and managerial character of the Commissioner's decision-making, in the context of the removal action process, and the importance of the Commissioner being able to act promptly to remove a member in whom he or she has lost confidence. As I have mentioned, the removal of a member in whom the Commissioner has lost confidence involves a managerial decision. It does not involve a finding that the member is guilty of an offence. The express scheme of pt IIB, as revealed by the statutory text, reflects the strong public interest in the Commissioner maintaining the faith of the community in the integrity of the Police Force by removing promptly a member in whom he or she has lost confidence.

104 Eighthly, the Police Act, on its proper construction, evinces a legislative intention that the Commissioner is not obliged, by the content of the rules of procedural fairness in the context of the procedure for the removal action process as stipulated in pt IIB, to suspend or adjourn the process, at the request of the member, because the member asserts that he or she does not wish to respond to the NOITR from the Commissioner, either fully or at all, until after the determination of the pending criminal proceedings (including because the member asserts that he or she does not want to make any admissions against interest which may be used against him or her in the pending criminal proceedings or otherwise prejudice his or her defence of the charge).

105 Ninthly, the extrinsic material to which I have referred (namely, the Clause Notes accompanying the Bill which upon enactment became the *Police Amendment Act 2003* and the Minister's second reading speech on the Bill) are capable of assisting in ascertaining the meaning of s 33W and confirm that the meaning of s 33W is the ordinary meaning conveyed by the text of the provision, as I have construed it, taking into account its context in the Police Act and the purpose or object underlying pt IIB.

106 Tenthly, if (as in my opinion was the case) the Commissioner was not obliged to grant an extension of time, pursuant to s 33L(2), to enable Mr Ferguson to respond to the Commissioner's NOITR after the charges had been resolved in the District Court and if (as in my opinion was the case) the content of the rules of procedural fairness did not oblige the Commissioner to grant Mr Ferguson the suspension or adjournment he sought, the Commissioner did not act unfairly in connection with the removal action process solely by reason of his refusal to grant an extension of time or to grant the suspension or adjournment.

107 Eleventhly, the express scheme of pt IIB, as revealed by the statutory text, is that the rights and interests of a member, who alleges that the Commissioner's removal action relating to the member was harsh, oppressive or unfair, are protected by the appeal process under s 33P. The substantive and procedural character of the appeal process before the IRC is fundamentally different from the substantive and procedural character of the removal action process before the Commissioner.

108 As I have mentioned, it is apparent from [101] - [104] of the IRC's reasons that the IRC held, in effect, that the declaration in s 33W is subject to an implied limitation; in particular, that the Commissioner will be precluded from commencing or continuing with removal action under pt IIB if the commencement or continuation of that action is, in all the circumstances of the case, 'unfair' to the member.

109 I am satisfied, for the reasons I have given at [97] - [107] above, that the reasoning and conclusion of the IRC on this issue was erroneous. The IRC's reasoning and conclusion reveal that it misconstrued s 33W by impermissibly reading into s 33W an unexpressed condition, based on fairness, in relation to the operation of the declaration.

The appeal to this court: was it open to the IRC to conclude that the Commissioner's decision to take removal action in relation to Mr Ferguson was 'unfair', within the expression 'harsh, oppressive or unfair' in s 33P(1), in that the Commissioner denied Mr Ferguson procedural fairness by refusing to adjourn the removal action process?

²⁴ *Critchley v The State of Western Australia* [2013] WASCA 28 [48] - [55] (Buss JA; Martin CJ and Mazza JA agreeing).

110 I am of the opinion, for the reasons I have given at [97] - [107] above, that it was not open to the IRC to conclude that the Commissioner's decision to take removal action in relation to Mr Ferguson was 'unfair', within the expression 'harsh, oppressive or unfair' in s 33P(1), in that the Commissioner denied Mr Ferguson procedural fairness by refusing to adjourn the removal action process. In particular, the Commissioner did not act unfairly in connection with the removal action process solely by reason of his refusal to grant an extension of time or to grant an adjournment.

111 I am satisfied that, in the context of the statutory framework governing the removal action process, the Commissioner afforded Mr Ferguson a reasonable opportunity to be heard in relation to the Commissioner's loss of confidence in Mr Ferguson's suitability to continue as a member of the Police Force and the proposed removal action process. Mr Ferguson chose not to address in his response to the Commissioner's NOITR the four allegations contained in the Summary of Investigation which formed the foundation of the Commissioner's loss of confidence. Mr Ferguson was not entitled to a suspension or an adjournment of the removal action process until the criminal charges against him had been finally determined in the District Court or otherwise disposed of. Mr Ferguson did not rely on any other facts or circumstances in support of his request that the Commissioner suspend the removal action process. The Commissioner's decision to continue with the removal action process in relation to Mr Ferguson was not in the circumstances unfair.

The appeal to this court: the outcome of the appeal and the appropriate orders

112 The ground of appeal, as developed by counsel for the Commissioner in his submissions at the hearing of the appeal, has been made out.

113 I would allow the appeal.

114 Section 90(3) of the *Industrial Relations Act*, as applied by s 33S of the *Police Act*, provides, relevantly, that on the hearing of an appeal under s 90(1), this court may confirm, reverse, vary, amend, rescind, set aside or quash the decision the subject of the appeal and may remit the matter to the IRC for further hearing and determination according to law.

115 As I have mentioned, the IRC dismissed ground 1 of Mr Ferguson's appeal, upheld ground 2 of his appeal and concluded that ground 3 was merely consequential on the IRC's finding that ground 2 had been made out. The IRC decided, in essence, that ground 2 should be upheld because the Commissioner had acted unfairly in proceeding with the removal action process 'over Mr Ferguson's request that it be stayed' and had then relied upon 'what may very well have been a product of refusing the stay, namely a response that was not detailed and did not admit fault and express contrition' [103].

116 As I have mentioned, Mr Ferguson did not seek leave from the IRC to tender new evidence in the appeal pursuant to s 33R of the *Police Act*. Also, Mr Ferguson did not assert before the IRC that the Commissioner's decision to take removal action relating to him was harsh, oppressive or unfair, within s 33P(1), on some other basis than the Commissioner's refusal to suspend the process until after the charges had been resolved in the District Court.

117 In those circumstances, the appropriate orders for this court to make, pursuant to s 90(3) of the *Industrial Relations Act*, are to set aside the declarations and orders made by the IRC and to substitute an order that Mr Ferguson's appeal to the IRC be dismissed. It is not appropriate for the matter to be remitted to the IRC for further hearing and determination according to law.

118 Section 90(3a) of the *Industrial Relations Act*, as applied by s 33S of the *Police Act*, provides, relevantly, that if any ground of the appeal is made out, but this court is satisfied that no injustice has been suffered by the appellant, this court shall confirm the decision the subject of the appeal unless it considers that there is good reason not to do so.

119 I am not satisfied, for the purposes of s 90(3a), that the Commissioner has not suffered any injustice as a result of the IRC's error in the construction of s 33W in the course of making the decision appealed against. It is therefore not open to this court to confirm the IRC's decision pursuant to s 90(3a).

MURPHY J:

120 The question in this appeal is, in essence, whether the Western Australian Industrial Relations Commission (IRC) misconstrued pt IIB of the *Police Act 1892* (WA) and, in particular, s 33W. In broad terms, pt IIB of the *Police Act* deals with the process for the removal of a police officer where the Commissioner of Police has lost confidence in the officer's suitability to continue as a member, having regard to the officer's integrity, honesty, competence, performance or conduct.²⁵ Section 33W of the *Police Act* provides:

33W Effect of charge for an offence or an acquittal

To avoid doubt, it is declared that if a member -

- (a) has been charged with committing an offence; or
- (b) has been acquitted of an offence,

that charge, the existence of proceedings relating to that charge or the acquittal does not preclude the Commissioner of Police from taking any action under this Part in relation to any matter, act or omission relating to or being an element of the offence.

121 This is a somewhat unusual case, where the answer to the question of whether the IRC misconstrued the *Police Act* in large measure turns upon the proper construction of the IRC's reasons.

122 Buss J has set out the relevant factual and procedural background to this appeal, and the relevant statutory framework. I gratefully adopt his Honour's recitation of those matters, subject to the matter to which I refer in [125] below, by way of elaboration and emphasis. I also adopt his Honour's nomenclature.

²⁵ See s 33L(1) of the *Police Act*.

123 I also respectfully agree with his Honour's observations as to the scheme, proper construction and operation of pt IIB of the *Police Act* referred to in [89] - [95] and [97] - [107] of his Honour's reasons. The words 'take any action' in s 33W are, in my view, apt to include the taking of any action which *continues* the process commenced by s 33L(1), and are not confined in their operation to the commencement of the process under s 33L(1).

124 There is no dispute that the Commissioner was required to afford Mr Ferguson procedural fairness. I agree with Buss J's observations to the effect that the content of a decision-maker's obligation to afford procedural fairness will be informed by the statutory context; in particular, the terms of the statute which creates the decision-maker's function, the nature of the function and the administrative framework in which the statute requires the function to be performed.²⁶ Also, in this context, the observations of the High Court in *Minister for Immigration and Border Protection v SZSSJ*,²⁷ are, in my opinion, pertinent:

[C]ompliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached ..., if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a 'practical injustice'.

Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person.

125 In relation to the letter from Mr Ferguson's solicitor to the Commissioner dated 29 December 2014, the IRC said:²⁸

He asked the Commissioner to suspend the [loss of confidence] process until the criminal charges against Mr Ferguson were resolved in the District Court. He noted the likely timing for the trial. *He said that it would be unfair for Mr Ferguson to be required to respond to the four issues because it would affect his position and defence to the criminal charges. He said:*

'The pressure to respond to the allegations as part of s 33L process may intrude upon [Mr] Ferguson's lawful privilege against self-incrimination. You will be aware that issues relating to the privilege in light of compulsion, and the compulsory nature of a s 33L response, have recently been raised and commented upon in cases like Critchley v The State of [Western Australia] [2013] WASC 28, Lee v The Queen [2014] HCA 20 and others that have a bearing on these issues.'

[Mr Ferguson's solicitor] also asserted that the allegations and 'component issues' that would arise at trial are matters that would be tested and decided by jury. He said that the result would have a strong bearing on the Commissioner's position on the allegations as part of the [loss of confidence] process, and he respectfully suggested that the Commissioner would be in 'a much better position to make [his] decision with the fulness [sic] of information available after trial'.

The letter pointed out that the Commissioner would be aware that s 33T of the Police Act provides for an adjournment of appeal proceedings in cases where the grounds correspond to criminal charges. (emphasis added)

126 Against this background, in my view, the appeal should be allowed, essentially for the following reasons:

1. The Commissioner afforded Mr Ferguson an opportunity to be heard in relation to the process for removal for loss of confidence (1) by inviting him, through the issue of the NOITR dated 27 November 2014, to make submissions, (2) by the Commissioner's correspondence (date unknown) in December 2014, and (3) by receiving and considering Mr Ferguson's written submissions through his solicitor's letter of 29 December 2014, and Mr Ferguson's letter dated 6 January 2015.
2. Mr Ferguson, with the benefit of legal advice, chose not to make written submissions on certain matters which would evidently be critical to the Commissioner's decision as to whether to recommend Mr Ferguson's removal from the police force.
3. In substance, Mr Ferguson, by his solicitor's letter dated 29 December 2014, sought an extension, under s 33L(2) of the *Police Act*, of the period in which to make written submissions to the Commissioner on those critical matters until after the determination of the criminal proceedings against him.
4. Mr Ferguson had, however, no right to insist on deferring the making of written submissions on those matters until after the determination of the criminal proceedings against him. That is evident from the (1) the terms of s 33L(2) of the *Police Act*, (2) the overall scheme in pt IIB of the *Police Act* as outlined by Buss J, and (3) the declaration in s 33W(a), which forms part of, and reinforces in clear terms, the effect of the statutory scheme in pt IIB of the *Police Act*.

²⁶ *National Companies* (326).

²⁷ *SZSSJ* [82] - [83].

²⁸ *Ferguson v Commissioner of Police* [2017] WAIRC 00832 [13] - [15] (IRC decision).

5. Accordingly, the power to extend time under s 33L(2) would not be construed as mandating an extension of time to be given to the police officer to make written submissions if criminal proceedings against the police officer had not been determined.
6. On the proper construction of the s 33L(2) in the context of the *Police Act* as a whole, including pt IIB as a whole and s 33W(a) in particular, the Commissioner is not required to give determinative, or even primary, weight to the fact that refusal to extend time under s 33L(2) may result in (1) disclosure by the police officer inconsistently with an asserted claim to privilege against self-incrimination, or (2) the exercise of an asserted claim to such privilege.²⁹
7. It may be inferred that s 33W was designed, at least in large part, to emphasise the amplitude of the Commissioner's power to remove a police officer for loss of confidence even, and perhaps in particular, in circumstances where the grounds for loss of confidence correspond with, or overlap, unresolved criminal charges against the police officer. That is particularly so where the concluding words of s 33W are '*in relation to any matter, act or omission relating to or being an element of the offence*'.
8. There were (see [125] above) no particular circumstances raised by Mr Ferguson by his solicitor's letter of 29 December 2014 in support of Mr Ferguson's application for an extension of time, beyond the fact that Mr Ferguson was facing unresolved criminal proceedings in relation to matters the subject of the NOITR and wished, in consequence of that, to assert a claim to privilege against self-incrimination.
9. Mr Ferguson, in this appeal, nevertheless contends,³⁰ in effect, that the IRC's conclusion that the Commissioner had made an 'error'³¹ by not, in effect, granting him the extension of time sought, was based on the particular circumstances of the case. Mr Ferguson refers in particular to the IRC's following findings:³²

We must consider the fairness of the Commissioner acting as he did, when he did. We conclude that s 33R does not cure the denial of procedural fairness in this case.

The Commissioner argues that any officer, faced with a criminal charge arising from the same conduct as gave rise to the [loss of confidence] process, could rely on the right to silence to avoid responding until criminal charges were dealt with, and that s 33W says he does not have to wait. We are not convinced that this will apply in all cases. *The circumstances of this case indicate that fairness overrides s 33W.* (emphasis added)
10. Mr Ferguson contends that the particular circumstance that the IRC took into account, in this case, was that the subject matter of the criminal charges 'overlapped' the subject matter of the NOITR.³³
11. As to that submission, it may be accepted that the IRC regarded it as significant that Mr Ferguson's unresolved criminal charges 'corresponded' with the subject matter of the NOITR.³⁴ However, the correspondence between the subject matter of a NOITR and unresolved criminal charges, and the potential effect of that correspondence on the removal process through the common law's rules concerning privilege against self-incrimination are, it may be inferred, the very matters which Parliament sought to address in the emphatic language employed in s 33W.
12. Le Miere J has, in his Honour's reasons in this appeal, referred to the circumstance that in the Commissioner's letter of 10 February 2015 to Mr Ferguson, the Commissioner noted that he had taken into account Mr Ferguson's failure to respond to critical matters because of his wish to claim privilege against self-incrimination.³⁵ As it seems to me, the IRC has treated the Commissioner's letter of 10 February 2015 as a failure by the Commissioner to recognise that the Commissioner had denied Mr Ferguson procedural fairness by his refusal to defer the process.³⁶ The Commissioner's letter to Mr Ferguson dated 10 February 2015, informing him of the bases for and the fact that the Commissioner had lost confidence in Mr Ferguson's suitability to remain as a member of the Police Force and had recommended that the Minister approve his removal, adds nothing to the absence of procedural fairness found by the IRC in the Commissioner's failure to defer the removal process.
13. The result is that, on the IRC's findings, there were no particular circumstances relevant to Mr Ferguson's case beyond his wish to defer dealing with the merits of the NOITR until after the resolution of the criminal charges against him.
14. The IRC's conclusion that Mr Ferguson had been denied procedural fairness³⁷ in not being given the opportunity to defer his written submissions until after the determination of his criminal proceedings is thus to be considered in the context where (1) there was no statutory obligation on the part of the Commissioner

²⁹ cf *Peko-Wallsend* (41).

³⁰ Respondent's written submissions, pars 3.7, 4.3, 4.4.

³¹ IRC decision [95].

³² IRC decision [101] - [102].

³³ Appeal ts 17 - 18, 21, 22 - 23.

³⁴ See, eg, IRC decision [15], quoted in the last paragraph of [125] above.

³⁵ See [176] below.

³⁶ IRC decision [80] - [83].

³⁷ IRC decision [87] - [88].

under s 33L(2) (or otherwise) to extend the time for Mr Ferguson to make written submissions, on account of the fact that the criminal proceedings against him had not yet been determined, (2) any prejudice arising from the refusal in connection with his wish to claim privilege against self-incrimination was not a factor to which the Commissioner was required to give determinative, or even primary, weight under s 33L(2) (or otherwise), and (3) there were no particular circumstances raised by Mr Ferguson's solicitor's letter of 29 December 2014 in support of the application for an extension of time beyond the fact that Mr Ferguson was facing unresolved criminal proceedings and wished, in consequence of that, to assert a claim to privilege against self-incrimination.

15. Mr Ferguson was given (see [126.1] above) the opportunity which would 'ordinarily' be afforded to a person entitled to procedural fairness.³⁸ The procedure adopted by the Commissioner did not relevantly 'constrain'³⁹ Mr Ferguson's opportunity to put his case. Any constraint was the product of his decision not to make written submissions on matters 'relating to or being an element'⁴⁰ of the unresolved criminal proceedings against him, within a statutory scheme which did not preclude the Commissioner from continuing the removal process for loss of confidence on that account.
16. In this context, an inference is open that the IRC's conclusion of error⁴¹ on the part of the Commissioner is explicable on the basis that it has misconstrued pt IIB of the *Police Act*.⁴² In my respectful opinion (as Buss J has found at [109]), the better view, on the proper construction of the IRC's reasons, is that the inference to be drawn is that the IRC has impermissibly read into s 33W an unexpressed condition, based on fairness, in relation to the operation of the declaration in that provision. That is so having regard to (1) the IRC's reasons as a whole, (2) the IRC's statements to the effect that there were 'good arguments' that a police officer 'should enjoy his right to silence',⁴³ thereby suggesting a desirable policy outcome without regard to the particular statutory scheme in pt IIB, and s 33W in particular, and (3) the express statement⁴⁴ that 'fairness overrides s 33W' in 'the circumstances of this case' - without specifying any circumstances.
17. Even if Mr Ferguson's solicitor's letter of 29 December 2014 were characterised as an application for the exercise of a (more general) implied power in the Commissioner to adjourn or stay the removal process for loss of confidence from time to time, the same observations apply.

127 For these reasons, I would allow the appeal. I also agree with Buss J's observations on the outcome of the appeal in [114] - [119] of his Honour's reasons.

LE MIERE J:

Summary

128 The respondent, Mr Ferguson, was a Detective Constable First Class. Whilst off duty he was involved in an incident with members of the public whilst attempting to arrest a person following a traffic incident. Mr Ferguson was charged with offences of unlawfully causing grievous bodily harm and assault. Prior to the determination of the criminal charges the appellant, the Commissioner of Police, removed Mr Ferguson from the Police Force under pt IIB of the *Police Act 1892* (WA). Mr Ferguson was acquitted of the charge of unlawfully doing grievous bodily harm and the charge of assault was discontinued.

129 Mr Ferguson appealed to the Western Australia Industrial Relations Commission on the ground that the decision of the Commissioner to take removal action was harsh, oppressive or unfair. The Commission declared that the Commissioner's decision to take removal action was unfair and ordered the Commissioner to pay Mr Ferguson \$34,776 as compensation for loss and injury caused by the removal.

130 The Commissioner now appeals to this court on the ground that the Commission erred in law in its construction of s 33W of the *Police Act*. Section 33W provides, amongst other things, that if a member has been charged with committing an offence, that charge or the existence of proceedings relating to that charge, does not preclude the Commissioner from taking any action under pt IIB. The Commissioner says that in allowing Mr Ferguson's appeal, the Commission erred in law by finding that considerations of fairness overrode the operation of s 33W.

131 For the reasons which follow the appeal should be dismissed on the ground that the Commission did not make an error in the construction or interpretation of s 33W in the course of deciding to allow Mr Ferguson's appeal to the Commission.

The Midland incident

132 On 18 July 2014 Mr Ferguson attended a bar in Midland to meet up with friends who had attended a Western Australian Police Social Club function at the bar. When Mr Ferguson walked outside he noticed a vehicle rev its engine and do a 'burnout'. Mr Ferguson attempted to arrest the driver, Gavin Gero. An incident then occurred which involved Mr Ferguson, Mr Gero and Hayley Lloyd-Riley, Sam Self and Joshua Prime, who were associates of Mr Gero.

³⁸ See *SZSSJ* [83], referred to in the second paragraph in [124] above.

³⁹ The language of the High Court in *SZSSJ* at [82], referred to in the first paragraph in [124] above.

⁴⁰ Section 33W of the *Police Act*.

⁴¹ IRC decision [95].

⁴² Compare *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360.

⁴³ IRC Decision [84] - [85].

⁴⁴ IRC decision [102], emphasis added.

Mr Ferguson was subsequently charged with unlawfully causing grievous bodily harm to Mr Prime and assaulting Ms Lloyd-Riley

Commissioner decides to remove Ferguson

133 The Commissioner may, subject to the approval of the Minister, remove any constable if the Commissioner has complied with s 33L in pt IIB of the *Police Act*. Section 33L sets out the procedure to be followed to remove a member where the Commissioner does not have confidence in the member's suitability to continue as a member having regard to the member's integrity, honesty, competence, performance or conduct.

134 After an interim internal investigation the Commissioner instituted the procedure relating to the removal of a member under pt IIB of the *Police Act* which is provided for in pt VIA of the *Police Force Regulations 1979* (WA). The Commissioner appointed a review officer in relation to Mr Ferguson's integrity, honesty, competence, performance or conduct. On 7 November 2014 the review officer provided the Commissioner with his Summary of Investigation. The review officer recommended that the Commissioner consider issuing Mr Ferguson with a notice of intention to remove (NOITR) having regard to Mr Ferguson's integrity, professionalism and conduct on the grounds that he acted in a manner that was likely to bring discredit on the force or in a manner that is unbecoming of a member of the force by using excessive force when arresting Mr Gero, assaulting Ms Lloyd-Riley, causing serious injury to Mr Prime and being disorderly and assaulting Mr Self.

135 On 27 November 2014 the Commissioner issued a notice to Mr Ferguson in which he said that he intends, in the absence of being persuaded otherwise, to recommend to the Minister for Police that she approve Mr Ferguson's removal from the Police Force. The notice set out the grounds on which the Commissioner did not have confidence in Mr Ferguson's suitability to continue as a member. In accordance with s 33L(2) of the *Police Act* the Commissioner invited Mr Ferguson to respond to the notice by making a written submission within 21 days.

136 By letter of 29 December 2014 Mr Ferguson's solicitor requested the Commissioner suspend the s 33L process until the criminal charges were resolved. The solicitor said it would be unfair to require Mr Ferguson to respond because a response to the issues in the NOITR will necessarily mean that Mr Ferguson is required to outline his position on, and defence to, the criminal charges. The solicitor said that the pressure to respond to the allegations as part of the s 33L process may intrude upon Mr Ferguson's lawful privilege against self-incrimination and referred to the decisions in *Critchley v The State of Western Australia* and *Lee v The Queen*.⁴⁵ The solicitor said that the result of the trial of the criminal charges will have a strong bearing on the Commissioner's position on the allegations as part of the loss of confidence process. The Commissioner responded saying that criminal and loss of confidence proceedings were separate processes that had to be independently considered and resolved. The Commissioner denied the request to suspend the loss of confidence process.

137 By a letter dated 1 December 2014 but delivered on 6 January 2015 Mr Ferguson responded to the Commissioner's notice. Mr Ferguson's response included the following. He asked that any information contained in his response be confined to the loss of confidence proceedings and not used in any criminal matters. He intends to plead not guilty to the alleged offences of grievous bodily harm and common assault. He cannot properly respond to issues that relate directly to the criminal charges against him for the reasons his solicitor had identified in his letter of 29 December 2014. He addressed matters relating to his level of intoxication at the time of the incident, addressed his personal background, set out circumstances leading up to the incident and set out his injuries and hospital treatment following the incident. He denied unlawfully assaulting Ms Lloyd-Riley, Mr Gero or Mr Self and in relation to the assault of Mr Prime he said he acted to protect himself in response to being attacked. Mr Ferguson attached a number of reports from police colleagues and supervisors in support of his submission to remain a member of the force.

138 On 10 February 2015 the Commissioner informed Mr Ferguson that he had decided to remove Mr Ferguson as a member of the Western Australia Police on the basis that he had lost confidence in Mr Ferguson's suitability to remain a member of the WA Police having regard to Mr Ferguson's integrity, performance and conduct. The Commissioner's letter included the following. Criminal and loss of confidence proceedings are separate processes and information provided in any managerial investigation is not released for use in criminal proceedings. Mr Ferguson's response to the NOITR failed to provide sufficient detailed explanation or mitigation for his actions despite the Commissioner's attempt to reassure Mr Ferguson that one process does not affect the other. Given Mr Ferguson's lack of detailed explanation or acknowledgement for his conduct his response offered the Commissioner no comfort that his actions were appropriate, justified or measured. Following his consideration of Mr Ferguson's written response the Commissioner continued to have lost confidence in Mr Ferguson's suitability to remain as a member of WA Police having regard to his integrity, performance and conduct and accordingly has recommended that the Minister for Police approve his removal from office. The Commissioner set out his reasons for reaching that conclusion.

139 By notice dated 25 February 2015 the Commissioner informed Mr Ferguson that the Minister for Police had approved Mr Ferguson's removal from the Police Force and in accordance with s 11 of the *Police Act* Mr Ferguson's appointment to the office of constable within the WA Police Force will be cancelled.

Ferguson appeals to the Commission

140 On 27 March 2015 Mr Ferguson instituted an appeal under *Police Act* s 33P against the decision of the Commissioner to remove him from office. There were three grounds of appeal:

1. The findings that [Mr Ferguson], on 18 July 2014 at Midland, acted in a manner that was likely to bring discredit on the force or in manner that is unbecoming of a member of the force cannot be a basis for the [Commissioner] to have lost confidence in [Mr Ferguson's] suitability to

⁴⁵ *Lee v The Queen* [2014] HCA 20; (2014) 253 CLR 455.

continue as a member of the WA Police Service having regard to his honesty, integrity and conduct because:

- 1.1. the findings were entirely based on findings that [Mr Ferguson's] conduct as alleged constituted criminal offences contrary to the Criminal Code WA;
- 1.2. as at the date of the Removal, [Mr Ferguson] had been charged with criminal offences arising from the same conduct and findings as alleged by the [Commissioner] (criminal charges);
- 1.3. as at the date of the Removal, the criminal charges had not been dealt with by a court.
2. [Mr Ferguson] was denied a fair go all round because the [Commissioner]:
 - 2.1. unreasonably refused [Mr Ferguson's] request dated 29 December 2014 (via his legal representative) to suspend the loss of confidence process under section 33L of the Police Act 1892 until after the determination of the criminal charges;
 - 2.2. failed to take into account [Mr Ferguson's] right to claim the privilege against self-incrimination whilst the criminal charges remained undetermined by concluding that [Mr Ferguson's] failure to provide a detailed explanation for, or acknowledgment of, his conduct on 18 July 2014 left the [Commissioner] with very little scope to even consider that [Mr Ferguson's] actions may have been justified;
 - 2.3. denied [Mr Ferguson] the benefit of the privilege against self-incrimination;
 - 2.4. in denying [Mr Ferguson] the benefit of the privilege against self-incrimination, thereby;
 - 2.4.1. denied [Mr Ferguson] the right to be heard in response pursuant to section 33L(2) of the Act; and/or
 - 2.4.2. failed to properly consider whether [Mr Ferguson] had committed the conduct as alleged.
3. The [Commissioner] failed to properly take into account the effect of [Mr Ferguson's] written submissions in response to the [Commissioner's] Notice of Intention to Remove and therefore took removal action contrary to section 33L(4) of the Act.

141 The Commission deferred Mr Ferguson's appeal, pursuant to s 33T of the *Police Act*, on the basis that Mr Ferguson had been charged with criminal offences arising from the same incident and did not wish to proceed to hearing until those charges had been dealt with.

Ferguson acquitted of criminal charges

142 On 13 November 2015 following a trial before a jury in the District Court Mr Ferguson was found not guilty of the offence of unlawfully causing grievous bodily harm to Mr Prime. Subsequently the complainant discontinued the prosecution of Mr Ferguson on the charge of unlawfully assaulting Ms Lloyd-Riley.

Commission allows Ferguson appeal

143 Following the dismissal of the criminal charges the Commissioner filed his response to Mr Ferguson's appeal. Mr Ferguson filed an outline of submissions and the Commissioner filed an outline of submissions.

144 On 1 May 2017 the Commission issued its reasons for deciding to allow Mr Ferguson's appeal. The Commission dismissed ground 1 of the appeal. The first ground, as explained during the hearing of the appeal before the Commission, was essentially that the allegations in the NOITR were of conduct constituting criminal offences, and could therefore not be the basis for a finding of loss of confidence unless and until those charges were determined by a court exercising criminal jurisdiction. The Commission held that the Commissioner was able to make findings about conduct, which might also constitute criminal conduct, as a step towards deciding whether to lose confidence in an officer, in the absence of a criminal court deciding the matter. The fact that the allegations considered by the Commissioner relied on the same incident, conduct and consequences did not mean that the Commissioner was obliged to await the outcome of the criminal charges. Whether to await the outcome of the criminal trial to take account of the acquittal or conviction, or of any additional information or evidence that was led at the trial, was a matter for the Commissioner.

145 The Commission upheld ground 2 for the following reasons. Mr Ferguson was denied the opportunity to respond to the allegations and to any proposed action because he sought to preserve and not potentially compromise his rights in the criminal trial [82]. There is a good argument that a member facing a criminal charge should be able to make a decision whether or not to give evidence in his own defence unencumbered by considerations of whether previous statements made by him may affect the credibility of that evidence in the ways that previous statements may do so [84] - [85]. The Commissioner's refusal to defer the loss of confidence process until the completion of the criminal trial meant that Mr Ferguson was not given a real opportunity to answer the allegations and was unfair [87]. The Commissioner's refusal to defer the loss of confidence process was a denial of procedural fairness which is arguably able to be cured by the appeal to the Commission [88]. The provisions of s 33R, which allow the Commission to receive new evidence on appeal, did not cure the denial of procedural fairness [101]. The Commissioner argued that any officer, faced with a criminal charge arising from the same conduct as gave rise to the loss of confidence process, could rely on the right to silence to avoid responding until criminal charges were dealt with and s 33W says the Commissioner does not have to wait but this will not apply in all cases [102]. The Commission said:

The circumstances of this case indicate that fairness overrides s 33W [102].

146 The Commission found that it was unfair of the Commissioner to proceed with the pt IIB process over Mr Ferguson's request that it be stayed and to then rely upon what may very well have been a product of refusing the stay, namely a response that was not detailed and did not admit fault and express contrition [103]. The Commission said that they had taken account of the provisions of s 33T and s 33W of the *Police Act* and stated:

These provisions merely say that the Commissioner is not precluded from proceeding with the LOC process. It does not oblige him to proceed. *In this particular case*, it was unfair that the Commissioner did not grant Mr Ferguson's request for a deferral to ensure that his rights were not negated [104]. (emphasis added)

147 The Commission found that ground 3 was merely consequential on the finding that ground 2 was made out.

Appeal to this court

148 The Commissioner appeals to this court against the finding of the Commission that the Commissioner's decision to remove Mr Ferguson was unfair. There is a single ground of appeal:

The Commission erred in law in its construction of section 33W of the *Police Act* in upholding ground 2, and consequentially ground 3 of the appeal, in finding that considerations of fairness overrode the operation of section 33W of the Act.

The statutory framework

149 Section 5 of the *Police Act* vests in the Commissioner the general control and management of the Police Force. Section 8(1) provides, amongst other things, that the Commissioner may, subject to the approval of the Minister, remove any constable. Section 8(2) provides that that power of removal can be exercised only if the Commissioner has complied with s 33L and the removal action has not been revoked under s 33N(1). The effect of s 8(2) is that before the Commissioner may exercise the power to remove a member the Commissioner must have lost confidence in the member's suitability to continue as a member having regard to the member's integrity, honesty, competence, performance or conduct.

150 The procedure to be followed by the Commissioner in making a loss of confidence decision is set out in pt IIB of the Act, which comprises s 33K to s 33Y, and pt VIA of the *Police Force Regulations 1979* (WA) which comprises reg 6A01 to reg 6A12.

151 Section 33L sets out the procedure to be followed to remove a member where the Commissioner has lost confidence in the member's suitability to continue as a member. The Commissioner must give the member a written notice setting out the grounds on which the Commissioner does not have confidence in a member's suitability to continue as a member. On receiving a notice the member may within 21 days or such longer period as is allowed by the Commissioner make written submissions to the Commissioner in relation to the grounds on which the Commissioner has lost confidence. The Commissioner must take into account any written submissions received from the member before taking a decision to take removal action. If the Commissioner decides to take removal action he must give the member written notice of the decision, the reasons for the decision and, except to the extent that the regulations otherwise provide, provide to the member a copy of any documents and materials that were examined and taken into account by the Commissioner in making the decision.

152 Section 33N allows the Commissioner to revoke his decision to take removal action any time including during the course of any subsequent appeal or after a member has actually been removed.

153 Part IIB div 3 introduces an appeal process in relation to removal. Section 33P entitles a member removed from office for loss of confidence to appeal to the Commission on the ground that the decision of the Commissioner to take removal action was harsh, oppressive or unfair.

154 Section 33Q sets out the procedure to be followed on appeal. The Commission is required to consider the Commissioner's reasons for deciding to take removal action, the case presented by the member on appeal as to why the decision was harsh, oppressive or unfair and the case presented on appeal by the Commissioner in answer.

155 Section 33R deals with new evidence on appeal. The effect of s 33R(1) is that the evidence before the Commission on an appeal is generally confined to materials examined and taken into account by the Commissioner in making a decision to take removal action, any written submissions made by the member to the Commissioner, the Commissioner's grounds for his loss of confidence and reasons for the Commissioner's decision to take removal action. New evidence may be tendered by the Commissioner if the member consents or the Commission is satisfied that it is in the interests of justice to do so. New evidence may be tendered by the member if the Commissioner consents or the Commission is satisfied that the member is likely to be able to show that the Commissioner has acted upon wrong or mistaken information, the new evidence might materially have affected the Commissioner's decision to take removal action or it is in the interests of justice to do so. If the member is given leave to tender new evidence the Commissioner is given an opportunity to consider the new evidence. If having considered the new evidence the Commissioner revokes the removal action under s 33N the appeal will be discontinued. Alternatively, the hearing will continue but the Commissioner may reformulate his original reasons for his loss of confidence and his new reasons are to be treated as if they were his original reasons.

156 Section 33T provides for an adjournment of the appeal where the appellant has been charged with an offence. If the appellant has been charged with an offence relating to any matter, act or omission that was taken into account by the Commissioner in deciding that he did not have confidence in the appellant's suitability to continue as a member and the charge has not been finally determined by a court or otherwise disposed of, the Commissioner or the appellant may apply to the Commission for an adjournment of the hearing of the appeal. If the application for an adjournment is made by the appellant, the Commission must adjourn the hearing of the appeal for such period not exceeding 12 months as is requested by the appellant. If the charge is finally determined by a court or otherwise disposed of before the expiration of

the period of the adjournment, the Commission or the appellant may apply to the Commission for the hearing of the appeal to be resumed. Before the expiration of any period of adjournment the Commissioner or the appellant may apply to the Commission for a further adjournment and if it is in the interest of justice to do so the Commission may grant a further adjournment for a period specified by it.

157 Section 33U sets out the power of the Commission if it decides that the decision to take removal action relating to the appellant was harsh, oppressive or unfair.

158 Section 33W makes clear that the Commissioner may take removal action notwithstanding that the member has been charged with a related criminal offence or has been acquitted of an offence. Section 33W is:

To avoid doubt, it is declared that if a member -

(a) has been charged with committing an offence; or

(b) has been acquitted of an offence,

that charge, the existence of proceedings relating to that charge or the acquittal does not preclude the Commissioner of Police from taking any action under this Part in relation to any matter, act or omission relating to or being an element of the offence.

159 Part VIA of the Regulations relate to pt IIB of the Act. Regulation 6A02 provides that if a complaint or information is received by the Commissioner concerning a member's integrity, honesty, competence, performance or conduct, the Commissioner may appoint a review officer in relation to that member. Regulation 6A03 provides that the review officer shall conduct an inquiry into the member and prepare a written report called a 'Summary of Investigation' that includes reference to relevant materials that were gathered by the review officer for the purpose of the inquiry and a written list called an 'Inspection List' of relevant materials that were gathered by the review officer for the purposes of the inquiry.

160 Regulation 6A04 provides that when the review officer completes his inquiry the review officer shall provide the Commissioner with the Summary of Investigation and the Inspection List and any material referred to in the Inspection List the review officer considers appropriate. Before the Commissioner decides whether or not to issue a NOITR the Commissioner may cause further materials to be provided to the Commissioner. The Commissioner may direct a review officer to conduct a further review and prepare and submit to him a supplementary Summary of Investigation and a supplementary Inspection List.

161 Regulation 6A05 sets out matters which must be included in the Commissioner's NOITR under s 33L(1) of the Act. Regulation 6A06 deals with the member's access to material referred to in the Inspection List. Regulation 6A07 deals with the Commissioner's assessment of a member's submission in response to the Commissioner's notice.

162 Regulation 6A09 provides for the Commissioner to give to the member a NOITR in accordance with s 33L(3) and (5).

Appellant's case

163 The appellant says that s 33W provides that the Commissioner may take any action under pt IIB notwithstanding that it relates to a matter or act relating to an element of an offence with which the member has been charged. It cannot be unfair for the purposes of pt IIB for the Commissioner to exercise his discretion in circumstances expressly permitted by the Act. The Commissioner does not submit that he was obliged to proceed with the loss of confidence process. The Commissioner submits that he was not precluded by the existence of the criminal charges from proceeding with the loss of confidence process. The Commission erred by concluding, in effect, that the existence of the criminal charges did preclude the Commissioner from relying upon s 33W.

Respondent's case

164 Mr Ferguson put his case in the appeal to this court on three bases. First, the appeal is not competent because the appellant has not identified an error in the construction or interpretation of s 33W; the Commission's decision is an application to the facts to statutory provisions which the Commission correctly understood. Secondly, the Commission made no error in the construction or interpretation of s 33W; the Commission's construction of s 33W was correct. Thirdly, in light of the nature of the Commission's jurisdiction under pt IIB div 3 of the *Police Act* it was open to the Commission to conclude that the Commissioner's decision was unfair because it denied the respondent procedural fairness.

Jurisdiction of the court

165 Police Act s 33S applies certain provisions, including s 90, of the *Industrial Relations Act 1979* (WA) (IR Act), modified in places, to an appeal instituted under pt IIB of the *Police Act*. Section 90(1) of the IR Act, so modified, provides that, subject to that section, an appeal lies to the Court from a decision of the Commission under s 33U of the *Police Act*, upon certain limited grounds. Pursuant to s 90(1)(b) one ground is that the decision is erroneous in law in that there has been an error in the construction or interpretation of any act in the course of making the decision appealed against. The Commissioner says that the Commission erred in its construction of s 33W of the *Police Act*.

Appeal is not competent

166 The Commissioner complains about the Commission's conclusion as to the content of a fair hearing in the circumstances of the case rather than about an error of law in the construction of s 33W of the *Police Act*. The Commission's decision is an application of the facts to statutory provisions which the Commission correctly understood, and of common law procedural fairness.

- 167 The Commission's interpretation of s 33W is that the Commissioner has power to continue with loss of confidence proceedings when criminal proceedings concerning the same matter, act or omission are pending but the Commissioner is not obliged to proceed with loss of confidence proceedings when criminal proceedings are pending.
- 168 The Commission did not construe s 33W in order to determine whether procedural fairness is implied. Nor did the Commission examine s 33W to determine whether the section excluded procedural fairness. The content of the fair hearing and the circumstances of the case was a matter of the application of common law principles to the facts of the case.
- 169 The Commission may have erred in finding that in the circumstances of the case it was a breach of procedural fairness and unfair for the Commissioner to refuse Mr Ferguson's request for a deferral but that error, if there was an error, was an error in finding that the Commissioner's refusal gave rise to procedural unfairness and was unfair not from any error in construing or interpreting s 33W.
- 170 The appellant has not identified any error by the Commission in the construction or interpretation of s 33W of the Police Act and hence the court's jurisdiction under s 90(1)(b) of the IR Act as applied by s 33S of the *Police Act* is not enlivened.

Commission did not misconstrue section 33W

- 171 When interpreting a statute the court must consider the text, context and purpose of a statutory provision: *CIC Insurance Ltd v Bankstown Football Club Ltd (CIC Insurance)*; *Project Blue Sky v Australian Broadcasting Authority (Project Blue Sky)*; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Alcan)*; *Commissioner of Taxation v Consolidated Media Holdings Ltd*; *Sztaf v Minister for Immigration and Border Protection (Sztaf)*. The starting point for the ascertainment of the meaning of the statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.⁴⁶ Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.⁴⁷ The statutory text must be considered in its context which includes legislative history. The court may have regard to extrinsic material to confirm the ordinary and natural meaning of statutory provisions or in cases of ambiguity or uncertainty but extrinsic material cannot be used to negate the plain meaning of statutory provisions.
- 172 Section 33W commences with the words 'To avoid doubt, it is declared that'. The operative enacted words should have the same effect whether or not the introductory or explanatory words are included.⁴⁸
- 173 The nub of s 33W is that the Commissioner is not 'precluded' from taking action to remove a member when the member has been charged with a related criminal offence. The usual and ordinary meaning of 'preclude' is to indicate that one event or circumstance prevents another event or circumstance from happening. The effect of s 33W is that the circumstance of a member having been charged with committing an offence does not prevent the Commissioner from taking removal action. It is a corollary of that proposition that it is not unfair for the Commissioner to take removal action merely because the member has been charged with a related criminal offence. However, that does not mean that it cannot be unfair for the Commissioner to take removal action in the particular circumstances of a case where the member has been charged with a related criminal offence.
- 174 Mr Ferguson appealed to the Commission on the ground that the decision of the Commissioner to take removal action was harsh, oppressive or unfair. The Commission did not find that the Commissioner's decision to remove Mr Ferguson was unfair merely because the Commissioner took removal action when Mr Ferguson had been charged with a related criminal offence.
- 175 The Commissioner argued before the Commission that any member who has been charged with committing an offence arising from the same conduct as gave rise to the loss of confidence process could rely on the right to silence to avoid responding to the NOITR until the criminal charges had been dealt with and that is inconsistent with s 33W which says that the Commissioner does not have to wait. However, the Commission said that that would not apply in all cases. It was the circumstances of this case that led to the Commission's conclusion.
- 176 One matter that the Commission took into account in determining that the Commissioner's decision to take removal action was unfair was that in the Commissioner's letter of 10 February 2015 to Mr Ferguson, the Commissioner said 'your failure to specifically respond does not attempt to account for your action, nor have you recognised that your actions were excessive and disproportionate and you have offered no contrition for your actions to address the serious questions that remain over your integrity, conduct and performance' in circumstances where Mr Ferguson had not responded because he 'sought to preserve, and not potentially compromise, his rights in the criminal trial'. That is, the Commissioner took into consideration Mr Ferguson's failure to respond as a factor in his decision to remove Mr Ferguson. The Commission considered that in the circumstances of this case it was unfair of the Commissioner to take into account Mr Ferguson's failure to respond in circumstances where Mr Ferguson was not obliged to respond and had a proper reason for not responding. If the Commission erred in its reasoning, it was not an error in the construction or interpretation of s 33W.
- 177 The Commission stated that it was the circumstances of the case that indicated that Mr Ferguson's removal was unfair. The Commission recognised that it will not be unfair for the Commissioner to take removal action in all cases.
- 178 The Commissioner's ground of appeal focuses on the statement of the Commission that 'the circumstances of this case indicate that fairness overrides s 33W'. That statement must be read fairly and in the context of the Commission's

⁴⁶ *Project Blue Sky* [69] - [71]; *Alcan* [47]; *Sztaf* [14].

⁴⁷ *CIC Insurance* (408); *Sztaf* [14].

⁴⁸ *Allen v Feather Products Pty Ltd* (2008) 72 NSWLR 507 [25] (Barrett J).

reasons as a whole, not minutely and finely with an eye keenly attuned to the perception of error. On a fair reading the Commission was not saying that s 33W may be disregarded. The Commission was saying that whilst s 33W does not preclude the Commissioner from taking removal action it may be unfair to do so in the particular circumstances of the case. The Commission's construction of s 33W was correct.

Commission's decision was open

179 If only one answer is reasonably open on the application of the statutory provision, properly construed, to the facts and a tribunal reaches a different answer it might be inferred that the Tribunal has misunderstood and misconstrued the statutory provision. However, where different conclusions are reasonably possible it cannot be inferred that the Tribunal has misunderstood or misconstrued the statutory provision.

180 Section 33P of the *Police Act* provides that a member may appeal against the Commissioner's decision on the grounds that it was harsh, oppressive or unfair. 'Unfair' is broader than a denial of procedural fairness at common law but includes a denial of procedural fairness. Procedural fairness is implied in relation to an exercise of power by the Commissioner to take removal action. Procedural fairness in a loss of confidence proceeding is not expressly excluded by the *Police Act*. Procedural fairness applies in relation to the loss of confidence proceedings. None of s 8, s 33W or s 33T, or any other provision of the *Police Act*, excludes procedural fairness in a loss of confidence proceedings.

181 The content of a fair hearing depends upon the circumstances of the case. Procedural fairness requires that a member be given a reasonable opportunity to answer the case against him. A member who is invited to make a submission at the time when related criminal proceedings are pending may suffer from constraints which deprive him of a meaningful opportunity to present his case. The Commissioner had a discretion as to whether he adjourned the loss of confidence proceeding while the criminal proceedings were pending and was not obliged to refuse Mr Ferguson's application for an adjournment. Indeed, s 33L(2) expressly confers on the Commissioner a discretion to extend the time for the member to make written submissions in relation to the grounds on which the Commissioner has lost confidence.

182 Mr Ferguson said that in the particular circumstances of his case it was unfair to require him to make submissions before the resolution of the criminal charges. The Commission found that it was unfair of the Commissioner to refuse to extend the time for Mr Ferguson to make written submissions and then to take into account Mr Ferguson's failure to make written submissions as a factor in his decision that he had lost confidence in Mr Ferguson. That finding was reasonably open to the Commission notwithstanding that this court may reach a different conclusion if it was vested with jurisdiction to make the decision. It cannot be inferred from the Commission's decision that if misunderstood or misconstrued s 33W of the *Police Act*.

Conclusion

183 For the reasons given I would dismiss the appeal.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

FN

Associate

25 JANUARY 2019

2019 WAIRC 00025

APPEAL AGAINST THE DECISION OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION IN APPL 109 OF 2015

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

THE COMMISSIONER OF POLICE

APPELLANT

-v-

SHANE MICHAEL FERGUSON

RESPONDENT

CORAM

THE HONOURABLE JUSTICE BUSS, PRESIDING JUDGE

DATE

THURSDAY, 31 JANUARY 2019

FILE NO/S

IAC 3 OF 2017

CITATION NO.

2019 WAIRC 00025

Result

Appeal allowed

Representation

Appellant

Mr N John (of counsel), instructed by State Solicitor's Office

Respondent

Ms M Allars SC, instructed by Tindall Gask Bentley Lawyers

Order

1. The appeal is allowed;
2. The decision of the Western Australian Industrial Relations Commission [2017] WAIRC 00832 is set aside; and
3. The respondent's appeal to the Commission (APPL 109 of 2015) is dismissed.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2019] WASCA 28

JURISDICTION : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION : WHOOLEY -v- SHIRE OF DENMARK
 [2019] WASCA 28
CORAM : BUSS J
 LE MIERE J
 MURPHY J
HEARD : 11 SEPTEMBER 2018
DELIVERED : 13 FEBRUARY 2019
FILE NO/S : IAC 1 of 2018
BETWEEN : ROBERT WHOOLEY
 Appellant
 AND
 SHIRE OF DENMARK
 Respondent

ON APPEAL FROM:

Jurisdiction : WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram : J H SMITH ACTING PRESIDENT
 S J KENNER ACTING SENIOR COMMISSIONER
 T EMMANUEL COMMISSIONER
Citation : SHIRE OF DENMARK v WHOOLEY [2017] WAIRC 01010
File Number : FBA 8 OF 2017 & FBA 9 OF 2017

Catchwords:

Industrial law - Appeal against decision of the Full Bench of Western Australia Industrial Relations Commission - Claim for benefits denied under employment contract - Statutory construction

Legislation:

Australian Broadcasting Corporation Act 1983 (Cth), s 25(1)(a), s 70, s 70(1)

Industrial Relations Act 1979 (WA), s 7, s 90(1), s 90(3a)

Local Government Act 1995 (WA), s 2.7, s 5.36, s 5.37, s 5.37(1), s 5.37(2), s 5.39(1a), s 5.41, s 5.41(g)

Result:

Appeal dismissed

Category: B

Representation:*Counsel:*

Appellant : In person
 Respondent : Mr J Darams

Solicitors:

Appellant : In person
 Respondent : Clyde & Co

Case(s) referred to in decision(s):

Australian Broadcasting Corporation v Redmore Pty Ltd [1989] HCA 15; (1989) 166 CLR 454
Galloway v Galloway (1914) 30 TLR 531
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Suttor v Gundowda Pty Ltd [1950] HCA 35; (1950) 81 CLR 418
University of Wollongong v Metwally (No 2) [1985] HCA 28; (1985) 59 ALJR 481
Water Board (NSW) v Moustakas [1988] HCA 12; (1988) 180 CLR 491
Whooley v Shire of Denmark [2017] WAIRC 00001

JUDGMENT OF THE COURT:**Summary**

- 1 The appellant, Mr Whooley, was employed by the respondent Shire as Director of Infrastructure Services under a written contract of employment. By a letter of 5 June 2015 the Shire's Chief Executive Officer (CEO) informed Mr Whooley that the Shire was summarily terminating Mr Whooley's employment.
- 2 Mr Whooley commenced proceedings in the Western Australian Industrial Relations Commission claiming contractual benefits to which he had been denied. Mr Whooley claimed that the termination of his employment was invalid and ineffective because the Shire had not complied with s 5.37(2) of the *Local Government Act 1995* (WA) (LGA). The Shire denied that the termination of Mr Whooley's employment was invalid and ineffective and further claimed that he was barred from bringing the claim because of a settlement agreement made between the Shire and Mr Whooley in the course of proceedings in the Fair Work Commission. The Commissioner found that the termination of employment of Mr Whooley was invalid and ineffective and the settlement agreement was void. The Commissioner ordered the Shire to pay Mr Whooley \$43,893.71.
- 3 The Shire appealed to the Full Bench of the Western Australia Industrial Relations Commission on the grounds that the termination of Mr Whooley's employment was not invalid and ineffective and that the settlement agreement was a bar to Mr Whooley's claim. The Full Bench, by majority, upheld both grounds of appeal, set aside the Commissioner's decision and ordered that Mr Whooley's claim be dismissed.
- 4 Mr Whooley has appealed to this court on two grounds. Ground 1 is that the Full Bench erred in finding that the termination of his employment was not invalid and ineffective. Ground 2 is that the Full Bench erred in finding that the settlement agreement bars his claim. For the reasons which follow we find that ground 1 of the appeal is made out and ground 2 of the appeal is not made out. We would confirm the decision of the Full Bench allowing the appeal from the decision of the Commissioner and dismissing Mr Whooley's claim to the Commission.

Mr Whooley brings proceedings in Fair Work Commission

- 5 After he received the letter of 5 June 2015 purporting to terminate his employment, Mr Whooley commenced proceedings in the Fair Work Commission alleging that the Shire had unfairly dismissed him from his employment. A conciliation conference was held on 15 July 2015. Mr Whooley and his representative, Ms Nyariel, an industrial officer with the Australian Services Union (ASU), participated in the conference. The CEO and a representative from the Western Australian Local Government Association participated on behalf of the Shire. The Shire says that an agreement was reached at the conference by which, among other things, Mr Whooley agreed to discontinue the Fair Work proceedings and bring no other proceedings against the Shire in respect of his employment. We will refer to this agreement, or alleged agreement, as the settlement agreement.
- 6 On 16 July 2015, Ms Nyariel informed the Fair Work Commission and the Shire's representatives that Mr Whooley had contacted the ASU and advised that he withdrew his agreement to the terms of the settlement that were reached at the conference on 15 July 2015.

Mr Whooley resigns

- 7 On 19 October 2015, after he had been elected as a councillor of the Shire, Mr Whooley sent an email to all councillors, councillors elect and the CEO in which he stated that he considered his dismissal by the CEO was unlawful. He went on to say that, so there would be no ambiguity, or conflict, with legislation relating to being both an employee and a councillor, he resigned as Director of Infrastructure in accordance with his contract.

Mr Whooley claims denied contractual benefits

- 8 Mr Whooley made a claim to the Western Australian Industrial Relations Commission that he had not been allowed a benefit to which he was entitled under his contract of employment. His claim was heard by Commissioner Matthews on 14 and 15 November 2016.
- 9 On 3 January 2017, the Commissioner found that the termination of employment of Mr Whooley was invalid and ineffective because LGA s 5.37(2) was not complied with before Mr Whooley received the purported letter of termination, and therefore the purported termination was wholly invalid and ineffective. LGA s 5.37(2) requires the CEO to inform the Shire council of a proposal to dismiss a senior employee and provides that the council may accept or reject the CEO's recommendation.
- 10 The Commissioner found that Mr Whooley and the Shire made the settlement agreement at the conference and the parties intended to be bound by it, but the settlement agreement was void because the subject matter of the agreement, the termination of Mr Whooley's employment, was non-existent.

11 The Commissioner found that Mr Whooley should be compensated for the remuneration that he would have earned between 5 June 2015 and 19 October 2015, the date of his resignation, less the amount of one month's salary he was paid upon termination on 5 June 2015 and any amount he earned from work during that period. The Commissioner ordered the Shire to pay to Mr Whooley the sum of \$43,893.71.

Shire appeals to Full Bench

12 The Shire appealed to the Full Bench of the Commission on two grounds:

1. The Commissioner erred in holding that the termination of the employment of Mr Whooley was invalid and ineffective because LGA s 5.37(2) was not complied with before notice of termination was provided on 5 June 2015 because, on the proper construction of the LGA, it is not a purpose of the legislation to render such decisions invalid.
2. The Commissioner erred in holding that the agreement reached between the Shire and Mr Whooley on 15 July 2015 was void in that:
 - a. the decision relied upon by the Commissioner in finding the agreement void, *Galloway v Galloway*,⁴⁹ does not represent the current position of the law in Australia; and/or
 - b. the subject matter of the agreement reached between the Shire and Mr Whooley on 15 July 2015 was not entirely non-existent.

13 The majority, Smith AP and Emmanuel C, found that both grounds of appeal were made out. The majority found:

- (a) the decision by the CEO to terminate the employment of Mr Whooley on 5 June 2015 was not invalid and ineffective; and
- (b) if, contrary to their opinion, the CEO's decision to terminate Mr Whooley's employment was invalid and ineffective, the compromise agreement made between Mr Whooley and the Shire in the Fair Work Commission on 15 July 2015 was valid and enforceable, and barred Mr Whooley's claim for contractual benefits.

Kenner ASC found that neither ground of appeal was made out.

14 The Full Bench ordered that the decision of the Commissioner be quashed and Mr Whooley's claim for denied contractual benefits be dismissed.

This appeal

15 Mr Whooley now appeals to this court from the decision of the Full Bench. There are two grounds of appeal. The first is that the majority erred in upholding ground 1 of the appeal to the Full Bench and holding that a breach of LGA s 5.37(2) did not render the termination of his employment invalid because of six specified matters. The second ground is that the majority erred in upholding ground 2 of the appeal to the Full Bench and holding that a compromise agreement had been reached and there was a bar to his claim because of 22 matters, which are specified in the notice of appeal.

Appeal ground 1

16 The Shire is established as a body corporate with the legal capacity of a natural person by the LGA. Its governing body is its elected council. LGA s 2.7 provides that the council governs the local government's affairs and is responsible for the performance of the local government's functions. LGA pt 5, amongst other things, deals with the employment of persons by local governments and matters relating to local government employees. Division 4 deals with local government employees. Section 5.36 deals with the employment of employees. Section 5.41 deals with the functions of the CEO. They include:

- (g) [to] be responsible for the employment, management, supervision, direction and dismissal of other employees (subject to s 5.37(2) in relation to senior employees).

Other employees refers to employees other than the CEO.

17 LGA s 5.37 deals with senior employees. Section 5.37(1) provides that a local government may designate employees or persons belonging to a class of employee to be senior employees. It is common ground that Mr Whooley was a senior employee for the purposes of s 5.37(1). Section 5.37(2) provides that:

The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in s 5.39(1a), and the council may accept or reject the CEO's recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.

Section 5.39(1a) is not presently relevant.

18 The CEO did not inform the council of the proposal to dismiss Mr Whooley and the council did not accept a recommendation to dismiss Mr Whooley. The Commissioner found that the termination of Mr Whooley's employment was invalid and ineffective because the CEO had not complied with LGA s 5.37(2).

⁴⁹ *Galloway v Galloway* (1914) 30 TLR 531.

19 The majority of the Full Bench reached a different decision. Smith AP, with whom Emmanuel C agreed, referred to authorities concerning whether a failure to comply with a legislative provision that purports to impose an obligation results in action taken under it being invalid. Her Honour referred to *Australian Broadcasting Corporation v Redmore Pty Ltd*⁵⁰ and *Project Blue Sky Inc v Australian Broadcasting Authority*.⁵¹

20 In *ABC v Redmore*, the ABC entered into a contract with Redmore. The ABC claimed it was not bound by the contract because it had entered into the contract without the approval of the Minister as required by the *Australian Broadcasting Corporation Act 1983* (Cth) (ABC Act). The High Court rejected the Corporation's claim that it was not bound by the contract because of this failure. Section 25(1)(a) of the ABC Act empowered the Corporation to enter into contracts for the performance of its functions. Section 70(1) provided that the Corporation shall not, without the approval of the Minister, enter into a contract under which the Corporation is to pay or receive an amount exceeding \$500,000. The High Court held that a contract within s 70(1) into which the Corporation entered without the Minister's approval was not beyond the Corporation's powers. The majority held that having regard to the structure of the ABC Act and the context of s 70, the direction in s 70(1) could not be construed as concerned to confine power or invalidate the otherwise lawful expenditure of money by the Corporation.

21 In *Project Blue Sky*, the High Court held that the Australian Broadcasting Authority, in making a broadcasting standard, had failed to comply with a statutory directive that the Authority was obliged to take into account in making the standard. The court held that it was not the intention of the Act that the standard should thereby be invalid. McHugh, Gummow, Kirby and Hayne JJ observed:

An act done in breach of the condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition [91].

22 Ground 1 raises a question of statutory construction. The answer to most questions of statutory construction is to be found in a careful analysis of the statutory text, understood in its proper context.

23 On its proper construction the LGA confers on the CEO power to dismiss a senior employee only if the CEO has informed the council of the proposed dismissal and the council has accepted the CEO's recommendation. That interpretation follows from the language of the LGA, its subject matter and objects and the consequences of holding that the CEO has power to dismiss a senior employee without informing the council of the proposal and the council accepting the CEO's recommendation.

24 LGA s 2.7 provides that the council governs the local government's affairs. Section 5.41 provides for the functions, which includes powers, of the CEO. Section 5.41(g) confers on the CEO the power to dismiss employees. That provision distinguishes between senior employees and other employees. By s 5.37(1), the local government (not the CEO) designates employees or persons belonging to a class of employee to be senior employees. By s 5.39, relevantly, the employment of a person who is a senior employee must be governed by a written contract in accordance with s 5.39. The CEO may dismiss other employees, but his or her power to dismiss senior employees is subject to s 5.37(2). The effect of s 5.37(2) is that if the CEO proposes to dismiss a senior employee, then the CEO must inform the council of the proposal and make a recommendation to the council that the senior employee be dismissed. Further, by s 5.37(2), the council may accept or reject the CEO's recommendation. The power and responsibility to determine whether a senior employee is to be dismissed rests with the council, not the CEO. The CEO's power to dismiss a senior employee, pursuant to the function conferred on the CEO by s 5.41(g), is not enlivened unless the CEO has complied with s 5.37(2) and the council has accepted the CEO's recommendation that the senior employee be dismissed.

25 To interpret s 5.41(g) as rendering effective a purported dismissal of a senior employee by the CEO without the council having been informed of the proposal and accepting the recommendation is to disregard the statutory scheme, which distinguishes between the dismissal of senior employees and other employees, and to disregard the scheme in relation to the dismissal of senior employees.

26 Further, such an interpretation ignores the language of s 5.41(g) that the power of the CEO to dismiss employees is 'subject to' s 5.37(2) in relation to senior employees.

27 Furthermore, the consequence of construing s 5.41(g) such that a dismissal of a senior employee by the CEO is effective without the council having been informed of the proposal and having accepted the recommendation, is to remove from the council the power and responsibility for deciding on the dismissal of senior employees, which is expressly conferred upon it by the LGA.

28 The only power conferred on the CEO to dismiss an employee is the power conferred by s 5.41(g). That power is expressly subject to s 5.37(2) in relation to senior employees. The CEO has no power to dismiss a senior employee unless the CEO has informed the council of the proposal to dismiss the senior employee and the council has accepted the CEO's recommendation. The CEO did not inform the council of his proposal to dismiss Mr Whooley and the council did not accept a recommendation of the CEO to dismiss Mr Whooley. Therefore, the CEO had no power to dismiss Mr Whooley. The CEO's letter of 5 June 2015 was ineffective to terminate Mr Whooley's employment.

⁵⁰ *Australian Broadcasting Corporation v Redmore Pty Ltd* [1989] HCA 15; (1989) 166 CLR 454.

⁵¹ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355.

29 Ground 1 is made out.

Appeal ground 2

30 The second ground of appeal is that the Full Bench erred in upholding ground 2 of the appeal to the Full Bench and holding that a compromise agreement had been reached and that there was a bar to Mr Whooley's claim because of 22 matters which Mr Whooley sets out in his notice of appeal. The essence of Mr Whooley's argument is that the settlement agreement was of no force or effect because it was beyond the power of the CEO (without a resolution by council or some other conferral of authority) to make the agreement on behalf of the Shire.

31 An appeal does not lie to the Court on that ground. Section 90(1) of the *Industrial Relations Act 1979* (WA) (IRA) provides that an appeal lies to the court from any decision of the Full Bench:

- (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter; or
- (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
- (c) on the ground that the appellant has been denied the right to be heard, but upon no other ground.

32 The second ground of appeal does not assert that the matter the subject of the decision is not an industrial matter. The matter the subject of the decision of the Full Bench is whether Mr Whooley has not been allowed by his employer a benefit to which he is entitled under his contract of employment. That is an industrial matter as defined in s 7 of the IRA.

33 The second ground of appeal does not assert that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against. The Full Bench did not construe or interpret any Act, regulation, award, industrial agreement or order in the course of deciding that the settlement agreement barred Mr Whooley's claim for contractual benefits. Mr Whooley does not identify any Act, regulation, award, industrial agreement or order which the Full Bench misconstrued or misinterpreted in the course of making the decision that the settlement agreement barred Mr Whooley's claim for contractual benefits.

34 In the course of his oral submissions to the court Mr Whooley submitted that he had been denied the right to be heard by the Full Bench. In his oral submissions to the Full Bench, Mr Whooley submitted that the CEO did not have authority to enter a legally binding contract on behalf of the Shire. After some discussion the Full Bench ruled that Mr Whooley could not raise that point because it had not been raised before the Commissioner and if it had been raised it could have been met by the calling of evidence. The Acting President said:⁵²

It wasn't a point put at first instance and if it had been a point put at first instance then it could have perhaps been addressed by some evidence which was given by, on behalf of [the CEO], or at least the - of someone else from the Council to say it was so authorised by the Council to enter an agreement to settle this claim.

35 The finding that the point had not been raised before the Commissioner was a finding open to the Full Bench. Mr Whooley's submission to this court, to the contrary, cannot be accepted. Mr Whooley said that the point had been raised in his evidence before the Commissioner.⁵³ However, that evidence was given in the context of, and was purportedly relevant to, the legal argument advanced by Mr Whooley's counsel that the settlement agreement was not intended to be immediately binding, or was conditional. Moreover, it is evident from Mr Whooley's counsel's submissions both in opening,⁵⁴ and in closing,⁵⁵ and from the Commissioner's reasons for decision,⁵⁶ that there was no argument on Mr Whooley's behalf to the effect that the CEO lacked the requisite authority to enter into the settlement agreement.

36 It is a well-established principle that, except in very exceptional cases, a party to an appeal cannot raise a point or objection on appeal not raised (whether deliberately or by inadvertence) in the primary proceedings. Exceptional circumstances, in this context, will not exist if there were any possibility that the point could have been met by additional or different evidence. See, for example, *Suttor v Gundowda Pty Ltd*;⁵⁷ *University of Wollongong v Metwally (No 2)*;⁵⁸ *Water Board (NSW) v Moustakas*.⁵⁹

37 The Full Bench did not deny Mr Whooley the right to be heard. The Full Bench heard Mr Whooley's argument. It held that Mr Whooley should not be permitted to raise the point as to the scope of the CEO's authority for the first time

⁵² ts 44.

⁵³ Mr Whooley referred to his evidence on 14 November 2016 at ts 203 - 204.

⁵⁴ ts 78 - 83, 14 November 2016.

⁵⁵ ts 200 - 208, 15 November 2016.

⁵⁶ *Whooley v Shire of Denmark* [2017] WAIRC 00001 [68] - [84].

⁵⁷ *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418.

⁵⁸ *University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 59 ALJR 481.

⁵⁹ *Water Board (NSW) v Moustakas* [1988] HCA 12; (1988) 180 CLR 491.

on appeal because it could possibly have been met by calling evidence before the Commissioner. That conclusion was open to the Full Bench on the materials before it.

Appeal does not succeed

38 On hearing an appeal from a decision of the Full Bench the court may confirm, reverse, vary, amend, rescind, set aside or quash the decision the subject of appeal or remit the matter to the Full Bench as the case requires. The decision the subject of this appeal is the decision of the Full Bench that the decision of the Commissioner should be quashed and Mr Whooley's claim dismissed. The Full Bench made that decision on two independent grounds. We have found that the Full Bench erred in respect of the first ground, that the decision by the CEO to terminate the employment of Mr Whooley was not invalid and ineffective.

39 The second ground of the Full Bench's decision is independent of the first ground of its decision and is not affected by the error made by the Full Bench in the course of deciding ground 1. Smith AP, with whom Emmanuel C agreed, considered ground 2 on the assumption that her Honour was wrong about the construction of LGA s 5.37(2) and the effect in law of the decision of the CEO to dismiss Mr Whooley was invalid and ineffective. Smith AP decided that if her Honour was wrong on ground 1 of the appeal to the Full Bench, as we have found she was, she would uphold ground 2 of the appeal. It is that decision which Mr Whooley challenges by ground 2 of his appeal.

40 The court does not have jurisdiction to hear Mr Whooley's appeal against the second ground of the Full Bench's decision. That ground of the Full Bench's decision stands. It is sufficient to found the decision of the Full Bench to quash the decision of the Commissioner and dismiss Mr Whooley's claim.

41 It is not sufficient for the court to allow an appeal and reverse, vary, or quash the decision the subject of appeal, or remit the matter to the Full Bench, that the Full Bench made an error in the course of its decision. The appellant must further show that the error affected, or may have affected, the decision of the Full Bench. In this case, the error of the Full Bench does not affect the second ground on which it upheld the appeal from the Commissioner. That ground is independent of, and not affected by, the decision of the Full Bench that the decision by the CEO to terminate Mr Whooley's employment was not invalid and ineffective. Therefore, the court should dismiss the appeal and confirm the decision of the Full Bench to quash the decision of the Commissioner and dismiss Mr Whooley's claim.

No miscarriage of justice

42 IRA s 90(3a) provides that if any ground of the appeal is made out but the court is satisfied that no injustice has been suffered by the appellant, the court shall confirm the decision the subject of appeal unless it considers there is good reason not to do so.

43 We are satisfied that no injustice has been suffered by Mr Whooley notwithstanding that ground 1 of his appeal is made out. An error of law in construing or interpreting an Act may or may not amount to, or give rise to, an injustice. Whether it does depends on the context of the appeal to the Full Bench, the matters in issue and the decision of the Full Bench. Generally there will be no injustice if an error, including an error in the construction or interpretation of any Act, has not affected the ultimate decision of the Full Bench on the overall merits of the case.

44 No injustice has been suffered by Mr Whooley in this case. The Full Bench found that the settlement agreement was valid and enforceable, and barred his claim for contractual benefits. That finding is sufficient to quash the decision of the Commissioner and dismiss Mr Whooley's claim. That ground of the Full Bench decision is not affected by its error in construing the LGA. Further, and in any event, this court does not have jurisdiction to review that ground of the Full Bench's decision.

45 Section 90(3a) of the IRA requires the court to confirm the decision the subject of appeal if it is satisfied that no injustice has been suffered by the appellant, unless it considers that there is good reason not to do so. We do not consider that there is any good reason not to confirm the decision of the Full Bench.

Conclusion

46 Ground 1 of the appeal is made out. The court does not have jurisdiction to hear ground 2. The error disclosed by ground 1 does not affect the decision the subject of appeal because the independent ground of the Full Bench's decision, that the settlement agreement barred Mr Whooley's claim, stands, and must result in the Commissioner's decision being quashed and Mr Whooley's claim being dismissed.

