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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.109 applications for review by

Minister for Workplace Relations and Small Business

WATER ECOSCIENCE AWARD 1994

(ODN C No. 32747 of 1994)

[Print L7533 [W0208]]

consolidated award [Print Q2550] issued by Commissioner Frawley on 29 June 1998

(C No. 90271 of 1998)

KENWORTH TRUCKS VEHICLE INDUSTRY (CONSOLIDATED)

AWARD 1992

(ODN C No. 02017 of 1977)

[Print K4778 [K0003]]

decision [Print Q2653] issued by Commissioner Foggo on 30 June 1998

(C No. 90272 of 1998)

RESEARCH AND SUPPLY VESSEL (AURORA AUSTRALIS) AWARD 1991

(ODN C No. 21994 of 1991)

[Print J9676 [R0071]]

decision [Print Q2690] issued by Commissioner Wilks on 30 June 1998

(C No. 90273 of 1998)

TOYOTA AUSTRALIA VEHICLE INDUSTRY AWARD 1988

(ODN C No. 00328 of 1988)

[Print H4026 [T0220]]

decision [Print Q2745] issued by Commissioner Lewin on 30 June 1998

(C No. 90274 of 1998)

THE STATE ELECTRICITY COMMISSION OF VICTORIA ELECTRICAL, ELECTRONIC AND ENGINEERING EMPLOYEES AWARD 1989

(ODN C No. 36197 of 1989)

[Print J3261 [S0220]]

decision [Print Q3187] issued by Commissioner Merriman on 30 June 1998

(C No. 90275 of 1998)

PHILIP MORRIS LIMITED AWARD 1994

(ODN C No. 33755 of 1994)

[Print L6625 [P0437]]

decision [Print Q2601] issued by Senior Deputy President Marsh on 3 July 1998

(C No. 90277 of 1998)

LAND SURVEYORS GENERAL - AWARD 1996

(ODN C No. 32542 of 1992)

[Print N4014 [L0138]]

consolidated award [Print Q2666] issued by Senior Deputy President Marsh on

30 June 1998

(C No. 90278 of 1998)

JOURNALISTS (TELEVISION) AWARD 1996

(ODN C No. 20300 of 1991)

[Print N3404 [J0069]]

decision [Print Q2390] issued by Senior Deputy President Marsh on 30 June 1998

(C No. 90280 of 1998)

JOURNALISTS (BOOK INDUSTRY) AWARD 1996

(ODN C No. 05702 of 1987)

[Print N1764 [J0025CR]]

decision [Print Q2389] issued by Senior Deputy President Marsh on 30 June 1998

(C No. 90281 of 1998)

JOURNALISTS (PROVINCIAL NON-DAILY NEWSPAPERS) AWARD 1982

(ODN C No. 03720 of 1982)

[Print J4494 [J0012CR]]

decision [Print Q2584] issued by Senior Deputy President Marsh on 3 July 1998

(C No. 90282 of 1998)

GENERAL MOTORS HOLDEN'S AUTOMOTIVE LIMITED (PART 1)

GENERAL AWARD 1988

(ODN C No. 30100 of 1988)

[Print H3647 [G0072]]

decision [Print Q2749] issued by Commissioner Lewin on 30 June 1998

(C No. 90283 of 1998)

HEALTH AND ALLIED SERVICES - PUBLIC SECTOR - VICTORIA CONSOLIDATED AWARD 1996

(ODN C No. 31827 of 1992)

[Print N7422 [H0564]]

decision [Print Q2498] issued by Commissioner Hingley on 29 June 1998

(C No. 90284 of 1998)

HEALTH AND ALLIED SERVICES - PRIVATE SECTOR - VICTORIA

AWARD 1995

(ODN C No. 33278 of 1994)

[Print M6132 [H0488]]

decision [Print Q2510] issued by Commissioner Hingley on 30 June 1998

(C No. 90285 of 1998)

GLASS INDUSTRY - GLASS MERCHANTS AND GLAZING CONTRACTORS - VICTORIA - CONSOLIDATED AWARD 1996

(ODN C No. 01333 of 1977)

[Print P0412 [G0034]]

order [Print Q2528] issued by Commissioner Lewin on 30 June 1998

(C No. 90286 of 1998)

FORD AUSTRALIA VEHICLE INDUSTRY AWARD, 1978

(ODN C No. 01398 of 1975)

[Print H2546 [F0019]]

decision [Print Q2655] issued by Commissioner Lewin on 30 June 1998

(C No. 90287 of 1998)

GLASS INDUSTRY - GLASS MERCHANTS AND GLAZING CONTRACTORS - SOUTH AUSTRALIA - CONSOLIDATED AWARD 1996

(ODN C No. 02709 of 1976)

[Print P0411 [G0005]]

decision [Print Q2629] issued by Commissioner Lewin on 30 June 1998

(C No. 90288 of 1998)

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(C No. 90289 of 1998)

FURNITURE AND FURNISHING TRADES (NSW) AWARD 1995

(ODN C No. 32762 of 1994)

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decision [Print Q2554] issued by Commissioner Lewin on 30 June 1998

(C No. 90290 of 1998)

FURNISHING INDUSTRY - GENERAL - VICTORIA, SOUTH AUSTRALIA AND TASMANIA - CONSOLIDATED AWARD 1996

(ODN C No. 00422 of 1961)

[Print N6876 [F0029]]

decision [Print Q2555] issued by Commissioner Lewin on 30 June 1998

(C No. 90291 of 1998)

THEATRICAL EMPLOYEES MOTION PICTURE PRODUCTION

AWARD 1988

(ODN C No. 04145 of 1983)

[Print H3872 [T0020CRA]]

decision [Print Q2824] issued by Commissioner Wilks on 30 June 1998

(C No. 90292 of 1998)

ENTERTAINMENT AND BROADCASTING INDUSTRY - THEATRICAL PRODUCTIONS - ACTORS - AWARD 1996

(ODN C No. 02548 of 1979)

[Print N9166 [E0471CR]]

consolidated award [Print Q2646] issued by Senior Deputy President Polites on

30 June 1998

(C No. 90293 of 1998)

DENTAL (PRIVATE SECTOR VICTORIA) AWARD 1996

(ODN C No. 31827 of 1992)

[Print N6126 [D0498]]

decision [Print Q2509] issued by Commissioner Hingley on 30 June 1998

(C No. 90294 of 1998)

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(ODN C No. 21680 of 1990)

[Print K3299 [E0068]]

consolidated award [Print Q4287] issued by Commissioner Merriman on 30 June 1998

(C No. 90295 of 1998)

CLEANING SERVICES - SPOTLESS SERVICES AUSTRALIA/ALHMWU -

OUTDOOR FACILITIES - AWARD 1996

(ODN C No. 21317 of 1996)

[Print N3489 [C1487]]

decision [Print Q2570] issued by Vice President Ross on 29 June 1998

(C No. 90296 of 1998)

SCIENTIFIC AND TECHNICAL OFFICERS (CHEMICAL INDUSTRY)

(CONSOLIDATED) AWARD 1984

(ODN C No. 00172 of 1972)

[Print J5393A [S0009]]

decision [Print Q2654] issued by Commissioner Hingley on 30 June 1998

(C No. 90297 of 1998)

BULK HANDLING AND GENERAL SERVICES PTY LTD

BULK HANDLING AWARD 1990

(ODN C No. 21194 of 1990)

[Print J8936 [B0166]]

decision [Print Q2822] issued by Commissioner Wilks on 30 June 1998

(C No. 90301 of 1998)

AIRCRAFT INDUSTRY (HAWKER DE HAVILLAND AUSTRALIA LIMITED)

AWARD 1977

(ODN C No. 01144 of 1977)

[Print F7021 [A0183]]

decision [Print Q3672] issued by Justice Munro on 14 July 1998

(C No. 90302 of 1998)

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT McINTYRE
COMMISSIONER RAFFAELLI

MELBOURNE, 12 MARCH 1999

Allowable award matters - applications to review under s.109 - Workplace Relations Act 1996, ss.89A, 109 - Workplace Relations and Other Legislation Amendment Act 1996, Schedule 5, item 49.

CONTENTS

LIST OF MAIN ABBREVIATIONS

ACCI Australian Chamber of Commerce and Industry

Act *Workplace Relations Act 1996*

ACTU Australian Council of Trade Unions

AI Group The Australian Industry Group

AIMPE The Australian Institute of Marine and Power Engineers

AMMA Australian Mines and Metals Association

AMOU The Australian Maritime Officers' Union

AMWU Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

CEPU Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

CFMEU Construction, Forestry, Mining and Energy Union

EIEA Entertainment Industry Employers Association

FACTS Federation of Australian Commercial Television Stations

FIAA (Vic/Tas) Furnishing Industry Association of Australia (Vic/Tas) Inc

FVIU Federation of Vehicle Industry Unions

Hospitality Award Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 [Print P9138 [H0008]]

Hospitality Decision Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995 [(1997) Print P7500, 75 IR 272] (Full Bench) (also known as the *Award Simplification Decision*)

HSUA Health Services Union of Australia

Leave Allowability Re *Victorian Shops Interim Award 1994* [(1998) Print Q9399]

Decision

LHMU Australian Liquor, Hospitality and Miscellaneous

Workers Union

MEAA Media, Entertainment and Arts Alliance

Metals Decision Metal Industry Award 1984 - Part I [(1998) Print P9311] (Marsh SDP)

Minister Minister for Employment, Workplace Relations and Small Business

MUA The Maritime Union of Australia

Power Industry Unions The unions respondent to the *Power and Energy Industry Electrical, Electronic and Engineering Employees Award 1998* [Print Q2767 [P1168]]

SIAG Service Industry Advisory Group

VHIA Victorian Hospitals' Industrial Association

VTHC Victorian Trades Hall Council

WROLA Act *Workplace Relations and Other Legislation*

Amendment Act 1996

DECISION

INTRODUCTION

[1] These are applications under s.109 of the *Workplace Relations Act 1996* (the Act) by the Minister for Workplace Relations and Small Business (now the Minister for Employment, Workplace Relations and Small Business) to review a number of decisions and awards made by members of the Commission as part of the award simplification process.

[2] Each of the decisions and awards the subject of the applications was made on or about 30 June 1998, the last day of the interim period referred to in item 49 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (the WROLA Act) (and defined in item 46).

[3] The applications require us to consider a number of statutory provisions; in particular ss.89A and 109 and item 49. We set out ss.89A and 109 and item 49 in Appendix A. References in this decision to sections are to sections in the Act. References to items are to items in Schedule 5 of the WROLA Act.

[4] A substantial number of decisions relating to award simplification have been made by the Commission, including the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995* [(1997) Print P7500, 75 IR 272] (Full Bench) and *Metal Industry Award 1984 - Part I* [(1998) Print P9311] (Marsh SDP). We refer to the first of these decisions as the *Hospitality Decision* and to the second as the *Metals Decision* . Page references to the *Hospitality Decision* are to the Commission print.

[5] On 2 November 1998, we gave a decision [Print Q8141] dealing with matters raised as threshold issues by persons opposing the Minister's applications. The substantial hearing of the applications took place in Melbourne on 1, 2, 3 and 21 December 1998.

[6] In addition to the applications with which this decision deals, applications were also made in relation to eight other awards; namely:

(1) *Catering (Victoria) Award 1995* [Print M6978 [C0777]] (C No. 90298 of 1998);

(2) *BHP Steel (AWI) Pty Ltd Geelong Wiremill Award 1994* [Print L5737 [B0402]] (C No. 90299 of 1998);

(3) *Port Services Award 1991* [Print K2506 [P0247]] (C No. 90276 of 1998);

(4) *Theatre Managers Award 1986* [Print G9991 [T0011]] (C No. 90269 of 1998);

(5) *Theatre Managers Award, 1974* [Print C3394 [T0011]] (C No. 90270 of 1998);

(6) *Bulk Terminal Services Bulk Handling Award 1990* [Print J9460 [B0169]] (C No. 90300 of 1998);

(7) *Professional Engineers (Consulting Engineers) Agreement 1988* [Print H3085 [P0165CRN]] (C No. 90303 of 1998); and

(8) *Pastoral Industry Award 1986* [Print G6783 [P0143]] (C No. 90279 of 1998).

[7] The first seven of these applications were withdrawn by the Minister. The eighth has, at the Minister's request, been deferred.

APPLICATIONS FOR EXTENSION OF TIME

[8] The applications were not instituted within the time prescribed by the *Australian Industrial Relations Commission Rules 1998* and, accordingly, the Minister sought an extension of time with respect to each application. The applications for an extension of time were, in general, opposed by the unions bound by the awards the subject of the applications for review and by a number of employer interests.

[9] Rule 19 provides:

"19. Review on application by Minister

The procedure to be followed in an application under section 109 of the Act must be generally in accordance with the procedure prescribed by rule 11."

[10] Rule 11(2) and (3) provides:

"(2) An appeal must be instituted:

(a) before the end of 21 days after the date of the award, order, decision or opinion appealed against; or

(b) if a request for a statement of reasons has been made under rule 46 - before the end of 21 days after the date on which the statement of reasons is given; or

(c) on application - within such further time as is allowed by a Full Bench.

(3) An application to a Full Bench for leave to institute an appeal after the 21 days mentioned in paragraph (2)(a) or (b) must be in accordance with Form R2."

[11] Section 111(1)(r) of the Act provides that, subject to the Act, the Commission may, in relation to an industrial dispute, extend any prescribed time.

[12] The applications were instituted on 28 August 1998. As we have earlier noted, the decisions and awards the subject of the reviews were, in almost all cases, made on 30 June 1998. Accordingly, the applications were, in those cases, filed some 38 days out of time.

[13] Mr Parry, counsel for the Minister, called Philip Malcolm Drever, Assistant Secretary, Labour Relations Policy Group of the Minister's Department, who

deposed to the correctness of a draft affidavit [Exhibit P7] which included:

> *"2. During July 1998, at the Minister's request, staff of my Branch commenced an analysis of all the decisions made by the Commission up to that time under item 49 of Part 2 of Schedule 5 to the Workplace Relations and Other Legislation Amendment Act 1996 (`WROLA'). Approximately 85 such decisions were made on or about 29-30 June 1998. This exercise involved an examination of approximately 94 decisions and awards, and the preparation of briefing material for the Minister which dealt with the content of the awards, and an assessment against the requirements of the Act.*
>
> *3. The Commonwealth had not had any prior involvement in any of the proceedings that are the subject of the review applications. In order to monitor `item 49' decisions and awards, Departmental officers consulted the Commission's Internet site which is regularly updated to provide information about decisions. In the majority of cases, no detailed reasons for decision were published, rather an amended award was made by consent, and in those cases copies were obtained from the Registry. These awards and decisions became available to the Department progressively during July 1998.*
>
> *4. Taking into account the material provided by the Department, the Minister concluded that 35 awards contained clauses providing for non-allowable matters or clauses that were otherwise contrary to the WR Act, and that the decisions and awards were contrary to the public interest.*
>
> *5. The applications were made as quickly as possible having regard to the magnitude of the task of examining each of the decisions and awards by Departmental officers and consideration by the Minister of whether s.109 applications should be made. The Department lodged applications on the Minister's behalf on 28 August 1998."*

[14] Mr Drever was extensively cross-examined by Mr Staindl, counsel for the Construction, Forestry, Mining and Energy Union (CFMEU). A number of the facts adduced in cross-examination are referred to in Mr Staindl's submissions to which we refer in paragraph 16.

[15] Mr Parry submitted that [Exhibit P6 at pp.6-7]:

> *" _ These applications are very different from the normal case of an appeal by a party from a decision made by a tribunal in proceedings* inter partes . *In the normal case, the parties are aware immediately of the decision of the tribunal, and of the fact that it directly affects their interests. They are given a period of 21 days to consider their position in the light of the decision (and the reasons if published).*
>
> *_ The Minister, by contrast, has to (by his agents) take steps to identify and obtain copies of decisions and awards which may be of interest to him before he can assess whether an application under s.109 is warranted.*
>
> *_ The Minister must take as his touchstone the public interest, as opposed to the private or organisational interests that normally motivate appeals by parties to proceedings. In the present case, the Minister took an overall view of a large number of decisions and awards of the Commission. It was necessary for him to do so in order to form a view on the public interest. A number of the subject awards raised common issues, which are apparent from the submissions hereunder on the substantive issues. It was inevitable in those circumstances that the Minister's Department must take some time to examine the large number of awards which were potentially relevant, and form a view as to whether the pattern demonstrated by those awards justified an application for review.*

_ *The delay in this case is not inordinately long and is adequately explained.*

_ *The Full Bench, like the Minister, is required by s.109 to act in the public interest in discharging its functions under the section. Where the public interest and not mere private or organisational interests are concerned the Commission should be more ready to extend time to allow the substantive issues to be heard and decided."*

[16] In opposing the granting of an extension of time, Mr Staindl submitted that Mr Drever's evidence, in particular matters adduced under cross-examination, fell far short of establishing a basis for the Minister's applications for extensions of time. Mr Staindl submitted that the cross-examination of Mr Drever revealed [Exhibit CFMEU7 at pp.1-3]:

"(a) He knew about the time limits in respect to Section 109 references;

(b) Besides himself there were five other departmental officers concerned with awards of the Commission together with a graduate assistant and Mr Drever's boss, Mr Leahy (albeit indirectly). There are also officers within another area of the Department who cover key industries. Building and Construction is a key industry and covers the furniture and glazing industry;

(c) There is no process in place for the Department to look at decisions of the Commission in case he (the Minister) wanted to take any action in respect of them;

(d) It can take several weeks for decisions of the Commission to be put on the internet, in Mr Drever's experience. This makes it difficult to ensure consistency of decisions if the decisions are not known during the appeal period;

(e) Prior to 30 June, 1998 simplified awards were looked at to ensure they did not contain inappropriate provisions;

(f) A previous Section 109 application had been made during 1997 concerning non-allowable matters in a simplified award. This alerted the Department to the possibility that other awards might contain provisions which were non-allowable;

(g) Departmental officers knew that awards were undergoing the process of award simplification;

(h) Departmental officers look at the law list on a regular basis. They also knew that the awards under review were undergoing a process of award simplification;

(i) Copies of 56 awards were sought in mid July. It took up to a week to get the awards. These were obtained from Melbourne;

(j) It took four to five days to distil what was in those awards;

(k) Contact was made with the Minister's office on 28 July, 1998 or thereabouts although previously Mr Drever had said it was approximately mid July. By that time there was sufficient concern to raise the issue with the Minister's office;

(l) Awards were initially looked at with a broader focus than whether or not matters in the awards were allowable. This process took a good deal of time but was unrelated to whether or not matters were allowable. The driving force behind the analysis was the broader policy question;

(m) Departmental officers are aware of a weekly decision summary issued by the Commission;

(n) Coming up to 30 June, 1998 some decisions relating to award simplification were expected. No one was sent to the Canberra Registry to obtain copies of those decisions and the Melbourne Registry was not rung in relation to such decisions etc."

[17] Mr Staindl relied on two decisions of the Commission in support of his submission that extensions of time should be refused. The first decision was *Meat and Allied Trades Federation v Australasian Meat Industry Employees Union* [(1990) 35 IR 25] (the *Meat Case*) in which a Full Bench said, with reference to an application to extend the time for initiating an appeal [p.26]:

"The Commission has a discretion to extend the time prescribed for instituting an appeal when it considers that such an extension would be desirable. We do not seek to codify, and it may be undesirable to constrain, the grounds upon which the Commission will exercise its discretion. However, we take as the starting point that it is for the appellant applicants to satisfy the Commission that an extension of time would be desirable."

and [p.26]:

"We are reluctant to accept that a time limit of this kind should be open to extension as a matter of course. There are sound administrative and industrial reasons for setting a limit to the time for bringing an appeal. The parties appearing before the Commission have an obligation to acquaint themselves with such limits."

[18] The Full Bench, after referring to the evidence in support of the application to extend time, said [p.26]:

"These matters undermine the case relied upon for contending that there is a reasonable excuse for the appellants needing to go beyond the prescribed time limit. In this context it cannot be overlooked that the appellants are both experienced litigants before the tribunal. Indeed, they are experienced litigants in relation to the industrial dispute the subject of the appeal. Nor can it be said in terms of the objects of the Act that the merits of the subject matter of this appeal itself afford persuasive reasons to our finding that an extension is desirable. In the circumstances, we refuse the application."

[19] The second case on which Mr Staindl relied was *National Rail Enterprise Agreement 1993* [(1993) Print L0238] (the *National Rail Case*), another Full Bench decision. In this case, the applicant for an extension of time was not a party to the proceedings below and sought to raise, on appeal, jurisdictional issues. In these respects, the application has some features in common with the applications before us. In the *National Rail Case* , the Full Bench give preliminary consideration to the applicant's main jurisdictional argument. It said [pp.11-12]:

"Although we have given preliminary consideration to the main jurisdictional arguments put by the EPU and their likelihood of success for the purposes of determining the application for an extension of time, we recognise that other issues of jurisdiction would need to be considered should the appeal be allowed to proceed. We also recognise that there are important issues for the EPU raised in the appeal and that the appeal has been pursued because of the EPU's concern that its membership rights and other interests have been adversely affected by the certification of the Agreement and other

developments relating to National Rail.

> *However we are of the view that in all circumstances it would not be appropriate to grant leave for the institution of the appeal out of time. There are sound administrative and industrial reasons for setting a limit on the time for bringing an appeal. We do not consider that the time limit should be extended as a matter of course. On the submissions and material presented, the EPU has not provided a satisfactory explanation for its delay in instituting the appeal."*

[20] The Bench went on to refer to considerations relating to fairness and the interests of the other parties and that these parties had proceeded for some considerable time on the basis of the decision from which the applicant sought to appeal.

[21] We have come to the conclusion that the Minister's applications for extensions of time should be granted. There are two reasons for this conclusion.

[22] First, we are of the view that the Minister has provided a satisfactory reason for the delay. A very large number of awards were made on or about 30 June 1998. Many of these awards were lengthy. We have no doubt that an examination of these awards and any accompanying decisions to consider whether they contained non-allowable award matters or provisions contrary to items 49(7) and (8) was a major task. In a sense, we can vouch for the magnitude of the task. We have found a consideration of the clauses challenged in the applications before us very time-consuming. The material that the Minister's representatives had to consider was considerably greater, involving many more awards and award provisions than are before us. We have considered Mr Staindl's submissions. There is considerable substance in them. We generally accept his submission as to what the cross-examination of Mr Drever revealed. Nevertheless we have come to the view that the magnitude of the task provided a satisfactory reason for the delay.

[23] Second, in deciding to grant extensions of time, we have had regard to the nature of the issues raised by the Minister's applications. It will be recalled that in the *Meat Case* the Full Bench said *"[n]or can it be said in terms of the objects of the Act that the merits of the subject matter of this appeal itself afford persuasive reasons to our finding that an extension is desirable"* [p.26]. And, in the *National Rail Case,* the Full Bench gave *"preliminary consideration to the main jurisdictional arguments put by the EPU and their likelihood of success for the purposes of determining the application for an extension of time"* [p.11]. In the applications before us we have had the advantage of hearing the cases in full before we have had to rule on the extension of time applications. Whether, having regard to s.89A and item 49, awards should contain the provisions challenged by the Minister raises questions of jurisdiction. As will be seen we have upheld a number of the Minister's challenges. These circumstances, in our view, constitute a compelling reason why we should accede to the applications for extensions of time.

[24] Having regard to all the circumstances we are of the view that it is, to use the word used in the *Meat Case , "desirable"* that we should grant the extensions sought.

PUBLIC INTEREST - SECTION 109(3)

[25] Section 109(3) provides:

> *"The Full Bench shall, if in its opinion the matter is of such importance that, in the public interest, the award, order or decision should be reviewed, make such review of the award, order or decision as appears to it to be desirable having regard to the matters referred to in the application."*

[26] An issue before us is whether the public interest test in s.109(3) has been met. Mr Staindl and others opposing the applications submitted that the Commission must itself form the view that the matter is of such importance that, in the public interest, it should be reviewed. Each award is not to be treated as an integrated whole; each matter in each award must satisfy the public interest test before it could be the subject of review. Mr Staindl, in support of this argument, referred to *Ship Painters and Dockers Award* [(1960) 94 CAR 579] and *Metway Group Industrial Organisation of Employees v Finance Sector Union of Australia* [(1992) Print K3827]. We agree with Mr Staindl's argument that each provision under challenge needs to be considered separately to ascertain whether, in the public interest, the award, order or decision should be reviewed. The approach which we take is set out in the first paragraph under the heading *"The Provisions Under Challenge"* .

AMENDMENTS SOUGHT TO BE MADE TO THE APPLICATIONS

[27] The Minister sought to amend some of the applications. These proposed amendments were first raised at the hearing (relating to threshold issues) on 20 October 1998 and were summarised in Exhibit P2 tendered that day. The Minister argued that leave to amend was not required, but, if it were, it should be granted. Those opposing the Minister's applications submitted that leave was required and that it should be refused insofar as the amendments sought to, or had the effect of, extending the subject matter of the reviews.

[28] We will assume, without so deciding, that leave to amend is necessary. In opposing the granting of leave, Mr Staindl, who argued the main case in opposition, relied on his arguments with respect to the applications for an extension of time and the public interest. Further the amendments sought would not achieve, as the Minister argued, greater consistency between awards given the limited number of awards the subject of the applications. The amendments sought to introduce entirely new matters for consideration. Leave should be refused.

[29] In our opinion, leave to amend should be granted for the same reasons as those we have given for allowing extensions of time for instituting the applications for review; that is, in brief, the substantial volume of material that the Minister's representatives had to consider and that the applications raise questions of jurisdiction under s.89A and items 49(7) and (8). Further, as we have said, the proposed amendments were first advised on 20 October 1998 providing sufficient opportunity for them to be considered by the parties to the awards concerned.

[30] One other submission should be mentioned. During proceedings on 20 October 1998, it was submitted by Mr Staindl, then appearing on behalf of the Australian Council of Trade Unions (ACTU), that where the amendments are substantial they amount to a fresh application or applications. This submission was subsequently repeated by the CFMEU. No particulars were provided of amendments which might be outside the scope of the original application in any particular case. Nor was any distinction made between amendments which might be said to narrow the scope of the original application and those which might be said to broaden it. Because it is clearly in the public interest that the real matters at issue be dealt with we grant leave to extend time in relation to the amendments insofar as it may be necessary to do so.

AWARD PROVISIONS NOT ALTERED - IS THERE A DECISION, AWARD OR ORDER UNDER SECTION 109(1)?

[31] In our decision of 2 November 1998 [Print Q8141] we referred to a submission, put as a threshold one, that in those cases where award provisions had not been altered, there was no relevant award, order or decision for the purposes of s.109. We said [p.7]:

> *"In our view, this is not a submission that can be dealt with in the absence of details, which were not provided, of the terms of each application, the terms of the variations finally pursued and the details of the variations that were, or were not, made in each case. We accordingly reject the*

submission as a purported threshold one."

[32] In the hearing relating to the threshold matters, the ACTU tendered a document [Exhibit ACTU2] which gave examples of award provisions which, the ACTU contended, had not been varied. In the later proceedings, Mr Parry, when dealing with the awards in respect of which the submission had been made, referred us to the specific decisions, orders or awards made.

[33] The approach generally adopted by the Member of the Commission in each of the awards the subject of the Minister's challenge was to issue an order (in almost all cases on 30 June 1998) which varied the award by deleting all provisions in it and replacing those provisions with those set out in the order. In many cases, a written decision was also given expressing the view that the award as varied contained only allowable award matters and complied with items 49(7) and (8).

[34] We accept that a number of provisions now challenged by the Minister are in the same, or substantially the same, terms as they were before the award was varied.

[35] Mr Staindl argued that, in the cases where award provisions had not been varied, or substantially varied, there was no *"award, or order or a decision relating to the making of an award or order made by a Member of the Commission"* under s.109(1). We do not agree with Mr Staindl's submissions on this issue. Section 109(1) allows the Minister to apply for the review *"of an award or order, or a decision relating to the making of an award or order"* . In each case before us, an award or order was made. That, in some cases, no change, or no substantial change, was made to a provision, is, in our view, immaterial. An award or order was made containing the provisions now challenged by the Minister. That, in our opinion, is sufficient to activate s.109(1).

[36] Mr Staindl drew attention to the terms of item 49(1) including the reference to an application *"for a variation of the award under this item"* and the Commission varying the award *"so that it only deals with allowable award matters"* . He submitted that the application to vary the award, so far as allowable award matters is concerned, determines the *"outer limit"* of what variations can be made. We reject this submission. It is true that a review of an award pursuant to item 49 can only be initiated by an application by one or more of the parties. Nevertheless, once it embarks upon the review, the Commission is obliged to decide for itself which of the award provisions are allowable and which are not.

SECTION 89A AND ITEM 49

[37] Having regard to some of the submissions and issues raised, we make some comments about s.89A and item 49.

[38] In opposing the Minister's applications, considerable reliance was, in a number of cases, placed on s.89A(6) which provides:

"The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award."

[39] There has been, we think, by some of those opposing the applications, a tendency to read s.89A(6) as if it referred to provisions *"that are incidental to and necessary for the effective operation of the award"* . We think it appropriate to emphasise that the word *"incidental"* applies to *"the matters in subsection (2)"* . Accordingly if s.89A(6) is to operate there must be an allowable award matter to which the award provision is incidental. We also emphasise that s.89A(6) does not operate unless the provision is *both* incidental to a matter in s.89A(2) *and* necessary for the effective operation of the award. As was said in the *Hospitality*

Decision [at p.6]:

> *"That subsection makes it clear that the matters specified in s.89A(2) are not to be expanded, but that an award provision which is incidental to one of the matters is permitted, provided it is also necessary for the effective operation of the award."*

[40] In a substantial number of cases those opposing the Minister's applications relied on the circumstance that the provision under challenge had been included in the award by consent, often following conciliation proceedings. Reference was made, in this respect, to the provisions of item 49 emphasising the desirability of reaching agreement with respect to allowable award matters (item 49(4)).

[41] While award parties reaching agreement about allowable award matters is of course desirable, in each case it is ultimately a matter for the Commission to decide whether, consent or not, a matter is an allowable award matter or whether a provision complies with items 49(7) and (8).

[42] We add that in deciding whether a matter comes within s.89A(2) the Commission is required to identify the matter accurately and then to consider whether the matter, properly characterised, is within any of paragraphs (a) to (t). On the other hand, in considering the applicability of items 49(7) and (8), questions of discretionary judgment are involved. The views of the parties are more likely to be relevant and the particular facts and circumstances need to be taken into account in deciding whether any and if so what action should be taken. (See for instance, the use of the words *"if it considers it appropriate"* in item 49(7) and the words *"where appropriate"* in items 49(8)(a), (b) and (e).)

THE PROVISIONS UNDER CHALLENGE

[43] We now turn to the challenges made to the various award provisions. It is convenient to deal with the provisions under the headings and in the order in which they were dealt with in the Minister's written submissions. Where a provision is not an allowable award matter pursuant to s.89A(2) and is not a s.89A(6) provision it is in the public interest that the award in question be quashed to the extent necessary to delete the provision. In some cases we also direct the Member of the Commission who made the award to deal with it further in accordance with our decision. Where a provision is under challenge for reasons related to the proper operation of items 49(7) and (8) it will depend upon the circumstances whether it is in the public interest to review the provision.

[44] We use the award names used by the Minister in his written submissions. The name of each award the subject of this decision was changed by the orders or awards the subject of the Minister's review. In some cases the change was minor (e.g. changing the year in the award name to 1998); in some cases it was substantial and in some cases awards were consolidated.

[45] We now, under each of the headings used in the Minister's submissions, deal with each of the provisions under challenge. The provisions under challenge are set out, in boxes, as they appear in the Minister's submissions. In some cases, parts of a clause, subclause, etc. are underlined. In such cases, only the underlined parts of that clause, subclause, etc. are challenged. An index of the awards reviewed is set out in Appendix B.

LIMITATIONS ON THE TYPE OF EMPLOYMENT

[46] The first group of provisions was challenged on the basis that each of them limits the number or proportion of employees that an employer may employ in a particular type of employment, contrary to s.89A(4)(a). In almost every case the Minister's submission was supported by the Australian Chamber of Commerce and Industry (ACCI) and The Australian Industry Group (the AI Group).

Vehicle Industry - Kenworth Trucks - Award 1998 (C No. 90272 of 1998)

[47] *4.3.3 What is the proportion of apprentices to tradespersons?*

(a)The proportion of apprentices to tradespersons will be 1 to 3 or fraction of 3.

(b)The number of tradespersons will be calculated on the basis of the average number working during the immediately preceding 6 months.

4.6.2 What is the proportion of juniors to adults?

With the exception of apprentices the proportion of juniors who may be employed by the company will be 1 junior (whether he or she be an indentured apprentice or an unapprenticed junior) to every 3 adults.

4.4.4 Are adult apprentices calculated in determining the proportion of apprentices?

No. An adult apprentice will not be taken into account in determining the ratio of apprentices to tradespersons as prescribed by Clause 4.3.3.

[48] The Minister's application was opposed by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU). It submitted that apprentices and juniors are not a type of employment as specified in s.89A(2)(r) and therefore the limitation in s.89A(4)(a) does not apply. As the Minister submitted, this issue was dealt with in the *Hospitality Decision* [clauses 16.4 and 16.5 at p.15]. Clauses 4.3.3 and 4.6.2 are not allowable award matters. Clause 4.4.4, being machinery related to clause 4.3.3, is likewise not allowable.

[49] The AMWU argued in the alternative that a provision for proportions of apprentices is allowable under s.89A(6) *"as it is incidental and necessary for the effective operation of s.89A(2)(a) which relates to the provision in awards of classification and skills-based career paths"* . We take this to be a submission that the provisions are incidental to classifications of employees and skill-based career paths and necessary for the effective operation of the award. Nothing put to us persuades us that a limitation on the proportion of apprentices to tradespersons is incidental to the matters in s.89A(2)(a) and necessary for the effective operation of the award. We reject this submission. The clauses will be deleted.

Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998 (C No. 90275 of 1998)

[50] *8.3.4 Extent of part-time work*

Part-time work shall be monitored so as not to exceed 8% of the total workforce in the union's area of classification coverage. This limit may be altered by mutual agreement.

[51] The respondent employer contended that this clause is allowable pursuant to s.89A(2)(r) or alternatively is incidental to the matters in s.89A(2)(r) and is necessary for the effective operation of the award. In the further alternative it submitted that recourse could be had to s.89A(5)(b). These submissions were supported by the Victorian Trades Hall Council (VTHC) and the Power Industry Unions.

[52] In our view the substantive operation of the clause is to impose a limit on the proportion of part-time work and thus upon the number or proportion of part-time employees. The fact that the proportion may be altered by agreement reinforces the conclusion that the clause operates to impose a limit, contrary to s.89A(4)(a). Accordingly the provision is not allowable pursuant to s.89A(2)(r). Nor is it a s.89A(6) provision. We also reject the alternative submission based on s.89A(5)(b). That section has no application in relation to s.89A(4)(a). It relates to s.89A(4)(b) only. The clause will be deleted.

Health and Allied Services - Public Sector - Victoria Consolidated Award 1998 (C No. 90284 of 1998)

[53] *15. JUNIORS*

An employer shall not employ more than one junior employee to every seven or fraction of seven adult workers receiving not less than the weekly base rate of pay identified in Wage/Skill Group 1 in clause 17 - Rates of pay.

[54] The parties accept that this clause involves a restriction on the number or proportion of juniors that an employer covered by the award may employ, contrary to s.89A(4)(a). They do not object to the clause being removed from the award. We will remove it.

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998)

[55] *15.2 Casual Employment*

...

15.2.3 The number of employees permitted to be employed under this provision shall be negotiated with the union and confirmed in writing. The union will consider each application on its merits.

15.6.3 Junior Workers

In classifications for which no apprenticeship is provided, one junior worker shall be allowed to each four adult workers or fraction thereof.

[56] In addition to the challenge to these provisions based on s.89A(4)(a), the Minister and the AI Group also submitted that clause 15.2.3 is obsolete and should

have been deleted from the award pursuant to item 49(8)(d). The CFMEU submitted that clause 15.2.3 does not impose a limit contrary to s.89A(4)(a), but merely provides for negotiations with the union. It also submitted that clause 15.6.3 is allowable pursuant to s.89A(2)(a) because, by providing for adequate adult supervision of juniors, the clause allows for a skill-based career path. Because s.89A(4) only applies in relation to matters covered by s. 89A(2)(r), it cannot affect provisions which are allowable under other paragraphs of s.89A(2).

[57] We have decided that clause 15.2.3 is contrary to s.89A(4)(a) and is not allowable. There is some ambiguity in the provision but it provides the means for a restriction to be applied to the number of casuals to be employed. Without the provision there would be no restriction. The provision will be deleted. We reject the CFMEU's submission that clause 15.6.3 is allowable pursuant to s.89A(2)(a). The clause does not deal with skill-based career paths but with the proportion of junior employees to adult employees, contrary to s.89A(4)(a). We shall delete both clauses.

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[58] *16.6.1 Apprentices*

16.6.1(a) An employee who is under 21 years of age on the expiration of his/her apprenticeship and thereafter works as a minor in the occupation to which he/she has been apprenticed shall be paid at not less than the adult rate prescribed in this award for that classification. One apprentice will be allowed to the first two adult workers or fraction thereof and thereafter, one additional apprentice to every two such workers.

16.6.2 Adult apprentice

...

16.6.2(a)(ii) Provided that at least one apprentice is employed under 16.6.1(a) one adult apprentice is to be allowed to the first five tradespersons and thereafter, one additional adult apprentice to every additional five tradespersons and additional two apprentices under the provisions of 16.6.1(a)(i).

16.6.3 Junior workers

In classifications for which no apprenticeship is provided, one junior worker shall be allowed to each four adult workers or fraction thereof.

[59] The Minister challenged all of the provisions set out above except the first sentence of clause 16.6.1(a). The CFMEU submitted that the provisions are allowable pursuant to s.89A(2)(a) in that adequate supervision of apprentices and juniors respectively in the workplace amounts to provision for skill-based career paths. We reject this contention. The clauses do not deal with skill-based career paths but limit the proportion of apprentices and juniors that an employer may employ, contrary to s.89A(4)(a). They will be deleted.

Cleaning Services - Spotless Services Australia/ALHMWU - Outdoor Facilities - Consent Award 1998 (C No. 90296 of 1998)

[60] *25. WEEKEND WORK*

25.1 All weekend work shall be offered to permanent employees before such work is offered to casuals.

[61] The Australian Liquor, Hospitality and Miscellaneous Workers Union (LHMU) submitted that the provision is allowable pursuant to s.89A(2)(b). We reject this submission. The clause is relevantly indistinguishable from the clause deleted from the *Hospitality Award* by the Full Bench in the *Hospitality Decision* [clause 28 at p.20]. The primary effect of both provisions is to give work to one group of employees in preference to another. The clause is not allowable and is not a s.89A(6) provision. We shall delete it.

LIMITATIONS ON PART-TIME HOURS

[62] The Minister, supported by ACCI, challenged the following award provision on the basis that it sets maximum or minimum hours of work for regular part-time employees, contrary to s.89A(4)(b). Reliance was also placed on item 49(8)(b).

Aerospace Industry (Hawker de Havilland) Award 1998 (C No. 90302 of 1998)

[63] *4.2.4 Part-time employment*

4.2.4(a) An employee may be engaged to work on a part-time basis involving a fixed or variable pattern of hours which shall average less than 32 hours per week with a minimum payment for any such employee to be equivalent to ten hours for each week worked.

[64] The Minister's challenge was opposed by the AI Group on behalf of the respondent employer. The AI Group submitted that the provision is allowable because the stipulation of a number of hours per week (32) is necessary to distinguish part-time from full-time employment. It further submitted that the provision does not establish a minimum number of hours to be worked by a regular part-time employee but only provides for payment for a minimum number of hours per week. Finally, it was submitted, the clause can be distinguished from the clause which the Full Bench found not to be allowable in the *Hospitality Decision* [at p.14]. The AMWU submitted that the clause is allowable pursuant to s.89A(2)(b) and (c). Alternatively it submitted that the clause can be amended to provide a minimum period of daily engagement of three hours.

[65] The prescription of a maximum of 32 hours per week does not coincide with the ordinary weekly hours prescribed by the award for full-time employees. Without the limitation, part-time employees could be engaged for an average of more than 32 hours per week. Furthermore, the provision for an average of less than 32 hours per week is not an allowable award matter pursuant to s.89A(2)(b) or (c). It establishes a maximum number of hours for regular part-time employees contrary to s.89A(4)(b). The provision is not allowable and should be deleted.

[66] The provision for a minimum payment of ten hours per week, regardless of the hours worked if less than ten, properly characterised, is a provision setting a minimum number of hours work per week for regular part-time employees. Section 89A(5)(b) permits the inclusion in an award of provisions setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work. It is clear from the terms of s.89A(4)(b) that, apart from the power contained in s.89A(5), the Commission has no power to make an award provision prescribing minimum hours of work for regular part-time employees. Because clause 4.2.4(a) purports to establish minimum hours on a weekly basis, rather than on a consecutive basis, it is not allowable. We shall delete it.

[67] The AMWU's alternative proposal that there be a minimum daily engagement for part-time employees is allowable in principle (s.89A(5)(b)). We shall leave it to the parties to make such application in that regard as they decide.

PROVISION OF PROTECTIVE EQUIPMENT, CLOTHING, TOOLS AND MATERIALS

[68] This part of our decision deals with a group of award provisions which the Minister submitted are neither allowable award matters nor s.89A(6) provisions. In particular, it was submitted that requirements for an employer or an employee to provide or periodically replace specialised clothing, protective clothing, equipment, tools or other materials should not appear in awards. Similarly award requirements for an employer or an employee to maintain or launder specialised clothing, protective clothing or equipment should also be deleted. Reliance was placed on the *Hospitality Decision* (see in particular pp.19 and 72). These submissions were supported by ACCI.

Vehicle Industry - Kenworth Trucks - Award 1998 (C No. 90272 of 1998)

[69] *5.1.6(c) The company will supply all tools required by the apprentice in the performance of his or her duties.*

5.5 CLOTHING, EQUIPMENT AND TOOL ALLOWANCES

5.5.1 What clothing, equipment and tools does the company supply?

The company provides:

· all necessary tools and measuring instruments;

· 2 laundered pairs of overalls per week; and

· all the necessary protective clothing and equipment to adequately protect each employee against hazardous substances, equipment and environmental conditions which would otherwise place the employee at undue risk as determined by the company or Safety Committee.

5.5.2 Do clothing, equipment and tools remain the property of the company?

Yes. Clothing, equipment and tools remain the property of the company at all times.

5.5.3 Does an employee have to pay for clothing, equipment and tools if lost or damaged?

Yes. An employee must replace or pay for clothing, equipment and tools which have been issued to him or her if lost or damaged through his or her negligence.

5.5.4 Is the company responsible for damage to an employee's work clothing or glasses?

Yes in certain circumstances. The company is responsible for any damage to work clothing or glasses that are damaged in the course of work by fire or molten metal or through the use of corrosive substances, or through any other cause as a direct result of carrying out work as directed by the company. The company is not responsible where the employee has contributed to the damage through his or her negligence in observing safe working practices, or where the damage is covered by accident compensation or other reimbursements which may be applicable.

[70] The AI Group supported the Minister's submissions. The AMWU sought an opportunity to reformulate the provisions in consultation with the employer to ensure the provisions fall within s.89A(2)(j). In their current form the provisions are not allowable. We will provide the parties with an opportunity to argue that a reformulated provision should be included in the award as part of the settlement of the order in this case if application is made. The existing provisions will be deleted.

Research & Supply Vessel (Aurora Australis) Award 1998 (C No. 90273 of 1998)

[71] *22.5 Protective and industrial clothing*

The parties acknowledge the particular climatic conditions and operational requirements in which the vessel operates and the need for specialised, protective or industrial clothing to be worn by crew members for particular voyages or operations.

Specialised clothing for particular climatic conditions and/or operations will be worn by employees as required.

Where a crew member is required to provide any specialised, protective and/or industrial clothing the employer will reimburse the employee for the cost of purchasing such clothing. The provisions of this clause do not apply where the specialised, protective or industrial clothing is provided by the employer.

Where provided by the employer, specialised protective or industrial clothing will be issued to an employee upon joining the vessel and will be replaced on a wear and tear basis. Such items shall remain the property of the employer.

[72] The Australian Mines and Metals Association (AMMA), on behalf of the respondent employer, and the union respondents submitted that these provisions are allowable. Reliance was placed on a number of factors, including the extreme climate in which the employees work, to support the submission that the requirement to wear or use protective clothing is incidental and necessary for the effective operation of the award, including the disputes procedure in it. We think the answer to this submission is that whether award provisions are allowable depends upon the construction of the various provisions in s.89A. Factors such as the conditions under which the work is performed, the views of the award parties and the history of the provision are of little relevance. The provisions in these clauses are of a kind which the Full Bench in the *Hospitality Decision* found not to be allowable (at pp.19 and 72). This clause is not relevantly distinguishable and, except for the third paragraph, should be deleted from the award.

Toyota Australia Vehicle Industry Award 1988 (C No. 90274 of 1998)

[73] *31 - CLOTHING, EQUIPMENT AND TOOLS*

Provision of tools

(a) (i) The Company shall provide all tools it regards as necessary for its employees to perform their duties in production areas.

(ii) All such items supplied will remain the property of the Company and must be returned when an employee leaves the employ of the Company.

(iii) An employee shall replace or pay for any tools so supplied if lost through his/her negligence or damaged through his/her neglect.

...

(i) (ii) The Company shall provide uniforms and/or protective clothing for clerks engaged in work damaging to clothing for example, the use of duplicators or similar machines or on receiving and/or despatch of goods.