47 We would dismiss the appeal and confirm the decision of the Full Bench, that is the decision of the Full Bench to quash the decision of the Commissioner and order that Mr Whooley's claim be dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

KL

Associate to the Honourable Justice Buss

13 FEBRUARY 2019

2019 WAIRC 00071

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 8 OF 2017

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	ROBERT WHOOLEY	APPELLANT
	-v-	
	SHIRE OF DENMARK	RESPONDENT
CORAM	THE HONOURABLE JUSTICE BUSS, PRESIDING JUDGE	
DATE	TUESDAY, 19 FEBRUARY 2019	
FILE NO/S	IAC 1 OF 2018	
CITATION NO.	2019 WAIRC 00071	

Result	Final Orders issued - Appeal dismissed
Representation	
Appellant	Mr R Whooley
Respondent	Mr J E Wyatt (of counsel)

Order

It is ordered:

1. THAT the appeal is dismissed.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2019 WAIRC 00011

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. OSH 3/2017 GIVEN ON 26 APRIL 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2019 WAIRC 00011
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS
HEARD	:	THURSDAY, 22 NOVEMBER 2018
DELIVERED	:	WEDNESDAY, 16 JANUARY 2019
FILE NO.	:	FBA 4 OF 2018
BETWEEN	:	ALCOA OF AUSTRALIA LIMITED Appellant AND ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM Respondent

ON APPEAL FROM:

Jurisdiction	:	Occupational Safety and Health Tribunal
Coram	:	Senior Commissioner S J Kenner
Citation	:	[2018] WAIRC 00269; (2018) 98 WAIG 392
File No	:	OSHT 3 of 2017

CatchWords	:	Industrial Law (WA) - Occupational Safety and Health Tribunal - Appeal against decision by Tribunal of Review of State mining engineer's decision to affirm prohibition notice - Whether in fact a prohibition notice required the removal of hazard or likely hazard and imposed requirements to be complied with until hazard or likely hazard removed - Whether prohibition notice ambiguous and sufficiently clear in its terms - Whether within power to impose a requirement to refrain from permitting any person to be in a place in a mine where they 'might' be exposed (to a hazard)
Legislation	:	<i>Industrial Relations Act 1979</i> (WA), s 49 <i>Mines Safety and Inspection Act 1994</i> (WA), s 3(1)(a), s 3(1)(b), s 3(1)(c), s 31AB, s 31AB(a), s 31AB(b), s 31AB(b)(ii), s 31AC, s 31AC(2), s 31AC(2)(a), s 31AC(2)(b), s 31AD, s 31AD(1), s 31AD(2), s 31AD(2)(a), s 31AD(2)(b), s 31AE, s 31AE(a), s 31AE(b), s 31AE(c), s 31AE(e), s 31AE(f), s 31AF, s 31AF(c), s 31AG, s 31AY, s 31AZ, s 31BA, s 31BB, s 31BB(2)(a), s 31BB(2)(b), s 31DE <i>Occupational Safety and Health Act 1984</i> (WA) s 51I <i>Occupational Health and Safety Act 2004</i> (Vic) s 112(b) <i>Mines Safety and Inspection Regulations 1995</i> (WA) reg 7.28, reg 9.32
Result	:	Appeal upheld, decision of Tribunal varied, prohibition notice cancelled
Representation:		
Counsel:		
Appellant	:	Mr S Vandongen SC and with him Ms E Chamizo
Respondent	:	Ms T Hollaway
Solicitors:		
Appellant	:	Ashurst Australia

Case(s) referred to in reasons:

Bio-Organics Pty Ltd v The Chief Executive Officer, Department of Water and Environment Regulation [2018] WASC 236
 Boughey v R (1986) 161 CLR 10; (1986) 65 ALR 609
 F v National Crime Authority (1998) 154 ALR 471
 Gray Bruni Constructions Pty Ltd v Victorian WorkCover Authority [2006] VCAT 1969; (2006) 25 VAR 11
 Rank Film Distributors Ltd v Video Information Centre [1982] AC 380
 Re Lawrence; Ex parte Goldbar Holdings Pty Ltd (1994) 11 WAR 549
 Wormald Security Australia Pty Ltd v Rohan (1994) 74 WAIG 2

*Reasons for Decision***SMITH AP AND SCOTT CC:****The appeal**

- 1 The appeal has been instituted under s 51I of the *Occupational Safety and Health Act 1984* (WA) (OSH Act) and s 49 of the *Industrial Relations Act 1979* (WA) (IR Act).
- 2 The appeal is against an order made by Kenner SC sitting as the Occupational Safety and Health Tribunal (Tribunal) on 26 April 2018 to modify a prohibition notice issued to the appellant which prohibited persons from being in places within the appellant's refinery at Pinjarra where they might be exposed to asbestos.

Background - The extent of use of asbestos at the Pinjarra refinery

- 3 The appellant mines bauxite and refines aluminium in Australia. It operates three refineries in Western Australia. One at Pinjarra, one at Kwinana and one at Wagerup. The Pinjarra refinery is situated on a large site approximately 10 kilometres from the town of Pinjarra and employs approximately 1,030 employees and contractors. It was commissioned in 1972 and is one of the largest bauxite refineries in the world, occupying a site of some 6,500 hectares.
- 4 At the time the refinery was constructed, asbestos-containing materials were not prohibited from use in industry and asbestos was widely used in the construction of the appellant's refinery at Pinjarra.
- 5 Consequently, materials containing asbestos are present throughout the Pinjarra refinery in the form of protective coatings, claddings, floor tiles, sheeting, asphalt wrapping, different types of lagging and insulation, electrical switchboards and gaskets. Also, throughout the refinery are paint-type protective coatings (including Coro-Kote) that contain asbestos material. These coatings are on structures such as girders, beams, handrails and other structures.
- 6 The appellant keeps an asbestos register as required by the National Code of Practice for the Management and Control of Asbestos in Workplaces (NOHSC: 2018 (2005)). The register contains a record of:
 - (a) all identified asbestos-containing materials on the refinery site; and

- (b) the location of the asbestos-containing material, how much is present, what it is, the condition of the asbestos-containing material and when it was last inspected and surveyed. A survey is conducted on a three-year cycle by the refinery's dedicated removalist, Cape Onshore Pty Ltd (Cape Australia), which has an office at the refinery.
- 7 The asbestos register is available to read online to all Alcoa employees at the refinery, but not to contractors unless they are at a supervisor or higher level.
- 8 The appellant has a program in place at the refinery for asbestos remediation and removal. Whether asbestos-containing material is removed or remediated depends on the level of risk the material poses and the practicality of its removal, as opposed to its remediation.
- 9 The appellant has a strategic asbestos management plan which details the company's plan for the safe removal of asbestos on the refinery site. The appellant also has its own suite of policies and procedures in relation to managing and working with asbestos at the refinery site. Part of the management of asbestos at the refinery involves the training of employees and contractors by an 'asbestos awareness' program, which covers a range of topics including the nature and risks of asbestos; personal protective equipment; who can lawfully remove/remediate asbestos and what to do if asbestos is discovered on the site.
- 10 The body with day to day management of asbestos at the refinery is the Asbestos Sub-Committee. One of the members of the sub-committee is Mr Andrew Obal, the refinery's health and safety manager. There are other representatives of the appellant on the sub-committee, together with a representative of Cape Australia and two employee representatives from the two main unions on the site. The committee meets regularly to generally discuss asbestos-containing material incidents on the refinery site, update the various registers, discuss the progress of remediation or removal works and discuss planning and budgetary issues.

Asbestos-containing materials at the refinery - how they become a hazard

- 11 The Tribunal heard evidence from Dr Glossop, an expert called by the State mining engineer. Dr Glossop is highly qualified in the management and control of asbestos hazards in workplaces.
- 12 It is common ground there is no safe level of exposure to respirable asbestos fibres.
- 13 Dr Glossop testified that the principal diseases caused by asbestos are caused by respirable asbestos fibres that are inhaled deep into a person's lungs. A respirable asbestos fibre, which is the most dangerous form of asbestos, has a diameter of less than 3µm, a length greater than 5 µm, and a length to width aspect ratio of greater than 3:1.
- 14 Dr Glossop's evidence was that:
- (a) respiratory diseases mesothelioma and asbestosis are caused by asbestos fibres lodged in a person's lungs;
 - (b) amphibole asbestos (crocidolite, amosite, actinolite, tremolite and anthophyllite) have much greater potential to cause all of the asbestos diseases (as amphibole remains in the lung) than serpentine asbestos (chrysotile) (as serpentine asbestos can be dissolved in the lung over time as short as a year);
 - (c) the level of hazard that arises from asbestos is directly related to the extent to which airborne respirable asbestos fibres occur;
 - (d) there are two broad categories of asbestos-containing materials:
 - (i) friable asbestos-containing materials are those which are asbestos fibres or fibrils that can be broken up and crushed by hand. Examples of this type of asbestos is lagging insulation, some kinds of insulation board and sprayed limpet asbestos used for fire rating purposes;
 - (ii) non-friable asbestos is asbestos that is normally contained in something else such as asbestos cement, adhesives, embedded in gaskets and vinyl floor tiles. The hazard level of non-friable asbestos is generally low, except in cases where the material is subject to aggressive treatment such as cutting or grinding with power tools, or drilling holes through products containing asbestos;
 - (e) because of the different hazards involved, friable asbestos may only be removed by an unrestricted licensed removalist. Non-friable asbestos can be removed by a person who has a restricted licence to remove;
 - (f) friable asbestos-containing materials which acts as a binder to the asbestos may deteriorate over time resulting from heat, moisture, vibration and other chemicals, which makes the material more fragile and increases the risk of release of a larger number of asbestos fibres when the material is disturbed. This includes the deterioration of protective coatings resulting from sunlight, which exposes the friable asbestos under the coating;
 - (g) research statistics reveal that the highest incident rate of mesothelioma occurred between 2010 and 2012 amongst trades people;
 - (h) tradespeople undertaking maintenance work on plant and equipment that involves asbestos-containing material are exposed to respirable asbestos fibres through the disturbance of the material. The level of exposure is much higher in the case of friable asbestos-containing materials than non-friable asbestos-containing materials; and
 - (i) non-friable asbestos-containing materials can deteriorate over time. For example, asbestos cement sheets used in roofing can be worn away by acid rain, frost and lichen which can leave bare asbestos fibres protruding from the sheeting by up to three to four millimetres. On occasions, fibres can break away completely from the sheeting.
- 15 Most of the asbestos-containing material at the Pinjarra refinery is non-friable. What remains of the friable material has either been or is planned to be contained by being encased in a metal wrap or other type of containment, in accordance with accepted and approved practices.

The risks created by maintenance work at the Pinjarra refinery

- 16 The appellant called Mr Obal to give evidence before the Tribunal about the steps to manage risks in relation to asbestos-containing materials where maintenance, repair and cleaning work is undertaken at the refinery. Mr Obal testified that for:
- (a) work planned in advance, asbestos-containing material is identified in the work to be performed and is arranged so as to minimise the risk of exposure to hazards;
 - (b) unplanned work, a job safety analysis is required, which will identify the hazards associated with the performance of the work, including asbestos-containing materials or suspected asbestos-containing materials; and
 - (c) work involving contractors, a different process applies. The contractor concerned and an employee employed by the appellant must both sign an authority to proceed form which requires each to identify on the form whether any asbestos-containing material may be encountered on the work in question. If so, they are required to review the asbestos register to confirm whether any asbestos-containing material will be present and, if so, to take steps to control the risk. This may involve engaging Cape Australia to remediate or remove the asbestos-containing material, as the case requires. Once these steps have been undertaken, and the work is to proceed, it is undertaken with the oversight by contractor supervision, not the appellant.

Relevant circumstances which led to the issue of the prohibition notice

- 17 Inspector Cullen is a Senior Investigator with the Department of Mines, Industry Regulation and Safety. Inspector Cullen holds a Bachelor of Science in Environmental Health, a Postgraduate Diploma in Occupational Health and Safety, and a Masters in Business Administration, in addition to other health and safety qualifications.
- 18 In 2014, Inspector Cullen was responsible for occupational health and safety regulation of complex processing plant, which included the appellant's three alumina refineries. In October 2014, an incident occurred at the Pinjarra refinery involving black pipe lagging that was said to contain asbestos material. The pipe lagging was attached to a very extensive network of piping and was directly adjacent to work being undertaken by a contractor to the appellant, Transfield Services (Australia) Pty Ltd, and a sub-contractor. The work that was being carried out was for a replacement of a biological oxalate destruction line (BOD line). It was alleged that up to 12 people may have been exposed to friable asbestos in a degraded condition.
- 19 A prohibition notice was issued on 21 October 2014, stopping the work on the BOD line project. The notice was lifted on 14 November 2014 after an inspector was satisfied that the work could safely proceed. Improvement notices were also issued in relation to these works. Inspectors from the Mines Inspectorate then conducted an investigation as a result of complaints that some employees had been exposed to asbestos. Following the incident, remedial steps were taken by the appellant that included recladding the entire BOD line, not just the affected area. This was a serious incident. Degraded and broken pipe lagging exposing asbestos insulation, some of it in friable condition, close to employees of the appellant and contractors, resulted in a serious risk of exposure to respirable asbestos fibres over a lengthy period.
- 20 Not long after the BOD line incident, on 19 December 2014, Inspector Cullen investigated a further incident of potential exposure to respirable asbestos fibres at the Pinjarra refinery. This resulted from an incident report, initiated from the appellant, and concerned the work of another employee of Transfield.
- 21 Between 16 September 2014 and 24 November 2014, the employee of Transfield engaged in oxy-acetylene gas cutting work of steel walkway platforms, coated in Coro-Kote, an asbestos-containing material, in Building 45 at the refinery. As a result of an investigation into this incident, corrective actions were recommended in the investigation report in relation to contractor management.
- 22 Sometime later, in about September 2015, Inspector Cullen obtained a copy of the injury-free events log for the Pinjarra refinery. The log covered the period from July to November 2014. During this period, some 21 asbestos related events were listed. Most events were recorded as events of a 'marginal' degree of severity, but one was recorded as a 'critical event'. However, none of the incidents were reportable asbestos-containing material events that the appellant was required to report to the Mines Inspectorate. Many of these entries were based on self-reporting by individuals of what they believed or suspected to be asbestos-containing materials and did not necessarily reflect the presence of asbestos-containing materials as a matter of fact.
- 23 A further incident arose in July 2016. Inspector Cullen received a report from the appellant that an incident had occurred at the substation 1, concerning the removal of old switchgear equipment. Switchgear work had been undertaken by a contractor, UGL Operations and Maintenance Pty Ltd. An employee of the appellant subsequently reported seeing broken pieces of fibre board material on the floor of substation 1 on 16 July 2016. It was suspected that the broken pieces of fibre board were asbestos-containing material. The suspicion was that the fibre board had broken off decommissioned electrical switch gear that had been stored in the substation. The switchgear fibre board contained both chrysotile and amosite asbestos in a non-friable form.
- 24 The switchgear substation 1 incident again highlighted problems with contractor management, supervision and control in relation to the identification and safe management of asbestos-containing materials at the Pinjarra refinery, despite changes being made to work practices following the Coro-Kote incident.
- 25 Two further matters came to Inspector Cullen's attention in late 2016 and early 2017.
- 26 In late 2016, he received a complaint relating to work performed by an employee of a contractor using a high-pressure water jetting inside a vessel that Cape Australia had previously identified as potentially containing asbestos-containing material. However, subsequent samples obtained from inside the vessel revealed there were no asbestos fibres present.

- 27 A second incident was reported to Inspector Cullen by Mr Obal on 3 February 2017. On 2 February 2017, a contractor had cut the underside of a steel stiffener, which was known to possibly contain an asbestos-containing material, Gilsomatic. The asbestos-containing material had not been identified by the appellant before the work had commenced and was only discovered after the job had been completed. In this instance, the contractor employee had been wearing a respirator. Once the material was identified, Cape Australia removed the asbestos-containing material. However, it was discovered that there had been overspray of the asbestos-containing material under the stiffener that had not been earlier identified which led to the incident.
- 28 From his review of the asbestos register, Inspector Cullen calculated that by area, there was approximately 42,794 square metres of asbestos-containing materials present on the refinery site.
- 29 From these incidents and a review of the appellant's asbestos register and from his own knowledge of the risks asbestos may pose from workplace exposure, Inspector Cullen formed the opinion that there was asbestos at the Pinjarra refinery that was dangerous, or likely to become dangerous, because:
- (a) activities at the refinery, including but not limited to construction work, electrical maintenance and installation work, shutdown and general plant maintenance, refurbishment or replacement of parts and equipment, were likely to result in the disturbance or abrasion of asbestos;
 - (b) the appellant regularly engages contractors to do the work described in (a). Some of the workers engaged in past incidents did not wear personal protective equipment, may never have worked with asbestos, may be unfamiliar with the appellant's procedures and were not aware of asbestos hazards;
 - (c) appropriate identification of the asbestos hazard, adequate risk assessments and suitable control measures were not in place (during incidents);
 - (d) the appellant is in control of its contractors, its procedures and the asbestos register;
 - (e) Cape Australia personnel were not present when contractors disturbed asbestos in the incidents he was aware of; and
 - (f) the injury free events log showed regular asbestos incidents over a significant period, in some cases being at least one event every few weeks.
- 30 As a result of forming this opinion, Inspector Cullen issued prohibition notice NP-372-223057 on 10 February 2017.
- 31 The terms of prohibition notice NP-372-223057 on its face recorded that on 21 October 2014, Inspector Cullen had formed the opinion under s 31AB of the *Mines Safety and Inspection Act 1994* (WA) (MSI Act) that the appellant had contravened reg 7.28 of the *Mines Safety and Inspection Regulations 1995* (WA) (MSI Regulations) in circumstances that make it likely that the contravention will continue or be repeated and the above matter or activity occasioning the contravention (hazardous materials containing materials at the mine) (the Pinjarra refinery)) constitutes or is likely to constitute a hazard to any person.
- 32 The grounds of Inspector Cullen's opinion stated in prohibition notice NP-372-223057 were:
- As a result of information obtained through investigations performed at the Mine, I am of the opinion that:
1. you have not taken all practicable steps to ensure that persons at the Mine have not been exposed to asbestos at the Mine, in circumstances that indicate that such exposure will continue or be repeated; and
 2. further, and in any event, asbestos at the Mine is likely to become dangerous so as to constitute a hazard to persons working there. In particular:
 - (a) Between July and October 2014, employees of Transfield Services (Australia) Pty Ltd and PASE Services Pty Ltd were exposed to damaged and/or degraded asbestos containing material at the Mine.
 - (b) Between 7 July and 16 July 2016 employees of United Group Limited employees were exposed to damaged asbestos containing material at the mine.
- Exposure of any persons to damaged and/or degraded asbestos containing materials is likely to result in the inhalation of airborne respirable asbestos fibres leading to their risk of asbestos related diseases.
- In accordance with section 31AC(2)(a) and/or section 31AD(2)(a), I require you to remedy the activity or matter.
- 33 The terms of the prohibition stated in NP-372-223057 were as follows:
- To the Principal Employer/Manager, under section 31AE of the Act I require that the following prohibition(s) on mining operations be imposed
- Pursuant to sections 31AC, 31AD and 31AE of the Act, I require you to remedy the matters referred to above by:
- From the date of issue of this notice you are to refrain from permitting any person to be at any place within the Mine where they might be exposed to any asbestos that is being disturbed, abraded or otherwise contacted in any manner, except as follows:
1. Where less than 10 square metres of non-friable asbestos containing materials is removed by persons who have been verified as competent; or
 2. Where non-friable asbestos containing materials are removed by licensed asbestos removalists; or
 3. Where friable asbestos containing materials are removed by unrestricted licensed asbestos removalists; or
 4. Where a sample of any asbestos containing material is removed by a competent expert for the purposes of testing;
 5. By express exemption of the State Mining Engineer; or

6. Where, despite all practicable measures having been taken to ascertain whether asbestos was present at a particular place, the presence of asbestos at that place could not reasonably have been ascertained.

Review of probation notice NP-372-223057 by the State mining engineer

- 34 After the issue of prohibition notice NP-372-223057, the appellant made an application for a review of the prohibition notice to the State mining engineer. The State mining engineer held a review and found that Inspector Cullen could not rely on a contravention of reg 7.28 of the MSI Regulations and, therefore, his opinion in this regard was insufficient to invoke s 31AB(a) of the MSI Act.
- 35 The State mining engineer, however, concluded that there were reasonable grounds for Inspector Cullen to issue prohibition notice NP-372-223057 pursuant to s 31AD(2)(b) and s 31AE of the MSI Act. The State mining engineer held:
- (a) Inspector Cullen accurately stated the ground for his opinion that asbestos which is damaged and/or degraded is likely to result in the inhalation of airborne respirable asbestos fibres, leading to disease;
 - (b) for the purposes of s 31AD(2)(a), the removal of the relevant hazard was achieved by keeping persons at a safe distance from respirable asbestos fibres release from asbestos-containing materials; and
 - (c) there is no need in every case (where a prohibition notice is issued) for an immediate hazard to exist. Section 31AB(b) contemplates there may be a situation justifying the issuance of a prohibition notice when a future potential hazard arises.

Relevant provisions of the legislative scheme – prohibition notices

- 36 Section 31AB of the MSI Act specifies the pre-conditions for the issue of a prohibition notice. These are, an inspector must form an opinion either that:
- (a) a contravention of any provision of this Act –
 - (i) is occurring at a mine; or
 - (ii) has occurred at a mine in circumstances that make it likely that the contravention will continue or be repeated,
 and any matter or activity occasioning the contravention constitutes or is likely to constitute a hazard to any person; or
 - (b) a mine, or any plant, mining practice or hazardous substance at or related to a mine –
 - (i) is dangerous; or
 - (ii) is likely to become dangerous,
 so as to constitute a hazard to any person.
- 37 In this appeal, the respondent relies upon the pre-conditions in s 31AB(b) as the threshold for issuing prohibition notice NP-372-223057. Consequently, any opinion by Inspector Cullen formed pursuant to s 31AB(a) is irrelevant to the disposition of the matters raised in this appeal.
- 38 Section 31AC prescribes, among other matters, the content and directions that must be given in a prohibition notice issued on grounds prescribed in s 31AB(a) (due to a breach of the MSI Act).
- 39 Section 31AD(1) prescribes the formalities as to whom a prohibition notice is to be issued to when an inspector forms the opinion prescribed in s 31AB(b).
- 40 It is common ground that the appellant is a person to whom prohibition notice NP-372-223057 could be issued.
- 41 Section 31AD(2) prescribes the requirements to which a prohibition notice must conform. Section 31AD(2) provides:
- The notice is to –
- (a) require the person referred to in subsection (1)(a) to remove the hazard or likely hazard; and
 - (b) in accordance with section 31AE, impose requirements to be complied with by the principal employer or the manager until an inspector is satisfied that the hazard or likely hazard has been removed.
- 42 The requirements (referred to in s 31AD(2)(b)) to be complied with until the principal employer or an inspector is satisfied that the hazard or likely hazard has been removed are prescribed in s 31AE as follows:
- In exercise of the powers conferred by sections 31AC(2)(b) and 31AD(2)(b) an inspector may require the principal employer or the manager –
- (a) to stop work at the mine or any specified part of the mine; or
 - (b) to refrain from doing any specified thing at or in relation to the mine; or
 - (c) to remove all persons from the mine or any specified part of the mine; or
 - (d) to take any combination of steps under paragraphs (a), (b) and (c),
- except to the extent that provision is made in the prohibition notice either with or without conditions or restrictions for –
- (e) any specified work, practice or activity to be carried out or any specified thing to be done at the mine; or
 - (f) any person to be at the mine or the part concerned.

43 Section 31AF prescribes the formalities of a prohibition notice as follows:

A prohibition notice under this Subdivision must –

- (a) state the opinion of the inspector in terms of section 31AB(a) or (b), as the case may require; and
- (b) state reasonable grounds for that opinion; and
- (c) specify –
 - (i) where section 31AB(a) applies, the provision of this Act; or
 - (ii) where section 31AB(b) applies, the mine, or the plant, mining practice or hazardous substance, in respect of which that opinion is held; and
- (d) contain a brief summary of the right to have the notice reviewed under Subdivision 7.

44 A failure to comply with a prohibition notice constitutes an offence (s 31AG).

The decision of the Tribunal on review

45 After considering the expert evidence given by Dr Glossop, the extent of asbestos-containing materials and systems of management of asbestos-containing materials at the Pinjarra refinery, together with facts relied upon to issue probation notice NP-372-223057, Kenner SC (sitting as the Tribunal) stated that there were four issues that required determination. These were:

- (a) How should the relevant provisions of the MSI Act regarding the issuance of prohibition notices be interpreted?
- (b) Whether, in the context of (a), the opinion formed by Inspector Cullen that asbestos-containing materials at the refinery are dangerous or likely to become dangerous, so as to constitute a hazard to any person, was based on reasonable grounds on the evidence?
- (c) Whether the prohibition notice otherwise complied with the requirements of the MSI Act?
- (d) Subject to (a) to (c), whether the prohibition notice was adequately framed and if not, should it be modified and if so how?

46 The Senior Commissioner made the following findings which are relevant to the issues raised in this appeal:

- (a) The terms of s 31AD(2) of the MSI Act require a prohibition notice to satisfy both subparagraphs (a) and (b). That is, a notice issued by an inspector must first require the removal of the relevant hazard or likely hazard. Second, the notice must impose such of the requirements of s 31AE as may be relevant to the circumstances of the case.
- (b) As a matter of construction, the language of s 31AD(2) where it is specified that the notice 'is to', imposes an obligation on an inspector to take the steps in s 31AE to address the particular hazard to which the notice relates. This provision is not discretionary, it is mandatory.
- (c) The composite phrase 'is likely to become dangerous' in s 31AB(b)(ii) should be construed by applying the reasoning in *Boughey v R* (1986) 65 ALR 609 to be taken to mean 'a substantial or real and not remote chance that a hazardous substance will become fraught with danger, or risk, be perilous, hazardous or unsafe'.
- (d) From the terms of s 31AB, the pre-condition to the exercise of the power to issue a prohibition notice is the formation of the required opinion, reasonably based. If an inspector has formed such an opinion, on reasonable grounds, then, under s 31AC and s 31AB, the inspector may, but is not required to, issue a prohibition notice. If a prohibition notice is to be issued, there are requirements that it must meet, as set out in s 31AF.
- (e) The purpose of a prohibition notice is in substance directed towards the removing of a relevant hazard or a likely hazard in the workplace. When viewed in this light, and given a broad and flexible operation, s 31AD(2)(a) and (b), when read with s 31AE, support the terms of a prohibition notice that directs an employer to ensure that persons are removed from an area of a workplace to remove the risk of exposure to a hazard (in this case, asbestos; specifically, the emission of respirable asbestos fibres from asbestos-containing materials). This constitutes the relevant 'removal of the hazard or likely hazard' of which s 31AD(2)(a) speaks. To achieve this objective, one or a combination of the measures in s 31AE(a) to (c) may be required to be imposed.
- (f) There is nothing in the language of s 31AD or s 31AE, when construed broadly, that suggests a time limit applies. It may well be, as the State mining engineer accepted in argument, that prohibition notice NP-372-223057 stays in place until all asbestos is removed from the refinery. This does not detract from the main purpose and effect of these provisions which is to enable a prohibition notice, as an enforcement measure, to be deployed to eliminate the risk of exposure to a likely hazard.
- (g) If the appellant's view of the need for the physical removal of a hazard, that being one that is essentially the removal of a transient but tangible object or substance, were to prevail, some major hazards in the mining industry may not be able to be adequately addressed (such as the removal of water from an underground mine). A control measure and the legitimate use of a prohibition notice, is the removal of employees or other persons from the areas of the mine from the highest risk of exposure to these hazards.
- (h) The use of the word 'might' in the prohibition notice is neither inappropriate nor inconsistent with the statutory scheme. 'Might' means no more than and is conformable with the notion that there is something more than a mere possibility of an occurrence, in terms of a real or substantial chance. There is little difference in meaning between 'may' and 'might' in this context.

- (i) There is nothing in the relevant provisions of the statute that require that any risk be imminent. The language of s 31AB(b) is the 'likelihood', in terms of it being more probable than not, of a substance becoming a hazard.
- (j) Prohibition notice NP-372-223057 is not vague and ambiguous. It contains a clear statement of the hazard and the opinion Inspector Cullen formed. The statement in the grounds, as to the consequences of exposure to damaged and degraded asbestos, is an accurate representation of the known risk of asbestos fibres likely being released in those circumstances. Prohibition notice NP-372-223057 clearly states the requirement that persons not be at any place at the mine where they might, because of the prohibited activity, be exposed to asbestos. There are then specified the exceptions from the prohibition that can be categorised into safe removal of asbestos by qualified persons, testing for the presence of asbestos, where the presence of asbestos could not reasonably be anticipated and providing for an exemption on the basis that the State mining engineer is satisfied any asbestos-containing material is not hazardous.

47 Senior Commissioner Kenner then turned to the question whether prohibition notice NP-372-223057 was adequately framed. The Senior Commissioner found the contention made by the appellant that (on Dr Glossop's evidence) mere 'contact' with asbestos cannot pose a hazard, should be accepted, as it is damage, deterioration and disturbance that can render asbestos hazardous. Accordingly, Kenner SC found that the reference to 'contact' in prohibition notice NP-372-223057 should be removed and the prohibition notice should be modified accordingly. Senior Commissioner Kenner also found that the reference in exception 4 to 'competent expert' should be modified to 'competent person', to be consistent with the meaning of that term in the 'Code'.

48 Consequently, the effect of the decision of the Tribunal was to modify prohibition notice NP-372-223057 as follows:

From the date of issue of this notice you are to refrain from permitting any person to be at any place within the Mine where they might be exposed to any asbestos ~~that is being disturbed, abraded or otherwise contacted in any manner~~ that is or has been damaged and/or disturbed and/or has deteriorated in any manner, except as follows:

1. Where less than 10 square metres of non-friable asbestos containing materials is removed by persons who have been verified as competent; or
2. Where non-friable asbestos containing materials are removed by licensed asbestos removalists; or
3. Where friable asbestos containing materials are removed by unrestricted licensed asbestos removalists; or
4. Where a sample of any asbestos containing material is removed by a ~~competent expert~~ competent person for the purposes of testing;
5. By express exemption of the State Mining Engineer; or
6. Where, despite all practicable measures having been taken to ascertain whether asbestos was present at a particular place, the presence of asbestos at that place could not reasonably have been ascertained.

(See the order made by the Tribunal: [2018] WAIRC 00269; (2018) 98 WAIG 392).

Appellant's amended grounds of appeal

49 The point made in ground 1 of the appeal is the appellant contends that the Tribunal erred in affirming prohibition notice NP-372-223057, as the prohibition notice was invalid as it failed to comply with s 31AD(2)(a) and (b) of the MSI Act, in that it:

- (a) did not require the appellant to remove any hazard or likely hazard specified in the prohibition notice;
- (b) did not impose on the appellant any requirement to be complied with until an inspector was satisfied that the hazard or likely hazard specified in the prohibition notice had been removed; and
- (c) is by reason of (b) specified to endure indefinitely and/or imposes a permanent restriction on the appellant and, as such, is beyond power.

50 If the appellant is successful in ground 1 of the appeal, its remaining grounds of appeal fall necessarily away.

51 In ground 2, the appellant contends that the Tribunal erred in finding that prohibition notice NP-372-223057 was not vague and ambiguous. It says the prohibition notice failed to specify unambiguously and with sufficient clarity, the matters required to be specified in a prohibition notice by operation of s 31AE(a), (b) and (c).

52 In grounds 3 and 5, the appellant contends that prohibition notice NP-372-223057, in so far as it is expressed to apply when persons 'might' be exposed to asbestos-containing material, offends s 31AB(b) because the use of the word 'might' implies that the prohibition notice was not grounded in either an opinion or conclusion that asbestos-containing material is either dangerous, or likely to become dangerous, so as to constitute a hazard to any person.

53 In appeal grounds 4 and 6, the appellant asserts that the modification of prohibition notice NP-372-223057, by including a reference to possible exposure to asbestos that has 'deteriorated in any manner', fundamentally altered the ambit and reach of the prohibition notice without providing substantive reasons as to why that modification was in the circumstances appropriate.

54 In ground 7, the appellant asserts that the Tribunal denied it procedural fairness by failing to afford it the opportunity of being heard in relation to the modification made to prohibition notice NP-372-223057 in circumstances where the modifications significantly and fundamentally altered the nature and extend of the appellant's obligations with respect to the prohibition notice.

Did the Tribunal err in finding that prohibition notice NP-372-223057 complied with the requirements of the MSI Act?**(a) Ground 1 of the appeal**

- 55 As the respondent points out in this matter, the jurisdictional threshold to issue a probation notice pursuant to the power conferred to do so in s 31AB(b) of the MSI Act, was whether or not asbestos-containing materials at the Pinjarra refinery constitute a hazardous substance, or a likely hazard, that may result in harm to the health of a person.
- 56 It is apparent from Kenner SC's reasons for decision, and from the express terms of prohibition notice NP-372-223057, that Inspector Cullen had formed an opinion under s 31AB(b) that a hazardous substance at the mine (specifically asbestos) is likely to become dangerous so as to constitute a hazard to persons working there.
- 57 It is clear that Inspector Cullen formed the view that the 'hazard or likely hazard' was the emission of respirable fibres from damaged, disturbed or deteriorated asbestos-containing materials and Kenner SC concurred [101].
- 58 Having decided that Inspector Cullen had properly formed that opinion, the Tribunal was then required to consider whether the prohibition notice conformed with s 31AD(2).
- 59 Senior Commissioner Kenner correctly found that a notice issued by an inspector under s 31AB(b) must impose steps on a person that must be complied with. These are, a notice must (by operation of s 31AD(2)) first require the removal of the relevant hazard or likely hazard, and second impose such of the requirements of s 31AE as may be relevant to the circumstances of the case [88] - [89].
- 60 The Senior Commissioner appeared to have accepted that a prohibition notice must state the matters specified in s 31AF.
- 61 The Senior Commissioner properly accepted that a hazard arises from asbestos if asbestos-containing materials have deteriorated or have been disturbed, which gives rise to the likelihood of airborne asbestos fibres being released into the air [107].
- 62 The respondent argues Kenner SC correctly found that the removal of the hazard was (as contemplated by s 31AD(2)(a)) to occur by the removal of persons from locations where the asbestos is likely to become dangerous; that is, removal from areas where asbestos is being damaged and/or disturbed and/or has deteriorated in any manner. Thus, it is said by removing persons from these areas, that the hazard is removed as the hazard is the exposure of persons to respirable airborne fibres.
- 63 The respondent says that the prohibition notice permits persons to be in parts of the refinery where there is asbestos (as they are able to do so now) until such time that the asbestos has deteriorated or when it is likely that works will damage or disturb the asbestos which could cause the release of fibres. In practical terms, it is said that workers are able to work in areas containing asbestos-containing materials that are in good condition, but says that if there is a potential for work to damage or disturb asbestos-containing materials, further controls should be in place to ensure no damage occurs to ensure the prohibition notice is not breached.
- 64 The respondent also says that if it is intended that a worker is to go into an area that contains asbestos-containing materials that are damaged, disturbed or deteriorated in any manner, then the exceptions to the notice are enlivened and that it must only be one of those persons listed in the exceptions that is to carry out the work to remove the hazard, or likely hazard. The respondent says, on the evidence, this course of action would be desirable.
- 65 The difficulty with the contentions put on behalf of the respondent is simply that prohibition notice NP-372-223057 does not have this effect.
- 66 The difficulty with the respondent's arguments are that prohibition notice NP-372-223057 does not create the regime the respondent says it does.
- 67 Prohibition notice NP-372-223057 does not put in place a regime to remove the hazard or likely hazard. A direction to prohibit persons from being in a place in the refinery where they might be exposed to damaged, disturbed or deteriorated asbestos-containing material could be said to be a regime to avoid exposure to a hazard or likely hazard that could be properly characterised as requirements to be complied with within the meaning of s 31AE, but is not a regime authorised by s 31AD(2)(a) and (b). This is because a regime to avoid is not a regime to remove. Nor is it a regime that is to be in place until an inspector is satisfied that the hazard or likely hazard has been removed.
- 68 As the appellant points out, in order to comply with s 31AD(2)(a), prohibition notice NP-372-223057 must require the appellant to remove asbestos-containing materials that are damaged and/or disturbed and/or has deteriorated.
- 69 However, prohibition notice NP-372-223057 does not require the appellant to remove the hazard or likely hazard. Instead, the prohibition notice requires the appellant to 'refrain from permitting any person to be at any place within the Mine where they might be exposed to any asbestos'.
- 70 Clearly, a prohibition notice may direct an employer to remove persons from an area of a workplace for the purpose of removing the risk of exposure to a hazard (s 31AE(c)). However, the terms of prohibition notice NP-372-223057, when properly construed, wrongly conflate the removal of the persons from a part of the mine (which can only be a requirement to be complied with until the removal is complete) with the removal of a hazard or likely hazard.
- 71 The power to impose a requirement to remove persons from the mine or any specified part of the mine can only be authorised pursuant to s 31AD(2)(b) for the period of time that it takes to remove the hazard or likely hazard. However, where a notice does not require the removal of a hazard or likely hazard, it is not open to impose any of the requirements specified in s 31AE.
- 72 In the absence of any direction in prohibition notice NP-372-223057 to remove the hazard or likely hazard, the requirement to refrain from permitting any person to be at any place within the mine is ongoing and is not imposed for a limited time (for the hazard or likely hazard to be removed).
- 73 For these reasons, we are satisfied that ground 1 of the appeal is made out.

(b) **Ground 2 of the appeal**

- 74 Ground 2 of the appeal asserts that the terms of prohibition notice NP-372-223057, as ultimately endorsed and modified by the Tribunal, failed to comply with s 31AE(a), (b) and (c), in that on its face it fails to specify unambiguously and with sufficient clarity the matters specified in the steps or requirements to be taken in those subsections (until the inspector is satisfied the hazard or likely hazard has been removed).
- 75 We agree that the words used in s 31AD and s 31AE, and the context in which they appear in the MSI Act, confer power to issue a prohibition notice that must be certain in its terms as a condition of its valid exercise.
- 76 This intention arises from the stated objects in s 3(1)(a), (b) and (c) of the MSI Act which provide (among other objects):
- (a) to promote, and secure the safety and health of persons engaged in mining operations; and
 - (b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and
 - (c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and
- 77 This intention also arises from s 31AF and the fact that a person issued with a prohibition notice commits an offence if the person does not comply with the notice, or such of the provisions of the notice as are applicable to the person (s 31AG).
- 78 The requirement to specify the matters in s 31AF(c) can only be construed in this context as a requirement to unambiguously identify and make these matters clear (see the discussion in a different statutory context in *Re Lawrence; Ex parte Goldbar Holdings Pty Ltd* (1994) 11 WAR 549, 554, 566 (Malcom CJ); applied by Allanson J in *Bio-Organics Pty Ltd v The Chief Executive Officer, Department of Water and Environment Regulation* [2018] WASC 236 [31] - [34]).
- 79 Thus, on its face a prohibition notice issued pursuant to s 31AB(b) (when read with s 31AF(c)) must unambiguously identify and make clear the mine, or the plant, mining practice or hazardous substance (that is dangerous or likely to become dangerous).
- 80 When s 31AF is read together with s 31AD and s 31AE, and within its context and legislative purpose, a prohibition notice must unambiguously identify and make clear what is to be done to remove the hazard and the requirements that are to be complied with until the inspector is satisfied the hazard or likely hazard has been removed.
- 81 Prohibition notice NP-372-223057 purports to require persons to refrain from being in specified areas of the Pinjarra refinery, namely those areas where they 'might be exposed to any asbestos that is or has been damaged and/or disturbed and/or has deteriorated in any manner'.
- 82 As the appellant points out, the part (or parts) of the refinery that are the subject of the requirement are defined by reference to:
- (a) whether a person 'might' be exposed to asbestos, without any guidance about what 'might be exposed' means, and what state the asbestos is in;
 - (b) the condition that the asbestos is in or, at some undefined time in the past, 'has been' in; and
 - (c) whether the asbestos is or has been damaged and/or disturbed and/or has deteriorated in any manner.
- 83 We agree the use of the word 'might' in prohibition notice NP-372-223057 raises ambiguity, as it raises a concept going to a vague possibility that a person may be exposed to respirable asbestos fibres. We explain our reasoning in this regard in our reasons that follow, in respect of grounds 3 and 5.
- 84 We also agree the words 'has been' could also give rise to ambiguity as it is impossible to suggest prohibition notice NP-372-223057 itself specifies a part of the mine or a hazardous substance by reference to something that has been, and not what the state of the asbestos-containing material is at the relevant time (that is, the time at which the work by the employees and contractors takes place or is to take place).
- 85 Therefore, while the prohibition notice itself does not identify in precise terms the particular asbestos-containing materials, the state or condition of it or where on the refinery site the material is located, the appellant's own records make this information available to the appellant (subject to the ambiguities regarding the use of 'might' and 'has been').
- 86 Is this sufficient bearing in mind that the imposition of a prohibition notice places the appellant in jeopardy of prosecution and penalty if it breaches the prohibition notice?
- 87 In our view, it is not sufficient in that context. The person in receipt of a prohibition notice is entitled to know, with a high degree of specificity, what it is prohibited from doing. The lack of specificity may make uncertain the outcome of any prosecution for breach. This lack of specificity, as well as reliance on the appellant's own records by the respondent for the purposes of being satisfied of compliance with a view to lifting the prohibition notice, or for a prosecution in the case that it alleges a breach, is also problematic (although the latter is not the concern of this appeal).
- 88 The manner in which the prohibition notice has been written is to, in effect, say to the appellant that it is prohibited from allowing persons to work, without actually specifying the terms of the prohibition and a required rectification. It leaves it to the appellant to work out what this means and to manage it. On one hand, this seems to be a perfectly reasonable and sensible approach, particularly as the site is large, the amount of asbestos-containing materials is significant and the appellant has detailed records. However, the regime set out in the MSI Act is one of inspection by a regulatory body which has the power to both direct improvement (which it did not do in this case, but which it could have done with a view to achieving the same result) and prohibit activity or access until rectification, with the capacity to prosecute for breach, with penalties.

- 89 In our view, in such a scheme a prohibition notice ought to specify, in particular what the recipient is prohibited from doing, rather than give a vague direction and require the recipient to work it out for themselves.
- 90 The prohibition notice in this case did not meet those requirements.
- 91 The appellant also argues that the words 'damaged and/or disturbed and/or has deteriorated in any manner' are not clear. It asks the question; does it mean microscopically deteriorated and to what extent exactly does it mean in terms of the appellant being required to identify itself what part of the mine it is required to ensure people are not permitted to go to?
- 92 However, we do not agree that ambiguity arises in this respect.
- 93 As counsel for the respondent points out, the appellant has developed an extensive manual to determine whether any of the asbestos-containing materials in the Pinjarra refinery is degraded or is deteriorating.
- 94 The evidence before the Tribunal established that the appellant has a comprehensive knowledge of not only the types of asbestos contained at the Pinjarra refinery but also the location of the asbestos and has a clear system of work in place for identifying and determining whether asbestos-containing material has degraded or deteriorated in any manner.
- 95 The appellant's 'Inspection and Risk Evaluation Manual for Materials Containing Hazardous Fibres at Pinjarra Refinery' contains a classification scale of degraded and deteriorating asbestos-containing materials, together with photographs and detailed descriptions for each particular type of asbestos that is located, or has been located, in the Pinjarra refinery (AB 18.57, pp 630 - 693).
- 96 The respondent also points out that whether asbestos is or has been damaged, disturbed or deteriorated in any manner was explained in evidence by the appellant's witness, Mr Obal, as follows:
- (a) The Inspection and Risk Evaluation Manual for Materials Containing Hazardous Fibres at Pinjarra Refinery is a document which provides guidance on making an assessment about the condition of those materials. The assessment is visual, looking at the level of deterioration and damage. There are broadly three categories (fair, good and poor) (ts 131).
 - (b) 'Fair' is something that in the future may become a problem so it warrants monitoring to make sure it does not deteriorate further. 'Poor' is even more deterioration than 'fair'. 'Good' means there is no signs of any deterioration (ts 132).
 - (c) In the strategic management plan asbestos is referred to as being in fair condition which Mr Obal says is deteriorating condition that has potential to become hazardous. Where the condition is noted as 'fair' and the action is 'remove' this is because it is deteriorating (ts 134).
 - (d) The Inspection and Risk Evaluation Manual for Materials Containing Hazardous Fibres and a risk matrix explains and enables classification of some asbestos-containing material in terms of its condition. Then, based on the potential for exposure, it provides a priority for action (ts 193).
- 97 In ground 2 of the appeal, the appellant also argues that the particularised exceptions to the direction given in prohibition notice NP-372-223057 are not identified, nor made unambiguously clear. In particular, the appellant contends that it is not clear what 'removed' means or 'removed by persons who have been verified as competent' in point 1 and it is not clear in point 4 who a 'competent person' is for the 'purpose of testing', or what type of 'testing' is being referred to.
- 98 We do not agree.
- 99 These terms and procedures are explained at length in the 'How to Manage and Control Asbestos in the Workplace Code of Practice' (Tab 18.50, pp 439 - 506 (AB)) and the 'Code of Practice for the Safe Removal of Asbestos' (2nd ed) [NOHSC: 2002 (2005)] (Tab 18.51, pp 507 - 593 (AB)). Both codes are well known to the appellant, its employees and agents who are responsible for the removal and testing of asbestos-containing material. In these circumstances, a contention that the exceptions are not specified with sufficient certainty cannot be made out.
- 100 In addition, reg 9.32 of the MSI Regulations provides:

9.32. Removal of asbestos

Each responsible person at a mine must ensure that if any asbestos removal work is carried out at the mine —

- (a) the work is carried out in accordance with the procedures specified in the 'Code of Practice for the Safe Removal of Asbestos' 2nd Edition [NOHSC:2002 (2005)] declared by the NOHSC and published in April 2005; and
- (b) the district inspector is notified in writing before the work commences.

Penalty: See regulation 17.1.

- 101 Notwithstanding the findings made in [91] - [100], we are satisfied that, in part, ground 2 of the appeal has been made out.

(c) Grounds 3 and 5 of the appeal

- 102 The appellant's contention in appeal grounds 3 and 5 is that prohibition notice NP-372-223057, which is expressed to apply when persons 'might' be exposed to asbestos-containing materials, offends s 31AB(b), essentially because the word 'might' implies that the prohibition notice was not grounded in either an opinion or conclusion that asbestos-containing materials are either dangerous, or likely to become dangerous, so as to constitute a hazard to any person.
- 103 In determining the meaning of 'might' in prohibition notice NP-372-223057, Kenner SC was referred (by the appellant's counsel at first instance) to a decision of the Victorian Civil and Administrative Tribunal in *Gray Bruni Constructions Pty Ltd v Victorian WorkCover Authority* [2006] VCAT 1969; (2006) 25 VAR 11 when it considered an application to review a

prohibition notice under s 112(b) of the *Occupational Health and Safety Act 2004* (Vic). Under the Victorian Act, an inspector was empowered to issue a prohibition notice if they believed that 'an activity may occur at a workplace that, if it occurs, will involve an immediate risk to the health or safety of a person'. In *Gray Bruni Constructions*, MacNamara ADP found that 'may' in this context means 'something more than mere possibility of occurrence must be made out' [82].

104 Whilst Kenner SC had regard to the decision in *Gray Bruni Constructions*, the Senior Commissioner made a finding that the legislation under consideration in that matter was materially different to the MSI Act, and thus such comparisons were of limited value.

105 Senior Commissioner Kenner also found that the use of the word 'might' in prohibition notice NP-372-223057 was not inappropriate or inconsistent with the MSI Act statutory scheme. The Senior Commissioner went on to find that the word 'might' meant something more than a mere possibility of an occurrence, in terms of a real or substantial chance and that there was little difference in meaning between 'may' and 'might' in this context.

106 With respect to the Senior Commissioner, we do not agree with this analysis.

107 Section 31AB(b) and s 31AD authorises the issue of the prohibition notice to require the removal of a hazard or likely hazard, not the removal of something that 'might' result in a person being exposed to a hazard or likely hazard, or to remove something that 'might' be a hazard.

108 The word 'might' does not mean the same as 'likely'. The word 'might' points to a lower threshold than 'likely'.

109 The statutory requirement in s 31AB(b) is not only to identify the hazard in the prohibition notice, but to identify the opinion that is required to be held by the inspector. In the words of Franklyn J in *Wormald Security Australia Pty Ltd v Rohan* (1994) 74 WAIG 2, 3:

[T]here must exist some evidence on which to base the opinion and that evidence must go further than to establish only a possibility ... the evidence must show that there exists something more than the bare possibility that injury or harm of that nature will occur from the activity in question.

110 The *Macquarie Dictionary* online defines the word 'might' as the past tense of 'may' and states that when the word 'might' is used as a verb it is a word that can be used to express strong uncertainty, or is used to express tentative suggestions.

111 However, it should be noted in *F v National Crime Authority* (1998) 154 ALR 471, 481 - 482, O'Loughlin J (in a very different statutory context to the MSI Act) observed that the words 'may' and 'might' are not necessarily interchangeable. 'Might' in some contexts may require a lower level of proof than 'may'. His Honour relevantly said:

Both 'may' and 'might' are commonly used when referring to a possibility, or an opportunity and in that sense, they do not impose the same degree of capability as 'will' and 'would'. Something that 'may or might' happen is less likely to occur than something that 'will or would' happen. But within the field of possibilities 'may' could suggest a possibility that is more likely to occur than one which 'might' only occur. Applying these dictionary definitions to the various expressions, it appears that there is an ascending order. An answer that 'might' tend to incriminate is at the lowest level – meaning that the risk of incrimination need only be a low level possibility to entitle a witness to refuse to answer the question. If however, the test is premised on the statement that the question 'may' tend to incriminate, the risk attendant on the witness having to answer the question could be marginally greater. But if the witness must answer a question unless the answer 'will' or 'would' tend to incriminate, one is elevated from possibilities – perhaps into the world of probabilities; there would be a far greater compulsion on the witness to answer in those cases where he or she could only be excused where an answer 'will' or 'would' tend to incriminate.

The practical differences that flow from the use of 'may' as distinct from 'might' are, in my opinion, slight. Indeed, there is a case for suggesting that some use the two words interchangeably. An example of that proposition appears in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; 45 ALR 609. The relevant legislation that was then under consideration contained that phrase 'may tend to incriminate' yet the editor of the headnote to the case incorrectly stated that the statute did not excuse a person from furnishing information 'on the ground that the information or document might tend to incriminate the person...'. Likewise, in their joint judgment (at CLR 337), Mason ACJ, Wilson and Dawson JJ, in the course of making a general observation about the construction of the relevant section used the phrase 'might tend to expose the party...'

112 The same interchangeable use of 'may' and 'might' is to be found in the speeches in the House of Lords in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.

113 Irrespective of whether there is any difference between the words 'may' and 'might', reliance upon the word 'might' in prohibition notice NP-372-223057 gives rise to a prohibition against a bare possibility that an exposure to airborne respirable asbestos 'might' occur and an ensuring bare possibility the exposure 'might' give rise to an injury or harm. Such a prohibition in these terms is simply not sufficient to enliven the power to issue a prohibition notice pursuant to s 31AB.

114 Whilst the evidence before the Tribunal made it absolutely clear that the danger to a person's health from respirable fibres of asbestos cannot be understated, s 31AB(b) requires an inspector to form a requisite opinion that a hazardous substance is dangerous or is likely to become dangerous so as to constitute a hazard to any person, and by the use of the word 'likely' requires a higher degree of probability than conveyed by the word 'might' so as to invoke the power to issue a prohibition notice.

115 As the appellant points out, it is the imposition of the word 'likely' that ensures that the power to issue a prohibition notice is not enlivened on the strength of remote or hypothetical possibilities.

116 The accepted meaning of the word 'likely' in *Bouhey v R* (1986) 161 CLR 10 is to convey a notion of substantial chance that is real and not remote, regardless of whether it is less or more than 50 per cent.

117 For these reasons, grounds 3 and 5 are made out.

(d) Grounds 4 and 6 of the appeal

118 For the reasons we have given in respect of ground 2, we do not find it necessary to consider grounds 4 and 6 of the appeal.

(e) Ground 7 of the appeal

119 Turning to ground 7, we do not accept that the Tribunal denied the appellant procedural fairness. The appellant was squarely provided with the opportunity of making submissions on any proposed amendments or modifications to prohibition notice NP-372-223057. During the course of the hearing, Kenner SC raised the issue of potential modifications with the parties and invited each of them to make submissions as to modifications (ts 103).

120 Senior Commissioner Kenner informed the parties that it would be helpful for him to hear from both parties as to an alternative submission (about what modifications should be made to the notice) in the event that a finding was made (for whatever reason) that the notice should remain in place but be modified.

121 In response, counsel on behalf of the appellant informed Kenner SC that in the event that the Tribunal was minded to issue a prohibition notice in revised form, that it (first) be put in that form and the parties then be asked to comment on it. The Senior Commissioner said in response, 'All right. Well perhaps you can have a think about that but I think it would be helpful to the Tribunal'.

122 The respondent later proposed in a set of reply submissions the modifications were ultimately adopted by the Tribunal.

123 Whilst there was no substantive debate regarding the appropriateness or otherwise of the proposed modifications that were ultimately adopted by the Tribunal, we do not accept the appellant's contention that it was not in a position to make submissions regarding the modifications. After having received the reply submissions from the respondent, the appellant could have sought an opportunity to make a submission about the proposed modifications (as Kenner SC had indicated to the appellant's that it would be helpful to receive submissions in respect of any proposed modifications) but it failed to do so.

The orders that should be made

124 For these reasons, we are of the opinion that grounds 1, 2, 3 and 5 of the grounds of appeal have been made out.

125 We would make orders to uphold the appeal and vary the decision of the Tribunal by revoking the decision of the State mining engineer. We would also make an order cancelling prohibition notice NP-372-223057.

MATTHEWS C:

126 On 10 February 2017 an inspector of mines appointed under the *Mines Safety and Inspection Act 1994* issued the appellant with a prohibition notice under that Act.

127 A prohibition notice may be issued pursuant to section 31AB *Mines Safety and Inspection Act 1994* if an inspector is of the opinion that a contravention of the *Mines Safety and Inspection Act 1994* is or has occurred and any matter or activity occasioning the contravention constitutes or is likely to constitute a hazard to any person or a mine, plant, mining practice or hazardous substance at a mine is dangerous or likely to become dangerous so as to constitute a hazard to any person.

128 Reading the prohibition notice it seems to have been issued primarily because the inspector was of the opinion that the appellant had contravened a provision of the *Mines Safety and Inspection Act 1994* and the circumstances of the contravention were such that the inspector was of the opinion it was likely the contravention would be repeated.

129 Again, from my reading of the prohibition notice, it seems to have been issued because the inspector was of the opinion that employees of contractors engaged to do work at the mine by the appellant had been exposed to damaged or degraded asbestos and that the appellant had not taken all practicable steps to ensure this would not again occur.

130 Section 31AC(2)(b) *Mines Safety and Inspection Act 1994* requires a prohibition notice to impose requirements to be complied with by the person in control of the mine until an inspector is satisfied that the problematic matter or activity raised by the prohibition notice has been remedied.

131 The prohibition notice prohibited the appellant from "permitting any person to be at any place within the mine where they might be exposed to any asbestos that is being disturbed, abraded or otherwise contacted in any manner." The prohibition notice then goes on to set out exceptions to this prohibition as follows:

1. Where less than 10 square metres of non-friable asbestos containing materials is removed by persons who have been verified as competent; or
2. Where non-friable asbestos containing materials are removed by licensed asbestos removalists; or
3. Where friable asbestos containing materials are removed by unrestricted licensed asbestos removalists; or
4. Where a sample of any asbestos containing material is removed by a competent expert for the purposes of testing;
5. By express exemption of the State Mining Engineer; or
6. Where, despite all practicable measures having been taken to ascertain whether asbestos was present at a particular place, the presence of asbestos at that place could not reasonably have been ascertained.

132 It is clear to me that the "exceptions" are an attempt by the inspector to devise a safe system of work for the appellant. It may be that the exceptions are an attempt to utilise section 31AE(e) and (f) *Mines Safety and Inspection Act 1994* but they clearly go beyond this.

133 "Exception 6" is illustrative of my point. It says, I think, that the prohibition notice will not be breached if "all practicable measures" have been taken to find out if asbestos was at a place before a person was permitted to be at the place. That is a

clear reference to system of work issues and could not be brought with section 31AE(e) or (f) *Mines Safety and Inspection Act 1994*.

- 134 I consider that the inspector has, in effect, attempted to devise a standing system of work in the prohibition notice.
- 135 Although the wording of the prohibition is a bit loose, the object of the prohibition notice, drawing at the moment solely upon the parts I have emphasised, seems to have been to make sure no one went near damaged or degraded asbestos until the appellant had developed practicable steps to ensure that persons at the mine were not exposed to asbestos fibres.
- 136 Although I skip ahead here to what took place at the appeal, I am reinforced in my view that this is essentially what the matter is about by the written submissions of the respondent at [53] as follows:
- In practical terms ... if workers are going into an area containing [asbestos] and that [asbestos] is in good condition, they are permitted to work. If there is the potential for work to damage or disturb this [asbestos], then further controls should be in place to ensure no damage actually occurs and therefore the Prohibition Notice is not breached. This may occur in a number of ways, such as training, supervision, specific documented processes, and/or restricting certain power tools onsite. The controls employed may change depending on the type and location of the asbestos and therefore have been left for the Appellant to determine what is appropriate depending on the particular circumstances.
- 137 I also refer to written submissions of the respondent at [54] that:
- If it is intended that a worker is going into an area that contains [asbestos] that is damaged, disturbed or deteriorated in any manner then the exceptions in the Notice are enlivened and it must be one of those persons listed in the exceptions that does the work - a competent person if less than 10sqm; a licensed asbestos removalist (licence requirements depending on type of asbestos - friable or non-friable); or an exemption is applied for to the State Mining Engineer.
- 138 My interpretation of the above is that the respondent is submitting that the prohibition notice is about ensuring the appellant has a system of work in place to minimise the risk of persons inhaling asbestos fibres. The respondent says that the appellant may develop its own system of work in one situation (that is where there is a potential for work to damage or disturb asbestos in good condition) but that in relation to another situation (where asbestos is already damaged, disturbed or deteriorated) the appellant must follow the system of work set out in the prohibition notice.
- 139 The respondent then is, in my view, seeking to have the prohibition notice upheld and continue in force so that he may impose a certain system of work upon the appellant into the indeterminate future deal with a problem identified by one of his inspectors in 2017.
- 140 In my view, such an approach does not conform with the *Mines Safety and Inspection Act 1994*.
- 141 If the circumstance that gives rise to a prohibition notice is a failure to take practicable steps, then the prohibition notice can only invoke the extraordinary powers under section 31AE until such time as that failure is remedied.
- 142 The remedy is not for the inspector or anyone else to devise and impose a safe system of work upon the person in control of a mine.
- 143 The statutory responsibility is upon an employer to, so far as is practicable, provide and maintain a working environment in which the employer's employees are not exposed to hazards.
- 144 While the respondent may stop an activity at a mine where there is danger in the conduct of such an activity, in a case where the activity is dangerous because of an alleged failure on the part of the person in control of the mine to take practicable steps to minimise risks, it is not for the respondent to devise and impose a system of work upon the person in control of a mine to reduce or minimise the risks associated with the activity. The respondent should stop the activity with the obligation being upon the person in control of the mine to then satisfy the respondent that it has developed and instituted a safe system of work, that is a system of work which, as practicably as possible, minimises the risks. At that point the prohibition notice would be lifted.
- 145 It would be, in my view, a dangerous development for the respondent to develop and impose a system of work upon persons in charge of mines in circumstance such as these.
- 146 In any event, I do not consider the *Mines Safety and Inspection Act 1994* allows it.
- 147 In my view, it is clear that it is the persons in charge of mines who have to remedy matters and not the respondent. Insofar as the prohibition notice prohibits a certain activity and then goes on to devise and impose a system of work, it is beyond power.
- 148 I find that [54] of the respondent's submissions reveal the problem with the prohibition notice. A prohibition notice cannot direct a person in charge of a mine to adopt a certain system of work in a "practicable steps" matter for all time.
- 149 I should make clear that I do not consider section 31AE(e) or (f) *Mines Safety and Inspection Act 1994* allows an inspector to devise a standing or permanent system of work. Those subsections are intended to be exceptions to prohibitions which will allow the person in charge of a mine to do work or have persons at the mine to remedy the problem at the mine identified in the prohibition notice.
- 150 The problems in this case emerged, in my view, because the prohibition notice inelegantly and unfortunately tried to invoke, or was found to have invoked, a part of the statutory regime wholly unsuited to dealing with the problem the circumstances giving rise to the prohibition notice revealed.
- 151 I have set out above that the *Mines Safety and Inspection Act 1994* allows a prohibition notice to be issued by an inspector if he is of the opinion there is a hazardous substance at a mine that is dangerous or is likely to become dangerous so as to constitute a hazard to any person.

- 152 Although the prohibition notice cited a breach of the *Mines Safety and Inspection Act 1994* as the ground for its issue, and goes on to specify the provision said to have been breached, it also made some references to a hazardous substance, being "damaged and/or degraded asbestos."
- 153 Under a subheading headed "Grounds", which is confusing in itself given the heading is also "Grounds", the inspector refers to "asbestos at the Mine [which] is likely to become dangerous" and then explains that "exposure of any persons to damaged and/or degraded asbestos containing materials is likely to result in the inhalation or airborne respirable fibres leading to the risk of asbestos related diseases."
- 154 There is then reference to "section 31AC(2)(a) and/or section 31AD(2)(a)."
- 155 I have already set out the "prohibition" section of the prohibition notice.
- 156 However, the prohibitions and exceptions thereto do not match up with the problem revealed by the circumstances giving rise to the prohibition notice and do not match up with section 31AB(b) *Mines Safety and Inspection Act 1994* (the subsection referring to hazardous substances) or to section 31AD(2)(a) (the subparagraph allowing a prohibition notice to require a person in control of a mine to "remove the hazard or likely hazard.")
- 157 I say this because the prohibitions do not require the "removal of a hazardous substance." The respondent I think tried to argue that removal of a hazardous substance and removal of a hazard or likely hazard are two different and discrete things. They may be in some cases, I have an open mind on the question, but they are not where the hazardous substance is specified and the only way to make the mine safe, if it is to continue to operate, is to remove that hazardous substance.
- 158 In a circumstance where there is a hazardous substance at a mine site then section 31AB(b) *Mines Safety and Inspection Act 1994* and section 31AD(2)(a) *Mines Safety and Inspection Act 1994* provide that a prohibition notice is to be used to ensure removal of the hazardous substance and that section 31AE should be invoked to stop work, except for work associated with removal of the hazardous substance, until the hazardous substance is removed.
- 159 The prohibitions and exceptions in this matter did not require removal of the hazardous substance.
- 160 If the prohibitions in the prohibition notice did so they would simply say that work at the mine is to cease until all damaged and/or degraded asbestos has been removed with exceptions allowing work associated with its removal.
- 161 Instead, the prohibitions set up an ongoing system of work to be used by the appellant when work is required to be done at a "place within the Mine where [persons] might be exposed to any asbestos that is being disturbed, abraded or otherwise contacted in any manner".
- 162 That system may involve removal of the asbestos, but it will not necessarily do so as items 4, 5 and 6 make clear.
- 163 Insofar as the prohibition notice ever came to be interpreted as a proper invocation of section 31AB(b) and section 31AD(2) *Mines Safety and Inspection Act 1994* error occurred.
- 164 The prohibition notice simply did not require removal of a hazardous substance.
- 165 I find as follows:
- (1) the prohibition notice did not properly invoke section 31AB(b) and section 31AD(2) *Mines Safety and Inspection Act 1994*; and
 - (2) insofar as the prohibition notice did properly invoke section 31AB(a) and section 31AC(2) *Mines Safety and Inspection Act 1994* it went well beyond what section 31AE *Mines Safety and Inspection Act 1994* allows insofar as it imposed a system of work upon the appellant when all it could do was stop work until the appellant had devised a safe system of work for itself.
- 166 I would uphold appeal grounds 1 to 4 because they essentially capture what I have found to be the problems with the prohibition notice, being:
- (1) The prohibition notice was not one properly within section 31AD(2) *Mines Safety and Inspection Act 1994* (appeal grounds 1 and 3).
 - (2) The prohibition notice did not properly comply with section 31AE in that it imposed a system of work upon the appellant when it was for the appellant to ensure it complied with the "management standards" required under the *Mines Safety and Inspection Act 1994* (appeal grounds 2 and 4).
- 167 I have not found it necessary to consider appeal grounds 5, 6 or 7.
- 168 I add that is a very unfortunate result, given the statutory scheme, that this matter remains alive some two years after the inspector had circumstances brought to his attention which he felt warranted the issue of a prohibition notice.
- 169 The State mining engineer seems to have given his decision on the appellant's application for review under section 31AY *Mines Safety and Inspection Act 1994* in a timely fashion but the matter then took the best part of a year to work its way through the Occupational Safety and Health Tribunal process under section 31BA.
- 170 Not all of the reasons for that are known to me of course, but at least part of the explanation is that "it was common ground [between the parties] that the Tribunal should approach the present matter as a hearing de novo." (see [12] of reasons for decision, AB 80)
- 171 I disagree that a hearing de novo should occur under section 31BA.
- 172 Section 31BB(2)(a) clearly provides that a review by the Occupational Safety and Health Tribunal "is to be in the nature of a rehearing."

- 173 The cases the parties apparently relied upon to come to their common position that the hearing should be a hearing de novo predate the insertion into the *Mines Safety and Inspection Act 1994* of section 31BB and, in particular, its stipulation that a review by the Occupational Safety and Health Tribunal is to be in the nature of a rehearing.
- 174 Insofar as *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1994) 74 WAIG 2 is relied upon as support for the proposition that reviews should be by way of a hearing de novo that reliance is misplaced. That decision was one made when the relevant provisions were quite different and, as I say, did not include section 31BB(2)(a) or its equivalent.
- 175 I am reinforced in my view by section 31BB(2)(b) *Mines Safety and Inspection Act 1994* which exhorts the Occupational Safety and Health Tribunal to complete its work "as quickly as is practicable."
- 176 Although a hearing de novo can still be conducted as "quickly as is practicable" it is clear to me that if section 31BB(2)(a) and (b) *Mines Safety and Inspection Act 1994* are read together Parliament did not intend reviews to be by way of a hearing de novo because this would take too long.
- 177 The hearing should have been in the nature of a rehearing. Exactly what this means may be a matter for another day, but what may be said with confidence is that it does not mean a hearing de novo.
- 178 In this case it is appropriate, in my view, for the Full Bench to exercise power which will quash the prohibition notice but my strong view, at least, is that the matter should not have played out in the way it did.
- 179 I do not know, of course, whether the "circumstances" described in the prohibition notice properly gave rise to the issue of a prohibition notice or not but let me assume there was something in the circumstances which did so. From that point on it seems to me that the structure and scheme of the *Mines Safety and Inspection Act 1994* is one which allows, indeed demands, the matter to be addressed practically and quickly.
- 180 On a review under section 31AZ *Mines Safety and Inspection Act 1994* the State mining engineer may "differ the notice with such modification is the State mining engineer consider appropriate."
- 181 This is a power that Occupational Safety and Health Tribunal also has.
- 182 Further, so long as no review by the State mining engineer or the Occupational Safety and Health Tribunal is pending, the State mining engineer can cancel a notice under section 31DE *Mines Safety and Inspection Act 1994*. Although this occurs "on his or her own initiative" it seems to me there is no reason why the State mining engineer could not be prompted to consider the matter based on a submission that satisfied him or her that a problem had been fixed.
- 183 Accordingly there are several ways in which, if it be assumed there was a problem, that problem may be addressed, and everyone get on with their business, short of what was an appeal to the Full Bench at which, without there being any criticism whatsoever directed at the appellant for this, arguments were made which one would expect to hear on an application for judicial review before the Supreme Court.
- 184 Of course, the Supreme Court may not have been interested in such arguments until the review process established by the *Mines Safety and Inspection Act 1994* was exhausted but in my view this is all the more reason why that review process should be quick and geared to finding practical solutions to practical problems acceptable, insofar as is possible, to all parties.

2019 WAIRC 00014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ALCOA OF AUSTRALIA LIMITED

PARTIES

APPELLANT

-and-

ANDREW CHAPLYN
STATE MINING ENGINEER
DEPARTMENT OF MINES AND PETROLEUM

RESPONDENT

CORAM

FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
CHIEF COMMISSIONER P E SCOTT
COMMISSIONER D J MATTHEWS

DATE

FRIDAY, 18 JANUARY 2019

FILE NO/S

FBA 4 OF 2018

CITATION NO.