44 - SPECIAL CONDITIONS - SECURITY OFFICERS AND/OR GATEKEEPERS

Uniforms

(d) A uniform if required to be worn by a Security Officer and/or Gatekeeper shall be provided by the Company but shall remain the property of the Company.

[74] The Federation of Vehicle Industry Unions (FVIU) opposed the deletion of these provisions and in the alternative proposed that they be replaced by new provisions for allowances. The employer respondent submitted that the term *"allowances"* in s.89A(2)(j) is not restricted to monetary amounts and that the clauses contain allowances in that broader sense. On this basis, it was submitted, the provisions are allowable pursuant to s.89A(2)(j) or s.89A(6).

[75] It is clear from the *Hospitality Decision* that these clauses are not allowable. Whilst the unions proposed some amendments to the clauses they were not supported by the employer. The clauses should be deleted.

[76] The AMWU proposed in the alternative that clause 31 might be rendered allowable if a preamble to the clause was inserted in the award. In our view the draft preamble suggested by the AMWU is not an adequate way of introducing an allowance. The terms of the draft make the provision of clothing and equipment the employer's primary obligation with the payment of an allowance being secondary. Further, the amount of the allowance is not fixed by or ascertainable from the terms of the draft (see *Metals Decision* at p.46). Any replacement provision should be dealt with in separate proceedings.

Philip Morris Limited Award 1998 (C No. 90277 of 1998)

[77] *20.4 Work clothing*

Philip Morris Limited will supply and launder uniforms for all employees. The uniforms will be worn as required by Philip Morris Limited during working hours.

[78] For reasons given earlier in this part of our decision the clause is not allowable and will be deleted. The Australian Workers' Union (AWU) indicated that discussions should be held with the employer if the Commission decides the clause is not allowable in its current form. The Minister submitted that the first sentence might be recast in the form of an allowance, although not the second. It is undesirable that we make any comment on that submission in the absence of a

specific application although the *Hospitality Decision* provides some guidance [at p.135].

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[79] *31 CLOTHING, EQUIPMENT AND TOOLS (excluding engineer and scientist employees)*

Provision of tools (trade, non trade, technical and supervisor employees)

(a) (i) The company shall provide all tools and precision and other measuring instruments it regards as necessary for its employees to perform their duties.

(ii) All such items will remain the property of the company and must be returned when an employee leaves the employ of the company.

(iii) An employee shall replace or pay for any tools so supplied if lost through his/her negligence.

Damage to clothing (trade, non-trade, technical and supervisor employees)

(b) Compensation to the extent of the damage sustained shall be made by the company where in the course of the work clothing or spectacles of an employee are damaged or destroyed by fire or molten metal or through the use of corrosive substances.

Where a technical employee as a result of performing any duty required by the company and as a result of negligence of the company, suffers and damage to or soiling of clothing or other personal equipment, the company shall be liable for the replacement, repair or cleaning of such clothing or personal equipment .

[80] Clause 31(a) and the second sentence of clause 31(b) are similar to the clauses we have dealt with in the *Toyota Award* (C No. 90274 of 1998). We have reached the same conclusion in this matter, namely, that the provisions should be deleted. The AMWU submitted, as it did in relation to the *Toyota Award* , that the clause would be rendered allowable by the inclusion of a preamble. Our earlier comments about that proposal apply equally in this award.

Health and Allied Services - Private Sector - Victoria Consolidated Award 1998 (C No. 90285 of 1998)

[81] *43.1.2 Rubber gloves and all necessary protective clothing and safety appliances shall be provided free of cost for the use of employees and an adequate supply of same shall be maintained.*

[82] For reasons already given the clause is not allowable in its current form and should be deleted. The Health Services Union of Australia (HSUA) proposed an alternative provision in the form of a reimbursement allowance:

> *"43.1.2 Where an employer requires an employee to wear rubber gloves or special clothing and/or where safety appliances are required for the work performed by an employee, the employer must reimburse the employee for the cost of purchasing such special clothing or safety equipment. The provisions of this clause do not apply where the special clothing or safety equipment is paid for by the employer."*

[83] We see no objection in principle to this clause. It is very similar to a provision adopted in the *Hospitality Decision* [clause 23.3.6 at p.135]. Since no submission was received from the respondent employers, however, we think the matter is best dealt with by separate application.

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998)

[84] *25.14 Supply and Insurance of Tools*

25.14.1 The employer shall provide necessary tools of the trade to all inside employees, and to apprentices in the first year of employment, and these tools for apprentices shall become the property of the employee once training is completed. Whereby agreement outside employees are required to provide tools, they shall be paid an allowance of $4.60 *per week for maintenance and replacement of tools and shall be responsible for maintaining in good order and condition a kit of tools necessary for the performance of their duties.*

25.14.2 The employer shall ensure tools against loss by theft to a maximum of $484.80 *and where practicable provide lock up facilities for tools. Provided that the employer shall provide, where necessary, power tools, pneumatic tools, explosive tools, suckers and spirit levels .*

43 CLOTHING, EQUIPMENT AND TOOLS

43.1 Employer to supply materials

An employee engaged at spraying, polishing or finishing, shall be supplied by his/her employer with all materials including suitable clean rags, brushes and kit box .

43.2 Protective Clothing

An employee shall be supplied by their employer with the following protective clothing.

43.2.1 If engaged in cleaning mirrors with acid rubber or leather gloves.

43.2.2 If employed bevelling or silvering - rubber or leather aprons and rubber aprons.

43.2.3 If employed on any other work - canvas or leather gloves when necessary.

43.3 Masks and Goggles

43.3.1 A suitable mask and goggles or other approved appliance shall be provided by an employer for an employee on spray painting or sand blasting.

43.3.2 Goggles shall be provided by an employer for an employee grinding tools.

43.3.3 Masks or goggles containing celluloid shall not be considered suitable for the purpose of this subclause.

43.3.3(a) Safety - sunglasses

Sunglasses shall be provided for employees engaged upon specified job sites as agreed between the employees and the employer.

43.3.3(b) Safety glasses shall be the responsibility of each employer.

43.4 Equipment

Employees when performing work referred to in this subclause, shall wear the equipment provided for their protection.

43.4.1 All employees shall be initially provided with one pair of safety boots or shoes, two pairs of overalls and a suitable protective jacket, with the employer bearing the full cost of standard use. If, during the first year of issue the footwear wears out, a second pair may be issued. In subsequent years, there shall be an annual issue of one pair of footwear, one pair of overalls and one protective jacket to be made at the employer's expense provided that the worn out items are returned by the employees as evidence that replacement issue is warranted save that a second pair of overalls and/or footwear may be issued in any given year if the existing overalls and/or footwear wear out before the expiry of such year.

43.4.2 Footwear or overalls required in excess of the above quantities shall be at the employee's expense. Such safety boots/shoes provided by the employer shall wherever practicable be of a type approved as meeting SAA requirements Z3 of Z2 of 1968, or as amended.

43.4.3 Jackets, overalls, safety boots/shoes are to be issued on a Christmas to Christmas basis, or alternatively on a June to June basis. Other set periods for the re-supply of jackets, overalls and safety boots/shoes may be arranged by agreement between the parties.

43.4.4 Laundering and upkeep of protective clothing shall be the responsibility of employees who shall be expectem/Un of the first three mon payment to be refunded to the employee upon the satisfactory completion of three months' service. Such issue shall be considered to be the initial issues as from the time of issue.*

[text of subclauses 43.4.5 and 43.4.6 missing from draft award]

43.4.7 The wearing of protective clothing provided by the employer shall be a condition of employment except in special cases where individual physical disabilities preclude wearing a standard issue.

43.4.8 The parties agree that where a worker is required to work on a site(s), the employer will be required to meet any site agreement requirements relating to additional issues of clothing and/or safety equipment. There will be no `double dipping' or continuous additional issue, but in such circumstances, there should be a `topping-up' of such items subject to fair wear and tear.

43.5 Damage to Clothing, Spectacles, Hearing Aids, etc.

43.5.1 Compensation to the extent of the damage sustained shall be made where in the course of the employer's work, clothing, spectacles, dentures, contact lenses, hearing aids or artificial eyes are damaged or destroyed by fire or by impact damage caused by equipment or material normally used in the course of employee's duties.

43.5.2 Provided further, that this subclause shall not apply when an employee is entitled to workers' compensation in respect of the damage.

[85] The Minister submitted that the underlined parts of the clauses are not allowable. The CFMEU submitted that the provisions are allowable *"as incidental to s.89A(2)(j)"* . In the alternative it submitted that it had no objection to the Commission establishing a proper monetary allowance. It drew our attention to relevant provisions in the *Metal, Engineering and Associated Industries Award 1998* [Print Q0444 [M1913]]. ACCI submitted that, while the underlined parts of the clauses were not allowable, they might be recast. No other employer made any submission. In our view none of the underlined provisions is allowable. We direct the parties to confer on new provisions.

Ford Motor Company (Vehicle Industry) - Consolidated Award 1998

(C No. 90287 of 1998)

[86] *4.4.1 Provision of tools*

4.4.1(a)(i) The Company shall provide for the use of employees all tools and precision and other measuring instruments it regards as necessary for an employee to perform his/her duties.

4.4.2 Damage to clothing

Where an employee as a result of performing any duty required by the Company, and as a result of negligence by the Company, suffers any damage to or soiling of clothing or spectacles, the Company shall be liable for the replacement, repair or cleaning of such clothing or spectacles.

4.4.4 Prescription glasses

4.4.4(a) In circumstances where the employee wears prescription glasses the following conditions will apply to one pair of prescription glasses:

4.4.4(a)(i) The company will provide prescription safety spectacles for any employee who requires visually corrected safety spectacles to perform their work. The total cost of these spectacles will be covered by the company.

4.4.4(a)(ii) Only prescription safety spectacles from an approved range of frames and lenses will be available. All lenses will be covered with hard coating and the Uvex frames shall have fixed/moulded side shields.

4.4.4(a)(iii) Appointments for eye testing for issue of prescription safety spectacles continue to be arranged through the company medical centre.

[87] Clauses 4.4.1 and 4.4.2 are similar to provisions we have dealt with in the *Toyota* and *Holden Awards* . For the reasons given in relation to the *Toyota Award* (C No. 90274 of 1998) the provisions are not allowable. Clause 4.4.4 deals with the supply of spectacles of a particular type and requires the company to arrange eye testing. The provisions are not allowable. The Vehicle Industry Unions proposed that the matter be dealt with by the use of a preamble. We have already dealt with that proposal in considering the *Toyota Award* . Our conclusions are the same in this case.

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[88] *27.14 Supply and Insurance of Tools*

27.14.1 The employer shall provide necessary tools of the trade to all inside employees, and to apprentices in the first year of employment, and these tools for apprentices shall become the property of the employee once training is completed. Whereby agreement outside employees are required to provide tools, they shall be paid an allowance of $4.60 per week for maintenance and replacement of tools and shall be responsible for maintaining in good order and condition a kit of tools necessary for the performance of their duties.

27.14.2 The employer shall insure tools against loss by theft up to a maximum of $484.80 and where practicable provide lock up facilities for tools . Provided that the employer shall provide, where necessary, power tools, pneumatic tools, explosive tools, suckers and spirit levels .

43.2 Supply of Overalls and Boots

43.2.1 All employees shall be initially paid an amount to fully reimburse the employee for the cost of one pair of safety boots or shoes, two pairs of overalls and a suitable protective jacket, or be provided with these items by the employer at the employer's cost. If, during the first year of issue, the footwear wears out, a second pair may be issued or reimbursement provided for. In any subsequent year, there shall be an annual issue of one pair of footwear, one pair of overalls and one protective jacket, or reimbursement shall be made accordingly, provided that the worn out items are returned by the employee as evidence that replacement issue is warranted. A second pair of overalls and/or footwear may be issued, or reimbursement paid, in any given year if the existing overalls and/or footwear wear out before the expiry of such year.

43.2.2 Footwear and overalls required in excess of the above quantities shall be at the employee's expense.

43.3 Laundering and upkeep of protective clothing shall be the responsibility of employees who shall be expected to maintain them in good condition and take reasonable care of such clothing.

[89] The Minister submitted that the whole of clause 43.2.1 and the underlined parts of the other clauses are not allowable and should be deleted. ACCI supported that submission but suggested that redrafting might be possible. The CFMEU submitted that the parts of clause 27.14 under challenge are s.89A(6) provisions being incidental to s.89A(2)(j) and necessary for the effective operation of the award. In the alternative the union has no objection to the Commission setting a proper monetary allowance. It referred us to the *Metal, Engineering and Associated Industries Award 1998* . In relation to clause 43.3, the CFMEU indicated that

it had no objection in principle to the amendment of the clause to provide an allowance for the replacement of clothing and equipment. Consistently with our approach to provisions of a similar type dealt with in this part of the decision we have decided that the relevant provisions should be deleted. We direct the parties to confer on suitable replacement provisions.

Food, Beverages and Tobacco Industry - Aerated Waters - General Award 1998 (C No. 90289 of 1998)

[90] *40.2 Where employees are required by the employer to wear special clothing supplied by the employer, the employer shall either launder such special clothing or make alternative arrangements by agreement with a majority of employees.*

40.3 Freezing or cold room employees shall be provided with suitable protective clothing.

40.4 All employees working on bottling machines or required to bring their hands in contact with broken glass shall be supplied with suitable protective gloves by the employer.

[91] The LHMU submitted that the clauses are incidental to rates of pay generally (s.89A(2)(c)) and are necessary for the effective operation of the award. It also submitted that clause 40.2 is a facilitative clause supported by s.143(1C)(a). In the alternative, the union submitted that the provisions should be redrafted and it filed a comprehensive draft as part of its submissions. The Chamber of Manufactures of New South Wales (Industrial) submitted that if the Commission decided the provisions are not allowable the clause should be redrafted rather than deleted. In our view the provisions are not allowable. A clause along the lines of that proposed by the LHMU may be appropriate. We think however that the matter should be dealt with by separate application. We will delete the provisions.

Furniture & Furnishing Trades (New South Wales) Award 1998 (C No. 90290 of 1998)

[92] *39. INSURANCE OF WORKERS TOOLS*

39.1 The employer shall provide his/her employees with all tools of trade necessary and such tools shall remain the property of the employer.

39.2 An employee who has been provided by the employer with facilities to lock up such tools shall be held responsible for the safe custody of tools issued to him/her, and shall replace or pay for any tools so provided if lost or wilfully or negligently damaged.

39.3 Provided that where, by mutual agreement, the employee provides tools of trade necessary for the performance of his/her duties as required by the employer, such tools shall be insured by the employer against loss by theft or fire up to a maximum of $483.20 and the employer shall also be required to replace those tools worn out by fair wear and tear.

Furnishing Trades - General - Victoria, South Australia and Tasmania Award 1998 (C No. 90291 of 1998)

[93] *44.1 Tools - supply and insurance*

44.1.1 The employer shall provide his/her employees with all tools of trade necessary and such tools shall remain the property of the employer.

44.1.2 An employee who has been provided by the employer with facilities to lock up such tools shall be held responsible for the safe custody of tools issued to him/her, and shall replace or pay for any tools so provided if lost or wilfully or negligently damaged.

44.1.3 Provided that where, by mutual agreement, the employee provides tools of trade necessary for the performance of his/her duties as required by the employer, such tools shall be insured by the employer against loss by theft or fire up to a maximum of $483.20 and the employer shall also be required to replace those tools worn out by fair wear and tear.

[94] The Minister, supported by ACCI and the AI Group, submitted that the underlined parts of these clauses are neither allowable nor s.89A(6) provisions. The CFMEU submitted that the provisions are incidental to s.89A(2)(j) and necessary for the effective operation of the award. In relation to C No. 90291 of 1998 the CFMEU's submission was supported by the Furnishing Industry Association of Australia (Vic/Tas) Inc (FIAA (Vic/Tas)). In the alternative the CFMEU has no objection to the Commission setting a proper monetary allowance. Reference was made in connection with this alternative position to the relevant provisions of the *Metal, Engineering and Associated Industries Award 1998* . The provisions are not allowances, nor are they s.89A(6) provisions. They should be deleted from the awards. The CFMEU should make application in the normal way if it wishes to have its proposals dealt with on their merits.

National Electrical, Electronic and Communications Contracting Industry Award 1998 (C No. 90295 of 1998)

[95] *31. EQUIPMENT AND TOOLS*

31.1 Compensation for loss of tools

31.1.1 An employer shall on behalf of the employee replace tools lost by breaking and entering while securely stored at the employers direction in a room or building on the employers premises, job, workshop or in a lock-up to a maximum trade value as defined in Tables C, G, K & O of this award.

31.1.2 Provided that this clause shall not apply if the employer has requested the employee to supply the employer with a list of tools required to be kept on the job and the employee has not supplied such a list.

31.3 Protective clothing or footwear to be provided - (South Australia only)

An employee, in any place where the clothing or boots may become saturated whether by water, oil, or otherwise, shall be provided by the employer with suitable and effective protective clothing and/or footwear.

33. PROTECTIVE CLOTHING IN AUSTRALIAN CAPITAL TERRITORY ONLY

33.1 Rubber and/or leather gloves

Employees performing work necessitating the handling of cement and/or lime and/or steel with the hands shall be provided by the employer with rubber and/or leather gloves.

33.2 Gum boots

Employees engaged in spreading concrete in trenches, bays, pier holes, manhole bottoms or other places where the employee is compelled to stand in wet concrete, shall be provided by the employer with gum boots

33.3 Protective equipment - welding

33.3.1 Employers shall provide a sufficient supply of the undermentioned equipment to enable each welder and the assistant when engaged on work necessitating its use to be supplied with the same.

33.3.1(a) hand screens or helmets fitted with coloured glass or in the case of oxyacetylene operators protective glasses with side shields;

33.3.1(b) anti-flash goggles;

33.3.1(c) aprons, leather sleeves and leggings (or coveralls of flame proof material) and gauntlet gloves; and

33.3.1(d) gum or other insulating boots when working in places so damp that danger or electric shock exists.

33.3.2 An employee who pursuant to this paragraph is supplied with any of the equipment herein shall wear or use as the case may be such equipment in such a way as to achieve the purpose of which it is supplied.

33.3.3 Where electric-arc operators are working, screens which shall be suitable and sufficient for the purpose shall be provided by the employer for the protection of employees from flash.

33.3.4 This subclause shall apply to contractors working in the Australian Capital Territory on non-residential sites.

33.4 Safety footwear

33.4.1 As soon as is possible upon commencement and subject to 33.8.1(f) safety footwear shall be supplied to company employees on the site. The cost of such footwear to be assessed at $20.00 and employees to accrue credit at the rate of $1.00 per week. Employees leaving before 20 weeks employment has been attained shall pay the difference between the credit accrued and the $20.00. The right to accrue credit shall commence from the date of request for the footwear.

33.4.2 In the event of footwear being supplied and the employee not wearing it while at work the employer shall be entitled to deduct the full cost of the footwear if the failure to wear it continues after one warning by the employer.

33.4.3 Upon issue of the footwear, employees will be required to sign the authority for deduction form as set out in 33.4.4.

33.4.4 Deduction form

.....acknowledge receipt of one pair of safety footwear provided in accordance with the provisions of this award. Should the full cost of $20.00 not be met by accumulation of credit (at the rate of $1.00 per week) from ..... I authorise deductions from any moneys due to me by the employer ..... of an amount necessary to meet the difference between the credit accrued and $20.00.

Signed: .....

Dated: .....

33.5 Protective clothing

33.5.1 Two sets of protective clothing shall be supplied to company employees upon request by such employees on commencement of work on the site. The cost of such protective clothing to be assessed at $40.00 and employees to accrue credit at the rate of $2.00 per week. Employees leaving before twenty weeks employment has been attained shall pay the difference between the credit accrued and the $40.00. The right to accrue credit shall commence from the date of request for the protective clothing.

33.5.2 It will be the employee's responsibility to maintain and repair all clothing supplied.

33.5.3 Upon issue of the clothing, employees will be required to sign the authority for deduction form as is set out in 33.5.4.

33.5.4 Deduction form

.....acknowledge receipt of two sets of protective clothing provided in accordance with the provisions of this award. Should the full cost of $40.00 not be met by accumulation of credit (at the rate of $2.00 per week) from ..... I authorise deductions from any moneys due to me by the employer ..... of an amount necessary to meet the difference between the credit accrued and $40.00.

Signed: .....

Dated: .....

33.6 Jackets

33.6.1 Each employee, who on 1 May 1983, has been employed by the employer for one continuous month, shall be eligible to be issued with one warm jacket.

33.6.2 Each employee, other than those referred to in 33.6.1, complete one month's service with the employer between 1 May 1983 and 1 September 1983, shall be eligible to be issued with one warm jacket.

33.6.3 The cost of such jacket to be assessed at $30.00 and employees to accrue a credit of $1.50 per week. Employees leaving before twenty weeks employment has been attained shall pay the difference between the credit accrued and the $30.00. The right to accrue credit shall commence from the date of request for the jacket.

33.6.4 Deduction form

.....acknowledge receipt of one jacket provided in accordance with the provisions of this award. Should the full cost of $30.00 not be met by accumulation of credit (at the rate of $1.50 per week) from ..... I authorise deductions from any moneys due to me by the employer ..... of an amount necessary to meet the difference between the credit accrued and $30.00.

Signed: .....

Dated: .....

33.7 Alternative arrangements for protective clothing

Individual employers may in consultation with the union make their own arrangements with employees to allow them to purchase their own work clothing. In this case the employer shall be exempt from the provisions of clauses 33.4, 33.5 and 33.6.

33.8 General conditions relating to protective clothing and footwear

33.8.1 It is further agreed by the parties to this award that it is a condition of supply of footwear and clothing that:

33.8.1(a) An employee is required to wear at work all footwear and clothing supplied by the employer.

33.8.1(b) Clothing issued may be identified by a company name or logo. Such logo to be restricted to pocket size.

33.8.1(c) It is the responsibility of employees to maintain and repair all clothing.

33.8.1(d) Clothing and footwear supplied shall be a type agreed to between the employer's organisation and the union.

33.8.1(e) The supplied footwear and clothing shall be replaced on a fair wear and tear basis provided they are produced to the employer as evidence of such fair wear and tear.

33.8.1(f) In the event of an employee changing employer after the initial issue of footwear and clothing, such issue shall be replaced in accordance with 33.8.1(e) hereof.

33.8.1(g) In the event of a dispute arising between an employer and the union in regard to the provisions of this clause, the parties agree that the dispute will be referred to the Australian Industrial Relations Commission for determination and work will continue while the dispute is being resolved.

[96] The Minister, supported by ACCI, submitted that the whole of clauses 31.1 and 31.3 and the underlined parts of clause 33 should be deleted. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) consented to the deletion of clause 33.8.1(g) but otherwise rejected the Minister's submissions. It submitted that clause 31.1 is allowable pursuant to s.89A(2)(j). The CFMEU submitted that it may be necessary to allow the parties to reconsider the terms of clauses 31.3 and 33 having regard to the *Metals Decision* (esp. at pp.43-46). We agree with the CEPU's position in relation to clause 33.8.1(g). It is appropriate to delete that clause consistently with item 49(8). We have no doubt that the remaining parts of the clauses under challenge are not allowable. They will be deleted.

Chemical Industry - Scientific and Technical Officers Award, 1998 (C No. 90297 of 1998)

[97] *5.7.3(c) Equipment*

An employee shall not be required to provide more than the following items of equipment - compasses, two set squares, protractor, A 12 inch scale (or metric equivalent) and a slide rule.

[98] The AMWU submitted that the clause is allowable and, in the alternative, that it should be replaced with a new clause which is allowable pursuant to s. 89A (2)(j). Provision of equipment is not an allowable award matter. The clause will be deleted. If the parties regard the issue as one of continuing significance it could be addressed by way of a separate application.

PROVISION OF TRANSPORT

[99] Each of the award provisions dealt with in this section was challenged by the Minister, with the support of ACCI, on the basis that the provision of transport is not an allowable award matter nor a s.89A(6) provision. The Minister submitted that similar provisions were modified in the *Hospitality Decision* so as to provide that the employer paid the cost of transport. The Minister's submission does not properly represent the Full Bench's decision. The relevant passage from the *Hospitality Decision* is as follows:

> *"36. Travelling Transport and Fares*
>
> *This clause requires an employer to provide transport and accommodation for the night when an employee is required to work late and to provide transport or the cost of it when an employee is required to start early. The employers submitted that the clause was not allowable. Provision of transport, and accommodation, is an allowance. Both could easily be converted to money amounts. Indeed this is the way in which clause 36.2 currently operates, an allowance being payable to reimburse the employee if transport is not provided when he or she is required to start early. The point is made explicit in the LTU's draft. We have adopted the LTU's proposal and relocated the provision to the allowances clause, a course suggested by the LTU."* [at p.26] (our emphasis)

[100] Here the Full Bench was recognising that in practice the provision of transport usually involves payment of fares either in advance, through provision of a voucher or by reimbursing the employee for expenditure. The requirement to provide transport, found in many awards, is usually met by the employer through a payment of one kind or another rather than the physical provision of a vehicle. As several of the unions pointed out, a number of the clauses under challenge are not relevantly distinguishable from clause 6.4.12 of the *Metal, Engineering and Associated Industries Award 1998* . The *Hospitality Decision* is authority for the proposition that the provision of transport, by contrast with the provision of clothing, tools and equipment, is an allowance within the meaning of s.89A(2)(j). We reject the Minister's submission to the contrary. Some of the provisions we deal with in this section were challenged on other bases and we deal with those submissions below.

Water Ecoscience Award 1998 (C No. 90271 of 1998)

[101] *16.6 Transport of employees*

> *When an employee, not entitled to payment of travelling allowance, after having worked approved overtime finishes work at a time when reasonable means of transport are not available, the company will provide transport home. Provided that this provision does not apply when the employee has been notified, at least on the day prior, of the requirement to work overtime.*

[102] The provision is allowable.

Philip Morris Limited Award 1998 (C No. 90277 of 1998)

[103] *20.5 Transport*

Transport home will be provided by Philip Morris Limited for employees finishing work at unreasonable hours.

[104] The provision is allowable.

Land Surveyors General Award 1998 (C No. 90278 of 1998)

[105] *6.3.10 When an employee working overtime or working on a Sunday or public holiday finishes work at a time when normal means of transport is not available, the employer must provide him with a conveyance to reach their home.*

[106] The provision is allowable.

Journalists (Television) Award 1998 (C No. 90280 of 1998)

[107] *15.5 A woman member engaged on work requiring attendance in evening dress shall be provided with reasonable transport facilities.*

[108] The provision is allowable.

Health and Allied Services - Public Sector - Victoria Consolidated Award 1998 (C No. 90284 of 1998)

[109] *28.6 In the event of any employee finishing any period of overtime at a time when reasonable mans of transport are not available for the employee to return to his or her place of residence the employer shall provide adequate transport free of cost to the employee.*

29.6 In the event of any employee finishing any period of overtime at a time when reasonable means of transport are not available for the employee to return to his or her place of residence the employer shall provide adequate transport free of cost to the employee.

[110] The provision is allowable.

Health and Allied Services - Private Sector - Victoria Consolidated Award 1998 (C No. 90285 of 1998)

[111] *29.5 In the event of any employee finishing any period of overtime at a time when reasonable means of transport are not available for the employee to return to his or her place of residence the employer shall provide adequate transport free of cost to the employee.*

30.6 In the event of any employee finishing any period of overtime at a time when reasonable means of transport are not available for the employee to return to his or her place of residence the employer shall provide adequate transport free of cost to the employee.

[112] The provision is allowable.

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998); and

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[113] *40 TRAVELLING IN EMPLOYER'S VEHICLE*

40.1 When an employee is required to travel to and from work in his/her employer's vehicle, the employer shall provide the vehicle with suitable seating accommodation together with a fly or other covers to protect the employee from the weather.

40.2 Not more than three persons shall travel in the driving compartment of a vehicle at any one time.

[114] The Minister submitted, supported by ACCI and the AI Group, that these clauses are not allowable nor s.89A(6) provisions. The CFMEU submitted that it has no objection to the clauses being reformulated to confer an entitlement to an allowance. The clause does not impose an obligation to provide transport but relates to the standard of transport the employer must provide when requiring an employee to travel in the employer's vehicle. It is not allowable nor a s.89A(6) provision. It will be deleted.

Furnishing Industry - General - Victoria, South Australia and Tasmania Award 1998 (C No. 90291 of 1998)

[115] *31.9 Transport of employees after overtime*

When an employee, after having worked overtime other than regular overtime and/or a shift for which he/she has not been regularly rostered, finishes work at a time when reasonable means of transport are not available, the employer shall provide the employee with conveyance to his/her home or to the nearest public transport.

39. TRAVELLING IN EMPLOYER'S VEHICLE

39.1 When an employee is required to travel to and from work in the employer's vehicle, the employer shall provide the vehicle with suitable seating accommodation together with a fly or other cover to protect the employee from the weather.

39.2 Not more than three persons shall travel in the driving compartment of a vehicle at any one time.

40.8 Employees on distant jobs within State borders

Where an employee is required by the employer on distant jobs within State borders to spend an extended period away from home, he/she shall each 21 days be provided by the employer with the means with which to return home on the weekend.

[116] Clauses 31.9 and 40.8 are allowable because, as we indicated earlier, provision of transport is an allowance. Clause 39 is not allowable for the reasons outlined in dealing with similar provisions in the *Glass Industry Awards* (C Nos 90286 and 90288 of 1998).

Entertainment and Broadcasting Industry - Motion Picture Production Award 1998 (C No. 90292 of 1998)

[117] *25.5 Mode of transport*

...

25.5.4 An employer will not require an employee to undertake a duty if it necessitates the employee travelling by a conveyance to which the employee has a reasonable objection. However should no alternative conveyance at similar cost be available to the employer, the employee may be stood down with pay for the duration of that particular assignment.

25.5.5 Vehicles in which employees are required to travel will comply with all relevant safety requirements of the Commonwealth or State or Territory in which they are in use.

[118] The Minister submitted that the first sentence of clause 25.5.4 is not allowable nor a s.89A(6) provision, but conceded that the second sentence may be allowable pursuant to s.89A(2)(o). ACCI submitted that no part of the clause is allowable. The Media, Entertainment and Arts Alliance (MEAA) submitted that the clause is allowable pursuant to s.89A(2)(c) and (o). No submission was received from the Screen Producers Association of Australia.

[119] The clause confers an entitlement on an employee to be stood down with pay in circumstances where the employee's duty requires him or her to travel by a conveyance to which he or she has a reasonable objection and no alternative conveyance is available at similar cost to the employer. Stand-down provisions is an allowable award matter under s.89A(2)(o). This clause, taken as a whole, is a stand-down provision and accordingly is an allowable award matter within s.89A(2)(o). The submissions of the Minister and ACCI to the contrary are rejected.

[120] The Minister, supported by ACCI, submitted that clause 25.5.5 is not allowable because it deals with the safety standards applying to vehicles in which employees are required to travel. MEAA did not press for its retention. We shall delete it.

Entertainment and Broadcasting Industry - Actors - (Theatrical) Award 1998 (C No. 90293 of 1998)

[121] *12.5 Conclusion of engagement*

12.5.1 At the conclusion of the run of the play or the particular period for which the employee was engaged, he or she shall be returned to the place of engagement and in the absence of any agreement to the contrary, the employment shall then be deemed to be at an end.

23.3.2 If an employee is detained too late to travel by the last train, tram, bus or vessel to his or her home (temporary or permanent as the case may be), the employer shall provide the employee with proper conveyance to his or her home.

[122] The Minister submitted that the first aspect of clause 12.5.1, the requirement that the employee be returned to the place of engagement, might be recast in the form of an allowance, but was submitted that the deeming of employment to cease is not an allowable award matter. MEAA proposed that the clause be amended to read as follows:

"At the conclusion of the run of the play or the particular period for which the employee was engaged, the employer must pay the cost of returning the employee to the place of engagement and in the absence of any agreement to the contrary, the employment shall then be deemed to be at an end."

[123] The Entertainment Industry Employers Association (EIEA) did not object to that proposal. Notice of termination is an allowable award matter pursuant to s.89A(2)(n). That section does not extend to deeming employment to cease. EIEA submitted, however, that the deeming of employment to cease was incidental to the payment of wages and travelling allowances and the type of employment and necessary for the effective operation of the award. Clause 12.5 only applies to employees engaged for the run of the play or for a particular period. We take the argument to be that the time at which termination of employment occurs for employees engaged in this way will be uncertain in the absence of agreement and of this provision. Whilst such a provision might be incidental to termination of employment, we cannot see how the provision could be incidental to notice of termination. We shall adopt the proposal up to the word *"engagement"* and delete the existing clause.

PROVISION OF FACILITIES

[124] This part of our decision deals with the challenge made to a number of award provisions requiring employers to make facilities of various kinds available to employees.

Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998 (C No. 90275 of 1998)

[125] *13.1.4 Morning and afternoon tea - day work employees:*

13.1.4.1 Paid morning and afternoon tea breaks of 7.5 minutes each shall be allowed and the employer shall provide the facilities (including milk, tea and sugar) for an employee to make tea. These facilities will also be available during the normal meal break.

13.1.4.2 Morning and afternoon tea must be taken at the workplace, subject to the following:

...

13.1.4.2(b) Where appropriate, facilities for morning and afternoon tea shall be shared in each work location.

27. FIRST AID

27.1 Attendant

Requirements for numbers of first aiders and casualty officers are given in the Health and Safety Manual Instruction - First Aid.

27.2 First aid facilities

Requirements for first aid facilities are included in the Health and Safety Manual Instruction - First Aid.

[126] The Minister submitted that the underlined parts of clause 13.1.4.1 and the other provisions set out are neither allowable award matters nor s.89A(6) provisions and should be deleted from the award. The Minister also submitted that clause 13.1.4 prescribed matters of detail more appropriately dealt with by agreement at the workplace level (see item 49(7)(a)). ACCI agreed with the Minister about the underlined portion of clause 13.1.4.1 but made no submission about the other provisions. The VTHC, the Power Industry Unions and the employer respondents submitted that rest breaks is an allowable award matter under s.89A(2)(b) and that clause 13.1.4 is incidental to rest breaks and necessary for the effective operation of the award. They also submitted that allowance is an allowable award matter under s.89A(2)(j) and that clause 27 is incidental to the first aid allowances prescribed by this award and necessary for the effective operation of the award.

[127] Provision of tea and coffee is not an allowable award matter. We uphold the Minister's submission in relation to clause 13.1.4.1. We have concluded that the parts of clause 13.1.4.2 set out are not allowable matters either. We have given consideration to the submission that clause 27 is a s.89A(6) provision. We are unable to accept that submission. Apart from anything else we fail to see how the provisions could be necessary for the effective operation of the award when they refer to documents which may be altered without reference to the Commission. Furthermore, the number of first aiders and casualty officers is not an allowable award matter, nor is the provision of first aid facilities. We are satisfied that clause 27 is not allowable. All of the provisions challenged will be deleted.

Journalists (Television) Award 1998 (C No. 90280 of 1998)

[128] *26.4 If a member with family is transferred and is unable within a period of three months of such transfer to find suitable living accommodation, he or she, upon a request in writing to the employer shall either be found such accommodation by the employer or be transferred back to the city or town in which he or she was employed prior to the transfer.*

[129] The Minister submitted that this clause requires an employer, in certain circumstances, to either locate suitable accommodation for a transferred employee or to reverse the transfer. He submitted that the clause is neither allowable nor a s.89A(6) provision. In particular it was submitted that the provision is not an allowance. MEAA submitted that provisions governing the transfer of journalists are referable to the contract of employment and a s.89A(6) provision. Reliance was placed on the decision of a Full Bench of the Commission in the *Higher Education Case No. 2* [(1998) Print Q0702 at p.41] and to the *APS Simplification Case* [(1998) Print Q4209 at pp.99-101].

[130] In substance the clause deals with an employer's obligation to find suitable accommodation. It does not deal with the provision of accommodation as such. The provision is not an allowable award matter. Furthermore we are satisfied that there is no paragraph of s.89A(2) to which the provision is incidental. We shall delete the clause.

Entertainment and Broadcasting Industry - Actors - (Theatrical) Award 1998 (C No. 90293 of 1998)

[131] *22.6 If there is a break of less than two hours between the conclusion of one performance and the beginning of the next performance the employer shall provide an employee with a satisfactory meal. Alternatively, the employer may pay to the employee an amount of $12.45 in lieu of the said meal. The employer shall also provide tea and coffee or the ingredients and facilities to make and serve same.*

[132] The Minister submitted that the last sentence in this clause should be deleted. The EIEA agreed with that submission. MEAA submitted that the provision should be replaced with an allowance. The Minister submitted that it would be unrealistic to do so. We have already decided that the provision of tea and coffee is not an allowable award matter. We shall delete the sentence.

TRAINING

[133] This part of our decision deals with challenges to a range of award provisions which the Minister submitted concern training and on that account are not allowable nor s.89A(6) provisions. Whilst the Minister conceded that the *Hospitality Decision* left open the possibility that training provisions might be an allowable award matter or incidental to an allowable award matter and necessary for the effective operation of the award, it was contended that none of the provisions met that description. It was also submitted that many of the provisions included matters of detail or process that would be more appropriately dealt with by agreement at the workplace or enterprise level (see item 49(7)(a)) or are obsolete or need updating (item 49(8)(d)).

Vehicle Industry - Kenworth Trucks - Award 1998 (C No. 90272 of 1998)

[134] *4.4.5 What preference is given to existing employees?*

Preference of employment as an adult apprentice should be given to an applicant who is currently employed by the employer so as to provide for genuine career path development.

[135] The AMWU submitted that the clause is allowable pursuant to s.89A(2)(a). We agree with the approach adopted by Marsh SDP to a similar clause in the *Metals Decision* [at p.35]. The giving of preference to existing employees in offering adult apprenticeships is not an allowable award matter nor a s.89A(6) provision. The clause should be deleted from the award.

Journalists (Television) Award 1998 (C No. 90280 of 1998)

[136] *14.7.2 Cadet Training requirements and related matters*

14.7.2(a) Cadets shall be instructed progressively throughout their cadetship in practical journalism and a responsible person shall supervise that training. Cadets shall also be given the opportunity to acquire a full knowledge of the handling of news/current affairs from its collection to its broadcast/ televising.

14.7.2(b) A cadet shall be given instruction and practical demonstrations in matters such as news presentation and sub-editing.

A cadet shall retain copies of material prepared by the cadet for checking by, and discussion with the person responsible for cadet training;

A cadet may be given explanations concerning changes to the material; prepared by the cadet.

14.7.2(c) A cadet shall be required to attend or study a series of lectures by senior journalists and/or other authorities on the theory and practices of journalism, such as lectures on the laws or practices currently in force on the subjects of libel, contempt of court, parliamentary and court privilege and also lectures on political and economic or other subjects of value to the cadet.

Lectures given during study for a diploma of journalism course shall be deemed to be lectures for purposes of these requirements;

A cadet shall be tested from time to time to ascertain the level of knowledge of news and/or current affairs.

14.7.2(d) A cadet shall learn shorthand and typewriting and shall be examined from time to time to determine the progress being made.

Subject to the proviso hereunder:

14.7.2(d)(1) A cadet shall not be entitled to become a second year cadet without having attained a minimum standard of 60 words per minute in shorthand.

14.7.2(d)(2) A cadet who commenced cadetship pursuant to subparagraph 14.7.1(a) shall not be entitled to be classified as a journalist without having obtained a minimum standard of 80 words per minute in shorthand.

14.7.2(d)(3) A cadet who commenced cadetship as a graduate pursuant to subparagraph 14.7.1(b) shall not be entitled to be classified as a journalist without having attained a minimum standard of 80 words per minute in shorthand.

Provided that, an employer is in a particular case able to waive the attainment of such standards as a condition of promotion to the next higher year of cadetship or to the classified staff as the case may be.

14.7.2(e) Tuition in shorthand shall be arranged by the employer either within or outside the office. Whether or not such tuition is given within the office, the person responsible for supervising that part of the training of a cadet shall regularly monitor the progress being made by each cadet, and particularly whether or not the cadet's record of attendance at classes is satisfactory.

14.7.2(f) A cadet shall be given wide practical experience in reporting work. To this end a cadet shall, so far as practicable, be required to gain experience in as many sections as possible.

Cadets shall from time to time accompany classified journalists on assignments to receive practical instruction.

14.7.2(g) A cadet shall be permitted by the employer to be absent during ordinary working hours for periods not exceeding a total of four hours in any week to attend instruction in shorthand and typewriting.

In addition a cadet may apply for leave of absence to be absent during ordinary working hours for periods not exceeding a total of four hours in any week to attend instruction in shorthand and typewriting.

In addition a cadet may apply for leave of absence according to the terms and conditions of appropriate public service regulations, as amended from time to time, to attend at an Australian university or college of advanced education for a course of the diploma of journalism or other courses approved by the employer and the Alliance.

14.7.2(h) All lectures and other fees and the requisite books for the studies prescribed in the last preceding subclause shall be made available by the employer, provided that reports of the cadet's conduct and progress are satisfactory.

Journalists (Country Non-Daily Newspapers) Award 1998 (C No. 90282 of 1998)

[137] *12.4.4 Instruction in Journalism*

(a) The employer shall ensure that cadets are regularly and thoroughly instructed in the practice of journalism by the editor or by an experienced journalist under the editor's direction. Such instruction is to embrace the range of duties fundamental to competent newspaper production.

(b) The employer shall ensure that during progression through cadetship and prior to grading, Cadets are:

(i) given explanations and inspections of the various inter-related newspaper departments, so a cadet can; gain a full understanding of how a newspaper is produced and the process of handling "copy" from the time of its receipt or preparation to its publication and gain an early understanding of the history and function of the local community;

(ii) instructed and become proficient in keyboard operation and in writing shorthand at a minimum of 100 WPM;

(iii) taught skills such as: the preparation of copy, elements of style, sub-editorial treatment, the developments of news sources and methods of gathering news;

(iv) given wide practical experience in reporting and not be restricted to one class of work;

(c) The employer may, at his discretion, for the purpose of instructing Cadets, use the manual designed by Country Press Australia as an introduction to post-cadet instruction as provided for in clause 14.4.

Instruction in Press Photography

(a) The employer shall ensure that each cadet photographer is:

(i) progressively instructed thoroughly in photographic journalism throughout his or her cadetship under the supervision of an experienced and responsible person;

(ii) made familiar with the handling and publication of pictures;

(iii) given wide practical instruction and experience in press photography and shall not be restricted to one class of work, unless they have been trained in a special branch of photography;

(b) Cadets may be required to:

(i) attend lectures by senior journalists and or other authorities on the theory and practice of journalism, to the extent that such lectures will give them an appreciation of news values, including the use of photographs in newspaper production.

(ii) accompany senior photographers on assignments to receive practical instruction.

12.4.5 Absence to attend training

Cadets are required to obtain instructions in their own time. Where this is not possible during ordinary working hours, each Cadet shall be permitted by his or her employer, for a period not exceeding four hours in any week, to attend classes which are approved by the employer. Such classes may be: in shorthand or other subjects relevant to the journalist profession including literature, economics, civics, history, politics or a diploma in journalism, granted by an Australian Tertiary Institution. A Cadet may be deprived of the benefit of this clause if abuse of this privilege is established.

12.4.6 Payment for fees and books

All lecture and other fees and the requisite books for the studies prescribed shall be made available by the employer provided that reports of the Cadet's conduct and progress are satisfactory and provided, also that all books purchased by the employer shall remain the property of the employer.

[138] The Country Press Association submitted that the provisions in the *Journalists (Country Non-Daily) Newspapers Award 1998* [Print Q2599 [J0012]] are related to the journalists' career path and provide for the development of skills and competencies. The provisions contain a uniform national system of skill

development on the job. The Federation of Australian Commercial Television Stations (FACTS) made similar submissions in relation to the provisions in the *Journalists (Television) Award 1998* [Print Q2514 [J0069]] .

[139] In a strong submission favouring the retention of the cadet provisions in both awards, MEAA contended that, in contradistinction to the position of apprentices, there is no State legislation concerning cadetships, nor national training standards, the only standards for skills development being those found in the awards. MEAA said:

> *"As stated earlier, the focus of cadet training is to provide practical experience. The requirements place obligations on an employer to ensure a cadet is exposed to the breadth of the industry. The cadet's duties are designed to ensure that the cadet develops the full range of skills of a professional journalist.*
>
> *Until the mid-1980s, the standard entry point for cadets was the HSC or its equivalent. Such cadets would then undertake a four year cadetship.*
>
> *In the mid 1980s, the awards recognised that employers were engaging a greater number of university graduates with journalism, communications or media studies degrees. Two types of cadetships were then introduced - a graduate cadetship of one year and a standard cadetship of three years.*
>
> *However, the training requirements and the cadet's duties remained fixed on providing and obtaining practical training and experience.*
>
> *As stated earlier, Senior Deputy President Marsh in the* `Metal Industry Simplification Decision' *dealt with a range of issues concerning apprenticeship training matters. The Alliance submits that cadets can fairly be compared to apprentices in a range of areas.*
>
> *However, there is one major difference. Where there is State legislation concerning apprenticeships and there are well developed national training standards, the only standards for cadets' skills development are those to be found in the award."*

[140] If the last two paragraphs of this submission are correct, and they were not controverted, we think it can fairly be said that the provisions are incidental to the allowable award matters in s.89A(2)(a) and necessary for the effective operation of the awards. The clauses contain a mixture of duties such as might be found in a position description, training obligations upon the employer and the cadet and provisions for testing of the cadet's knowledge from time to time. Whilst training is not an allowable award matter as such, in this case we are persuaded that the clauses are necessary for the effective operation of the awards in relation to the cadet classifications.

[141] Both awards require the employer to provide the requisite books for the studies prescribed for cadets (clauses 14.7.2(h) and 12.4.6 respectively). Provision of textbooks is not an allowable award matter. We will delete the relevant part of each clause.