2019 WAIRC 00014

Result	Appeal upheld, decision of Tribunal varied, prohibition notice cancelled
Appearances	
Appellant	Mr S Vandongen SC and with him Ms E Chamizo, of counsel
Respondent	Ms T Hollaway, of counsel

Order

This appeal having come on for hearing before the Full Bench on 22 November 2018, and having heard Mr S Vandongen SC and with him Ms E Chamizo, of counsel, on behalf of the appellant, and Ms T Hollaway, of counsel, on behalf of the respondent, and reasons for decision having been delivered on 16 January 2019, 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 Tribunal given on 26 April 2018 in OSHT 3 of 2017 is varied by revoking the decision of the State mining engineer.
3. Prohibition notice NP-372-223057 is cancelled.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00838

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ALCOA OF AUSTRALIA LIMITED	APPELLANT
	-and-	
	ANDREW CHAPLYN STATE MINING ENGINEER DEPARTMENT OF MINES AND PETROLEUM	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS	
DATE	FRIDAY, 9 NOVEMBER 2018	
FILE NO/S	FBA 4 OF 2018	
CITATION NO.	2018 WAIRC 00838	

Result	Consent Order
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Order

Paras (1) - (2) of the Full Bench's orders of 5 September 2018 be varied as follows —

1. THAT the appellant file its submissions in support of the appeal on or before 9.30 am on Monday, 12 November 2018.
2. THAT the respondent file its submissions in support of the appeal not less than seven days after the appellant serves its submissions in support of the appeal.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2018 WAIRC 00727

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ALCOA OF AUSTRALIA LIMITED

APPELLANT

-and-
ANDREW CHAPLYN
STATE MINING ENGINEER
DEPARTMENT OF MINES AND PETROLEUM

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
CHIEF COMMISSIONER P E SCOTT
COMMISSIONER D J MATTHEWS

DATE WEDNESDAY, 5 SEPTEMBER 2018
FILE NO/S FBA 4 OF 2018
CITATION NO. 2018 WAIRC 00727

Result Order made
Appearances
Appellant Mr S Vandongen SC
Respondent Ms T Hollaway, of counsel

Order

This appeal having come on for a directions hearing before the Full Bench on 5 September 2018, and having heard Mr S Vandongen SC on behalf of the appellant, and Ms T Hollaway, of counsel, on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appellant file its submissions in support of the appeal 14 days prior to the date of hearing of the appeal.
2. The respondent file its submissions in opposition to the appeal seven days prior to the date of hearing of the appeal.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2019 WAIRC 00020

APPEAL AGAINST A DECISION OF THE PUBLIC SERVICE ARBITRATOR IN MATTER NO. PSACR 5 OF 2018 GIVEN
ON 12 JULY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**FULL BENCH**

CITATION : 2019 WAIRC 00020
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
CHIEF COMMISSIONER P E SCOTT
COMMISSIONER D J MATTHEWS
HEARD : MONDAY, 17 DECEMBER 2018
DELIVERED : TUESDAY, 29 JANUARY 2019
FILE NO. : FBA 7 OF 2018
BETWEEN : THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA
INCORPORATED
Appellant
AND
COMMISSIONER OF POLICE, WA POLICE SERVICE
Respondent

ON APPEAL FROM:

Jurisdiction	:	Public Service Arbitrator
Coram	:	Senior Commissioner S J Kenner
Citation	:	[2018] WAIRC 00415; (2018) 98 WAIG 1081
File No	:	PSACR 5 of 2018

CatchWords	:	Industrial Law (WA) - Industrial dispute - Arbitrator erred in finding employer entitled to direct an employee to take unpaid personal leave without pay by operation of <i>Public Service and Government Officers CSA General Agreement 2017</i> when read with Administrative Instruction 601 - Construction of administrative instructions as modified by <i>Public Sector Management Act 1984</i> (WA) considered - Application of employer's Ill Health Retirement Policy required in the factual circumstances of the case before the Arbitrator that personal leave be with pay
Legislation	:	<i>Industrial Relations Act 1979</i> (WA), s 26(3), s 49 <i>Corporations Law</i> (Cth) (repealed), s 583 <i>Interpretation Act 1984</i> (WA), s 41, s 42 <i>Public Sector Management Act 1994</i> (WA), s 22A(7), s 29(1)(h), s 30(b), s 39, s 64, s 64(1), s 100(2), s 108 <i>Public Service Act 1978</i> (WA) (repealed), s 3, s 19 <i>Public Service Regulations 1988</i>
Result	:	Appeal upheld; decision of Public Service Arbitrator varied
Representation:		
Appellant	:	Mr B Cusack and with him Ms D Larson
Respondent	:	Mr D Anderson, of counsel
Solicitors:		
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Automatic Fire Sprinklers Pty Ltd v Watson [1946] HCA 25; (1946) 72 CLR 435
Peninsular Group Ltd v Kintsu Co Ltd (1998) 44 NSWLR 534

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

- 1 This is an appeal to the Full Bench instituted pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (IR Act) against the decision of the Public Service Arbitrator to dismiss PSACR 5 of 2018 on 12 July 2018 ([2018] WAIRC 00415; (2018) 98 WAIG 1081).

Background

- 2 PSACR 5 of 2018 was an industrial matter referred for hearing and determination arising out of a dispute between the appellant and the respondent in respect of a direction given by the respondent to one of the appellant's members, Ms Tara-Jayne Richardson, not to attend work and to place Ms Richardson on personal sick leave on 22 December 2017.
- 3 The schedule of matters referred for hearing and determination were as follows:
 1. Ms Tara-Jayne Richardson is a member of the Union and is employed by the Commissioner of Police as a Level 2 Administrator in the Forensic Fingerprint Bureau.
 2. Due to significant ill-health, Ms Richardson has utilised all her entitlement to paid personal leave under the *Public Service and Government Officers CSA General Agreement 2017*. Ms Richardson was granted paid personal leave up to 7 December 2017. Prior to this time, Ms Richardson had been working three days per week and taking personal leave for two days per week.
 3. As a result of medical reports obtained by both Ms Richardson and the Commissioner of Police, the parties are in dispute as to Ms Richardson's fitness to resume her full duties and whether she should be called upon to retire in accordance with the terms of s 39 of the *Public Sector Management Act 1994* (WA). That remains a separate issue to the present dispute.
 4. The present dispute relates to the Union's contention that the Commissioner of Police has unilaterally and unlawfully, placed Ms Richardson on unpaid personal leave. The Union's position is that the Commissioner of

Police has no ability to do so without an application being made for such leave by an employee. This is disputed by the Commissioner of Police.

5. The Union contends that the actions of the Commissioner of Police in unilaterally placing Ms Richardson on unpaid personal leave is also contrary to his own policy entitled 'HR - 11.05 Retirement on the Grounds of Ill Health – Police Staff'. The Union contends that the effect of this policy is to require that Ms Richardson be paid whilst unfit for duty.
 6. Accordingly, the Union contends that the Commissioner of Police has acted contrary to both the terms of the Agreement and his own policy. The Union seeks a reversal by the Commissioner of Police of his decision to place Ms Richardson on unpaid personal leave for 14, 15, 21 and 22 December 2017 and from 22 December 2017 onwards. The Union also says that Ms Richardson should be reimbursed by the Commissioner of Police for her lost entitlements.
 7. The Commissioner of Police objects to and opposes the Union's claim and maintains that at all material times, he has acted in accordance with his rights and obligations.
- 4 The industrial dispute was essentially whether Ms Richardson's absence from work from 22 December 2017 to 31 January 2018 should have been treated as unpaid leave, or as paid time in accordance with the respondent's HR-11.05 Retirement on Grounds of Ill Health - Police Staff (Ill Health Retirement Policy).

- 5 The Arbitrator determined the matter on agreed facts and documents.

Agreed facts and material documents

- 6 Ms Richardson is a public service officer and employed by the respondent as a fingerprint processing officer in the Forensic Fingerprint Bureau.
- 7 Ms Richardson suffered significant periods of ill health beginning in April 2017. By 7 December 2017, she had used all of her accrued entitlements to paid personal leave under the *Public Service and Government Officers CSA General Agreement 2017* (2017 General Agreement).
- 8 As at 7 December 2017, Ms Richardson for a period of time had been working three days a week and taking personal leave for two days a week.
- 9 On 29 November 2017, at the instruction of the respondent, Ms Richardson undertook a medical assessment with Western Australian police consultant occupational physician, Dr Karina Powers.
- 10 At the assessment, Dr Powers informed Ms Richardson that she would recommend to the respondent that he should consider that she (Ms Richardson) should be retired on the grounds of ill health.
- 11 In a report by Dr Powers dated 29 November 2017, in answer to a question, 'Please outline any changes to her treatment, and how effective this has been', Dr Powers stated:

Despite multiple specialist involvement and various medication changes, she has been unable to present a durable reliable work return over the long term and the number and complexity of her medical conditions means she is at high risk, based on current information, of further significant time off work and/or significant symptoms affecting her efficiency and focus when at work within the foreseeable future.

- 12 A copy of Dr Powers' report dated 29 November 2017 was sent to Ms Richardson's general practitioner.
- 13 On 6 December 2017, Dr Powers produced a supplementary report in which she gave answers to three questions as follows:
 - 1) **In your opinion is Ms Richardson currently fit to continue working 3 full days per week in an administrative role?**
In my opinion she is currently unfit for work in light of her complex and unpredictable health conditions. Medical retirement is recommended for consideration.
 - 2) **If not please explain the reasons why and if there are any risks associated with her being in the workplace.**
In my opinion, based on current information, there is risk of moderate to high level for significant aggravation of her symptoms if she remains in the workplace in regard to persistent musculoskeletal and neurological type symptoms, gut symptoms, fatigue in the setting of her complex psychological and physical presentation.
 - 3) **Does she have any capacity to continue working whilst The Employee Relations Unit progress with the impending retirement process?**
Please see answers above. I am happy for her and her treating doctors to have a copy of this report if requested.
- 14 On 7 December 2017, a general practitioner, Dr Hui Tan, provided Ms Richardson with a medical certificate stating that she had been receiving medical treatment but is now recovered and is fit to return to full-time normal duties with immediate effect.
- 15 On 13 December 2017, Dr Powers provided a further supplementary report in which she answered the following questions:

1. **In your opinion is Ms Richardson currently fit to work in a reduced capacity as per her previous return to work program at a maximum of 3 days, without the workload demands typically placed on a staff member of her level?**

In my opinion, based on all current information available to me, she is currently totally unfit for work in light of her complex and unpredictable health conditions, with moderate to high level of risk if she was to remain in the work place of significant event/exacerbation of symptoms at work requiring medical intervention. Medical retirement is recommended for consideration.

2. **Is Ms Richardson fit to be in the workplace in any capacity from a medical perspective? Please identify suitable restrictions/workplace accommodations.**

Please see answer above.

3. **Please further explain the risks that are associated with Ms Richardson continuing to be in the workplace, how significant these are and whether or not the workplace can do anything to mitigate these.**

Please see answer to question 1. I am concerned in particular that there is significant increased risk of falls, musculoskeletal injuries and exacerbation of her symptoms in the setting of her persistent musculoskeletal and neurological type symptoms, gut symptoms and fatigue and her complex psychological and physical presentation. Altogether across her myriad of symptoms/illnesses and pathologies I estimate a moderate to high level of risk if she was to remain in the work place of significant event/exacerbation of symptoms at work requiring medical intervention.

4. **If she is totally unfit to be at work in any capacity please explain why.**

Please see answer above.

- 16 On 14 December 2017, general practitioner, Dr Robert Liddell-Melville, wrote to Ms Michelle Bryant, a vocational rehabilitation consultant employed by the respondent. In the letter Dr Liddell-Melville stated he was totally opposed to any consideration of medical retirement (of Ms Richardson) and made the following points:

- (a) He was one of Ms Richardson's treating doctors who had managed her for many years.
- (b) Ms Richardson had come through an extremely challenging period with several medical conditions and now has every prospect of a normal working life.
- (c) Ms Richardson developed complications relating to surgery and that has been responsible at least in part to her illness. Ms Richardson is now through that period.
- (d) Ms Richardson is exercising and has rejoined a volunteer bushfire brigade and has recommenced training with them.
- (e) Ms Richardson lives on her own. She is motivated and survived medical conditions that would have destroyed others.

- 17 On 22 December 2017, Acting Inspector Chris Hoath from the respondent's Forensic Fingerprint Bureau wrote to Ms Richardson to inform her that she was being placed on sick leave with immediate effect on grounds that Dr Powers had certified her to be unfit for work, and directed her not to attend work. The letter stated as follows:

Outcome of Medical Appointment of 29 November 2017

You attended appointment with Western Australia (WA) Police Consultant Physician, Dr Powers on 29 November 2017. This appointment resulted in medical opinion being presented to WA Police Health and Safety Division that you are unfit for work and; that medical retirement should be considered.

You were made aware of the advice resulting from appointment of 29 November 2017 following your attendance, and copy of the associated medical report was sent to your treating doctor by WA Police's Health and Safety Division.

You subsequently returned to the workplace and given that prior to this appointment you had been undertaking a Return to Work Program working reduced hours, on adjusted duties, State Crime Division sought further advice from Health and Safety Division as to the impact of the outcome of this appointment upon your ability to continue attendance in the workplace (undertaking adjusted and/or alternative duties).

Two medical certificates were [sic] then submitted by you in support of your continued workplace attendance, these being certificate dated 7 December 2017 from Dr Hui Tan (Appendix 1), and letter dated 14 December 2017 from Dr Robert Liddell (Appendix 2). As a result, these documents were both submitted to Health and Safety Division for their review and consideration whereupon confirmation was provided to State Crime Division that Dr Powers previous report and opinion remained unchanged in respect your fitness to attend work and the appropriateness of progression of retirement on the grounds of ill health.

Requirement to commence Personal Leave (sick) effective immediately

On 21 December 2017 the Assistant Director Health and Safety Division provided advice to State Crime Division via HR Business Partner Robert Pavleski, that upon review of the medical information available to WA Police regarding your fitness to attend work, you are to be placed on personal (sick) leave effective immediately. This determination occurred due the health risks associated with you remaining in the workplace, as identified and represented by Dr Powers.

You are therefore not to attend work at this time, and until advised otherwise. You remain able to access any relevant leave entitlements available to you in line with Public Service and Government Officers CSA General Agreement 2017 and Public Service Award 1992. For advice as to your current paid leave entitlements please contact Personnel Services, via email Personnel.sickleave@police.wa.gov.au.

Referral for Retirement on the Grounds of Ill Health

I can also advise that Health and Safety Division has now referred your case to the Employee Relations Division (within HR) having recommended the commencement of progression of retirement on the ground of ill health as per policy HR-11.05 Retirement on the Grounds of Ill Health – Police Staff (Appendix 3).

Employee Relations Division will review the case whereupon authority will be sought from the Director of Human Resources as to decision of progression via this process which will include calling upon you to retire on the grounds of ill health under Section 39 of the Public Sector Management Act 1979.

- 18 On 8 January 2018, Ms Renae Lavell, Director of Human Resources, wrote to Ms Richardson and called upon her to retire on the grounds of ill health. The letter instructed Ms Richardson to advise Ms Lavell, in writing, within seven days, whether she (Ms Richardson) accepted or rejected the call to retire, and to provide her own medical evidence within 28 days from the date of receipt of the letter in the event she did not accept the respondent's medical evidence.
- 19 On 15 January 2018, Ms Richardson by letter informed the respondent that she rejected the call to retire on medical grounds, and advised that she would provide her own medical evidence.
- 20 On 19 January 2018, the appellant wrote to the respondent and reiterated that Ms Richardson rejected the medical evidence of the respondent and stated that Ms Richardson had arranged an appointment with Dr Brian Dare, Occupational Physician, for 23 January 2018. The appellant's letter also initiated the dispute settlement procedure in cl 52 of the 2017 General Agreement in respect of the decision to 'place' Ms Richardson on personal leave.
- 21 On 31 January 2018, the appellant wrote to the respondent stating that the dispute had escalated in accordance with cl 52.3 of the 2017 General Agreement and attached a copy of a report by Dr Dare dated 24 January 2018 in which Dr Dare concluded that Ms Richardson was fit to perform her full duties and that there were no grounds for retirement on the grounds of ill health.
- 22 On 7 February 2018, the appellant received an email advising that the respondent would reinstate the payment of Ms Richardson's salary effective from 31 January 2018 (being the date that Dr Dare's report was provided to the respondent). The email also stated that there was now a dispute about the medical assessment and that the respondent would now seek a further report from an independent medical expert in accordance with the Ill Health Retirement Policy.
- 23 On 16 February 2018, the appellant filed application PSAC 5 of 2018.
- 24 On 11 April 2018, Ms Richardson attended a medical assessment with independent Consultant Occupational Physician, Dr Phillip Meyerkort.
- 25 On 30 April 2018, the respondent received and provided to the appellant a report by Dr Meyerkort in which it was concluded that Ms Richardson was fit to perform the full range of duties within her position description on a full-time basis without restriction.
- 26 Ms Richardson returned to the workplace in a full-time capacity on 11 May 2018.

The issue in dispute before the Arbitrator

- 27 The Arbitrator found the question to be determined was whether the respondent was correct to act as it did by directing Ms Richardson to proceed on unpaid personal leave, having regard to the relevant provisions of the 2017 General Agreement, the respondent's policies and the terms of the Public Sector Commission Administrative Instruction 601.

The relevant provisions of the 2017 General Agreement, the Ill Health Retirement Policy and Administrative Instruction 601

(a) The 2017 General Agreement

- 28 Clause 5.8 of the 2017 General Agreement provides that (subject to cl 5.7 which is not applicable to the resolution of matters in this appeal) where the provisions of the applicable award (the *Public Service Award 1992*) and the 2017 General Agreement are inconsistent, the 2017 General Agreement will prevail.
- 29 Clause 22.1 of the 2017 General Agreement provides that the provisions of this clause (personal leave) replaces cl 31 - Short Leave, cl 27 - Carer's Leave, and cl 26 - Sick Leave of the *Public Service Award*.
- 30 Clause 22.24 of the 2017 General Agreement provides:

Reasonable and legitimate requests for personal leave will be approved subject to available credits. Subject to clause 22.8 the Employer may grant personal leave in the following circumstances:

 - (a) where the Employee is ill or injured;
 - (b) to provide care or support to a member of the Employee's family or household who requires care or support because of an illness or injury to the member; or an unexpected emergency affecting the member;
 - (c) for unanticipated matters of a compassionate or pressing nature which arise without notice and require immediate attention;
 - (d) by prior approval of the Employer having regard for Agency requirements and the needs of the Employee, planned matters where arrangements cannot be organised outside of normal working hours or be accommodated by the utilisation of flexi time credits by Employees working according to approved flexible working hours arrangements or other leave. Planned personal leave will not be approved for regular ongoing situations.
- 31 Clause 22.33 of the 2017 General Agreement provides:

If the Employer has reason to believe that an Employee is in such a state of health as to render a danger to themselves, fellow Employees or the public, the Employee may be required to obtain and furnish a report as to the Employee's condition from a registered medical practitioner nominated by the Employer. The Employer shall pay the fee for any such examination.

32 Clause 22.36 of the 2017 General Agreement provides:

Employees who have exhausted all of their personal leave entitlements and are ill or injured may apply for personal leave without pay. Employees are required to complete the necessary application and provide evidence to satisfy a reasonable person. The Employer shall not unreasonably withhold this leave.

33 Clause 22.37 of the 2017 General Agreement provides:

Personal leave without pay not exceeding a period of three months in a continuous absence does not affect salary increment dates, anniversary date of personal leave credits, long service leave entitlements or annual leave entitlements. Where a period of personal leave without pay exceeds three months in a continuous absence, the period in excess of three months is excised from qualifying service.

(b) Administrative Instruction 601

34 Administrative Instruction 601 – Sick Leave provides as follows:

1. Entitlement

Entitlements to sick leave are prescribed in the Public Service Regulations, 1988 and the Public Service Award, 1992.

2. Delegation

The chief executive officer has the authority to approve sick leave with pay to the extent of the officer's entitlement or without pay for any period.

3. Application

Applications for sick leave shall be submitted in writing.

4. Requirements of Certificate

- a) Where the certificate of a registered medical practitioner or a registered dentist is required in accordance with Award provisions, such certificate must:
- i) be on the normal letterhead stationery of the medical practitioner or dentist; and
 - ii) include the name of the officer for whom it is issued; and
 - iii) indicate the period during which the officer is or was unfit to perform his/her normal duties.
- b) The chief executive officer may require the officer to obtain and provide a further certificate from a registered medical practitioner nominated by the chief executive officer and if that certificate does not confirm or substantially confirm the original certificate:
- i) the officer making the application for sick leave shall pay the fee of the nominated registered practitioner in respect of the certificate; and
 - ii) if the sick leave had been approved with pay, such approval may be revoked.
- Disciplinary action may also follow.

5. Officer Not Fit to Resume Duty

Where it appears unlikely that an officer will be fit to resume duty, the chief executive officer should give consideration to recommending to the Public Service Commissioner that the officer be retired on the grounds of ill health or that the officer's employment be terminated.

6. Officer Considered to be a Danger to Others

- a) Where a chief executive officer has reason to believe that an officer is in such state of health as to be or to become a danger to colleagues or members of the public, the chief executive officer shall, in accordance with Award provisions, require the officer to obtain and provide a report as to his/her condition from a registered medical practitioner, or by a registered medical practitioner nominated by the chief executive officer. The fee for any such examination shall be paid by the department.
- b) Upon receipt of the medical report, the chief executive officer may direct the officer to be absent from duty for a specified period, or if already absent on leave, the officer may be directed to continue on leave for a specified period. Such absence shall be regarded as sick leave.

7. Infectious Diseases

- a) Upon report by a registered medical practitioner that, by reason of contact with a person suffering from an infectious disease and through the operation of restrictions imposed by Commonwealth or State law in respect of that disease, an officer is unable to attend for duty, the officer concerned may be granted sick leave or, at the option of the officer, the whole or any portion of the leave may be deducted from accrued annual leave or long service leave.
- b) Leave shall not be granted for any period beyond the earliest date at which it would be practicable for the officer to resume duty, having regard to the restrictions imposed by law.

8. **Credits for Previous Employment**

- a) Entitlements to claim credits for previous employment in a State body or statutory authority prescribed by Administrative Instruction 611 or in the service of the Commonwealth or of any other State of Australia, are prescribed in the Public Service Award.
- b) This matter should be negotiated and documented as part of the recruitment process.

(c) **HR-11.05 Retirement on Grounds of Ill Health – Police Staff**

35 The policy is composed of three parts, the policy, procedures and guidelines.

36 The purpose of the policy, procedures and guidelines is to:

- Provide consistent advice about the management of employees whose health is believed to be significantly impacting on their ability to fulfil their work function
- Outline a consistent process for both employer and employee in dealing with the ill health retirement process.

37 The policy is 'to effectively manage employee health and welfare needs including where necessary, calling upon employees to retire on the grounds of ill health'.

38 The procedures (relevant to this appeal) are that:

Where WA Police is strongly of the opinion that an employee's:

- a. Permanent or intermittent failure to attend work due to ill health
- b. The employees inability to undertake the full range of duties within the appropriate position description
- c. Sustained poor performance is directly attributed to the employee's ill health
- d. Where there is sufficient evidence to suggest that an employee's sustained poor health poses a significant risk to the welfare of themselves and/or other staff or the public

the agency may seek its own medical advice as to the employee's ability to continue in current employment.

- Where that medical advice supports the employee's retirement on the grounds of ill health, WA Police may call upon the employee to retire in accordance with section 39 of the *Public Sector Management Act 1994*.
- Where WA Police has called upon an employee to retire in accordance with section 39 of the *Public Sector Management Act 1994*, WA Police shall also advise the employee to obtain advice from their superannuation fund.
- If the employee accepts the medical evidence but does not agree to retire on the grounds of ill health, the WA Police will instruct the employee to retire from the Public Service forthwith.
- Failure to retire forthwith, on the grounds of ill health, will be treated as failure to comply with a lawful order and may lead to disciplinary action being progressed.
- If the employee does not agree with the medical evidence, the employee may provide the agency with his or her own medical evidence. This medical evidence must be supplied within 28 days of being called upon to retire. Consideration may be given to extend the 28 day period upon application by the employee.
- If the employee's own medical evidence contradicts the agency's advice that the employee should retire on the grounds of ill health, a dispute will be recorded and the employee will be directed not to attend work. During this period the employee will remain on the same pay as they would have received had they not been directed to not attend work. The employee will not be required to attend work until revoked or until the medical advice supports the employee's safe return to work.
- If a dispute arises regarding the advice as to whether an employee should retire on the grounds of ill health, both the agency and employee must agree to a medical report being sought from an independent medical expert. That report will be commissioned and paid for by WA Police. The employee must attend any medical appointment arranged as part of this process.

39 Guidelines 1 and 2 provide:

1. At any time should WA Police deem there is sufficient evidence to suggest that an employee's sustained poor health poses a significant risk to the welfare of themselves and/or other staff, the agency may direct the employee not to attend work. During this period the employee will remain on the same pay as they would have received had they not been directed to not attend work. The employee will not be required to attend work until revoked or until the medical advice supports the employee's safe return to work.
2. At any point in the process, an employee can be required to attend medical appointment(s).

The Arbitrator's reasons for decision

40 After setting out the factual background and the issue in dispute, the Arbitrator made the following findings which are relevant to the disposition of this appeal:

- (a) The first point to be considered is whether the terms of the 2017 General Agreement in relation to personal leave supported the respondent's decision in relation to Ms Richardson.

- (b) Clause 22 of the 2017 General Agreement replaces short leave, carers' leave and sick leave provisions of the *Public Service Award* and combines them into one entitlement as personal leave.
- (c) To the extent that cl 22.33 is inconsistent with cl 26(4) of the *Public Service Award*, insofar as the latter does not include reference to an officer being a danger to themselves, cl 22.33 of the 2017 General Agreement prevails.
- (d) The provisions of the 2017 General Agreement as to personal leave do not enable an employer to 'place' or to direct an employee to proceed on personal leave. To do so would require express provision which is absent.
- (e) By cl 5 of 2017 General Agreement, the terms of the 2017 General Agreement and the *Public Service Award* are to be read together. Both form part of the scheme as to the terms and conditions of employment for public servants in this State. The presence of an express right of an employer to direct an employee to take annual leave and long service leave, with the sanction of disciplinary action if not complied with, reinforces the need for a corresponding express provision in either the 2017 General Agreement or the *Public Service Award*, or other instrument, for an employer to direct an employee to take personal leave.
- (f) Whilst the respondent made much of the fact that as a matter of logic and common sense, the obtaining of a medical report under cl 22.33 of the 2017 General Agreement must be able to be acted upon, the absence of a right of the employer to place an employee on sick leave by the terms of the 2017 General Agreement itself, does not mean the employer may not take steps. The facts of this case show that the employer may use the report to, for example, require a public service officer to retire on the grounds of ill health under s 39 of the *Public Sector Management Act 1994* (WA) (PSM Act) or act in accordance with Administrative Instruction 601.
- (g) By cl 5(1) of sch 5 of the PSM Act, the terms of Administrative Instruction 601 are preserved as a transitional instrument, until it is repealed by a Commissioner's instruction or by regulations under s 108 of the PSM Act.
- (h) Administrative instructions, as continued in effect by cl 5(1), will continue to apply, subject to 'such modifications as are necessary'. Phrases such as 'with such modifications as are necessary' and 'with such adaptations as are necessary' in legislation, extend beyond matters of mere nomenclature and description and may embrace substantive provisions: *Peninsular Group Ltd v Kintsu Co Ltd* (1998) 44 NSWLR 534.
- (i) Section 64(1) of the PSM Act provides that employment of a person in accordance with Commissioner's instructions as a public service officer is subject to any binding award, order or industrial agreement made under the IR Act. Any conflict must be resolved in favour of the 2017 Agreement. Section 64(1) of the PSM Act should be construed as a reference to both Commissioner's instructions and administrative instructions, as both instruments have the same character and effect. Thus, any inconsistency between a prior administrative instruction made under the former *Public Service Act 1978* (WA) and preserved by the PSM Act, must give way to the terms of any award or agreement made under the IR Act. Any conflict must be resolved in favour of the 2017 Agreement.
- (j) Both Administrative Instruction 601 and the sick leave provisions of the *Public Service Award* were plainly intended to be read together and to operate as part of a scheme. Both cl 26(4) of the *Public Service Award* and Administrative Instruction 601 cover the circumstances of an employee being in such a state of ill health as to render themselves a danger to fellow officers and the public at large. Both also refer to the employer's right to direct the employee to obtain a medical report. Clause 6(b) of Administrative Instruction 601, however, goes a step further. Clause 6(b) must be construed as meaning if cl 6(a) is satisfied, a chief executive officer has the authority to direct an employee to remain away from the workplace and such absence is to be regarded as sick leave.
- (k) The only change introduced by the 2017 General Agreement in cl 22.3 (the form of which seemed to have been successive industrial agreements since at least 2006, if not earlier) is to enable the employer to direct a medical report to be obtained in circumstances where the employer considers the employee's state of ill health to be a danger to themselves, in addition to any danger to fellow employees or the public.
- (l) Administrative Instruction 601 should be read as modified by cl 22.33 of the 2017 General Agreement, to include the situation where an employee is in such a state of ill health as to constitute a danger to themselves, as well as to fellow employees or the public.
- (m) Whilst the terms of the Ill Health Retirement Policy in relation to 'procedures' and 'guidelines' are somewhat confusing, the policy does not assist the appellant in this case. When the payment provision was triggered in this case, following the disputed medical reports being received (being the date of the receipt of Dr Dare's report by the respondent), Ms Richardson was paid accordingly. The Ill Health Retirement Policy, when construed as a whole in accordance with its evident intention, does not support the payment of Ms Richardson at any point prior to the dispute arising on the medical reports.
- (n) Accordingly, it was open for the respondent to rely upon the terms of the 2017 General Agreement read with Administrative Instruction 601 (to direct Ms Richardson not to remain at work and the absence to be regarded as sick leave).

41 For these reasons, the Arbitrator dismissed the application for relief sought by the appellant.

The grounds of appeal

- 42 In ground 1 of the appeal, it is contended that the Arbitrator made an error of law when he considered that it was open for the respondent to rely upon the terms of the 2017 General Agreement when read with Administrative Instruction 601.
- 43 In ground 2 of the appeal, the appellant contends that the Arbitrator made an error of law and fact when he concluded that the respondent's Ill Health Retirement Policy did not support the payment of Ms Richardson at any point prior to the dispute arising on the medical reports.

44 In ground 3 of the appeal, the appellant attempts to claim that it was denied procedural fairness in that the Arbitrator made an error of law by failing to consider the operation of s 26(3) of the IR Act with respect to the findings made as to the construction of Administrative Instruction 601.

Disposition of the appeal

45 The relevant provisions of the 2017 General Agreement make it clear that the terms of the *Public Service Award* that apply to sick leave are rendered inoperative whilst the 2017 General Agreement remains in force.

46 Importantly, the Arbitrator was correct to find that there is no right for an employer to direct an employee to take personal leave on grounds of ill health in cl 22 of the 2017 General Agreement. Clause 22.24 only applies to applications for leave by employees. Clause 22.32 and cl 22.33 only empowers an employer to direct an employee to submit to a medical examination.

47 As noted at [27] of these reasons the question was whether the respondent was correct to act as he did by directing Ms Richardson to proceed on unpaid personal leave, having regard to the relevant provisions of the 2017 General Agreement, the respondent's policies and the terms of Administrative Instruction 601. It is not about other action the respondent may have taken under other legislation, instruments or regimes, but did not do so. It is limited to the circumstances and the action actually taken by the respondent in the context of the instruments upon which he relied.

48 Whilst cl 26 of the *Public Service Award* does not apply whilst the 2017 General Agreement is operative, even if it could be said to apply by operation of the effect of Administrative Instruction 601 there is nothing in cl 26 of the *Public Service Award* that provided a power to direct an employee not to work and to take sick leave.

49 It was not in dispute at the hearing before the Arbitrator that Administrative Instruction 601 remains in force and effect. The appellant, however, attempted to depart from this concession at the hearing of the appeal. The appellant sought to argue that by operation of s 3 of the *Public Service Act 1978* (repealed), the provisions of Administrative Instruction 601 that provides a power to public sector agencies to direct an employee to take sick leave have no effect, as Administrative Instruction 601 was inconsistent with the provisions of the *Public Service Award*. This argument has no merit. Leaving aside the effect of s 3 of the *Public Service Act 1978* (in relation to which I do not find it necessary to make any finding) it is conceded by the appellant, cl 26 of the *Public Service Award* does not and did not contain any provision that allowed or allows public sector agencies to direct an employee to take sick leave. Consequently, the argument sought to be put by the appellant is not open.

50 Prior to the enactment of the PSM Act, s 19 of the *Public Service Act 1978* provided that the Public Service Commissioner may perform his or her functions by administrative instructions, published, notwithstanding s 41 of the *Interpretation Act 1984* (WA), in public service notices but not in the Gazette. Further, by operation of s 19, administrative instructions were deemed to be subsidiary legislation, but s 42 of the *Interpretation Act* did not apply to, or in relation to, them.

51 Pursuant to cl 5(1) of sch 5 of the PSM Act, administrative instructions continue in operation, with such modifications as are necessary, after commencement of the PSM Act until repealed by a Commissioner's instruction or regulations made under s 108 of the PSM Act.

52 The words 'with such modifications as are necessary' must be read as if the administrative instructions were made as Commissioner's instructions under the PSM Act and not modified at large, such as modified by any incorporation of the provisions of an industrial agreement made under the IR Act. Insofar as the Arbitrator found otherwise in respect of the statutory text in cl 5(1) of sch 5 of the PSM Act ([40] - [41]), I respectfully do not agree with this approach.

53 The observations made by the New South Wales Court of Appeal in *Kintsu* does not support such a construction as applied by the Arbitrator. In *Kintsu*, the New South Wales Court of Appeal was called upon to consider whether s 583 of the *Corporations Law* (Cth) (repealed) dealt with winding up of a company on grounds of insolvency where the company was a foreign company. Section 583 of the *Corporations Law* provided that chapter 5 applied to a pt 5.7 body with such adaptations as are necessary. Section 583 went on to prescribe an exclusive list of modifications that were found by the New South Wales Court of Appeal to constitute a code. What was considered by the Court of Appeal was whether the provisions of chapter 5 of the *Corporations Law* applied to a foreign company.

54 It was not in issue in *Kintsu* whether the provisions of any other instrument should apply to a foreign company. Yet, this is the issue squarely raised in this matter.

55 It is clear that cl 5(1) of sch 5 of the PSM Act should be construed as applying necessary modifications to an administrative instruction to render such administrative instruction to be consistent with the effect of instructions issued by the Public Sector Commissioner.

56 When this approach is applied, it can be seen that insofar as cl 1 of Administrative Instruction 601 states that the entitlements to sick leave are prescribed in the *Public Service Regulations 1988* and the *Public Service Award*, this provision is to be read as necessarily 'modified' because there are now no regulations that prescribe sick leave entitlements. This provision could also be said to be modified by s 64 of the PSM Act.

57 Section 64 of the PSM Act provides:

- (1) Subject to this section and to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* or employer-employee agreement under Part VID of the *Industrial Relations Act 1979*, the employing authority of a department or organisation may in accordance with the Commissioner's instructions appoint for and on behalf of the State a person as a public service officer (otherwise than as an executive officer) on a full-time or part-time basis –
 - (a) for an indefinite period as a permanent officer; or
 - (b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment.
- (2) An appointment under subsection (1) shall be to such level of classification and remuneration as is determined by the relevant employing authority –

- (a) in accordance with the Commissioner's instructions; and
 - (b) as being appropriate to the functions to be performed by the person so appointed.
- (3) The employing authority of a department or organisation shall –
- (a) in accordance with the Commissioner's instructions; and
 - (b) at the time of the appointment of a person under subsection (1) or, if that employing authority considers it impracticable to make the appointment concerned at that time, at a later time, appoint the person to fill a vacancy in an office, post or position in the department or organisation.
- (4) Subject to subsection (5), a person appointed under subsection (1)(b) cannot apply for an appointment under subsection (1)(a) unless the relevant vacancy has first been advertised as a public sector notice in accordance with the Commissioner's instructions or in a daily newspaper circulating throughout the State.
- (5) Subsection (4) does not apply to a person –
- (a) appointed under subsection (1)(b); and
 - (b) having, or occupying an office, post or position having, the lowest level of classification at which persons of the same prescribed class as that person are at the relevant time recruited into the Public Service.
- (6) The employing authority of an organisation shall not make an appointment under subsection (1) unless the written law under which the organisation is established or continued authorises or requires the appointment or employment of public service officers for the purposes of that organisation.
- (7) Nothing in this section prevents a public service officer who holds an office, post or position in one department or organisation from being appointed, whether by way of promotion or otherwise, to an office, post or position in another department or organisation.
- 58 Section 64 empowers an employing authority of a department to appoint public service officers, subject to any binding award, order or industrial agreement, in accordance with the Commissioner's instructions. Whilst it is not necessary to decide the point, and without any argument on this point, I am not persuaded that it could be said by operation of s 64(1) of the PSM Act that any provision of an administrative instruction or a Commissioner's instruction that is inconsistent with the provisions of an award or industrial agreement is rendered inoperative by s 64(1) (see, for example, the relationship between, and the effect of, an award, order or industrial agreement and Commissioner's instructions in s 29(1)(h), s 30(b) and s 100(2) of the PSM Act.)
- 59 It is also not necessary to decide the point for the purposes of this appeal whether administrative instructions have ceased to be subsidiary legislation for the purposes of the *Interpretation Act*. However, it is arguable that the effect of an administrative instruction is so modified by s 22A(7) of the PSM Act which provides that Commissioner's instructions are not subsidiary legislation for the purposes of the *Interpretation Act*.
- 60 It is clear, however, that cl 2 of Administrative Instruction 601 would have no operative effect as it would also be modified. Prior to the enactment of the PSM Act, the Public Service Commissioner was the employer of all public service officers. On coming into operation of the PSM Act, chief executive officers became the employers of public service officers in departments. In these circumstances, cl 2 of Administrative Instruction 601 has no work to do as there is no necessity to delegate an employer's power (that is, the power of the former Public Service Commissioner as the employer of public service officers) to a chief executive officer, who by operation of the provisions of the PSM Act, are employing authorities of public service officers in departments.
- 61 When regard is had to s 64(1) of the PSM Act, Administrative Instruction 601 is to be construed as an instruction to the respondent as an employing authority that is to be complied with, together with the provisions of any binding award or industrial agreement. As there is no binding award provision that applies whilst cl 22 of the 2017 General Agreement remains in force, the relevant instruments that applied to the conditions of sick leave of a public service officer in a position of Ms Richardson are Administrative Instruction 601 and cl 22 of the 2017 General Agreement.
- 62 Clause 6 of Administrative Instruction 601 cannot be relied upon by the respondent to direct Ms Richardson not to attend work as cl 6(a) only applies where a chief executive officer has reason to believe that an officer is in such state of health as to be or to become a danger to colleagues or members of the public. There is nothing in the PSM Act which would enable the scope of the direction given in Administrative Instruction 601(6) to be any wider. Even if Administrative Instruction 601 is subject to and can be overridden by the provisions of cl 22 of the 2017 General Agreement, there is nothing in the 2017 General Agreement that enables an employer to direct a public service officer to be absent from duty on sick leave.
- 63 Importantly, when regard is had to the express terms of Administrative Instruction 601, there is nothing in the various medical reports that were considered by the respondent's officers prior to giving the direction to Ms Richardson on 22 December 2017 which indicate the state of health of Ms Richardson was such as to be or to become a danger to colleagues or members of the public. All of the reports by Dr Powers that the respondent had before it on 22 December 2017 indicated only that Ms Richardson was at high risk if she was to remain at work of a significant event or exacerbation of her symptoms requiring medical intervention.
- 64 When regard is had to the medical reports of Dr Powers and to the medical evidence provided by Dr Tan and Dr Liddell-Melville, the Ill Health Retirement Policy had application to Ms Richardson as at the date that Acting Inspector Hoath sent the letter.
- 65 I do not agree that the Ill Health Retirement Policy did not require the respondent to pay Ms Richardson for the period from 22 December 2017 to 31 January 2018.
- 66 The express terms of the Ill Health Retirement Policy do not support a construction that it was not until Dr Dare's report dated 23 January 2018 was received by the respondent, there was a 'dispute' on the medical evidence as to whether Ms Richardson should retire on the grounds of ill health.

- 67 Clearly, Ms Richardson had provided medical evidence upon which a 'dispute' arose prior to 22 December 2017. The medical certificate provided by Dr Tan dated 7 December 2017 and the report of Dr Liddell-Melville dated 14 December 2017, constituted medical evidence and grounds upon which a 'dispute' could objectively be said to have arisen as contemplated by the sixth dot point of the procedures and guideline 1 of the Ill Health Retirement Policy.
- 68 Importantly, there is nothing in the Ill Health Retirement Policy that allows the respondent to direct an employee not to attend work without pay.
- 69 The Ill Health Retirement Policy applies where there is sufficient evidence to suggest that an employee's sustained poor health poses a significant risk to themselves. This was squarely the opinion of Dr Powers prior to 22 December 2017.
- 70 Of importance, in the letter dated 22 December 2017 to Ms Richardson directing her not to attend work, Acting Inspector Hoath stated that the process of retirement on grounds of ill health had commenced (in respect of Ms Richardson) as per the Ill Health Retirement Policy.
- 71 It is clear that as the respondent is a public sector employing authority, a model litigant and public sector employer, he should be bound by his policies and procedures.
- 72 Whilst the respondent attempted to raise an argument that relies upon the ordinary application of the 'no work, no pay' principle leads to a conclusion that there is no entitlement to wages, I am not satisfied that such an argument may be open on the facts that were before the Arbitrator: *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435.
- 73 Firstly, whilst there is an independence of service and wages in a claim for wages following a breach of contract by an employer, resulting in the discharge of employment of an employee, the industrial dispute referred for hearing and determination by the Arbitrator in this matter was not a claim for contractual benefits and turned on the effect of Administrative Instruction 601 and the 2017 General Agreement and the proper application of the respondent's Ill Health Retirement Policy.
- 74 Secondly, in *Watson's* case, an issue arises in respect of public service officers as to whether the terms of a person's employment provide that the payment of salary attaches to the office, or whether it is conditional on the performance of the duties of the office. In the former case, the principle in *Watson* does not apply. Whether Ms Richardson's terms of employment provides for salary that attaches to her office as a Level 2 Administrator was not a matter that was the subject of evidence nor argument before the Arbitrator (see the discussion on this point by G J McCarry, *Aspects of Public Sector Employment Law* (1988) pp 186 - 203).
- 75 For these reasons, I am on the opinion that ground 1 and ground 2 of the appeal have been made out. I do not find it necessary to deal with the procedural fairness point raised in ground 3 of the appeal.

Conclusion

- 76 I would uphold the appeal and make an order to vary the decision of the Arbitrator by making an order that the direction given to Ms Richardson to be absent from duty from 22 December 2017 to 31 January 2018 be treated as, and recorded as, paid time (as if she had not been directed to not attend work in that period).

SCOTT CC:

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

MATTHEWS C:

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

2019 WAIRC 00021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPELLANT

-and-

COMMISSIONER OF POLICE, WA POLICE SERVICE

RESPONDENT

CORAM

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER P E SCOTT

COMMISSIONER D J MATTHEWS

DATE

WEDNESDAY, 30 JANUARY 2019

FILE NO/S

FBA 7 OF 2018

CITATION NO.

2019 WAIRC 00021

Result	Appeal upheld; decision of Public Service Arbitrator varied
Appearances	
Appellant	Mr B Cusack and with him Ms D Larson
Respondent	Mr D Anderson, of counsel

Order

This appeal having come on for hearing before the Full Bench on 17 December 2018, and having heard Mr B Cusack and with him Ms D Larson on behalf of the appellant, and Mr D Anderson, of counsel, on behalf of the respondent, and reasons for decision having been delivered on 29 January 2019, 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 Public Service Arbitrator given on 12 July 2018 in PSACR 5 of 2018 is varied by deleting the words 'THAT the application be and is hereby dismissed' and substituting the following order:

THAT the direction given to Ms Tara-Jayne Richardson on 22 December 2017 to be absent from duty (in respect of the period from 22 December 2017 to 31 January 2018) be treated as, and recorded as, paid time (as if Ms Richardson had not been directed to not attend work in that period).

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2019 WAIRC 00015

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2019 WAIRC 00015
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	WEDNESDAY, 31 OCTOBER 2018, TUESDAY, 30 OCTOBER 2018
DELIVERED	:	FRIDAY, 18 JANUARY 2019
FILE NO.	:	APPL 86 OF 2017
BETWEEN	:	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
		Applicant
		AND
		SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH
		Respondent

CatchWords	:	Award interpretation - Section 46 Industrial Relations Act 1979 (WA) - <i>The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977</i> - Scope - Common rule award - Industries carried on by named respondents - Removal of named respondent may not affect the scope of the award
Legislation	:	Section 29A, s 37, s 38, s 40, s 46, s 47 of the <i>Industrial Relations Act 1979</i> (WA), <i>Labour Relations Reform Act 2002</i> (WA), <i>Industrial Arbitration Act, 1912-1976</i> (WA)
Result	:	Declaration made
Representation:		
Applicant	:	Mr D Rafferty (of counsel)
Respondent	:	Mr N Tindley (of counsel)
First intervener	:	Mr R Kenzie QC and with him Mr T Dixon (of counsel)
Second intervener	:	Mr R Andretich (of counsel)

Case(s) referred to in reasons:

- (Commission's Own Motion) v (Not Applicable)* [2007] WAIRC 00318; (2007) 87 WAIG 903
- (Commission's Own Motion) v Dardanup Butchering Co & Others* [2004] WAIRC 10864; (2004) 84 WAIG 465
- BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch)* [2006] WASCA 124
- City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813
- City of Wanneroo v Holmes* (1989) 30 IR 362
- Derby Meat Processing Co. Ltd. v West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 862
- Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty. Ltd.* (1984) 64 WAIG 1926
- Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch* (1991) 71 WAIG 1746
- Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498
- Health Services Union of Western Australia (Union of Workers) v The Director General of Health* [2012] WAIRC 01117; (2012) 93 WAIG 1
- Norwest Beef Industries Limited v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers* (1984) 64 WAIG 2124
- R. J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317
- The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WAIRC 00830; (2017) 97 WAIG 1689
- The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Another v Anodisers W.A., Dardanup Butchering Co, Bradford Insulation* [2001] WAIRC 03164; (2001) 81 WAIG 1598
- The Shop Distributive and Allied Employees' Association of W.A. File No. 76 80 105* (1995) 75 WAIG 954
- The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty. Ltd.* (1970) 50 WAIG 704

Reasons for Decision

- 1 This is an application by the Shop, Distributive and Allied Employees' Association of Western Australia (**Union**) for interpretation and a declaration under s 46(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) because the parties disagree about how *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (Shop Award)* should be interpreted in light of cl 3 - Scope, cl 9 - Hours, cl 28 - Wages, cl 40 - Chemists Shops, schedule B (which explains what can be sold at a 'special retail shop') and schedule C (which contains a list of respondents). For reference, cl 3 and cl 40 are reproduced here from the current version of the Shop Award:

3. – SCOPE

This award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule "C" and to all employers employing those workers.

40. – CHEMIST SHOPS

Any worker employed in a chemist's shop shall be subject to the terms of this award up to the time he or she becomes indentured to the profession.

The parties agree that in the current version of the Shop Award, there are no known respondents carrying on the retail pharmacy industry. They disagree about whether other clauses that reference chemist shops or pharmacies, for example cl 40, can have an effect on the scope of the Shop Award.

- 2 The Pharmacy Guild of Western Australia Organisation of Employers (**Pharmacy Guild**) and the Minister for Commerce and Industrial Relations (**Minister**) have intervened in this application because of its potential effect on employers and employees in the retail pharmacy industry and interpretation of common rule State awards.
- 3 The Union asks the Commission to resolve the matter by answering this question:
- Does the Shop and Warehouse Award as varied apply to workers employed in any calling or callings mentioned in the award in the Retail Pharmacy Industry and to employers employing those workers?
- 4 The Union is in dispute with Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth (**Chemist Warehouse**) over the minimum entitlements of one of its members. From the notice of application and submissions made, it is clear to me that the essential nature of this matter is an interpretation of the Shop Award and not enforcement or an industrial dispute. The Union asks for a declaration, not an order to enforce the Shop Award. It asks the Commission to interpret the Shop Award in its current form and the application raises proper issues for interpretation. A real controversy exists between the parties as to the proper construction of cl 3, cl 28, cl 40, schedule B and schedule C. I am satisfied that interpreting the Shop Award to declare its true interpretation, by determining whether its scope extends to the retail pharmacy industry, is within the Commission's jurisdiction under s 46(1)(a) of the IR Act.

- 5 The Union led evidence about the history of the Shop Award and operation of Boans Ltd of Murray St, Perth (**Boans**) and Perth United Friendly Society Chemists of 84 Beaufort St, Perth (**PUFSC**). This evidence included affidavits from Mr Geoffrey Allan Bingemann and Mr Thomas Chee Wai Lui about the retail pharmacy activities of Boans and PUFSC. At the hearing it became clear that the parties and interveners agree the Shop Award applied to retail pharmacy employees at the date the Shop Award was made. It is not in dispute that at least Boans and PUFSC were carrying on the retail pharmacy industry and were named respondents to the Shop Award when it was made. On the evidence, I have no difficulty finding that when the Shop Award was made, Boans and PUFSC owned and operated retail pharmacies and the Shop Award applied to employees working in the retail pharmacy industry.
- 6 The parties and interveners also agree that both retail pharmacies, Boans and PUFSC, are no longer named in schedule C to the Shop Award, and that PUFSC was the last respondent known to have carried on the industry of retail pharmacy named on that schedule. It is not disputed that PUFSC was removed from schedule C by the Commission of its own motion under s 47 of the IR Act on 5 April 1995: *The Shop Distributive and Allied Employees' Association of W.A. File No. 76 80 105* (1995) 75 WAIG 954.
- 7 At this stage, it is useful to note that throughout the hearing of this matter, the parties and interveners have used the terms 'chemist shop', 'chemist', 'pharmacy' and 'retail pharmacy' interchangeably. The Union argues these terms are interchangeable and the Minister agrees. Chemist Warehouse and the Pharmacy Guild did not oppose this submission. For the purpose of this decision, I accept that 'chemist' and 'pharmacy' are the same, as are 'chemist shop' and 'retail pharmacy'.
- 8 The parties and interveners agree the Shop Award applies to those working in callings in this award in the industries covered by this award. The dispute in this matter is about whether the Shop Award still applies to the retail pharmacy industry.
- 9 In essence, the Union and Minister say the Shop Award applies to the retail pharmacy industry because cl 40 should be interpreted as saying as much. Further, cl 3, cl 9, cl 28 and schedule B should also be interpreted such that it is clear the Shop Award applies to workers in the retail pharmacy industry. They also say the industries covered by the Shop Award were set at the date the Shop Award was made. It is not in dispute that at that time, Boans and PUFSC carried on businesses in the retail pharmacy industry and so the Shop Award applied to retail pharmacies. The Union and Minister say removing Boans and PUFSC as respondents to the Shop Award does not alter the scope of the Shop Award.
- 10 Chemist Warehouse and the Pharmacy Guild say only the scope clause can be considered by the Commission when determining whether the Shop Award applies to the retail pharmacy industry. They say the scope of the Shop Award is limited to the industries of the current respondents to the Shop Award. Removing respondents, such as Boans and PUFSC, has the effect of changing the scope of the Shop Award so that it no longer applies to the industry of those respondents once removed.
- 11 A copy of the Shop Award in its current form is annexed to this decision for reference. Clause 40 was previously numbered cl 38 and schedule C was previously named schedule B.

Is interpreting the Shop Award finally (and not just primarily) a matter of construction?

- 12 To resolve this matter I must first consider whether interpreting the Shop Award is finally (and not just primarily) a matter of construction.

Type of scope clause

- 13 A 'Glover' scope clause states that an award applies to the industries carried on by the respondents set out in the schedule to that award: *The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty. Ltd.* (1970) 50 WAIG 704 (**Glover**). A 'Donovan' scope clause states that an award applies to the employees of employers named and engaged in industries specified in the schedule to that award. It also sets out the employers and industries in the schedule to that award: *R. J. Donovan and Associates Pty. Ltd. v Federated Clerks Union of Australia Industrial Union of Workers, W.A. Branch* (1977) 57 WAIG 1317 (**Donovan**).
- 14 The parties and interveners agree that the Shop Award is a common rule award with a 'Glover' scope clause and not a 'Donovan' scope clause.

What can the Commission consider?

- 15 The Union and Minister say the Commission can consider every word of the Shop Award and in particular cl 9, cl 28 and cl 40 along with clause 3 and schedule C (which lists the respondents to the Shop Award). The primary task is construction and any factual inquiry is secondary. The Minister says cl 40 clearly can stand alone and should be interpreted as extending the scope of the Shop Award to workers employed in retail pharmacies.
- 16 The Union says a plain reading of only cl 3 does not correspond to the legal meaning of the clause. Adopting a literal or grammatical approach creates inconsistency with cl 9, cl 28 and cl 40. The Union argues it is proper to give the Shop Award a meaning that advances its purpose. The Union says its construction is more realistic, advances the Shop Award and the IR Act's purpose, gives consideration and weight to every part of the award and avoids absurdity and injustice. To the extent of any inconsistency, cl 3 must give way to cl 40 and other clauses.
- 17 Chemist Warehouse and the Pharmacy Guild say the Commission can only consider cl 3 and schedule C. This is because only the scope clause determines scope, so the Commission must 'start and finish with it.' Chemist Warehouse says the wording of cl 3, 'the scope shall be', shows it is complete. The Pharmacy Guild says a scope clause's whole purpose is to determine the scope of the Shop Award's operation and cl 9, cl 28 and cl 40 do not relate to scope. Those clauses simply identify industrial entitlements.
- 18 However, the parties and interveners agree there is no authority that says the Commission can only consider the scope clause to determine an award's scope.

- 19 The Union and Minister say that commonly an award's scope is dealt with by considering the scope clause, but there is not (and never has been) a requirement that consideration of scope be limited to the scope clause. The Commission should take each award as it finds it. They say the authorities may have only construed scope clauses because in those matters no other clauses were relevant, whereas in this matter, cl 9, cl 28 and cl 40 are relevant to scope because they unambiguously prescribe rights and obligations for 'special retail shops' (pharmacies). On its face, it is clear the Shop Award is intended to cover retail pharmacies, so it is not necessary to return to cl 3 to determine whether the retail pharmacy industry is covered by the Shop Award.
- 20 Chemist Warehouse says 'where the words of a relevant provision are clear and unambiguous, the Commission should confine itself to reviewing those words and determining their meaning.' It relies on Collier C's statement in *Derby Meat Processing Co. Ltd. v West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 862 at (864):
- It is now trite law that when the meaning of language read in its ordinary and natural sense is obtained it is not necessary or indeed permissible to look to the intention of the parties.
- 21 Chemist Warehouse says the scope clause of the Shop Award is clear and unambiguous. It does not apply to retail pharmacies because there are none listed in schedule C. Although it may be difficult to determine the industries carried on by the named respondents to the Shop Award, it is not impossible. Chemist Warehouse says the Union has identified the activities of at least two of the formerly named respondents, Boans and PUFSC, which demonstrates it is possible to know the scope of the Shop Award by considering the list of its respondents.
- 22 Therefore, Chemist Warehouse says there is no ambiguity in the scope clause and the '[Union]'s application predominantly falls away.'
- 23 Chemist Warehouse and the Pharmacy Guild say the Commission should only consider cl 3 of the Shop Award when determining scope. Chemist Warehouse argues that scope clauses 'have a special significance beyond that of other clauses' and that s 29A of the IR Act provides restrictions specific to varying a scope clause, which supports a conclusion that scope clauses are not subject to or impacted by other clauses in an award. They say cl 9, cl 28 and cl 40 are not relevant to determining scope. Rather, those clauses may or may not apply, depending on whether scope covers the industry they relate to. As a result, the Pharmacy Guild says there is no inconsistency between cl 3 and cl 9, cl 28 and cl 40 when appropriate weight is given to cl 3 and schedule C (as varied), presumably because on its argument those clauses simply no longer apply.
- 24 Chemist Warehouse says cl 40's purpose is to identify a distinction where the Shop Award applies. The Shop Award must first apply. Where it does, cl 40 provides for the people the Shop Award applies to. Clause 40 does not affect the scope clause. Clause 9 and cl 28 work in the same way. They guide conditions if an industry is covered by the scope clause.
- 25 Chemist Warehouse and the Pharmacy Guild appear to accept that cl 9, cl 38 and cl 40 were all at some stage intended to cover retail pharmacies but they do not agree with the Union and the Minister that they continue to apply to that industry in circumstances where no retail pharmacies are named on schedule C. The Pharmacy Guild says these 'vestigial references to pharmacy' should not be considered.

Consideration

- 26 Just because it is not impossible to determine scope does not mean it is unambiguous. Ambiguity does not require impossibility. In circumstances where the Shop Award does not expressly identify the industries to which it applies, ambiguity in relation to scope seems inevitable and I find it exists here. I am satisfied the Shop Award requires interpretation to resolve that ambiguity.
- 27 Absent authority to the contrary, I do not agree the Commission is limited to considering the scope clause when considering the scope of an award. I consider it is appropriate to interpret the Shop Award's scope in light of all the clauses in the award.
- 28 This approach is consistent with the reasons of French J (as he was then) in *City of Wanneroo v Holmes* (1989) 30 IR 362 at (378-379) (**Holmes**), and in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813 at [53] and [57], and the Full Bench's reasons in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2017] WAIRC 00830; (2017) 97 WAIG 1689 (**RTBUWA**) at [76] in relation to award construction. These authorities make it clear that award construction begins with a consideration of the natural and ordinary meaning of its words, which should be read as a whole and in context. As Street J says in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at (503) (**Geo A Bond**) and as referred to by French J (as he was then) in *Holmes* at (379):

...in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.

- 29 As Smith AP (as she was then) and Beech CC observed in *Health Services Union of Western Australia (Union of Workers) v The Director General of Health* [2012] WAIRC 01117; (2012) 93 WAIG 1 at [38], relying on *Geo A Bond*, the task of construction of industrial instruments is to be approached in a way that allows for a generous construction. See also Pullin J (with whom Wheeler and Roberts-Smith JJ agreed) in *BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch)* [2006] WASCA 124 at [23]:

French J in [**Holmes**], also referred to what Street J has said in [**Geo A Bond**], reminding courts that awards were made in the light of customs and working conditions of each industry and that they frequently result from an agreement between parties couched in terms intelligible to themselves but often framed without that careful attention to form and draftsmanship which one expects to find an Act of Parliament.

- 30 Olney J says in *Norwest Beef Industries Limited v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers* (1984) 64 WAIG 2124, at (2133):

If it be the case that the correct approach to the interpretation of an industrial award is to read the document itself and give to the words used their ordinary commonsense English meaning... then the first task in every case will be to determine whether the words are capable in their ordinary sense of having unambiguous meaning. If that question is answered in the affirmative then the further consideration of the award making tribunal does not fall to be considered.

- 31 Smith AP (as she was then) said, with whom Scott CC agreed, that the purpose of s 46 of the IR Act is to determine the objective intention of the parties as it is embodied in the words they have used: see *RTBUWA* at [83].
- 32 Construing the Shop Award as a whole and giving its words, in particular those of cl 40, their ordinary meaning, I consider the Shop Award is intended to cover the retail pharmacy industry.
- 33 Therefore I find that in this case, interpreting the Shop Award is finally and not just primarily a matter of construction.
- 34 If I am wrong about that, then interpreting the Shop Award is only primarily a matter of construction. A plain reading of cl 3 and schedule C does not reveal the industries covered by the Shop Award so, although the scope may not be impossible to determine, to do so it is necessary to find relevant facts as set out in *Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch* (1991) 71 WAIG 1746 (**Freshwest**) and *Glover*. This means the Shop Award's scope is inherently ambiguous and it is appropriate for the Commission to interpret it.

How should the scope of the Shop Award be interpreted?

- 35 The parties and interveners disagree about whether the Shop Award continued to apply to the retail pharmacy industry after all known pharmacies were removed from the list of respondents.

Overview of submissions

The Union

- 36 The Union says the removal of Boans and PUFSC, which to the best of its knowledge were the only representatives of the retail pharmacy industry, did not alter the Shop Award's scope. It argues this is supported by the parties' other amendments to the Shop Award, which included amendments to the clauses that specifically mention chemist shops or pharmacies.
- 37 According to the Union, removal of those two named retail pharmacy respondents did not affect the scope of the Shop Award. This is because the Shop Award was not varied to expressly exclude the retail pharmacy industry and also because the applications for their removal did not comply with 29A(2) of the IR Act, which requires parties intending to alter the scope of an award to meet specific publication requirements. Therefore, it says the removal of the final retail pharmacy, PUFSC, from the list of respondents, was an administrative decision made by the Commission and was not intended to, and did not, affect the scope of the Shop Award. The Union says this is supported by its evidence showing that even after both Boans and PUFSC were removed, the Commission and other stakeholders (such as the Pharmacy Guild of Australia) proceeded on the basis the Shop Award applied to the retail pharmacy industry.
- 38 Further, the Union argues that in 1995 the Commission had no general power to vary an award on its own motion, other than under s 47(2) of the IR Act to strike out a respondent employer if it was no longer carrying on a business in the industry to which the award applies. For scope to be varied, s 29A of the IR Act must be complied with. Section 47 is not capable of varying scope. Nothing in the transcript from those 1995 proceedings shows an intention to reduce or vary the Shop Award's scope when PUSFC was removed. It was merely an administrative variation to the list of named respondents.
- 39 The Union says the wording of s 47(2) of the IR Act shows the distinction between the industries carried on at the date an award was made (being the industries to which that award applies) and the industries carried on by the employer at a later time.
- 40 It says even though Boans and PUFSC were removed from the list of respondents, the Shop Award's application to the retail pharmacy industry was unaffected because the Shop Award's industries were established when it was made, and since then no industries have been expressly excluded from the Shop Award's coverage. Further, cl 9, cl 28 and cl 40 continued to bear their ordinary and natural meaning of subjecting relevant workers in the retail pharmacy industry to the Shop Award.
- 41 To the extent the Pharmacy Guild and Chemist Warehouse rely on the reasoning of Gregor C (as he was then) in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Another v Anodisers W.A., Dardanup Butchering Co, Bradford Insulation* [2001] WAIRC 03164; (2001) 81 WAIG 1598 (**Anodisers**), the Union says the Commission should disregard it because the parties in that matter were not heard about that issue.

The Minister

- 42 In the Minister's view, a finding is required about what industries the original named respondents to the Shop Award were carrying on at the date the Shop Award was made in order to determine the scope of the award. The Minister says:
- The change in residency did not change the scope of the [Shop Award] so as to remove the industry of retail chemist shops from the scope of the [Shop Award]. This is because the scope of the [Shop Award] is to be determined by the industries carried on at the time the [Shop Award] was made by the then named respondents. 'That is the industry of which the parties to the award were speaking.'
- 43 The Minister says it is clear on the Union's evidence that Boans and PUFSC owned and operated retail pharmacies at the date the Shop Award was made, therefore the Shop Award extended to shop assistants and other employees in the retail pharmacy industry. As much is conceded by Chemist Warehouse and the Pharmacy Guild.

- 44 The Minister says some degree of security and certainty is necessary because of the way a common rule award binds employers and employees. An award's scope and coverage should not ebb and flow with changes in business activities of the named respondents, nor by changes to the named respondents. Therefore if scope is to be changed, there must at least be some notice of some type of hearing for those who would be affected. There are and there were specific provisions in the *Industrial Arbitration Act, 1912-1976* (WA) (which was in force when the Shop Award was made) and IR Act that deal with changes and variations. Section 47 of the IR Act is not one of those provisions. Rather it simply allows the Commission to strike out a named employer as a named party to the award.
- 45 Like the Union, the Minister says s 29A of the IR Act applies to applications on the Commission's own motion because they constitute a referral. In other words, the Commission has referred a matter to itself: (*Commission's Own Motion*) v (*Not Applicable*) [2007] WAIRC 00318; (2007) 87 WAIG 903 (*Commission's Own Motion*); (*Commission's Own Motion*) v *Dardanup Butchering Co & Others* [2004] WAIRC 10864; (2004) 84 WAIG 465 (*Dardanup*). This includes matters initiated by the Commission under s 47 of the IR Act. This supports the argument that the removal of a named party under s 47(2) could not change an award's scope.
- 46 To the extent that Chemist Warehouse and the Pharmacy Guild rely on the reasoning of Gregor C in *Anodisers*, the Minister says the Commission should not adopt that Commissioner's approach. His comments were obiter, the point was not argued and it was not necessary for the disposition of the matter.
- The Pharmacy Guild*
- 47 The Pharmacy Guild says if the Commission finds the retail pharmacy industry was initially covered by the Shop Award, which it concedes in any event, the retail pharmacy industry is no longer covered because the removal of the respondents Boans and PUFSC meant the industries they represented were also removed from the scope of the Shop Award.
- 48 The Pharmacy Guild says the applicant is not seeking an interpretation of the current Shop Award, but of the Shop Award as it stood before 1995 when PUFSC was removed as a respondent. The Pharmacy Guild says this is beyond the scope of s 46 of the IR Act.
- 49 Instead the Pharmacy Guild says the scope of an award should be determined by reference to the form of the scope clause, which it says necessarily means the scope clause of the Shop Award currently in force. The scope of an award is to be determined by reference to the activities of the respondents at the time of the inquiry, and not, as the Union and Minister say, by reference to the activities of those who were respondents at the date that award was made. It says s 37 of the IR Act supports this approach. Consequently, the activities of a respondent that has been removed cannot determine the scope of the Shop Award and the answer to the Union's question must be 'no'.
- 50 In relation to the s 47 order removing PUFSC in 1995, contrary to the Full Bench's reasoning in *Dardanup*, the Pharmacy Guild says an application on the Commission's own motion is not a referral for the purpose of s 29A(2) of the IR Act. As a result, that section of the IR Act does not apply. The Pharmacy Guild argues that even if it did apply and PUFSC was removed contrary to that section, the removal happened and that had legal effect, including the effect of varying scope such that the Shop Award no longer applied to the retail pharmacy industry.
- 51 The Pharmacy Guild relies on *Glover*, *Freshwest* and *Anodisers* to support its view that scope should be determined by reference to the form of the scope clause, necessarily being the scope clause of the award currently in force. The Pharmacy Guild says this is because s 37 of the IR Act should be understood to be at odds with any suggestion the text of an award as originally made can be read as if it applied without reference to any variation subsequently made by the Commission. Following this, it also says s 38 of the IR Act means 'at any given time when you want to discern the scope of the award you have to have regard to the award in the form it then takes.' Therefore the scope of the Shop Award should be determined by reference to the respondents who remained respondents to the Shop Award after 1995 and what their activities were at the date the Shop Award was made.
- 52 The Pharmacy Guild says it is a conflation to suggest there is some sort of immutability about the coverage just because the Shop Award is a common rule award. Rather, because it is a common rule award it necessarily requires an inquiry into the activities of the employers named in the scope clause. This inquiry should be into the activities of the employers named in the award at the time of the inquiry.
- 53 Further, the Pharmacy Guild says anyone looking at the Shop Award should be able to see the list of respondents and know only those respondents will impact on the Shop Award's scope.
- Chemist Warehouse*
- 54 Chemist Warehouse generally agrees with the Pharmacy Guild.
- 55 It argues the IR Act and authorities do not say awards are fixed in time by those respondents who were respondent to an award when it was made.
- 56 Chemist Warehouse says the Union and Minister's interpretation of *Freshwest* is 'fairly liberal' and unsupported by the circumstances of that case and the reasoning behind it. It says the Commission should conclude that the principle to be drawn from *Freshwest* is that changes in a business' activities should not change the scope of an award where that business continues to be a respondent to the award.
- 57 According to Chemist Warehouse, the removal of PUFSC as the last remaining retail pharmacy had consequences. It is unfortunate if the parties and Commission did not appreciate that at the time, but that makes no difference to the result.
- Consideration
- 58 On the uncontested evidence, I have no difficulty finding that when the Shop Award was made, Boans and PUFSC owned and operated retail pharmacies and the Shop Award applied to employees working in the retail pharmacy industry.

- 59 I find Boans carried on a retail pharmacy business in its Perth department store that traded with the general public. Boans dispensed medicine and drugs, gave advice and sold other health care products until around 1987.
- 60 I find PUFSC carried on retail pharmacy businesses. Like Boans it operated as any other retail pharmacy, trading with the general public until around 1983.
- 61 I am not persuaded by the arguments of Chemist Warehouse and the Pharmacy Guild about how to apply the authorities, in particular *Glover*, *Freshwest* and *Anodisers*.
- 62 I prefer the Union and Minister's arguments and characterisation of *Glover*, *Freshwest* and *Anodisers*. I find Chemist Warehouse's characterisation too narrow.
- 63 At (705), *Glover* states that in an award of this type, where one considers the scope clause, the industries to which the award relates involves making findings of fact 'as to the industry carried on by the named respondents as at the date of the award. This having been done, the limits of the industry are then established.'
- 64 Similarly, *Freshwest* provides (at 1748):
 For the industries to which [the award] applies to be determined with certainty – an essential to any award – it is necessary, in the absence of clear intention to the contrary, to define them by what they were at the date of the award. That is the industry of which the parties to the award were speaking.
- 65 In the Shop Award there is an 'absence of clear intention to the contrary'.
- 66 I consider that the qualification 'at the date of the award' applies to the respondents *and* their activities.
- 67 I find the scope of the Shop Award, being a common rule award with a 'Glover' scope clause, is determined at least by reference to the industries at the date the award was made of the respondents at the date the award was made (see *Glover* and *Freshwest*), subject to the qualification discussed from [78] to [81]. As agreed by the parties and interveners, at the date the Shop Award was made, two of its respondents carried on the retail pharmacy industry.
- 68 I do not agree with Chemist Warehouse that a strict grammatical interpretation of cl 3 should be adopted when interpreting scope. The language used by the parties to the Shop Award is not the sole determinant of the Shop Award's legal effect in relation to scope.
- 69 I accept the Minister and Union's submissions about the nature and scope of the Commission's power under s 47 of the IR Act, other than in relation to the Union's argument about stakeholder behaviour after PUFSC's removal, which adds little to its case.
- 70 Where the scope of an award is to be varied, s 29A of the IR Act requires certain steps to occur. No evidence or argument is put that those steps occurred when Boans and PUFSC were removed as respondents to the Shop Award. I have been given no reason to think those steps occurred.
- 71 Section 40 of the IR Act is a general power that allows the Commission to vary an award on application by the parties. Section 47 is a special power: *Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty. Ltd.* (1984) 64 WAIG 1926 at (1927). Variations to an award under s 40(1) are subject to s 29A and s 38 of the IR Act.
- 72 Section 47 of the IR Act provides:

47. Defunct awards etc., cancelling; employers not in business etc., deleting from awards etc.

- (1) Subject to subsections (3), (4) and (5), where, in the opinion of the Commission, there is no employee to whom an award or industrial agreement applies, the Commission may on its own motion, by order, cancel that award or industrial agreement.
- (2) Subject to subsections (3), (4) and (5), where the Commission is of the opinion that a party to an award who is named as an employer is no longer carrying on business as an employer in the industry to which the award applies or is, for any other reason, not bound by the award, the Commission may on its own motion, by order, strike out that party as a named party to the award.
- (2a) Subject to subsections (3), (4) and (5), where the Commission is of the opinion that a party to an industrial agreement is no longer carrying on business as an employer referred to in section 41(4)(a)(ii) in relation to the agreement or is, for any other reason, not bound by the agreement, the Commission may on its own motion, by order, strike out that party to the agreement.
- (3) The Commission shall not make an order under subsection (1), (2) or (2a) unless before making the order —
 - (a) it has directed the Registrar to make such enquiries as it considers necessary, and the Registrar has reported on the result of those enquiries to the Commission in writing; and
 - (b) after receiving the report of the Registrar, the Commission has —
 - (i) caused the Registrar to give general notice by publication in the required manner of the intention of the Commission to make the order; and
 - (ii) directed the Registrar to serve copies of the notice on such persons as the Commission may specify.
- (4) Any person may, within 30 days of the day on which the notice referred to in subsection (3) is first published, object to the Commission making the order referred to in the notice.

- (5) If the Commission does not uphold an objection to the making of the order referred to in the notice the Commission may make the order and shall, as soon as practicable thereafter, direct the Registrar to serve a copy of the order —
- (a) where the order relates to an award, on each organisation of employees that is a named party to the award, on such other persons as are bound by the award as the Commission thinks fit, and on UnionsWA, the Chamber and the Mines and Metals Association;
- (b) where the order relates to an industrial agreement, on each party to the agreement.

[Section 47 amended by No. 94 of 1984 s. 28 and 66; No. 15 of 1993 s. 31; No. 1 of 1995 s. 53; No. 20 of 2002 s. 190(2) and (3); No. 53 of 2011 s. 48.]

- 73 To the extent the Commission acts under s 47 of the IR Act to remove a listed respondent that no longer carries on business in an industry to which the award applies, the Commission exercises a special power. It goes no further than removing a listed respondent. Such an order does not have the effect of removing an industry, thereby reducing the award's scope. In my view, that reasoning is supported by the limited notice provisions that apply to s 47 of the IR Act.
- 74 In relation to the Commission's order on its own motion in 1995 to remove PUFSC under s 47 of the IR Act as a listed respondent, there is nothing in the application, transcript or reasons for decision to suggest that the parties or the Commission intended or contemplated the removal of PUFSC to have the effect of removing the retail pharmacy industry from the Shop Award's scope. It is clear from the discussion at the hearing on transcript that regard was had to the possibility that *naming a new employer* might affect scope. It is implicit in the wording of the order, and all that preceded it, that the award would continue to apply to the industries to which the award applied before the order was made.
- 75 I consider the 1995 order under s 47 of the IR Act did no more than remove PUFSC as a named respondent because it no longer carried on business in an industry to which the Shop Award applied. The retail pharmacy industry itself continued to be an industry to which the Shop Award applied.
- 76 As Chemist Warehouse and the Pharmacy Guild concede, *Anodisers* is not binding and I am not persuaded that I should adopt the approach suggested by the Commissioner in that case. That matter involved a consent variation to an award that expressly identified the industries it applied to. The Commission was not asked to consider the effect of removing a respondent, the parties were not heard on the issue and it was not necessary for the Commission to make the comment to resolve the matter before it.
- 77 The argument made by the Pharmacy Guild at [53] is misconceived. It is uncontroversial that many aspects of the current State industrial awards are not ideal. Further, the argument that the scope of an award is determined by the industries of the current respondents, as those industries were at the date the award was made, is flawed for another reason.
- 78 From the time the Shop Award was made until 8 July 2002, s 38(3) of the IR Act limited the effect on an award of an added employer engaged in an industry to which the award did not previously apply to that employer. In 2002, the amending *Labour Relations Reform Act 2002* (WA) changed the wording from 'to that employer' to 'to that industry', without retrospective effect. This means that since 2002, the effect of adding an employer carrying on an industry to which the Shop Award did not previously apply was to also add that new industry to the Shop Award's coverage.
- 79 For this reason, the submission made by Chemist Warehouse and the Pharmacy Guild, that to establish the Shop Award's scope one simply looks at the currently named respondents in schedule C and works out what their activities were at the date the award was made, cannot be correct.
- 80 On its face it is not clear from the Shop Award whether a currently named respondent was added between 2 September 1977 and 8 July 2002 or whether it was added after that time. The effect of the amendment to s 38 of the IR Act is that coverage did not extend on a common rule basis for the industries of respondents added between 2 September 1977 and 8 July 2002.
- 81 In light of the ordinary words of the Shop Award, the authorities and the statutory scheme, this award must be interpreted such that its scope is established by the industries carried on at the date the Shop Award was made by the respondents to the Shop Award at the date the Shop Award was made, as well as the industries of any respondents added from 8 July 2002 as those industries were at the date those respondents were added. It will also extend to any employer who was added as a respondent after the Shop Award was made and before 8 July 2002.
- 82 The Shop Award has always applied to the retail pharmacy industry and continues to apply to it.

Conclusion

- 83 For these reasons, the answer to the question is 'yes'.
- 84 The Commission declares *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* as varied applies to workers employed in any calling or callings mentioned in the award in the retail pharmacy industry and to employers employing those workers.

**The Shop, Distributive and Allied Employees' Association of Western Australia -v- Samuel Gance (ABN 50 577 312 446)
T/A Chemist Warehouse Perth, Pharmacy Guild of Western Australia Organisation of Employers, Minister for Commerce
and Industrial Relations**

1. - TITLE

This award shall be known as The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 and replaces awards numbered 4 of 1972, 18 of 1963 and 10 of 1969 and 12 of 1971 as variously amended and consolidated.

1B. - MINIMUM ADULT AWARD WAGE

- (1) No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.
- (2) The minimum adult award wage for full-time employees aged 21 or more working under an award that provides for a 38 hour week is \$726.90 per week.
- The minimum adult award wage for full-time employees aged 21 or more working under awards that provide for other than a 38 hour week is calculated as follows: divide \$726.90 by 38 and multiply by the number of ordinary hours prescribed for a full time employee under the award.
- The minimum adult award wage is payable on and from the commencement of the first pay period on or after 1 July 2018.
- (3) The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.
- (4) Unless otherwise provided in this clause adults aged 21 or more employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result, shall not be paid less than pro rata the minimum adult award wage according to the hours worked.
- (5) Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award (if applicable) to the minimum adult award wage, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.
- (a) The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or government approved work placement programs or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.
- (6) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.
- (7) Subject to this clause the minimum adult award wage shall –
- (a) Apply to all work in ordinary hours.
- (b) Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.
- (8) **Minimum Adult Award Wage**
- The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2018 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.
- Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.
- (9) **Adult Apprentices**
- (a) Notwithstanding the provisions of this clause, the minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for a 38 hour week is \$621.10 per week.
- (b) The minimum adult apprentice wage for a full-time apprentice aged 21 years or more working under an award that provides for other than a 38 hour week is calculated as follows: divide \$621.10 by 38 and multiply by the number of ordinary hours prescribed for a full time apprentice under the award.
- (c) The minimum adult apprentice wage is payable on and from the commencement of the first pay period on or after 1 July 2018.
- (d) Adult apprentices aged 21 years or more employed on a part-time basis shall not be paid less than pro rata the minimum adult apprentice wage according to the hours worked.
- (e) The rates paid in the paragraphs above to an apprentice 21 years of age or more are payable on superannuation and during any period of paid leave prescribed by this award.
- (f) Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

2. - ARRANGEMENT

1. Title
- 1B. Minimum Adult Award Wage
2. Arrangement
- 2A. No Extra Claims
3. Scope
4. Area
5. Term

6. Definitions
7. Casual Workers
- 7A. Nightfill Duty
8. Part Time Workers
9. Hours
10. Display of Rosters
11. Meal Breaks and Rest Periods
12. Meal Money
13. Overtime
14. Holidays
15. Annual Leave
16. Change Rooms
17. No Reduction
18. Higher Duties
19. Casual Limitations
20. Contract of Employment and Termination
21. Time and Wages Record
22. Uniforms and Overalls
23. Board of Reference
24. Supported Wages Employees
25. Country Work and Travelling Time
26. Junior Worker's Certificate
27. Sick Leave
28. Wages
- 28A. Structural Efficiency Agreement - Cold Storage Industry
29. Easter Week
30. Right of Entry
31. Other Provisions
32. Motor Vehicle Allowance
33. Long Service Leave
34. Shift Work
35. Payment of Wages
36. Posting of Award
37. Stand Down
38. Bereavement Leave
39. Location Allowance
40. Chemists Shops
41. Liberty to Apply
42. Parental Leave
43. Union Notice Board
44. Introduction of Change
45. Superannuation
46. First Aid Allowance
47. Traineeships
48. Additional Loading for Late Night Trading
49. Trade Union Training Leave
50. Enterprise Level Award Change Procedure
51. Redundancy

Appendix 1 - Parental Leave Entitlements

Appendix - Resolution of Disputes Requirement

Schedule "A"

Schedule "B"

Schedule "C"

Schedule D - Union Party

Appendix - S.49B - Inspection Of Records Requirements

2A. - NO EXTRA CLAIMS

It is a term of this award that the union undertakes for the duration of the Principles determined by the Commission in Court Session in Application No. 704 of 1991 not to pursue any extra claims, award or overaward except when consistent with the State Wage Principles.

3. - SCOPE

This award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule "C" and to all employers employing those workers.

4. - AREA

This award shall have effect over the State of Western Australia.

5. - TERM

This award shall operate for a period of one year from and including the 15th day of August 1977.

6. - DEFINITIONS

(1) "Shop Assistant" shall mean a worker performing one or more of the following functions in retail or wholesale establishments:

- (i) the receipt into and preparation for sale and or display of goods in or about any shop,
- (ii) the prepacking or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale,
- (iii) the display, shelf filling, replenishing or any other method of exposure or presentation for sale of goods,
- (iv) the sale of goods by any means,
- (v) the receiving, arranging or making payment by any means,
- (vi) the recording by any means of a sale or sales,
- (vii) the wrapping or packing of goods for despatch.

The terms shall include soda fountain and/or milk bar assistants, assistants in country order departments, messengers, checkout operators, persons employed on information desks or booths, refund assistants, persons employed on service desks, persons employed as bag checkers in or about the entrance to stores, persons employed on customer service or as door greeters, persons employed as lay-by attendants, persons employed in hiring out activities in a shop, persons engaged in the stocking or collection of money from and preparation of commodities for sale in automatic vending devices, or persons engaged in the cooking and or preparation of provisions for sale in the shop of the employer other than for consumption in a cafeteria, persons engaged to collect trollies by any means, persons employed as spruikers in shops and persons engaged in operating photographic processing machinery.

(2) "Storeman" shall mean a worker performing one or more of the following duties: receiving, handling, storing, assembling, recording, preparing, packing, weighing and/or wrapping, branding, sorting, stacking or unpacking, checking, distributing or despatching or distributing goods in a shop, store or warehouse or delivering goods from a shop, store or warehouse for transit. Such duties shall include the use of computerised equipment where necessary.

"Storeman Operator Grade I" means a worker employed as such carrying out the duties of a storeman who is substantially required to operate the following mechanical equipment in the performance of his duties:

- (a) Ride-on power operated tow motor
- (b) Ride-on power operated pallet truck
- (c) Walk beside power operated high lift stacker

"Storeman Operator Grade II" means a worker employed as such carrying out the duties of a storeman who is substantially required to operate the following mechanical equipment in the performance of his duties:

- (a) Ride-on power operated forklift
- (b) High lift stacker
- (c) High lift stock picker
- (d) Power operated overhead traversing hoist

(3) "Storeman working singly" shall mean a storeman working where no other storeman is employed in the establishment.

(4) "Despatch hand" shall mean a worker who is substantially engaged in handling or receiving goods in or from departments for despatch or who passes them over to the packing room, or prepares and hands over packages to carters for delivery and who, if required, shall be responsible for the proper checking off of such packages and for the proper branding and marking thereof, and keeping necessary records, such as rail notes and cart notes.

(5) "Packer" shall mean a worker who packs goods for transport by air, post, rail or ship. Provided that a worker who packs goods for delivery by road transport where the destination of such goods is beyond a radius of 25 miles of the nearest post office to the employer's business, shall be classed as a packer

(6) "Adult": For the purpose of this award, the word "adult" shall mean a worker twenty-one years of age and over or a worker who is in receipt of the prescribed adult rate of pay.

(7) "Wholesale Establishment" shall mean any warehouse or place where goods are exclusively or principally sold for re-sale and/or where goods are sold for consumption and/or use in another business.

(8) "Canvasser" shall mean a worker who collects or requests orders by retail for goods in places other than the employer's establishment, but shall not include motor vehicle salesmen.

(9) "Collector" shall mean a worker whose principal duties consist of collecting money for his employer in places other than the employer's establishment. The duties of a canvasser or collector may be amalgamated to suit the convenience of the employer's business.

- (10) "Wholesale Salesman" shall mean a worker performing one or more of the following duties in any establishment selling by wholesale:-
Receiving, selling, assembling orders, distributing, handling goods for manufacture or sale by wholesale.
- (11) "General Retail Shop" shall mean all shops other than special retail shops, small retail shops or section 42 shops.
- (12) "Small Retail Shop"
A shop shall be regarded as a small retail shop if:
- (a) Only goods or services listed in Schedule "A" to this award are sold or provided at the retail shop.
 - (b) The retail shop is owned and operated by not more than two natural persons either in partnership or as a body corporate and the retail shop -
 - (i) is the only retail shop operated by those persons or any one of them or the body corporate, as the case requires;
 - (ii) is operated solely or principally for those persons or the members of the body corporate, as the case requires; and
 - (iii) is operated at any one time by not more than 4 persons including at least one of the persons who own and operate the retail shop;
 - (c) The permanent Head of the Department of Labour has issued a certificate in relation to the retail shop certifying that it is a small retail shop in terms of this subclause.
- (13) "Special Retail Shop"
A shop shall be regarded as a special retail shop if:-
- (a) A certificate is issued by the Permanent Head of the Department of Labour in relation to the retail shop specifying it to be a special retail shop as contained in Schedule "B" to this Award; and
 - (b) only the goods or services or both that are prescribed in relation to a special retail shop of that category are sold or provided at the retail shop.
- (14) "Section 42 Shop" shall mean a shop operating under a permit issued pursuant to section 42 of the Retail Trading Hours Act 1987.
- (15) "Window Dresser/Visual Merchandiser" shall mean a worker whose principal duties consist of the arranging, creating, labelling or presentation of merchandise, fixtures and surrounding areas. Such duties shall include the use of tools, paint and other equipment associated with the visual display and presentation of goods and merchandise.
- (16) "Ticket writer" shall mean a worker engaged in the production of price tickets and/or showcards by the use of water colours and/or employed on silk screen work, whether such work involves designing and/or setting or not; and/or engaged in operating a "printasign" machine.

7. - CASUAL WORKERS

- (1) "Casual Worker" shall mean a worker engaged by the hour and who may be dismissed or leave the employer's service at any moment without notice and except as hereinafter provided shall not be engaged for more than 30 hours per week in ordinary hours.
Notwithstanding the aforementioned a casual worker may be engaged in ordinary hours for 38 hours per week for periods not in excess of 4 consecutive weeks.
Any casual worker engaged and not permitted to commence work shall receive two hours' pay at the rate of 20 per centum in addition to the appropriate rates of wages prescribed in this award.
- (2) The minimum period of engagement for casual workers shall be three consecutive hours on any day. Provided that:-
- (a) School students who are employed solely to collect trolleys in or about a shopping centre complex may be employed for a minimum of two consecutive hours between 4.00 p.m. and 6.00 p.m. Monday to Saturday inclusive;
 - (b) Employees who are undergoing a period of training may be employed for a minimum of two consecutive hours in each of two such training periods which shall be undertaken in the first fortnight of employment;
- (3) The rate for casual workers within ordinary time shall unless otherwise stated, be determined by dividing the appropriate wage rate prescribed by Clause 28. - Wages of this Award by thirty eight (38) and adding the appropriate loading prescribed by the award.
- (4) A casual worker shall be paid an additional loading in accordance with the following scale:
- (a) where the casual engagement on any day is for a full day's work - a loading of twenty (20) per cent.
 - (b) where the casual engagement on any day is for less than a full day's work - a loading of twenty-five (25) per cent.
- (5) Calculation of Saturday rates for casual workers.
The rate of pay for casual workers working on Saturdays during ordinary time shall be determined according to the following formula:-

$$\frac{\text{Weekly rate for full time worker Monday to Friday}}{38} + \frac{\text{Weekly rate for ordinary hours between Monday and Saturday with the completion of ordinary hours after 1.00p.m. Saturday - weekly rate for ordinary hours Monday to Friday}}{7.6} \times 120\%$$

- (6) Tea breaks shall be taken in accordance with Clause 11. - Meal Breaks and Rest Periods.
 (7) Meal breaks shall be taken in accordance with Clause 11. - Meal Breaks and Rest Periods.

7A. - NIGHTFILL DUTY

- (1) Shop assistants (as defined) may be employed on duties associated with stock replenishment, pricing or labelling during times when the shop is closed to public trading Monday to Saturday inclusive.
- (2) Subject to the provisions of Clause 9. - Hours, Clause 8. - Part Time Workers and Clause 7. - Casual Workers shop assistants may be employed on a full time, part time or casual basis.
- (3) Meal breaks shall be taken in accordance with Clause 11. - Meal Breaks and Rest Periods.
- (4) Tea breaks shall be taken in accordance with Clause 11. - Meal Breaks and Rest Periods.
- (5) Where a holiday prescribed in Clause 14. - Holidays of this award falls on any day upon which a worker is required to work ordinary hours, the ordinary hours in that week shall be reduced by the number of hours ordinarily worked by that worker on the day on which the holiday occurs.
- (6) Any junior worker employed subject to this Clause who is under 18 years of age shall be paid as though he were 18 years of age.
- (7) Workers employed other than under this subclause by an employer shall not be employed by that employer under the terms of this subclause.
- (8) Overtime worked by employees under this Clause shall be paid for it at the rates prescribed in Clause 13. - Overtime.
- (9) (a) A full-time, part-time or casual worker employed in a "General Retail Shop" or "Special Retail Shop" pursuant to this clause shall be paid an additional loading as prescribed hereunder:
- (i) Monday to Saturday prior to 7.00 am
- (aa) Full-time and Part-time Workers
- a loading of \$3.42 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.
- (bb) Casual Workers
- a loading of \$3.42 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.
- (ii) Saturday between 5.00 pm and Midnight
- (aa) Full-time and Part-time Workers
- a loading of \$4.86 per hour in addition to the ordinary hourly rate of a full-time worker as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.
- (bb) Part-time Workers
- a loading of \$10.60 per hour in addition to the ordinary hourly rate of a full-time shop assistant as prescribed in column (i) of subclause (1) of Part I of Clause 28. - Wages.
- (cc) Casual Workers
- a loading of \$12.68 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.
- (b) Junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.
- (c) The loadings referred to in (i) and (ii) above shall be paid for the purpose of superannuation calculations.

8. - PART-TIME WORKERS

- (1) Except as hereinafter provided, a part-time worker shall mean a worker who may be engaged on any day Monday to Saturday inclusive for a minimum of twelve hours per fortnight, and a maximum of sixty four hours per fortnight, with not more than ten daily work commencements in any fortnightly period. Provided that a part-time worker shall not be engaged for less than three consecutive hours, nor more than nine and half consecutive hours exclusive of meal times on any one day, except as provided by subclause (6) hereof.

Provided further, that an employer and the Union may agree in writing to extend the maximum ordinary hours that may be worked pursuant to this subclause.

- (2) A part time worker shall receive payment for wages, annual leave, holidays, sick leave and long service leave on a pro rata basis in the same proportion as the number of hours regularly worked each week bears to 38 hours.
- (3) When a day, being a day when a worker would have been rostered to work is a holiday under the provisions of Clause 14. - Holidays of this award, then that day shall be a holiday without deduction of pay to such worker.
- (4) Tea breaks shall be taken in accordance with Clause 11. - Meal Breaks and Rest Periods.
- (5) Meal breaks shall be taken in accordance with Clause 11. - Meal Breaks and Rest Periods.
- (6) On the day of late night trading, part-time workers may be employed for a maximum of 11½ hours within ordinary time.
- (7) The rate of pay for part time workers working on Saturdays during ordinary time shall be determined according to the following formula:

- (a) For all hours worked between 8.00a.m. and 1p.m.

$$\frac{\text{Weekly rate for full time worker Monday to Friday}}{38} + \frac{\text{Weekly rate for ordinary hours between Monday and Saturday with the completion of ordinary hours at or before 1.00p.m. Saturday - weekly rate for ordinary hours Monday to Friday.}}{4}$$

- (b) For all hours worked after 1.00p.m. and up to and including 6.00p.m.

$$\frac{\text{Weekly rate for full time worker Monday to Friday}}{38} + \frac{\text{Weekly rate for ordinary hours between Monday and Saturday with the completion of ordinary hours after 1.00p.m. Saturday - weekly rate for ordinary hours Monday to Friday.}}{7.6}$$

9. - HOURS

PART 1 - HOURS OF WORK

- (1) (a) Subject to this clause and except as provided elsewhere in this award the ordinary hours of work shall be 38 per week, or an average of 38 per week, to be worked in one of the following methods:
- (i) 38 hours in one week
 - (ii) 76 hours in two consecutive weeks
 - (iii) 114 hours in three consecutive weeks
 - (iv) 152 hours in four consecutive weeks
- (b) (i) The ordinary hours of work shall be exclusive of meal breaks and be so rostered that a worker shall not be required to commence work on more than 5 days in each week or 10 days in each fortnight of any work cycle.
- (ii) Except on the day of late night trading when the maximum shall be 11.5 hours within ordinary hours, a full-time worker may be engaged for a maximum of 9.5 hours within ordinary hours.
- (c) Provided that in retail or wholesale establishments employing on a regular basis 15 or more employees per week, unless specific agreement exists to the contrary between an employer and an employee, the employee shall not be required to work ordinary hours on more than 19 days in each 4 week cycle.
- Where specific agreement exists between an employer and employee, the employee may be worked on the basis of:
- not more than 4 hours' work on one day in each two week cycle.
 - not more than 6 hours' work on one day in each week.
 - not more than 7.6 hours' work on any day.
- (d) Provided that in retail or wholesale establishments employing on a regular basis more than 5 employees but less than 15 employees per week, unless specific agreement exists to the contrary between an employer and employee, the employee may be worked their ordinary hours on one of the following bases at the employer's discretion:
- not more than 19 days' work in each 4 week cycle.
 - not more than 4 hours' work on one day in each two week cycle.
 - not more than 6 hours' work on one day in each week.
- Where specific agreement exists, between an employer and an employee, the employee may be worked on not more than 7.6 hours on any day.
- (e) Provided that in retail or wholesale establishments employing on a regular basis 5 or less employees per week, employees may be worked their ordinary hours on one of the following bases at the employer's discretion:

- not more than 19 days in each 4 week cycle.
 - not more than 4 hours' work on one day in each two week cycle.
 - not more than 6 hours' work on one day in each week.
 - not more than 7.6 hours' work on any day.
- (f) The employer shall give the union 7 days' notice of any working hours agreement reached in accordance with the provisions of this Clause. Any dispute arising out of the method of implementation of the working hours arrangement shall be referred to the Commission for adjudication.
- (g) (i) By agreement employees may request that the rostered day off be rescheduled and taken at any other convenient time within the period of the current or the next following work cycle.
- (ii) By agreement between the employer and a worker, the rostered day off may be accumulated up to a maximum of five days in any one year. Such accumulated periods may be taken at times mutually convenient to the employer and the worker.
- (h) All overtime worked on a rostered day off shall be paid for at the rate laid down by Clause 13(7)(a) of this award.
- (i) Schedules of Rostered Days Off will be published and displayed in a place accessible to staff, one month in advance.
- (j) If a public holiday falls on a Rostered Day Off, an employee shall be compensated in one of the following methods by agreement between the employer and employee:
- (i) payment of an additional day's wages, or
 - (ii) another day shall be allowed with pay within twenty eight days, or
 - (iii) an additional day shall be added to the annual leave entitlement.

PART II - ORDINARY HOURS

- (1) (a) Subject to Part I of this Clause
- Establishments shall arrange the ordinary hours of work each day according to the provisions herein:
- (b) "General Retail Shops" - the ordinary hours of work may be worked on any or all days of the week between the hours of 7.00 a.m. and 6.00 p.m. Monday to Saturday inclusive, excepting the day of late night trading when the ordinary hours of work may be worked between 7.00 a.m. and 9.00 p.m.
- (c) "Small Retail Shops" - the ordinary hours of work shall be worked within a spread on 11 consecutive hours exclusive of meal breaks except on the day of late night trading where the spread may be 12 consecutive hours exclusive of meal breaks between the hours of 6.00a.m and 11.30p.m.
- (d) (i) "Special Retail Shops" - except as provided in placitum (ii) herein, the ordinary hours of work may be worked on any or all days of the week between the hours of 7.00 a.m. and 6.00 p.m. excepting on the day of late night trading when the ordinary hours of work may be worked between 7.00 a.m. and 9.00 p.m.
- (ii) "Special Retail Shops" (Pharmacies) - the ordinary hours of work may be worked on any or all days of the week between the hours of 6.00a.m. and 11.30p.m.
- (e) "Section 42 Shops" - the ordinary hours of work may be worked on any or all days of the week.
- (f) "All Other Establishments" - the ordinary hours of work may be worked on any or all days of the week Monday to Saturday inclusive: provided that on the days Monday to Friday inclusive the hours of work shall be between 6.30a.m. and 6.00p.m. and on Saturdays such hours of work shall be between 7.00a.m. and 5.00p.m.

PART III - ROSTERS

- (1) Subject to Part I of this Clause each full time weekly employee shall be employed on one of the following rosters:
- (a) Monday to Friday (inclusive) in which case Saturday shall be deemed to be the employee's rostered day off.
- (b) Two week roster in which case the employees shall be rostered off on alternative Saturdays and alternative late night trading nights. In such case the rostered day off shall be a Monday following the rostered Saturday off or Friday preceding the rostered Saturday off and work on the Saturday rostered on shall conclude by 1.00p.m.
- (c) Tuesday to Saturday (inclusive) in which case Monday shall be deemed to be the employee's rostered day off.
- (d) Nine start per fortnight roster in which case the employee shall be rostered off on alternative Saturdays and alternative late night trading nights and the rostered days off shall be consecutive and immediately prior to or after the Saturday off work.
- (e) Four start per week roster in which case the employee shall submit a written request to the employer to work such a roster. The work period shall be Wednesday to Saturday each week including the full day of late night trading after 6.00p.m. The rostered day off shall be Monday and Tuesday of each week. An employee shall receive a full thirty eight (38) hours pay plus other award entitlements for working such roster.

- (f) (i) An employee employed in a shop described in paragraphs (1)(c) to (1)(e) of Part II - Ordinary Hours may be rostered to work ordinary hours on a Sunday provided the employee freely gives his/her consent to being so rostered on each occasion.
- (ii) Sunday work in accordance with this paragraph shall be paid for at the rate prescribed in paragraph (5)(b) of Clause 13. - Overtime of this award.
- (iii) A roster for an employee in accordance with this paragraph shall provide for not more than five consecutive working days and for two consecutive rostered days off in each week.

PART IV - SMALL SHOPS

- (1) The requirements of Part III - Rosters of this clause shall not apply to any shop employing less than four weekly employees subject to this award.
- (2) An employee employed in a shop described in paragraphs (1)(c) to (1)(e) of Part II - Ordinary Hours may be rostered to work ordinary hours on a Sunday provided the employee freely gives his/her consent to being so rostered on each occasion. Such work shall be paid for at the rate prescribed in paragraph (5)(b) of Clause 13. - Overtime of this award.
- (3) A roster for an employee shall provide for two rostered days off in each week or four days in each fortnight, and shall not require an employee to work on more than six consecutive days.

10. - DISPLAY OF ROSTERS

- (1) Every employer shall post or cause to be posted and keep posted, in a conspicuous position in each establishment, so as to be easily accessible to, and easily read by, every worker employed therein, a roster written in the English language showing:
 - (a) The name of each worker bound by the award, and
 - (b) The days, during each work cycle, upon which the worker is required to work his/her ordinary hours of work, the start and finish times of each work period, and the time of any meal break.
 - (c) The particulars referred to in paragraph (b) above shall be published two weeks in advance and may be changed in any of the following circumstances:
 - (i) by two weeks notice,
 - (ii) by mutual agreement between employer and employee,
 - (iii) on account of the sickness or absence of a worker,
 - (iv) by the inclusion of particulars in respect of casual workers.
 - (d) Where changes to rosters are made in accordance with paragraph (c) of this subclause, ordinary rates apply.
- (2) Notwithstanding the provisions of subclause (1) herein, the employer may provide each worker with an individual roster in writing containing the required information.
- (3) The particulars contained in such roster shall be in respect of the full week Monday to Saturday inclusive, during which it is posted.
- (4) Schedules of rostered days off shall be published one month in advance.
- (5) The ordinary hours of work and any meal interval prescribed by this award shall be rostered as a continuous period on any day.

11. - MEAL BREAKS AND REST BREAKS

- (1) Ordinary Hours Meal Breaks - Unpaid
 - (a) On every day that an employee works more than five ordinary hours, he or she shall be allowed a meal break of not less than 45 minutes and not more than one hour. Provided that any employee and any employer may agree that the meal break shall be not less than 30 minutes.
 - (b) An employee shall not take a meal break before he or she has worked at least two and a half hours and shall not work more than five hours without having a meal break.
 - (c) Notwithstanding paragraph (b), where an employee does work more than five hours before or after a meal break, they will be eligible for a 15 minute paid tea break in accordance with paragraph (c) of subclause (2) below.
 - (d) On each day that ordinary hours are worked the meal break shall be taken during the hours of 11.00am and 3.00pm.
 - (e) An employee who is required to work in ordinary hours on the night of late night trading shall be entitled to take a meal break between the hours of 4.30pm and 7.00pm.
- (2) Ordinary Hours Tea Breaks - Paid
 - (a) All employees working more than four and a half but not exceeding eight ordinary hours of work on any day shall be entitled to one paid ten minute tea break. The tea break shall be taken to suit the needs of the business, provided that:
 - (i) the break is not taken in the first hour of work on any day, or in the first hour of work after a meal break; and

- (ii) no employee is required to work more than four and a half ordinary hours without having a tea break.
- (b) All employees working more than eight ordinary hours of work on any day shall be entitled to two ten minute paid tea breaks, one to be taken in the morning and one to be taken in the afternoon. The tea breaks shall be taken to suit the needs of the business, provided that:
 - (i) the breaks are not taken in the first hour of work on any day, or in the first hour of work after a meal break; and
 - (ii) no employee is required to work more than four and a half ordinary hours without having a tea break.
- (c) Where an employee works more than five ordinary hours before or after a meal break in accordance with paragraph (c) of subclause (1) above, the tea break prescribed by paragraphs (a) and (b) above shall be 15 minutes in lieu of 10 minutes and the unpaid second meal break.
- (3) Overtime Meal Breaks - Unpaid
 - (a) Where an employee is required to continue working beyond his or her normal finishing time for more than two hours he or she shall be allowed an unpaid break for a meal of not less than 30 minutes. This meal break shall be allowed to the employee during the employee's overtime work, and not before 5.00pm.
 - (b) If the overtime continues beyond the meal break, an additional 30 minute unpaid meal break shall be allowed after each period of overtime of not more than five hours.
- (4) The meal breaks prescribed by this clause shall be granted and taken in one continuous period.

12. - MEAL MONEY

- (1) When a worker is required to continue working after the usual finishing time for more than one hour he/she shall be paid \$12.75 for the purchase of any meal required.
- (2) Late Night Trading Meal Allowance:
A worker who commences work at or prior to 1.00pm on the day of late night trading and is required to work beyond 7.00pm on that day shall be paid a meal allowance of \$12.75.
- (3) Meal money may be paid prior to the meal period on the day upon which the overtime is to be worked or as part of the normal weekly or fortnightly wage as appropriate.

13. - OVERTIME

- (1) (a) Subject to the provisions of Clause 9. - Hours, all time worked outside of ordinary hours shall be deemed to be overtime, payable in accordance with this clause.
- (b) Where more than 38 hours are worked in any week during a period of two consecutive weeks the provisions of this clause shall not apply unless:
 - (i) more than 76 ordinary hours are worked in that two week period; or
 - (ii) more than 38 ordinary hours are worked in that two week period if one week of a period of annual leave occurs in that two week period.
- (2) Any worker on duty when, in accordance with the roster such worker should be off duty (except as provided by subclause (1) of Clause 10. - Display of Rosters), shall be paid at overtime rates.
- (3) All time worked before the usual starting time or after the usual finishing time in any establishment shall be paid for at overtime rates.
- (4) Excepting as provided hereunder, all overtime worked shall be paid for at the rate of time and a half for the first two hours and double time thereafter. In the calculation of overtime each day shall stand alone, excepting in the case of Small Retail Shops where overtime is calculated on a weekly basis.
- (5) (a) All overtime worked after 12.00 o'clock noon on Saturday shall be paid for at the rate of double time.
- (b) Work performed on a Sunday shall be paid for at the rate of double time.
- (6) Work performed on a holiday prescribed in subclause (1) of Clause 14. - Holidays hereof shall be paid for at the rate of double time and a half.
- (7) (a) Work performed on any day Monday to Saturday inclusive which is a worker's rostered day off shall be paid for at the rate of time and a half for the first two hours and double time thereafter with a minimum engagement of 4 hours at overtime rates.
- (b) Notwithstanding paragraph (a) above, work performed on Saturdays before 12 o'clock noon in establishments which work a five-day week (Monday to Friday inclusive) shall be paid for at the rate of time and a half for the first two hours and double time thereafter.
- (c) Notwithstanding (a) and (b) above, work performed on Saturdays before 12 o'clock noon by Night Fillers shall be paid for at the rate of time and one-half for the first two hours and double time thereafter.
- (8) When a worker is recalled to work after leaving the employer's work establishment he/she shall be paid for at least three hours at the appropriate rate, and time reasonably spent in getting to and from work shall be counted as time worked.

- (9) When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that workers have at least eight consecutive hours off duty between the work of successive days. A worker (other than a casual worker) who works so much overtime between the termination of his ordinary work on one day and the commencement of his ordinary work on the next day that he has not had at least eight consecutive hours off duty between those times, shall, subject to this paragraph, be released after completion of such overtime until he has had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. If, on the instructions of his employer, such a worker resumes or continues work without having had eight consecutive hours off duty, he shall be paid at double rates until he is released from duty for such period and he shall then be entitled to be absent until he has had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.
- (10) Notwithstanding anything contained in this award -
- (a) An employer may require any worker other than part-time workers to work reasonable overtime at overtime rates and such worker shall work overtime in accordance with such requirement.
 - (b) No organisation, party to this award or worker or workers covered by this award, shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this subclause.
- (11) Notwithstanding anything contained in this clause, an employee and an employer may agree that time off shall be allowed in lieu of payment of overtime. Such time off shall be allowed subject to -
- (a) the time off allowed shall be equivalent to the overtime rate that otherwise would have been paid; and
 - (b) the time of taking time off shall be agreed at the time of arranging the overtime.

14. - HOLIDAYS

- (1)
 - (a) The following days or the days observed in lieu shall, subject to this subclause and to clause 13. - Overtime be allowed as holidays without deduction of pay, namely, New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.
 - (b) When any of the days mentioned in paragraph (a) hereof falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.
- (2) Where -
 - (a) a day is proclaimed as a public holiday or public half-holiday under section 7 of the Public and Bank Holidays Act 1972; and
 - (b) that proclamation does not apply throughout the State or to the metropolitan area of the State, that day shall be a whole holiday or, as the case may be, a half-holiday for the purposes of this award within the district or locality specified in the proclamation.
- (3) A worker absent without leave on the day before or the day after any of the holidays referred to in subclause (1) shall be liable to forfeit wages for the holiday as well as for the day of absence except where an employer is satisfied that the worker's absence was caused through illness in which case wages shall not be forfeited for the holiday. Provided that a worker absent on one day only, either before or after a group of holidays, shall forfeit wages only for one holiday as well as for the period of absence.
- (4) Where the services of a worker are terminated by the employer on the day preceding a holiday or holidays, refer to Clause 20 - Contract of Employment and Termination, subclause (3)
- (5)
 - (a) When any of the holidays prescribed in subclause (1) of this Clause falls on a day which for a full time or part time employee is a day of the week upon which he or she is usually required to work less than one fifth of his or her ordinary weekly hours of duty, such employee shall be allowed time off duty without deduction of pay equivalent to the difference between the time usually worked (on that day) and one fifth of the ordinary weekly hours of duty.
 - (b) Provided that an employee who works overtime on such a day shall receive time off equivalent to the difference between the time off calculated in accordance with paragraph (a) of this subclause and the hours for which he or she has been paid at overtime rates.
 - (c) The time off duty is to be allowed either:
 - (i) at a time mutually agreed to between the employee and the employer or
 - (ii) in addition to but not as part of the annual leave to which the employee is entitled pursuant to Clause 15. - Annual leave of this award.
 - (d) The provisions of this subclause shall not apply to casual employees.
- (6) Where a holiday prescribed in Clause 14. - Holidays of this award falls on any day upon which a worker is required to work ordinary hours, the ordinary hours in that week shall be reduced by the number of hours ordinarily worked by that worker on the day on which the holiday occurs.

15. - ANNUAL LEAVE

- (1) Except as otherwise provided by this clause, a period of four consecutive weeks leave with payment of ordinary wages as prescribed shall be allowed annually by the employer to an employee who has completed twelve months' continuous employment with that employer.
- (2)
 - (a) During a period of annual leave an employee shall be paid a loading of 17.5% calculated on his or her ordinary wages, as prescribed by this award.
 - (b) The loading prescribed by paragraph (a) above shall not apply to proportionate leave paid out on termination.
- (3) If any holiday as prescribed by Clause 14. - Holidays of this award falls within an employee's period of annual leave and is observed on a day which would otherwise have been an ordinary working day for that employee, one day shall be added to the employee's period of annual leave for each such holiday.
- (4)
 - (a) Entitlement to annual leave shall accrue weekly at the rate of 2.923 hours per week.
 - (b) If after one week's continuous service in any qualifying 12 month period an employee leaves his or her employment or his or her employment is terminated by the employer, then the employee shall be paid 2.923 hours' pay at his or her ordinary rate of pay for each completed week of service.
 - (c) In addition to the payment to which an employee may be entitled under paragraph (a) of this subclause, an employee whose employment terminates after the completion of a twelve month qualifying period and who has not been allowed the leave or a portion of the leave prescribed under this award shall be given payment as prescribed by subclauses (1) and (2)(a) of this clause in lieu of that leave or portion of leave, unless:
 - (i) the employee has justifiably been dismissed for misconduct; and
 - (ii) the misconduct for which the employee has been dismissed occurred prior to the completion of that qualifying period.
- (5) Any time in respect of which a worker is absent from work except time for which he is entitled to claim sick pay or time spent on holidays or annual leave as prescribed by this award shall not count for the purpose of determining his right to annual leave.
- (6) In the event of a worker being employed by an employer for portion only of a year, he shall only be entitled, subject to subclause (4) of this clause to such leave on full pay as is proportionate to his length of service during that period with such employer, and if such leave is not equal to the leave given to the other workers he shall not be entitled to work or pay whilst the other workers of such employer are on leave on full pay.
- (7) In special circumstances and by mutual consent of the employer, the worker and the union concerned, annual leave may be taken in not more than two periods.
- (8) When a worker is entitled to annual leave under this clause, he shall receive at least two weeks' notice from his employer of the date when it will be convenient to the employer that such worker shall take his leave.
- (9) Every worker shall be given and shall take annual leave within six months after the date the leave falls due.
- (10) The provisions of this clause shall not apply to casual workers.
- (11) Notwithstanding anything else herein contained an employer who observes a Christmas close down for the purpose of granting annual leave may require a worker to take his annual leave in not more than two periods but neither of such periods shall be less than one week.

16. - CHANGE ROOMS

Where an employer usually has more than six workers engaged at the same time under the terms of this award, he shall provide his workers with a suitable room for keeping their hats and clothing and to use as a room for taking their meals. Such room shall be situated within a reasonable distance of his place of business and shall be kept in a proper state of cleanliness and shall be equipped with coat-hangers, tables and chairs.

17. - NO REDUCTION

Nothing herein contained shall entitle an employer to reduce the wage of any worker who at the date of this award was being paid a higher rate of wage than the minimum prescribed for his or her class of work.

18. - HIGHER DUTIES

A worker who is required to do work, which is entitled to a higher rate under this award, other than that which he or she usually performs shall be entitled to payment at the higher rate while so employed. Provided that where no record is kept in the time and wages record of the actual times upon which the worker is engaged on such higher grade work, the worker shall be paid for the whole day at the rate prescribed for the highest function performed.

19. - CASUAL LIMITATIONS

- (1) In a general retail shop or special retail shop employing 13 or more employees the total number of hours worked by a casual employee shall not exceed 33 1/3% of the total hours worked in that shop. Hours worked by nightfill employees shall not be included in this calculation.
- (2) Provided the 33 1/3% limitation on casual hours worked in general retail shops or special retail shops shall not apply to:
 - Tourist resort areas during tourist extended trading hours
 - Christmas and/or Easter.

- (3) Provided further that any general retail shop or special retail shop referred to above which at 1/9/1990 employs casuals to an extent exceeding 33 1/3% of total hours worked in the shop may continue to do so provided that no additional casuals are employed until the limit of hours of 33 1/3% is achieved.

20. - CONTRACT OF EMPLOYMENT AND TERMINATION

- (1) (a) An employee will be engaged as a full time, part time or casual employee.
 (b) A full time or part time employee engaged for a period of four consecutive weeks or less shall be deemed a casual employee and be paid not less than the minimum rates of wages contained in Clause 7. - Casual Workers hereof.

This paragraph shall not apply to an employee engaged as a full time or part time employee who is justifiably dismissed or who severs his or her contract of service.

- (2) In addition to the provisions contained in Clause 31(2), an employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training and to use such equipment as may be required, provided that the employee has been properly trained in the use of such equipment.

(3) Termination of Employment

(a) Full time and Part time employees

- (i) Should an Employer wish to terminate a full time or part time employee, the following period of notice shall be provided:

Period of Continuous Service	Period of Notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

- (ii) Employees over 45 years of age with 2 or more years continuous service at the time of termination, shall receive an additional week's notice.

- (iii) Where the relevant notice is not provided, the employee shall be entitled to payment in lieu. Provided that employment may be terminated by part of the period of notice and part payment in lieu.

- (iv) Payment in lieu of notice shall be calculated using the employees weekly ordinary time earnings.

- (v) The period of notice in this clause shall not apply in the case of dismissal for serious misconduct, that is, misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.

- (vi) Notice of termination by employee

Except in the first 2 month's of service, 1 week's notice shall be necessary for an employee to terminate his or her engagement or the forfeiture or payment of 1 week's pay by the employee to the employer in lieu of notice.

In the first month of service, an employee may give a moment's notice to terminate his or her employment.

In the second month's service, an employee may give 1 day's notice to terminate his or her employment, or the forfeiture of 1 day's pay by the employee to the employer in lieu of notice.

- (vii) Termination by employer prior to public holiday.

An employee whose employment is terminated by the employer on the business day preceding a holiday or holidays, otherwise than for misconduct, shall be paid for such holiday or holidays.

Provided that in the event of Christmas Eve falling on a Saturday or a Sunday any employee whose employment is terminated by the employer on the preceding Friday otherwise than for misconduct, shall be paid for Christmas Day and Boxing Day.

- (viii) Probation

An employee engaged under the terms of this Award may be engaged under probation for an agreed period not exceeding two months.

Notwithstanding placitum (i) above, should an employer wish to terminate an employee still on probation, the following notice shall be provided:

First month of probationary employment	A moment
Second month of probationary employment	1 day

Provided that where the relevant notice period is not provided, the employee shall be entitled to payment in lieu.

- (b) Casual Employees

The employment of a casual employee may be terminated by the giving or receiving of 1 hour's notice.

21. - TIME AND WAGES RECORD

- (1) Each employer bound by this award shall maintain a record containing the following information relating to each worker -
- (a) the name and address given by the worker,
 - (b) the age of the worker if paid as a junior worker,
 - (c) the classification of the worker and whether the worker is full-time, part-time or casual,
 - (d) the commencing and finishing times of each period of work each day,
 - (e) the number of ordinary hours and the number of overtime hours worked each day and the totals for each pay period,
 - (f) the wages and any allowances paid to the worker each pay period and any deductions made therefrom.
 - (g) the amount of superannuation contributions made to the superannuation fund in accordance with Clause 45.- Superannuation of this Award by the employer.
- (2)
- (a) At the time of payment of wages the worker may be given a pay slip showing that part of the record specified in paragraphs (e) and (f) of subclause (1) with respect to the pay period for which payment is being made.
 - (b) If a pay slip is not given to the worker as prescribed in paragraph (a) hereof the employer shall permit the worker to inspect the record either at the time of payment or at such other time as may be convenient to the employer. The employer shall not unreasonably withhold the record from inspection by the worker.
- (3)
- (a) The record may be maintained in one or more parts depending on the system of recording used by the employer whether manual or mechanical provided that if the record is maintained in more than one part, those parts shall be kept in such a manner as will enable the inspection referred to in subclauses (2) and (4) to be conducted at the one establishment.
 - (b) The record shall be kept in date order so that the inspections referred to in subclauses (2) and (4) of this clause may be made with respect to any period in the six years from 1st March 1984.
 - (c) The employer may, if it is part of normal business practice, periodically send the record or any part of the record to another person, provided that the provision of this paragraph shall not relieve the employer of the obligations with respect to provisions contained elsewhere in this clause with the exception of those contained in paragraph (b) of this subclause.
 - (d) Before exercising a power of inspection the representative shall give reasonable notice of not less than 24 hours to the employer.
Subject to this clause the record shall be available for inspection by a duly authorised official of the union during the normal hours of business of the employer, but excepting any time when the employer or his employees who are required to maintain the record may be absent.
 - (e) The union official shall be permitted reasonable time to inspect the record and, if he requires, take an extract or copy of any of the information contained therein.
- (4)
- (a) If, for any reason, the record is not available for inspection by the union official when the request is made, the union official and the employer or his agent may fix a mutually convenient time for the inspection to take place.
 - (b) If a mutually convenient time cannot be fixed, the union official may advise the employer in writing that he requires to inspect the record in accordance with the provisions of this award and shall specify the period contained in the record which he requires to inspect.
 - (c) Within 10 days of the receipt of such advice:
 - (i) Employers who normally keep the record at a place more than 35 kilometres from the G.P.O. Perth shall send a copy of that part of the record specified to the office of the union; and,
 - (ii) employers who normally keep the record at a place less than 35 kilometres from the G.P.O. Perth shall make the record available to the union official at the time specified by the union official. If the record is not then made available to the union official the employer shall within three days send a copy of that part of the record specified to the office of the union.
 - (d) In the event of a demand made by the union which the employer considers unreasonable the employer may apply to the Industrial Commission for direction. An application to the Industrial Commission made by an employer for direction will, subject to that direction, stay the requirements contained elsewhere in this subclause.
 - (e) The Roster referred to in clause 10. - Display of Rosters shall be available for inspection by a duly authorised representative of the union during normal trading hours.

22. - UNIFORMS AND OVERALLS

- (1) On or after the 1st day of January 1987, any employer who requires an employee to wear a uniform for the purpose of his or her employment shall supply such uniforms free of charge or pay for its purchase and such uniform shall remain the property of the employer.
For the purpose of this clause a "uniform" shall mean any outer wearing apparel or part thereof including jumpers which is distinctive to the employer's business either by bearing an embroidered or other permanent form of logo or business

name or being outer wearing apparel of identical style, cut or design, and colour for all of the employees required to wear such a uniform.

- (2) Should any dispute arise between the parties as to the wearing of uniforms and overalls, if such are required to be worn, the dispute however originating and any matter arising therefrom including the matter of the laundering of uniforms and overalls, shall be determined by the Board of Reference.

23. - BOARD OF REFERENCE

- (1) The Commission hereby appoints for the purposes of this award, a Board of Reference consisting of a chairman and two other members who shall be appointed pursuant to section 48 of the Industrial Arbitration Act, 1979.
- (2) The Board of Reference is hereby assigned the function of allowing, approving, fixing, determining or dealing with any matters of difference between the parties in relation to any matter which, under this award, may be allowed, approved, fixed, determined or dealt with by a Board of Reference.

24. - SUPPORTED WAGES EMPLOYEES

- (1) This Clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Award. In the context of this clause, the following definitions will apply:
 - (a) "Supported Wage System" means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability, as documented in "[Supported Wage System: Guidelines and Assessment Process]".
 - (b) "Accredited Assessor" means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.
 - (c) "Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.
 - (d) "Assessment Instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

- (2) Eligibility Criteria

Employees covered by this Clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.

(The Clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.)

The Award does not apply to employers in respect of their facility, program, undertaking, service or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under Section 10 or Section 12A of the Act, or if a part only has received recognition, that part.

- (3) Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed Capacity (Subclause (4))	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall not be less than \$45.00 per week.)

* Where a person's assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.

- (4) Assessment of Capacity

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (a) the employer and the union, in consultation with the employee or, if desired, by any of these; and

- (b) the employer and an accredited assessor from a panel agreed by the parties to the Award and the employee.
- (5) Lodgement of Assessment Instrument
- (a) All assessment instruments under the conditions of this clause, including the appropriate percentage of the Award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Western Australian Industrial Relations Commission.
- (b) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within ten working days.
- (6) Review of Assessment
- The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.
- (7) Other Terms and Conditions of Employment
- Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other workers covered by this Award paid on a pro-rata basis.
- (8) Workplace Adjustment
- An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve redesign of job duties, working time arrangements and work organisation in consultation with other workers in the area.
- (9) Trial Period
- (a) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.
- (b) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.
- (c) The minimum amount payable to the employee during the trial period shall be no less than \$45.00 per week.
- (d) Work trials should include induction or training as appropriate to the job being trialed.
- (e) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (4) above.

25. - COUNTRY WORK AND TRAVELLING TIME

- (1) When a worker is engaged on outside work, the employer shall pay all fares, and a proper allowance at current rates shall be paid for all necessary meals. Fares shall be second class, except when travelling by coastal boat, when saloon fares shall be paid.
- (2) When a worker is engaged at such a distance that he cannot return at night, suitable board and lodging shall be found, at the employer's expense.
- (3) Travelling time outside ordinary working hours shall be paid for at ordinary rates up to a maximum of twelve hours in any twenty-four hour period, from the time of starting on the journey: Provided that, when the travelling is by boat, not more than eight hours shall be paid for in such period.

26. - JUNIOR WORKER'S CERTIFICATE

- (1) Junior workers shall if required furnish the employer with a certificate showing the following particulars -
- (a) Name in full.
- (b) Age and date of birth.
- (2) The certificate shall be signed by the worker.
- (3) No worker shall have any claim upon the employer for additional wages in the event of his age being wrongly stated on the certificate. If any worker mis-states his or her age in the certificate he or she alone shall be deemed guilty of a breach of this award, and in the event of a worker having received a higher rate than that to which he or she was entitled, he or she shall make restitution to the employer.

27. - SICK LEAVE

- (1) (a) An employee who is unable to attend or remain at his or her place of employment during ordinary hours of work by reason of personal ill health or injury shall be entitled to payment for such absence in accordance with the following provisions.
- (b) Entitlement to payment for a full-time employee shall accrue weekly at the rate of 1.461 hours per week, such that an employee's maximum annual sick leave entitlement shall be 76 hours. For part-time employees the entitlement in hours to sick leave shall accrue at a rate per week calculated in the following manner:

Hours Per week
38 x 1.461

- (c) The rate of pay for an absence in accordance with this clause shall be the employee's ordinary wage that he/she would have received had he/she not been on leave. For part-time employees, payment shall only be made for rostered ordinary hours he/she would have worked had he/she not been on leave in accordance with this clause.
- (d) If, in the first or successive years of service with the employer, an employee is absent on the ground of personal ill health or injury for a period longer than his/her entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.
- (2) The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the worker if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during the year at the time of the absence. Provided that a worker shall not be entitled to claim payment for any period exceeding ten weeks in any one year of service.
- (3) Employers and employees may enter into agreements with respect to the notification to the employer, within a specified period, of an employee's inability to attend work due to illness or injury. In all cases an employee shall notify the employer as soon as reasonably practicable of the absence, provided that:
- (a) the agreement is between the employer and the majority of employees covered by this award who are affected by the notification requirements;
 - (b) the agreement is available for inspection in the same manner as prescribed in Clause 21. - Time and Wages Record; and
 - (c) an entitlement to payment under this clause shall not be withheld if:
 - (i) the employee has given notice within 24 hours of the commencement of the absence; or
 - (ii) the employee demonstrates extraordinary circumstances existed which prevented notice being given.
- (4) The provisions of this clause do not apply to an employee who fails to produce a certificate from a medical practitioner dated at the time of the absence or who fails to supply such other proof of illness or injury that would satisfy a reasonable person. Provided that an employee shall not be required to produce a medical certificate or such other proof with respect to absences of two days or less unless after two such absences in any year of service the employer requests that the next and subsequent absences, if any, shall be accompanied by such certificate.
- (5)
 - (a) Subject to the provisions of this subclause, the provisions of this clause apply to a worker who suffers personal ill health or injury during the time when he is absent on annual leave and a worker may apply for and the employer shall grant paid sick leave in place of paid annual leave.
 - (b) Application for replacement shall be made within seven days of resuming work and then only if the worker was confined to his place of residence or a hospital as a result of his personal ill health or injury for a period of seven consecutive days or more and he produces a certificate from a registered medical practitioner that he was so confined. Provided that the provisions of this paragraph do not relieve the worker of the obligation to advise the employer in accordance with subclause (3) of this clause if he is unable to attend for work on the working day next following his annual leave.
 - (c) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the worker was entitled at the time he proceeded on annual leave and shall not be made with respect to fractions of a day.
 - (d) Where paid sick leave has been granted by the employer in accordance with paragraphs (a), (b) and (c) of this subclause, that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the worker or, failing agreement, shall be added to the worker's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 15. - Annual Leave.
 - (e) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 15. - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.
- (6) Where a business has been transmitted from one employer to another and the worker's service has been deemed continuous in accordance with subclause (3) of clause 2 of the Long Service Leave provisions published in volume 59 of the Western Australian Industrial Gazette at pages 1-6, the paid sick leave standing to the credit of the worker at the date of transmission from service with the transmitter shall stand to the credit of the worker at the commencement of service with the transmittee and may be claimed in accordance with the provisions of this clause.
- (7) The provisions of this clause with respect to payment do not apply to workers who are entitled to payment under the Workers' Compensation Act nor to workers whose injury or illness is the result of the worker's own misconduct.
- (8) The provisions of this clause do not apply to casual workers.

28. - WAGES

Part I -

The minimum rates of wages payable to workers under this award shall be as follows -

- (1) With effect on and from the commencement of the first pay period on or after 1 July 2018.

ADULTS (Classifications and Wages per week):

	(i) Who works ordinary hours Monday to Friday	(ii) Who works ordinary hours between Monday and 1.00 pm Saturday	(iii) Who works ordinary hours between Monday and Saturday with the completion of ordinary hours after 1.00 pm Saturday
	\$	\$	\$
Shop Assistants, Sales Person, Wholesale Sales Person, Demonstrator, Canvasser and/or Collector, Storeperson, Packer, Despatch Hand, Reserve Stock Hand, Ticket Writer	Award Rate 789.90	802.80	816.50
Window Dresser/ Visual Merchandiser	Award Rate 797.10	810.10	828.10
Storeperson Operator Grade I	Award Rate 801.60	814.70	832.90
Storeperson Operator Grade II	Award Rate 806.70	819.70	838.00

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

- (2) An employee in (1) - (5) above who is required by the employer to be in charge of a shop, store or warehouse or other employees shall be paid an in charge allowance for all purposes of the award calculated as follows:
- if placed in charge of a shop, store or warehouse with no other employees or if placed in charge of less than three other employees -
3.4% of the rate specified in subclause (1) - (5) above, as appropriate
 - if placed in charge of three or more other employees but less than ten other employees -
6.2% of the rate specified in subclause (1) - (5) above, as appropriate
 - if placed in charge of ten or more other employees -
11.2% of the rate specified in subclause (1) - (5) above, as appropriate

Part II -

The minimum rates of wages payable to all junior workers covered by this award shall be as follows -

Junior workers: (per cent of the appropriate wage prescribed in PART I hereof) per week:

	%
Under 16 years of age	40
16 years of age to 17 years of age	50
17 years of age to 18 years of age	60
18 years of age to 19 years of age	70
19 years of age to 20 years of age	80
20 years of age to 21 years of age	90

Part III -

In addition to the rates prescribed elsewhere in this clause the following allowances and rates shall be paid to a worker where applicable:

- A worker required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk beside power operated high lift stacker in the performance of his duties shall be paid an additional 0.73 cents per hour whilst so engaged.
 - A worker required to operate a ride-on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his duties shall be paid an additional 0.81 cents per hour whilst so engaged.

- (c) The allowances prescribed by this subclause shall not be payable to an employee engaged, and paid, as a "Storeman Operator Grade 1" or a "Storeman Operator Grade 2".
- (2) Any workers, whether a junior or adult, employed as a canvasser and/or collector shall be paid the adult male wage.
- (3) Where a canvasser provides his own bicycle he shall be paid an allowance of \$1.58 per week.
- (4) (a) A worker shall receive an additional payment for every hour of which he spends 20 minutes or more in a cold chamber in accordance with the following:
In a cold chamber in which the temperature is:
- | | | |
|-------|------------------------------------|--------------------|
| (i) | Below 0° Celsius to -20° Celsius | - \$0.90 per hour |
| (ii) | Below -20° Celsius to -25° Celsius | - \$1.05 per hour |
| (iii) | Below -25° Celsius | - \$1.18 per hour. |
- (b) Workers required to work in temperatures less than -18.9° Celsius shall be medically examined at the employer's expense.
- (5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid a loading of 20% for each hour worked after 6.00p.m.
For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7(4) of this award.
- (b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" (pharmacy) as defined shall be paid a loading of 20% for each hour worked after 6.00p.m.
- (i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.
- (ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.
- (6) (a) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight Monday to Friday inclusive shall be paid a loading of 20% for each hour so worked.
Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.
- (b) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours between 6.00pm and midnight on Saturday shall be paid a loading of 20% for each hour worked after 6.00pm.
- (i) A casual employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.
- (ii) A full or part-time employee employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part-Time Workers.
- (c) An employee in a "Section 42 shop" as defined who is required to work any of his or her ordinary hours before 7.00am on any day Monday to Saturday inclusive shall be paid a loading of 30% for each hour so worked.
Provided that for casual workers such loading shall be paid in addition to the rates prescribed in Clause 7. - Casual Workers subclause (4) of this award.
- (7) An automotive spare parts or accessories salesman qualified (i.e. one who has passed the appropriate course of technical training) shall be paid the sum of \$26.90 per week in addition to the rates prescribed herein.

28A. - STRUCTURAL EFFICIENCY AGREEMENT - COLD STORAGE INDUSTRY

P. & O. Cold Stores and Clelands Cold Stores shall pay \$26.90 per week in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 November 1989 and \$4.50 in addition to the rates prescribed by Clause 28. - Wages of this award from the beginning of the first pay period commencing on or after 1 December 1989 on account of agreement reached for a structural efficiency package which the parties anticipate will result in the creation of a Cold Storage Award being negotiated in accordance with the objectives and content of the Structural Efficiency Principle.

29. - EASTER WEEK

- (1) Except in the case of "small retail shops" as defined, in the week commencing immediately preceding Easter Day, employees engaged at that time shall not be required to work on Saturday, Easter Eve in 1990. Such employees may be required to work on Saturday, Easter Eve in subsequent years.
- (2) All time worked on Saturday, Easter Eve within ordinary time shall be paid for at the rate of time and one half calculated on the Monday to Friday rate as prescribed in Column (i) of subclause (1) of Clause 28. - Wages of this Award.

30. - RIGHT OF ENTRY

Consistent with the terms of the Labour Relations Legislation Amendment Act 1997 and S.23(3)(c)(iii) of the Industrial Relations Act a representative of the Union shall not exercise the rights under this clause with respect to entering any part of the premises of the employer unless the employer is the employer, or former employer of a member of the Union.

- (1) On notifying the employer or his representative an accredited representative of the union shall be permitted to interview a worker during non-working times or the meal period on the business premises of the employer, but this permission shall not be exercised without the consent of the employer more than once in any one week.
- (2) In the case of a disagreement existing or anticipated concerning any of the provisions of this award, an accredited representative of the union, on notifying the employer or his representative, shall be permitted to enter the business premises of the employer to view the work, the subject of any such disagreement, but shall not interfere in any way with the carrying out of such work.

31. - OTHER PROVISIONS

- (1) Employees called upon to carry or lift shall do so in accordance with the Manual Handling Code of Practice issued by the Occupational Health, Safety and Welfare Commission of W.A.
- (2)
 - (a) It shall be part of employees' duties to perform cleaning functions incidental to their work. Without limiting the generality of the foregoing, the dusting of shelves and of stock, the sweeping up of string and wrapping around counters, the cleaning of implements and fixtures used in the work, the cleaning (including vacuum cleaning) of the immediate work area and the cleaning of spillages and breakages, shall be so included.
 - (b) An employee shall not be required to wet wash floors, clean lavatories, sweep pavements or clean the exteriors of windows other than for the removal of occasional defacements.
 - (c) An employee shall not be required to carry out systematic cleaning duties which go beyond the incidental functions as outlined in paragraph (a) of subclause (2) of this clause.

32. - MOTOR VEHICLE ALLOWANCE

- (1) Where an employee is required and authorised to use his or her own motor vehicle in the course of the employee's duties the employee shall be paid an allowance not less than that provided for in the table set out hereunder. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.
- (2) Where an employee in the course of a journey travels through two (2) or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.
- (3) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.
- (4) This allowance has a nexus with the *Metal Trades (General) Award* established in matter number 1135 of 1991 at transcript page 2.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS			
AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES) RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over1600cc - 2600cc	1600cc & Under
Metropolitan Area	78.9	70.7	61.5
South West Land Division	80.7	72.5	63.1
North of 23.5° South Latitude	88.9	80.0	69.5
Rest of the State	83.5	74.7	65.0
Motor Cycle (in all areas)	27.2 cents per kilometre		

“Metropolitan Area” means that area within a radius of fifty kilometres from the Perth Railway Station.

“South West Land Division” means that South West Land Division as defined by Schedule 1 of the *Land Administration Act 1997* excluding the area contained within the Metropolitan Area.

33. - LONG SERVICE LEAVE

The long service leave provisions published in Volume 59 of the Western Australian Industrial Gazette at pages 1 to 6, both inclusive, are hereby incorporated in and shall be deemed to be part of this award.

34. - SHIFT WORK

The provisions of this clause apply to workers employed on shift work in Bulk Warehouses or Manufacturing Establishments and shall not apply to premises in which goods are sold retail.

- (1) Hours of Shifts:
 - (a) The ordinary hours of work for shift workers shall not exceed 38 in any week to be worked in shifts not exceeding eight hours (excluding meal breaks) between midnight on Sunday and midnight on Friday in accord with subclauses (1)(b), (c) and (d) of Clause 9. - Hours.

- (b) Such ordinary hours shall be worked continuously except for meal breaks at the discretion of the employer. A worker shall not be required to work for more than 4 1/2 hours without a break for a meal of at least thirty minutes.
 - (c) Except at regular changeover of shifts a worker shall not be required to work more than one shift in each 24 hours.
- (2) Definitions:
- "Afternoon shift" means any shift finishing after 6.00 p.m. and at or before 1.00 a.m.
- "Day shift" means any shift finishing after 2.00 p.m. and at or before 6.00 p.m.
- "Night shift" means any shift finishing after 1.00 a.m. and at or before 7.00 a.m.
- (3) Where any particular process is carried out on shifts other than day shift and less than five consecutive afternoon or five consecutive night shifts are worked on that process the workers employed on such afternoon or night shifts shall be paid at overtime rates.
 - (4) The consecutive sequence of shifts referred to in subclause (3) of this clause shall not be deemed to be broken by reason of the fact that work on the process is not carried out on a Saturday, Sunday or holiday.
 - (5) The loading on the ordinary rates of pay for each afternoon shift or night shift shall be -
 - (a) in the case of adult workers - 15% of one-fifth of the ordinary rate prescribed by this award, and
 - (b) in the case of junior workers - seventy-five per cent of the amount prescribed for adult workers.
 - (6) The employer shall post in a place readily accessible to the workers a roster showing the starting and finishing times of the shifts each week.
 - (7) Overtime on afternoon shift or night shift shall be calculated on the rate payable for shift work.
 - (8) A junior worker under the age of eighteen years shall not be required to work afternoon shift or night shift without his consent.
 - (9) A worker shall not work continuous afternoon shift or night shift unless he elects to do so.
 - (10) The loading on the ordinary rates of pay for employees required to work permanent night shifts shall be 25 per cent of one fifth of the ordinary rate of pay prescribed by this award.

35. - PAYMENT OF WAGES

- (1) (a) The employer may elect to pay employees in cash, by cheque or by means of a credit transfer to a bank, building society or credit union account in the name of the employee. The day that the credit transfer is credited to the employee's account shall be deemed to be the date of payment.
- (b) Payment shall be made within three trading days from the last day of the pay period and if in cash or by cheque shall be made during the employee's ordinary working hours.
- (c) No employer shall change its method of payment to employees without first giving them at least four weeks' notice of such change.
- (d) No employee shall be required to accept a change in the method of payment if such change causes hardship. Any dispute concerning hardship in a particular case shall be referred to a Board of Reference for determination.
- (2) (a) The employer may elect to pay employees weekly or fortnightly in accordance with subclause (1) of this clause.
- (b) No employer shall change the frequency of payment to employees without first giving them and the Union at least four weeks' notice of such change.
- (c) The method of introducing a fortnightly pay system shall be by the payment of an additional week's wages in the last weekly pay before the change to fortnightly pays to be repaid by equal fortnightly deductions made from the next and subsequent pays provided the period for repayment shall not be less than 20 weeks or some other method agreed upon by the Union and employer.
- (3) For the purpose of effecting the rostering off of workers as provided by this award such wages may be either for the actual hours worked each week; or an amount being the calculated weekly average of the wages accruing over the two or three, as the case may be, consecutive weekly period.

36. - POSTING OF AWARD

The employer shall allow a copy of this award, if supplied by the union to be posted in a place which is easily accessible to the workers.

37. - STAND DOWN

- (1) Notwithstanding the provisions of clause 20. - Contract of Employment and Termination the employer may stand down without pay any worker who cannot be usefully employed because of any strike, ban, limitation or restriction on the performance of work by workers or any union, association or organisation or because of any break down or failure of the employer's machinery which the employer could not reasonably have prevented.

- (2) The provisions of subclause (1) of this clause shall not be applied unless and until the ordinary hours in which the worker cannot be usefully employed because of a strike, ban, limitation or restriction on the performance of work or a break down or failure of the employer's machinery exceeds four.

38. - BEREAVEMENT LEAVE

- (1) An employee shall, on the death of the spouse, de facto spouse, parent, step-parent, child or step-child of the employee or any other person who, immediately before that person's death, lived with the employee as a member of the employee's family, be entitled to paid bereavement leave for ordinary hours of up to two days.
- (2) The right to such leave shall be dependent on compliance with the following conditions.
- (a) The employee shall furnish proof such as would satisfy a reasonable person as to the death that is the subject of the leave and/or the relationship of the employee to the deceased person should the employer so request.
- (b) The employee shall not be entitled to leave under this clause during a period of any other kind of leave.

39. - LOCATION ALLOWANCES

- (1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

<u>TOWN</u>	<u>PER WEEK</u>
Agnew	\$21.60
Argyle	\$57.80
Balladonia	\$22.30
Barrow Island	\$37.60
Boulder	\$9.20
Broome	\$34.80
Bullfinch	\$10.10
Carnarvon	\$17.80
Cockatoo Island	\$38.10
Coolgardie	\$9.20
Cue	\$22.20
Dampier	\$30.30
Denham	\$17.80
Derby	\$36.10
Esperance	\$6.30
Eucla	\$24.20
Exmouth	\$31.70
Fitzroy Crossing	\$43.90
Halls Creek	\$50.60
Kalbarri	\$7.70
Kalgoorlie	\$9.20
Kambalda	\$9.20
Karratha	\$36.30
Koolan Island	\$38.10
Koolyanobbing	\$10.10
Kununurra	\$57.80
Laverton	\$22.10
Learmonth	\$31.70
Leinster	\$21.60
Leonora	\$22.10
Madura	\$23.30
Marble Bar	\$56.00
Meekatharra	\$19.10
Mount Magnet	\$24.00
Mundrabilla	\$23.80
Newman	\$20.70
Norseman	\$19.10
Nullagine	\$55.90
Onslow	\$37.60
Pannawonica	\$28.20

TOWN—continuedPER WEEK

Paraburdoo	\$28.00
Port Hedland	\$30.10
Ravensthorpe	\$11.40
Roebourne	\$41.80
Sandstone	\$21.60
Shark Bay	\$17.80
Southern Cross	\$10.10
Telfer	\$51.50
Teutonic Bore	\$21.60
Tom Price	\$28.00
Whim Creek	\$36.00
Wickham	\$34.80
Wiluna	\$21.90
Wyndham	\$54.10

- (2) Except as provided in subclause (3) of this clause, an employee who has:
- (a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;
 - (b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.
- (3) Where an employee:
- (a) is provided with board and lodging by his/her employer, free of charge; or
 - (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;
- such employee shall be paid $66\frac{2}{3}$ per cent of the allowances prescribed in subclause (1) of this clause.
- (4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
- (5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.
- (6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.
- (7) For the purposes of this clause:
- (a) "Dependant" shall mean -
 - (i) a spouse or defacto partner; or
 - (ii) a child where there is no spouse or defacto partner;
 who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.
 - (b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and UnionsWA or, failing such agreement, as may be determined by the Commission.
- (9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

40. - CHEMISTS SHOPS

Any worker employed in a chemist's shop shall be subject to the terms of this award up to the time he or she becomes indentured to the profession.

41. - LIBERTY TO APPLY

Liberty is reserved to any of the parties to apply to amend this award in respect of the following matters:

- (1) Calculation of casual rates on Thursday evenings.
- (2) Easter Week provisions.
- (3) Casual Limitations and minimum engagement provisions.

42. - PARENTAL LEAVE

(1) Subject to the terms of this clause employees are entitled to unpaid maternity, paternity and adoption leave and to work part time with the approval of the employer in connection with the birth or adoption of a child in accordance with the provisions of Appendix 1 to this Award.

(2) Definitions

For the purposes of Appendix 1, the following definitions shall apply:

- (a) "Employee" includes a part time employee but does not include an employee engaged upon casual or seasonal work.
- (b) "Spouse" includes a de facto or a former spouse.
- (c) "Continuous service" means service under an unbroken contract of employment and includes:
 - (i) Any period of leave taken in accordance with this clause;
 - (ii) any period of part time employment worked in accordance with this clause; or
 - (iii) any period of leave or absence authorised by the employer or by the award.

43. - UNION NOTICE BOARD

An employer bound by this award shall permit a shop steward or an official from The Shop, Distributive and Allied Employees' Association of Western Australia, as the case may be to post formal Union notices, authorised by the General Secretary of the Union or his nominee upon an appropriate notice board.