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998)

[142] *15.6.2 Adult apprentice*

15.6.2(a) An employee must be employed for a minimum of six months in the flat glass industry before such employee can become an adult apprentice.

15.6.2(b) Work experience during the six months must be confined to the factory environment only.

19.3.3(e) Adult trainee

19.3.3(e)(i) A company seeking to implement this provision must firstly seek the agreement of the union.

19.3.3(e)(ii) This provision is designed to permit Level 1 employees to acquire additional skills via on-the-job structured and regulated training.

19.3.3(e)(iii) The maximum term of this training period is six months.

19.3.3(e)(iv) Employees participating in this scheme would continue to be paid at the Level 1 employee rate for the maximum period of six months.

19.3.3(e)(v) Whilst the employee is undertaking the training program at all times he/she shall be working under supervision.

19.3.3(e)(vi) During the training period, the employer must assess the employee's potential to undertake an adult apprenticeship.

19.3.3(e)(vii) If, at the end of the six months training period, the employee has good reason not to proceed with an adult apprenticeship then he/she shall revert to a Level 1 employee, or be upgraded to a Level 2 employee.

19.3.3(e)(viii) Should an employer decline, without sound reasons, to grant an apprenticeship to an employee who has successfully completed his/her six months initial training program then that employer may not be given agreement by the Union for the future employment of an employee under the terms of this provision .

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[143] *16.6.2 Adult apprentice*

16.6.2(a) An employee must be employed for a minimum of six months in the flat glass industry before such employee can become an adult apprentice.

16.6.2(a)(i) Work experience during the six months must be confined to the factory environment only.

21.3.3(e) Adult Trainee

21.3.3(e)(i) A company seeking to implement this provision must firstly seek the permission of the Union.

21.3.3(e)(ii) This provision is designed to permit adult utility workers to acquire additional skills via on-the-job training.

21.3.3(e)(iii) The maximum term of this training period is six months.

21.3.3(e)(iv) Employees participating in this scheme would continue to be paid at the wage rate for a utility worker for the maximum six months period.

21.3.3(e)(v) Whilst the employee is undertaking the training programme at all time he or she shall be working under supervision.

21.3.3(e)(vi) During the training period, the employer must assess the employees potential to undertake an adult apprenticeship.

21.3.3(e)(vii) If at the end of the six months training period, the employee has a good reason not to proceed with an adult apprenticeship, then he or she shall revert to a utility worker, or be upgraded to a Level 2 Employee.

21.3.3(e)(viii) Should an employer decline without sound reasons, to grant an apprenticeship to an employee who has successfully completed his or her six months initial training programme then that employer shall not be granted permission by the union for the future employment of an employee under the terms of this provision.

[144] We have concluded that the provisions dealing with adult apprentices are allowable (clauses 15.6.2 and 16.6.2 respectively). They provide that in order to qualify for an adult apprenticeship employees must have six months experience in the flat glass industry in a factory environment. The provisions are allowable under s.89A(2)(a). We see no difficulty with a provision which specifies a particular type and duration of experience in the industry as a prerequisite to undertaking an adult apprenticeship. Whether the provision is appropriate is not a matter that arises. In the *Kenworth Trucks Award* (C No. 90272 of 1998) we held that a similar provision is not allowable. That provision gave preference of employment as an adult apprentice to applicants currently employed by the employer. That provision, unlike this one, was not based on experience of a particular kind in the industry.

[145] In each award there is a provision that a company seeking to implement the adult trainee scheme must first seek the agreement of the union (clauses 19. 3.3 (e)(i) and 21.3.3(e)(i) respectively). Those provisions are not allowable. Adult trainees are a type of employment within s.89A(2)(r). The provisions limit the number or proportion of adult trainees that an employer may employ contrary to s.89A(4)(a). They will be deleted.

[146] Each award contains a clause stating that the adult trainee provision is designed to permit level 1 employees to acquire additional skills by on-the- job structured and regulated training (clauses 19.3.3(e)(ii) and 21.3.3(e)(ii) respectively). Whilst a simple statement of intent is generally not allowable, here the clauses serve the purpose of confining the availability of adult traineeships to level 1 employees and describe the method by which the skills are to be obtained. The provisions are allowable pursuant to s.89A(2)(a). So too are the provisions requiring that an employee undertaking the program shall at all times be working under supervision (clauses 19.3.3(e)(v) and 21.3.3(e)(v) respectively).

[147] We agree with the Minister's submission that clauses 19.3.3(e)(viii) and 21.3.3(e)(viii) are not allowable. These provisions depend for their operation upon the requirement that a company seeking to implement the adult trainee provision must first seek the agreement of the union. Such provisions are not allowable. These provisions also should be deleted.

Furnishing Trades - General - Victoria, South Australia and Tasmania Award 1998 (C No. 90291 of 1998)

[148] *22.2.1(e) Training Review*

The parties to this award agree to undertake a review of vocational training matters pertaining to the furnishing industry in Victoria. The Committee dealings with these matters will meet regularly and will report back to the Commission on progress of the review no later than twelve months from the date of making this award.

Dental (Private Sector Victoria) Award 1998 (C No. 90294 of 1998)

[149] *14. TRAINING*

14.1 The parties to this award recognise that in order to increase the efficiency and productivity of the Dental industry, a greater commitment to training and skill development is required. Accordingly, the parties commit themselves to:

14.1.1 Developing a more highly skilled and flexible workforce;

14.1.2 Providing employees with career opportunities through appropriate training to acquire additional skills; and removing barriers to the utilisation of skills acquired.

[150] Training as such is not an allowable award matter. The provisions in question do not come within s.89A(2)(a) nor are they s.89A(6) provisions. We agree with the Minister's submission that in each case the clause contains a statement or statements *"which describe objectives or philosophies rather than establishing entitlements"* and are not allowable [*Hospitality Decision* at p.8]:

Aerospace Industry (Hawker de Havilland) Award 1998 (C No. 90302 of 1998)

[151] *4.2.6(p) Career Path Development*

To provide for genuine Career Path development, in selecting adult apprentices, the company will first consider applicants who are currently employed by the company.

[152] For the reasons given in relation to clause 4.4.5 of the *Kenworth Trucks Award* (C No. 90272 of 1998) this clause is not allowable and will be deleted.

CONSULTATION AND GENERAL DISPUTE RESOLUTION PROCEDURES

[153] The Minister submitted that the clauses dealt with in this part of the decision should be reviewed on one or more of the following grounds:

· they include matters of detail or process which should be deleted pursuant to item 49(7)(a);

· consultation with employees in relation to organisational change which is likely to affect their employment is not an allowable award matter [*Hospitality Decision* at p.11];

· the role of shop stewards is not an allowable award matter and/or dispute settlement procedures should not require the involvement of union officials [*Hospitality Decision* at p.11; *Metals Decision* at pp.18-20];

· consultation provisions may be permitted pursuant to s.89A(6) if they relate to an allowable award matter; and

· statements of intent are not allowable [*Hospitality Decision* at p.8].

[154] For the most part we have been able to resolve each of the matters by reference to the *Hospitality Decision,* the *Metals Decision* or both.

Vehicle Industry - Kenworth Trucks - Award 1998 (C No. 90272 of 1998)

[155] *3.1 CONSULTATIVE MECHANISM AND PROCEDURE*

3.1.1 In the event that changes occur or are likely to occur to the performance or organisation of work the company will consult with the shop stewards. The union is entitled to be involved in those discussions.

3.1.2 A shop steward will be given reasonable time to discuss employee related matters with management during working hours.

[156] Clause 3.1.1 deals with consultation in relation to organisational change. According to the *Hospitality Decision* [at p.11] such provisions are not allowable. It will be deleted.

[157] Clause 3.1.2 deals with the role of shop stewards. We adopt what Senior Deputy President Marsh said in the *Metals Decision* [at p.20]:

"In my view a role for shop stewards is not an adjunct to the dispute settling procedure, although a clause arguably could be constructed which recognises the representation role of shop stewards within the hierarchy of representation provided for in the clause (see Hospitality Decision *p.67 which indicates that representation is an allowable award matter under dispute settling procedures (s.89A(2)(p)))."*

[158] In this case the AMWU submitted that clause 3.1.2 was incidental to an allowable award matter, namely, ordinary time hours of work in s.89A(2)(b). It also argued that clauses 3.1.1 and 3.1.2 are s.89A(6) provisions because they are necessary for the effective operation of the award in relation to the ordinary time hours of work of a person who is a shop steward. We reject these submissions. Clause 3.1.1 does not deal with hours of work at all. Clause 3.1. 2, while it touches on hours of work, in substance is directed to the entitlements of shop stewards. The entitlements of shop stewards is not an allowable award matter. We have already said that clause 3.1.1 will be deleted. Clause 3.1.2 will be deleted also.

Research & Supply Vessel (Aurora Australis) Award 1998 (C No. 90273 of 1998)

[159] *22.2 Antarctica Consultative Committee*

22.2.1 The vessel shall have a shipboard management committee which will consist of the master, 1st mate, chief engineer, 2nd engineer, chief steward, chief cook and chief integrated rating.

The master as the employer's representative shall be chair of the committee and subject to the provisions of any applicable law or award, the vessel shall operate under the overall authority of the master.

22.2.2 The Voyage Leader is responsible for the conduct of the expeditioners to the satisfaction of the master.

22.2.3 All employees shall work as a team with each employee working to the level of each individual's training and ability in a co-operative effort to ensure the safe and efficient operation of the vessel.

[160] AMMA, on behalf of the respondent employer, P&O Maritime Services Pty Ltd, The Australian Maritime Officers' Union (AMOU) and The Maritime Union of Australia (MUA) submitted that this clause is allowable because it is a dispute settling procedure within s.89A(2)(p) or incidental to the dispute settling procedure in clause 9 of the award and necessary for its effective operation. Clause 9 is as follows:

"9. DISPUTE RESOLUTION PROCEDURE

In the event of a dispute arising in the workplace the procedure to be followed to resolve the matter will be as follows:

9.1 The employee and their supervisor meeting and conferring on the matter; and

9.2 If the matter is not resolved at such a meeting, the parties shall arrange for further discussions between the employee and his or her nominated representative, if any, and more senior levels of management.

9.3 If the matter is still not resolved a discussion shall be held between senior management or its nominated representative and the Unions or other employee representative.

9.4 If the matter cannot be resolved it may be referred to the Commission.

9.5 While the parties attempt to resolve the matter work will continue as normal unless an employee has a reasonable concern about an imminent risk to his or her health and safety."

[161] Other reasons were advanced in support of the submission that the clause is a s.89A(6) provision. It is not necessary to set out those reasons.

[162] Clause 22.2.1 is not a dispute settling procedure itself and as a matter of construction is not incidental to the procedure in clause 9. If, as the parties submit, the Antarctica Consultative Committee operates as a dispute settling procedure it does so for reasons which are substantially unrelated to the terms of clause 22.2

of the award. It may be possible for the parties to draft a clause which deals with dispute settling either as a replacement for, or an adjunct to, the procedure in clause 9 and to make application for a new clause in the award. Clause 22.2.1 should be deleted from the award.

[163] Clause 22.2.2 purports to deal in part with the duties of the Voyage Leader. The Voyage Leader is the representative of the charterer on the vessel and is not employed under the award. The clause is not allowable and should be deleted.

[164] Clause 22.2.3 deals with the duties to be performed by employees on the vessel and is allowable pursuant to s.89A(2)(a).

Toyota Australia Vehicle Industry Award 1988 (C No. 90274 of 1998)

[165] *37 - GRIEVANCE PROCEDURE*

...

(b) For the purposes of implementing the procedure set out in 37(a) above the following facilitative provisions will also apply for the purpose of identifying the support for and responsibilities of shop stewards:

Shop stewards

(i) An employee appointed as a shop steward in the shop or department in which he/she is employed shall, upon notification thereof by the responsible officer of the union concerned to the Company, be recognised as the accredited representative of the union to which he/she belongs and shall be allowed the necessary time during working hours to interview the employer or the employer's representative on matters affecting employees whom the shop steward represents.

Senior shop stewards

(ii) An employee appointed as senior shop steward for a particular union in the plant in which he/she is employed shall, upon notification thereof by a responsible officer of the union concerned to the Company, be recognised as the accredited senior shop steward for the union in that plant subject to the following:

(1) In a plant where there are more than three accredited shop stewards of a particular union, a senior shop steward elected by the members of that union in that plant shall be recognised for that plant to represent those shop stewards and the respective employees.

(2) Subclause (i) hereof is conditional upon the ratio of shop stewards to members not being greater than that existing at the time of making this Award.

(3) A senior shop steward may hold a meeting of the shop stewards he/she represents to discuss grievances raised by employees provided that:

(A) the meeting is held during the meal break;

(B) the meeting has the prior approval of the Human Resources Officer who will designate the location of the meeting;

(C) notice of the meeting is given at least one full day prior to the date of the meeting.

(D) not more than one meeting will be permitted in one month unless the senior shop steward considers a special circumstance has arisen which would justify the holding of an additional meeting, in which case the senior shop steward should approach the Human Resources Officer who will place the request before management for consideration.

(E) shop stewards whose attendance at such meetings would entail a change in a meal break must approach their supervisor and, subject to operating needs, approval for a change will be granted.

If the Company considers that a senior shop steward is unduly interfering with its plant, is creating disaffection amongst its employees, is offensive in his/her methods or is committing a breach of any of the previous conditions the Company may refuse to recognise that person as an accredited shop steward. The union concerned shall have the right to bring such refusal before a member of the Commission.

Other meetings prohibited

(iii) The holding of meetings by shop stewards or senior shop stewards on Company property other than as outlined above is expressly prohibited.

Shop steward education

(iv) The Company shall pay a shop steward's normal weekly wage as prescribed in Schedules A, B, C or D to this Award whilst the employee is attending a trade union sponsored training course.

Provided that:

(A) payments to any one shop steward shall not exceed the equivalent of ten days' full pay in any year;

(B) each request to the Company for permission to attend a training course and receive full pay for the consequent absence must be endorsed by a Federal officer of the union concerned;

(C) each request takes into consideration normal staffing requirements in the employee's work area.

(D) For the purpose of this clause "year" means a full calendar year.

Union Meetings

(v) Where a grievance in respect to wage rates or a condition of their employment has arisen directly between the Company and its employees and the State Secretary, or in his/her absence the acting State Secretary, of the union concerned considers that a meeting of its members or a section thereof would assist in achieving a settlement of the matter, then by giving reasonable notice to the Company, he/she may convene such a meeting limited to the members of the union requesting it and personally conduct such meeting, or have it conducted by such full-time paid official of the union as he/she nominates, on the Company's property in the employee's own time and at a location nominated by the Company.

(vi) Nothing in subclause (v) hereof shall require the Company to permit a meeting to be held on its property in relation to any political election or community issue.

(vii) If the Company alleges that an official, representative or member of a union which has requested a meeting pursuant to (v) hereof is unduly interfering with the workshop, is creating disaffection amongst its employees, is offensive in his/her methods or is creating a breach of any of the conditions expressed in (v) hereof, the Company may refuse to the union concerned the right of holding meetings on its property, but such union shall have the right to bring such refusal before a member of the Commission.

(viii) A meeting of a section of employees may be called and conducted in accordance with subclause (v) hereof and the Company will assist, where practical in view of the nature of its operations, to arrange a combined meal break meeting or advise the union official concerned why this cannot be arranged. When a meeting of a section of employees in terms of this subclause is planned and the union official gives an acceptable reason for an extension of the meeting prior to such meeting to the Human Resources Officer of the plant concerned, the late resumption of work shall not exceed ten minutes or exceed an additional five minutes when, by prior agreement, this extension is granted to allow sufficient time for communicating with major groups through an interpreter or interpreters.

The maximum extension of a meal break under this subclause is therefore fifteen minutes and a proportionate deduction of wages will apply.

[166] For the reasons we expressed earlier in relation to clause 3.1.2 of the *Kenworth Trucks Award* (C No. 90272 of 1998) clauses 37(b)(i), (ii) and (iii) are not allowable. The provisions deal with the role and responsibilities of shop stewards and any connection with dispute settling procedures is too remote. Nor are they s.89A(6) provisions.

[167] Clause 37(b)(iv), like the provisions just discussed, is not allowable because it deals with the role and responsibilities of shop stewards. Our conclusion is consistent with the decision in the *Leave Allowability Decision* [Print Q9399 at paragraphs 37-40 of the majority decision]. No submission was made in this case that clause 37(b)(iv) is allowable pursuant to s.89A(2)(g). (Compare *Leave Allowability Decision* at paragraph 26).

[168] Clauses 37(b)(v) to (viii) are allowable pursuant to s.89A(2)(p). Although the provisions are headed *"Union Meetings"* , on a proper analysis they constitute a dispute settling procedure. They deal with conduct of meetings and the role of shop stewards but they do so in the context of an integrated procedure for dealing with grievances.

[169] The Minister submitted that the clause deals with matters of detail or process which are more appropriately dealt with by agreement at the workplace or enterprise level (item 49(7)(a)). We are unsure of the relevance of that submission to provisions in an award applying to one employer only. We also note the company's submission that a review under item 49(7) is discretionary and that the parties to the award are engaged in a process of award consolidation which will involve further consideration of award provisions such as these. We do not think it is in the public interest to use our powers under s.109 to review these provisions pursuant to item 49(7)(a).

Land Surveyors General Award 1998 (C No. 90278 of 1998)

[170] *3.2 Dispute Avoidance and Resolution Procedure*

3.2.1 A procedure for the avoidance or resolution of disputes will apply in all enterprises covered by this Award. The mechanism and procedures for resolving industrial disputes will include, but not be limited to, the following:

3.2.1(a) The employee/s concerned will first meet and confer with their immediate supervisor. The employee/s may appoint another person to act on their behalf including a shop steward or delegate of their union.

Where the shop steward or delegate is involved they must be allowed the necessary time during working hours to interview the employee(s) and the supervisor.

3.2.1(b) If the matter is not resolved at such a meeting the parties will arrange further discussions involving more senior management as appropriate. The employee may invite a union official to be involved in the discussions. The employer may also invite into the discussions an officer of the employer organisation to which the employer belongs.

The shop steward or delegate must be allowed, at an appropriately confidential place designated by the employer within the employer's premises, a reasonable period of time during working hours to interview the duly accredited Officials of the Union to which they belong.

[171] The Minister objected to the underlined sentences. The objection is without foundation. The underlined sentences are to be interpreted in the context of the first part of the clause in each case. Viewed in that light they are allowable under s.89A(2)(p).

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[172] *33 - SHOP STEWARDS, SENIOR SHOP STEWARDS AND GRIEVANCE PROCEDURE (excluding engineer and scientist employees)*

(a) (i) An employee appointed as shop steward in the shop or department in which he/she is employed shall, upon notification thereof by the responsible officer of the union concerned to the company, be recognised as the accredited representative of the union to which he/she belongs and he/she shall be allowed the necessary time during working hours to interview the company's representative on matters affecting employees whom he/she represents.

(ii) A shop steward may hold a meeting of the members he/she represents to discuss union business provided that:

the meeting is held during the meal break;

the meeting has the prior approval of the senior industrial officer who in conjunction with local management, will also designate the location of the meeting.

Senior Shop Stewards

(b) An employee appointed as senior shop steward for a particular union in the plant in which he/she is employed shall, upon notification thereof by a responsible officer of the union concerned to the company, be recognised as the accredited senior shop steward for that union in the plant subject to the following conditions:

(i) In a plant where there are more than five accredited shop stewards of a particular union a senior shop steward shall be recognised for that plant to represent those shop stewards and their respective members.

(ii) Paragraph (b)(i) above is conditional upon the ratio of shop stewards to members not being greater than that existing at 17 August 1978, at the premises of the former company.

(iii) A senior shop steward may hold a meeting of the shop stewards he/she represents to discuss union business, provided that:

the meeting is held during the meal break;

the meeting has the prior approval of the senior industrial officer who, in conjunction with local management will also designate the location of the meeting;

notice of the meeting is given at least one full day prior to the date of the meeting;

shop stewards whose attendance at such meetings would entail a change of meal break must approach their supervisor and subject to operating needs, approval for a change will be granted.

(iv) If a shop steward requests a meeting of his/her members in accordance with paragraph (a)(ii) above and wishes his/her senior shop steward to attend, the senior shop steward may attend subject to the following conditions:

The senior shop steward obtains the prior approval of the senior industrial officer. If attendance at such a meeting entails a change of meal break for the senior shop steward he/she must also obtain the approval of his/her supervisor for this change.

Briefly state topics to be discussed at the meeting so that the senior industrial officer can ascertain whether the senior shop steward's attendance is warranted.

(v) If the company considers that a senior shop steward is unduly interfering with its plant or is creating disaffection amongst its employees or is offensive in his/her methods or is committing a breach of any of the previous conditions, the company may refuse to recognise him/her as an accredited senior shop steward. The union shall have the right to bring such refusal before a member of the Australian Industrial Relations Commission.

(vi) The company will provide a secure cupboard or drawer for the use of senior shop stewards.

(vii) Where the senior shop steward is absent a duly authorised deputy senior shop steward will be recognised during the absence of the senior shop steward.

Other meetings prohibited

(c) The holding of meetings by shop stewards or senior shop stewards on company property other than as outlined above is expressly prohibited.

Grievance procedure

(d) Notwithstanding anything appearing elsewhere in this clause the following grievance procedure shall apply in the event of a grievance being raised by an employee:

(i) The employee should normally advise his/her supervisor of his/her problem or complaint, but alternatively, he/she may elect for personal reasons to have his/her shop steward take up the problem or complaint on his/her behalf. The supervisor of the employee concerned will then endeavour to solve the matter within his/her supervisory capacity.

(ii) If the matter is not resolved to the satisfaction of the employee/shop steward, the employee/shop steward should seek approval from the supervisor to interview the industrial officer and permission to do so will be granted.

If the employee initially elects to complain to his/her supervisor and subsequently is not satisfied he/she may request his/her shop steward to represent him/her before the industrial officer. In this case he/she must seek and will be granted reasonable time from his/her supervisor to privately acquaint his/her shop steward of the details of the matter to be discussed.

(iii) If the matter is still not resolved to the satisfaction of the employee/shop steward, the shop steward may refer the matter to the senior shop steward. The shop steward must seek and will be granted reasonable time from his/her supervisor to privately acquaint the senior shop steward on the details of the matter.

(iv) The senior shop steward should then seek approval from his/her supervisor to approach the industrial officer and permission to do so will be granted. The senior shop steward will not inspect or investigate a matter without the prior approval of the industrial officer and on such inspection or investigations the senior shop steward must be accompanied by the industrial officer.

(v) The industrial officer will refer all matters not satisfactorily settled to the senior industrial officer.

(vi) Nothing in the above procedure will take away the right of any shop steward or employee who has previously complained to his/her supervisor, and the matter has not been resolved to his/her satisfaction, to then refer the problem for the attention of a full-time paid union official.

(vii) It is the responsibility of the supervisor to advise the employee and/or shop steward of the progress of the complaint if there is a delay in resolving the issue. This will apply whether the complaint is being handled by the industrial officer or the supervisor of the section concerned.

(viii) It is the responsibility of the industrial officer to advise the senior shop steward of the progress of a compliant in which the senior shop steward is involved.

(ix) Plant supervisors have the same rights of grievance procedures through their respective supervision as applies to other employees. Consequently, where a supervisor carries out his/her function in disciplining a plant employee and a dispute arises, particularly an inter-union dispute, either the employee or the supervisor concerned, or both, may seek to resolve the dispute through the grievance procedure, or by agreement between the union official concerned, the matter may be referred to the Australian Industrial Relations Commission.

Shop steward education

A relevant union can request a shop steward to be granted paid time off work of up to 10 days in a 12 month period to undertake training which is necessary to assist the steward in their grievance role. The training arrangements will be considered by the Company, having regard to the normal staffing requirements in the shop stewards work area.

42 - CONSULTATION ARRANGEMENTS (GMHAL employees)

Site Committee

(a) A site committee comprising members of company management and unions will facilitate the most appropriate change program in relation to alternative working arrangements and the Holden Production System.

The role of this committee is to discuss and agree upon, on an ongoing basis, the implementation activities that best serve to promptly and effectively implement agreed strategies.

Each site committee will comprise no more than 5 company representatives and 5 union representatives. The framework in which HPS will be introduced is supported by the following processes:

No employee will be directly retrenched as a result of the introduction of the Holden Production System.

The company is committed to consultation prior to the implementation of workplace change through the site committee.

There will be joint involvement in the implementation of workplace change through the site committee.

All employees will be given adequate information in order to understand the need for change which will be co-ordinated through the site committee.

If the site committee is unable to reach agreement, the issue in dispute will be dealt with in accordance with the dispute settlement procedure in clause 10.

All negotiations on enterprise agreements and this award including the implementation of this award will be conducted through a single bargaining unit comprising the unions and the company.

Information sharing

(b) The following information sharing arrangements are agreed:

(i) Company management updates for union officials - 4 times per year covering:

Business Plan

Business Plan Performance - each quarter

Key forward activities and events

Continuous improvement activities

(ii) Management updates for Senior Shop Stewards, quarterly or more frequently if necessary.

(iii) Formation and ongoing meeting of site committee.

(iv) Continuation of local plant based management/Senior Shop Steward/Shop Stewards meetings as currently applies.

(c) The company will notify and consult with the unions over any proposed efficiency review which may lead to consideration of outsourcing. The status quo will be preserved while negotiations are in progress. Advice will be given to the unions regarding the full rationale for consideration of changes and the potential impact of options under consideration. A detailed analysis of options which may include the retention of in- house operations will be discussed at that time.

Provisions in sub-clauses 49(a) and 49(b) reflect those contained in G0132(13) and replicated in G0348 slightly amended so that the language of the award reflects the ongoing nature of the provisions and the changes that have already occurred following the introduction of G0132. Sub- clause 48(b) reflect the provisions on outsourcing contained in G0348. Reference to FVIU has been replace by a reference to unions as the FVIU is not registered as an organisation the purposes of the Act. Clarification required on this issue. There are not strictly comparable provisions in the HEC contributing awards but see 49A.

43 - CONSULTATION PROCESS (HEC employees)

Consultation over the introduction of change will occur at two levels dependent on the extent and the impact of the changes detailed in sub-clauses (a), (b), and (c).

(a) Major Upgrades

Consistent with the principles in the introduction, once a decision to introduce change has been made, a meeting of the Consultative Committee will be scheduled.

The company shall be responsible for providing advice to the committee on:

- the nature and extent of the change;

- the time schedule for the implementation of the change;

- the extent of impact on employees.

The Committee shall jointly determine:

- an action plan to mitigate adverse impacts;

- an action plan to communicate the change to employees concerned;

- any matter raised by employees or union representatives.

(b) New Advanced Technology

The parties recognise that the introduction of advanced technology is necessary to ensure that the company places itself in the best competitive position to seek increased business opportunities or expand on current activities. The parties also recognise that information of this nature is commercially sensitive and will take appropriate measures to ensure confidentiality. (The Consultative Committee shall develop guidelines on the confidentiality of information.)

The Company recognises that for the successful introduction of advanced technology, it will be necessary for consultation through the Consultative Committee with representation from the Federal and State leave, if necessary, to achieve an "In Principle" agreement in the first instance.

These consultations will take place in an appropriate time frame to ensure that the introduction of the equipment will meet the production requirements on new business requirements of new business contracts or the expansion of current business.

Consultations will cover:

** Work organisations and functions*

** Classification levels*

** Shift Patterns*

** Occupational Health and Safety*

** Training requirements*

** Other issues raised by Unions regarding impact on employees.*

(c) Production levels

Dependent on the extent of change, consultation will occur at two levels:

(i) Plant Level

Where production levels are impacted on a short term basis and/or the need to increase or reduce the number of production days is required, initial consultations will be held with the Consultative Committee.

The company will advise details of the situation covering:

- the extent of changes to production levels,

- the estimated period of time covered by the schedule variations,

- the date when schedule variation must be achieved,

- proposals to minimise to impact of change.

The Consultative Committee shall then consider:

- the impact of the schedule change on employees

- proposals to minimise impact having consideration for providing up to 5 non productive days in each calendar year with the company paying 50% of an employees wage or salary on each of the days utilised under this provision;

employees may elect on a collective basis, but not individually, to increase this payment by the use of Annual Leave loading;

where possible, down days will be scheduled over a period of time to reduce the impact of short wages in any given period;

continued employment for employees within the first 12 months of service;

method of communicating to employees the changes position and the agreed arrangements to cope with the situation.

It is envisaged that as a result of the measures outlined above, the payment for down-time will lead to a cost neutral situation.

(ii) Union Level

Where production levels are impacted on a short term or long term basis and may possibly lead to redundancies, State and/or Federal union officials will be consulted as soon as practicable after it is determined that the changes will impact on employment levels.

The Company will advise the union/s whose members will be impacted by the schedule changes:

- the extent of schedule changes;

- the number of employees affected;

- any proposals to mitigate adverse impact on employees.

Consultation and/or negotiations will commence between the parties to reach a resolution to the situation.

Discussions should cover options that would make consideration of redundancies a last resort.

Options to be considered include:

- Appropriate internal transfers

- Natural attrition

- Employees in the first 12 months of service

- Down time strategies

- Voluntary reductions

Where employees who are not covered by the above are involved in a redundancy situation, the company will provide the union/s with the necessary information for use by FVIU/LAP facilitation.

[173] None of the provisions of clauses 33(a) to (c) are allowable for the reasons explained in our decision concerning similar clauses in the *Vehicle Industry - Kenworth Trucks - Award 1998* and the *Toyota Australia Vehicle Industry Award 1988* . We shall delete them. Clause 33(d) was challenged by the Minister on the basis that it was not subject to an appropriate review pursuant to items 49(7) and (8). The award applies to one employer only. We were told that the provisions

were retained by consent after extensive negotiations. In addition, there is to be a further review and consolidation of the award in the near future. In all of the circumstances we are not prepared to exercise our powers under s. 109 to review clause 33(d) pursuant to items 49(7) and (8).

[174] The provision for shop steward education appearing at the foot of clause 33(d) is limited to leave to undertake training necessary to assist the stewards in their grievance role under the clause. It is therefore incidental to the dispute settling procedure. It is to be inferred that Commissioner Lewin concluded that the provision is also necessary for the effective operation of the award. The possibility that provisions such as these can fall within s.89A(6) is contemplated by the *Leave Allowability Decision* [Print Q9399 at paragraph 41]. In the circumstances it is not in the public interest that we exercise our powers pursuant under s.109 to review that part of clause 33(d) on that ground either.

[175] Clauses 42 and 43 are not allowable. They provide for consultation in relation to organisational change and are relevantly indistinguishable from the clause dealt with by the Full Bench in the *Hospitality Decision* (clause 11 at p.11).

Ford Motor Company (Vehicle Industry) - Consolidated Award 1998 (C No. 90287 of 1998)

[176]

2.1 Continuity of work and grievance resolution procedure

2.1.1 Objective

The objective of the grievance procedure is to resolve grievances promptly and fairly without disruptions to the Company's operations and without loss of wages to employees.

2.1.2 Key Requirements

In order to fulfil the objective and to enhance effective working relationships it is essential that the procedure encourages:

improved two-way communication between employees and their supervision,

resolution of the problem where it initially occurs.

2.1.3 The process

In order to promote speedy, effective and informal resolution of workplace grievances, the employee with the grievance will first discuss the matter with the immediate supervisor and every effort will be made to resolve it at this early stage. The supervisor will respond to the employer's grievance as soon as possible within their supervisory capacity. It is recognised that not all grievances will be resolved this way, and therefore a formal process for the resolution of problems following the employee/supervisor interaction will be in accordance with the following procedure.

2.1.3(a) Stage 1 of formal procedure

After having tried to resolve the grievance informally, the employee may refer it to their shop steward or representative for discussion with the supervisor. Alternatively, the employee may report it directly to the superintendent or next level of supervision.

2.1.3(b) Stage 2 of formal procedure

If the grievance remains unresolved after discussion at Stage 1, the aggrieved employee and the area shop steward will confer with the immediate supervisor and the next supervisory level. If after discussion the matter remains unresolved the person initiating the grievance (shop steward/representative or employee) will formally document the grievance on a Grievance Report Form.

2.1.3(c) Stage 3 of formal procedure

If the grievance remains unresolved after discussion at Stage 2, the aggrieved employee and the area shop steward will confer with the Area/Department Manager, Senior Shop Steward/Senior Representative and Employee Relations. If the grievance is resolved and an action plan agreed, the plan should be documented on the Grievance Report form.

2.1.3(d) Stage 4 of formal procedure

If the grievance remains unresolved after discussion at Stage 3, the aggrieved employee and the senior shop steward and/or union official will confer with more senior Management and Employee Relations. If the grievance is resolved and an action plan agreed upon, the plan should be documented on Grievance Report form.

2.1.3(e) Stage 5 of formal procedure

If the grievance remains unresolved after discussion at Stage 4, the parties may choose one of the following:

2.1.3(e)(i) Providing both parties are agreed, the grievance may be referred to an Independent Arbitrator who will arbitrate between the position of the Employee (Union) and the Company. If the matter is referred to an Independent Arbitrator the parties agree that the decision on the matter will be final and will be accepted by all parties concerned.

or

2.1.3(e)(ii) Either party may elect to make application to the AIRC. If the matter is referred to the AIRC, the parties agree that the decision on the matter will be final, subject to any appeal in accordance with the Workplace Relations Act 1996, and will be accepted by all parties concerned.

2.1.4 Operation and administrative requirements

For any procedure to be effective all parties must be completely committed to following the procedure and the operational and administrative requirements supporting the procedure. These are:

2.1.4(a) At Stage 2 the employee/shop steward/representative initiating the grievance will complete a Grievance Report form. Such forms will be accountable documents and copies will be available to the aggrieved employee, appropriate union representatives and supervision.

2.1.4(b) Stages 1 and 2 will normally take 4 working days, whilst Stages 1 to 4 will occur within 10 working days. Either party may elevate the grievance to the next level within the specified period providing there has been a reasonable opportunity to resolve the problem at the informal level and each of the stages.

2.1.4(c) It is the clear intention of the parties that there will be no industrial action taken by any party whilst the grievance is being handled in accordance with this procedure. No party will be prejudiced as to the final settlement by the continuance of work in accordance with this procedure.

2.1.4(d) Employee Relations in each location will be responsible for maintaining complete records of all Grievance Report forms and will, quarterly, prepare a report reviewing procedural activity in the previous three months.

2.1.4(e) For the purposes of 2.1 the employees shop steward/ union representative means an employee appointed as shop steward/union representative in the shop or department in which he/she is employed, who upon notification to the employer, will be recognised as the accredited representative of the union to which the employee belongs.

2.1.4(f) Such shop steward/union representative will be allowed the necessary time during work hours to interview the company or its representatives on matters affecting the employees represented by such employee.

2.1.4(g) At all stages of the grievance resolution procedure shop stewards and employee representatives will be allowed the necessary time during working hours to interview an employee(s) or duly accredited union officials.

2.1.4(h) Shop stewards/union representatives will be granted up to 10 days paid leave per year to undertake training that will assist them in their grievance resolution role.

[177] The Minister submitted that this clause should be amended to delete statements of intent, which are not allowable, and that it should also be reviewed against all of the criteria contained in items 49(7) and (8).

[178] In the *Hospitality Decision* the Commission considered the allowability of the following provision:

> *"The provisions of this award have been developed over time with the input of the employers, union and employees to develop an industry providing high standards of hospitality service, customer satisfaction and a reasonable and fair standard of wages and conditions for employers and employees in the industry."* [at p.74]

[179] In concluding that the provision was not allowable the Commission indicated that statements which describe objectives or philosophies rather than establishing entitlements are, generally speaking, not allowable. Clause 2.1.1 of this award appears to us to be in a different category. It provides guidance of a general character on the manner in which the grievances are to be resolved in accordance with the procedure set out. We are unable to conclude that clause 2.1.1, or any other part of the clause, is not allowable. Indeed, the whole of the clause is allowable pursuant to s.89A(2)(p).

[180] All of the respondents to the award opposed a further review pursuant to items 49(7) and (8). The award applies to one company only. The parties envisage undertaking a further review themselves. In all of the circumstances we are not persuaded that it would be in the public interest to exercise our powers under s.109 to review this clause pursuant to items 49(7) and (8).

Aerospace Industry (Hawker de Havilland) Award 1998 (C No. 90302 of 1998)

[181]	*3.1 CONSULTATIVE MECHANISM AND PROCEDURES* *Summary* *The company and employees are to maintain a consultative mechanism and procedures at the enterprise to achieve co-operative workplace relations.* *3.1.1 The company and employees and those unions with members at the workplace, shall maintain the established consultative mechanism and procedures which they agree would assist in achieving and maintaining co-operative workplace relations and mutually beneficial work practices.*

[182] The Minister, supported by ACCI and the AI Group, submitted that clause 3.1 is not an allowable award matter nor a s.89A(6) provision. The respondents all submitted that the provision is incidental to dispute settling procedures and necessary for the effective operation of the award.

[183] We uphold the Minister's submission. Although the clause might conceivably contribute to a reduction in disputation it is not concerned with dispute settling procedures and is not allowable under s.89A(2)(p). No basis was advanced for the conclusion that the provision is necessary for the effective operation of the dispute settling procedure and we find that it is not a s.89A(6) provision. It will be deleted. The employer respondents submitted that we should redraft the clause. In our view any replacement provision is a matter for separate application.

TERMINATION AND DISCIPLINARY PROCEDURES

[184] We deal in this part of our decision with challenges made by the Minister, for the most part with the support of ACCI, to provisions dealing with termination and disciplinary procedures. In particular, it was submitted that the following kinds of provisions are not allowable:

· disciplinary procedures;

· provisions concerning certificates of service;

· a requirement to state reasons for dismissal;

· a code of conduct containing restrictions on work arrangements; and

· a number of other matters.

[185] The Minister also relied upon items 49(7)(a) and 49(8)(c).

Research & Supply Vessel (Aurora Australis) Award 1998 (C No. 90273 of 1998)

[186]	*22.1 Code of Conduct* *22.1 The parties to this award have developed Code of Conduct Standing Orders, which supplement the industry Code of Conduct, to reflect the particular circumstances of the Aurora Australis and its operating environment and these shall apply to the crew of the vessel.*

[187] The parties to the award submitted that the clause exists to ensure a harmonious working relationship between crew members and expeditioners and that the environment in which crew members work and the conditions of their employment require the inclusion of a code of conduct in the award. As drafted the provision is unrelated to any dispute resolution procedure. No proper basis was advanced for a finding that the provision is either allowable or a s.89A(6) provision. We shall delete it.

Toyota Australia Vehicle Industry Award 1988 (C No. 90274 of 1998)

[188]	*46 - CERTIFICATION OF SERVICE* *Upon termination of employment, the Company, when requested by the employee, shall provide the employee with a certificate of service stating length of service, duties performed and classification of office.*

Philip Morris Limited Award 1998 (C No. 90277 of 1998)

[189]	*13.5 Philip Morris Limited shall, upon receipt of a request from an employee whose employment has been terminated, provide the employee with a written statement specifying the period of employment and the classification of or type of work performed by the employee.*

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[190]	*5. CONTRACT OF EMPLOYMENT* *(a)-(k)...* *Certification of service (technical, supervisor and clerical employees)* *(l) Upon termination of employment the company, when requested by the employee, shall provide him/her with a certificate of service stating length of service, duties performed and classification of office.*

[191] It is convenient to deal with these three clauses together. None of them is an allowable award matter. The *Hospitality Decision* is clear authority for the proposition that a statement of employment is not an allowable award matter [at p.17]. Nor is it a s.89A(6) provision. Consequently the provisions under challenge in C Nos 90274, 90277 and 90283 of 1998 must be deleted from the relevant awards.

Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998 (C No. 90275 of 1998)

[192]	*8.1.3 When an employee is dismissed, suspended or reduced in salary or is informed of being disrated, and within four weeks thereafter asks in writing to be furnished with the reasons for such action, the employee shall be informed in writing thereof within fourteen days provided that no employee shall be dismissed, suspended, disrated, or reduced in salary as a result of any charge or complaint made without being informed of the nature of such charge or complaint and being given a reasonable opportunity to make an explanation.*

[193] This clause deals with disciplinary and other procedures. It is not an allowable award matter. It was submitted by the employers, the VTHC and the Power Industry Unions that the provision is incidental to redundancy pay (s.89A(2)(m)) and notice of termination (s.89A(2)(n)) and necessary for the effective operation of the award. We reject that submission. We cannot see any basis for a conclusion that the notice and redundancy pay provisions of the award will not operate effectively if we delete the clause. We shall do so.

Health and Allied Services - Public Sector - Victoria Consolidated Award 1998 (C No. 90284 of 1998); and

Health and Allied Services - Private Sector - Victoria Consolidated Award 1998 (C No. 90285 of 1998)

[194]	*9.2 Disciplinary procedures* *9.2.1 Where disciplinary action is necessary, the management representative shall notify the employee of the reason. The first warning must be verbal and will be recorded on the employee's personal file. A Union or other representative shall be present if desired by either party.* *9.2.2 If the problem continues, the matter will be discussed with the employee and a second warning in writing will be given to them and recorded on the employee's personal file. A Union or other representative shall be present if desired by either party.* *9.2.3 If the problem continues the employee will be seen again by management. If a final warning is to be given then it shall be issued in writing and a copy sent to the relevant Union. A union or other representative shall be present if desired by either party.* *9.2.4 In the event of the matter recurring, the employee may be terminated. No dismissals are to take place without the authority of senior management.* *9.2.5 Dismissal of an employee may occur for acts of "serious and wilful misconduct".* *9.2.6 If a dispute should arise over the disciplinary action, the course of action to be followed is that the matter shall be referred to the Commission for resolution. Such resolution shall be accepted by the parties as final.* *9.2.7 If after any warning, a period of twelve months elapses without any further warnings or action being required, all adverse reports relating to the warning must be removed from the employee's personal file.* *9.3 Employers will formulate policies and practices in accordance with these procedures, which shall be circulated to all employees throughout each facility, and which shall be translated into other language groups.* *9.4 All new employees shall be handed a copy of these procedures on commencement of employment.*

[195] The Minister's position was supported by ACCI and opposed by the Victorian Hospitals' Industrial Association (VHIA) and the Service Industry Advisory Group (SIAG), on behalf of respondent employers, and the HSUA. The clause was defended on the basis that it is part of a dispute settling procedure or incidental thereto and necessary for the effective operation of the award. The clause is not a dispute settling procedure but a disciplinary procedure and is not allowable. Whilst clause 9.2.6 has the appearance of a dispute settling procedure, it is more properly to be viewed as an adjunct to the disciplinary procedure rather than a dispute settling procedure in its own right. It cannot stand on its own if the remainder of the clause is deleted. The whole of clause 9.2 will be deleted.

Ford Motor Company (Vehicle Industry) - Consolidated Award 1998 (C No. 90287 of 1998)

[196]

2.2 CODE OF CONDUCT TO SUPPORT THE CONTINUITY OF WORK AND GRIEVANCE RESOLUTION PROCEDURE

2.2.1 A fundamental pre-requisite to the continuity of work and grievance resolution procedure is the need for there to be healthy working relationships between plant supervision/ management, shop stewards/representative and employees. It is only through healthy work relationships and the quality of daily association with fellow employees that we can hope to work jointly and positively in implementing the changes necessary for achieving our goals of international competitiveness, employment and income security. In particular the actions and relationships of both supervisor and union stewards must focus on these goals.

2.2.2 The Company accepts that to assist in creating this focus there must be regular and continuously improving consultative opportunities for and between supervisors/management and shop stewards/representative. To support this consultation and the information sharing inherent in it, the Company will in consultation with the Union conduct training for shop stewards and plant supervisors that will enable them to better understand the Company and industry structure and the business decision making processes. This training will be incremental to existing shop stewards education provisions of the various awards.

2.2.3 Combined with improved consultation and training it is also important that all parties behave and conduct themselves in a respectful and courteous manner when dealing with one another.

2.2.4 The Principles

In order to achieve this level of conduct the parties have agreed to the following principles.

2.2.4(a) Supervisors have a legitimate and important role which they must carry out responsibly. To do this they must:

2.2.4(a)(i) conduct themselves in a proper and dignified manner.

2.2.4(a)(ii) be given the opportunity to correct problems/issues in their work area with the confidence that normal work will continue whilst the problem/issue is being resolved.

2.2.4(a)(iii) manage their area responsibly and consistent with:

2.2.4(a)(iii)(1) all agreements between the Company and its Unions.

2.2.4(a)(iii)(2) quality and productivity objectives.

2.2.4(a)(iv) attend all meetings associated with the implementation of all company/Union industrial agreements.

2.2.4(b) Further to these principles it is agreed that supervisors will be able to use the Grievance procedure (apart from

when disciplinary action is necessary) to assist them in carrying out their responsibilities.

2.2.4(c) Equally the parties agree that shop stewards/representatives have a legitimate role which they must carry out responsibly. To do this they must:

2.2.4(c)(i) conduct themselves in a proper and dignified manner.

2.2.4(c)(ii) consistent with operating requirements and the nature of the concern, be given a reasonable amount of time to address employee concerns as per the grievance procedure.

2.2.4(c)(iii) give supervision reasonable time to resolve problems before progressing to the next level of the grievance procedure.

2.2.4(c)(iv) accept, as with all other employees, that they have important daily work responsibilities which must be performed.

2.2.4(c)(v) attend all meetings associated with the implementation of all Company/Union industrial agreements.

2.2.5 Application of Principles

2.2.5(a) These principles will apply consistently across all of the Company's operations.

2.2.5(b) Further it is recognised and agreed by the parties that for practical reasons relating to the nature of the operation, the shift and the availability of appropriate people etc. it may be necessary for local procedures to be developed consistent with these principles.