Any notice posted on a notice board not so signed by the General Secretary of the Union or his nominee may be removed by the employer.

44. - INTRODUCTION OF CHANGEEmployer's duty to notify

- (1) (a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes and the union.
- (b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and restructuring of jobs. Provided that where the award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

Employer's Duty to Discuss Change

- (2) (a) The employer shall discuss with the employees affected and the union inter alia, the introduction of the changes referred to in subclause (1) hereof, the effects the changes are likely to have on employees, measures to avert or mitigate the adverse effects of such changes on employees and shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes.
- (b) The discussion shall commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in subclause (1)(a) hereof.
- (c) For the purpose of such discussion, the employer shall provide to the employees concerned and their union, all relevant information about the changes including the nature of the changes proposed; the expected affects of the changes on employees and any other matters likely to effect employees provided that any employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

45. - SUPERANNUATION

The superannuation provisions contained herein operate subject to the requirements of the hereinafter prescribed provision titled - Compliance, Nomination and Transition.

The provisions of this clause shall be read in conjunction with and shall complement the provisions of the Superannuation Guarantee (Administration) Act 1992.

(1) Definitions:

"Fund": In this clause all reference to "Fund" shall mean the Retail Employees Superannuation Trust.

"Ordinary Time Earnings": In this clause the term "ordinary time earnings" shall mean the base classification rate, including supplementary payments where appropriate, in charge rates, shift penalties and (if any) overaward payments, together with any other all purpose allowance or penalty payment for work in ordinary time and shall include in respect to

casual employees the appropriate casual loadings as prescribed by this award, but shall exclude any payment for overtime worked.

"Employees": In this clause all reference to "employees" shall mean employees whose employment is regulated by the following award:

Shop and Warehouse (Wholesale and Retail Establishments) Award No. 32 of 1976

"Trustee": In this clause all reference to "Trustee" shall mean the Trustee of the Retail Employees Superannuation Trust.

"Approved Superannuation Fund": In this clause "Approved Superannuation Fund" shall mean a superannuation fund which complies with the Occupational Superannuation Standards Act, 1987.

(2) Quantum

(a) Employers bound by this Award shall make application to participate in the Fund either formally or informally and shall contribute to the Fund in respect of all eligible employees an amount equal to the percentage as set out in paragraph (b) of this subclause of each employee's weekly ordinary time earnings.

(b) The percentage applicable to an employer for the purposes of paragraph (a) of this subclause shall be -

YEAR	PERCENTAGE AMOUNT
1996-1997	6%
1997-1998	6%
1998-1999	7%
1999-2000	7%
2000-2001	8%
2001-2002	8%
2002-2003	9%
Subsequent Years	9%

(3) Cessation of Contributions:

The obligation of the employer to contribute to the Fund in respect of an employee shall cease on the last day of such employee's employment with the employer.

(4) Eligibility

(a) The employer shall be required to make contributions in accordance with this clause in respect of each employee except where -

- (i) an employee earns less than \$450.00 in any calendar month; or
- (ii) an employee who is aged under 18 years of age and works 30 hours or less per week.

(b) Employees with existing superannuation entitlements.

Notwithstanding paragraph (a) above, the employer shall be required to make contributions in accordance with this clause in respect of each part-time or casual employee who had an entitlement to receive superannuation payments on 24 October 1996.

(5) Employee contributions

Employees who may wish to make contributes to the Fund additional to those being made by the employer pursuant to subclause (2) shall be entitled to authorise the employer to pay into the Fund from the employee's wages amounts specified by the employee.

Employee contributions to the Fund requested under this subclause shall be made in accordance with the rules of the Fund.

(6) Frequency of Payment

Each employer shall pay such contributions together with any employee's deductions to the Fund in the following manner:

- (a) In respect of full time and part time employees payments shall be made monthly for pay periods completed in the month, and
- (b) In respect of casual employees payments shall be made every three months for pay periods completed in such three months.

Provided that payments may be made at such other times and in such other manner as may be agreed in writing between the Trustees of the Fund and the employer from time to time.

(7) Existing Superannuation Arrangements

No employer shall be excluded from this clause on the basis of existing voluntary superannuation arrangements.

Compliance, Nomination and Transition

Notwithstanding anything contained elsewhere herein which requires that contribution be made to a superannuation fund or scheme in respect of an employee, on and from 30 June 1998 -

- (a) Any such fund or scheme shall no longer be a complying superannuation fund or scheme for the purposes of this clause unless -

- (i) the fund or scheme is a complying fund or scheme within the meaning of the Superannuation Guarantee (Administration) Act 1992 of the Commonwealth; and
- (ii) under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme;
- (b) The employee shall be entitled to nominate the complying superannuation fund or scheme to which contributions are to be made by or in respect of the employee;
- (c) The employer shall notify the employee of the entitlement to nominate a complying superannuation fund or scheme as soon as practicable;
- (d) A nomination or notification of the type referred to in paragraphs (b) and (c) of this subclause shall, subject to the requirements of regulations made pursuant to the Industrial Relations Legislation Amendment and Repeal Act 1995, be given in writing to the employer or the employee to whom such is directed;
- (e) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the complying superannuation fund or scheme to which contributions are to be made;
- (f) The employer shall not unreasonably refuse to agree to a change of complying superannuation fund or scheme requested by a employee;
Provided that on and from 30 June 1998, and until an employee thereafter nominates a complying superannuation fund or scheme -
- (g) if one or more complying superannuation funds or schemes to which contributions may be made be specified herein, the employer is required to make contributions to that fund or scheme, or one of those funds or schemes nominated by the employer;
or
- (h) if no complying superannuation fund or scheme to which contributions may be made be specified herein, the employer is required to make contributions to a complying fund or scheme nominated by the employer.

46. - FIRST AID ALLOWANCE

A worker holding either a Red Cross or St. John Senior First Aid Certificate of at least 'A' level who is appointed by the employer to perform first aid duties shall be paid \$10.65 per week in addition to the worker's ordinary rate.

47. - TRAINEESHIPS

- (1) Scope
 - (a) Subject to paragraph (b) of this subclause, this clause shall apply to persons:
 - (i) who are undertaking a traineeship (as defined); and
 - (ii) who are employed by an employer bound by this award; and
 - (iii) whose employment is covered by the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 No. R 32 of 1976.
 - (b) Notwithstanding the foregoing, this clause shall not apply to employees who were employed by an employer bound by this clause prior to the date of approval of a traineeship scheme relevant to the employer, except where agreed between the employer and the union.
- (2) Objective
 - (a) The objective of this clause is to establish a system of traineeships which provides approved training in conjunction with employment in order to enhance the skill levels and future employment prospects of trainees, particularly young people, and the long term unemployed.
 - (b) The system is neither designed nor intended for those who are already trained and job ready.
 - (c) Existing employees shall not be displaced from employment by trainees.
- (3) Supersession

The existing award provisions for the Australian Traineeship System (ATS) shall not apply to any employer bound by this award, except in relation to ATS trainees who commenced a traineeship with the employer before the employer was bound to this award.
- (4) Definitions

"Approved Training" means training undertaken in a traineeship and shall involve formal instruction, both theoretical and practical, and supervised practice in accordance with a traineeship scheme approved by the relevant state training authority or NETTFORCE. The training will be accredited and lead to qualifications as set out in subclause 5(e).

"Relevant Award" means The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 No. R 32 of 1976.

"Trainee" means an employee who is bound by a traineeship agreement made in accordance with this clause.

"Traineeship" means a system of training which has been approved by the appropriate state training authority, or which has been approved on an interim basis by the National Employment and Training Taskforce (NETTFORCE), until final approval is granted by the relevant state training authority.

"Traineeship Agreement" means an agreement made subject to the terms of this award between an employer and the trainee for a traineeship and which is registered with the appropriate state training authority, NETTFORCE, or under the provisions of the appropriate state legislation. A traineeship agreement shall be made in accordance with the relevant approved traineeship scheme and shall not operate unless this condition is met.

"Traineeship Scheme" means an approved traineeship applicable to a group or class of employees or to an industry or sector of an industry or an enterprise. A traineeship scheme shall not be given approval unless consultation and negotiation with the union upon the terms of the proposed traineeship scheme and the traineeship have occurred. An application for approval of a traineeship scheme shall identify the union and demonstrate to the satisfaction of the approving authority that the abovementioned consultation and negotiation have occurred.

"Parties to a Traineeship Scheme" means the employer organisation and/or the employer and the union involved in the consultation and negotiation required for the approval of a traineeship scheme.

References in this award to "the relevant state training authority or NETTFORCE" shall be taken to be a reference to NETTFORCE in respect of a traineeship that is the subject of an interim approval but not a final approval by the relevant state training authority. NETTFORCE powers and functions stipulated in this award may be circumscribed and/or delegated by the terms of an agreement between NETTFORCE and a relevant state training authority. Reference to NETTFORCE within this clause will have no effect during the currency of the W.A. State Training Authority/NETTFORCE Memorandum of Agreement.

"Appropriate State Legislation" means the State Employment and Skills Development Authority Act 1990.

(5) Training Conditions

- (a) The trainee shall attend an approved training course or training programme prescribed in the traineeship agreement or as notified to the trainee by the appropriate state training authority in accredited and relevant traineeship schemes or NETTFORCE if the traineeship scheme remains subject to interim approval.
- (b) A traineeship shall not commence until the relevant traineeship agreement, made in accordance with a traineeship scheme, has been signed by the employer and the trainee and lodged for registration with the relevant state training authority or NETTFORCE, provided that if the traineeship agreement is not in a standard format a traineeship shall not commence until the traineeship agreement has been registered with the relevant state training authority or NETTFORCE. The employer shall ensure that the trainee is permitted to attend the training course or programme provided for in the traineeship agreement and shall ensure that the trainee receives the appropriate on-the-job training.
- (c) The employer shall provide a level of supervision in accordance with the traineeship agreement during the traineeship period.
- (d) The employer agrees that the overall training programme will be monitored by officers of the appropriate state training authority or NETTFORCE and training records or work books may be utilised as part of this monitoring process.
- (e) Training shall be directed at:
 - (i) the achievement of key competencies required for successful participation in the workplace (where these have not been achieved) (e.g. literacy, numeracy, problem solving, teamwork, using technology) and as proposed to be included in the AVC Level 1 qualification. This could be achieved through foundation competencies which are part of endorsed competencies for an industry or enterprise, and/or
 - (ii) the achievement of competencies required for successful participation in an industry or enterprise (where there are endorsed national standards these will define these competencies) as proposed to be included in the AVC Level 2 qualification or above.

(6) Employment Conditions

- (a) A trainee shall be engaged as a full time employee for a maximum of one year's duration provided that a trainee shall be subject to a satisfactory probation period of up to one month which may be reduced at the discretion of the employer. By agreement in writing, and with the consent of the relevant state training authority or NETTFORCE the parties to a traineeship agreement may vary the duration of the traineeship and the extent of approved training provided that any agreement to vary is in accordance with the relevant traineeship scheme.
- (b)
 - (i) An employer shall not terminate the employment of a trainee without firstly having provided written notice of termination to the trainee concerned in accordance with the traineeship agreement and to the relevant state training authority or NETTFORCE. The written notice to be provided to the relevant state training authority or NETTFORCE shall be provided within five working days of termination.
 - (ii) An employer who chooses not to continue the employment of a trainee upon the completion of the traineeship shall notify, in writing, the relevant state training authority or NETTFORCE of its decision.
- (c) The trainee is permitted to be absent from work without loss of continuity of employment and/or wages to attend the training in accordance with the traineeship agreement.
- (d) Where the employment of a trainee by an employer is continued after the completion of the traineeship period, such traineeship period shall be counted as service the purposes of any relevant award or any other legislative entitlements.

- (e) (i) The traineeship agreement may restrict the circumstances under which the trainee may work overtime and shift work in order to ensure the training programme is successfully completed.
- (ii) No trainee shall work overtime or shift work on their own unless consistent with the provisions of this award.
- (iii) No trainee shall work shift work unless the parties to a traineeship scheme agree that such shift work makes satisfactory provision for approved training. Such training may be applied over a cycle in excess of a week, but must average over the relevant period no less than the amount of training required for non-shift work trainees.
- (iv) The trainee wage shall be the basis for the calculation of overtime and/or shift penalty rates prescribed by the relevant award, unless otherwise agreed by the parties to a traineeship scheme, or unless the relevant award makes specific provision for a trainee to be paid at a higher rate, in which case the higher rate shall apply.
- (f) All other terms and conditions of the relevant award that are applicable to the trainee, or would be applicable to the trainee but for this clause, shall apply unless specifically varied by this clause.
- (g) A trainee who fails to either complete the traineeship, or who cannot for any reason be placed in full time employment with the employer on successful completion of the traineeship, shall not be entitled to any severance payments payable pursuant to termination, change and redundancy provisions or provisions similar thereto.

(7) Wages

- (a) (i) The minimum rates of wages payable weekly to trainees are as provided in subparagraph (iv) of this subclause.
- (ii) These wage rates will only apply to trainees while they are undertaking an approved traineeship which includes approved training as defined in this clause.
- (iii) The wage rates prescribed by this clause do not apply to completed trade level training which is covered by the apprenticeship system.
- (iv) Skill Level B:
Where the accredited training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level B.

School Leaver	HIGHEST YEAR OF SCHOOLING COMPLETED		
	Year 10 and below\$	Year 11\$	Year 12\$
	265.00	317.00	367.00
Plus 1 year out of school	317.00	367.00	433.00
Plus 2 years	367.00	433.00	495.00
Plus 3 years	433.00	495.00	563.00
Plus 4 years	495.00	563.00	
Plus 5 years	563.00		

The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the Award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

- (b) The skill level of approved Traineeships in the retail and wholesale industries has been agreed to be skill Level B.
- (c) For the purposes of this provision "out of school" shall refer only to periods out of school beyond year 10, "(or below)" and shall be deemed to:
- (i) include any period of schooling beyond year 10 "(or below)" which was not part of nor contributed to a completed year of schooling;
- (ii) include any period during which a trainee repeats in whole or part a year of schooling beyond year 10; "(or below)" and
- (iii) not include any period during a calendar year in which a year of schooling is completed.
- (iv) have effect on an anniversary date being January 1 in each year.
- (d) At the conclusion of the traineeship this clause ceases to apply to the employment of the trainee and the award shall apply to the former trainee.

48. - ADDITIONAL LOADING FOR LATE NIGHT TRADING ESTABLISHMENTS

- (1) A full-time or part-time worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid a loading of \$4.29 per hour in addition to the ordinary hourly rate of a full-time or part-time worker.
- (2) A casual worker employed in a "General Retail Shop" or "Special Retail Shop" who works ordinary hours between 6.00 p.m. and 9.00 p.m. on the day of late night trading shall be paid the amount of \$4.29 per hour in addition to the ordinary casual rate as laid down in paragraph (a) of subclause (4) of Clause 7. - Casual Workers.
- (3) Provided that junior workers shall be paid the appropriate percentage as laid down in Part II of Clause 28. - Wages.
- (4) The loading referred to in subclauses (1), (2) and (3) above shall be paid for the purpose of superannuation calculations.

49. - TRADE UNION TRAINING LEAVE

- (1) Subject to this clause a union delegate or duly elected or appointed union representative shall, upon application in writing by the union, be granted up to five days leave with pay, each calendar year, non cumulative, to attend courses approved under the Commonwealth Trade Union Training Authority Act in Western Australia provided that such courses shall qualify for the purposes of the Training Guarantee Act.

The courses to be attended shall be those most suited to the industrial situation pertaining to the Wholesale and Retail Industry in Western Australia.

A notice to an employer affected by the leave shall be made in writing by the Union to the employer and shall include the following details:

- the name of the employee seeking leave,
- the period of time for which leave is sought (including daily commencing and finishing times),
- the title description and agenda of the course or courses to be attended,
- the place or places where the said course or courses will be held,
- the name of the person or persons conducting the said course or courses,
- a copy of the syllabus and curriculum of the course or courses to be attended.

- (2) Leave shall be granted by the employer on the dates notified by the union but shall be subject to the union giving not less than one, and, where possible, two, calendar month's notice of the intention to attend such course or such lesser period as may be agreed between employer, the union and the employee concerned.

Provided that where the leave is to be taken in the four weeks prior to Christmas Day or the five weeks after Christmas Day, in the week prior to or after Easter, in the week prior to Father's Day or Mother's Day, or during an annual or half-yearly sale, or a scheduled stocktake, the employer may require that such leave be deferred. In any other exceptional circumstances, for example, the week during which a public holiday falls, the employer may request in writing to the union to defer and in the event of disagreement, either party may refer the matter to the Western Australian Industrial Relations Commission.

- (3) Only employees who have completed twelve months' continuous service with their current employer shall be eligible for leave pursuant to this clause. In the case of a new shop opening no leave shall be taken in the first six months.
- (4) Each employee on leave approved in accordance with this clause shall be paid all ordinary time earnings which normally become due and payable during the period of the leave. Ordinary time earnings shall be as defined in Clause 45(1) of this award. Employees shall not be paid under this clause if they were not ordinarily scheduled to work.
- (5) Leave granted will not incur any additional payment to the extent that the course attended coincides with any other period of paid leave granted pursuant to this award.
- (6) The employer shall not incur any liability with respect to the cost of travel to and from the place where the courses are conducted, nor to any accommodation and associated costs during such leave, or any other cost associated with the conducting of the course.
- (7) Leave of absence granted pursuant to this clause shall count as service for all purposes of the award.

- (8) For the purpose of this clause the number of employees under this award attending courses in any calendar year shall be:

Numbers of Full-time, Part-time and regular casual employees in Shop	No of representatives
Less than 100	1
100 or more	2

"Regular casual employee" shall mean a casual employee who works on an ongoing basis in the shop.

Provided that in the case of multi-level shops the number of employees entitled to leave under this clause per calendar year shall be as agreed between the union and the employer or, failing agreement, as determined by the Western Australian Industrial Relations Commission.

- (9) Employees granted leave pursuant to this clause shall, upon request, inform the employer after the completion of the course of the nature of the course and their observations on it.
- (10) On completion of the course the employee shall, upon request, provide to the employer proof satisfactory to the employer of his or her attendance at the course. The employer shall not be required to make payment for any period of leave granted that is not utilised in the attendance at a course unless the employee can substantiate that the failure to attend the course was due to the taking of paid leave otherwise authorised by this award.

- (11) This clause shall not apply to:
- (a) A retail shop which employs 17 or less full-time or part-time employees under the award;
 - (b) A warehouse where 10 or less full-time or part-time employees are employed under the award;
 - (c) Hot bread manufacturing establishments;
 - (d) Motor traders' establishments where this award is not the major award; and
 - (e) Motor traders' establishments where this is the major award until a date which is two years after the date from which this clause operates.

50. - ENTERPRISE LEVEL AWARD CHANGE PROCEDURE

- (1) The Union and the employers to whom this clause applies recognise that because of the variety of employers and types of enterprises covered by this award, circumstances may exist within the industry which are appropriately regulated by single enterprise agreements or by workplace agreements or, where more than one union has coverage of employees within a workplace, a part-workplace agreement binding only on all employees eligible for membership of The Shop, Distributive and Allied Employees' Association of Western Australia.
- (2) Such single employer agreements, to the extent that they are inconsistent with the provisions of this award, shall prevail over the provisions of this award, upon ratification by the Western Australian Industrial Relations Commission.
- (3) Where either an employer or its employees propose a change in award conditions in relation to an enterprise, those parties shall contact the union for the purpose of negotiating such an agreement. Where the union proposes a change in award conditions in relation to an enterprise, the union shall contact the employer for the purpose of negotiating such an agreement.
- (4) The employer and the union shall genuinely attempt to negotiate proposals for an agreement.
- (5) It shall be open to the employer and its employees to have had prior informal discussions about the possibility of an agreement of the character contemplated in this clause. However the final agreement negotiations are to be handled by the union.
- (6) By arrangement between the employer and the union, employees of the enterprise may participate in the negotiation of an agreement and, in any event, there shall be consultation with employees by the union and the employer. The union and the employer shall each have equal time to put alternative proposals to the employees during working hours.
- (7) Following negotiations between the employer and the union, but before an agreement can be achieved, a majority of employees shall have agreed to it.
- (8) The union and the employer may agree to adopt appropriate methods of ascertaining the views of the employees affected, such as a secret ballot, to ensure that the agreement is genuine.
- (9) Any agreement must be in writing and it shall specify the employees affected, the name and address of the enterprise affected, the terms of the agreement (including any award provisions from which the said enterprise is exempt) the alternate provisions which are to apply in lieu of such award provisions, the period of operation and the method of termination of the agreement prior to its expiration.
- (10) When an agreement is finalised, the parties to it shall make application to the Western Australian Industrial Relations Commission for its terms to be ratified in the appropriate manner.
- (11) Where the parties are unable to reach agreement, it shall be open for the matter to be referred to the Western Australian Industrial Relations Commission for resolution.
- (12) Nothing in this clause shall prevent an employer or the union from having any matter arising from this clause referred to the Western Australian Industrial Relations Commission for the purposes of conciliation and/or arbitration.

51. - REDUNDANCY

- (1) This clause applies to employers who engage 15 or more employees at the time of any redundancies.
- (2) Discussions Before Terminations
 - (a) Where the employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the employer shall hold discussions with the employees directly affected and with the union.
 - (b) The discussions shall take place as soon as is practicable and shall cover, amongst other matters, the reasons the proposed terminations are required, measures to avoid or minimise the terminations and measures to mitigate any adverse effects of any terminations on the employees concerned.
 - (c) For the purposes of the discussion the employer shall, as soon as practicable, provide in writing to the employees concerned and the Union all relevant information about the proposed terminations, including the reasons for the proposed terminations, the number and categories of employees likely to be affected, and the number of employees normally employed and the period over which the terminations are likely to be carried out.

Provided that the employer shall not be required to disclose confidential information the disclosure of which would be detrimental to the employer's interests.

(3) Transfer to Lower Paid Duties

Where an employee is transferred to lower paid duties for reasons set out in subclause (2) above, the employee shall be entitled to the same period of notice of transfer as they would have been entitled to if they had been terminated, and the employer may make payment in lieu thereof of an amount equal to the difference between the former ordinary time rate of pay and the new lower ordinary time rates for the number of weeks of notice still owing.

(4) Severance Pay

In addition to the period of notice provided in Clause 20. - Contract of Employment and Termination, a permanent employee whose employment is terminated for reasons set out above shall be entitled to the following amount of severance pay in respect of a continuous period of service.

Period of continuous service severance pay	
Less than 1 year	nil
1 year but less than 2 years	2 weeks' pay
2 years but less than 3 years	4 weeks' pay
3 years but less than 4 years	6 weeks' pay
4 years but less than 5 years	8 weeks' pay
5 years and over	10 weeks' pay

"Weeks' pay" means the ordinary time rate of pay for the employee concerned.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(5) Superannuation Benefits

- (a) Subject to further order of the Commission, where an employee, who is terminated receives a benefit from a superannuation scheme, the employee shall only receive under subclause (4) of this clause the difference between the severance pay specified in that subclause and the amount of the superannuation benefit the employee receives which is attributable to employer contributions only.
- (b) If the superannuation benefit is greater than the amount due under subclause (4) of this clause then the employee shall receive no payment under that paragraph.
- (c) Provided that benefits arising directly or indirectly from contributions made by an employer in accordance with an award, agreement or order made or registered under the Industrial Relations Act 1979 or the Industrial Relations Act 1988, or in accordance with the Superannuation Guarantee (Administration) Act 1992, shall not be taken into account unless the Commission so orders in a particular case.

(6) Employee Leaving During Notice

An employee whose employment is terminated for reasons set out in subclause (2) above may terminate his or her employment during the period of notice and, if so, shall be entitled to the same benefits and payments under this clause had he or she remained with the employer until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice in accordance with Clause 20. - Contract of Employment and Termination.

(7) Alternative Employment

- (a) The employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee.
- (b) Where the employer in a particular redundancy case obtains employment for an employee, which is:
 - (i) equivalent in status and salary or wages to the former position; and
 - (ii) does not require the employee to travel any further to his or her new employment than the employee was travelling to his or her former employment,

he employer is not required to make payments in accordance with subclause (4) above. Provided that the union may refer such matter to the Commission for determination.

(8) Time Off During Notice Period

- (a) During the period of notice of termination given by the employer an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.
- (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or they shall not receive payment for the time absent.

For the purpose a statutory declaration will be sufficient.

(9) Notice to Commonwealth Employment Service

Where a decision has been made to terminate the services of 15 or more employees in the circumstances outlined in subclause (2) above, the employer shall notify the Commonwealth Employment Service thereof as soon as possible giving relevant information including the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out.

- (10) **Transmission of Business**
- (a) Where a business is before or after the date of this award, transmitted from one employer (in this subclause called "the transmitter") to another employer (in this subclause called "the transmittee") and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee:
- (i) The continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission; and
- (ii) The period of employment which the employee has had with the transmitter or any prior transmitter shall be deemed to be service of the employee with the transmittee.
- (b) In this subclause "business" and "transmission" has the same meaning and effect as in the Long Service Leave General Order at Volume 59 of the Western Australian Industrial Gazette, at pages 1 to 6.
- (11) **Employees With Less Than One Year's Service**
- This clause shall not apply to employees with less than one year's continuous service and the general obligation on the employer should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity, and to take such steps as may be reasonable to facilitate the obtaining by employees of suitable alternative employment.
- (12) **Employees Exempted**
- This clause shall not apply where employment is terminated as a consequence of conduct that justifies instant dismissal, including malingering, inefficiency or neglect of duty, or in the case of casual employees, apprentices, or employees engaged for a specific period of time or for a specified task or tasks.
- (13) **Incapacity to Pay**
- An employer in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the employer's incapacity to pay.

APPENDIX 1 - PARENTAL LEAVE ENTITLEMENTS

- (1) **Maternity Leave**
- (a) **Nature of Leave**
- Maternity leave is unpaid leave
- (b) **Definitions**
- For the purposes of this subclause:
- (i) "Paternity leave" means leave of the type provided for in subclause (2) of this Clause whether prescribed in an award or otherwise.
- (ii) "Child" means a child of the employee under the age of one year.
- (c) **Eligibility for Maternity Leave**
- An employee who becomes pregnant, upon production to the Employer of the certificate required by paragraph (d) hereof, shall be entitled to a period of up to 52 weeks maternity leave provided that such leave shall not extend beyond the child's first birthday. This entitlement shall be reduced by any period of paternity leave taken by the employee's spouse in relation to the same child and apart from paternity leave of up to one week at the time of confinement shall not be taken concurrently with paternity leave, specified in the relevant statutory declaration.
- Subject to paragraphs (f) and (i) hereof the period of maternity leave shall be unbroken and shall, immediately following confinement include a period of six weeks compulsory leave. Notwithstanding the requirement to take compulsory leave, an employee may request to return to work at any time, subject to the agreement of the employer.
- The employee must have had at least 12 months continuous service with the Employer immediately preceding the date upon which she proceeds upon such leave.
- (d) **Certification**
- At the time specified in paragraph (e) the employee must produce to the Employer;
- (i) A certificate from a registered medical practitioner stating that she is pregnant and the expected date of confinement;
- (ii) a statutory declaration stating particulars of any period of paternity leave sought or taken by her spouse and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment.
- (e) **Notice Requirements**
- (i) An employee shall, not less than ten weeks prior to the presumed date of confinement, produce to the employer the certification referred to in subparagraph placitum (i) of paragraph (d) above.

- (ii) An employee shall give not less than four weeks notice in writing to the Employer of the date upon which she proposes to commence maternity leave stating the period of leave to be taken and shall, at the same time, produce to the Employer the statutory declaration referred to in placitum (ii) of paragraph (d) above.
 - (iii) The Employer by not less than 14 days notice in writing to the employee may require her to commence maternity leave at any time within the six weeks immediately prior to the presumed date of confinement.
 - (iv) An employee shall not be in breach of this Clause as a consequence of failure to give the specified period of notice in accordance with placitum (ii) hereof if such failure is occasioned:
 - (aa) by the confinement occurring earlier than the presumed date, or
 - (bb) due to compelling circumstances, it was not reasonably practicable for the employee to comply; or
 - (cc) by the employee submitting the application as soon as reasonably practicable before, on or after the first day of the leave.
- (f) **Transfer to a Safe Job**
- Where in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee shall, if the Employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of maternity leave.
- If the transfer to a safe job is not practicable, the employer may, or the Employer may require the worker to, take leave for such period as is certified necessary by a registered medical practitioner. Such leave shall be treated as maternity leave for the purposes of paragraphs (j), (k), (l) and (m) hereof.
- (g) **Variation of Period of Maternity Leave**
- (i) Provided the maximum period of maternity leave does not exceed the period to which the employee is entitled under paragraph (c) hereof;
 - (aa) the period of maternity leave may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;
 - (bb) The period may be further lengthened by agreement between the employee and the Employer.
 - (ii) The period of maternity leave may, with the consent of the Employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.
- (h) **Cancellation of Maternity Leave**
- (i) Maternity leave, applied for but not commenced, shall be cancelled when the pregnancy of a employee terminates other than by the birth of a living child.
 - (ii) Where the pregnancy of an employee then on maternity leave terminates other than by the birth of a living child, it shall be the right of the employee to resume work at a time nominated by the Employer which shall not exceed four weeks from the date of notice in writing by the employee to the Employer that she desires to resume work.
- (i) **Special Maternity Leave and Sick Leave**
- (i) Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child then -
 - (aa) she shall be entitled to such period of unpaid leave (to be known as special maternity leave) as a registered medical practitioner certifies as necessary before her return to work, or
 - (bb) for illness other than the normal consequences of confinement she shall be entitled, either in lieu of or in addition to special maternity leave, to such paid sick leave as to which she is then entitled and which a registered medical practitioner certifies as necessary before her return to work.
 - (ii) Where an employee not then on maternity leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special maternity leave) as a registered practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special maternity leave and maternity leave shall not exceed the period to which the employee is entitled under paragraph (c) hereof.
 - (iii) For the purposes of paragraph (j), (k) and (l) hereof, maternity leave shall include special maternity leave.
 - (iv) An employee returning to work after the completion of a period of leave taken pursuant to this paragraph shall be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to paragraph (f), hereof to the position she held immediately before such transfer.

Where such position no longer exists but there are other positions available, for which the employee is qualified for and is capable of performing she shall be entitled to a position as nearly comparable in status and pay to that of her former position.

(j) Maternity Leave and Other Leave Entitlements

- (i) Provided the aggregate of any leave, including leave taken under this subclause, does not exceed the period to which the employee is entitled under paragraph (c) hereof, an employee may in lieu of or in conjunction with maternity leave, take any annual leave or long service leave or any part thereof to which she is entitled.
- (ii) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during her absence on maternity leave.

(k) Effect of Maternity Leave on Employment

Subject to this subclause, irrespective of any award or other provision to the contrary, absence on maternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

(l) Termination of Employment

- (i) An employee on maternity leave may terminate her employment at any time during the period of leave by notice given in accordance with this award.
- (ii) The Employer shall not terminate the employment of an employee on the ground of her pregnancy or of her absence on maternity leave, but otherwise the rights of the Employer in relation to termination of employment are not hereby affected.

(m) Return to Work After Maternity Leave

- (i) An employee shall confirm her intention of returning to her work by notice in writing to the Employer given not less than four weeks prior to the expiration of her period of maternity leave.
- (ii) An employee upon returning to work after maternity leave or the expiration of the notice required by paragraph (i) hereof, shall be entitled to the position which she held immediately before proceeding on maternity leave or, in the case of an employee who was transferred to a safe job pursuant to paragraph (f) hereof, to the position which she held immediately before such transfer or in relation to an employee who has worked part time during the pregnancy the position she held immediately before commencing such part time work.

Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, she shall be entitled to a position as nearly comparable in status and pay to that of her former position.

(n) Replacement Workers

- (i) A replacement employee is an employee specifically engaged as a result of an employee proceeding on maternity leave.
- (ii) Before the Employer engages a replacement employee the Employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
- (iii) Before the Employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising her rights under this subclause, the Employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (iv) Nothing in this subclause shall be construed as requiring a Employer to engage a replacement employee or to continue to employ the replacement employee beyond the date of return of the employee.

(2) Paternity Leave

(a) Nature of Leave

Paternity leave is unpaid leave

(b) Definitions

For the purposes of this subclause

- (i) "Maternity leave" means leave of the type provided for in subclause (1) of this clause and includes special maternity leave whether prescribed in an award or otherwise.
- (ii) "Child" means a child of the employee or the employee's spouse under the age of one year.
- (iii) "Primary care-giver" means a person who assumes the principal role of providing care and attention to a child.

(c) Eligibility for Paternity Leave

A male employee upon production to the Employer of the certification required by paragraph (f) hereof, shall be entitled to one or two periods of paternity leave, the total of which shall not exceed 52 weeks, in the following circumstances:

- (i) An unbroken period of up to one week at the time of confinement of his spouse;
- (ii) A further unbroken period of up to 51 weeks in order to be the primary care-giver of a child provided that such leave shall not extend beyond the child's first birthday. This entitlement shall be reduced by any period of maternity leave taken by the employee's spouse in relation to the same child and shall not be taken concurrently with that maternity leave.

The employee must have had at least 12 months continuous service with the Employer immediately preceding the date upon which he proceeds upon either period of leave.

(d) Certification

At the time specified in paragraph (e) the employee must produce to the Employer;

- (i) A certificate from a registered medical practitioner which names his spouse, states that she is pregnant and the expected date of confinement or states the date on which the birth took place;
- (ii) in relation to any period to be taken under placitum (ii) of paragraph (c) hereof, a statutory declaration stating:
 - (aa) He will take that period of paternity leave to become the primary care-giver of a child;
 - (bb) particulars of any period of maternity leave sought or taken by his spouse; and
 - (cc) for the period of paternity leave he will not engage in any conduct inconsistent with his contract of employment.

(e) Notice Requirements

- (i) The employee shall, not less than ten weeks prior to each proposed period of leave, give the Employer notice in writing stating the dates on which he proposes to start and finish the period or periods of leave and produce the certificate and statutory declaration required in paragraph (d) hereof.
- (ii) The employee shall not be in breach of this paragraph as a consequence of failure to give the notice required in paragraph (a) hereof if such failure is due to:
 - (aa) The birth occurring earlier than the expected date; or
 - (bb) the death of the mother of the child; or
 - (cc) other compelling circumstances.
- (iii) The employee shall immediately notify the Employer of any change in the information provided pursuant to paragraph (d) hereof.

(f) Variation of Period of Paternity Leave

- (i) Provided the maximum period of paternity leave does not exceed the period to which the employee is entitled under paragraph (c) hereof:
 - (aa) The period of paternity leave provided by placitum (ii) of paragraph (c) may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;
 - (bb) The period may be further lengthened by agreement between the Employer and the employee.
- (ii) The period of paternity leave taken under placitum (ii) of paragraph (c) hereof may, with the consent of the Employer be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

(g) Cancellation of Paternity Leave

- (i) Paternity leave, applied for under placitum (ii) of paragraph (c) hereof but not commenced, shall be cancelled when the pregnancy of the employee's spouse terminates other than by the birth of a living child.
- (ii) Paternity leave shall terminate within four weeks if the employee ceases to be the child's primary care giver, or such other period as agreed between the employee and the employer.

(h) Paternity Leave and Other Leave Entitlements

- (i) Provided the aggregate of any leave, including leave taken under this subclause, does not exceed the period to which the employee is entitled under paragraph (c) hereof, an employee may, in lieu of or in conjunction with paternity leave, take any annual leave or long service leave or any part thereof to which he is entitled.
- (ii) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during his absence on paternity leave.

- (i) **Effect of Paternity Leave on Employment**
 Subject to this subclause, notwithstanding any award or other provision to the contrary, absence on paternity leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.
- (j) **Termination of Employment**
- (i) An employee on paternity leave may terminate his employment at any time during the period of leave by notice given in accordance with this Award.
- (ii) The Employer shall not terminate the employment of an employee on the ground of his absence on paternity leave, but otherwise the rights of the Employer in relation to termination of employment are not hereby affected.
- (k) **Return to Work After Paternity Leave**
- (i) An employee shall confirm his intention of returning to work by notice in writing to the Employer given not less than four weeks prior to the expiration of the period of paternity leave provided by placitum (ii) of paragraph (c) hereof.
- (ii) An employee, upon returning to work after paternity leave or the expiration of the notice required by placitum (i) above, shall be entitled to the position which he held immediately before proceeding on paternity leave or, in relation to an employee who has worked part time under this clause to the position he held immediately before commencing such part time work.
 Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, he shall be entitled to a position as nearly comparable in status and pay to that of his former position.
- (l) **Replacement Employees**
- (i) A replacement employee is an employee specifically engaged as a result of an employee proceeding on paternity leave.
- (ii) Before the Employer engages a replacement employee the Employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
- (iii) Before the Employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising his rights under this subclause, the Employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (iv) Nothing in this subclause shall be construed as requiring a Employer to engage a replacement employee or to continue to employ the replacement employee beyond the date of return of the employee.
- (3) **Adoption Leave**
- (a) **Nature of Leave**
 Adoption leave is unpaid leave
- (b) **Definitions**
 For the purposes of this subclause
- (i) "Child" means a person under the age of five years who is placed with the employee for the purposes of adoption, other than a child or step-child of the employee or of the spouse of the employee or a child who has previously lived continuously with the employee for a period of six months or more.
- (ii) "Relative Adoption" occurs where a child, as defined, is adopted by a grandparent, brother, sister, aunt or uncle (whether of whole blood or half blood or by marriage).
- (iii) "Primary care-giver" means a person who assumes the principal role of providing care and attention to a child.
- (c) **Eligibility**
 An employee, upon production to the Employer of the certification required by paragraph (d) hereof, shall be entitled to one or two periods of adoption leave, the total of which shall not exceed 52 weeks, in the following circumstances:
- (i) An unbroken period of up to three weeks at the time of placement of the child;
- (ii) An unbroken period of up to 52 weeks from the time of the child's placement in order to be the primary care-giver of a child. This leave shall not extend beyond one year after the placement of the child and shall not be taken concurrently with adoption leave taken by the employee's spouse in relation to the same child. This entitlement of up to 52 weeks shall be reduced by:
- (aa) Any period of leave taken pursuant to placitum (i) above; and
- (bb) the aggregate of any periods of adoption leave taken or to be taken by the employee's spouse;

The employee must have had at least 12 months continuous service with the Employer immediately preceding the date upon which he or she proceeds on such leave in either case.

- (iii) The entitlement to adoption leave must not overlap with any periods of adoption leave taken by the employee's spouse, except an unbroken period of up to three weeks at the time of placement of the child.
- (d) **Certification**

Before taking adoption leave the employee must produce to the Employer;

 - (i) (aa) A statement from an adoption agency or other appropriate body of the presumed date of placement of the child with the employee for adoption purposes; or
 - (bb) a statement from the appropriate government authority confirming that the employee is to have custody of the child pending application for an adoption order.
 - (ii) in relation to any period to be taken under placitum (ii) of paragraph (3) hereof, a statutory declaration stating:
 - (aa) The employee is seeking adoption leave to become the primary care-giver of the child;
 - (bb) particulars of any period of adoption leave sought or taken by the employee's spouse; and
 - (cc) for the period of adoption leave the employee will not engage in any conduct inconsistent with his or her contract of employment.
- (e) **Notice Requirements**
 - (i) Upon receiving notice of approval for adoption purposes, an employee shall notify the Employer of such approval and within two months of such approval shall further notify the Employer of the period or periods of adoption leave the employee proposes to take. In the case of a relative adoption the employee shall notify as aforesaid upon deciding to take a child into custody pending an application for an adoption order.
 - (ii) An employee who commences employment with the Employer after the date of approval for adoption purposes shall notify the Employer thereof upon commencing employment and of the period or periods of adoption leave which the employee proposes to take. Provided that such employee shall not be entitled to adoption leave unless the employee has not less than 12 months continuous service with the Employer immediately preceding the date upon which he or she proceeds upon such leave.
 - (iii) An employee shall, as soon as the employee is aware of the presumed date of placement of a child for adoption purposes but no later than 14 days before such placement, give notice in writing to the employer of such date, and of the date of the commencement of any period of leave to be taken under placitum (i) of paragraph (c) hereof.
 - (iv) An employee shall, ten weeks before the proposed date of commencing any leave to be taken under placitum (ii) of paragraph (c) hereof, give notice in writing to the Employer of the date of commencing leave and the period of leave to be taken.
 - (v) An employee shall not be in breach of this subclause, as a consequence of failure to give the stipulated period of notice in accordance with placitum (iii) and (iv) hereof if such failure is occasioned by the requirement of an adoption agency to accept earlier or later placement of a child, the death of the spouse or other compelling circumstances.
 - (vi) The employee shall immediately notify the employer of any change in the information provided pursuant to this subclause.
- (f) **Variation of Period of Adoption Leave**
 - (i) Provided the maximum period of adoption leave does not exceed the period to which the employee is entitled under paragraph (c) hereof:
 - (aa) The period of leave taken under placitum (ii) of paragraph (c) hereof may be lengthened once only by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened;
 - (bb) The period may be further lengthened by agreement between the Employer and the employee.
 - (ii) The period of adoption leave taken under placitum (ii) of paragraph (c) hereof may, with the consent of the Employer be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.
- (g) **Cancellation of Adoption Leave**
 - (i) Adoption leave, applied for but not commenced, shall be cancelled should the placement of the child not proceed.

- (ii) Where the placement of a child for adoption purposes with an employee then on adoption leave does not proceed or continue, the employee shall notify the Employer forthwith and the Employer shall nominate a time not exceeding four weeks from receipt of notification for the employee's resumption of work.
- (iii) Adoption leave shall terminate within a reasonable period if the employee ceases to be the child's primary care giver.
- (h) **Special Leave**
The Employer shall grant to any employee who is seeking to adopt a child, such unpaid leave not exceeding two days, as is required by the employee to attend any compulsory interviews or examinations as are necessary as part of the adoption procedure. Where paid leave is available to the employee the Employer may require the employee to take such leave in lieu of special leave.
 - (i) **Adoption Leave and Other Entitlements**
 - (i) Provided the aggregate of any leave, including leave taken under this subclause, does not exceed the period to which the employee is entitled under paragraph (c) hereof, an employee may, in lieu of or in conjunction with adoption leave, take any annual leave or long service leave or any part thereof to which he or she is entitled.
 - (ii) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during the employee's absence on adoption leave.
- (j) **Effect of Adoption Leave on Employment**
Subject to this subclause, irrespective of any award or other provision to the contrary, absence on adoption leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.
- (k) **Termination of Employment**
 - (i) An employee on adoption leave may terminate the employment at any time during the period of leave by notice given in accordance with this award.
 - (ii) The Employer shall not terminate the employment of an employee on the ground of the employee's application to adopt a child or absence on adoption leave, but otherwise the rights of the Employer in relation to termination of employment are not hereby affected.
- (l) **Return to Work After Adoption Leave**
 - (i) An employee shall confirm the intention of returning to work by notice in writing to the Employer given not less than four weeks prior to the expiration of the period of adoption leave provided by placitum (ii) of paragraph (c) hereof.
 - (ii) An employee, upon returning to work after adoption leave shall be entitled to the position held immediately before proceeding on such leave or, in relation to an employee who has worked part time under this clause to the position held immediately before commencing such part time work.
Where such position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee shall be entitled to a position as nearly comparable in status and pay to that of the employee's former position.
- (m) **Replacement Employees**
 - (i) A replacement employee is an employee specifically engaged as a result of an employee proceeding on adoption leave.
 - (ii) Before the Employer engages a replacement employee the Employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
 - (iii) Before the Employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising rights under this subclause, the Employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
 - (iv) Nothing in this subclause shall be construed as requiring a Employer to engage a replacement employee or to continue to employ the replacement employee beyond the date of return of the employee.
- (4) **Part Time Work**
 - (a) **Definitions**
For the purpose of this subclause:
 - (i) "Male employee" means a employed male who is caring for a child born of his spouse or a child placed with the employee for adoption purposes.
 - (ii) "Female employee" means an employed female who is pregnant or is caring for a child she has borne or a child who has been placed with her for adoption purposes.

- (iii) "Former position" means the position held by a female or male employee immediately before proceeding on leave or part time employment under this subclause whichever first occurs or, if such position no longer exists but there are other positions available for which the employee is qualified and the duties of which he or she is capable of performing a position as nearly comparable in status and pay to that of the position first mentioned in this definition.
- (b) Entitlement
With the agreement of the Employer:
 - (i) A male employee may work part time in one or more periods at any time from the date of birth of the child until its second birthday or, in relation to adoption, from the date of placement of the child until the second anniversary of the placement.
 - (ii) A female employee may work part time in one or more periods while she is pregnant where part time employment is, because of the pregnancy, necessary or desirable.
 - (iii) A female employee may work part time in one or more periods at any time from the seventh week after the date of birth of the child until its second birthday.
 - (iv) In relation to adoption a female employee may work part time in one or more periods at any time from the date of the placement of the child until the second anniversary of that date.
- (c) Return to Former Position
 - (i) An employee who has had at least 12 months continuous service with the Employer immediately before commencing part time employment after the birth or placement of a child has, at the expiration of the period of such part time employment or the first period, if there is more than one, the right to return to his or her former position.
 - (ii) Nothing in placitum (i) hereof shall prevent the Employer from permitting the employee to return to his or her former position after a second or subsequent period of part time employment.
- (d) Effect of Part time Employment on Continuous Service
Commencement on part time work under this clause, and return from part time work to full time work under this clause, shall not break continuity of service or employment.
- (e) Pro Rata Entitlements
Subject to the provisions of this subclause and the matters agreed to in accordance with paragraph (f) hereof, part time employment shall be in accordance with the provisions of this award which shall apply pro-rata.
- (f) Part time Work Agreement
 - (i) Before commencing a period of part time employment under this subclause the employee and the Employer shall agree:
 - (aa) That the employee may work part time; Upon the hours to be worked by the employee, the days upon which they will be worked and commencing times for the work;
 - (bb) Upon the classification applying to the work to be performed; and
 - (cc) Upon the period of part time employment.
 - (ii) The terms of this agreement may be varied by consent.
 - (iii) The terms of this agreement or any variation to it shall be reduced to writing and retained by the Employer. A copy of the agreement and any variation to it shall be provided to the employee by the Employer.
 - (iv) The terms of this agreement shall apply to the part time employment.
- (g) Termination of Employment
 - (i) The employment of a part time employee under this clause, may be terminated in accordance with the provisions of this award but may not be terminated by the Employer because the employee has exercised or proposes to exercise any rights arising under this clause or has enjoyed or proposes to enjoy any benefits arising under this clause.
 - (ii) Any termination entitlements payable to an employee whose employment is terminated while working part time under this clause, or while working full time after transferring from part time work under this clause, shall be calculated by reference to the full time rate of pay at the time of termination and by regarding all service as a full time employment and all service as a part time employee on a pro-rata basis.
- (h) Extension of Hours of Work
The Employer may request, but not require, an employee working part time under this clause to work outside or in excess of the employee's ordinary hours of duty provided for in accordance with paragraph (f).
- (i) Nature of Part Time Work
The work to be performed part time need not be the work performed by the employee in his or her former position but shall be work otherwise performed under this award.
- (j) Inconsistent Award Provisions
An employee may work part time under this clause irrespective of any other provision of this award which limits or restricts the circumstances in which part time employment may be worked or the terms upon which it

may be worked including provisions prescribing a minimum or maximum number of hours a part time employee may work.

- (k) Replacement Employees
- (i) A replacement employee is an employee specifically engaged as a result of an employee working part time under this subclause.
 - (ii) A replacement employee may be employed part time. Subject to this paragraph, paragraphs (e), (f), (g) and (j) of this subclause apply to the part time employment of a replacement employee.
 - (iii) Before an employer engages a replacement employee under this paragraph, the Employer shall inform the person of the temporary nature of the employment and of the rights of the employee who is being replaced.
 - (iv) Unbroken service as a replacement employee shall be treated as continuous service for the purposes of placitum (v) of paragraph (a) hereof.
 - (v) Nothing in this subclause shall be construed as requiring a Employer to engage a replacement employee or to continue to employ the replacement employee beyond the date of return of the employee.

APPENDIX - RESOLUTION OF DISPUTES REQUIREMENT

- (1) This Appendix is inserted into the award/industrial agreement as a result of legislation which came into effect on 16 January 1996 (Industrial Relations Legislation Amendment and Repeal Act 1995) and further varied by legislation which came into effect on 23 May 1997 (Labour Relations Legislation Amendment Act 1997).
- (2) Subject to this appendix, and in addition to any current arrangements the following procedures shall apply in connection with questions, disputes or difficulties arising under this award/industrial agreement.
 - (a) The persons directly involved, or representatives of person/s directly involved, shall discuss the question, dispute or difficulty as soon as is practicable.
 - (b)
 - (i) If these discussions do not result in a settlement, the question, dispute or difficulty shall be referred to senior management for further discussion.
 - (ii) Discussions at this level will take place as soon as practicable.
- (3) The terms of any agreed settlement should be jointly recorded.
- (4) Any settlement reached which is contrary to the terms of this award/industrial agreement shall not have effect unless and until that conflict is resolved to allow for it.
- (5) Nothing in this appendix shall be read so as to exclude an organisation party to or bound by the award/industrial agreement from representing its members.
- (6) Any question, dispute or difficulty not settled may be referred to the Western Australian Industrial Relations Commission provided that with effect from 22 November 1997 it is required that persons involved in the question, dispute or difficulty shall confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking those matters to the Commission..

SCHEDULE "A"

The following goods and services are prescribed for the purposes of sale at a small retail shop:

- (a) essential and convenience items; being
 - (i) food (excluding fresh meat other than in prepacked quantities not exceeding 500g weight);
 - (ii) smokers' requisites;
 - (iii) newspapers, books and stationery;
 - (iv) pet and veterinary requisites;
 - (v) household cleaning products (excluding electrical appliances);
 - (vi) light globes;
 - (vii) torches;
 - (viii) dry batteries;
 - (ix) first aid requisites; and
 - (x) toilet and cosmetic requisites;
- (b) drapery, being -
 - (i) any cloth or textile, fabric, linen or dress materials;
 - (ii) towels, sheets and pillowcases;
 - (iii) rugs, blankets, eiderdowns, quilts and bedcovers; and
 - (iv) loose covers for floors and furniture;
- (c) haberdashery;
- (d) clothing (excluding footwear, hats, gloves and handbags);
- (e) art supplies and equipment;

- (f) sporting equipment (excluding any vehicle subject to registration under the Road Traffic Act 1974 and any craft or vessel, other than inflatable craft, subject to registration under the Navigable Waters Regulations made under the Western Australian Marine Act 1982, the Shipping and Pilotage Act 1967 and the Jetties Act 1926);
- (g) camping equipment (including portable AC/DC coolers and generators);
- (h) giftware (including trophies, glassware, novelties, costume jewellery);
 - (i) photographic equipment (excluding video equipment);
- (j) kitchenware (excluding powered equipment);
- (k) second-hand furniture (including domestic electrical appliances);
- (l) cassette tapes, records and compact discs;
- (m) prints, framing and blocking;
- (n) toys (excluding mains operated computer games and equipment);
- (o) goods and services, other than pharmaceutical goods and services, prescribed under Schedule "B" in relation to a special retail shop.

SCHEDULE "B"

The following goods and services are prescribed for the purposes of sale at a special retail shop.

	Column 1	Column 2
	Shop Categories	Goods and Services
1	Art and craft (shops engaged in the sale of art and craft works)	Original art and craft works; prints and reproductions of original works; art and craft related reading materials.
2	Souvenirs (shop offering items of tourism significance)	Souvenirs featuring Australian flora, fauna, locations, characteristics or events of national significance; souvenirs projecting the flavour of the pioneering era or Aboriginal culture; original Australian art and craft works, reading materials and video cassettes of tourism significance; souvenirs and jewellery featuring Australian minerals and pearls valued at not more than \$1000.00 per item; souvenirs crafted from unique Australian woods, hides or skins; Australian coins.
3	Pharmaceutical (shops from which the principal activity involves the dispensing of medical prescriptions)	Goods and services which may be sold or provided in a pharmacy under section 40A of the Pharmacy Act 1964.
4	Home improvements (shops engaged in the sale of major domestic improvements)	Swimming pools; spas; patios; garages; home additions; household fixtures and fittings (excluding free standing furniture, carpets and electrical items).
5	Nurseries, florists and landscaping (shops principally engaged in the sale of floral arrangements and products for the establishment and maintenance of gardens).	Flowers; greenstocks; seeds and bulbs; reticulation equipment; hoses, sprinklers and fittings fertilizers, pesticides, herbicides, applicators and related personal protective items; garden related tools and ancillary items excluding power operated tools; compost tumblers; garden sheds; landscaping and garden decorative products (excluding furniture items); plant containers and household items for the display of garden produce; garden related books and video cassettes.
6	Video Shops	Video cassette tapes and video head cleaning products.
7	Hardware (shops principally offering items for the purposes of domestic construction and maintenance.)	Domestic construction and maintenance materials; paint and wallpaper products and accessories; tools; household fixtures and fittings (excluding free standing furniture [other than wooden outdoor furniture and accessories], carpets and electrical items); household cleaning products (excluding powered equipment); reticulation equipment, hoses, sprinklers and fittings; fertilizers, pesticides and herbicides; swimming pool chemicals and accessories; garden sheds; extension cords and electrical fittings (excluding decorative light fittings); maintenance related books and video cassettes; barbecues; kitchenware (excluding electrical items); solid fuel space heaters; outdoor lighting; water heaters; gas powered camping equipment and accessories; awnings and blinds; nursery and landscaping products (excluding fresh flowers and plants).

SCHEDULE "C"RESPONDENTS

ACI Fibreglass
Acme Group Pty Ltd
Addressograph Multigraph of Aust. Pty Ltd
AFA Airfreight Pty Ltd
Aherns Pty Ltd
Airport Retail Enterprises
Alco
Allmark and Associates Pty Ltd
Alaska Investments Pty Ltd Trading for Hugal and Hoile Unit Trust T/A Hugal and Hoile (WA)
Alsco Linen Service Pty Ltd
Angliss and Co (Aust) Pty Ltd
Angus and Coote Audioclinic
ANI Products
Arcus Commercial Refrigeration Pty Ltd
Arnotts Biscuits Ltd
Atkins Carlyle Ltd
AT and T Global Information Solutions (Aust) Pty Ltd
3M Australia Pty Ltd
Australian Abrasives Pty Ltd
Australian Consolidated Investments Ltd
Australian Glass Manufacturers Co
Australian Shipbuilding Industries (WA) Pty Ltd
Avion Australia
AWA Ltd
Baily CH & Son
Bank of New South Wales
Baroid (Aust) Pty Ltd
Bayer Aust Ltd
Bearing Service Pty Ltd
Bell, Reg A Ltd
Bell Bros Pty Ltd
Belmont Forum Food Centre
Beta Pet Meals Pty Ltd
Boart Longyear Pty Ltd
Boral Windows Pty Ltd
Bradford Insulation (WA) Ltd
Bradmill Industries Ltd
Bristle Clay Tiles
Brown & Dureau Pty Ltd
BTR Engineering (Aust) Ltd
BTS Pty Ltd
Buildex Industries
Bunning Bros
Burns Philip Food Properties Pty Ltd
Cable Makers Aust (WA) Pty Ltd
CAI Fences

Candle Light Co Pty Ltd
Canning Engineers Pty Ltd
Cargill's Pty Ltd
Cement Aid (WA) Pty Ltd
Cereal Foods Pty Ltd
Chandon Pty Ltd
Channel 7
Charlie Carters Pty Ltd
Churchill Gallery
City Milling Pty Ltd
Coates Hire Service
Coles & Co Ltd GJ
Commonwealth Industrial Gases Ltd
Coolbellup Deli
Cottees Foods
Coventrys
CSR Building Material
Dalgety Holdings Pty Ltd
Davro Interiors Pty Ltd
De Wolf N and Associates Pty Ltd
Diamond and Boart Pty Ltd
Doogue G. Esq Lucky Lottery Agency
D'Orsogna Bros Pty Ltd
Dreske-Someff Pty Ltd
Dulux Australia
Dunlop and Olympic Tyres
Dunlopillo Pty Ltd
ED Oates Brushware Pty Ltd
Edwards Dunlop and Co
Eilbeck Wire Industries Pty Ltd
Elder Smith Goldsbrough Mort
Electrolux Pty Ltd
Email Ltd
EMI Music (Aust) Pty Ltd
Engineering Supplies (WA) Pty Ltd
Evans Deakin Industries Ltd
Faulding & Co Ltd FH
Federal Loan Office
Felt Products of WA
Fern Investment
Filter Supplies (WA)
Flexascreen Pty Ltd
Flower Davies-Wemco Pty Ltd
Ford Motor Co (Aust) Ltd
Fosroc Expandite
Fremantle Bond Store Pty Ltd
Fremantle Fisherman's Co-op Soc Ltd
Fuji Xerox Aust Pty Ltd

Gadsden Pty Ltd J
Galvin Roy & Co Pty Ltd
Gamemaster Billiard Tables
Garlock Pty Ltd
GEASF Nominees Pty Ltd
GEC-AGI (Aust)
Gibbs Bright & Co
Gibson Benness Industries Pty Ltd
Globe Meats
Golden Sheaf Macaroni (WA) Pty Ltd
Gordon and Gotch (A/Asia) Ltd
Gray and Co Ltd D
H F Holland Pty Ltd
Hanimex Pty Ltd
Hardie & Co James
Hart & Co SW
Hawker Noyes Investments Pty Ltd
Hayman and Sons Pty Ltd
Heidelberg Harris Aust Pty Ltd
Hills Industries Ltd
Hoover (Aust) Pty Ltd
Hotel and Cafe Supplies Pty Ltd
Hunts Canning Co Pty Ltd
IBM Ltd
IBM Aust Ltd
ICI Australia Ltd
Ilford (Aust) Pty Ltd
Ingot Metal WA
International Floral Boutique
IPE Packaging Pty Ltd
Jackson's Drawing Supplies Pty Ltd
Jason Industries Ltd
John Sands Pty Ltd
Jones Blind and Awning Co
Joyce Bros (WA) Pty Ltd
Jute Manufacturer's (WA) Pty Ltd
Kodak (A/Asia) Pty Ltd
Kolotex Australia Pty Ltd
Kraft Foods Ltd
Lever Rexona
Lockyer Simpson Pty Ltd
London Court Florist
Lysaght (Aust) Ltd John
McDougall Pty Ltd
McPhersons Ltd
Marigny (A/Asia) Pty Ltd
Marshall Flower Manufacturer's Agencies
Massey Ferguson Iseki Australia Ltd

Medical Teletronics Pty Ltd
Mettler Toledo Ltd
Meuleman's Sport Supply
Middlewicks
Millars (WA) Pty Ltd
Milne and Co Pty Ltd WH
Mine Safety Appliances (AUST) Pty Ltd
Minster Carpets Pty Ltd
Moss Pty Ltd George
Morley Delicatessen
Myer Stores Ltd (incorporated in Victoria)
Myer (WA) Stores Ltd
National Can (WA) Pty Ltd
Nestles Aust Ltd
Newcastle Shop Fitters
Nolan Shannon (WA) Pty Ltd
Norcross Australia Greeting Cards
Nylex Corporation Ltd
Moulden Products (WA) Pty Ltd
Oakwood Finance Pty Ltd
Ocean Pools Pty Ltd
Olympic Tyre and Rubber Co Pty Ltd
Pak Pacific Corp. Pty Ltd
Pellegrini & Co (W.A.) Pty Ltd
Perrott, Vance and Sons
Perth Jukebox Hire Services
Pine Valley Flowers (WA) Pty Ltd
Plunkett Baby Furniture Pty Ltd
Poon Bros (W.A.) Pty Ltd
Poultry Growers of W.A. Co-op Society Ltd
Rapid Metal Development Aust Pty Ltd
Ready Lime Putty Pty Ltd
Repco Auto Parts
Rheem Aust Ltd
Rowntree Hoadley Ltd
Sadleir & Co. Pty Ltd R.C.
St. REGIS-ACI Pty Ltd
Sands & McDougall (Aust) Pty Ltd
Sanitarium Health Food Co.
Sara and Cook Pty Ltd
Scott Bonnar Sales Pty Ltd
Sealane Supplies
Sellys Chemical Co. Pty Ltd
Sew-Knit Enterprises Pty Ltd
Sheridan's Engraving & Metal Stamping Co.
Shimenson's Surplus Stores
Siemens Industries Ltd
Simplex International Time Equipment Pty Ltd

Simpson and Kelvinator Sales Pty Ltd
 Simsmetal Ltd
 Sirs for Men Pty Ltd
 Smith Copeland (WA) Pty Ltd
 Smith & Co. W.H.
 Smits, Wim Esq, Philatelists
 Spicers (Aust) P/L, Spicer Cowan
 S.S. Enterprises Westralia Pty Ltd
 Streeter & Male Pty Ltd
 Sunshine General Industries Pty Ltd
 Swan Motor Wreckers Ltd
 Swan Settlers Co-op Assn
 Tony Sadler Pty Ltd
 Tough Instrument Co.
 Tropical Traders
 Ullrich Noyes Bros Pty Ltd
 Unilever Australia Pty Ltd
 United Motors
 United Welders Pty Ltd
 Venables Pty Ltd L & T
 V.S. Supplies
 W.A. Salvage Co.
 Watsons Food Holdings Pty Ltd
 Wells & Son, H.E.
 Wesfarmers Kleenheat Gas Pty Ltd
 Western Glass Works Pty Ltd
 Western Refrigeration 74
 Westralian Drug Co. Pty Ltd
 Westralian Farmers Co-Op Ltd
 Wigg E.S. & Son Pty Ltd
 Wills (Aust) Ltd W.D. & H.O.
 Woolworths (W.A.) Ltd
 Wormald Electronics
 Yeast of Australia
 Young (Aust) P/L, Marjorie

SCHEDULE D - UNION PARTY

The Union party to this award is The Shop, Distributive and Allied Employees' Association of Western Australia.

APPENDIX - S.49B - INSPECTION OF RECORDS REQUIREMENTS

- (1) Where this award, order or industrial agreement empowers a representative of an organisation of employees party to this award, order or industrial agreement to inspect the time and wages records of an employee or former employee, that power shall be exercised subject to the Industrial Relations (General) Regulations 1997 (as may be amended from time to time) and the following:
- (a) The employer may refuse the representative access to the records if: -
 - (i) the employer is of the opinion that access to the records by the representative of the organisation would infringe the privacy of persons who are not members of the organisation; and
 - (ii) the employer undertakes to produce the records to an Industrial Inspector within 48 hours of being notified of the requirement to inspect by the representative.
 - (b) The power of inspection may only be exercised by a representative of an organisation of employees authorised for the purpose in accordance with the rules of the organisation.
 - (c) Before exercising a power of inspection, the representative shall give reasonable notice of not less than 24 hours to an employer.

VARIATION RECORDTHE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977NO R32 OF 1976.