2.3 BEHAVIOUR AT WORK AGREEMENT

2.3.1 Introduction

2.3.1(a) The Company employs large numbers of people who work in a wide variety of complicated industrial processes. If working conditions are to be safe and if the business is to continue to operate successfully, everybody needs to work within certain rules. In any community, whether at work or outside of work, we must make sure such rules are responsibly observed.

2.3.1(b) Therefore employees need to understand what their responsibilities are to the rules, policies and procedures within the Company, and what can happen if these responsibilities are not met. It is the Company's responsibility to maintain discipline and to act when breaches of the rules, policies and procedures occur.

2.3.1(c) At the same time, the rights and interests of each employee must be protected. Thus it is also important to have an effective means of settling any problems that arise from disciplinary breaches and to make sure that employees know how it works.

2.3.2 Applying Discipline

2.3.2(a) The rules which employees have to observe are derived from:

2.3.2(a)(i) those contained in employee induction information booklets and those included in periodic employee information updates.

2.3.2(a)(ii) those advised in and related to the local work area.

Employees must also follow:

2.3.2(a)(iii) authorised instructions from supervision/management and

2.3.2(a)(iv) well established and easily recognised (community) standards of conduct.

2.3.2(b) Any disciplinary action resulting from a breach of these rules will match the seriousness of the offence. Repeated infringements will merit stronger disciplinary action. The ultimate penalty is termination, which normally would only be applied following other less severe disciplinary action. However, very serious offences, such as those indicated in 2.3.2(e) may warrant termination on their own.

2.3.2(c) An employee accused of a disciplinary offence is entitled to:

2.3.2(c)(i) be informed of the evidence against them.

2.3.2(c)(ii) be given every opportunity to present their case for consideration before disciplinary action is taken.

2.3.2(c)(iii) union representation.

2.3.2(d) When it appears that a disciplinary offence has taken place the following will apply:

2.3.2(d)(i) the employee will be informed of the nature of their alleged offence and advised of the relevant evidence and of their right to seek the assistance of their shop steward/representative.

2.3.2(d)(ii) following full investigation, and careful consideration of the evidence and the employee's defence,

disciplinary action, if any will be decided upon. Disciplinary action will normally consist of one of the actions listed in 2.3.3(b).

2.3.2(e) Generally employees will not be dismissed for a first offence except for instances of neglect of duty, inefficiency, malingering and/or gross misconduct. Instances of gross misconduct that could render employees liable to dismissal are:

· Theft, dishonesty

· Smoking in restricted areas

· Fighting on Company premises

· Deliberately clocking another's clock card

· Wilfully damaging or tampering with Company property

· The distribution or possession or use of drugs on Company premises for non-medically prescribed purposes

· The unauthorised distribution, possession or use of alcohol on Company premises

· Gambling

· Wilfully endangering others

· Threatening to cause harm to others

· All other equally serious offences.

2.3.2(f) In cases where it is decided that the employee is not to be disciplined as a result of the formal discussion, all personal records about the alleged offence will be destroyed.

2.3.2(g) Disciplinary matters will be dealt with promptly while allowing enough time to ensure the facts are established and given careful consideration.

2.3.3 Types of disciplinary action

2.3.3(a) As part of their day to day responsibilities a supervisor may provide feedback and comment on an employee's

performance outside of the procedure set out in this document.

2.3.3(b) formal disciplinary action and minimum authority levels for such action will normally be in accordance with the following:

Disciplinary Action	*Minimum Authority levels*
Recorded verbal warning	*Supervisor*
Written warning	*Supervisor*
Suspension without pay	*Superintendent*
Termination	*Area/Functional Manager*

2.3.3(c) Disciplinary action can be categorised as follows:

2.3.3(c)(i) Work Performance - for example neglect of duty, inefficiency, malingering, etc.

2.3.3(c)(ii) Misconduct - for example fighting, horseplay etc.

Where (ii) - Work performance and (iii) - Misconduct occurs, the formal disciplinary action in 2.3.3 (b) will apply.

2.3.3(d) In cases of a recorded verbal warning the employee will be told formally that the warning will be entered on their employment record.

2.3.3(e) In cases of a written warning or suspension, confirmation will be given to the employee and the are shop steward in writing.

2.3.3(f) Where discipline has occurred in response to a number of separate and different events the following progressive table will apply separately to the disciplinary categories of Work Performance and Misconduct:

2 verbal warning equals 1 written warning

2 written warnings equals suspension without pay for a minimum of 2 working shifts and up to 10 working shifts.

Any further warning following a suspension will normally result in termination.

2.3.3(g) Previous discipline will be disregarded in accordance with the following:

Verbal warning after 1 year

Written warning after 2 years

Suspension after 3 years

2.3.4 Appeals against disciplinary action

2.3.4(a) An employee has the right of appeal against a disciplinary decision/action through the continuity of work and Grievance resolution procedure.

2.3.4(b) Where disciplinary action involving summary dismissal is to take place the dismissal may be delayed for up to 1 working day before becoming effective providing a request is received from an official of the union. If it is agreed to delay the summary dismissal the employee will receive their regular rate of pay for the working time involved. An appeal against dismissal will initially be handled by the Area Manager/Functional Manager who authorised the termination.

[197] Clause 2.2 is a code of conduct. A code of conduct is not an allowable award matter. Clause 2.3 deals with behaviour at work. Behaviour at work is not an allowable award matter. It is true that elements of the clause might be allowable in a different context. For example, clause 2.2.4(c)(iii) would not be out of place in a dispute settling procedure. Nevertheless the clause as a whole does not deal with allowable award matters. We reject those submissions which suggested that the clauses are s.89A(6) provisions. The clauses should be deleted.

Dental (Private Sector Victoria) Award 1998 (C No. 90294 of 1998)

[198]	*9.2 Disciplinary procedure* *9.2.1 Where disciplinary action is necessary, the management representative shall notify the employee of the reason. The first warning shall be verbal and will be recorded on the employee's Personnel File.* *9.2.2 If the problem continues, the matter will be discussed with the employee and a second warning in writing will be given to the employee and recorded on the employee's personnel file. The local union representative shall be present if desired by either party.* *9.2.3 In the event of the matter recurring, then the employee may be terminated. No dismissals are to take place without the authority of the Practice Principal.* *9.2.4 Summary dismissal of an employee may still occur for acts of "serious and wilful misconduct", referred to here as "Gross Misconduct".* *9.2.5 If a dispute should arise over the disciplinary action, the course of action to be followed is that the matter shall be referred to the Australian Industrial Relations Commission for resolution. Such resolution shall be accepted by the parties as final.* *9.2.6 If after any warning, a period of twelve months elapses without any further warning or action being required, all adverse reports relating to the warning must be removed from the employee's Personnel File.* *9.2.7 Each employer shall make available a copy of the disciplinary procedure, which shall apply in that workplace.*

[199] The clause contains a disciplinary procedure and for reasons we have already outlined it should be deleted from the award. Our comments in relation to clause 9.2.6 of the *Health and Allied Services - Public Sector - Victoria Consolidated Award 1998* apply with equal force to clause 9.2.5 of this award.

Bulk Handling and General Services Pty Ltd Bulk Handling Award 1998 (C No. 90301 of 1998)

[200]	*23. NOTICE OF TERMINATION* *23.8 When an employer has given notice of termination to an employee, an employee shall be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.* *Not withstanding the provisions above, the employer shall arrange for professional counselling relating to the following matters:* *· Financial counselling* *· Superannuation* *· Retraining* *· Alternative employment*

[201] The Minister challenged the underlined sentence. The AMWU submitted that the provision is allowable but submitted in the alternative that an allowance should be created if the Commission decides the provision is not allowable in its current form. The CFMEU sought the deletion of the provision and the creation of an allowance. Clearly the provision of counselling is not an allowable award matter. Although it may be incidental to redundancy pay (s.89A(2)(m)) it cannot be said to be necessary for the effective operation of the award. We will delete the provision and leave it to the parties to make separate application if it is necessary to do so.

NOTICE OF TERMINATION

[202] In this part of our decision we deal with award provisions which the Minister challenged on the basis that they provide for periods of notice of termination that are inconsistent with the minimum entitlements established by s.170CM(2) of the Act and are therefore obsolete or in need of updating pursuant to item 49(8)(d). In some cases it was submitted that the provisions are not allowable either.

Research & Supply Vessel (Aurora Australis) Award 1998 (C No. 90273 of 1998)

[203]	*12.2 The required period of notice for employees other than officers, shall be one week, given at any time during the week or by payment of a week's wages in lieu.*

[204] The parties agree that the provisions in s.170CM(2) should be put into the award to replace the current provision for one week's notice. This is a clear case in which it is in the public interest that the award be amended to remove any inconsistency with the statutory entitlements contained in s.170CM(2). We will refer the matter to Commissioner Wilks to be dealt with in accordance with this decision.

Toyota Australia Vehicle Industry Award 1988 (C No. 90274 of 1998)

[205] *6 - CONTRACT OF EMPLOYMENT*

Termination of employment - production and trade employees

(c) (i) Employment shall be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages as the case may be. Such notice given before the commencement of a day's work or shift shall be deemed to have been given at the end of the previous day's work or shift and notice given during a day's work or shift shall be deemed to be given at the end of that day's work or shift.

This shall not affect the right of the Company to dismiss an employee without notice for malingering, inefficiency, neglect of duty or misconduct, and in such cases wages shall be paid up to the time of dismissal only.

Termination of employment - clerical, supervisory and technical employees

(ii) Employment shall be terminated by a fortnight's notice on either side given at any time during the week or by the payment or forfeiture of a fortnight's wages as the case may be. Such notice shall not affect the right of the Company to dismiss an employee without notice for malingering, inefficiency, neglect of duty or misconduct, and in such cases wages shall be paid up to the time of dismissal only.

[206] In this, as in the previous award, the parties to the award agree that it is obsolete in part. It is in the public interest that the award should not prescribe entitlements which are less than those in s.170CM(2). We refer this matter to Commissioner Lewin to vary the award to ensure consistency with s. 170CM(2).

Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998 (C No. 90275 of 1998)

[207] *8.1 Fortnightly hire*

8.1.1 Employment shall be by the fortnight and may be terminated at any time by the employer or the employee giving a fortnight's notice to the other or the payment or forfeiture of a fortnight's salary.

This shall not affect the right of the employer to dismiss any employee for misconduct or neglect of duty and, in such cases, salary shall be paid up to the time of dismissal only.

[208] The parties agree with the Minister's submission that this clause should be amended to ensure consistency with s.170CM(2). The respondent employers proposed an amendment which is supported by the Power Industry Unions. The Minister indicated that the amendment would address his concern with the clause. We will adopt the amendment, which is in the following terms:

"(1) Employment shall be by the fortnight and may be terminated at any time by the employer or employee giving notice to the other in accordance with the provisions in the Workplace Relations Act 1996 or the payment or forfeiture of salary for the required notice period.

(2) This shall not affect the right of the employer to dismiss any employee for serious misconduct, and, in such cases, salary shall be paid up to the time of dismissal only."

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[209] *5 - CONTRACT OF EMPLOYMENT*

...

Permanent employment (excluding engineer and scientist employees)

(b) All employees unless part-time or casual, shall be regarded as permanent employees. Permanent employees shall be entitled to notice or payment or forfeiture in lieu of such notice in accordance with sub-clause (g) hereof. Where retrenchments occur, notice shall be given in accordance with the following:

Retrenchments

(i) "Retrenchment" means the situation where the Company deems that it has an excess of employees because of a reduction in work available. "Retrenchment" is further defined in clause 37.

Trade, non trade, technical and supervisor employees: Entitlements

(ii) Where an employee with at least twelve months' continuous service with the Company is to be retrenched, a trades, non trades, technical or supervisor employee shall be entitled to the following notification of termination of service:

One year but less than 2 years service 4 weeks notice

2 years but less than 3 years service 6 weeks notice

3 years but less than 4 years service 8 weeks notice

4 years but less than 5 years service 10 weeks notice

5 years but less than 6 years service 12 weeks notice

6 years but less than 7 years service 14 weeks notice

7 years but less than 8 years service 16 weeks notice

8 years but less than 9 years service 18 weeks notice

9 years but less than 10 years service 20 weeks notice

10 years but less than 11 years service 22 weeks notice

11 years but less than 12 years service 24 weeks notice

12 years but less than 13 years service 26 weeks notice

13 years but less than 14 years service 28 weeks notice

14 years but less than 15 years service 30 weeks notice

15 years but less than 16 years service 32 weeks notice

16 years but less than 17 years service 34 weeks notice

17 years but less than 18 years service 36 weeks notice

18 years but less than 19 years service 38 weeks notice

19 years but less than 20 years service 40 weeks notice

20 years but less than 21 years service 42 weeks notice

Etcetera, based on the formula of two weeks' severance pay, plus two weeks' pay for each year of service. Provided that in no case shall an employee receive an amount in redundancy pay exceeding that which he/she would have received if he/she had remained in employment until normal retirement.

(iii) The Company shall pay trade, non trade, technical and supervisor employees an amount equal to the wages the employee would have received for ordinary hours occurring between the termination of employment and expiry of the notice required by paragraph (ii) above.

Plant closedown and employee relocation

(iv) (1) In the event of a plant close down, the Company shall offer trade, non trade, technical and supervisor employees:

Continued employment to employees so affected.

Where an employee is required to travel to another interstate plant in order to be able to continue in the employ of the Company, the Company will pay to the employee an allowance of $708 in the case of a single employee and $1061 in the case of a married employee in addition to the payment of economy class airfares to an employee, his/her or her spouse and dependent children.

The cost of air travel will be reimbursed to employees after six months' service in the new location.

Continuity of service for these employees shall be maintained for all purposes of this Award and for the Vehicle Industry (Long Service Leave) Award 1977.(1)

In addition to the aforementioned, an employee accepting relocation will be entitled to redundancy pay in accordance with this Award.

(2) (A) In the event of a trade, non trade, technical or supervisor employee not accepting continued employment at another location, an employee so made redundant shall be entitled to payment of redundancy pay of two weeks' pay plus two weeks' pay for each year of service, with a minimum of four weeks' pay. Provided that in no case should a person get an amount in severance pay exceeding that which he/she would have received if he/she had remained in the employment of the employer until normal retirement age.

(B) The Company will further pay trade, non trade, technical and supervisor employees a loading of 17-1/2% on untaken pro rata annual leave.

(C) The Company will provide reasonable assistance for trade, non trade, technical or supervisor employees to obtain alternative employment, including co-operation with the appropriate Commonwealth and State government agencies as well as reasonable time off to attend job interviews.

Clerical employees: Entitlements

(v) Where a clerical employee with at least 12 months continuous service with the Company is to be retrenched he/she shall be entitled to the following notification of termination of his/her services:

If the employee is less than 50 years of age he/she shall be entitled to two weeks notice of retrenchment, plus an additional period of notice equivalent to one ordinary working day for each completed year of continuous service up to 20 years, and two ordinary working days for each completed year of continuous service in excess of 20 years.

If the employee is 50 years of age or more he/she shall be entitled to two weeks notice of retrenchment, plus an additional period of notice equivalent to two ordinary working days for each completed year of his/her continuous service with the Company.

(vi) The Company may, at its discretion, terminate the employment of a clerical employee before the expiry of the period of notice pursuant to paragraph (v), provided that if the Company so terminates it shall:

If the termination is through no fault of the employee, pay the employee an amount equal to the wages he/she would have received for ordinary hours occurring between the termination of his/her employment and the expiry of the notice required by paragraph (ii) hereof; or

in other circumstances, pay the employee up to the time at which his/her employment ends.

(vii) A clerical employee who is given notice pursuant to paragraph (ii) may terminate his/her employment prior to the expiration of such notice - provided that:

If he/she gives the Company at lease one week's notice of his/her intention so to terminate, he/she shall be paid an amount equal to 50 per cent of the wages prescribed by this Award which he/she would have received for ordinary hours occurring between the termination of his/her employment and the expiry of the notice of paragraph (ii) hereof; or

if he/she fails to give the Company at least one week's notice of his/her intention so to terminate, he/she shall be paid up to the time at which he/she ceases work.

(viii) The rate of pay of a clerical employee under notice pursuant to paragraph (v) of this sub-clause shall not be reduced, but the employee shall during such period, if so directed by the Company, perform a class or classes of work other than that normally performed by him/her.

Termination of employment

(g) (i) Employment shall be terminated by either side by a week's notice (for trade and non-trade employees), a fortnight's notice (for technical, supervisor and clerical employees) or a month's notice (for engineer and scientist employees) at any time during the week or by the payment or forfeiture of a week's wages (for trade and non-trade employees), a fortnight's salary (for technical, supervisor and clerical employees) or a month's salary (for engineer and scientist employees) as the case may be. This shall not affect the right of the company to dismiss an employee without notice for malingering, inefficiency, neglect of duty or misconduct and in such cases wages shall be paid up to the time of dismissal only.

For trade, non-trade, technical, supervisor and clerical employees such notice may be given at any time but shall expire at the ordinary finishing time of a working day or shift. Notice given before the commencement of a day's work or shift shall be deemed to have been given at the end of a previous day's work or shift and notice given during a day's work or shift shall be deemed to be given at the end of that day's work or shift.

[210] The parties have agreed to modify clause (g)(i) to ensure that it is consistent with s.170CM(2). This should be done. For the same reason clause (b)(v) should also be amended.

[211] The Minister objected to clause 5(b)(iv)(1) on the basis that it involves a prohibition on termination of employment. No party to the award made any submission concerning the effect of this clause. The second sentence of the clause places an obligation on the employer not to terminate the employment of trade, non-trade, technical and supervisory employees in the event of a plant close-down. A prohibition on termination of employment is not allowable [*Hospitality Decision* at p.17]. The clause is not allowable and should be deleted.

[212] The Minister took objection to clause 5(b)(iv)(2)(C) submitting that it is not allowable. The parties to the award did not make any submissions. That part of the clause requiring the employer to provide assistance to obtain alternative employment is not allowable. Provision of time off during a notice period to attend job interviews is allowable [*Hospitality Decision* at p.16].

[213] In the circumstances we quash the order insofar as is necessary to do so and direct Commissioner Lewin to vary the award in accordance with this decision.

Entertainment and Broadcasting Industry - Motion Picture Production Award 1998 (C No. 90292 of 1998)

[214] *8.2 Employment will be terminated by one week's notice on either side, or by the payment or forfeiture of a week's wages as the case may be or by such other arrangements in excess of these conditions as may be agreed upon. This will not affect the right of the employer;*

8.2.1 to dismiss any employee without notice for any act of dishonesty or any act reasonably termed as misconduct; or

8.2.2 to deduct payment for any day where an employee cannot be usefully employed because of any strike, ban on work, or any other stoppage or interruption with work beyond the control of the employer.

[215] This clause is inconsistent with s.170CM(2) and should be amended accordingly. MEAA proposed a variation based on the simplified *Hospitality Award* . There was no appearance by the employers. In the circumstances we will quash clause 8.2 and direct Commissioner Wilks to amend the award in accordance with this decision.

Entertainment and Broadcasting Industry - Actors - (Theatrical) Award 1998 (C No. 90293 of 1998)

[216] *12. TERMS OF ENGAGEMENT*

12.1 Non-specific engagement

In the case of employees not specifically engaged for a run of the play or a particular period, and not paid the rates for those casually engaged, the employment shall only be terminated on either side by two weeks notice or by the payment or forfeiture of two weeks wages. Such notice shall be either given in writing or plainly posted upon the call board or other place seen by the employees in the ordinary course of their employment. Such notice may be given at any time during the week and the employee shall only be entitled to payment pro rata for the time up to the expiration of the notice.

27. SICK LEAVE - INJURY LEAVE

An employee engaged by the week absent from his or her work on account of personal sickness, injury or accident arising other than out of and in the course of his or her employment shall be entitled to leave of absence without deduction of pay, subject to the following conditions and limitations:

27.1 ...

27.2 Termination of engagement

The employer may terminate the employee's engagement forthwith if by reason of illness or accident the employee is absent:

27.2.1 during the four weeks prior to opening, from all rehearsal calls on three consecutive days or for an aggregate of five days; or

27.2.2 during the run of the play, from twelve or more performances during a period of three consecutive calendar weeks, or from more than sixteen performances during a period of three consecutive calendar months.

[217] MEAA and the EIEA submitted that the entitlement provided by the clause was more generous than that contained in s.170CM(2) because all employees are entitled to receive a minimum of two weeks notice of termination of employment. Theatrical productions it was said never go for three years, therefore no inconsistency would arise. In our view, as it stands clause 12.1 is inconsistent with s.170CM(2). We think the clause should be amended to make it clear that any more generous entitlements available under the Act apply.

[218] The Minister submitted that clause 27.2 provides an entitlement to terminate employment on account of illness or accident and that accordingly it is inconsistent with s.170CK(2)(a) and regulation 30C of the *Workplace Relations Regulations* . The EIEA, supported by MEAA, submitted that the provision is incidental to an allowable award matter and necessary for the effective operation of the award. It was further submitted that employees affected by the clause are excluded from the operation of s.170CK by regulation 30B of the *Workplace Relations Regulations* . Regulation 30B specifies the kinds of employees that are excluded from the operation of the termination of employment provisions of the Act, including s.170CK(2)(a). Employees engaged for a specified period of time or for a specified task are among the kinds of employees specified.

[219] We are not persuaded that all employees potentially affected by clause 27.2 are excluded employees within the meaning of regulation 30B. If an employer terminates an employee's employment, acting in reliance on clause 27.2, and the employee is entitled to the protection afforded by s.170CK(2)(a), a breach of that section might occur and the former employee be entitled to seek reinstatement and the imposition of a penalty on the employer. We think the clause should be amended to make it clear to the reader that it does not reduce any protections or rights contained in s.170CK(2)(a). We will quash the order so far as it is necessary to do so and direct that Senior Deputy President Polites deal with the clause in accordance with this decision.

Dental (Private Sector Victoria) Award 1998 (C No. 90294 of 1998)

[220] *16.1 Notice of termination by employer*

16.1.1 Other than during the first four weeks of employment, during which period employment may be terminated with one days notice , in order to terminate the employment of a weekly employee the employer shall give to the employee the following notice:

[221] The underlined part of the clause is on its face inconsistent with s.170CM(2) and should be amended. We will quash the order in the relevant respect and direct Commissioner Hingley to deal with the clause in accordance with this decision.

ITEMS 49(7) AND 49(8) REVIEWS

[222] The Minister has submitted that two awards have not been properly reviewed pursuant to items 49(7) and (8). They are the *Toyota Australia Vehicle Industry Award 1988* (C No. 90274 of 1998) and the *Holden Limited Consolidated Award 1998* (C No. 90283 of 1998). The Minister provided some particulars of the parts of the award which it was suggested should be deleted or amended as part of the review. The submission was made on the basis that no review had occurred at the time the awards were varied pursuant to item 49 or that any such review was inadequate. It was submitted on behalf of the employers that they recognise that further work now needs to be done in converting paid rates awards to minimum rates and that work has already commenced, that all of the existing awards applying to each of them must be consolidated in two single enterprise awards and that as part of the consolidation process further refinement of a number of provisions is necessary to ensure the final award is current and free of ambiguity and uncertainty. They conceded that some variation to the existing provisions may be necessary or desirable but stated that there is no need for a further review of the awards in these proceedings. They also pointed out that the Commission was actively involved in the conciliation process and was provided with copies of the proposed awards and determined that the requirements of the legislation were satisfied. On the basis of these submissions we do not think it is in the public interest that we use our powers under s.109 to undertake a further review of the award pursuant to items 49(7) and (8). Any new award made as a result of the consolidation process which has been foreshadowed must comply with s.143(1B) and (1C). Those provisions replicate the terms of items 49(7) and (8).