Delivered 02/09/77 at 57 WAIG 1324

Varied and Consolidated Order 1519/87 23/12/88 at 69 WAIG 1215 Section 93(6)

Consolidation at 29/09/92 72 WAIG 2401

CLAUSE NO.	EXTENT OF VARIATION	ORDER NO.	OPERATIVE DATE	GAZETTE REFERENCE
1. Title				
(1A. State Wage Principles)				
	Ins. Cl.	1752/91	31/01/92	72 WAIG 191
	Cl. & Title	1457/93	24/12/93	74 WAIG 198
(1A. State Wage Principles December 1993)				
	Cl. & Title	985/94	30/12/94	75 WAIG 23
(1A. Statement of Principles December 1994)				
	Cl. & Title	1164/95	21/03/96	76 WAIG 911
(1A. Statement of Principles March 1996)				
	Cl & Title	915/96	07/08/96	76 WAIG 3368
(1A Statement of Principles - August 1996)				
	Cl & Title	940/97	14/11/97	77 WAIG 3177
(1A. Statement of Principles - November 1997)				
	Cl. & Title	757/98	12/06/98	78 WAIG 2579
(1A. Statement of Principles - June, 1998)				
	Del. Cl.	609/99	06/07/99	79 WAIG 1843
1B. Minimum Adult Award Wage				
	Ins. 1B	940/97	14/11/97	77 WAIG 3177
	(1)-(8)	1456/98	23/10/98	78 WAIG 4368
	(2),(3),(5) & (8) rates & text	609/99	01/08/99	79 WAIG 1843
	Cl.	654/00	01/08/00	80 WAIG 3379

1B. Minimum Adult Award Wage —*continued*

Cl.	752/01	01/08/01	81 WAIG 1721
Cl.	797/02	01/08/02	82 WAIG 1369
Cl.	569/03	5/06/03	83 WAIG 1899 & 2611
(9)	1197/03	1/11/03	83 WAIG 3537
Cl.	570/04	4/06/04	84 WAIG 1521
Cl.	576/05	07/07/05	85 WAIG 2083, 2843
Cl.	957/05	7/07/06	86 WAIG 1631 & 2360
Cl.	1/07	01/07/07	87 WAIG 1487 & 2286
Cl.	115/07	01/07/08	88 WAIG 773 & 1490
Cl.	1/09	01/10/09	89 WAIG 735 & 1922
Cl.	2/10	01/07/10	90 WAIG 568 & 1313
Cl.	2/11	01/07/11	91 WAIG 1008 & 1711
Cl.	2/12	01/07/12	92 WAIG 1461
Cl.	1/13	01/07/13	93 WAIG 1129
Cl.	1/14	01/07/14	94 WAIG 1343
Cl.	1/15	01/07/15	95 WAIG 1311
Cl.	1/16	01/07/16	96 WAIG 1161
Cl.	1/17	01/07/17	97 WAIG 1226
Cl.	1/18	01/07/18	98 WAIG 263 & 948

2. Arrangement

Cl.	2441/89(R)	01/12/89	69 WAIG 3576
Del. (2B)	381/90	02/04/90	70 WAIG 1906
Ins. (47)	627/89	25/06/90	70 WAIG 2829

2. Arrangement —*continued*

Ins. (48)	614/90(R2)	10/08/90	70 WAIG 3732
Ins. (1A)	1752/91	31/01/92	72 WAIG 191
Ins. (49) & (50)	1135/91 & 318/92	22/05/92	72 WAIG 1348
Ins. Sch. D	345/93	31/05/93	73 WAIG 1836
1A. Title	1457/93	24/12/93	74 WAIG 198
1A. Title	985/94	30/12/94	75 WAIG 23
Del. (47); rename (47A); ins. (47B)	1326/92	07/02/95	75 WAIG 724
1A. Title	1164/95	21/03/96	76 WAIG 911
Del. (47A); rename (47B) as (47)	87/96	23/04/96	76 WAIG 1417
(24). title	234/96	23/04/96	76 WAIG 2005
Ins. Appendix - Resolution...	693/96	16/07/96	76 WAIG 2768
Ins. Appendix - S.49B...	694/96	16/07/96	76 WAIG 2789
1A. Title	915/96	07/08/96	76 WAIG 3368
Rename cl.(38)	144/95	25/10/96	76 WAIG 4693
Ins cl (51)	512B/96	25/10/96	76 WAIG 4925
(20) & (42) title; Ins. App 1 *(Corr/Ord.required to Ins after (51) and not (50)*	512(A)/96	25/10/96	76 WAIG 4695
Ins App 1 after cl. (51) - Correct/Ord	512(A)/96	08/11/96	76 WAIG 4702
1A	940/97	14/11/97	77 WAIG 3177
Ins. 1B	940/97	14/11/97	77 WAIG 3177
1A. Title	757/98	12/06/98	78 WAIG 2579
Del. 1A	609/99	06/07/99	79 WAIG 1843

(2A. State Wage Principles - September 1988)

Del. cl.	1940/89	08/09/89	69 WAIG 2913
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2A. No Extra Claims

Ins. cl.	2441/89(R)	01/12/89	69 WAIG 3576
Cl.	1100(1)/91	01/10/91	71 WAIG 2592

(2B. Easter Week Variations 1989)

Ins. cl.	237/89	10/03/89	69 WAIG 1129
Del. cl.	381/90	02/04/90	70 WAIG 1906

3. Scope**4. Area****5. Term****6. Definitions**

Ins. (16)	614/90(R2)	10/08/90	70 WAIG 3732
(12); ins. (15); Renum (15)&(16) as (16)&(17)	2008/90	07/06/91	71 WAIG 1515
Del. (7) & renum exist (8-17) as (7-16)	512(A)/96	25/10/96	76 WAIG 4695

7. Casual Workers

(4)(c)	641/89	01/08/89	69 WAIG 2095
Text - (2); del. (2)(c), (2)(d) & (4)(c)	614/90(R2)	10/08/90	70 WAIG 3732

7A. Nightfill Duty

(9); del. (10)-(12)	614/90(R2)	10/08/90	70 WAIG 3732
Rates - (9)(a)(i)(aa),(bb) (9)(a)(ii)(aa)-(cc)	1100(1)/91	01/10/91	71 WAIG 2592
Rates - (9)(a)(i)(aa)&(bb) & (9)(a)(ii)(aa) (bb) & (cc)	607/96	26/09/96	76 WAIG 4313
Rates - (9)(a)(i)(aa)&(bb) & (9)(a)(ii)(aa) (bb) & (cc)	1262/99	28/10/99	79 WAIG 3407
Rates - (9)(a)(i)(aa)&(bb) & (9)(a)(ii)(aa) (bb) & (cc)	1609/02	10/01/02	82 WAIG 285
(9)	1408/02	20/11/02	82 WAIG 3235
(9)	1007/03	28/10/03	83 WAIG 3635

7A. Nightfill Duty —*continued*

(9)	853/04	05/11/04	84 WAIG 3546
(9)	949/05	24/11/05	85 WAIG 4011
(9)	116/06	17/01/07	87 WAIG 219
(9)	85/07	18/10/07	87 WAIG 2924
(9)(a)(ii)(aa)	125/07	24/01/08	88 WAIG 90
(9)	31/08	02/10/08	88 WAIG 2019
(9)	10/10	29/07/10	90 WAIG 1425
(9)	142/10	14/02/11	91 WAIG 337
(9)	50/11	10/10/11	91 WAIG 2152
(9)	56/12	06/11/12	92 WAIG 1976

8. Part Time Workers

(1),(6)	614/90(R2)	10/08/90	70 WAIG 3732
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9. Hours

Part I – renum (1)(b) as (1)(b)(i); Ins. (1)(b)(ii); Part II – (1)(b),(1)(d)(i); Figure – (1)(e)	614/90(R2)	10/08/90	70 WAIG 3732
Part II – Ins. (1)(e); Renum (1)(e) as (1)(f)	2008/90	07/06/91	71 WAIG 1515
Part I – (1)(h);	1100(1)/91	01/10/91	71 WAIG 2592
Part IV title, Part II – amd. (1)®; (1)(d)(i) & (ii); (1)(e) Part I-I - Ins. (1)(f)Part –V - Cl.	1818/91; 1343/92; & 843/93	19/11/93	73 WAIG 3447

10. Display of Rosters

Ins. (1)(c); (4)	614/90(R2)	10/08/90	70 WAIG 3732
(1),(3)	1100(1)/91	01/10/91	71 WAIG 2592

11. Meal Breaks and Rest Periods

(5)	614/90(R2)	10/08/90	70 WAIG 3732
Cl.	144/95	25/10/96	76 WAIG 4693

12. Meal Money

Cl.	2441/89(R)	01/12/89	69 WAIG 3576
Rates - (1) & (2)	614/90(R2)	10/08/90	70 WAIG 3732
Rates - (1) & (2)	1100(1)/91	01/10/91	71 WAIG 2592
Rates - (1) & (2)	607/96	26/09/96	76 WAIG 4313
Rates - (1) & (2)	1262/99	28/10/99	79 WAIG 3407
Rates - (1) & (2)	1609/02	10/01/02	82 WAIG 285
Cl	1408/02	20/11/02	82 WAIG 3235
Rates - (1) & (2)	1007/03	28/10/03	83 WAIG 3635
Cl	853/04	05/11/04	84 WAIG 3546
(1) & (2)	949/05	24/11/05	85 WAIG 4011
(1) & (2)	116/06	17/01/07	87 WAIG 219
(1) & (2)	85/07	18/10/07	87 WAIG 2924
(1) & (2)	31/08	02/10/08	88 WAIG 2019
(1) & (2)	10/10	29/07/10	90 WAIG 1425
(1) & (2)	142/10	14/02/11	91 WAIG 337
(1) & (2)	50/11	10/10/11	91 WAIG 2152

13. Overtime

(5)	237/89	10/03/89	69 WAIG 1129
Del. (5); renum (6) - (11) as (5)-(10)	381/90	02/04/90	70 WAIG 1906
Ins. (11)	614/90(R2)	10/08/90	70 WAIG 3732
(2)	1100(1)/91	01/10/91	71 WAIG 2592

14 Holidays

Amd. reference to cl. 20 title in (4)	512(A)/96	25/10/96	76 WAIG 4695
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15. Annual Leave

(1);(2);(3) & (4).	144/95	25/10/96	76 WAIG 4693
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16. Change Rooms**17. No Reduction****18. Higher Duties****19. Casual Limitations**

Text (1)	1100(1)/91	01/10/91	71 WAIG 2592
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(20. Engagement)

Ins. (4)	1100(1)/91	01/10/91	71 WAIG 2592
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Cl. & title	512(A)/96	25/10/96	76 WAIG 4695
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20. Contract of Employment and Termination**21. Time and Wages Record**

Ins. (1)(g)	512(A)/96	25/10/96	76 WAIG 4695
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Ins text.(3)(d)	491/98	16/04/98	78 WAIG 1471
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22. Uniforms and Overalls**23. Board of Reference****(24. Under-Rate Workers)**

Cl. & title	234/96	23/04/96	76 WAIG 2005
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24. Supported Wages Employees**25. Country Work and Travelling Time****26. Junior Worker's Certificate****27. Sick Leave**

(1);(3) & (4).	144/95	25/10/96	76 WAIG 4693
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28. Wages

Part I - (1); Part III - rates - (1)(a), (1)(b), (4)(a)(i)(ii)(iii)	2441/89(R)	01/12/89	69 WAIG 3576
Part I; Part III - rates - (1)(a)(b) (4)(a)(i)(ii)(iii); del (7)	614/90(R2)	10/08/90	70 WAIG 3732
Corr: Part I - ins. (6).	614/90(R2)	10/08/90	71 WAIG 1951
Part III - ins. (6); Renum (6) as (7)	2008/90	07/06/91	71 WAIG 1515
Part I - (1),(2); del. (3) to (5); renum (6) as (3); Part III - rates - (1)(a) & (1)(b); rates - (4)(a)			
(1); (2)	1100(1)/91	01/10/91	71 WAIG 2592
Del (1) & (2); re-num.(3) as (2); ins (1)	222/94	21/03/94	74 WAIG 967
(1)	152/95	17/04/95 & 12/05/95	75 WAIG 1933
(1)	479/96	23/05/96	76 WAIG 2005
Rates & Ins. Text	940/97	14/11/97	77 WAIG 3177
Part 1 (1)	1456/98	23/10/98	78 WAIG 4368
Part 1 (1) rates & insert text	609/99	01/08/99	79 WAIG 1843
Pt III (1)(a)&(b):(4)(a):(7)	1262/99	05/11/99	79 WAIG 3407
Cl.	654/00	01/08/00	80 WAIG 3379
Cl.	752/01	01/08/01	81 WAIG 1721
Pt III (1)(a)&(b):(4)(a):(7)	1609/02	10/01/02	82 WAIG 285
Cl.	797/02	01/08/02	82 WAIG 1369
Part III (1) & (4) & (7)	1408/02	20/11/02	82 WAIG 3235
Cl.	569/03	5/06/03	83 WAIG 1899 & 2611
Part III	1007/03	28/10/03	83 WAIG 3635
Cl.	570/04	4/06/04	84 WAIG 1521 & 2035
Pt III	853/04	05/11/04	84 WAIG 3546
Cl.	576/05	07/07/05	85 WAIG 2083, 2843

28. Wages —*continued*

Part III	949/05	24/11/05	85 WAIG 4011
Cl.	957/05	7/07/06	86 WAIG 1631 & 2360
Part III	116/06	17/01/07	87 WAIG 219
Cl.	1/07	01/07/07	87 WAIG 1487 & 2286
Part III	85/07	18/10/07	87 WAIG 2924
Cl.	115/07	01/07/08	88 WAIG 773 & 1490
Part III	31/08	02/10/08	88 WAIG 2019
Cl.	1/09	01/10/09	89 WAIG 735 & 1922
Part III	10/10	29/07/10	90 WAIG 1425
Cl.	2/10	01/07/10	90 WAIG 568 & 1313
Part III	142/10	14/02/11	91 WAIG 337
Cl.	2/11	01/07/11	91 WAIG 1008 & 1711
Part III	50/11	10/10/11	91 WAIG 2152
Cl.	2/12	01/07/12	92 WAIG 1461
Part III	56/12	06/11/12	92 WAIG 1976
Cl.	1/13	01/07/13	93 WAIG 1129
Cl.	1/14	01/07/14	94 WAIG 1343
Cl.	1/15	01/07/15	95 WAIG 1311
Cl.	1/16	01/07/16	96 WAIG 1161
Cl.	1/17	01/07/17	97 WAIG 1226
Cl.	1/18	01/07/18	98 WAIG 263 & 948

(28A. 3% and \$10.00 Wage Additions)

Del. cl.	2441/89(R)	01/12/89	69 WAIG 3576
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28A. Structural Efficiency Agreement – Cold Storage Industry

Ins. Cl.	2441/89®	01/12/89	69 WAIG 3576
Rates	1262/99	28/10/99	79 WAIG 3407
Rates	1609/02	10/01/02	82 WAIG 285
Cl	1408/02	20/11/02	82 WAIG 3235
Cl	1007/03	28/10/03	83 WAIG 3635
Cl	853/04	05/11/04	84 WAIG 3546
Cl	949/05	24/11/05	85 WAIG 4011
Cl	116/06	17/01/07	87 WAIG 219
Cl	85/07	18/10/07	87 WAIG 2924
Cl	31/08	02/10/08	88 WAIG 2019
Cl	10/10	29/07/10	90 WAIG 1425
Cl	142/10	14/02/11	91 WAIG 337
Cl	50/11	10/10/11	91 WAIG 2152
Cl	56/12	06/11/12	92 WAIG 1976

29. Easter Week

(2)	237/89	10/03/89	69 WAIG 1129
Cl.	381/90	02/04/90	70 WAIG 1906

30. Right of Entry

Ins. Text	2053(1)/97	22/11/97	77 WAIG 3138
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31. Other Provisions

(1)	876/94	0/12/94	75 WAIG 415
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32. Motor Vehicle Allowance

Table	61/92	22/05/92	72 WAIG 1350
Sch.	1262/99	28/10/99	79 WAIG 3407
Cl	1408/02	20/11/02	82 WAIG 3235
Cl	949/05	24/11/05	85 WAIG 4011
Cl	116/06	17/01/07	87 WAIG 219
Cl	85/07	18/10/07	87 WAIG 2924
Cl	31/08	02/10/08	88 WAIG 2019
Cl	10/10	29/07/10	90 WAIG 1425
Cl, Ins (1)-(4)	142/10	14/02/11	91 WAIG 337

33. Long Service Leave**34. Shift Work****35. Payment of Wages****36. Posting of Award****37. Stand Down**

Amd. Reference to cl. 20 title in (1)	512(A)/96	25/10/96	76 WAIG 4495
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(38. Compassionate Leave)

Clause & title; (1) & (2);

Delete (3)	144/95	25/10/96	76 WAIG 4693
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38. Bereavement Leave**39. Location Allowance**

Cl.	778 & 1065/90	01/07/90	70 WAIG 2995
(1)	1049/91	01/07/91	71 WAIG 2753
Cl.	851/92	01/07/92	72 WAIG 2498

39. Location Allowance —*continued*

Cl.	943/93	01/07/93	73 WAIG 1989
Cl.	714/94	01/07/94	74 WAIG 1869
Cl.	641/95	01/07/95	75 WAIG 2125
Cl.	911/96	01/07/96	76 WAIG 3365
Cl.	1400/97	01/07/97	77 WAIG 2547
Cl.	975/98	01/07/98	78 WAIG 2999
Cl.	690/99	01/07/99	79 WAIG 1843
Cl.	1050/00	01/08/00	80 WAIG 3153
Cl.	718/01	01/08/01	81 WAIG 1559
Cl.	686/02	01/07/02	82 WAIG 1185
Cl.	570/03	01/07/03	83 WAIG 1657
Cl.	696/04	01/07/04	84 WAIG 2145
Cl.	458/05	01/07/05	85 WAIG 1893
Cl.	59/06	01/07/06	86 WAIG 1471
Cl.	53/07	01/07/07	87 WAIG 2435
Cl.	9/08	01/07/08	88 WAIG 689
Cl.	24/09	01/07/09	89 WAIG 729
Corr. Order Schedule B (7)(a)(i)&(ii)	24/09	01/07/09	89 WAIG 2483
Cl.	117/10	01/07/10	90 WAIG 561
Cl.	24/11	01/07/11	91 WAIG 995
Cl.	6/12	01/07/12	92 WAIG 725
Cl.	7/13	01/07/13	93 WAIG 461
Cl.	11/14	01/07/14	94 WAIG 669

39. Location Allowance —*continued*

Cl.	118/15	01/07/15	95 WAIG 700
Cl.	15/16	01/07/16	96 WAIG 631
Cl.	20/17	01/07/17	97 WAIG 585

40. Chemists Shops**41. Liberty to Apply**

(42. Maternity Leave)

Cl. & title	512(A)/96	25/10/96	76 WAIG 4695
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42. Parental Leave**43. Union Notice Board****44. Introduction of Change****45. Superannuation**

(5)	1554(1)/89	18/08/89	69 WAIG 2751
Ins.Preamb; (2); del (4) - (7). Ins.(4) - (5); renumb (8) -(9) as (6) - (7); del (10)-(11)	606/96	25/10/96	76 WAIG 4480
Ins. Text	599/98	30/06/98	78 WAIG 2559

46. First Aid Allowance

Rates	1100(1)/91	01/10/91	71 WAIG 2592
Rates	1262/99	28/10/99	79 WAIG 3407
Rates	1609/02	10/01/02	82 WAIG 285
Cl	1408/02	20/11/02	82 WAIG 3235
Cl	1007/03	28/10/03	83 WAIG 3635
Cl	853/04	05/11/04	84 WAIG 3546
Cl	949/05	24/11/05	85 WAIG 4011
Cl	116/06	17/01/07	87 WAIG 219

46. First Aid Allowance —*continued*

CI	85/07	18/10/07	87 WAIG 2924
CI	31/08	02/10/08/	88 WAIG 2019
CI	10/10	29/07/10	90 WAIG 1425
CI	142/10	14/02/11	91 WAIG 337
CI	50/11	10/10/11	91 WAIG 2152
CI	56/12	06/11/12	92 WAIG 1976

(47. Traineeships)

Ins. CI.	627/89	25/06/90	70 WAIG 2829
Rename cl.	1326/92	07/02/95	75 WAIG 724

(47A. Australian Traineeship System)

Del. CI.	87/96	23/04/96	76 WAIG 1417
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(47B. Traineeships)

Ins. CI.	1326/92	07/02/95	75 WAIG 724
Re-number CI as(47)	87/96	23/04/96	76 WAIG 1417

47. Traineeships

(7)(a)(iv); (7)(b);ins text (7)(c); ins (7)(c)(iv)	87/96	23/04/96	76 WAIG 1417
(7)(a)(iv)	448/97	29/04/97	77 WAIG 1260
Pt 1 (1) rates & insert text	609/99	01/08/99	79 WAIG 1843
CI.	654/00	01/08/00	80 WAIG 3379
CI.	752/01	01/08/01	81 WAIG 1721
CI. (Corr)	752/01	01/08/01	83 WAIG 1869
CI.	569/03	5/06/03	83 WAIG 1899 & 2611
CI.	570/04	4/06/04	84 WAIG 1521 & 2035

47. Traineeships —*continued*

Cl.	576/05	07/07/05	85 WAIG 2083, 2843
Cl.	957/05	7/07/06	86 WAIG 1631 & 2360
Cl.	1/07	01/07/07	87 WAIG 1487 & 2286
Cl.	115/07	01/07/08	88 WAIG 773 & 1490
Cl.	1/09	01/10/09	89 WAIG 735 & 1922
Cl.	2/10	01/07/10	90 WAIG 568 & 1313
Cl.	2/11	01/07/11	91 WAIG 1008 & 1711
Cl.	2/12	01/07/12	92 WAIG 1461
Cl.	1/13	01/07/13	93 WAIG 1129
Cl.	1/14	01/07/14	94 WAIG 1343
Cl.	1/15	01/07/15	95 WAIG 1311
Cl.	1/16	01/07/16	96 WAIG 1161
Cl.	1/17	01/07/17	97 WAIG 1226
Cl.	1/18	01/07/18	98 WAIG 263 & 948

48. Additional Loading for Late Night Trading Establishments

Ins. cl.	614/90(R2)	10/08/90	70 WAIG 3732
Figures - (1) - (2)	1100(1)/91	01/10/91	71 WAIG 2592
Rates - (1) - (2)	607/96	26/09/96	76 WAIG 4313
(1)-(2)	1262/99	28/10/99	79 WAIG 3407
(1)-(2)	1609/02	10/01/02	82 WAIG 285
Cl	1408/02	20/11/02	82 WAIG 3235

48. Additional Loading for Late Night Trading Establishments —continued

(1) - (2)	1007/03	28/10/03	83 WAIG 3635
Cl	853/04	05/11/04	84 WAIG 3546
(1) - (2)	949/05	24/11/05	85 WAIG 4011
(1) - (2)	116/07	17/01/07	87 WAIG 219
(1) - (2)	85/07	18/10/07	87 WAIG 2924
(1) - (2)	31/08	02/10/08	88 WAIG 2019
(1) - (2)	10/10	29/07/10	90 WAIG 1425
(1) & (2)	142/10	14/02/11	91 WAIG 337
(1) - (2)	50/11	10/10/11	91 WAIG 2152
(1) - (2)	56/12	06/11/12	92 WAIG 1976

49. Trade Union Training Leave

Ins. Cl.	1135/91 & 318/92	22/05/92	72 WAIG 1348
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50. Enterprise Level Award Change Procedure

Ins. cl.	1135/91 & 318/92	22/05/92	72 WAIG 1348
Del. (13)	876/94	06/12/94	75 WAIG 415

Appendix I - Parental Leave Entitlements

Cl. & title	512(A)/96	25/10/96	76 WAIG 4695
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51. Redundancy

Ins. Cl.	512B/96	25/10/96	76 WAIG 4475
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Appendix - Resolution of Disputes Requirements

Ins. App	693/96	16/07/96	76 WAIG 2768
(1),(6), Del (7)	2053/97	22/11/97	77 WAIG 3079

Schedule "A"**Schedule "B"****Schedule "C"**

Del. respondent	76/80/9	30/07/91	71 WAIG 2158
Del. respondents	76/80/76	05/05/92	72 WAIG 1146
Del. respondent	76/80/80	05/05/92	72 WAIG 1146
Del. respondents	76/80/53	02/06/92	72 WAIG 1621
Del. respondent	76/80/87	02/06/92	72 WAIG 1621
Del. Respondents	76/80/105	05/04/95	75 WAIG 954
Sch.	423B/95	06/09/95	75 WAIG 2836
Del. Respondents	76/80,Part 196	08/04/98	78 WAIG 1884
Del. Respondents	76/80,Pt 192 193	17/06/98	78 WAIG 2922
Del. Respondents	76/80,Parts 194&197	29/07/98	78 WAIG 3343
Del Respondents	76/80/205	30/08/99	79 WAIG 2625
Del Respondent	58/06	2/5/06	86 WAIG 1085

Schedule D - Union Party

Ins. Sch.	345/93	31/05/93	73 WAIG 1836
Del Address	1609/02	10/01/02	82 WAIG 285

Appendix - s.49B - Inspection of Records Requirements

Ins. App	694/96	16/07/96	76 WAIG 2789
Ins. Text	2053(1)/97	22/11/97	77 WAIG 3138
App.	491/98	16/04/98	78 WAIG 1471

2019 WAIRC 00016

THE SHOP AND WAREHOUSE (WHOLESALE AND RETAIL ESTABLISHMENTS) STATE AWARD 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPLICANT

-v-

SAMUEL GANCE (ABN 50 577 312 446) T/A CHEMIST WAREHOUSE PERTH

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** MONDAY, 21 JANUARY 2019**FILE NO.** APPL 86 OF 2017**CITATION NO.** 2019 WAIRC 00016

Result	:	Declaration made
Representation:		
Applicant	:	Mr D Rafferty (of counsel)
Respondent	:	Mr N Tindley (of counsel)
First intervener	:	Mr R Kenzie QC and with him Mr T Dixon (of counsel)
Second intervener	:	Mr R Andretich (of counsel)

Declaration

HAVING heard Mr D Rafferty (of counsel) on behalf of the applicant, Mr N Tindley (of counsel) on behalf of the respondent, Mr R Kenzie QC and with him Mr T Dixon (of counsel) on behalf of the first intervener and Mr R Andretich (of counsel) on behalf of the second intervener;

AND HAVING given reasons for decision in which the Commission made a declaration;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), declares –

THAT *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* as varied applies to workers employed in any calling or callings mentioned in the award in the retail pharmacy industry and to employers employing those workers.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2019 WAIRC 00042

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2019 WAIRC 00042
CORAM	:	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	:	WEDNESDAY, 29 AUGUST 2018
DELIVERED	:	THURSDAY, 7 FEBRUARY 2019
FILE NO.	:	M 205 OF 2017
BETWEEN	:	JOSHUA DANE JENSEN

CLAIMANT

AND

CAPE AUSTRALIA ONSHORE PTY LTD

RESPONDENT

CatchWords	:	INDUSTRIAL LAW - Classification of Employee under Enterprise Agreement - 'Scaffolder' or 'Carpenter' - Cutting and fixing plywood deck to scaffold structure
Legislation	:	<i>Fair Work Act 2009</i> (Cth)
Instrument	:	<i>Cape Australia Wheatstone Project Agreement 2013</i> [2014] FWCA 1084 <i>Building and Construction Industry General On-site Award 2010</i> <i>National Building and Construction Industry Award 2000</i>
Case(s) referred to in reasons	:	<i>Tucker v Digital Diagnostic Imaging Pty Ltd</i> [2011] FWA 1767 <i>Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd</i> [2014] FCCA 4 <i>Federated Clerks Union of Australia Industrial Union of Workers, WA Branch v Carey</i> (1977) WAIG 585 <i>Joyce & Ors v Christofferson & Ors</i> (1990) 33 IR 390 <i>McMenemy v Thomas Duryea Consulting</i> (2012) 223 IR 125 <i>Stagnitta v Bechtel Construction (Australia) Pty Ltd</i> [2018] WAIRC 886 <i>Wright v Bechtel Construction (Australia) Pty Ltd</i> [2018] WAIRC 887 <i>Re Harrison; Ex Parte Hames</i> [2015] WASC 247 <i>Qube Ports Pty Ltd v Maritime Union of Australia</i> [2018] FCAFC 72 <i>Construction, Forestry, Mining and Energy Union v Anglo Coal (Callide Management) Pty Ltd</i> [2015] FCA 696 <i>Fair Work Ombudsman v Broome Helicopter Services Pty Ltd & Anor</i> [2017] FCCA 2364 <i>Joske v Dental Cash Order Company Pty Ltd</i> [1916] HCA 7 <i>Baldwin & Francis Ltd v Patents Appeal Tribunal</i> [1959] AC 663
Result	:	Claim dismissed
Representation:		
Claimant	:	Mr D. Scaife as instructed by Eureka Lawyers
Respondent	:	Mr A. Denton as instructed by Svenson Barristers

REASONS FOR DECISION

Introduction

1 The claimant (Mr Jensen) was employed by the respondent (the Company) between 12 January 2016 and 9 December 2016. He worked in a team that erected and dismantled scaffolding on a large liquified natural gas (LNG) construction project west of Onslow in the north of Western Australia, known as 'the Wheatstone Project'. His primary task was the measuring and cutting of plywood sheets and fixing of those sheets to scaffold structures. Mr Jensen's employment was subject to an enterprise agreement made under s 54 of the *Fair Work Act 2009* (Cth), the *Cape Australia Wheatstone Project Agreement 2013* (the Agreement). On appointment, the Company was required by cl 9 of the Agreement to classify Mr Jensen to a level within a structure set out in the Agreement. Mr Jensen's classification level determined his wages and other entitlements. At the time of appointment, Mr Jensen was a qualified and experienced carpenter. He also, on his second attempt, completed a competency test in basic scaffolding. Mr Jensen's classification by the Company was to be 'based on [his] skills, qualifications, experience, competency and training provided that the Company had the need for such skill and competence'.¹ He was classified by the Company as a 'scaffolder' resulting in remuneration calculations based on an hourly pay rate of \$47.65. Mr Jensen contends that, having regard to the tasks involving plywood that were required of him, he should have been classified as a 'carpenter' and paid accordingly (\$49.64 per hour), as well as being paid the 'tradesperson's allowance' provided for in cl 10 of Appendix 2 of the Agreement (\$2.07 per hour). The Company disputes that it had a need for the skills of carpenter. Shortly stated, the issue for me to determine is whether the Company correctly classified Mr Jensen as a scaffolder, or as Mr Jensen seeks to prove, has contravened the Agreement by underpaying him as a result of failing to correctly classify him as a carpenter. For the reasons set out below, I am not satisfied that the Company has contravened the Agreement by failing to classify Mr Jensen as a carpenter.

Criteria for Classification

2 The starting point for resolution of a dispute on the effect of the Agreement is the ordinary meaning of the relevant words of the Agreement.² Clause 2 states that the Agreement is binding upon Cape Australia and employees of the Company employed in the classifications provided for in the agreement and performing work falling within the application of the agreement. Clause 3 provides for the application of the Agreement to 'on-site construction work for the Wheatstone Project'. It is not in dispute that Mr Jensen was employed by the Company and engaged in the construction work of the Company on-site for the Wheatstone Project. The Company and Mr Jensen were bound by the Agreement.

- 3 It is appropriate to set out the full text of cl 9(1) of the Agreement, entitled ‘Wages and Classification Structure’:

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...

- 4 The remainder of cl 9(1) read with Appendix 1 sets out classifications in the form of groups of various named construction occupations. The groups are arranged in hierarchical rows and distributed among three tables with headings, ‘Civil/Structural’, ‘Trade & Technical Classifications’ and ‘Crane Classifications’. The result is classification levels comprising groups of occupations in each of three tables.
- 5 Clause 9 of the Agreement placed an obligation upon the Company to select a classification level for Mr Jensen based on his ‘skills, qualifications, experience, competency and training’ (the Employee Skills). The obligation is qualified in one respect, ‘provided that the Company has the need for such skill and competence’ (the Company Needs). Clause 9 does not expressly state what follows if the qualification is to be applied as a result a mismatch between the Employee Skills and the Company Needs. However, it is implicit that the Company will have discharged the obligation imposed by the clause by selecting the classification level that is the ‘best fit’ between the Employee Skills and the Company Needs. ‘Carpenter’ appears in a group of eleven occupations in the second row of the ‘Trade & Technical Classifications’ table within cl 9(1). ‘Scaffolder’ appears in a group of six occupations in a group of ‘Civil/Structural’ occupations set out in Appendix 1.
- 6 When confronted with the task of placing an employee into classifications found in an industrial instrument or instruments, courts have frequently looked to the quantity and quality of the elements of the employee’s work to determine the major and substantial employment of the employee (the Substantial Employment test).³ However, courts have also examined the nature of the work being performed and the circumstances in which the employee was employed to ascertain the principal purpose for which the employee is employed (the Principal Purpose test), particularly where the text of the industrial instrument expressly provides for classification based upon the skill level required of an employee to carry out the principal functions of employment.⁴ Clause 9 of the Agreement requires an analogous (but not identical) comparison to that required by the Principal Purpose test. The nature of the work being performed by Mr Jensen and the circumstances of his employment, including his skills and qualifications, will inform the determination of the Company Needs and, consequently, the appropriate classification.
- 7 A number of factors have been remarked upon in cases that have applied the Principal Purpose test:
- a. The relevant circumstances of employment will include: the contents of any job description, person specification or job advertisement; the qualifications of the employee and whether the qualifications are necessary to the exercise of the primary function being performed. *Tucker v Digital Diagnostic Imaging Pty Ltd* [2011] FWA 1767 [169]; *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 [167] – [171].
 - b. Relevant to an assessment of the nature of the work being performed will include: characterisation of the ‘substance’ of the work of an employee; the level of importance and relevance of particular duties in the context of the employing organisation’s overall purpose. *Federated Clerks Union of Australia Industrial Union of Workers, WA Branch v Carey* (1977) WAIG 585, 586⁵; *Tucker* [22]; *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 [169] – [170].
 - c. The title given to an employee is not determinative of the nature of work being performed; it may mislead as to the nature of the job. *Joyce & Ors v Christofferson & Ors* (1990) 33 IR 390, 405.
 - d. The time spent in different duties is relevant but not determinative of the classification; an employee might perform duties which the employee prefers, or believes to be required, but which are not the duties the employee is necessarily directed (or employed) to perform. *McMenemy v Thomas Duryea Consulting* (2012) 223 IR 125, 133; *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 [168].

- 8 I agree with the Company's submission that the opening sentence of Appendix 1 of the Agreement invites examination of a link between 'previous LNG construction agreements' and modern awards as relevant contextual background to the presence of the word 'scaffolder' in Appendix 1. 'Scaffolder' appears in a group of six occupations in the group of 'Civil/Structural' occupations set out in Appendix 1. Appendix 1 of the Agreement is headed 'Classifications Structure'. For each of six headings 'CW1 – Tasks Undertaken', 'CW2 – Tasks Undertaken', 'CW3 – Tasks Undertaken', et cetera, occupations are listed. Under the heading 'CW2 – Tasks Undertaken' and a subheading 'Transitional Group 3' is listed 'Scaffolder'. The significance of this structure is explained to the extent that the opening sentence of Appendix 1 states that it:

includes increases for the transition from the historical classification structure contained in previous LNG construction agreements and a new structure that is more closely based on the modern award classification structure.

- 9 The Company's submission commences with the Australian Industrial Relations Commission identifying three 'historical' awards that informed work on the exposure draft of the *Building and Construction Industry General On-site Award 2010*⁶ and identify references to 'carpenter' or 'scaffolder' in each of those four instruments.⁷ Emphasis is placed on extended definitions of 'carpenter and joiner' and 'scaffolder' found, respectively, in cl 4.7 and cl 4.45 of the *National Building and Construction Industry Award 2000* (the 2000 Award). A difficulty for the Company's submission is that the relationship between the four identified instruments and the 'previous LNG construction agreements' mentioned in Appendix 1, if any, has not been explained and is not apparent from the Agreement. Unless the relationship is explained, the contents of the instruments are of limited assistance. Further, any use to be made of the 2000 Award is necessarily limited to being relevant to the context of the Agreement. Nothing in the text of the Agreement would justify defining a term found in the Agreement by reference to a definition found in the 2000 Award. In any event, the definition of 'scaffolder' found in cl 4.45 of the 2000 Award⁸, on my assessment, does not contain anything that would favour the result urged by either party in this case.
- 10 Mr Jensen submits that reference should be made to the *Macquarie Concise Dictionary* and the *Australian Standard Classification of Occupations (Second Edition)* (ASCO) when construing 'carpenter' and 'scaffolder'. Emphasis is placed upon the classification in ASCO of the tasks of a 'carpenter' as including cutting materials and erecting scaffolding⁹ in contrast to tasks of a 'scaffolder' as placing planks over horizontal bars to create platforms.¹⁰ When called upon to consider the ordinary meaning of a word that has been used in its natural and ordinary sense, a court may use a dictionary to 'refresh the judicial mind' of the ordinary meaning of the word.¹¹ If required to determine the meaning of a technical word or a word that has been used in a special technical sense, the court may use any appropriate technical source to assist in ascertaining the meaning of the word.¹² My view is that the ASCO cannot be used to determine the meaning of 'carpenter' or 'scaffolder'. There is nothing in the Agreement to suggest that those words have been used in other than their natural and ordinary sense. The ASCO is not a dictionary. The purpose of ASCO, published in July 1997, is to provide detailed occupation information¹³ for use in 'statistical surveys, labour market analysis, vocational education and training, job placement activities and careers guidance'.¹⁴ The 'tasks' identified in ASCO are intended to be a 'representative list of the primary tasks performed in the occupation'.¹⁵ A representative list of the primary tasks of carpenters and scaffolders throughout Australia as at July 1997 is of limited utility in determining the ordinary meaning of 'carpenter' and 'scaffolder' in connection with construction work on the Wheatstone Project in 2016.

Findings of Fact

- 11 In December 2015, Mr Jensen contacted the Company about employment opportunities. It was suggested he obtained a 'scaffolding ticket'. He obtained a 'license to erect or dismantle scaffolding at basic level' and informed the Company of this fact. He had also sent the Company a copy of his résumé which, I infer, contained a reference to his completion of a carpentry apprenticeship in 2006.
- 12 By a letter dated 9 January 2016, the Company made an offer of employment as a 'basic scaffolder (CW2/3)' to commence on 12 January 2016. The letter included reference to the following:
- Your employment on the project will end upon the completion of the task for which you are employed on the project, namely an intermediate scaffolder unless your employment is terminated earlier. Any additional applicable allowances will be as per the agreement. The agreement prescribes the circumstances when additional allowances apply. Please note that some allowances are 'all purpose' and some are not.*
- 13 Mr Jensen was required to undertake testing of his scaffolding skills by way of what is known as a 'verification of competency' (VOC Process) before he commenced his work on the Wheatstone Project. He failed the VOC Process. Mr Jensen understood that his employment may be terminated. He spoke to representatives of the Company, drawing attention to his skills working with plywood. He was permitted to re-sit the VOC Process. He passed on the second attempt.
- 14 Mr Jensen worked in a group of around twelve employees known as a crew. The crew erected and dismantled scaffolding around very tall, very large structures associated with LNG processing. The photographs at the annexure marked 'SM-2' to the witness statement of Steven May (exhibit 5) are indicative of the height and size of the structures and the scaffolding. The scaffold design may place the scaffold in a location where the plywood scaffold flooring ('the deck') was 'penetrated' by parts of the structure itself (for example, a pipe). This is illustrated by the photographs which appear as annexure 'SM-3' to the witness statement of Steven May and the photographs which are annexure 'JDJ-7' annexed of the witness statement of Mr Jensen (exhibit 1). In these locations it is necessary to: take measurements of the relevant penetration; scribe (i.e. mark) the plywood; make cuts necessary to the plywood; and to fit the plywood in place (together, 'Plywood Work'). It was necessary for Mr Jensen to complete the Plywood Work to a particular standard; no gap on the scaffold deck must be greater than 10 millimetres ('the 10mm Standard').
- 15 Mr Jensen engaged in Plywood Work for part or all of each day that he worked for the Company. He estimated that Plywood Work occupied 85% of the total time that he worked for the Company. There was one month in the middle of 2016 when Plywood Work occupied about 50% of his working time. When not engaged in Plywood Work, Mr Jensen was engaged in the

- same duties being performed by other members of his crew which included one or more of the following: general labouring; erecting barricading; erecting scaffold; dismantling scaffold; and modifying scaffold.
- 16 For the purpose of enabling Mr Jensen to undertake Plywood Work, he was issued with tools designed for working with plywood, including a jig saw, circular saw and a drill. Mr Jensen had access to a workstation (photographed in 'JDJ-5') where he undertook the Plywood Work (except for fixing the sheets to the structure).
- 17 The crew in which Mr Jensen worked was similar to other crews in that there was a division of labour between the majority of workers engaged in the task of scaffold frame construction and a minority of workers who were engaged in Plywood Work. Mr Lawther, a Company manager involved in scaffolding on the Wheatstone Project during the period of Mr Jensen's employment explained how the allocation of tasks within a crew came about (exhibit 6):
- (16) *It is not uncommon for craft [employees] to hold multiple tickets in the construction industry. When cutting duties were required and needed to be assigned, a supervisor would ask his crew if any member were interested in performing the duty and if so assess their skill set.*
- (17) *A scaffolder with a carpentry background would often volunteer to perform this task, which they found more enjoyable and less physically demanding than scaffold erection, dismantling and moving scaffold gear into place.*
- 18 Before a crew worker was involved in Plywood Work, the employee was required to have completed testing to confirm competency in the use of power tools, known a 'Challenge Test'. For the Company, aptitude in Plywood Work was the dominant consideration when allocating this task. In the result, crew members who engaged in Plywood Work were volunteers who completed a power tool competency test and had one or more the following: aptitude; experience and qualifications in a trade. The crew workers engaged in Plywood Work, typically, had been employed as a trades assistant, basic scaffolder or intermediate scaffolder.
- 19 A crew worker engaged in Plywood Work, including Mr Jensen, was typically referred to by other crew workers as the 'chippie'. This nickname is also commonly used in the construction industry to refer to a carpenter.
- 20 Mr Jensen, in common with all members of his crew, was required to sign a 'Job Hazard Analysis' (JHA), as required, at regular intervals throughout his employment. During the period in which Mr Jensen was employed, there is evidence a 'workgroup' identified as 'scaffolding' being required to complete a separate JHA for each of two tasks: scaffolding; and carpentry. A JHA dated 1 February 2016 – 29 February 2016¹⁶ concerns the task of scaffolding. It contains references to: 'tools and equipment required: hand and power tools', 'scaffolding/scafftag' permits; 'use of power tools being controlled by ensuring competence person undertakes tasks'; and 'incorrect use of power tools/cuts to the body' controlled by 'apply correct cutting techniques, cut away from the body'. A JHA dated 1 March 2016 – 31 March 2016 concerns the task of general carpentry. It contains references to: power and hand tools being required; job steps including the cutting and assembly of materials; hazards including an operator being untrained; and hazard controls including that users have completed verification of competency requirements.
- 21 Evidence was received of JHA's maintained by the Company *after* Mr Jensen ceased to be employed by the Company to similar effect as the last mentioned JHA on the task of carpentry, save that an additional reference is made to a job step of working from scaffold platforms.
- 22 The Company published a 'safe work method statement' for specified work activities and required the document be signed by employees involved in the activity. One statement issued to Mr Jensen,¹⁷ is entitled, 'Cape Wheatstone SWMS – Carpentry'. The document includes the following:
- The following tools are required in completing carpentry works. ... If any worker is not fully trained and VOC'd in the maintenance and use of the required tools to complete their job task, stop work and notify the Works Supervisor.*
- 23 The Company issued 'guidance statements' to employees. I am satisfied that during the course of his employment, Mr Jensen received a statement in connection with the use of 'wearing double eye protection' which statement was directed to 'all carpenters'.¹⁸
- 24 The Company issued a 'Safety Task Analysis Risk Reduction Talk' document (STARRT) to employees. I'm satisfied that the STARRT document at 'JDJ-4', though issued after Mr Jensen ceased to be employed by the Company, is illustrative of STARRT documents issued while he was employed. The document is entitled, 'STARRT CARD – SCAFFOLD'. Employees are required to hand write the 'task' about to be commenced. Mr Jensen used various terms when he completed the document including: 'general carpentry', or 'cutting ply general carpentry', or 'cutting ply'.
- 25 In summary, Mr Jensen was a member of a small crew of workers who erected, dismantled and modified scaffolding. He was the only member of the crew to specialise in a task that was required to complete the erection of scaffolding: Plywood Work. The successful completion of this task required precision, notably achievement of the 10mm Standard. Mr Jensen's qualifications and experience in carpentry were relevant and useful to him when engaging in Plywood Work and in ensuring that he achieved the 10mm Standard. On occasion, he was required to remedy the Plywood Work done by others that had not achieved the 10mm Standard.

Analysis

- 26 The Company submission embraces the Principal Purpose test and submits that the principal purpose for which Mr Jensen was employed was to erect scaffolding. The point was made by counsel for the Company during closing submissions:¹⁹
- [A]ll the duties that were carried out by Mr Jensen for Cape were inextricably linked to the erection and dismantling of scaffolds. ... [I]f the scaffolds weren't there he wouldn't be there; [if] there was no scaffolding, there was no work. In other words, but for the task of scaffolding his job would not exist. ... Presumably he was good at [the woodwork tasks].*

Presumably he was better than many of the other basic scaffolders that did the same tasks. That's not the point. At any given time he could have reasonably been directed to do other duties of a basic scaffolder because that was his job.

- 27 Undeniably, the Company needed employees with the skills required to erect *scaffolding*. However, the submission of the Company does not acknowledge that the erection of scaffolding involved Plywood Work. *If* the skills of a carpenter were needed to do Plywood Work and to achieve the 10mm Standard, the Company *needed* a carpenter to erect scaffolding. Put another way, the primary purpose of the Company was *not* the employment of scaffolders; the primary purpose of the Company was the construction of scaffolding.
- 28 It is necessary to examine the circumstances of Mr Jensen's employment and the nature of his work to determine whether the Company had a need for his skills and qualifications as a carpenter.
- 29 There is no evidence of the Company seeking employees with carpentry qualifications or nominating carpentry qualifications as necessary for appointment. It is also to be noted that, absent his scaffolding basic licence and completing the VOC Process, Mr Jensen would not have been employed by the Company. At the time of his appointment, Mr Jensen possessed qualifications as a carpenter *and* a scaffolder. His scaffolding qualification was in the form of a licence at a 'basic level' and he had no experience as a scaffolder. In addition to his carpentry qualifications, he had significant experience as a carpenter acquired since he had completed his trade qualification. Mr Jensen had limited skills in scaffolding, except to the extent that skills acquired as a carpenter overlapped with skills required of a scaffolder. There is an overlap. A scaffolder requires the skills necessary to lay a deck as part of the construction of scaffolding. Where the deck involves Plywood Work, a carpenter is likely to possess those skills. The fact that Mr Jensen was permitted a second attempt at the VOC Process after drawing attention to his carpentry skills serves to highlight the overlapping skills. I am satisfied that the Company anticipated that, *if* he completed the VOC Process on the second attempt, Mr Jensen would be engaged exclusively in Plywood Work. The fact that the Company accommodated a second attempt at the VOC Process serves to highlight the significance of Mr Jensen's carpentry skills to the needs of the Company. It is a fact that weighs in favour of a conclusion that the Company needed the skills of a carpenter to erect scaffolding.
- 30 Aspects of the nature of Mr Jensen's work also weigh in favour of a conclusion that the Company needed his carpentry skills. Plywood Work involves a series of tasks that are discrete from other tasks required in the erection of scaffolding. The proportion of Mr Jensen's time spent on Plywood Work was significant, approaching 100% of his time. Mr Jensen, an experienced carpenter, described Plywood Work as work typically done by a carpenter. Mr Jensen stated that he had, on occasion, corrected Plywood Work to result in the 10mm Standard being achieved. The existence of specification level for the Plywood Work (i.e. the 10mm Standard) and Mr Jensen's corrective work also suggests that the skills of a carpenter were needed by the Company.
- 31 Notwithstanding the above-mentioned factors suggesting that the Company needed Mr Jensen's carpentry skills, I am not satisfied that the Company contravened the Agreement by failing to classify Mr Jensen as a carpenter. It is significant to me that the Company was indifferent to the experience and qualifications of crew members who were assigned to Plywood Work. Volunteers were required to demonstrate aptitude in Plywood Work. There is no evidence that Plywood Work was necessarily or likely to be beyond the ability of an employee who did not have a qualification as a carpenter. Excepting Mr Jensen, there is no evidence of the proportion of crew members engaged in Plywood Work who possessed a qualification as a carpenter. Scaffold erection necessarily involves 'laying of a deck' on a frame. Plywood Work involved discrete and specialised tasks directed to this end. Mr Jensen's carpentry skills and qualifications assisted him in his Plywood Work. However, I am not satisfied that the Company *needed* those carpentry skills and qualifications.
- 32 I have not overlooked that the Company's safety documentation relevant to Mr Jensen is replete with references to the word 'carpenter' or 'carpentry'. I have noted references found in the 'Job Hazard Analysis', the 'Safe Work Method Statement' and the 'Guidance Statements'. I have also noted that Mr Jensen (and other Company employees) used the term 'carpenter' or 'chippie' when referring to his role. For example, in the 'Safety Task Analysis Risk Reduction Talk' card. My view is that the use of terms as noted in this paragraph is not of especial significance in circumstances where those terms are a convenient means of identifying tasks or a class of employees requiring discrete consideration. None of the documents refer to trade qualifications. A number of the documents refer to the need for verification of competency requirements, a fact which is inconsistent with a task being undertaken by a person with a trade qualification.

Conclusion

- 33 I am not satisfied that the Company has contravened the Agreement by failing to classify Mr Jensen as a carpenter. The circumstances of his employment reveal that he had qualifications as both a carpenter and a scaffolder. However, the overlapping skill-set of 'carpentry skills' and the skills required for Plywood Work met the *need* of the Company for an employee who, in substance, would erect scaffolding. Notwithstanding the evidence of Mr Jensen, I am not satisfied that Plywood Work involved the skills of a carpenter. The same work was successfully undertaken by crew members who did not have qualifications as a carpenter.
- 34 If I am wrong and the Company was required to classify Mr Jensen as a carpenter, my view is that he would be entitled to the Tradesperson Allowance provided for in cl 10 of Appendix 2 of the Agreement:
- 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.*
- 35 If the effect of the Agreement was that the Company was obligated to engage Mr Jensen on the basis of a classification as a 'carpenter' then he would have been engaged 'at Tradesperson level or higher': *Stagnitta v Bechtel Construction (Australia) Pty Ltd* [2018] WAIRC 886; *Wright v Bechtel Construction (Australia) Pty Ltd* [2018] WAIRC 887. He held a qualification as a 'current tradesperson'. The factual findings necessary to support a conclusion that the correct classification of Mr Jensen is

‘a carpenter’, would also be sufficient to ground a conclusion that Mr Jensen performed the ‘full range of duties of a Tradesperson’.

M. FLYNN

INDUSTRIAL MAGISTRATE

¹ Quoted words from Clause 9 of the Agreement.

² I respectfully adopt the observations made in *Re Harrison; Ex Parte Hames* [2015] WASC 247 (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 [50].*

When interpreting legal instruments of the nature of industrial awards and agreements, additional considerations are relevant. 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.

³ *Construction, Forestry, Mining and Energy Union v Anglo Coal (Callide Management) Pty Ltd* [2015] FCA 696 [38] – [39] (Logan J).

⁴ See the cases collected in *Fair Work Ombudsman v Broome Helicopter Services Pty Ltd & Anor* [2017] FCCA 2364 [30] – [39]

⁵ *If in substance the worker’s job is to write and the job is done when the writing has been done he is a clerk. Both in substance the writing done by the worker is but a step taken in the doing by him of something extending beyond it then he is not. The ‘substance’ of the work identifies the question as being one of degree and it indicates the answer to it will be or may be, very much the product of a value judgment.*

⁶ *Award Modernisation – Statement* [2009] AIRCFB 50 at [32].

⁷ Transcript at pages 78 – 85.

⁸ 4.45 Scaffolder

4.45.1 means a person engaged substantially in the erecting or altering or dismantling of any structure or framework used or intended to be used in building operations:

- 4.45.1(a)** to support workers or material; or
- 4.45.1(b)** to support framework; or
- 4.45.1(c)** as a temporary support for members or parts of a building.

Where such structure or frame work is composed of standards and/or ledgers and/or pud locks or any combination of these components normally used in scaffolding work.

4.45.2 Nothing in this definition shall extend to:

- 4.45.2(a) any scaffolding used or intended to be used to support workers or materials which is not intended to be erected to a height over three metres; or
- 4.45.2(b) any work relating to formwork which consists solely of the tying together of occasional pieces of scaffolding tube to arrow or similar type props; or
- 4.45.2(c) any work which consists of a structure or framework composed solely of timber.

⁹ **4411-13 Carpenter**

Constructs, erects, installs, renovates and repairs structures and fixtures of wood, plywood, wallboard and other materials.

Skill Level:

The entry requirement for this occupation is an AQF Certificate III or higher qualification. Registration or licensing may be required.

Tasks Include:

- studies drawings and specifications to determine materials required, dimensions and installation procedures
- orders and selects timbers and materials, and prepares layouts
- cuts materials with hand and power tools, and assembles or nails cut and shaped parts
- erects framework, lays sub-flooring and verifies trueness of structures
- assembles ceiling joists and rafters to construct roof framing, or nails pre-fabricated roof trusses into place
- nails fascia panels, sheathes roofs and fits exterior wall cladding to enclose structures
- cuts and nails frames around windows and doors, hangs doors, installs prefabricated units and other structures, and nails floor-boards over sub-floor
- may install door handles, locks, hardware, flooring underlay, suspended ceilings, insulating materials and other fixtures
- may examine and remove parts of existing structures, do minor preparatory work and install building supports
- *may erect scaffolding and steel studding*

¹⁰ **7913-11 Scaffolder**

Erects and dismantles scaffolding to provide work platforms on building or industrial sites, or for temporary structures such as stages and seating.

Skill Level:

The entry requirement for this occupation is an AQF Certificate II or higher qualification or at least 1 years relevant experience. Registration or licensing may be required.

Tasks Include:

- loads and unloads scaffolding and equipment
- sets levels for erection of scaffolds
- selects scaffolding
- fits together tubes, support braces and components to form bases for scaffolds
- lifts and positions sections of scaffolding
- fits and bolts pipes and tubes together to build up scaffolding
- *places planks over horizontal bars to create platforms*
- verifies levels in scaffolding structures
- dismantles scaffolding.

¹¹ *Joske v Dental Cash Order Company Pty Ltd* [1916] HCA 7; (1916) 21 CLR 172 at 178 (Isaacs J).

¹² *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at 691 (Denning LJ).

¹³

<http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1220.0Main%20Features11997?opendocument&tabname=Summary&prodno=1220.0&issue=1997&num=&view=>

¹⁴ <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/5D42FC8A703B686ECA25697E00184D3B?opendocument>

¹⁵ 'Tasks This list specifies a representative list of the primary tasks performed in the occupation.' <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/0DC436A3DA9DC198CA25697E00184D98?opendocument>

¹⁶ Appearing in annexure 'ML-2'. The JHA for the date 1 March 2016 – 31 March 2016 signed by Mr Jensen was to a similar effect.

¹⁷ I am satisfied that 'JDJ-2' is indicative of the SWMS issued to Mr Jensen, notwithstanding 'JDJ-2' was not signed by him.

¹⁸ See 'JDJ-3'.

¹⁹ Transcript, p 92 (29 August 2018).

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00032

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JAI CORBETT	APPLICANT
	-v-	
	GLENFIELD IGA	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	THURSDAY, 7 FEBRUARY 2019	
FILE NO/S	U 14 OF 2018	
CITATION NO.	2019 WAIRC 00032	

Result	Application dismissed	
Representation		
Applicant	Ms D Corbett as agent	
Respondent	Mr D Klesser as agent	

Order

HAVING heard from Ms D Corbett, as agent for the applicant, and Mr D Klesser, as agent for the respondent, at conferences between the parties on Tuesday, 20 February 2018, Tuesday, 13 March 2018 and Thursday, 24 January 2019 and at hearing on Monday, 13 August 2018;

AND WHEREAS at the conference on Thursday, 24 January 2019 the parties agreed to settle the matter upon payment from the respondent to the applicant in the sum of \$1,000.00;

AND WHEREAS the respondent has informed the Western Australian Industrial Relations Commission the settlement amount was paid on Thursday, 24 January 2019;

AND WHEREAS the applicant has confirmed receipt of the settlement amount;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order that the application be and is hereby dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2019 WAIRC 00012

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	:	2019 WAIRC 00012
CORAM	:	COMMISSIONER D J MATTHEWS
HEARD	:	WEDNESDAY, 5 DECEMBER 2018
DELIVERED	:	THURSDAY, 17 JANUARY 2019
FILE NO.	:	B 95 OF 2018
BETWEEN	:	KAY HEALD Applicant (Respondent to current application) AND METLABS AUSTRALIA PTY LTD Respondent (Applicant in current application)

CatchWords	:	Denied contractual benefits claim - Respondent to substantive claim applies to have claim dismissed on basis it is barred by a deed - Consideration of relevant principles
Legislation	:	<i>Industrial Relations Act 1979</i> sections 26(1)(a), 27(1)(a)(ii) and (iv)
Result	:	Application granted; substantive claim dismissed

Representation:

Applicant	:	Mr G McCorry
Respondent	:	Ms R Harding (of counsel) and with her Ms D Dyer (of counsel)
Solicitors:		
Applicant	:	Not applicable
Respondent	:	Jackson McDonald

Case(s) referred to in reasons:

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447

Australia and New Zealand Banking Group Ltd v Karam [2005] NSWCA 344

Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors [2013] WASCA 36

Valenzuela v Commonwealth Bank of Australia [2017] NSWSC 1243

Reasons for Decision

- 1 Ms Kay Maree Heald started work as an Administration Manager with Metlabs Australia Pty Ltd in July 2012. On 20 July 2018, she resigned from that employment and signed a Deed of Settlement and Release which relevantly provided that the deed may “be pleaded in bar against any action or suit or proceeding taken by the employee arising out of or in connection with the separation of employment or the employment generally.”
- 2 By Notice of Claim filed 7 August 2018 Ms Heald seeks “payment of my share of the Respondent’s profits for the 2017/2018 financial year.”
- 3 Ms Heald alleges that she had a contractual entitlement to payment of a bonus out of profits achieved by Metlabs Australia Pty Ltd in any given year. Ms Heald alleges that this bonus had been paid in previous years, that a profit was made in the 2017/2018 financial year, that she has not been paid a bonus and that she should be paid a bonus as a matter of contractual entitlement.
- 4 Metlabs Australia Pty Ltd, by its Notice of Answer filed 28 August 2018, denies that it entered into any contract to provide Ms Heald with a share of its profits as alleged by Ms Heald or at all and further relies on the deed as barring and estopping Ms Heald from bringing her claim.
- 5 The matter did not settle at conference and on 13 September 2018 Metlabs Australia Pty Ltd filed an application seeking an order under section 27(1)(a) *Industrial Relations Act 1979* that the claim be “summarily dismissed” because Ms Heald was “barred from bringing the claim” as a result of the deed.
- 6 At the hearing of that application, Metlabs Australia Pty Ltd relied upon sections 27(1)(a)(ii) and (iv) *Industrial Relations Act 1979* and argued that the claim should not be heard and determined on its merits because there was a deed under which Ms Heald had agreed not to bring such a claim and, additionally, if reliance needed to be placed upon it, because it was not in the public interest for a person to prosecute a matter to hearing and determination when that person had promised not to do so and had received consideration for that promise.
- 7 This is my decision on the application under section 27(1)(a) *Industrial Relations Act 1979*.
- 8 Firstly, I turn to the facts, which were, in some important respects, a matter of conflict between the parties.
- 9 Two persons gave oral testimony, Ms Heald and Ms Jodie Martine Beeson, a human resources consultant who was engaged by Metlabs Australia Pty Ltd at the time of Ms Heald’s departure from employment, and who was the main player in the story on behalf of Metlabs Australia Pty Ltd.
- 10 Ms Beeson’s initial engagement by Metlabs Australia Pty Ltd was to undertake what Ms Beeson described as “a full workplace review” (Exhibit 2 at [9]) and she met with staff individually on 2 July 2018 as part of that review.
- 11 By 17 July 2018, in relation to Ms Heald at least, things had become focused in that the Managing Director of Metlabs Australia Pty Ltd had made it clear to Ms Beeson that he had concerns about Ms Heald’s performance and conduct in her employment and had charged Ms Beeson, using neutral language, to do something about those concerns.
- 12 Page 8 of Exhibit 2 is an email from the Managing Director to Ms Beeson setting out issues that he had with Ms Heald’s conduct and performance.
- 13 The email is evidently in response to a request from Ms Beeson to the Managing Director that he provide such information to her and is also, quite evidently, in the style of “ammunition” for Ms Beeson to use in doing something about Ms Heald.
- 14 Ms Beeson met with Ms Heald about the Managing Director’s concerns on 20 July 2018.
- 15 I accept Ms Heald’s evidence in relation to what happened at the meeting.

- 16 In accepting Ms Heald's evidence I reject those parts of Ms Beeson's evidence where it conflicts with that of Ms Heald.
- 17 Before I set out what happened at the meeting I set out my reasons for preferring Ms Heald's evidence to that of Ms Beeson.
- 18 Ms Heald was an impressive witness, although I only saw her under cross-examination.
- 19 Ms Heald was forthright and direct, even when her answers harmed her case and where she would have known they harmed her case.
- 20 A good example of this is where she admitted the deed, on its face, prevented the substantive proceedings and that she knew this at the time of signing it when, in my view, it would have been easy enough to obfuscate on this issue, and perhaps with material effect given the evidence referred to at [66] and [67] below.
- 21 Further, Ms Heald demonstrated excellent recall of the meeting.
- 22 Ms Heald was able to give evidence about aspects of the discussion that Ms Beeson could only recall after being prompted by having Ms Heald's version put to her.
- 23 It is perhaps not surprising that Ms Heald had the superior recollection of the meeting given that for her it was a unique and memorable one, which would not have been the case for Ms Beeson who had had other such meetings. In any event, for whatever reason, Ms Heald demonstrated a superior recollection.
- 24 An example is Ms Heald recalling Ms Beeson's comment to the effect that Ms Beeson had four children with whom she would like to spend time over the weekend but would have instead to work on disciplinary proceedings against Ms Heald if Ms Heald did not resign.
- 25 Ms Beeson failed to mention this comment in two affidavits she swore in this matter but accepted she had made it when it was put to her in cross-examination.
- 26 Another example is that Ms Heald recalled, and included in her affidavit, that Ms Beeson had said words to her to the effect that a working relationship was like a marriage and that once it broke down it was time to move on. Ms Beeson only included this comment in her second affidavit (Exhibit 3) which was prepared having read the affidavit of Ms Heald.
- 27 On the whole Ms Heald demonstrated intelligence, honesty and good recall in the stand.
- 28 Ms Beeson was a far less impressive witness.
- 29 I am concerned that Ms Beeson was somewhat blasé about the truth and the seriousness of the oath she took when swearing her affidavit and before me.
- 30 Ms Beeson adopted an affidavit (Exhibit 2) that turned out to include an accurately described but completely unreadable document. Her attitude to this appeared to be, when I questioned her about its contents, that she could simply tell me in vague terms what the document related to with its actual contents being unimportant.
- 31 Also in Exhibit 2, Ms Beeson's first affidavit, she made reference only to those parts of the exchange between her and Ms Heald that assisted the case of Metlabs Australia Pty Ltd and omitted those that did not.
- 32 I have made reference to two comments above which were recalled by Ms Heald but which Ms Beeson did not include in Exhibit 2. Exhibit 2, now that I have heard all of the evidence, is unaccountably brief and excessively self-serving, in the sense that it contains only things favourable to the respondent and its case and not things, which certainly occurred and ought to have been remembered, which were unfavourable to the respondent and its case.
- 33 The following was also telling in relation to my assessment of Ms Beeson as a witness.
- 34 Ms Beeson, on behalf of Metlabs Australia Pty Ltd, gave evidence, consistent with the respondent's case, that the meeting on 20 July 2018 was not about Ms Heald's employment coming to an end at all and that, adopting my words under oath, the brief from her client was to have the employment relationship improve but continue.
- 35 Ms Beeson put forward in her evidence that she was simply starting a process in relation to Ms Heald that could have any number of possible outcomes and that it was Ms Heald who first raised the issue of her resigning. Ms Beeson's evidence was that Ms Heald quickly and rudely brought things to a head in the meeting by saying that the process was "bullshit" and that she "didn't need the stress" and "wanted to resign."
- 36 Ms Beeson's evidence was that this development was unexpected, she did not go so far as to say unwelcome, and that her main concern after the possibility of resignation was raised was to make sure that Ms Heald did not act rashly and took time to make sure this is what she truly wanted.
- 37 Ms Beeson was at pains to characterise her further interactions with Ms Heald as being to ensure that if Ms Heald was to act on her initial impulse to resign that she did so with a clear mind.
- 38 The agent for Ms Heald, on the other hand, wished to develop an argument, consistent with Ms Heald's evidence, that it was Ms Beeson who first referred to Ms Heald resigning and did so in circumstances where pressure was brought to bear upon her to do so.
- 39 Ms Heald gave evidence that Ms Beeson produced a pro forma deed at the meeting and gave her a choice between signing such a document, once the proper details had been inserted, or facing a disciplinary process.
- 40 It is obvious that whether or not Ms Beeson had a pro forma deed to hand at the meeting was a key matter in the competing versions of events. If Ms Beeson had a copy of a pro forma deed to hand this would obviously undermine her portrayal of events and her motives in calling, and conduct at, the meeting.

- 41 At t22, in answer to a question from the agent for Ms Heald about whether she had a copy of a deed with her in the meeting, Ms Beeson denied this and adopted language that she was “absolutely positive” that she did not have a deed with her at the meeting.
- 42 This was consistent with Ms Beeson’s evidence in chief that she “did not have a copy of any deed of release with me in the meeting” and that “the only documents I had with me were my notebook and Ms Heald’s personnel file.” (Exhibit 3 [7cc]).
- 43 Later during cross-examination the agent for Ms Heald produced a copy of a deed that bore the handwriting of Ms Beeson and put it to Ms Beeson that she had provided it to Ms Heald at the meeting.
- 44 Ms Beeson was visibly surprised by the production of the document and was not able to give an explanation for it being in Ms Heald’s possession other than her having given it to Ms Heald during the meeting.
- 45 Ms Beeson’s version disintegrated in the stand with her evidence quickly going from her being “absolutely positive” that she did not have a deed with her at the meeting to that she could not recall whether she had or not.
- 46 The issue was a highly material one and the retreat from a position of absolute certainty on it to something much less was, as I say, telling in my assessment of Ms Beeson as a witness.
- 47 I prefer Ms Heald’s evidence where it conflicts with that of Ms Beeson. I do not so conclude simply because of the issues I have found with Ms Beeson’s attitude and evidence. I positively found Ms Heald to be an honest person with better recall than Ms Beeson.
- 48 Against that background I find that what happened at the meeting was what was sworn to by Ms Heald at paragraphs 20 to 37 of her affidavit of 1 October 2018 (except that Ms Heald was not only shown a pro forma deed but was evidently provided with a copy of it).
- 49 I materially find, (with the full detail of what occurred being found at paragraphs 20 to 37 of Ms Heald’s affidavit made 1 October 2018), that the meeting on Friday 20 July 2018 commenced with Ms Beeson telling Ms Heald that she had committed serious breaches of discipline while employed by Metlabs Australia Pty Ltd. Ms Beeson then gave Ms Heald details of those breaches.
- 50 I emphasise here that Ms Beeson told Ms Heald she had committed serious breaches and not that it was alleged she had. Further, I find that the references to details and documents by Ms Beeson was to set out why it was considered the breaches had been made out and was not presented as a body of materials giving rise to a suspicion of wrongdoing.
- 51 I find that Ms Beeson then told Ms Heald that she had two options.
- 52 Ms Beeson told Ms Heald she could resign and receive five weeks’ pay or she could subject herself to a disciplinary process about what “she had done wrong”. Ms Beeson told Ms Heald that if she did not resign, the process would start that very weekend by provision to her of a letter which she would be expected to respond to at a meeting with Ms Beeson on the following Monday.
- 53 I find that Ms Heald attempted to explain her side of the story in relation to the “breaches” and that Ms Beeson countered each attempt to do so by reference to the “facts” from the employer’s point of view and maintained that Ms Heald had committed “serious breaches”.
- 54 I find that Ms Beeson did not engage in a serious discussion about Ms Heald’s side of the story.
- 55 I find that during the meeting Ms Beeson returned repeatedly and steadfastly to the “options” set out above and that she provided Ms Beeson with a pro forma deed.
- 56 I find that Ms Beeson said words to the effect that the employment relationship was “like a marriage, once the trust is broken it can’t be made back, the relationship has ended. You may never know the real reason but it’s over. You just have to move on”.
- 57 I find that Ms Beeson said that if Ms Heald did not resign, and sign a deed, she would get a chance to tell her side of the story but that she emphasised, when she said this, that one possibility of participating in the disciplinary process was Ms Heald could be terminated immediately and that there would be no payment to her. I find that Ms Beeson did not refer to the full range of possibilities, including exoneration, and by her reference only to termination without payment she emphasised this outcome and meant to do so.
- 58 I find that Ms Beeson did characterise what was being discussed as a “deal”.
- 59 I find that Ms Beeson made it clear that she wanted Ms Heald to make a decision that day about whether to take the deal or not, telling her that it was only on the table for that day.
- 60 I find that Ms Heald told Ms Beeson that the planned care of her baby grandson that night would affect her ability to make a quick decision and that Ms Beeson retorted that she had four children and would like to spend the weekend with them but that if Ms Heald did not sign a deed she would “need to make up the show cause letter on Saturday morning.”
- 61 I find that at the end of the meeting Ms Beeson told Ms Heald to “go home and think about things”, even though it was only mid-morning.
- 62 I find that Ms Beeson told Ms Heald to get her bag and leave and not to talk to any other employees and that this is what happened.
- 63 I find that Ms Beeson entered the meeting with the purpose of offering a “deal” to Ms Heald that would bring Ms Heald’s employment to an end on terms satisfactory, indeed favourable, to her client and that she prosecuted this purpose forcefully by painting a grim picture of Ms Heald’s future employment with Metlabs Australia Pty Ltd if she did not resign. I find that Ms Beeson prosecuted her purpose at the meeting by putting a deed in front of Ms Heald, and trumpeting it as an attractive alternative, and by trying to get a quick and favourable, for her and her client, decision from Ms Heald.

- 64 What happened after the meeting is largely common between the parties because it is captured by document trails.
- 65 Soon after the meeting on 20 July 2018 Ms Heald asked Ms Beeson to “email me the form” and, once it was established that Ms Heald wanted a copy of the deed she was being asked to sign, that is one with the full details entered, Ms Beeson provided it under cover of an email. Ms Beeson asked in that email that Ms Heald let Ms Beeson know her intentions “as soon as possible” and reminded Ms Heald that if she did not hear from Ms Heald before Saturday morning Ms Beeson would, at that time, prepare the “show cause letter” and send it to Ms Heald for her to consider over the weekend ahead of the meeting planned for Monday.
- 66 Also on the Friday, Ms Heald texted Ms Beeson asking whether the matter the subject of the substantive claim in this matter, payment of the bonus, would be affected by the deal. Ms Beeson responded conveying instructions that there was no contractual entitlement to payment of bonuses, that payment was at the discretion of the Managing Director and that he had decided bonuses were not going to be paid for the financial year 2017/2018.
- 67 Ms Heald sent a short text back about the matter and Ms Beeson responded that Ms Heald should take the matter up with a lawyer and that the issue was “outside this process I have been engaged to manage”. I interpose that this response might have given Ms Heald scope to give evidence that she did not understand that the deed would affect the substantive claim brought here. However, Ms Heald, to her credit, did not do so.
- 68 Ms Heald forwarded the deed Ms Beeson had sent her to an industrial agent and spoke to him by telephone about her circumstances.
- 69 The industrial agent told Ms Heald not to sign the deed but Ms Heald told him of her need for the money the deal guaranteed, against the possibility of being terminated without payment, and the industrial agent told Ms Heald that if she did sign the deed she should make it clear that she was doing so under duress.
- 70 Ms Heald then sent an email to Ms Beeson stating that she did not feel she had a choice other than to sign the deed but that she would be “signing this form under duress.”
- 71 Ms Beeson sent a reply email telling Ms Heald that she should not “under any circumstances sign the Deed of Settlement and Release under duress.”
- 72 The email went on to set out that Ms Heald did not have to resign and that she could, instead, go through the “disciplinary management process.”
- 73 Ms Beeson wrote she thought this would be “best” and promised to forward the “Show Cause letter” soon and to arrange a meeting for the Monday.
- 74 Ms Heald responded that she would “send the signed deed in tomorrow”. This email then went on to make some comments about Ms Beeson that may be described as misguided and fiery. Ms Beeson responded to the email but only to address those comments and there was no further communication about the issue of duress.
- 75 Ms Heald sent Ms Beeson a screen shot of the signed deed on the Saturday afternoon and formalities in relation to obtaining an original, and discharging obligations under the deed, then followed.
- 76 And so I turn to whether I should bar these proceedings because of the deed or not.
- 77 The jurisdiction of a court of equity to relieve against unconscionable dealing will be invoked to set aside a deed of settlement and release, or not allow a party to rely upon it, where a party makes unconscientious use of their superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special position of disadvantage (see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 per Mason J at 461).
- 78 The jurisdiction of a court of equity to relieve against unconscionable dealing will only be exercised if a party to a transaction was under a special disability and that disability was sufficiently evident to the stronger party to make it unfair or unconscientious for that party to accept the assent of the weaker party to the transaction (see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 per Deane J at 474 to 475).
- 79 It is a common law doctrine of contract that a court will set aside a contract, or not allow a party to enforce it, where one party has applied pressure to the other party to achieve the other party’s entry into the contract where the pressure involves an actual or threatened unlawful act (see *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors* [2013] WASCA 36 at [25]).
- 80 It is an established part of the common law doctrine that an actual or threatened breach of contract is unlawful conduct (see *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors* [2013] WASCA 36 at [26]).
- 81 The common law doctrine of economic duress set out in the previous two paragraphs is “a close cousin of the equitable doctrine of undue pressure” (see *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors* [2013] WASCA 36 at [23]).
- 82 However, the Court in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd and Ors* [2013] WASCA 36 did not deal with the question of whether, for the purposes of the equitable doctrine, an actual or threatened breach of contract is unlawful conduct.
- 83 The New South Wales Court of Appeal grappled with that question to some extent in *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344
- 84 The Court held, at [66], that the equitable doctrine was limited to “threatened or actual unlawful conduct” but the Court did not seem keen on the idea that, in relation to the equitable doctrine, an actual or threatened breach of contract was “unlawful,” a proposition which is, as set out above, uncontroversial in relation to the common law doctrine (see the discussion of the Court in *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344 at [62] to [65]).

- 85 I note also that the Court in *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344 at [66] found that “where the power to grant relief is engaged because of a contravention of a statutory provision...the Court may be entitled to take into account a broader range of circumstances than those considered relevant under the general law.”
- 86 Although it is not correct to say that, in this case, the power to grant relief is engaged because of a contravention of a statutory provision it is important to remember that I must act “according to equity [and] good conscience” (section 26(1)(a) *Industrial Relations Act 1979*).
- 87 Finally, it is clear that the jurisdiction of a court of equity, or at least such a court in Australia, will not be exercised to set aside a deed on the basis that there was simply some inequality of bargaining power between the parties to the deed (see *Valenzuela v Commonwealth Bank of Australia* [2017] NSWSC 1243 at [72], a recent consideration of *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344). More is needed.
- 88 The question then is what approach do I use in deciding whether or not to enforce the deed to bar the substantive denied contractual benefits claim.
- 89 I have no difficulty in deciding that the equitable principles set out above apply.
- 90 I also have no difficulty in deciding that, as they are equitable principles, they provide guidance on what it is meant for me to act “according to good conscience and equity.”
- 91 That is, the principles being equitable ones, I find they provide content to this obligation and section 26(1)(a) *Industrial Relations Act 1979* does not widen the scope of my enquiry and assessment. That is, I consider the statutory imperative in a case such as this is fulfilled by application of principles developed by courts in equity.
- 92 In relation to deciding what use I may make of an actual or threatened breach of contract, if I find such, I pause for thought.
- 93 Although it is clearly part of the common law doctrine that this will amount to relevant unlawfulness, the parties did not approach or argue this matter by relying on common law doctrines, instead confining themselves to arguments of equity.
- 94 In the result, as will be clear later, I have found it unnecessary to decide whether it is enough, to establish unlawfulness for the purposes of the equitable doctrine, to establish an actual or threatened breach of contract.
- 95 Looking at the equitable doctrine of unconscionable dealing it is clear to me, and I find, that Ms Heald was not under any special disadvantage when she signed the deed.
- 96 I accept that Ms Heald was “stressed” from the time of the meeting on 20 July 2018 until the time she signed the deed.
- 97 However, her stress falls well short of establishing special disadvantage.
- 98 The stress about which there was evidence was the normal emotional reaction one would experience given what was happening and there is no evidence that it progressed beyond what a normal person would experience in the situation in which Ms Heald found herself.
- 99 Certainly, there was nothing which would cause Ms Beeson, on behalf of Metlabs Australia Pty Ltd, to consider that Ms Heald was experiencing an actual psychological or emotional state beyond what would be normal.
- 100 Ms Heald remained articulate and strong throughout the meeting.
- 101 Subsequent to the meeting Ms Heald was able to obtain professional advice and communicate clearly, and strongly, with Ms Beeson by email.
- 102 Ms Heald did not have any of the characteristics normally associated with special disadvantage and displayed nothing during the process which would cause an objective observer to think she had, at any relevant time, any such characteristics. She was not aged or infirm or deficient in mental capacity or language and her conduct throughout the process was that of someone who was stressed but who remained lucid, intelligent and strong.
- 103 I move on then to consider the concept of undue pressure.
- 104 I find that Ms Beeson, on behalf of Metlabs Australia Pty Ltd, applied pressure which ultimately induced Ms Heald to sign the deed. The pressure was sustained and forceful and of the kind which invites consideration of the concept of undue pressure in relation to it.
- 105 The pressure commenced the moment the meeting on 20 July 2018 started and continued until the deed was signed.
- 106 The following aspects of Ms Beeson’s treatment of Ms Heald during the meeting were unfair, at the very least, in a relevant sense:
- (1) Ms Beeson told Ms Heald at the start of the meeting on 20 July 2018 that she had committed serious breaches of discipline, rather than that there was an allegation or allegations that she had done so;
 - (2) Ms Beeson rebuffed Ms Heald’s attempts to tell her side of the story by referring to “evidence” of the breaches, without producing that evidence, and repeated that the “breaches”, and not the “allegations”, were serious (of course, such a discussion and the production of such evidence would have been, all things being equal, quite premature; but all things were not equal, Ms Beeson was telling Ms Heald she had committed “breaches”, supported by evidence, and that she had to make a decision about what happened next against that background);
 - (3) Ms Beeson signalled to Ms Heald, by the above, that Ms Beeson, on behalf of Metlabs Australia Pty Ltd, had no real interest in Ms Heald’s side of the story;
 - (4) Ms Beeson referred at any early stage in the meeting to a “deal”, that is to Ms Heald resigning and receiving payment upon doing so, and characterised the “deal” as a way to avoid the consequences of Ms Heald’s serious breaches;

- (5) Ms Beeson returned throughout the meeting to the “deal”, even going so far as to provide Ms Heald with a pro forma copy of a deed, thus giving the “deal” clear primacy in a meeting that Ms Beeson would have us believe was about discussion of “next steps” and “options”;
 - (6) Ms Beeson mentioned only that immediate termination without payment was a possible outcome if Ms Heald did not take the “deal” when, of course, there were many other possible outcomes, including full exoneration and the happy continuation of the employment relationship;
 - (7) Ms Beeson made it clear that the employment relationship was “over” and that “you just have to move on”, which again emphasised the worst for Ms Heald and accentuated the virtues of the “deal” as an alternative;
 - (8) Ms Beeson made it clear that a decision whether or not to take the “deal” had to be made quickly by Ms Heald, with the unpalatable alternative likely to occur soon, and quickly, if the “deal” was not taken;
 - (9) Ms Beeson’s commented that she had family commitments over the weekend, a comment which was really quite unkind and unreasonable given that Ms Beeson’s and Ms Heald’s situations were completely different with Ms Heald being required to make a big decision about her future while Ms Beeson was choosing to work to a timetable of her making in the context of a paid engagement; and
 - (10) Ms Heald was told by Ms Beeson to leave work despite it being mid-morning, something that was apparently inconsistent with any thought or belief that Ms Heald might somehow survive the planned process if she chose to participate in it rather than resign.
- 107 The meeting was ostensibly about Ms Heald being informed that her employer had some suspicions about her conduct and that a process would be commencing in relation to them. This was, however, by no means its content or tenor.
- 108 This was a meeting at which Ms Beeson was trying to get Ms Heald to take a deal to resign her employment, and receive money for doing so, against a clear background that if she did not resign she might end up with no job and no money.
- 109 That is exquisite pressure for most people and was for Ms Heald.
- 110 Ms Beeson kept up the pressure after the meeting.
- 111 That Ms Beeson only gave Ms Heald the weekend to consider the matter was pressure enough.
- 112 The matter under consideration was no small matter for Ms Heald. Many cases relating to setting aside, or relieving persons from the consequences of, agreements relate to large sums of money and ruinous life consequences. This matter is perhaps not one of those but the seriousness of the matter from Ms Heald’s point of view should not be underestimated.
- 113 Ms Heald had held her job for six years and it provided her with her livelihood. Ms Heald had gone to work on Friday 20 July 2018 presumably believing that there was no threat to that livelihood continuing into the indeterminate future.
- 114 Ms Beeson left work during the morning of that day facing a choice between agreeing to end that employment, for five week’s pay, or remaining in that employment with the prospect, looming large, of that employment being ended for her with no payment.
- 115 Ms Beeson kept up the pressure on Ms Heald by her references to the disciplinary process, and its quick prosecution, in the emails to Ms Heald on Friday 20 July 2018 at 5.37pm and 6.28pm.
- 116 The first email, and its comment to effect that if Ms Heald did not sign the deed Ms Beeson would immediately get to work on the “Show Cause” letter, made it explicit that taking the deal would allow Ms Heald to avoid unpalatable, and imminent, consequences. This was an unfair characterisation of what a fair process would involve or, perhaps more accurately, a fair characterisation of an unfair process.
- 117 Also, the email was quite unfair insofar as it suggested that Ms Heald’s failure to sign the deed would, in fact, “trigger” the next step in the process.
- 118 Ms Beeson wrote that “if I don’t hear from you I will prepare the Show Cause letter tomorrow [ie Saturday] morning.” This could only convey to Ms Heald that her failure to take the deal would be the cause of further, probably deleterious, steps and, what is more, that those steps would be taken very quickly.
- 119 If the matter had been truly urgent the “Show Cause letter” could have been ready on Friday 20 July 2018. If it was not urgent enough to have been ready for the meeting on that date then there would appear to have been no reason why it needed to be done on a Saturday, other than its threatened preparation was intended to keep up the pressure on Ms Heald. I was not given a satisfactory explanation during the hearing for why Ms Beeson thought it appropriate to have Ms Heald do work on the weekend. I can only assume it was all about keeping up the pressure on her.
- 120 The second email responded to Ms Heald saying that she would sign the deed “under duress”.
- 121 Ms Beeson responded that Ms Heald should not sign if she is under duress but the email immediately returns to the quick prosecution of the disciplinary process as the inevitable result of not signing.
- 122 It is impossible to reconcile concern about Ms Heald’s feelings of being under duress with the naked exertion of further pressure upon her by reference to the disciplinary process being immediately prosecuted.
- 123 I note that when Ms Beeson received a screen shot of the signed deed the next day she did not return to the issue of duress with Ms Heald, or seek any assurance that entry into the deed was voluntary and properly informed.
- 124 The question, however, given I find that there is ample evidence of exquisite and sustained pressure being brought to bear on Ms Heald is whether that pressure was the kind of pressure that should result in relief from the action it clearly induced in Ms Heald, being execution of the deed.

- 125 In the result, I find that the pressure was not “undue” in a relevant sense.
- 126 I find this because it did not involve any actual or threatened unlawful conduct by Ms Beeson on behalf of Metlabs Australia Pty Ltd.
- 127 Firstly, I find that there was no actual or threatened criminal act. I reject the argument made, indeed primarily relied upon by Ms Heald, that there was a “threat” as that term is used in the *Criminal Code*.
- 128 Secondly, I find that Ms Beeson’s pressure did not involve any actual or threatened breach of contract. This means that even if I had applied the common law doctrine referred to above, or accepted that for the equitable doctrine it is enough to establish an actual or threatened breach of contract to demonstrate unlawfulness, I would not have found that either of the doctrines apply to give Ms Heald relief against reliance on the deed by the respondent.
- 129 I should, at the outset, say that Ms Heald did not identify with any clarity the term or terms of the contract which she alleges Ms Beeson, on behalf of Metlabs Australia Pty Ltd, breached or threatened to breach. This is because Ms Heald’s arguments went off on a hopeless tangent about Ms Beeson having breached the criminal law.
- 130 The best I can do, reviewing the matter, is to say that Ms Heald alleged that:
- (1) threatening disciplinary action when there is no basis for doing so is a breach of the employment contract; and/or
 - (2) threatening to dismiss someone summarily, that is without notice or payment in lieu of notice, is a breach of contract if there is no basis for a belief that the employee had engaged in conduct which warranted summary dismissal.
- 131 The problem with Ms Heald’s first argument is that I am not at all sure that an employee has a contractual right to only face disciplinary proceedings when there is a basis for them.
- 132 Such action might provoke the exercise of powers by the Western Australian Industrial Relations Commission but that is an entirely different thing from there being a contractual term to this effect.
- 133 It is to be remembered that there is no contractual duty upon an employer to act with good faith toward employees.
- 134 In any event, I find that Ms Beeson did have a basis for telling Ms Heald that disciplinary action might be taken against her. The allegations, of course, were not tested in the hearing but no argument was made that they were completely illusory and, in any event, I find that they were not invented and that the matters could properly have given rise to a relevant suspicion on the part of Ms Heald’s employer that she had breached discipline. I put to one side evidence and argument to the effect that Ms Heald was not guilty of the supposed breaches. That evidence and argument addressed a different question to that I find relevant, being whether there could be a suspicion of wrongdoing. I find there could very well have been a relevant suspicion.
- 135 In relation to the second argument, if I have identified it correctly, it is on firmer ground from a contractual point of view. Unless there is something in the written contract of employment or something in an award or industrial agreement that bears upon the question, and I was not referred to any of these things, a term is implied into Ms Heald’s contract that if she was to be dismissed, except in circumstances warranting summary dismissal, she would be given reasonable notice or payment in lieu thereof.
- 136 To threaten Ms Heald with summary dismissal, if there was no basis whatever for summary dismissal, might very well have involved a threat of a breach of the contract by Metlabs Australia Pty Ltd.
- 137 However, the facts, and I stress that I have found the facts to be largely as Ms Heald gave them, do not make out the argument.
- 138 Ms Beeson never said that if Ms Heald did not resign she would be summarily dismissed without regard to the facts. Nor did she, in truth, suggest that this would occur. She singled it out as a possibility but did not go quite so far as to intimate that it would occur.
- 139 While Ms Beeson did emphasise the possibility of dismissal without payment, that is summary dismissal, there was no threat that this would necessarily be the result if Ms Heald did not resign.
- 140 Ms Beeson did enough to make it clear, while making reference to the possibility of summary dismissal, that this was only one of the options and that Ms Heald’s response to the breaches of discipline would be looked at before any decision was made in relation to her employment.
- 141 A statement made at the meeting that Ms Heald had to resign or she would be summarily dismissed might very well, if it had induced entry into the deed, have been within the territory of an unlawful threat but no such statement was made and no such thing occurred.
- 142 The facts simply do not allow a conclusion that Ms Beeson, on behalf of Metlabs Australia Pty Ltd, threatened to breach the contract of employment.
- 143 I find that Ms Heald was put in a most unfair position by Ms Beeson and that Ms Beeson prosecuted her purpose in relation to Ms Heald, that was to get her to agree to end her employment on terms favourable to Metlabs Australia Pty Ltd, in a most unfair way but at the end of the day I consider that this matter is resolved in favour of the respondent according to the application of known principles to the facts as found by me.
- 144 Unfairness of the sort I have identified is not in itself enough to cause me to set aside the deed.
- 145 I recognise the difference in the bargaining strength of the parties.
- 146 I recognise that Ms Heald was stressed throughout the relevant period.

- 147 I recognise that Metlabs Australia Pty Ltd, through the agency of Ms Beeson, had little regard for Ms Heald's stress and the awful position she found herself in and prosecuted its purpose unremittingly and forcefully.
- 148 However, Ms Heald was under no special disadvantage and Ms Beeson did not, on behalf of Metlabs Australia Pty Ltd, breach or threaten to breach the contract of employment, if this was a material question to answer.
- 149 I recognise that the *Industrial Relations Act 1979* requires me to act according to equity and good conscience and that it is necessary for me, in coming to my decision, to have regard to the public interest.
- 150 I have been guided by equitable principles which helpfully, in my view, flesh out the way in which the imperative under section 26(1)(a) *Industrial Relations Act 1979* should operate in this case.
- 151 In terms of the public interest, I find, taking into account all of things considered above, that there is a public interest in the Western Australian Industrial Relations Commission enforcing deals such as that struck in this case. That is, a deal not which was not attended by the taking advantage of a special disadvantage or one achieved through actual or threatened unlawful conduct.
- 152 However, I hasten to add for the benefit of the interested reader that this matter turns very much on its own facts.
- 153 I would not wish, by my decision, to encourage a belief that entry into deeds by employees to avoid potentially negative action toward them is simply part of the rough and tumble of employment relations in this State and such an outcome may be prosecuted without regard to equity and good conscience. Meetings such as those between Ms Heald and Ms Beeson will no doubt continue to occur but employers should be careful to ensure that what is said by them, or on their behalf, at such meetings is within the law.
- 154 The application under section 27(1) *Industrial Relations Act 1979* will, by order, be granted and the substantive claim will, by order, be dismissed.

2019 WAIRC 00013

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	KAY HEALD	APPLICANT
	-v-	
	METLABS AUSTRALIA PTY LTD	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	THURSDAY, 17 JANUARY 2019	
FILE NO/S	B 95 OF 2018	
CITATION NO.	2019 WAIRC 00013	
Result	Application granted; substantive claim dismissed	
Representation		
Applicant	Mr G McCorry as agent	
Respondent	Ms R Harding (of counsel) and with her Ms D Dyer (of counsel)	

Order

HAVING HEARD Mr G McCorry as agent for the applicant (respondent) and Ms R Harding (of counsel) and with her Ms D Dyer (of counsel) for the respondent (applicant), the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

- (1) The application under section 27(1) *Industrial Relations Act 1979* be granted; and
- (2) The substantive claim be dismissed.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2019 WAIRC 00078

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00078
CORAM : COMMISSIONER T B WALKINGTON
HEARD : WEDNESDAY, 6 FEBRUARY 2019
DELIVERED : WEDNESDAY, 20 FEBRUARY 2019
FILE NO. : B 138 OF 2018
BETWEEN : MS GEORGINA ROCKETT
 Applicant
 AND
 MERLIN DIAMONDS LIMITED (ABN 86 009 153 119)
 Respondent

CatchWords : Denied contractual benefits – Unpaid wages and entitlements – Parties reached an agreement to compromise the applicant’s claim – Unimpeached compromise agreement – Commission can make orders in terms of the agreement – No appearance by respondent
Legislation : *Industrial Relations Act 1979* (WA) s 6(b), s 6(c), s 23(1), s 23A, s 26(1)(a), s 27(1)(d), s 29(1)(b)(ii), s 32, s 32A; *Industrial Relations Commission Regulations 2005* (WA) reg 24(2).
Result : Order Issued
Representation:
Counsel:
Applicant : Ms M Corbould of counsel
Solicitors:
Applicant : Hammond Legal

Cases referred to in reasons:

Beverly McLeod v Paulownia Trees Pty Ltd (1997) 78 WAIG 1057

Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service [2004] WAIRC 11100; (2004) 84 WAIG 2612

Maurice Bradbury v Jos van Baren, John Dewick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate (1995) 75 WAIG 2927

Prudential Assurance Company Ltd v McBains Cooper (A Firm) and Others [2000] 1 WLR 2000; [2001] 3 All ER 1014

Reasons for Decision

- 1 The applicant, Ms Georgina Rockett, worked as a Senior Exploration Geologist for the respondent, Merlin Diamonds Limited (**Merlin Diamonds**) from 27 April 2009 to 31 May 2018.
- 2 On 8 November 2018 Ms Rockett made an application under s 29(1)(b)(ii) *Industrial Relations Act 1979* (WA) (**IR Act**) for:
 - a. unpaid salary for the period 1 May - 31 May 2018 totalling \$11,666.00;
 - b. accrued annual leave of \$5,577.37;
 - c. accrued long service leave of \$19,928.79;
 - d. superannuation for the period 1 October 2017 to 31 May 2018 of \$8,866.64; and
 - e. 16 weeks of redundancy payments totalling \$43,076.80.
- 3 On 4 December 2018 Mr Gutnick filed a *Form 5 – Notice of answer* on behalf of Merlin Diamonds. The respondent’s answer asserted that a redundancy had been discussed and agreed to between the parties and was calculated as of 30 April 2018, therefore, no salary payment was due for the period 1 May - 31 May 2018.
- 4 On 7 December 2018 my Associate wrote to the parties by email and letter to inform them that a conciliation conference was listed for 10:30 am on Tuesday, 18 December 2018.
- 5 At 9.06 am on 18 December 2018, Mr Lee, on behalf of the respondent, telephoned my Associate to advise that he had injured himself and was unable to attend work to access the papers he required to participate in the conciliation conference. He requested that the conciliation conference be adjourned. Subsequently Mr Lee confirmed his request for adjournment by email and advised that he would be available on Thursday of the same week. On 18 December 2018, my Associate informed the parties by email that the conciliation conference was adjourned until 10.00 am on Thursday, 20 December 2018.
- 6 On Thursday, 20 December 2018 Ms Rockett participated in the conciliation conference by telephone and was represented by counsel, who appeared in person. Mr Lee appeared on behalf of the respondent, participating by telephone. An agreement to compromise application B 138/2018 (Agreement) was reached by the parties.

- 7 The Agreement was recorded in an email from my Associate to the parties set out below:

Dear Ms Corbould / Mr Lee

APPLICATION NO B 138 OF 2018

MS GEORGINA ROCKETT

V

MERLIN DIAMONDS LIMITED (ABN 86 009 153 119)

RE: Outcome of conference

I refer to the abovementioned application and write to confirm the outcome of the conference convened on 20 December 2018 by Commissioner Walkington.

At the conclusion of the conference, the parties agreed that:

- (1) Merlin Diamonds Limited will pay Ms Georgina Rockett \$51,665.00. This will be paid in two instalments, the first sum of \$25,832.50 on 15 January 2019 and the second sum of \$25,832.50 on 15 February 2018. These payments reflect the sum of 5 weeks' notice, salary for the month of May and accrued annual and long service leave based on the calculations supplied by the respondent.
- (2) The matter will remain open until the applicant receives the total amount payable. At that time the Applicant will discontinue her claim.

Should you have any questions, please do not hesitate to contact me.

Yours faithfully

E Roberts

Associate to Commissioner T B Walkington

- 8 On 16 January 2019 counsel for the applicant informed my Associate that despite attempts to contact the respondent, Ms Rockett had not received the first instalment payment. On the same day, my Associate advised the parties, by email, that the matter would be relisted for conciliation conference and requested the parties' availability.
- 9 On 17 January 2019, Mr Gutnick advised my Associate that Mr Lee would no longer represent the respondent and requested that the conciliation conference be rescheduled for a later time. In reply to Mr Gutnick's email, on the same day, counsel for the applicant emailed my Associate to request that the matter be relisted for conciliation conference as soon as possible.
- 10 On 17 January 2019 my Associate informed the parties by email and letter that a conciliation conference was listed for 2.15 pm on Wednesday, 23 January 2019. On the same day, Mr Gutnick contacted my Associate by email requesting that the conciliation conference be delayed until a later date.
- 11 On 18 January 2019 my Associate advised the parties by email and letter that the conciliation conference had been adjourned and re-listed for Thursday, 24 January 2019.
- 12 On Thursday, 24 January 2019 Ms Rockett participated in the conciliation conference by telephone and was represented by counsel, who appeared in person. Mr Gutnick appeared on behalf of the respondent, participating by telephone. The outcome of the conciliation conference was that the applicant requested the matter be listed for hearing. On the same day, a *Form 15 - Notice of hearing* was emailed and posted to the parties informing them that the matter was listed for hearing at 1.00 pm on Wednesday, 6 February 2019.
- 13 The respondent did not attend the hearing listed on Wednesday, 6 February 2019. Counsel for the applicant attended the hearing, in person.
- 14 The Commission has the power to proceed to hear and determine a matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) IR Act. Service on the respondent in this matter may be affected by leaving the notice at, or sending it be pre-paid post to the principal place of business: *Industrial Relations Commission Regulations 2005* (WA) reg 24(2).
- 15 I am satisfied that the respondent was duly served with notice of these proceedings and the Commission may proceed with the hearing in the absence of the respondent in the circumstances.

The Applicant's Case

- 16 Counsel for the applicant submitted that the parties had reached an Agreement to compromise her claim for denied contractual benefits at the conciliation conference on 20 December 2018. The terms of the Agreement were set out in the email from my Associate in [7]. Counsel for the applicant confirmed that payment of the first instalment had not yet been made and therefore the respondent had not complied with the Agreement.

Consideration

- 17 The Agreement made between the parties is an unimpeached compromise which represents the end of the dispute or disputes from which it arose: *Prudential Assurance Company Ltd v McBains Cooper (A Firm) and Others* [2000] 1 WLR 2000; [2001] 3 All ER 1014, 1019 [19] (Brooke LJ); *Beverly MacLeod v Paulownia Trees Pty Ltd* (1997) 78 WAIG 1057.
- 18 In this case the Agreement reached by the parties has overtaken Ms Rockett's claim for denied contractual benefits: *Maurice Bradbury v Jos van Baren, John Dewick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate* (1995) 75 WAIG 2927.
- 19 I agree with the reasoning of Smith C (as she was then) in *Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service* [2004] WAIRC 11100; (2004) 84 WAIG 2612 [52] referring to the IR Act:

I am of the view that the Commission has the power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is

implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with it everything necessary for the effective exercise of the power.

20 I am of the view that the Commission has the power to make orders in the terms of a compromise agreement and I adopt the reasoning of Beech C (as he was then) in *Beverly McLeod v Paulownia Trees Pty Ltd* in the present circumstances:

[If] the Commission does not issue an order in the terms of the parties' agreement, it calls into question the value of agreements reached before the Commission, certainly in s.32 proceedings.

21 I find that the parties reached an Agreement to compromise Ms Rockett's claim in the terms set out at [7] and that Merlin Diamonds has not complied with the Agreement.

22 I find that Mr Lee was represented Merlin Diamonds, understood the terms, and freely entered into the Agreement at the time the compromise agreement was made.

23 I find that Merlin Diamonds has not complied with the Agreement and the Commission may make an order in the terms of the Agreement consistent with s 26(1)(a) IR Act.

24 I am of the view that Merlin Diamonds owes Ms Rockett \$51,665.00 and that the first instalment of the two payments ought to have been affected on 15 January 2019 and the second instalment is to be paid on 15 February 2019. Accordingly, I will order that Merlin Diamonds pay the first instalment immediately and the second instalment on 15 February 2019.

2019 WAIRC 00029

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MS GEORGINA ROCKETT	APPLICANT
	-v-	
	MERLIN DIAMONDS LIMITED (ABN 86 009 153 119)	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON	
DATE	WEDNESDAY, 6 FEBRUARY 2019	
FILE NO/S	B 138 OF 2018	
CITATION NO.	2019 WAIRC 00029	

Result	Order issued
Representation	
Applicant	Ms M Corbould of counsel
Respondent	

Order

Having heard Ms Miriam Corbould (of counsel) for the applicant, and there being no appearance on behalf of the respondent, the Commission, pursuant to powers conferred under the *Industrial Relations Act 1979*, hereby orders:

That the respondent pay the sum of \$51,665.00 to the applicant. The sum is to be paid in two instalments. The first instalment of \$25,832.50 is to be paid immediately and the second instalment of \$25,832.50 is to be paid on 15 February 2019.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2018 WAIRC 00146

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	: 2018 WAIRC 00146
CORAM	: SENIOR COMMISSIONER S J KENNER
HEARD	: MONDAY, 19 FEBRUARY 2018
DELIVERED	: MONDAY, 26 FEBRUARY 2018
FILE NO.	: U 121 OF 2017, B 155 OF 2017
BETWEEN	: IAN GREGORY SAMPSON
	Applicant
	AND
	PAUL LOTHAR RALF MEYER C/O THAMES LEGAL OFFICE
	Respondent

Catchwords	:	<i>Industrial Law (WA) - Application for discovery and inspection of documents - Whether documents relate to what is an issue in the proceedings - Principles applied - Order issued</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Industrial Relations (Superannuation) Regulations 1997</i>
Result	:	Application upheld in part

Representation:

Counsel:

Applicant	:	In person
Respondent	:	Mr P Meyer of counsel
Solicitors:		
Respondent	:	Thames Legal

Case(s) referred to in reasons:

ALHMMWU v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & Others (1995) 75 WAIG 1801

Hollis v Vabu (2001) 207 CLR 21

Reasons for Decision

- 1 The substantive claims in these proceedings brought by the applicant, allege that firstly, on or about 11 September 2017, the applicant was dismissed from his employment as a restricted legal practitioner and secondly, that he has been denied contractual benefits in the sum of \$42,974 in respect of unpaid wages; unpaid annual leave; payment in lieu of notice and unpaid superannuation contributions.
- 2 The applicant has brought an application for discovery and production of documents, for the purposes of the conduct of his case. By letter dated 22 January 2018, the applicant wrote to the respondent requesting production of documents informally. By letter dated 1 February 2018, the respondent replied to the applicant rejecting his request and maintaining that the documents sought by the applicant are either confidential, not relevant to the applicant's claims or otherwise constitute a fishing expedition. As the matter of production of documents was not resolved informally, as is the preferred approach in this jurisdiction, the Commission listed the applicant's application for hearing.
- 3 At the hearing of the application, the applicant maintained that the documents sought by his letter of 22 January 2018, are germane to a just determination of the matters before the Commission and to order their discovery and inspection would be consistent with equity and good conscience and the substantial merits of the case: *ALHMMWU v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & Others* (1995) 75 WAIG 1801. In *Burswood*, the Full Bench outlined the general principles in relation to discovery and inspection of documents. At p 1805 the Full Bench observed that discovery, production and inspection of documents in the Commission's jurisdiction is not available as of right. Orders in relation to these matters may only be made if the Commission considers that it would be just to do so under s 27(1)(o) of the *Industrial Relations Act 1979* (WA). The onus is on an applicant seeking an order to establish that in the circumstances such an order would be just.
- 4 In the substantive claims, a threshold issue arises as to whether the applicant was at all material times, an employee or an independent contractor. The application for discovery and inspection of documents relates to that issue. The relevant indicia of an employment contract, turn on the relevant facts and circumstances and how the relationship between the parties may be assessed against the "multi-factor" test: *Hollis v Vabu* (2001) 207 CLR 21 at [33]. The threshold issue is determined based upon the facts as to the nature of the working relationship between the parties and how in law, it should be characterised.
- 5 I will deal with the applicant's requests in accordance with the numbered paragraphs in his letter to the respondent of 22 January 2018. Paragraphs 1, 2 and 3 relate to correspondence between the respondent and Law Mutual, the Legal Practice Board and/or the Legal Profession Complaints Committee and Legal Aid Western Australia, mentioning the applicant, in the period October 2015 to September 2017 inclusive. In the case of Law Mutual, the applicant contended that correspondence exists in relation to professional indemnity insurance and goes to his status as an employee or otherwise. The ground of his status is the basis for the request in relation to the Legal Practice Board. It is not immediately apparent as to how any correspondence between the respondent and Legal Aid would be relevant. I consider any documents as described in pars 1 and 2 of the request should be discovered.
- 6 As to par 4, in relation to notices under Reg 4 of the *Industrial Relations (Superannuation) Regulations 1997* (WA), this relates to a notice to be given by an employer to an award employee in relation to notification of choice of superannuation fund. The respondent maintained that no such notice was given, as the applicant was not an employee, rather was employed by his own company Sampson Investments Pty Ltd. In any event, if any such notices were given, they ought to be in the possession of the employee. It is not contended that the applicant was covered by an award and in any event, no award exists in this jurisdiction to cover legal practitioners. This request is not relevant.
- 7 As to par 5, regarding correspondence with WorkCover that is alleged to have mentioned the applicant, to the extent that any such correspondence relates to workers compensation liability cover for the applicant, it should be discovered.

- 8 As to par 6, being payment schedules created by the respondent and provided to either Sampson Investments Pty Ltd or the applicant, documents of this kind are relevant. They should be discovered.
- 9 In relation to par 7, being correspondence with the Child Support Agency, the respondent indicated that only one such document exists, that being a letter of 31 January 2017 with an attached form "Confirmation of a Person's Employment". The respondent has agreed to provide both documents to the applicant.
- 10 As to par 8, copies of "Pay Back Orders from Legal Aid WA", the respondent submitted that this related to overpayments made to the respondent firm in relation to work performed for Legal Aid WA. The respondent submitted that it was required to pay a sum of money back to Legal Aid WA in respect of an error made by Mr Meyer as to amounts that could be chargeable. This does not relate to any issue with practitioners engaged by the firm. I am not persuaded that any mention of the applicant in such correspondence is a relevant to indicia as to the nature of the relationship.
- 11 Paragraph 9 of the request refers to a copy of the respondent's books of account said to have been shown to the applicant at some point during the engagement. The respondent maintained that both the applicant and another restricted practitioner were shown the books of account of the firm, to acquaint them with its financial position, with a view to their future progression with the firm. Whilst the applicant submitted that in some way this was evidence of his integration into the business of the firm, copies of the books of account are not necessary for that purpose. In any event, that material is plainly confidential. Accordingly, no order will be made in respect of such documents.
- 12 Paragraphs 10, 11 and 12 refer to copies of tax invoices in relation to matters worked on by the applicant and which are said to have noted him as a fee earner in the periods October 2015 to 31 December 2015; 4 January 2016 to 31 December 2016; and 1 January 2017 to 28 September 2017. In my view, those documents are relevant to the issue of the relationship between the applicant and the respondent and they should be discovered.
- 13 Paragraph 13 refers to a request for a copy of the respondent's lease for its premises at London Court in the Perth CBD. As I understood the submission, this related to extra space being leased for the use of staff. Regardless of the reason for any extension of the leased premises, I fail to see how the lease itself could be relevant to the preliminary issue to be determined.
- 14 Paragraph 14 refers to "attendance records" of the applicant at the respondent's office. The applicant maintained he was required to be at the firm from 9.00 am to 5.00 pm and there exists an electronic record in relation to these matters. The respondent submitted that the electronic records refer to only notes, court attendances, client attendances and where a staff member makes a prison visit. The respondent submitted there are no records of hours of attendance as suggested by the applicant. I consider that this material may be relevant to the preliminary issues. Copies of electronic records reflecting attendances by the applicant in respect of matters that may be allocated to him may, depending upon the evidence, go to the issue of the exercise of control in the working relationship between the parties. Copies of such documents should be discovered.
- 15 As to para 15 this relates to a request for a copy of an excel spreadsheet containing client information and allocation to fee earners of the firm. The respondent maintained that this document contains confidential client information and is used for the purposes of allocation of matters only. Given the client confidentiality of this document and its purpose, I am not minded to order its discovery.
- 16 Paragraphs 16, 17 and 18, refer to various promotional material including the respondent's mention of the applicant on the respondent's website between 2016 and 2018, photographs of the applicant and artwork used in business cards. Whilst the respondent said no such material is now available, any material that does remain of this nature in my view is relevant to the preliminary issue and should be discovered.
- 17 In the circumstances of this case, having regard to s 26(1)(a) of the Act, I consider it would be just to make orders for discovery of the above documents. Additionally, as the applicant's claims are to be heard and determined together, an order should be made that they be joined for that purpose. The Commission orders accordingly.

2018 WAIRC 00148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

IAN GREGORY SAMPSON

APPLICANT

-v-

PAUL LOTHAR RALF MEYER C/O THAMES LEGAL OFFICE

RESPONDENT**CORAM**

SENIOR COMMISSIONER S J KENNER

DATE

TUESDAY, 27 FEBRUARY 2018

FILE NO/S

U 121 OF 2017, B 155 OF 2017

CITATION NO.

2018 WAIRC 00148

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr P Meyer of counsel

Order

HAVING heard the applicant on his own behalf and Mr P Meyer of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT discovery is to be given by the respondent of the documents referred to in pars 1, 2, 5, 6, 10, 11, 12, 14, 16, 17 and 18 of the applicant's letter of request dated 22 January 2018 by 12 March 2018.
- (2) THAT inspection of documents shall be completed by 26 March 2018.
- (3) THAT the applications U 121 of 2017 and B 155 of 2017 be and are hereby joined and will be heard and determined together.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00419

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2018 WAIRC 00419
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 3 NOVEMBER 2017, MONDAY, 19 FEBRUARY 2018, MONDAY, 26 FEBRUARY 2018, TUESDAY, 8 MAY 2018, TUESDAY, 26 JUNE 2018
DELIVERED	:	MONDAY, 16 JULY 2018
FILE NO.	:	U 121 OF 2017, B 155 OF 2017
BETWEEN	:	IAN GREGORY SAMPSON Applicant AND PAUL LOTHAR RALF MEYER C/O THAMES LEGAL OFFICE Respondent

Catchwords	:	<i>Industrial Law (WA) – Preliminary issues – Whether Commission has jurisdiction - Whether the applicant is an employee or an independent contractor – Whether a restricted legal practitioner under s 50 of the Legal Profession Act 2008 (WA) can be an independent contractor - Principles applied – Claim within Commission's jurisdiction – Commission satisfied that “restricted legal practice” under s 50 of the Legal Profession Act 2008 only includes employees at common law</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA) Legal Profession Act 2008 (WA), s 50 Minimum Conditions of Employment Act 1993 (WA)</i>
Result	:	<i>Application to be re-listed</i>
Representation:		
Counsel:		
Applicant	:	Ms M Saraceni of counsel
Respondent	:	In person

Case(s) referred to in reasons:

Building Workers' Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104

Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41

Phillip Digney v The Black Cockatoo Preservation Society of Australia [2014] WAIRC 01285; (2014) 95 WAIG 562

Federal Commissioner of Taxation v Barrett (1973) 129 CLR 395

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Marshall v Whittaker's Building Supply Co (1963) 109 CLR 210

Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313

On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3) [2011] FCA 366

Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers (2004) 85 WAIG 5

Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539

Roy Morgan Research v Commissioner of Taxation [2010] FCAFC 52; (2010) 184 FCR 448

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

United Construction Pty Ltd v Birighitti [2003] WASCA 24

Zuijs v Wirth Brothers (1955) 93 CLR 561

Reasons for Decision

- 1 There are two applications before the Commission. The first is a claim by the applicant Mr Sampson, that he was unfairly dismissed by the respondent, sole legal practitioner Mr Paul Meyer, trading as Thames Legal. The second is an application by Mr Sampson for denied contractual benefits that he alleges Thames Legal denied to him during what he maintained was an employment relationship with the firm, from October 2015 to September 2017.
- 2 Mr Sampson maintained that he commenced employment with Thames Legal as a restricted legal practitioner under the terms of s 50 of the *Legal Profession Act 2008* (WA). Despite this, Mr Sampson maintained that Thames Legal treated him as a subcontractor and paid him by way of remuneration, 40% of the fees charged to and received by clients of the firm, when Mr Sampson performed the work charged to the client.
- 3 Mr Sampson claimed that events leading to his dismissal included a letter from him requesting that Mr Meyer pay monies owed to him, in terms of outstanding pay and entitlements. Mr Sampson seeks compensation for loss. As to the denied contractual benefits claim, Mr Sampson claimed \$42,974 in salary or wages. Whilst in the particulars of claim the basis for this was not clear, it subsequently emerged that it is founded on the application of relevant provisions of the *Minimum Conditions of Employment Act 1993* (WA). Additionally, Mr Sampson seeks recovery of an amount in respect of leave and some other alleged contractual benefits.
- 4 Thames Legal opposes the claim of Mr Sampson. Moreover, it was contended that his applications are not within the Commission's jurisdiction, because at all material times the parties were in a relationship of principal and independent contractor and not one of employer and employee for the purposes of the *Industrial Relations Act 1979* (WA). As a question of the Commission's jurisdiction has been raised, the Commission is obliged to satisfy itself that it has the jurisdiction to enquire into and deal with Mr Sampson's claims. This matter was listed for hearing as a threshold issue.

Legal principles

- 5 The issue of whether a person is an employee or an independent contractor involves the consideration of the totality of the relationship between the parties. This principle is referred to and relied upon by the Industrial Appeal Court in *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5. In *Philip Digney v The Black Cockatoo Preservation Society of Australia* [2014] WAIRC 01285; (2014) 95 WAIG 562 I set out the relevant principles at par 23, in the following terms:

23 The relevant principles as to whether a person should, as a matter of fact and law, be regarded as an employee or an independent contractor, have been dealt with by the Industrial Appeal Court. In *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5, Steytler J dealt with this issue at pars 20-28, EM Heenan J at pars 50-52 and Simmonds J dealt with the issue at pars 98-100. In particular, Simmonds J said at pars 95-101 as follows:

95 The common law test for distinguishing a relationship of employer/employee, on the one hand, and principal/independent contractor, on the other, has recently been reviewed in some detail in the judgment of Hasluck J of this Court in *Birighitti* (*supra*), at [57] to [67]. The other members of the Court (Anderson J, who dissented on the jurisdictional issue in the case, and Scott J) did not find it necessary to enter into the question in as much detail because of the case's particular facts.

96 In this case, where it seems to me the matter is rather more evenly balanced than in *Birighitti*, I consider it is necessary to review the matter again, particularly as it was contended in this case that there had been a shift in the law not entered into in *Birighitti*. I review the matter again without meaning to depart from the view of Hasluck J there in any way, but to emphasise matters of first principle particularly relevant to this case.

97 The most recent High Court authority in point, for the purposes of vicarious liability for the negligence of a bicycle courier, is *Hollis v Vabu Pty Ltd* (*supra*). There was a clear majority on the issue of the application of the test, that of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, with McHugh J dissenting, and Callinan J not expressing a concluded view on the matter. As to the test itself, however, I see no clear difference between all of the members of the Court who expressed a concluded view.

98 The test set out in *Vabu* by the majority is expressed in terms of the difference between a person (an employee) whose work serves another, and is done **in that other's business**, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a **trade or business of the person doing the work**, on the other. The majority referred (*Vabu*, at 39) for this purpose to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, at 48, per Dixon J, and to *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, at 217 per Windeyer J, where language of this sort is used. The *Vabu* majority also referred to *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 366 per McHugh J, where

the distinction is expressed in terms of the independent contractor as a person who does the work not as "the representative of the employer".

99 For the application of the test, and particularly for the relevance of the matter of "control" of the work done, the *Vabu* majority refer to the dicta in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, at 29 per Mason J. There, his Honour acknowledges the historical significance of the "control test" and the difficulties in using it in the historical ways in modern working conditions, where he says

"The common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers* [(1955) 93 CLR 461, at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in *Stevens (supra)*, which is not referred to in *Vabu*, but which is a passage quoted in *Odco* as setting out the law on this point ((*supra*) at 754):

"The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552; *Zuijs' case [supra]*; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall [supra]* at 218. Other relevant factors include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

101 As these dicta tend to indicate, the application of the test is a matter of some difficulty, as this case illustrates. I need to consider that question separately.

24 His Honour then went on to apply the test set out in the various decisions of the High Court referred to, and took into account a number of factors including control, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax, the delegation of work, indicia of a separate business, integration in the organisation, and the language of the parties' written contract: see pars 108-150 inclusive.

25 The "multi factor" test referred to and applied by Simmonds J, as set out above, was referred to and applied by the High Court in *Hollis v Vabu Pty Limited* (2001) 207 CLR 21.

6 In *Hollis* the High Court set out what is known as the "multi-factor" test. The case of *Hollis* was discussed in detail by the learned authors in Sappideen, C O'Grady, P and Riley, J in *Macken's Law of Employment* 8th ed at [2.200] to [2.350]. Without setting out the summary of these principles in any great detail, the key points to consider include whether a person carries on a business in their own account; the extent to which the putative employer exercises detailed control over the employee; whether the person performs work for others, has a separate place of work and advertises services; whether significant tools and equipment are provided; the capacity to sub-contract and delegate work; whether a person is represented as part of the employer's business; taxation issues; the method of payment; the right to suspend or dismiss; whether leave entitlements are provided; the existence of a profession, trade or calling; whether goodwill or saleable assets are involved; and whether there is any significant business expenditure.

7 Furthermore, the learned authors in *Macken's Law of Employment* refer to the issue of incorporation at par [2.360]. They state that:

[2.360] It is assumed in the Australian authorities that incorporation automatically prevents an employment relationship with the other contracting party even if the person is sole owner and shareholder of the company and is providing personal services.²⁹¹ A court could not "lift the corporate veil" and treat the contractor as an employee: "an employer does not usually have employee corporations".²⁹² This does not, however, address the difficulty that workers are frequently in an unequal bargaining position and are effectively forced to incorporate in order to get work.²⁹³ Occasionally courts have been prepared to decide that there is an employer-employee relationship.²⁹⁴ So that interviewers employed by a market research company were held to be employees for purposes of superannuation despite the fact that they were able to incorporate. The Full Federal Court accepted that:

[T]he ability of an interviewer to incorporate as a factor entitled to little weight because the entity selected to do the work (conduct interviews) was the individual interviewer, and the company featured only as the recipient of the fees that would otherwise have been paid to the interviewer.²⁹⁵

On this same principle, insurance representatives were held to be employees despite the fact that contracts of appointment were nominally with their companies.²⁹⁶ Despite the existence of the corporate structure, the insurance representatives were still required to personally provide services and sell insurance; they could not employ others to undertake this work for them. The company structure allowed the diversion of income but did not amount to an agreement under which the company contracted to provide the services of its employee to the insurance company.²⁹⁷

8 However, it is not in all cases where there is the interposition of a corporation, that this will be fatal to a finding that a person was an employee rather than an independent contractor. Whilst the existence of a corporation will be a relevant consideration, where the evidence supports a finding that a company was only used as a vehicle to receive fees or payment and the relevant work was otherwise undertaken by an individual, this factor may be outweighed by others: *Roy Morgan Research v Commissioner of Taxation* [2010] FCAFC 52; (2010) 184 FCR 448 at par 43 (as referred to in *Macken* above).

9 Ultimately, in applying these principles, each case will turn on its own facts.

10 A further issue to be considered in this case, is the terms of s 50 of the LP Act. This provides for a period of supervised legal practice for an admitted legal practitioner, that is required before a person may practice law on an unrestricted basis. Section 50 of the LP Act is as follows:

50. Restricted legal practice

(1) In this section –

required experience means —

- (a) 18 months supervised legal practice, in the case of a person who, to qualify for admission to the legal profession, completed practical legal training —
 - (i) principally under the supervision of an Australian legal practitioner, whether involving articles of clerkship or otherwise; or
 - (ii) involving articles of clerkship principally under the supervision of a person other than an Australian legal practitioner in accordance with the admission rules;

or

- (b) 2 years supervised legal practice, in the case of a person who, to qualify for admission to the legal profession in this or another jurisdiction, completed other practical legal training;

restricted legal practice means legal practice by a person who is an Australian legal practitioner —

- (a) as an employee of a law practice if —
 - (i) at least one partner, legal practitioner director or other employee of the law practice is an Australian legal practitioner who holds an unrestricted practising certificate; and
 - (ii) the person engages in legal practice under the supervision of an Australian legal practitioner referred to in subparagraph (i);

or

- (b) as a partner in a law firm if —
 - (i) at least one other partner is an Australian legal practitioner who holds an unrestricted practising certificate; and
 - (ii) the person engages in legal practice under the supervision of an Australian legal practitioner referred to in subparagraph (i);

or

- (c) as a WA government lawyer; or
- (d) as an interstate government lawyer; or
- (e) as an employee of a body that carries on a business other than the practice of law if the person engages in legal practice under the supervision of an Australian legal practitioner who holds an unrestricted practising certificate; or
- (f) in a capacity approved for the purposes of this paragraph under a legal profession rule.

- (2) In determining whether a person has the required experience regard can only be had to a period of supervised legal practice that the regulations permit to be taken into account for the purposes of this section.
- (3) The required experience may be made up of separate periods of supervised legal practice.
- (4) A local legal practitioner who does not have the required experience must engage in restricted legal practice only.
- (5) A person contravening subsection (4) is taken to contravene a condition of the person's local practising certificate.
- (6) A condition of a local practising certificate may require the holder to engage in supervised legal practice even though the holder has the required experience.
- (7) The Board may exempt a person or class of persons from the requirement of subsection (4) or may reduce the required experience for the person or class of persons, if satisfied that the person or persons do not need to be supervised or need to be supervised only for a shorter period, having regard to —
 - (a) the length and nature of any legal practice previously engaged in by the person or persons; and
 - (b) the length and nature of any legal practice engaged in by the supervisors (if any) who previously supervised the legal practice engaged in by the person or persons.
- (8) An exemption under subsection (7) may be given unconditionally or subject to such conditions as the Board thinks appropriate.

11 An issue arising in the context of the present case, is whether somebody can be an independent contractor who is also a restricted legal practitioner for the purposes of s 50 of the LP Act, being subject to close supervision and, by implication, further training, which restricted legal practice requires. At first blush, the close supervision and oversight which is required to be exercised by a legal practitioner in respect of a restricted practitioner under s 50 of the LP Act may be argued to be inconsistent with the notion of independence inherent in the relationship between a principal and an independent contractor. This was the contention of Mr Sampson in this case. Allied to this, the requirement in the decided cases, for an independent contractor to be in business on his or her own account, as opposed to being part of and being seen to be a part of, the other person's business, may also be relevant in this context. Furthermore, the provision of training may point towards employment: *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 at 288.

The evidence

- 12 Mr Sampson studied law as a mature aged student, after being in business for some 30 years as a sailmaker and conducting a windsurfing enterprise. Mr Sampson was admitted to the Supreme Court of Western Australia as a legal practitioner on 5 June 2015. He outlined how he came to be engaged by Thames Legal as a restricted practitioner. Mr Sampson testified that he met Mr Grauaug, who was then an unrestricted legal practitioner engaged in legal practice with Thames Legal, at a CPD function in September 2015. Both Mr Sampson and Mr Grauaug had known one another through sailing circles, many years prior. Mr Grauaug testified that Mr Sampson informed him that he was looking for a restricted practitioner position. Mr Grauaug said that Mr Meyer, from Thames Legal, may be interested.
- 13 One thing led to another and a meeting took place at Thames Legal's premises on 15 October 2015. Present at this meeting were Mr Sampson, Mr Grauaug and Mr Meyer. These discussions led to an arrangement where Thames Legal offered and Mr Sampson accepted, a position as a restricted legal practitioner, on the basis that he be paid a percentage commission. The arrangement was the same as apparently applied to other staff members, where Mr Meyer would receive 60% and Mr Sampson would receive 40% of fee income received from firm clients, when Mr Sampson performed the work charged to the client. Mr Sampson did not dispute Mr Meyer's evidence that because of Mr Meyer's prior health issues, Mr Meyer said the level of work at the firm had been reduced. Mr Meyer said that he told Mr Sampson in the meeting that he was unable to engage employed solicitors on a PAYE basis. Mr Sampson did not agree that the reference to employment on a PAYE basis was referred to in the meeting.
- 14 Some discussion took place between Mr Sampson and Mr Meyer as to the requirements of s 50 of the LP Act in relation to restricted practitioners. Mr Sampson was to work for the firm at the firm's offices under close supervision of Mr Meyer. The firm would provide an office, computer and telephone. Staff of the firm were not permitted to use their own mobile telephone. The system of work and the office/client management process was outlined in the evidence and was not essentially in dispute. It was common ground that Thames Legal had strict file management systems in place and all staff were required to strictly comply with them. Mr Sampson initially commenced on a part time, three-day per week basis. He started working on a full-time basis in early January 2016.
- 15 Mr Meyer allocated matters, set fees and met all firm clients. The firm used a "blended" billing rate of \$300 per hour plus GST. This rate was charged to clients regardless of the fee earner who may have worked on a matter. All work performed on a matter was recorded on the matter file. All advice prepared for clients was settled and signed by Mr Meyer. Court documents were settled and signed by Mr Meyer also. Legal staff were expected to work from 9 am to 5 pm. Each morning at about 8.30 am Mr Meyer and the legal staff had a meeting in a local coffee shop to discuss and plan the day's work ahead. Mr Sampson was to inform Mr Meyer if he wanted to take any time off. As for all legal staff, a business card for Mr Sampson was produced, tendered as exhibit A7. The card had Mr Sampson's name and the firm name "Thames Legal" on it, along with the relevant signage.
- 16 Photos were taken at the Supreme Court of Mr Meyer and the firm's legal staff which were then placed on the firm's website. All legal staff of the firm, including Mr Sampson, were presented as the "Thames Legal team". None of the promotional material tendered or referred to in evidence made any reference to Mr Sampson's company, Sampson Investments Pty Ltd. As to this company, Mr Sampson testified that when he sold his former business, he did intend to wind it up. However, on advice provided to him, he needed to keep the company on foot because it was a corporate trustee for his superannuation fund.
- 17 Mr Sampson testified that he had to approach Mr Meyer in about December 2015, as he had not been paid for any work performed since his commencement. Whilst there was some dispute on the evidence as to at whose request this was done, the upshot was that Mr Sampson was only to be paid if he provided an invoice from his company and used the business ABN. As a part of this arrangement, the firm was also to produce a "remittance advice" in respect of work done by Mr Sampson on any matters. Examples of both types of documents were tendered as exhibits A10 and A14. As a part of his engagement, Mr Sampson did not receive any paid leave or worker's compensation cover.
- 18 Bills for legal services performed for clients of the firm, examples of which were tendered as exhibit A8, made no reference to Mr Sampson's company as a disbursement or otherwise. Mr Sampson was identified on bills to clients, as a fee earner with the initials "IGS". As to the day to day time management of the firm, a calendar system was used. It was common ground that Thames Legal had strict protocols for its use. Each member of the legal staff was required to record all office and court attendances, so each staff member knew where, when and what other staff members were doing. Colour codes were used as a part of this calendar system.
- 19 Furthermore, correspondence between Thames Legal and the Legal Practice Board, Law Mutual in relation to indemnity insurance, Legal Aid of Western Australia in relation to legal aid panel work, and the Law Society of Western Australia, all referred to Mr Sampson as an employed solicitor of Thames Legal. None of this correspondence made any reference to Sampson Investments Pty Ltd or that Mr Sampson was engaged by the firm as an independent contractor. Copies of such correspondence were tendered as exhibits A17, A18 and A19.
- 20 I find accordingly.

Consideration

- 21 For the following reasons, which I can relatively shortly state, I have no hesitation in concluding that at all material times, Mr Sampson was an employee of Thames Legal and was not an independent contractor.
- 22 First and foremost, the requirements of close supervision and control, underpinning the engagement of a restricted legal practitioner, as set out in s 50 of the LP Act, are entirely at odds with the independence and autonomy that is associated with a person engaged as an independent contractor. Secondly, as a matter of construction of s 50(1) of the LP Act, "restricted legal practice" as defined in the presently relevant pars (a) and (e), in my view, only contemplates legal practitioners who are employees at common law. As to par (e), whilst it refers to persons who practice "as an employee of a body that carries on business other than the practice of law", in my view, this contemplates a person working as, for example, in-house counsel for a corporation under supervision of an unrestricted Australian legal practitioner. It may also encompass a legal practitioner

working as an employee for an employer or industry body or a trade union, as further examples. It also seems intended from the terms of par (e), that the person who holds an unrestricted practising certificate as an Australian legal practitioner and who is to supervise the restricted legal practitioner, is also to be employed by the body carrying on the business.

- 23 Construed as a whole and in context, for the purposes of pars (a) and (e) of the definition of “restricted legal practice” in s 50(1), a restricted legal practitioner must be an employee of a law practice or of a body conducting a substantive business or enterprise, and which business or enterprise also engages the Australian legal practitioner who holds an unrestricted practising certificate, and who is responsible for the supervision of the restricted practitioner concerned. There was no evidence before the Commission, or any submission made, referring to an approval in a legal profession rule, for the purposes of par (f), that would support the arrangement between Mr Sampson and Thames Legal.
- 24 In conclusion on this point, I do not consider that an independent contractor can be a restricted legal practitioner for the purposes of s 50 of the LP Act. This also seemed to be view of the Legal Practice Board, on the evidence of its Executive Director, Ms Fulham.
- 25 Whilst the combined issues of the requirements of s 50 of the LP Act and the indicia of control are sufficient to dispose of the jurisdictional argument, I will, as evidence was led on some of them, consider other indicia relevant to the threshold point.
- 26 As to whether Mr Sampson was engaged in business in his own account, in this case, I am not persuaded to any extent that this factor is satisfied. On the evidence, it was clear that Mr Sampson worked as part of and was represented to clients and to the outside world, as part of Thames Legal as a firm. At all times the firm promoted the Thames Legal “team”, which included Mr Sampson. At no stage was Mr Sampson’s company, Sampson Investments, identified or promoted as engaging in legal practice or any other business for that matter. As I have already mentioned, the only role that the company played was to be a conduit to issue invoices to Thames Legal and receive payments from the firm. All work performed by Mr Sampson was done by him as an individual legal practitioner, who was integrated into and formed part of Thames Legal. For these reasons too, the use of an ABN is of no material weight.
- 27 On the question of the interposition of Mr Sampson’s company generally, as I have already outlined above, this is not a matter of any significant weight where, as here, the only role that the company played was to receive payment for work performed by an individual: *Roy Morgan Research*.
- 28 There was no evidence that Mr Sampson performed any work for others and as a restricted legal practitioner, nor could he really do so. There was no separate place of work for Mr Sampson and he did not promote himself as a business independently of the firm. Nor was there any evidence of the right to delegate work or to engage others to perform it. And as I have already mentioned, this is not something that in any event, could occur having regard to s 50 of the LP Act.
- 29 As to payment by percentage reward, this is somewhat neutral as both employees and independent contractors may be paid by results or by commission and piecework rates. The same goes for the factor of the existence of a profession in this case. It may go either way. The absence of paid leave and workers’ compensation cover would tend to indicate independence, all other things being equal, which they are far from so in this case.

Conclusion

- 30 The Commission has concluded that Mr Sampson was, as a restricted legal practitioner under the LP Act, an employee of Thames Legal for the purposes of the Act. The Commission will so declare. Mr Sampson’s substantive claims will now be listed for hearing.

2018 WAIRC 00656

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

IAN GREGORY SAMPSON

APPLICANT

-v-

PAUL LOTHAR RALF MEYER C/O THAMES LEGAL OFFICE

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER

DATE

THURSDAY, 19 JULY 2018

FILE NO.

U 121 OF 2017, B 155 OF 2017

CITATION NO.

2018 WAIRC 00656

Result

Declaration issued

Representation

Applicant

Ms M Saraceni of counsel

Respondent

In person

Declaration

HAVING heard Ms M Saraceni of counsel on behalf of the applicant and the respondent on his own behalf the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT for the purposes of the herein applications at all material times the applicant was an employee of the respondent.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00914

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2018 WAIRC 00914
CORAM : SENIOR COMMISSIONER S J KENNER
HEARD : TUESDAY, 2 OCTOBER 2018
DELIVERED : FRIDAY, 21 DECEMBER 2018
FILE NO. : U 121 OF 2017, B 155 OF 2017
BETWEEN : IAN GREGORY SAMPSON
 Applicant
 AND
 PAUL LOTHAR RALF MEYER C/O THAMES LEGAL OFFICE
 Respondent

Catchwords : *Industrial Relations Law (WA) - Unfair dismissal claim - Whether applicant was dismissed - Contractual benefits claim - Claim for annual leave, notice period and payment on a quantum meruit basis - Principles applied - Applicant was not dismissed - applicant entitled to annual leave payment - Minimum Conditions of Employment Act (WA) 1993 not applicable - quantum meruit claim unsuccessful as employment agreement enforceable*

Legislation : *Industrial Relations Act 1979 (WA) s 7*
Fair Work Act 2009 (Cth) ss 112(2), 117(2), 117(3), 759
Legal Profession Act 2008 (WA) ss 16, 26(1)(a), 116(1)
Minimum Conditions of Employment Act 1993 ss 3, 24(2), 24(3)
Minimum Conditions of Employment Regulations 1993 r 3

Result : Order issued

Representation:
Counsel:
Applicant : Ms M Saraceni of counsel
Respondent : Mr P Meyer in person

Case(s) referred to in reasons:

Ahern v AFTPI (1999) 79 WAIG 1867
ANZ Banking Group Ltd v Westpac Banking Corporation (1988) 164 CLR 662
Australian Mutual Provident Society v Allan (1978) 52 ALJR 407
Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385
Baltic Shipping Co v Dillon (1993) 176 CLR 344
Bearings Inc (Aust) Pty Ltd v Treloar (1999) 95 IR 169
Bogunovich v Bayside Western Australia Pty Ltd (1998) 79 WAIG 8
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363
Codelfa Construction Pty Ltd v State Rail Authority of SNW (1982) 149 CLR 337
Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169
Davey v Cray Holdings Pty Ltd (1996) IRCA 129
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353
Hawkins v Clayton (1988) 164 CLR 539
Hayman v Betta Brushware Pty Ltd (1946) 63 WN (NSW) 247
Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704
Ian Gregory Sampson v Paul Lothar Ralf Meyer c/o Thames Legal Office [2018] WAIRC 00419

Liverpool City Council v Irwin (1997) AC 239
Oats v Sanders Executive Pty Ltd (1999) 79 WAIG 3543
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221
Richards v Nicoletti (2016) 97 WAIG 117
Roxborough v Rothmans of Pall Mall Australia Ltd [2001] HCA 68
Stone v Chapel [2016] SASC 32
Swan Yacht Club (Inc) v Bramwell (1997) WAIG 579 at 583
Westpac Banking Corporation v Wittenberg (2016) 330 ALR 476

Case(s) also cited:

ACE Insurance Ltd v Trifunovski (2011) 200 FCR 532
Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867
Australian Air Express Pty Ltd v Langford (2005) 147 IR 240
Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540
AWI Administration Services Pty v Birnie (2001) 81 WAIG 2849
Balfour v Travelstrength Ltd (1980) 60 WAIG 1015
Banks v Blue Chip Electronics Pty Ltd (1993) 49 IR 255
Belo Fisheries v Froggett (1983) 63 WAIG 2394
Bogunovich v Bayside Western Australia (1999) 71 WAIG 8
Bone Densitometry Australia Pty Ltd v Lenny (2005) 85 WAIG 2981
Brailey v Mendex Pty Ltd (1992) 73 WAIG 26
Breen v Williams (1996) 186 CLR 71
Brenner v First Artists' Management Pty Ltd (1993) 2 VR 221
Capewell v Cadbury Schweppes Australia Ltd (1998) 78 WAIG 299
Carter v Mt Pleasant Bowling Club Inc (2017) WAIRC 274
Connelly v Wells [1994] 55 IR 73
Conti Sheffield Real Estate v Brailey (1992) 72 WAIG 1965
Duddington v Mario and Clara Enterprises Pty Ltd and Morgan Trading Pty Ltd 2017 WAIRC 00885
Epath WA Pty Ltd v Adriansz [2003] 83 WAIG 3048
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors (2015) HCA 45
Ferguson v Salvation Army 2014 WAIRC 001042
Gilmour v Cecil Bros FDR Pty Ltd (1996) 76 WAIG 4434
Grobler v Stasikowski 2017 WAIRC 00115
Growers Market Butchers v Backman (1999) 79 WAIG 1313
Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64
Jensen v Cultural Infusion (Int) Pty Ltd (2018) FCCA 2137
Kinneen v Whelans Australia Pty Ltd (2016) 96 WAIG 1622
Lynham v Lataga Pty Ltd (2001) 81 WAIG 986
Meehan v Jones (1982) 149 CLR 571
Metropolitan (Perth) Passenger Transport Trust v Ehard Gersdorf (1981) 61 WAIG 611
NSW Cancer Council v Sarfarty (1992) 28 NSWLR 64
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 307
Powell v Braun (1954) 1 All ER 484
Rankin v Marine Power International Pty Ltd (2001) 107 IR 117
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234
Re Porter (1989) 34 IR 179
Re Transport Workers Union of Australia (1989) 34 IR 87
Richards v Nicoletti (2016) WAIRC 00941
Roy Morgan Research Pty Ltd v Commissioner of Taxation (2010) FCAFC 52
Ryde-Eastwood Leagues Club Ltd v Taylor [1994] NSWIRComm 112
Saad v TWT Ltd (1998) NSWCA 199
Scicluna v William Paul Brookes t/as Bayview Motel Esperance WA (2016) WAIRC 00862
Secured Income Real Estate (Australia) Ltd v St. Martins Investments Pty Ltd [1979] HCA 511
Shirlaw v Southern Foundries (1926) Ltd (1939) 2 KB 206

Simons v Business Computers International Pty Ltd 65 WAIG 2039

Stevens v Brodribb 160 CLR 16 – DATE?

Stewart v Port Noarlunga Hotel Ltd (1980) 47 SAIR 406

The Moorcock (1889) 14 PD 64

Tranchita v Wavemaster International Pty Ltd (1999) 79 WAIG 1886

Turner v Australian Postal Corporation (2016) FWC 801

Undercliffe Nursing Home v FMWU (1985) 65 WAIG 385

Vabu Pty Ltd v Federal Commissioner for Taxation (1996) 33 ATR 537

Wesfarmers Federation Insurance Ltd v Wells [2008] NSWCA 186

Reasons for Decision

- 1 In the decision of the Commission in relation to jurisdiction in these matters, I held that the applicant was an employee of the respondent and not an independent contractor: *Ian Gregory Sampson v Paul Lothar Ralf Meyer c/o Thames Legal Office* [2018] WAIRC 00419. This decision concerns the applicant's claims on the merits. The first claim made is that the applicant was summarily dismissed by the respondent on 11 September 2017. The applicant does not seek reinstatement or re-employment, rather compensation for his loss and injury. The second claim made by the applicant is that he was denied certain contractual benefits by way of unpaid salary; annual leave, and salary in lieu of notice. Whilst originally making a claim for unpaid superannuation, the applicant abandoned this claim at the commencement of the hearing. The applicant also seeks costs and expenses. I will deal with the applicant's unfair dismissal claim first.

Unfair dismissal claim

- 2 In relation to this claim, it is first necessary to determine whether the applicant was dismissed. The respondent contended that the applicant left his employment and thus resigned. The applicant denied this and maintained that the respondent summarily dismissed him.

Was the applicant dismissed?

- 3 Whether the applicant was dismissed by the respondent relates to the events of the morning of Monday 11 September 2017 at the respondent's office, in the context of the surrounding circumstances. It was common ground that in the months leading up to September 2017, the applicant had become increasingly concerned as to delays in payment of his remuneration in accordance with his agreement with the respondent. The applicant testified that he had many problems in getting paid by the respondent. The applicant said that some amounts related to the period from March 2017. He testified that his problems with getting paid by the respondent occurred almost from the beginning of his engagement as a restricted practitioner. Detail of these matters will be touched on later when considering the applicant's denied contractual benefits claim.
- 4 The applicant testified that he wrote a letter to the respondent on Friday 8 September 2017. The letter was in relation to arrears of monies owed to him for work done under his agreement. He said that he wrote the letter at home and later printed it off in the respondent's office. The applicant said that he left a signed copy of the letter on the respondent's computer keyboard on that Friday. A copy of it was also sent by email by the applicant to the respondent on Saturday 9 September 2017. A copy of the letter was exhibit A21. The letter referred to outstanding sums the applicant said were owed to him by the respondent, in total an amount of \$10,146.19. The applicant requested payment by 14 September 2017. If no payment was made the applicant said legal action to recover would be commenced. The letter also referred to the applicant seeking further legal advice in relation to superannuation and other entitlements.
- 5 Before leaving his office on Friday 8 September 2017, the applicant said he packed it up. As to why he did this, the applicant testified that it was because he had seen how other staff had been treated by the respondent. The applicant expected a poor response from the respondent to his letter. The applicant also had a medical certificate because of some health issues and would need to be on sick leave.
- 6 On Monday 11 September 2018 the applicant said he arrived at the office early. He said he wanted to give the respondent a copy of the letter in person and make any necessary arrangements whilst he was going to be absent on sick leave. The applicant was in the meeting room at the respondent's office. He had taken the copy of the letter which he had left on the computer keyboard up to the meeting room with him. Another restricted practitioner, Mr Ward, also arrived at the office along with the respondent. The applicant testified that the respondent said both he and his wife had been ill over the weekend and had not been able to process the payment of accounts. The applicant gave the respondent his letter. The respondent read the letter and the applicant said that as he did so, he became more agitated. According to the applicant, the respondent became red in the face and visibly upset. The respondent said words to the effect that the letter was wrong. When the respondent got to the last page of the letter where the applicant said he would be seeking legal advice, and would commence legal proceedings to recover his money, the applicant said that the respondent got up and stormed out of the room in an angry state. The applicant testified that the respondent said words to the effect "I don't owe you that much. How dare you threaten to sue me": ts217. The applicant also said that he gave the respondent a copy of his medical certificate at the same time.
- 7 Both the applicant and Mr Ward remained in the meeting room. The applicant said that Mr Ward asked him why he had done this, and that he, Mr Ward, only had two weeks remaining to complete his restricted practice. The applicant's evidence was that he told Mr Ward that he was sorry that the situation had affected him. The applicant testified that the respondent returned to the office about 10 to 15 minutes later. The respondent said he went out for a walk to the train station because the letter was a shock to him. He said up to that time there had been no "bad blood" between the applicant and himself or other staff of the firm. This was not disputed by the applicant.
- 8 On returning, the applicant said that the respondent told him words to the effect "look if you're sick, you should just get out of the office. Just go": ts 218. According to the applicant, the respondent became irate and ultimately said "get the f... out of my

- office”: ts218. The applicant said that he then went downstairs, retrieved the rest of his belongings, gave the keys to the respondent and left the office.
- 9 The respondent’s version of the events was that he was aware that some monies were owed to staff. He said that when he arrived in the office that morning he told both the applicant and Mr Ward that he had good news as he had been able to borrow some money from his wife to make the payments he had owed to the staff. There had been cash flow problems in the firm which had made paying on time difficult. He said he did not want to be in that position and was sorry that he was. The respondent said that the letter from the applicant to him was a coincidence, given that he had arranged to pay the monies owed to the staff. He said that the applicant’s letter was “nasty” and it shocked him. The respondent took it as a demand and a threat. The respondent understood that the applicant may have wanted to receive monies owed to him prior to proceeding on a planned holiday overseas.
- 10 In terms of the letter itself, the respondent said that when he read it, he took it as a clear indication that the applicant had thought the relationship between the applicant and the firm had come to an end and the applicant no longer wished to work for him. The respondent said that he took the applicant’s medical certificate as being genuine and said, if he was sick, then he had better go. The respondent said he had calmed down by this time after going for a walk to the train station. He denied that he shouted or got irate with the applicant on his return to the office. The respondent maintained that the applicant simply left after their brief discussion and he did not return or give any indication of intending to continue with the firm. The only other occasion on which the applicant returned was to serve a further letter of demand on the respondent asking for further payment and to serve the notice of application in these proceedings. The respondent denied he had shouted at other staff as alleged by the applicant. Whilst the respondent accepted that the applicant’s letter of 8 September 2017 did not say he was resigning, on the basis that the applicant had cleared out his office on the prior Friday, the respondent took it that the applicant clearly was not proposing to return and by his actions, did not want to work for the firm anymore.
- 11 The respondent also said that it was the case, contrary to the applicant’s denials, that he had earlier proposed to the applicant that the applicant become a partner in the firm because the respondent was considering retiring. The applicant, as a mature age restricted practitioner, would in the respondent’s opinion, be suitable to take over and learn the running of the firm.
- 12 The only other evidence as to the events that took place on 8 and 11 September 2017 came from Mr Ward, another restricted practitioner. Mr Ward gave some evidence as to these matters in the earlier preliminary hearing as to determine the Commission’s jurisdiction to hear the applicant’s claim. Mr Ward said that he had an office next to the applicant’s. On Friday 8 September 2017, late in the afternoon, he went in to see the applicant. He saw that the applicant had removed his many certificates from the office wall and had packed up his personal belongings into a suitcase. Mr Ward testified that he asked the applicant in words to the effect “what the hell are you doing?” The applicant responded “that he had had enough, and he was going to make an ultimatum to the respondent and he was sorry if it affected me in any negative way”: ts182. When asked as to the events that took place on the following Monday, Mr Ward said that when the applicant gave the respondent his letter, the respondent put the letter on the table and walked out without saying anything.
- 13 Mr Ward said that on the respondent’s return, the applicant had stood up and the respondent said to the applicant in words to the effect “Well you’d better go then”: ts183. Mr Ward said the applicant had also put a medical certificate on the table. Mr Ward’s evidence as to whether the respondent spoke prior to or after the applicant producing the medical certificate was a little unclear. There was no mention of the respondent getting angry or using profane language on Mr Ward’s evidence.
- 14 On the same Monday later in the afternoon, the respondent informed a settlement agent in relation to a client matter, that the applicant was no longer working for the firm: exhibit A22. A copy of this communication was also sent to the applicant at his private email address. There was no evidence that the applicant disputed this assertion from the respondent. On 20 September 2017 the applicant returned to the respondent’s office to collect his remaining belongings. He also served the unfair dismissal claim on the respondent. The applicant also provided the respondent with a further medical certificate for ongoing fitness for work. At the same time the applicant gave the respondent a “Form 5” from the Legal Practice Board, in relation to his work hours at the firm and a schedule of work attendances.
- 15 On his arrival home that day, the applicant sent the respondent an email and confirmed the above. Somewhat curiously, the last paragraph of the applicant’s email to the respondent read “I am on planned annual leave as approved by you commencing tomorrow and will be available on Friday 27 October 2017”. The respondent replied to the applicant on the same day shortly after, referring to the applicant having cleared out his office on Friday 8 September 2017 without the respondent’s knowledge. The respondent also referred to the applicant’s letter, handed to him on 11 September 2017, as rude and threatening, followed by the applicant walking out of the respondent’s office. The respondent advised the applicant that he would respond to his unfair dismissal claim and that the applicant was not on annual leave: exhibit A24. Sometime later, on 28 and 30 September 2017 the respondent notified Law Mutual and the Legal Practice Board that the applicant was no longer working for the firm: exhibit A23.
- 16 The issue to be determined on the evidence is, who terminated the contract of employment? A dismissal may be pre-emptory or on notice. It may involve the “dispensing of someone’s services”: *Swan Yacht Club (Inc) v Bramwell* (1997) 78 WAIG 579 at 583.
- 17 It seemed common ground that up until the events of 11 September 2017, the applicant, the respondent and other staff at the firm had a good working relationship. This was also the view of Mr Grauaug, who gave evidence in the earlier proceedings in this matter. Whilst the applicant testified that he had seen how the respondent had reacted to other staff, including Mr Grauaug, this was not Mr Grauaug’s own evidence. Mr Grauaug did say that the respondent could be direct but did not observe any swearing or abusive behaviour. The comment as to the respondent being direct accords with my own observations of the respondent over the course of several days of hearing in these proceedings, in terms of his manner and demeanour, both in and out of the witness box.

- 18 It is understandable that the applicant had concerns as to the late payment of his remuneration in accordance with the agreement he had with the respondent. This is so especially given his impending absence on an overseas pre-arranged trip. I also accept that in the context of the prior working relationship, the applicant's letter of 8 September 2017 would have come as a shock to the respondent. It was blunt. It threatened legal action. This is despite some of the claims made by the applicant being disputed by the respondent.
- 19 I find that on Friday 8 September 2017 the applicant largely cleaned out his office and packed up his belongings that afternoon. He spoke to Mr Ward who came into his office to see him. I am satisfied that the applicant told Mr Ward in words to the effect that "he had had enough and would be making demands" of the respondent the following Monday. Whilst the applicant says he packed his office because of how he thought the respondent may react to his letter, to remove all certificates from the walls and pack his belongings in a suitcase was quite an extraordinary course. It is also a course of conduct consistent with the applicant preparing to leave the firm. Whilst the applicant gave evidence as to how the respondent was alleged to have reacted to other staff members, this was not, as I have noted above, the evidence of Mr Grauaug.
- 20 I accept that the letter of 8 September 2017 did not say that the applicant was resigning from the firm. However, it was clear from the letter that the applicant did not appear to have any trust and confidence in the working relationship, despite what was said in the second last paragraph. Furthermore, the request by the applicant for the respondent to provide a schedule of attendance for the purposes of the applicant's restricted practice obligation to the Legal Practice Board in the letter, and at that time, prior to the end of the period of restricted practice, is more consistent with the applicant wanting to sever the working relationship rather than to preserve it.
- 21 Whilst the applicant said that when the respondent returned to the office he became increasingly angry and shouted at the applicant, this was not Mr Ward's evidence. The respondent said by the time he had walked to the train station and back, he was calm. The medical certificate had been provided by the applicant and the respondent said he did not doubt its genuineness. In response to the medical certificate, and on the view of the respondent, that the applicant's letter meant the applicant no longer wished to work for the firm, the respondent told the applicant that he had better leave. At no stage did the applicant tell the respondent that it was not his intention to leave the firm.
- 22 Subsequent correspondence from the applicant to the respondent was somewhat confusing. After the applicant's visit to the respondent's office on 20 September 2017, as I have mentioned, the applicant sent an email later that evening to the respondent, confirming that he was on planned leave and was available from 27 October 2017. This cannot be so. The applicant had just served his unfair dismissal claim on the respondent, which had been filed on the same day. The unfair dismissal claim asserted that the applicant was summarily dismissed on 11 September 2017. Furthermore, the provision of a further medical certificate at the same time as the applicant's visit to the office on 20 September 2017, is also inconsistent with his assertion that he was summarily dismissed on 11 September 2017. It is therefore unclear why the applicant would tell the respondent this and provide a further medical certificate, when it is completely at odds with his allegations in these proceedings. The respondent, also by email of 20 September 2017, responded to the applicant's email. The respondent contested the applicant's assertions.
- 23 Understandably, the applicant placed some focus on the correspondence from the respondent to the Legal Practice Board and Law Mutual that the applicant was no longer working at the firm. However, viewed objectively, this is not only consistent with the applicant's version of the events. It is also consistent with the respondent's contentions that from the letter of 8 September 2017, and in packing up and removing his effects from his office, the applicant made it clear that he no longer wished to work for the respondent. Furthermore, it would be reasonable to assume that by the time of the email to the settlement agent, sent by the respondent late in the afternoon on the Monday, the respondent would have discovered that the applicant had cleaned out and packed up his office, which he wasn't aware of at the time of the meeting earlier that morning. I place considerable weight on this event and view this action as an emphatic statement of the applicant's intention, especially in the context of his statement to Mr Ward that "he had had enough". There was no suggestion on the evidence that after the events of the morning of Monday 11 September 2017, that the applicant was barred from the respondent's premises or otherwise prevented from collecting his belongings. There was nothing to suggest that the applicant could not have cleared out and packed up his office on the morning of Monday 11 September 2017, after the meeting with the respondent. I consider the applicant's conduct, taken in the context of the relevant events, to be consistent with what he told Mr Ward on the Friday afternoon.
- 24 This issue has been somewhat difficult to factually resolve. It is not without some oscillation that I tend to the view, having regard to the circumstances, including the events of the preceding Friday 8 September 2017, on which I place very considerable weight, that the applicant was not dismissed on Monday 11 September 2017. Even if the relationship remained on foot after that time, as somewhat curiously suggested in the applicant's later correspondence, his commencement of these proceedings certainly brought it to an end at his initiative. The Commission cannot be satisfied that the applicant was dismissed to attract the Commission's jurisdiction and therefore the applicant's unfair dismissal claim must be dismissed.
- 25 In the alternative, had I not reached this conclusion, it was manifestly clear on the evidence that the applicant was most unlikely to return to the firm, despite what he said in his subsequent correspondence. I doubt very much if the working relationship would have continued much longer, on the applicant's initiative. It had clearly broken down, at least from the applicant's point of view. I do not consider it likely at all that the applicant would have returned after he was due to take his trip away for six weeks, following the 11 September 2017 meeting. The likelihood of the employment continuing is a relevant consideration in determining any compensation that the Commission may award, in the event of a finding of unfair dismissal: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 at 13 per Kenner C.

Denied contractual benefits – general principles

- 26 There are well settled principles in relation to claims of this kind. The issue to be determined is the legal right of the applicant under his contract of employment with the respondent. It is necessary for the applicant to establish that his claim relates to an industrial matter; that the applicant was an employee; that the benefit claimed is one to which the applicant was entitled under

his contract of service; the contract is a contract of service; the benefit claimed is not under an award or order; and the benefit claimed has been denied: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704; *Ahern v AFTPI* (1999) 79 WAIG 1867. The Commission's task in such matters is to discover and enforce the relevant contract of employment.

- 27 The applicant maintained that the original arrangement with the respondent for a "fee split" of 60% to the respondent and 40% to the applicant changed over time. It was not always 60/40 according to the applicant. Whilst this was the basis of the oral offer and acceptance of the engagement on 16 October 2015, the applicant contended that he understood he would work for the respondent as a restricted legal practitioner, as an employee. However, the respondent treated the applicant as a subcontractor and required the submission of invoices for payment. The applicant maintained that the remuneration arrangement, which he referred to as the "Skeleton Arrangement" should not be the basis of the Commission's findings as to the terms of the contract of service, now that the Commission has concluded that the applicant was an employee of the respondent.
- 28 The applicant, in detailed and helpful written submissions, maintained that as a matter of law and also as a matter of equity, good conscience and the substantial merits of the case under s 26(1)(a) of the *Industrial Relations Act (WA) 1979* (the Act), the Commission is able to conclude that the terms and conditions of the applicant's employment by the respondent could be implied on a number of bases, they being:
- (a) By the relevant provisions of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act);
 - (b) By the common law principles applicable to terms usually implied into contracts of employment; and
 - (c) By the implication of terms in fact.
- 29 A further submission made in respect of remuneration, was based on *quantum meruit*, as a claim for a reasonable sum for work performed by the applicant for the respondent as an employed restricted legal practitioner.

What were the terms of the agreement?

- 30 I do not repeat my observations at pars 12-19 of my preliminary reasons. Those findings set out the essential facts and record the relevant oral offer and acceptance of the engagement between the applicant and the respondent which the Commission has found to be an employment relationship. The only term and condition of engagement discussed and agreed, was remuneration. The applicant argued that to the extent that the Commission has found that the relationship was one of employer and employee, and not one of principal and independent contractor, I should not consider the remuneration arrangement as being part of the contract of employment. This was submitted to be because the arrangement was not what the applicant understood he was agreeing to with the respondent. The applicant understood he was to be engaged as an employed restricted legal practitioner. It was only after commencing that the respondent requested invoices from the applicant and regarded him as a contractor.
- 31 Furthermore, the applicant submitted that the remuneration arrangement changed shortly after he commenced. The percentages to be paid to him varied and were not consistent. The arrangement was thus said to be uncertain and incomplete. It was submitted that it would be unfair and contrary to s 26(1)(a) of the Act to have regard to it. Submissions were also made in relation to the fee splitting or commission payment arrangement and the effect of the *Legal Profession Act 2008* (WA) (LP Act). The applicant contended that his company, Sampson Investments Pty Ltd, could not be an incorporated legal practice because the applicant was not at the material times an Australian legal practitioner with an unrestricted practicing certificate and nor did he hold himself out to be such. It was contended that the respondent was aware of this. Accordingly, s 116(1) of the LP Act, permitting an Australian legal practitioner to share revenue with an incorporated legal practice had no application. The applicant also referred to s 16 of the LP Act, which enables an Australian legal practitioner to share revenue or other income from a legal practice with an "unqualified person", subject to any restriction in the applicable legal profession rules or regulations. Whilst it was not entirely clear what the submission was in this respect, the applicant contended that despite this, "Mr Meyer chose an income sharing arrangement that appears to put him outside the scope of s 116(1) of the *Legal Profession Act 2008*".
- 32 The question of the terms of an agreement as found, is a different issue to how the relationship between the parties to that agreement should be characterised. It is a mixed issue of fact and law as to what the elements of the relationship are. One important aspect is the indicia of method of remuneration. But it is only a factor. In this case it was not payment of a wage or salary, but a payment based on percentage reward. A range of other factors led me to conclude the relationship should be classified as one of employment. However, that does not mean the remuneration element is to be disregarded. It is part of the Commission's fact finding and cannot be put aside, unless it is so on other grounds, such as being unlawful as contrary to a statutory requirement; contrary to public policy, or some other proper ground. As a general matter, there is no prohibition on an employee being remunerated by percentage reward, payment of a commission or a percentage of profits: *Hayman v Betta Brushware Pty Ltd* (1946) 63 WN (NSW) 247; *Bearings Inc (Aust) Pty Ltd v Treloar* (1999) 95 IR 169; (1999) 46 AILR at 4-122. In deciding whether a person is an employee or an independent contractor, the method of payment to a putative employee is not, of itself, determinative: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385; *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407 (PC); *Stone v Chapel* [2016] SASC 32; BC201612149.
- 33 Given the arguments now put by the applicant as to the remuneration arrangements at the respondent's firm, it is necessary to more closely examine the evidence led in both the earlier and present proceedings. This is particularly so because the applicant argued in these proceedings that in effect, the pay arrangements lacked certainty and should not be a basis for a finding by the Commission as to the terms of the applicant's contract of employment. In this respect the applicant tendered bundles of documents as exhibit A32, comprising client matters, work done on the matter and the fees paid to the respondent and other fee earners of the firm. This had the purpose of demonstrating that the fee percentages paid were not uniform and on some occasions the applicant received no fee revenue from some matters. It is fair to say in summary from exhibit A32 that some matters led to a 40/60 split; some 20/80, some 30/70 and others nil revenue to the applicant. From exhibit A32 however, most matters that were invoiced to clients were the subject of the 40/60 percentage as agreed.

- 34 The respondent testified that when he and the applicant, in the company of Mr Grauaug, discussed the applicant joining the firm, he made it clear that the firm was not able to support employed solicitors because of cash flow. He had had a heart attack and had to scale down his practice. This meant that whilst he was prepared to take on both Mr Ward and the applicant as restricted practitioners and provide them with work experience and supervision to satisfy the Legal Practice Board requirements for unrestricted practice, the financial position of the firm was such that the only way they could be remunerated was by payment of a commission or percentage of fees invoiced, received and banked from clients. The applicant's evidence was that he had had difficulty finding a firm to take him on. He had made many job applications without success. He was keen to take up the respondent's offer. The respondent saw the applicant, as a mature aged person, who had years of prior business experience and contacts, as a person who could help grow the practice. I have no doubt on the evidence, that both parties entered into this arrangement with a sense of optimism that this would be the case.
- 35 As the agreement was that the applicant would have the same arrangement as Mr Grauaug and the respondent, and that too was the applicant's evidence, I now turn to consider Mr Grauaug's testimony on this issue. Mr Grauaug was a senior legal practitioner with some 25 years of experience. He had his own legal practice at the material times. Mr Grauaug became known to the respondent through another acquaintance and indicated that he was interested in getting some experience in criminal law. One thing led to another and Mr Grauaug and the respondent agreed that Mr Grauaug would effectively subcontract to the respondent on a 40/60 revenue split basis. The detail of their arrangement was set out in Mr Grauaug's evidence as follows at 37-38 ts:

Mr Meyer discussed with me that he was, principally, at the time, working on his own in the practice. He had one - one person working under him, in his employ, and that was a Mr Ben Bullock. And Ben was working under Paul's, um, supervision at the time as a - a restricted practitioner. Um, and, um, he just - we - we discussed how that was working and, um, Paul said to me, if he was going to engage anyone, it would be on the basis of, um, of a - of a - of a success. So in other words, you work on a matter, and if you work on the matter, he would expect that, um, he would give the - whoever worked on the matter, um, the fee earner would get 40 per cent.

40 per cent - - -?---And - - -

- - - of what, sorry?---Oh, 40 per cent of the - of the invoiced revenue collected by Thames Legal, Mr Meyer's firm.

And - - -?---Ah - - -

- - - you - - -?---And - and Mr Meyer would retain the 60 per cent. But what - that was - that was - that was the discussion. He - Mr Meyer was interested in - - -

Yes. No. But I - - -?--- - - - exploring that - exploring the relationship with me working - working for him under that - under that scenario.

Mr Grauaug, what did you eventually agree with Mr Meyer in relation - - -?---Okay.

- - - to your services?---We agreed - essentially, what was agreed at the end of that meeting was, that I would work, um, ah, in the office there, on - on Mondays, Thursdays and Fridays, initially. Um, so to arrive at the office at about - around about 9 am, and, um, ah, I would, basically, work under Mr - with - with Mr Meyer, doing criminal law work, most of which was Legal Aid. But he had some other matters that were non-Legal Aid. And it was agreed that I would be paid, um, 40 per cent of the revenue collected on matters that I worked on. Okay?

And did - - -?---So it was a handshake, and we agreed that that was the - that was the - that was the deal. I - my law firm, Richard Simon Legal, was going to be the - I think, at the end of that discussion, what Mr Meyer suggested was, "Look, you can either be - you can either be an employee on a part-time basis, or you can, um, invoice me through your firm". Um - - -

And what had - did you agree with - - -?---And - - -

- - - Mr Meyer?---And I - I decided and agreed eventually, it may have been the next day, that I would use my firm.

And how did that work in practice?---Well, in practice, what that meant was, that I had to invoice Mr Meyer, um, for work that I'd done. And the way that worked practically was that Mr Meyer would give me a sheet of, um, matters that he and his accountant, his wife, had - had - had recorded as being matters I'd worked on.

Yes?---And at the end of a given accounting period, maybe a month or two months, he would give me a sheet showing the - the revenues that had been collected from clients, and my 40 per cent share of that revenue. So I would, then, invoice against that - that - that sheet and render an invoice, and my terms of payment were, as far as I can recall, were 14 days. And, initially, at - at least, um, payment was pretty - pretty, um, well within that - that - that period, in - in the initial. So, effectively, we agreed that, um, I would work for him on that - on that basis, by handshake. We never put it in writing. But it was, effectively, a subcontracting arrangement to my firm.

- 36 Mr Grauaug confirmed the respondent's evidence that the respondent's wife did the firm's books of account and would come into the office each fortnight, and the fee schedules and invoices would be generated. Mr Grauaug was present when the applicant and the respondent discussed the possibility of the applicant joining the firm in October 2015. As to the respondent's offer to the applicant and the remuneration arrangements, Mr Grauaug said as follows at 47 ts:

What was the nature of the offer?---The nature of the offer was, "You can work - you - you - you - your", um - "You can serve your restricted practice here, under me". Ah, the - the terms of that offer were effectively that Ian would - would - would, ah - ah, be paid 40 per cent of the revenue that was received and/or collected by Mr Meyer's firm, Thames Legal, ah, from the clients and, er - on the matters which Mr Sampson worked on personally. So that meant that if Mr Sampson

was the fee earner working on a matter, ah, er, he would be paid 40 per cent of - of the - of - and the - and the 60 per cent would be retained by Mr Meyer.

Was there any discussion about how often payment would be made?---Ah, the discussions were, um, ah - I think there was some discussion about, um, Mr Meyer's wife would come in every fortnight to do the books - or so. Ah, so potentially, there was - potentially, there - there could be payment, ah, er, as early as possible. But I - the - the impression was that it would only be when money was actually collected by Mr Meyer from the - from the client.

And is this arrangement similar to the arrangement that you had with Mr Meyer?---Yes

- 37 As to how the arrangement worked in practice, including with the applicant, who Mr Grauaug said he worked with at the firm on client matters, he said at 49 ts:

Okay, so, um, in terms of my interaction with Mr Sampson, um, there was some matters that I worked on that I needed assistance on. And Mr Meyer, um, instructed Mr Sampson could assist me on some of those matters. The - the arrangement was somewhat more complicated because when two fee earners worked on a matter, Mr Meyer said, "Look, you've either got to agree to share it 20 per cent each, so the net - the - the aggregate is 40, or you've got to come to some arrangement where you effectively work on it and you get 40 per cent on a knock-for-knock basis across matters". So effectively - well, to explain that, what that would mean is you just, er - if I help Mr Sampson on a matter, instead of him giving me a certain percentage of that, I would - I would probably take a knock on that, and he would work for me and take a knock on that. But some matters, the workload was so significantly done by one or other of us that - that the - the - at the outset, we would have to agree with Mr Meyer whether the split would change. And so that - that occurred on occasion. Um, to explain, that would mean that possibly - in some instances, for example, Mr Meyer would say, "Look, this matter's taking up a lot of your time. I'll give - I'll give you 60 per cent to share between yourselves and you'll get 30 per cent each". I think that may have happened on one occasion. Um, "Or - or it might be that, um, you give 10 per cent to Mr Sampson and keep 30". So there was a bit of a - where I - where I was involved in that - in that supervision, there was also an element of, okay, sharing some of the - the spoils of - of - of the work. Because as you can appreciate, it wasn't a - it was a practice of being paid when you get - when - when the client paid. And the whole thing depended on the revenue coming into the firm.

- 38 Thus, Mr Grauaug agreed that the 40/60 percentage was to a degree negotiable, depending on the circumstances of the matter at hand and who were the fee earners involved in the work on the client file. I pause to note that Mr Grauaug's evidence as to how the arrangement worked in practice is consistent with the evidence of the respondent and Mr Ward. Mr Ward, whilst I do not propose to set out his evidence in any detail, largely confirmed that this was how the remuneration arrangement operated at the respondent's firm. I also pause to observe that the applicant's evidence in the initial hearing, as to his first meeting with the respondent, also referred to practitioners in the firm taking a joint share of fees, along with the respondent. This could involve a division on a 30/30 share basis for the fee earners: ts 109. Accordingly, I need to consider the terms of exhibit A32 in the context of this evidence. In my view, it is consistent with the evidence of the respondent, Mr Grauaug and Mr Ward. For example, whilst it is very difficult to cross reference the material in evidence, I note that some entries in exhibit A32 refer to the applicant sharing matters with Mr Grauaug or Mr Ward. In these cases, the schedule shows a lesser percentage to the applicant than 40 percent, consistent with the evidence of Mr Grauaug as to how the arrangement worked in practice.
- 39 I am not persuaded that exhibit A32 shows a disregard for the original agreement. On the contrary, I consider that exhibit A32 is itself, at least largely as best I can examine it with the other material in evidence, including the applicant's own invoices to the respondent, consistent with the original agreement. Accordingly, I am not prepared to disregard the method of remuneration agreed between the applicant and the respondent, as urged by the applicant in his submissions. To do so would be to rewrite the contract, which is not a step the Commission can take in proceedings of the present kind.
- 40 To the extent that the terms of the engagement were express, they covered remuneration only. To the extent that the terms are to be implied, they can be so by legislation; as a function of the type of contract; and in fact, as may be necessary. I will deal with the applicant's contentions on these issues below.

Minimum Conditions of Employment Act 1993

- 41 An issue to be determined in this case, is whether, as an employee of the respondent, the applicant was subject to the MCE Act. This is because of the arrangement agreed between the applicant and the respondent that the applicant be paid a portion of the fee revenue from matters worked on by him. This was variously described in the evidence as a "fee split" by the applicant and a "commission" by the respondent. The relevance of the issue is that by reg 3 of the *Minimum Conditions of Employment Regulations 1993* (WA) (MCE Regulations), certain classes of persons in Schedule 1 are not considered "employees" for the purposes of the MCE Act. One such class of persons are those "whose services are remunerated wholly by commission or percentage reward". Therefore, was the applicant such a person at the material times?
- 42 Under s 3 of the MCE Act, the meanings of "employee" and "employer" have the same meaning as in s 7(1) of the IR Act. In s 7(1) of the IR Act "employee" is defined as:

7. Terms used

- (1) In this Act, unless the contrary intention appears —

employee means —

- (a) any person employed by an employer to do work for hire or reward including an apprentice; or
- (b) any person whose usual status is that of an employee; or

- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,
- but does not include any person engaged in domestic service in a private home unless —
- (e) more than 6 boarders or lodgers are therein received for pay or reward; or
- (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;
- 43 I have already found that the applicant was an employee for the purposes of par (b) of the definition. The applicant drew attention to par (c) of the definition and submitted that this is very similar to the definition in Schedule 1 to the MCE Regulations. It was submitted that the reference to “canvasser” in the definition of employee in the IR Act referred to those as found, for example, in the *Commercial Travellers and Sales Representatives Award 1978*, as persons paid on a commission only basis. There is a similar reference in the Real Estate Award applicable in the federal system. The applicant also referred to the introduction into the Parliament of the Minimum Conditions of Employment Bill 1993 and the exemption then proposed for real estate agents in Schedule 1: *Hansard* 7 September 1993 p 3219. Therefore, the contention put by the applicant was that the “class of persons” to whom the exemption from the MCE Act extends, are employees who are canvassers, real estate sales representatives and those engaged in like occupations. It was not intended to exclude persons in the position of the applicant, even if engaged and paid on a percentage reward or commission basis, as the submission went.
- 44 There are some difficulties with this argument. The exclusion in Schedule 1 of the MCE Regulations to the definition of “employee” in s 3 of the MCE Act, is not in the same terms as the class of persons referred to in s 7(1)(c), the definition of employee in the IR Act. Parliament must have been taken to have been aware of the definition of employee in s 7(1) of the IR Act when s 3 of the MCE Act and Schedule 1 to the MCE Regulations were drafted. There are also other possible reasons for the distinction, not the least of which being that “canvassers” are covered by a State award made under the IR Act. In s 3 of the MCE Act, the definition of “employee” adopts the terms of s 7(1) of the IR Act, but it is made subject to the specific exclusion of “classes of persons” prescribed by the MCE Regulations. When one goes to reg 3, it is seen that again the phrase “class of persons” is used.
- 45 In Schedule 1, the reference to the relevant “class of persons” is to “Persons whose services are remunerated wholly by commission or percentage reward”. It is immediately apparent that the draftsman of Schedule 1 did not adopt the same words as in s 7(1)(c) of the IR Act. There is no reference to a “canvasser” for example, or indeed any other occupation. Furthermore, the exclusion refers to those *wholly* paid by commission or percentage reward. The definition in s 7(1)(c) of the IR Act refers to those who are *wholly or partly* paid in this way. Whilst on the introduction of the legislation into the Parliament references were made to real estate agents, who were to be excluded, in my view, this can only be taken as an example of such a class of persons.
- 46 However, I do not consider the scope of excluded persons in Schedule 1 of the MCE Regulations, in terms of occupations or callings, to be closed or to be limited to those suggested by the applicant. The definition extends to “all persons” meeting the requirements of Schedule 1. The defining characteristic of such “persons” is the method of remuneration i.e. those persons whose remuneration is paid wholly by commission or percentage reward. Therefore, the issue of whether a person is an excluded person or not, is determined not by the description of their occupation or calling, but by the terms of their contract and specifically, the method of their remuneration. It was on this basis that the court in *Davey v Cray Holdings Pty Ltd* (1996) IRCA 129 held that a person engaged in the fishing industry as a share fisher, paid by percentage reward, was not a person to whom the MCE Act applied. (See too *Oats v Sanders Executive Pty Ltd* (1999) 79 WAIG 3543.) This conclusion is fortified when the definition of “employee” in the MCE Act and Schedule 1 of the MCE Regulations are read together, along with s 7(1) of the IR Act. They plainly contemplate as excluded persons, those who are otherwise employees at common law i.e. those defined in s 7(1) of the IR Act as persons employed to do work for hire or reward, or those whose usual status is that of an employee, but who are remunerated wholly by commission or percentage reward.
- 47 In this case it was not in dispute, and I have already found that the applicant’s remuneration, as agreed between himself and the respondent at the outset of their working relationship, was based on a percentage reward or a commission. In my view, it does not matter how one describes the method of payment as either a “commission” as maintained by the respondent, or as a “fee split” as maintained by the applicant. It was not a salary, in the sense that it was not a payment calculated by reference to time worked, but a payment based on a percentage of fees earned by the firm from a client. It plainly was a “percentage reward”, as that phrase would be ordinarily understood, for the purposes of Schedule 1 to the MCE Regulations.
- 48 I accept that it would be unusual for a person in the position of the applicant, as an employed restricted legal practitioner, to be remunerated in this way. However, the employment of solicitors and their terms and conditions of employment, is principally a matter for the common law. No award or industrial agreement has application to their employment in this State. It is a matter of negotiation and agreement between the employer and employee, no doubt having regard to market forces. This is of course, subject to minimum entitlements prescribed by the MCE Act and the *Fair Work Act 2009* (Cth), where applicable. In my view, the MCE Act did not apply to the applicant’s employment by the respondent.

Terms implied

- 49 It is well settled that in the case of informal oral contracts, a less rigid approach is adopted to the implication of terms than that taken in the leading cases of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 and *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337. In the case of informal contracts, where the parties have not reduced the terms of their agreement to writing, the function of a court or tribunal is to establish what the contract is,

to the extent that most of the terms have been left to be inferred or implied: *Hawkins v Clayton* (1988) 164 CLR 539 at 571-573 per Deane J (citing *Liverpool City Council v Irwin* (1997) AC 239 at 254). In *Hawkins*, the approach of Deane J at 573 was to ask whether the term(s) should be implied in such contracts, “if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case”.

- 50 Terms implied in law are so because of the inherent nature of the contractual relationship. The High Court has recently cautioned against any attempt to lightly imply terms into contracts on this basis: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169 at par 29 per French CJ, Bell and Keane JJ.

Annual leave

- 51 The first issue relates to annual leave. An employee’s entitlement to four weeks annual leave should now be regarded as a notoriously well-known entitlement of all employees in Australia. Not only is the entitlement specified in the MCE Act and the FW Act (Cth), but it is also a universal entitlement in awards and industrial agreements across the land.
- 52 A term will be implied into the applicant’s contract of employment in this case that he was entitled to four weeks annual leave per annum, such entitlement accruing pro rata and on a cumulative basis. Furthermore, a term will be implied into the contract to the effect that accrued but not taken annual leave is payable on termination of employment, in accordance with the approach as set out in s 24(2) and (3) of the *MCE Act*, which I regard as a useful guide for present purposes. There is no doubt that the implication of a term of annual leave is necessary to make the applicant’s contract effective as a contemporary contract of employment.
- 53 In accordance with exhibit A33, the applicant particularised his working hours, days, and weeks along with the sick leave and annual leave that he took, as part of a summary of his claimed entitlements. Whilst it was at odds with his written submissions, the evidence from this record was, and the respondent did not dispute, that the applicant took some 36 days of leave out of an entitlement of 40 days. Thus, a shortfall arises of four days of annual leave. I find accordingly. However, the applicant said he was not paid at all for any of this time. He should be. A contractual benefit of 40 days of annual leave has been denied to the applicant.

Notice

- 54 As I have concluded that the respondent did not terminate the applicant’s employment, it is unnecessary for me to determine this aspect of his claim. However, if I am incorrect on that issue, I make the following observations.
- 55 In the absence of an agreed term as to notice of termination of employment, the law will imply a reasonable period. However, implication of a term of reasonable notice will only be made if it is necessary to do so. Necessity, in this context, is where there are gaps to fill in the contract: *Westpac Banking Corporation v Wittenberg* (2016) 330 ALR 476 per Buchanan J at pars 216 – 217; 234 – 237; *Richards v Nicoletti* (2016) 97 WAIG 117 per Scott CC and Kenner ASC (Smith AP dissenting).
- 56 In *Nicoletti*, the majority held that the provisions of s 112(2) of the FW Act, prescribing notice of termination of employment, as extended by s 759 to non-national system employers and employees, precluded the necessity of implying a reasonable period of notice. The same consideration applies in this case. Section 117(2) of the FW Act extended to the parties under the applicant’s contract of employment. By s 117(3) the applicant was entitled to two weeks’ notice of termination of employment. However, as this is an entitlement arising under the FW Act and not the applicant’s contract of employment, it cannot be recovered as a denied contractual benefit. It must be enforced in accordance with the FW Act in respect of such matters.

Remuneration

- 57 As I have already noted, part of the applicant’s case was that the remuneration arrangement between the applicant and the respondent should not be upheld by the Commission. The applicant submitted that the Commission should assess his claim based on an estimate of reasonable value for services performed as a *quantum meruit*. In this respect, the applicant tendered as part of exhibit A33, a folio of documents outlining remuneration guides based on average wages; the minimum wage in Western Australia; salary levels for junior solicitors; and the salary for a law graduate under the federal Legal Services Award. The contention put was that this information could provide a basis for an assessment of reasonable remuneration, according to the applicant’s submissions.
- 58 A claim based on *quantum meruit* is based on the equitable doctrine of unjust enrichment. *Quantum meruit* means “the amount he deserves” or “what the job is worth”. The expression is defined in the *CCH Macquarie Dictionary of Law* (revised, CCH, 1996) p 142 as “[A]n amount claimed by way of restitution as reasonable recompense for a benefit conferred or work done at the request of another, based on an implied promise to pay for it”. The implied promise is no longer a requirement of the modern law. It is now subsumed in the law of restitution. This includes restitution for the recovery of the value of non-monetary benefits transferred to another party and the recovery of money paid to the other party. These were formerly characterised as claims in quasi-contract (*quantum meruit* or *quantum valebat*). These claims were rationalised based on an imputed or implied promise. The High Court has since unequivocally indicated that the common basis of recovery in such cases is a general duty imposed by law to make restitution for unjust enrichment: *Pavey & Matthews v Paul* (1987) 162 CLR 221; *ANZ Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68. The modern law of restitution subsumes all claims previously classified as quasi-contractual (See Seddon N, Bigwood R and Ellinghaus M in *Cheshire and Fifoot Law of Contract* 10th Australian Edition at p 1232).
- 59 The relevant principles to apply in cases of a claim based on a quantum meruit are discussed by the learned authors in *Cheshire and Fifoot Law of Contract* 10th Australian Edition at par 26.2 as follows:

26.2 Claim in restitution for unjust enrichment not available if valid and subsisting contract applies.

A claim cannot be made in restitution for unjust enrichment where an existing enforceable contract governs the right sought to be enforced by the claim. Thus, in the foundation case *Pavey & Matthews Pty Ltd v Paul*²⁰ (see 26.6 below), a claim for reasonable remuneration for work done under an unenforceable building contract, Deane J said:

The obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution.

This means that money or other benefits transferred in connection with a contract can be recovered in restitution only if no contractual right to recovery exists in the circumstances, whether this is the case because no contract relating to the benefit in question was in fact made between the parties,²¹ or because the contract between them was invalid and has been avoided, or because the contract, though validly formed, has subsequently been terminated.²² The general label of 'ineffective' or 'ineffectual' contracts has been used to cover situations in which restitution is potentially available.²³ On this basis the law of restitution offers potential relief where a contract failed to eventuate; or a contract is invalid or unenforceable because it is not in a form required by the law, or because of lack of capacity, mistake, misrepresentation, duress, undue influence, unconscionable dealing or illegality; or because it has been terminated as a result of frustration, non-fulfilment of a contingent condition, or breach by either party.

The extent to which restitutionary remedies are available in relation to 'effective' contracts cannot, however, be regarded as wholly settled. This issue is an aspect of a wider debate concerning the role of restitution in the law of obligations.²⁴ In *Lumbers v W Cook Builders Pty Ltd (in liq)*,²⁵ four members of the High Court²⁶ made it clear that 'an essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made. It is essential to consider how the claim fits with contracts the parties have made because, ... "serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract"'.²⁷ In other words, restitutionary liability will not be imposed if the effect of doing so would be to disturb an existing allocation of risk or limitation of liability previously established by contract, or to alter the rights and obligations that each party assumed under the applicable bargain.²⁸

- 60 There is a difficulty in applying these principles to this case. First, I have found that there was an agreement in existence between the applicant and the respondent. Second, there is no basis to conclude that the contract of employment between the parties in this case is invalid or unenforceable. Whilst the applicant drew attention to provisions of the LP Act, I am not persuaded, certainly not without fulsome argument on the matter, that the arrangement entered between the applicant and the respondent, was invalid or unenforceable due to any provision of this legislation. Whilst I have very real concerns as to the amount of income earned by the applicant, which on any measure was very low, as I have said, unlawfulness or the implication of terms aside, it is not for the Commission to rewrite the agreement. I am limited to discovering the terms of the contract and determining whether any benefit under it has been denied. I have found the terms of the bargain did involve a degree of variability, largely due to the nature of the arrangement and how, on the evidence, it operated, no doubt heavily influenced by the fortunes of the firm. I can find no basis to set aside the arrangement in order that the above principles may have any work to do in this case.
- 61 I have already concluded that the MCE Act had no application in this case. The next question is whether the applicant's claim in relation to remuneration can be supported by the implication of a term, applying the common law principles I have set out above. In my view, it cannot. To do so would be to offend against the general rule that a term cannot be implied into a contract, that conflicts with an express term. The parties made provision for remuneration in the contract that they entered into, as I have found above, by a system of payment by percentage reward. To the extent that the parties agreed to this, a term cannot be implied to, for example, import the State minimum wage or some other level of average remuneration, as suggested by the applicant. The contract between the applicant and the respondent was effective without any such implication.

Conclusions

- 62 I have found aspects of this case troubling. The remuneration earned by the applicant was very low on any measure. Arrangements such as the present should be strongly discouraged in the legal profession. An employed solicitor, by education and training, as a professional, deserves to be accorded at least adequate remuneration. The arrangement entered into in this case fell far short of that standard. There was far too much risk to be borne by the employee, even accepting the applicant's difficulties in finding a firm to engage him and to provide the requisite supervision to satisfy the Legal Practice Board requirements to attain an unrestricted practice certificate.
- 63 There was an admitted debt of \$3,926.58 owed by the respondent to the applicant that will be the subject of an order. There was no indication that this debt had been paid at the time of the conclusion of the hearing. There will also be an order that the respondent pay to the applicant 40 days of annual leave. Doing the best I can from the material in evidence and applying the principle that a person paid by piece rates or percentage reward receive payment for leave at an average rate, it will be paid at an average monthly rate based on the applicant's earnings over his period of employment, as set out in exhibit A32. I will use 20 completed months that the applicant worked full time leading to a payment for one month in the sum of \$1,970. This leads to an amount of \$5,896.58.

2018 WAIRC 00915

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
IAN GREGORY SAMPSON

APPLICANT

-v-

PAUL LOTHAR RALF MEYER

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE FRIDAY, 21 DECEMBER 2018
FILE NO/S U 121 OF 2017
CITATION NO. 2018 WAIRC 00915

Result Order issued

Representation

Applicant Ms M Saraceni of counsel

Respondent Mr P Meyer in person

Order

HAVING heard Ms M Saraceni of counsel on behalf of the applicant and Mr P Meyer in person on behalf of the respondent the Commission, pursuant to the powers conferred on it by the Industrial Relations Act 1979, hereby orders -

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

2018 WAIRC 00916

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
IAN GREGORY SAMPSON

APPLICANT

-v-

PAUL LOTHAR RALF MEYER C/O THAMES LEGAL OFFICE

RESPONDENT

CORAM SENIOR COMMISSIONER S J KENNER
DATE MONDAY, 24 DECEMBER 2018
FILE NO/S B 155 OF 2017
CITATION NO. 2018 WAIRC 00916

Result Declaration and order issued

Representation

Applicant Ms M Saraceni of counsel

Respondent Mr P Meyer in person

Order

HAVING heard Ms M Saraceni of counsel on behalf of the applicant and Mr P Meyer in person on behalf of the respondent the Commission, pursuant to the powers conferred on it by the Industrial Relations Act 1979, hereby -

- (1) DECLARES that the applicant has been denied contractual benefits by the respondent by way of remuneration and annual leave in the sums of \$3,926.58 and \$1,970.00 respectively.
- (2) ORDERS that the respondent pay to the applicant the total sum of \$5,896.58 as contractual benefits less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1936 (Cth) and actually paid within 21 days of the date of this order.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner.

CORRECTIONS—

2019 WAIRC 00053

JUVENILE CUSTODIAL OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

CHIEF EXECUTIVE OFFICER, BEING THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE, DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENTS**CORAM**

PUBLIC SERVICE ARBITRATOR

SENIOR COMMISSIONER S J KENNER

DATE

TUESDAY, 12 FEBRUARY 2019

FILE NO

P 4 OF 2018

CITATION NO.

2019 WAIRC 00053

Result

Order issued

Representation**Applicant**

Ms J Moore of counsel

Respondent

Mr S Dane

Correcting Order

HAVING HEARD Ms J Moore of counsel on behalf of the applicant and Mr S Dane on behalf of the respondents, and there being an error in the order of 21 December 2018, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the order of 21 December 2018 deposited in the office of the Registrar on 21 December 2018 be and is hereby corrected in the terms of the attached Schedule.

(Sgd.) S J KENNER,
Senior Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE**1. Clause 1.4. – Scope: Delete subclause 1.4 and insert the following in lieu thereof:****1.4. - SCOPE**

This award shall apply to all Government Officers classified as a Juvenile Custodial Officer, Unit Manager or Senior Officer employed in a Juvenile Custodial facility and/or detention centre by the Director General, Department of Justice or the Director General, Department of Communities who are members of, or eligible to become members of, The Civil Service Association of Western Australia Incorporated.

2. Clause 1.6. – Definitions: Delete subclause 1.6 and insert the following in lieu thereof:**1.6. - DEFINITIONS**

1.6 In this award, the following expressions shall have the following meaning:

“Accrued Day(s) Off” (ADOs) means the paid day(s) off accruing to an employee resulting from an entitlement to the 38 hour week as prescribed in clause 3.1 – Hours of this award.

“Award” means the Juvenile Custodial Officers’ Award.

“De Facto Partner” means a relationship (other than a legal marriage) between two persons who live together in a ‘marriage-like’ relationship and includes same sex partners.

“Employee” means a Government Officer classified as Juvenile Custodial Officer, Unit Manager or Senior Officer.

“Employer” and “Employing Authority” means Director General, Department of Justice or Director General, Department of Communities, as applicable.

“Government Officer” means a Government Officer as defined in s 80C of the *Industrial Relations Act 1979*.

“Headquarters” means the place in which the principal work of an employee is carried out, as defined by the employer.

“Juvenile Custodial Officer” has the same definition as that given in the Juvenile Custodial Rule 103 made pursuant to s 181(1) of the *Young Offenders Act 1994* (previously known as Group Worker).

“Metropolitan Area” means that area within a radius of 50 kilometres from the Perth City Railway Station.

“Minister” means the Minister for Corrective Services or the Minister for Child Protection, as applicable.

“Partner” means either spouse or de facto partner.

“Senior Officer” has the same definition as that given in Juvenile Custodial Rule 103 made pursuant to s 181(1) of the *Young Offenders Act 1994*.

“Spouse” means a person who is lawfully married to that person.

“Union” means The Civil Service Association of Western Australia Incorporated

“Unit Manager” has the same definition as that given in Juvenile Custodial Rule 103 made pursuant to s 181(1) of the *Young Offenders Act 1994*.

3. Clause 5.7. – Relieving Allowance: Delete subclause 5.7.4 and insert the following in lieu thereof:

5.7.4 If an employee whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the employee shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of \$209.00 to cover incidental personal expenses: Provided that an employee shall receive no more than one lump sum of \$209.00 in any one period of three years.

4. Clause 5.8. – Removal Allowance:

A. Delete paragraphs (3) and (4) of subclause 5.8.1 of this clause and insert the following in lieu thereof:

(3) An allowance of \$580 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least \$3,477.

(4) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of \$197.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

B. Delete subclause 5.8.6 of this clause and insert the following in lieu thereof:

Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of \$1,080.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

5. Clause 9. – Parties to the Award: Delete this clause and insert the following in lieu thereof:

9. - PARTIES TO THE AWARD

- 9.1 Director General, Department of Justice
- Director General, Department of Communities
- The Civil Service Association of Western Australia Incorporated

6. Schedule E Clause 3.2 – Overtime: Delete Part I – Out of Hours Contact of this Schedule and insert the following in lieu thereof:

PART I – OUT OF HOURS CONTACT

(Operative from the first pay period commencing on or from the date of hearing)

Standby	\$11.34 per hour
On Call	\$5.67 per hour
Availability	\$2.84 per hour

Clause 4.4.2 of the award defines salary for calculation purposes.

5 Delete Schedule G – Expired General Agreement Salaries of this award and insert the following in lieu thereof:

SCHEDULE G – EXPIRED GENERAL AGREEMENT SALARIES

Existing Annual Salary at date of pay period on and from 13 June 2016 (Not to be subject to arbitrated safety net adjustments)

	\$ Per Annum
Juvenile Custodial Officers	
1 st Year	\$ 59,172
2 nd Year	\$ 60,781
3 rd Year	\$ 62,482
4 th Year	\$ 64,256

Existing Annual Salary at
date of pay period on and
from 13 June 2016
(Not to be subject to
arbitrated safety net
adjustments)

	\$ Per Annum
Unit Managers	
1 st Year	\$ 67,896
2 nd Year	\$ 69,781
3 rd Year	\$ 71,723
4 th Year	\$ 73,717
Senior Officers	
1 st Year	\$ 76,452
2 nd Year	\$ 78,593
3 rd Year	\$ 80,797

PROCEDURAL DIRECTIONS AND ORDERS—

2019 WAIRC 00027

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SUNIT BELBASE

APPLICANT

-v-

SIMBIOTIC PTY LTD.

RESPONDENT**CORAM**

COMMISSIONER D J MATTHEWS

DATE

TUESDAY, 5 FEBRUARY 2019

FILE NO/S

B 50 OF 2018

CITATION NO.

2019 WAIRC 00027

Result Order issued

Representation

Applicant Mr S Belbase

Respondent Mr L Lucioli

Order

HAVING HEARD Mr S Belbase on his own behalf and Mr L Lucioli on behalf of the respondent;

AND WHEREAS the parties agreed in writing on 6 June 2018 that the respondent would pay the applicant the sum of \$26,000 according to a schedule of payments;

AND WHEREAS the respondent has paid some but not all of the sum due under that agreement;

AND WHEREAS the applicant now seeks an order in relation to the outstanding amount;

AND by consent, I hereby order, pursuant to the powers conferred under the *Industrial Relations Act 1979*:

1. The respondent pay to the applicant the sum of \$2,000 on 1 April 2019; and
2. The respondent pay to the applicant the sum of \$2,000 on 1 May 2019;
3. The respondent pay to the applicant the sum of \$2,000 on 1 June 2019;
4. The respondent pay to the applicant the sum of \$2,000 on 1 July 2019;
5. The respondent pay to the applicant the sum of \$2,000 on 1 August 2019; and
6. The respondent pay to the applicant the sum of \$1,000 on 1 September 2019.

[L.S.]

(Sgd.) D J MATTHEWS,
Commissioner.

2019 WAIRC 00018

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TRACY CORLESS-CRANE

APPLICANT

-v-

GEORGE HATZIKOSTIS AS TRUSTEE FOR THE EAGLE FAMILY TRUST TRADING AS THE
FURNITURE GALLERY

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 23 JANUARY 2019
FILE NO/S B 148 OF 2018
CITATION NO. 2019 WAIRC 00018

Result Order issued, change of respondent's name

Representation

Applicant Mr Stephen Edwards of counsel

Respondent

Order

Having heard Mr Stephen Edwards (of counsel) for the applicant and Mr George Hatzikostis for the respondent, the Commission, pursuant to powers conferred under the *Industrial Relations Act 1979*, hereby orders:

- (1) That the name of respondent be amended to "The Furniture Gallery Osborne Park Pty Ltd Trading as The Furniture Gallery Osborne Park"

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2019 WAIRC 00044

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TRACY CORLESS-CRANE

APPLICANT

-v-

THE FURNITURE GALLERY OSBORNE PARK PTY LTD TRADING AS THE FURNITURE
GALLERY OSBORNE PARK

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 8 FEBRUARY 2019
FILE NO/S B 148 OF 2018
CITATION NO. 2019 WAIRC 00044

Result Order Issued

Representation

Applicant Mr Stephen Edwards of counsel

Respondent Mr Tom Lankester as agent

Order

The Commission, having heard from Mr S Edwards of counsel for the applicant and Mr T Lankester for the respondent, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

- (1) THAT the applicant file and serve any further and better particulars of claim by 19 February 2019.
- (2) THAT the respondent file and serve any further and better particulars of answer by 1 March 2019.
- (3) THAT each party shall give informal discovery by serving its list of documents by 8 March 2019.
- (4) THAT inspection of the documents shall be completed by 4 April 2019.
- (5) THAT evidence be adduced by signed witness statements which will stand as evidence in chief in this matter.
- (6) THAT the applicant file and serve upon the respondent any signed witness statements upon which it intends to rely, no later than 18 April 2019.

- (7) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely, no later than 2 May 2019.
- (8) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely, no later than three clear days prior to the date of hearing.
- (9) THAT the matter be listed for hearing for two (2) days, on a date to be fixed.
- (10) THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2019 WAIRC 00017

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE MONDAY, 21 JANUARY 2019
FILE NO/S CR 10 OF 2018
CITATION NO. 2019 WAIRC 00017

Result Order issued
Representation
Applicant Mr C Fordham (of counsel)
Respondent Mr D Anderson (of counsel)

Order

HAVING heard from the parties, pursuant to powers conferred under the *Industrial Relations Act 1979*, I hereby order:

1. The respondent serve its outlines of witness evidence upon the applicant by no later than close of business on 29 March 2019;
2. The applicant serve any outlines of witness evidence in response upon the respondent by no later than close of business on 19 April 2019;
3. The matter be set down for a 10 day hearing not before 16 May 2019; and
4. There be liberty to apply.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2019 WAIRC 00063

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 23 OCTOBER 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PAULA LOUGHTON-WALSH

PARTIES

APPELLANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER D J MATTHEWS - CHAIRMAN
MR J O'BRIEN - BOARD MEMBER
MS B CONWAY - BOARD MEMBER
DATE FRIDAY, 15 FEBRUARY 2019
FILE NO PSAB 28 OF 2018
CITATION NO. 2019 WAIRC 00063

Result	Order issued
Representation	
Appellant	Ms D Arntzen as agent
Respondent	Mr J Bennett of counsel

Order

HAVING heard from Ms D Arntzen, as agent, for the appellant, and Mr J Bennett, of counsel, for the respondent, on Thursday, 14 February 2019, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that:

1. The respondent file and serve a list of documents by close of business Friday, 8 March 2019 responding to item 2 in the application filed by the applicant on 2 January 2019, including written reasons where discovery of a document is objected to;
2. The respondent file and serve submissions in relation to which party ought present their case first at hearing by close of business Friday, 8 March 2019;
3. The applicant file and serve any response to the respondent's list of documents described in order 1 above by close of business Friday, 29 March 2019;
4. The applicant file and serve any response to the respondent's submissions in relation to which party ought present their case first at hearing by close of business Friday, 29 March 2019;
5. Discovery otherwise be informal;
6. The matter be listed for a hearing of three days on dates to be fixed; and
7. The parties have liberty to apply.

(Sgd.) D J MATTHEWS,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2019 WAIRC 00043

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JESSICA AUFDEMKAMPE	APPLICANT
	-v-	
	THAKKAR FAMILY TRUST	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS	
DATE	FRIDAY, 8 FEBRUARY 2019	
FILE NO/S	U 119 OF 2018	
CITATION NO.	2019 WAIRC 00043	

Result	Order issued
Representation	
Applicant	Mr M Harris as agent and with him Ms J Aufdemkampe
Respondent	Mr M Thakkar

Order

HAVING heard from Mr M Harris, as agent for the applicant, and Mr M Thakkar for the respondent on Friday, 8 February 2019; NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order that the respondent provide to the applicant's agent any documents related to the financial state of the respondent's business at the time of the applicant's dismissal, being 9 September 2018, by close of business on Friday, 22 February 2019.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2019 WAIRC 00064

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MYRON SAMS

APPLICANT

-v-

DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM COMMISSIONER D J MATTHEWS
DATE FRIDAY, 15 FEBRUARY 2019
FILE NO/S U 121 OF 2016
CITATION NO. 2019 WAIRC 00064

Result Order made

Representation

Applicant Mr Y Yogendran of counsel

Respondent Mr J Carroll of counsel

Order

Pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, I hereby order:

That the Amended Notice of Answer filed 13 February 2019 stand as the Notice of Answer in this matter.

(Sgd.) D J MATTHEWS,
Commissioner.

[L.S.]

2019 WAIRC 00045

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JOHN GEOFFREY BOURKE

APPLICANT

-v-

RICHARD EDMONDS TRADING AS PERTH PREMIER TRANSFERS AND PERTH
PLATINUM TOUR
ABN 11 820 446 077

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE FRIDAY, 8 FEBRUARY 2019
FILE NO. U 1 OF 2019
CITATION NO. 2019 WAIRC 00045

Result Directions Issued

Representation

Applicant

Respondent

Directions

The Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs, in relation to the issue of jurisdiction:

- (1) THAT each party shall give informal discovery by filing with Registry and serving their respective lists of documents on the other party by 15 February 2019.
- (2) THAT inspection of the documents provided shall be completed by 22 February 2019.
- (3) THAT the parties file and serve an outline of submissions no later than 7 March 2019.
- (4) THAT the parties file and serve a list of authorities upon which they intend to rely, no later than 7 March 2019.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2019 WAIRC 00036

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2019 WAIRC 00036

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS B CONWAY - BOARD MEMBER
MR S GREGORY - BOARD MEMBER

HEARD : TUESDAY, 8 JANUARY 2019

DELIVERED : THURSDAY, 7 FEBRUARY 2019

FILE NO. : PSAB 13 OF 2018

BETWEEN : MARGARET GRACE HUDSTON
Appellant
AND
NORTH METROPOLITAN HEALTH SERVICES
Respondent

CatchWords : Public Service Appeal Board – Casual employee – Jurisdiction of the Public Service Appeal Board – Appellant was not dismissed

Legislation : Section 80I of the *Industrial Relations Act 1979* (WA), Part 11 Div 4 *Health Services Act 2016* (WA)

Result : Appeal dismissed

Representation:

Appellant : In person

Respondent : Mr M Golesworthy (as agent)

Cases referred to in reasons:

Loves Bus and Taxi Service v Zucchiatti [2006] WAIRC 05758; (2006) 86 WAIG 3351

Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service [2017] WAIRC 00991; (2017) 97 WAIG 1871

Melrose Farm Pty Ltd t/as Milesaway Tours v Milward [2008] WASCA 175

Doyle v Sydney Steel Co Ltd (1936) 56 CLR 545

Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd t/as Sunland Wholesale Meats (1988) 24 IR 467

Ryde-Eastwood Leagues Club Ltd v Taylor (1994) 56 IR 385

Reed v Blue Line Cruisers Ltd (1996) 73 IR 420

Swan Yacht Club (Inc) v Leanne Bramwell (1998) 78 WAIG 579

Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf (1981) 61 WAIG 611

Robert Gallotti v Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds [2002] WAIRC 06828; (2002) 82 WAIG 3011

Reasons for Decision

- 1 These are the unanimous reasons for decision of the Public Service Appeal Board (**Board**).
- 2 Ms Hudston has appealed to the Board. She says she was unfairly dismissed by the North Metropolitan Health Service (**Health Service**) and asks the Board for 'work or compensation'.
- 3 On 21 March 2018, Ms Hudston filed an unfair dismissal application at the Commission. Following a conciliation conference, Ms Hudston withdrew that claim and filed a new application for an appeal to the Board.
- 4 The Health Service objects to the Board hearing Ms Hudston's appeal because it says the Board lacks jurisdiction and Ms Hudston's appeal should not be accepted out of time. Even if the appeal were accepted out of time, the Board would not have jurisdiction to hear Ms Hudston's appeal under the relevant legislation because Ms Hudston has not been the subject of any disciplinary process, finding or decision, nor has she been dismissed. It argues Ms Hudston is still employed by the Health Service on a casual basis.
- 5 The Health Service says Ms Hudston first worked at the Sir Charles Gairdner Hospital Mental Health Unit (**Mental Health Unit**) and then at the Osborne Adult Community Mental Health Clinic. Since June 2018 she has worked at the WA Eating Disorders Outreach Consultation Service. Those three services are part of the Health Service. It says Ms Hudston has been employed by the Health Service against the same position number since March 2017.

What must the Board decide?

- 6 The Board must decide whether it has jurisdiction to hear and determine Ms Hudston's appeal. If it does, it must decide whether it should accept Ms Hudston's appeal out of time.

Ms Hudston's evidence and submissions

- 7 Ms Hudston was a Clerical Officer at the Mental Health Unit. She has a written contract of casual employment dated 13 March 2017.
- 8 Ms Hudston worked at the Mental Health Unit for about 11 months from March 2017 to February 2018.
- 9 Ms Hudston says although her contract is for casual employment, she agreed to it because her supervisor Ms Chris Bruce guaranteed her full-time hours at her job interview a few weeks earlier. Ms Hudston gave evidence that she explained to Ms Bruce that she had been offered a permanent role elsewhere. However, that employer could only offer her part-time hours with 'the opportunity of extra hours'. Ms Bruce replied that she could guarantee Ms Hudston full-time hours plus penalty rates, that the position would always exist, the work would be ongoing and the casual contract did not mean anything. Ms Hudston says based on this conversation, she later accepted the written offer of casual employment with the Health Service.
- 10 Ms Hudston gave evidence she was employed on a regular and systematic basis, and had a reasonable expectation of ongoing work based on Ms Bruce's guarantee of full-time hours. She tendered a copy of her rosters from March 2017 to February 2018 and her bank records for most of that period. Initially Ms Hudston's evidence was that those documents show she worked full-time hours. She then said she worked 35 hours per week each week and that her hours and the area she worked in differed. Ms Hudston would not concede in cross-examination that her bank records and rosters showed her hours varied and were not regular. She seemed to consider that she worked on a regular and systematic basis because the income she received was better than an average full-time income. She said 'And that was the regular and systematic part. The hours may have differed, the departments may have differed, um, but it was a, um, a regular, um, full-time income and better than most.'
- 11 Ms Hudston says that after she was employed, several other casual staff members were engaged to fill gaps in rosters when staff were on leave. Just before the Christmas period in 2017, many staff returned from leave and her hours of work were reduced.
- 12 On around 17 January 2018 when her supervisor Ms Bruce returned from leave, Ms Hudston asked Ms Bruce's assistant why her hours had been reduced. Just after that, Ms Hudston was asked to meet with Ms Bruce. In response to that request, when Ms Hudston saw Ms Bruce near her work area Ms Hudston asked Ms Bruce whether she should be concerned and whether Ms Bruce was dismissing her. Ms Hudston's evidence is that Ms Bruce replied 'yes' to both questions.
- 13 Ms Hudston then met with Ms Bruce and two others later that day. At the meeting Ms Hudston was told she was no longer required and she was offered part-time short-term casual hours in another part of the Health Service. Ms Hudston did not accept that offer.
- 14 Ms Hudston then worked at the Mental Health Unit until 10 February 2018. In April 2018 she worked at Osborne Adult Community Mental Health Clinic and in June 2018 she started work at WA Eating Disorders Outreach Consultation Service. Ms Hudston agreed in evidence that she has not received anything in writing from the Health Service suggesting she was dismissed, nor a new employment contract. She agrees she continues to work as a casual employee under her March 2017 employment contract and against the same position number.
- 15 Ms Hudston says she was really a permanent employee even though she agreed to a casual employment contract, was paid as a casual employee and ticked 'casual' on her unfair dismissal and Board applications. She says this for several reasons.
- 16 Ms Hudston refers to several provisions from the *WA Health – HSUWA - PACTS – Industrial Agreement 2016 (PACTS Agreement)*. They provide:

3.2 "Casual Employee" means an employee engaged by the hour for a period of up to four consecutive weeks on each occasion the employee is engaged, provided that the employee is informed of the conditions of employment for casual employees before they are engaged.

9.1 Modes of Employment

- (a) Subject to the provisions of this clause, the employer may employ employees on arrangements that are most appropriate in the circumstances.
- (b) Employment will be either on:
- (i) an ongoing full time or part time hours ("permanent") basis; or
 - (ii) a fixed term full time or part time hours basis; or
 - (iii) a casual basis
- (c) Notwithstanding subclause 9.1(a) and (b), the employer undertakes to employ employees on a permanent basis whenever possible.

Fixed Term Contracts

9.2 Subject to the provisions of this clause, employees may be employed on fixed term contracts in the following circumstances:

- (a) to cover one-off periods of relief;
- (b) to facilitate modified return to work arrangements and secondments;

- (c) to cover projects with a finite life;
- (d) to fill positions which are subject to external funding;
- (e) for work that is seasonal in nature;
- (f) to temporarily fill a vacancy during a recruitment process;
- (g) to facilitate change;
- (h) where an employee is on a visa with a fixed duration;
- (i) for periods of traineeships and cadetships; and
- (j) any other situations as agreed in writing.

- 17 Ms Hudston says she was not engaged every four weeks in accordance with the industrial agreement, she was employed for more than one month and there was no clear end date for her employment. Therefore she says she was not a casual nor fixed-term employee as defined by the industrial agreement, so she must have been a permanent employee. Ms Hudston says the Board should apply the reasoning from *Loves Bus and Taxi Service v Zucchiatti* [2006] WAIRC 05758; (2006) 86 WAIG 3351 (**Loves Bus**) and conclude that it has jurisdiction to hear and determine her appeal.
- 18 Ms Hudston argues she worked regular, systematic hours and had a reasonable expectation of ongoing employment because of Ms Bruce's guarantee at the interview. In effect Ms Hudston argues that being told she was no longer needed at the Mental Health Unit amounted to a dismissal.

The Health Service's evidence and submissions

- 19 Ms Bruce gave evidence that she never promised Ms Hudston full-time or permanent employment. Rather, she says Ms Hudston was offered and accepted casual work with the Health Service in March 2017 and she worked irregular and unsystematic hours. In September or October 2017, the Mental Health Unit recruited two fixed-term employees and their hours of work 'displaced the hours worked by casual employees.' Ms Bruce says Ms Hudston did not apply for one of those advertised fixed-term positions.
- 20 According to Ms Bruce, Ms Hudston was placed at Osborne Adult Community Mental Health Clinic in early April 2018 and then at WA Eating Disorders Outreach Consultation Service around 26 June 2018. She is still employed by the Health Service as a casual employee.
- 21 The Health Service argues Ms Hudston has not been dismissed, nor has any disciplinary decision or finding been made in relation to her. The Board therefore lacks jurisdiction to hear and determine her appeal.

Consideration

Witnesses

- 22 Ms Hudston seemed to have difficulty at times being precise about dates and events, but she was generally forthcoming and impressed the Board as a truthful witness. Where Ms Hudston needed prompting to provide specific information, it appeared to the Board to be as a result of being disorganised, unprepared for the hearing and unfamiliar with legal proceedings, rather than for any other reason.
- 23 Ms Bruce's evidence was considerably more precise than Ms Hudston's evidence, but the Board has concerns about the reliability of Ms Bruce's evidence.
- 24 Ms Bruce was not a forthcoming witness. The Board had to prompt her to answer Ms Hudston's questions in cross-examination and also ask her several times to answer some of the Board's questions. Ms Bruce often contradicted her own evidence in cross-examination. When Ms Bruce was asked to explain why Ms Hudston was told she was no longer needed, which is an issue central to this matter, Ms Bruce gave a variety of answers. Initially, Ms Bruce said Ms Hudston was no longer needed at the Mental Health Unit because her hours had been given to the new fixed-term employees. Later in cross-examination, Ms Bruce said the hours had been given to other casuals. When the Board continued to pursue this issue, Ms Bruce said it was because of quality issues. She later said it was because new casuals had been put through a merit selection process.
- 25 Ms Hudston and Ms Bruce's evidence conflicts in relation to what was discussed during Ms Hudston's interview and on the day Ms Hudston was told she was no longer needed at the Mental Health Unit. To the extent it is necessary to resolve that conflict to determine this matter, the Board prefers Ms Hudston's evidence.

Jurisdiction

- 26 The parties agree Ms Hudston is a government officer and her employment with the Health Service is governed by the PACTS Agreement and the *Health Services Act 2016* (WA) (**HS Act**).
- 27 The Board does not have general jurisdiction to enquire into and deal with all industrial matters on application by an individual. For government officers employed by health services, generally the Board's jurisdiction is conferred by 80I of the *Industrial Relations Act 1979* (WA) (**IR Act**) and Part 11 Div 4 of the HS Act, as discussed in *Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service* [2017] WAIRC 00991; (2017) 97 WAIG 1871 from [79] to [91].
- 28 Ms Hudston has not been able to point to a section of an Act conferring jurisdiction on the Board to deal with her appeal. Sections 80I(1)(a) to (c) of the IR Act do not seem to be relevant to this matter. On the facts alleged by Ms Hudston, unless she relies on s 80I(1)(d) of the IR Act and can establish that the Health Service's treatment of her amounts to dismissal, the Board lacks jurisdiction to hear and determine Ms Hudston's appeal. Section 80I(1)(d) of the IR Act refers to the Board's jurisdiction to adjust an employer's decision to dismiss a government officer.

- 29 The difficulty for Ms Hudston is even if the Board accepted that events occurred broadly as Ms Hudston says they did, that does not establish the jurisdictional fact or facts necessary to invoke the Board's jurisdiction.
- 30 Ms Hudston believes she has been unfairly treated and that the Health Service breached parts of the PACTS Agreement that deal with engaging employees. The essence of her appeal is that she was promised full-time work but ultimately did not get full-time work. She says she relied on that promise to her detriment because she turned down another job on a permanent part-time basis. She agreed to a written employment contract to be engaged as a casual employee.
- 31 Regardless of what Ms Hudston may have been promised during her interview, the Board finds Ms Hudston did not work on a regular and systematic basis between March 2017 and February 2018. The rosters do not support Ms Hudston's claim that she worked regular shifts on a full-time basis. Most fortnights, Ms Hudston worked between 50 and 80 hours. Her days, hours and numbers of shifts varied. Unsurprisingly, her bank records reflect that irregularity as well.
- 32 The circumstances of Ms Hudston's employment are distinguishable from *Loves Bus*. In that matter, the employee worked for his employer for seven years. Though he was paid as a casual employee, he had no roster because his hours and duties were regular and consistent. Each week he worked 35 hours and earned \$668.36. Ms Hudston's hours and duties varied across the 11-month period she refers to, as did her weekly pay.
- 33 It also does not follow that Ms Hudston must be a permanent employee because she was not engaged as a casual employee in accordance with the award and she was not employed for a fixed term.
- 34 It is well established that in Australian law 'casual employee' and 'casual employment' are expressions with no fixed meaning: *Le Miere J* with whom *Steytler P* agreed in *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175 at [103] (*Melrose*), citing *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545, 551, 555, 565; *Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd t/as Sunland Wholesale Meats* (1988) 24 IR 467, 473; *Ryde-Eastwood Leagues Club Ltd v Taylor* (1994) 56 IR 385; *Reed v Blue Line Cruisers Ltd* (1996) 73 IR 420, 425.
- 35 At [106] of *Melrose*, *Le Miere J* states:
 The essence of casual employment is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work. It is not a necessary characteristic of casual employment that the employee work under a series of separate and distinct contracts of employment each entered into for a fixed period.
- 36 The Board finds Ms Hudston was a casual employee. This does not mean she could not have been dismissed.
- 37 A casual employee can be dismissed. Whether a particular casual employee was dismissed is a matter of fact in any given case: *Swan Yacht Club (Inc) v Leanne Bramwell* (1998) 78 WAIG 579; *Ryde-Eastwood Leagues Club Ltd v Taylor* (1994) 56 IR 385. It is clear from the authorities that a dismissal involves being sent away or removed from office, employment or position: *Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf* (1981) 61 WAIG 611; *Robert Gallotti v Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds* [2002] WAIRC 06828; (2002) 82 WAIG 3011 at [55] – [62].
- 38 The Full Bench in *Ryde Eastwood* said 'A casual employee deprived of employment from time-to-time according to a regular roster arrangement may well, in our view, reasonably be said to have had his services dispensed with – that constitutes a dismissal' at (392) – (393).
- 39 It is clear from the rosters and bank records provided by Ms Hudston that her hours, days of work, shifts and income varied from pay period to pay period. On that basis the Board cannot find that Ms Hudston was employed according to a regular roster arrangement. Further, although Ms Hudston's services at the Mental Health Unit were dispensed with on 10 February 2018, the Board is not satisfied that she was sent away or removed from her employment or position. Indeed, Ms Hudston is still employed by the Health Service as a casual employee under the same position number and employment contract.
- 40 On the evidence, the Board is satisfied that no disciplinary decision or finding has been made against Ms Hudston and she has not been dismissed from her employment with the Health Service.
- 41 The appeal must be dismissed for lack of jurisdiction.

2019 WAIRC 00037

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARGARET GRACE HUDSTON

APPELLANT

-v-

NORTH METROPOLITAN HEALTH SERVICES

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS B CONWAY - BOARD MEMBER
MR S GREGORY - BOARD MEMBER**DATE**

FRIDAY, 8 FEBRUARY 2019

FILE NO

PSAB 13 OF 2018

CITATION NO.

2019 WAIRC 00037

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr M Golesworthy (as agent)

Order

HAVING heard from the appellant in person and Mr M Golesworthy (as agent) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

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

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2018 WAIRC 00657

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 JUNE 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR BENJAMIN LANG

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

SENIOR COMMISSIONER S J KENNER
MR J ROSSI
MR G LEE

DATE

THURSDAY, 19 JULY 2018

FILE NO.

PSAB 15 OF 2018

CITATION NO.

2018 WAIRC 00657

Result	Directions issued
Representation	
Appellant	Ms D Larson
Respondent	Ms A Ryan

Directions

- (1) THAT the respondent file and serve its notice of answer by 27 July 2018.
- (2) THAT each party shall give informal discovery by serving its list of documents by 3 August 2018 with inspection seven days thereafter.
- (3) THAT the matter be listed for hearing for one day.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Senior Commissioner.

[L.S.]

2018 WAIRC 00920

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 JUNE 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR BENJAMIN LANG

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER S J KENNER - CHAIRMAN
MR G LEE - BOARD MEMBER
MR J ROSSI - BOARD MEMBER**DATE**

FRIDAY, 21 DECEMBER 2018

FILE NO

PSAB 15 OF 2018

CITATION NO.

2018 WAIRC 00920

Result	Order issued
Representation	
Appellant	Ms D Larson
Respondent	Mr D Anderson of counsel

Order

WHEREAS the appellant sought and was granted leave to discontinue the application, the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Senior Commissioner,
On behalf of the Public Service Appeal Board.

2019 WAIRC 00038

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 31 JANUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LYNDA NEETER

APPELLANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE DEPARTMENT

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR J LAMB - BOARD MEMBER
MR D STEWART - BOARD MEMBER**DATE**

FRIDAY, 8 FEBRUARY 2019

FILE NO

PSAB 4 OF 2018

CITATION NO.

2019 WAIRC 00038

Result	Appeal discontinued
Representation (by correspondence)	
Appellant	In person
Respondent	Mr T Pontre (of counsel)

Order

WHEREAS on 6 February 2019 the appellant informed the Registry in writing that she wished to discontinue her appeals PSAB 4 of 2018 and PSAB 5 of 2018 (**Appeals**) and sent the Registry a *Form 14- Notice of withdrawal or discontinuance* to discontinue both Appeals;

AND WHEREAS the respondent does not object to the Appeals being discontinued;

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

THAT appeal PSAB 4 of 2018 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2019 WAIRC 00040

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 21 FEBRUARY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LYNDA NEETER

APPELLANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE DEPARTMENT

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR J LAMB - BOARD MEMBER
MR D STEWART - BOARD MEMBER

DATE

FRIDAY, 8 FEBRUARY 2019

FILE NO

PSAB 5 OF 2018

CITATION NO.

2019 WAIRC 00040

Result	Appeal discontinued
Representation (by correspondence)	
Appellant	In person
Respondent	Mr T Pontre (of counsel)

Order

WHEREAS on 6 February 2019 the appellant informed the Registry in writing that she wished to discontinue her appeals PSAB 4 of 2018 and PSAB 5 of 2018 (**Appeals**) and sent the Registry a *Form 14- Notice of withdrawal or discontinuance* to discontinue both Appeals;

AND WHEREAS the respondent does not object to the Appeals being discontinued;

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

THAT appeal PSAB 5 of 2018 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

NOTICES—Union Matters—**2019 WAIRC 00074**

NOTICE

FBM No. 1 of 2019 and FBM No. 3 of 2019

NOTICE is given of applications by the Registrar of the Western Australian Industrial Relations Commission to the Full Bench of the Western Australian Industrial Relations Commission to cancel the registrations of the *Licensed Car Salesmen's Association, Union of Workers, of Western Australia* (FBM 1/2019) and the *West Australian Psychiatric Nurses' Association (Union of Workers)* (FBM 3/2019) on the grounds the organisations are defunct.

The matters are listed for hearing before the Full Bench at **10.30am on Tuesday, 19 March 2019** on Level 18, 111 St Georges Terrace, Perth.

Any person who desires to object to the application/s may do so by appearing at the hearing before the Full Bench at the above listed date and time.

[L.S.]

19 February 2019

(Sgd.) S BASTIAN,
Registrar.