SUMMARY DISMISSAL - UNNECESSARY DUPLICATION

Chemical Industry - Scientific and Technical Officers Award, 1998 (C No. 90297 of 1998)

[223] *4.3.3 Summary Dismissal*

The employer has the right to dismiss any employee without notice for serious misconduct and in such cases any entitlements under this award are to be paid up to the time of dismissal only.

Aerospace Industry (Hawker de Havilland) Award 1998 (C No. 90302 of 1998)

[224] *4.3.3 Summary Dismissal*

The company has the right to dismiss any employee without notice for serious misconduct, neglect of duty and in such cases any entitlements under this award are to be paid up to the time of dismissal only

[225] The Minister, supported by ACCI, submitted that these clauses should be deleted from the awards for two reasons. Firstly it was submitted that they involve unnecessary duplication contrary to item 49(8)(c) because dismissal without notice for misconduct is permitted elsewhere in each award under different subclauses. Secondly it was submitted the clauses are not allowable being about substantive rights of termination rather than notice of termination. We find these submissions puzzling. If both are correct the other clauses of which these are said to be duplications would not be allowable yet no challenge is made to them. ACCI submitted that none of the clauses is allowable because their subject matter is not notice of termination.

[226] We have concluded that the clauses are not allowable because they relate to substantive rights of termination of employment rather than notice of termination. ACCI drew our attention to clause 17.1.5 of the award approved in the *Hospitality Decision* [at p.124]. That provision relieves the employer of the obligation to give notice of termination of employment where the employee is guilty of conduct justifying instant dismissal. We think, that a provision in those terms is the appropriate way to deal with the question of summary dismissal. We shall delete the clauses being challenged.

DISPUTE RESOLUTION - ADDITIONAL PROCEDURES

[227] This part of our decision deals with a number of other award provisions which the Minister submitted would have been deleted from the awards in question if a proper review had been conducted pursuant to items 49(7) and (8). The Minister submitted that the provisions contain dispute settling procedures apart from and in addition to the main dispute settling procedures in each award. It was submitted that in the *Hospitality Decision* a dispute settling mechanism additional to the main dispute settling clause had been deleted by the Full Bench pursuant to item 49(8)(d) [at p.18]. It is convenient to deal with all of the provisions together.

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[228] *33. SHOP STEWARDS, SENIOR SHOP STEWARDS AND GRIEVANCE PROCEDURE (excluding engineer and scientist employees)*

Grievance procedure

(cdc) Notwithstanding anything appearing elsewhere in this clause the following grievance procedure shall apply in the event of a grievance being raised by an employee:

(i) The employee should normally advise his/her supervisor of his/her problem or complaint, but alternatively, he/she may elect for personal reasons to have his/her shop steward take up the problem or complaint on his/her behalf. The supervisor of the employee concerned will then endeavour to solve the matter within his/her supervisory capacity.

(ii) If the matter is not resolved to the satisfaction of the employee/shop steward, the employee/shop steward should seek approval from the supervisor to interview the industrial officer and permission to do so will be granted.

If the employee initially elects to complain to his/her supervisor and subsequently is not satisfied he/she may request his/her shop steward to represent him/her before the industrial officer. In this case he/she must seek and will be granted reasonable time from his/her supervisor to privately acquaint his/her shop steward of the details of the matter to be discussed.

(iii) If the matter is still not resolved to the satisfaction of the employee/shop steward, the shop steward may refer the matter to the senior shop steward. The shop steward must seek and will be granted reasonable time from his/her supervisor to privately acquaint the senior shop steward on the details of the matter.

(iv) The senior shop steward should then seek approval from his/her supervisor to approach the industrial officer and permission to do so will be granted. The senior shop steward will not inspect or investigate a matter without the prior approval of the industrial officer and on such inspections or investigations the senior shop steward must be accompanied by the industrial officer.

(v) The industrial officer will refer all matters not satisfactorily settled to the senior industrial officer.

(vi) Nothing in the above procedure will take away the right of any shop steward or employee who has previously complained to his/her supervisor, and the matter has not been resolved to his/her satisfaction, to then refer the problem for the attention of a full-time paid union official.

(vii) It is the responsibility of the supervisor to advise the employee and/or shop steward of the progress of the complaint if there is a delay in resolving the issue. This will apply whether the complaint is being handled by the industrial officer or the supervisor of the section concerned.

(viii) It is the responsibility of the industrial officer to advise the senior shop steward of the progress of a compliant in which the senior shop steward is involved.

(ix) Plant supervisors have the same rights of grievance procedures through their respective supervision as applies to other employees. Consequently, where a supervisor carries out his/her function in disciplining a plant employee and a dispute arises, particularly an inter-union dispute, either the employee or the supervisor concerned, or both, may seek to resolve the dispute through the grievance procedure, or by agreement between the union officials concerned, the matter may be referred to the Australian Industrial Relations Commission.

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998)

[229] *42. ACCIDENT PAY*

42.17 In the event of any dispute arising as to the entitlement of an employee to payment of accident pay in accordance with the provisions of this Award the matter shall if any party to this Award so requires be referred to the Australian Industrial Relations Commission .

Furniture & Furnishing Trades (New South Wales) Award 1998 (C No. 90290 of 1998)

[230] *25.3 Dirty work*

25.3.2 In case of disagreement between the employer and the worker, the worker or delegate on the worker's behalf shall be entitled, within 24 hours, to ask for a decision on the workers claim by the employers industrial officer, the employer or other appropriate officer. In such case a decision shall be given on the workers claim within two working days of the claim, or else the said allowance shall be paid.

Furnishing Trades - General - Victoria, South Australia and Tasmania Award 1998 (C No. 90291 of 1998)

[231] *27.7 Dirty work*

27.7.2 In the case of disagreement between the foreperson/supervisor and an employee, the employee or shop steward on his/her behalf shall be entitled, within 24 hours, to ask for a decision on the employee's claim by the employer's industrial officer if there be one, or otherwise by the employer or the executive officer responsible for the management or superintendence of the plant concerned. In such case a decision shall be given on the employee's claim within 48 hours of its being asked for (unless that time expires on a non-working day, in which case it shall be given during the next working day) or else the said allowance shall be paid.

...

27.14 Second-hand work

27.14.5 In the event of any dispute arising as to whether work is second-hand, an employee or a shop steward on his/her behalf or the employer or the supervisor on his/her behalf shall be entitled within 24 hours to ask for a decision on the dispute by the Australian Industrial Relations Commission **.**

Dental (Private Sector Victoria) Award 1998 (C No. 90294 of 1998)

[232] *23.6 All employees - disagreements concerning working hours*

In the absence of agreement in any establishment in respect to working hours, the procedure to be followed to resolve the matter shall be as follows:

23.6.1 Consultation shall take place within the particular establishment concerned.

23.6.2 If a problem is unable to be resolved at establishment level, it may be referred to the Branch Secretary of the Union, or his/her nominated representative, at which level the dispute shall be dealt with without delay.

23.6.3 If the problem remains unresolved, may be referred by either party to the Australian Industrial Relations Commission.

National Electrical, Electronic and Communications Contracting Industry Award 1998 (C No. 90295 of 1998)

[233] *33.8 General conditions relating to protective clothing and footwear*

33.8.1 It is further agreed by the parties to this award that it is a condition of supply of footwear and clothing that:

...

33.8.1(g) In the event of a dispute arising between an employer and the union in regard to the provisions of this clause, the parties agree that the dispute will be referred to the Australian Industrial Relations Commission for determination and work will continue while the dispute is being resolved.

[234] We adopt the remarks in the *Hospitality Decision* that it is undesirable for an award to contain more than one dispute settling procedure. Nevertheless, given the subject matter, in our opinion it is not in the public interest that we exercise our powers pursuant to s.109 to review the provisions pursuant to items 49(7) and

(8).

OBSOLETE OR UNNECESSARY PROVISIONS

[235] In this part of our decision we deal with provisions challenged by the Minister either on the basis that they are obsolete and should be deleted pursuant to item 49(8)(d) or that they are unnecessary and should be deleted for reasons relied on by the Full Bench in the *Hospitality Decision* . In that case the Commission deleted a clause dealing with sexual harassment because sexual harassment is specifically made unlawful by Commonwealth and State legislation [*Hospitality Decision* at p.12]. The Minister submitted that the Full Bench also deleted provisions dealing with time and wages books on the ground that they replicated the regulations [*Hospitality Decision* at p.28].

Vehicle Industry - Kenworth Trucks - Award 1998 (C No. 90272 of 1998)

[236] *7.4 Long Service Leave*

An employee is entitled to the long service leave provisions contained in the Long Service Leave Act 1992 (Victoria).

[237] In our opinion it is not in the public interest to exercise our powers under s.109 to review this provision.

Health and Allied Services - Public Sector - Victoria Consolidated Award 1998 (C No. 90284 of 1998)

[238] *APPENDIX B - JOBSKILLS TRAINEES*

1. ARRANGEMENT

2. DEFINITION

A Jobskills trainee is an employee who is employed under the conditions applying in the Commonwealth Government Jobskills program guidelines as recorded in Schedule A to this Appendix.

3. APPLICATION

This appendix applies to health and community services employees engaged under the Jobskills program and, insofar as the terms of this appendix vary from the terms of the Health and Allied Services - Private Sector - Victoria Consolidated Award 1996 the terms of this appendix shall prevail. In all other respects the terms of the applicable award shall continue to operate.

4. JOBSKILLS TRAINEE

4.1 Training Conditions

4.1.1 A Jobskills trainee shall attend approved on and off-the-job training prescribed in the relevant training agreement, or as notified to the Jobskills trainee by the employer or agent.

4.1.2 Jobskills trainees will receive over a period of up to 26 weeks a mix of supervised work experience, structured training on-the-job and off-the-job and the opportunity to develop and practice new skills in a work environment.

4.1.3 Jobskills trainees may only be engaged by employers to undertake activities under the Jobskills program guidelines. The employer shall ensure that the Jobskills trainee is permitted to attend the prescribed off-the-job training and is provided with appropriate on-the-job training.

4.1.4 The employer shall provide an appropriate level of supervision in accordance with the approved training plan.

4.1.5 No Jobskills trainee shall commence work unless the Jobskills participant plan (Schedule A) has been completed and signed by all parties to the plan.

4.2 Employment conditions

4.2.1 Jobskills trainees shall be engaged in addition to existing staff levels. Positions held by permanent employees shall not be filled by Jobskills trainees.

4.2.2 Jobskills trainees shall be engaged for a period of up to 26 weeks as full-time employees.

4.2.3 Jobskills trainees are permitted to be absent from work without loss of continuity of employment to attend the off-the- job training in accordance with the training plan. However, except for absences provided for under the award failure to attend work or training without an acceptable cause will result in loss of pay for the period of absence.

4.2.4 Overtime shall not be worked by Jobskills trainees except to enable the requirements of the training plan to be effected. When overtime is worked the relevant penalties and allowances of this award, based on the trainee wage shall apply. Jobskill trainees shall be able to work weekend shifts, and shall receive an additional payment of $20.00 for each shift so worked. The shift-worker provisions of this award shall not apply.

4.2.5 The union shall be afforded reasonable access to Jobskills trainees for the purposes of explaining the role and functions of the union and enrolment of the trainee as a member.

4.2.6 Jobskills trainees employed on day or afternoon shifts shall not be required to work night shift or public holidays. Jobskills trainees may not be rostered to work weekends without prior written approval from the relevant HSUA branch secretary.

4.3 Wages

The weekly wages payable to Jobskills trainees shall be $300.00 gross. It is the rate for all purposes of the award and takes account the range and extent of training provided.

5. NO PRECEDENT

This appendix represents the outcome of negotiations on the part of all parties and will not be used as a precedent in proceedings before industrial tribunals.

6. NO DISADVANTAGE

No existing full-time, part-time or casual employee who is a member of the Health Services Union of Australia shall suffer any reduction in hours, diminution of conditions or disadvantage as a result of the placement of Jobskills trainees.

7. RESERVATION

The parties to this appendix reserve the right to seek its variation or revocation if circumstances develop in the operation of the Jobskills program which adversely affect their interests or the interests of their members to the extent that variation or revocation is warranted.

SCHEDULE A - JOBSKILLS PARTICIPANT PLAN

[text of schedule not reproduced]

Appendix D - National Training Wage Award 1994

[The whole of the above award is attached to this award as an appendix - text not reproduced]

[239] The employers argued that the Jobskills Trainees provisions should be deleted as did the HSUA. The HSUA, however, submitted that obsolete provisions can be deleted in subsequent award variations. These provisions appear to be out of date. Commissioner Hingley's award should be varied. We direct the Commissioner to deal with the provisions under item 49(8)(d) in accordance with this decision. If the Jobskills provisions are obsolete they should be deleted from the award.

[240] In relation to the *National Training Wage Award 1994* in Appendix D, all parties agree that it could be incorporated by reference rather than being included as an appendix to the award. That appears to us to be a highly desirable course, if indeed it is necessary that the award contain reference to the *National Training Wage Award 1994* at all. The Commissioner's decision should be varied in this respect also and we direct the Commissioner to deal with Appendix D in accordance with this decision.

Health and Allied Services - Private Sector - Victoria Consolidated Award 1998 (C No. 90285 of 1998)

[241] *26. IMPLEMENTATION OF 38 HOUR WEEK*

26.1 This clause shall only apply to employers who implement a 38 hour week after the date of operation of this award.

26.2 The method of implementation of the 38 hour week may be any one of the following:

26.2.1 by employees working less than eight ordinary hours each day; or

26.2.2 by employees working less than eight ordinary hours on one or more days each week; or

26.2.3 by rostering employees off on various days of the week during a particular work cycle so that each employee has one week day off during that cycle.

26.3 In absence of agreement at each facility in respect to the implementation of the 38 hour week, the following procedure shall be applied without delay:

26.3.1 Consultation shall take place within the particular facility concerned.

26.3.2 If the matter is unresolved at the facility level, the matter shall be referred to the State Secretary of the Union or their deputy, at which level a conference of the parties shall be convened without delay.

26.3.3 In the absence of agreement either party may refer the matter to the Commission for resolution.

26.4 Except as provided in provided in subclauses (h) and (i) hereof, in cases where, by virtue of the arrangement of ordinary hours, an employee in accordance with paragraph (e)(iii) hereof, is entitled to a day off during their work cycle, such employee shall be advised by the employer at least four weeks in advance of the weekday they are to take off; provided that a lesser period of notice may be agreed by the employer and the majority of employees in the facility, section or sections concerned.

26.5 An employer, with the agreement of the majority of employees concerned, may substitute the day an employee is to take off in accordance with paragraph (e)(iii) for another day to meet the requirements of the facility or some other emergency situation.

26.5.1 An individual employee, with the agreement of the employer, may substitute the day they are to take off for another day.

26.6 Where the hours of work in a facility or section are organised in accordance with subclause (e)(iii) hereof an employer the Union and the majority of employees in the facility, section or sections concerned may agree to accrue up to a maximum of five rostered days off.

APPENDIX B - JOBSKILLS TRAINEES

1. ARRANGEMENT

Subject matter Clause number

Application 3
Arrangement 1
Definition 2
Jobskills trainee 4

No disadvantage 6

No precedent 5

Reservation 7

2. DEFINITION

A Jobskills trainee is an employee who is employed under the conditions applying in the Commonwealth Government Jobskills program guidelines as recorded in Schedule A to this Appendix.

3. APPLICATION

This appendix applies to health and community services employees engaged under the Jobskills program and, insofar as the terms of this appendix vary from the terms of the Health and Allied Services - Private Sector - Victoria Award 1995 the terms of this appendix shall prevail. In all other respects the terms of the applicable award shall continue to operate.

4. JOBSKILLS TRAINEE

4.1 Training Conditions

4.1.1 A Jobskills trainee shall attend approved on and off-the-job training prescribed in the relevant training agreement, or as notified to the Jobskills trainee by the employer or agent.

4.1.2 Jobskills trainees will receive over a period of up to 26 weeks a mix of supervised work experience, structured training on-the-job and off-the-job and the opportunity to develop and practice new skills in a work environment.

4.1.3 Jobskills trainees may only be engaged by employers to undertake activities under the Jobskills program guidelines. The employer shall ensure that the Jobskills trainee is permitted to attend the prescribed off-the-job training and is provided with appropriate on-the-job training.

4.1.4 The employer shall provide an appropriate level of supervision in accordance with the approved training plan.

4.1.5 No Jobskills trainee shall commence work unless the Jobskills participant plan (Schedule A) has been completed and signed by all parties to the plan.

4.2 Employment conditions

4.2.1 Jobskills trainees shall be engaged in addition to existing staff levels. Positions held by permanent employees shall not be filled by Jobskills trainees.

4.2.2 Jobskills trainees shall be engaged for a period of up to 26 weeks as full-time employees.

4.2.3 Jobskills trainees are permitted to be absent from work without loss of continuity of employment to attend the off-the- job training in accordance with the training plan. However, except for absences provided for under the award failure to attend work or training without an acceptable cause will result in loss of pay for the period of absence.

4.2.4 Overtime shall not be worked by Jobskills trainees except to enable the requirements of the training plan to be effected. When overtime is worked the relevant penalties and allowances of this award, based on the trainee wage shall apply. Jobskill trainees shall be able to work weekend shifts, and shall receive an additional payment of $20 (twenty dollars for each shift so worked). The shift-worker provisions of this award shall not apply.

4.2.5 The Union shall be afforded reasonable access to Jobskills trainees for the purposes of explaining the role and functions of the Union and enrolment of the trainee as a member.

4.2.6 Jobskills trainees employed on day or afternoon shifts shall not be required to work night shift or public holidays. Jobskills trainees may not be rostered to work weekends without prior written approval from the relevant HSUA Branch Secretary.

4.3 Wages

The weekly wages payable to Jobskills trainees shall be $300.00 gross. It is the rate for all purposes of the award and takes account the range and extent of training provided.

5. No Precedent

This appendix represents the outcome of negotiations on the part of all parties and will not be used as a precedent in proceedings before industrial tribunals.

6. No Disadvantage

No existing full-time, part-time or casual employee who is a member of the Health Services Union of Australia shall suffer any reduction in hours, diminution of conditions or disadvantage as a result of the placement of Jobskills trainees.

7. Reservation

The parties to this appendix reserve the right to seek its variation or revocation if circumstances develop in the operation of the Jobskills program which adversely affect their interests or the interests of their members to the extent that variation or revocation is warranted.

SCHEDULE A - JOBSKILLS PARTICPANT PLAN

JOBSKILLS AGREEMENT

[text of schedule not reproduced]

[242] We turn first to clause 26 - Implementation of 38 Hour Week . Whilst it is true, as submitted by the Minister, that the *Hospitality Decision* resulted in a significant rationalisation of the hours of work provision in the award concerned, in that case there was significant debate between the parties as to the level of award regulation that was appropriate. In this case the award parties wish to retain the provisions which the Minister has challenged. In our opinion it is not in the public interest that we exercise our powers pursuant to s.109 to review the clause.

[243] The provisions dealing with Jobskills Trainees appear to be obsolete. We will follow the same course as we have in relation to similar provisions in the *Health and Allied Services - Public Sector - Victoria Consolidated Award 1996.* The award will be remitted to Commissioner Hingley for the purpose of giving effect to this decision.

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[244] *22.1.2 Weekly wage rates*

The rates of pay prescribed in 22.1.3 and 22.1.4(c) arise out of the completion of the minimum rates adjustment process and the broadbanding of classifications as a consequence of the establishment of a national pay scale in accordance with the August 1989 National Wage Case Decision [Print H9100].

42. Accident Pay

An employer shall pay and an employee shall be entitled to receive accident pay in accordance with State legislation.

[245] The parties agree that clause 22.1.2 is obsolete. We will delete it. In our opinion it is not in the public interest we exercise our powers pursuant to s.109 in relation to clause 42.

Furniture & Furnishing Trades (New South Wales) Award 1998 (C No. 90290 of 1998)

[246] ***32. Long Service Leave***

See Long Service Leave Act 1955 (NSW).

[247] In our opinion it is not in the public interest that we exercise our powers pursuant to s.109 in relation to this provision.

Furnishing Trades - General - Victoria, South Australia and Tasmania Award 1998 (C No. 90291 of 1998)

[248] *21.3 Comparative Schedule of Old Classifications and New Broadbanded Wage Levels*

21.3.1 Comparative schedule

[Schedule not reproduced]

21.3.2 Transitional arrangements

Whilst the transitional arrangements from the old to the new structure are being finalised, no employee shall be entitled to seek re-classification on the basis that he or she comes within the scope of the new job definitions and definitive tasks, as set out in 21.2 of this award until appropriate skill standards and skill assessment procedures have been established for the new structure.

21.3.3 No reduction of pay

As a consequence of the introduction of the classifications and rates of pay structure contained in 22.1.4, employees are to be transferred to that new structure without loss of pay in accordance with 21.3.2 which "lines up" the old classification description with the new levels.

22.2.1(a)(ii) The provisions provided for in 22.2.1(a)(i) shall apply for a pilot period of twelve months from the making of this award to allow the parties to this award to consider the desirability and practicality of the program continuing.

...

22.2.1(b)(iii) The provisions provided for in 22.2.1(b)(ii) and (iii) shall apply for a pilot period of twelve months from the making of this award, to allow the parties to this award to consider the desirability and practicality of the program continuing.

22.3 AVC Pilot - cabinet making/wood machining

22.3.1 Rates to apply during competency based training level.

The rates of pay for the AVC Pilot program specified in this clause will apply during the period competency based training arrangements are being trialled in accordance with the terms of the agreed project.

22.3.2 Period of service

The nominal period to be served by participating trainees shall be no less than three years.

22.3.3 Development of course, selection of modules and training requirements.

22.3.3(a) The training course has been developed to meet the requirements of the National Furnishing Industry Training Council by the South Australian Furnishing Industry Training Council. Training modules will be selected from those as specified in subparagraphs 22.3.7(a), (b) and (c) accredited by the Industrial and Commercial Training Commission. Trainees will be required to become competent in all the Broad Based Skills, points value - 270. The remaining modules of training to be selected from Core Skills and Specific Skills, across a maximum of two trades, (See Note 1) to a value of 530 points. Course Total 800 points. (See Note 2).

22.3.3(b) Note 1: In the selection of training modules, at least 65% must be selected from one trade stream and at least 30% from the other stream.

22.3.3(c) Note 2: Trainees require competence in modules to the value of 800 points to achieve Trade status. Module selection should be made accordingly.

22.3.4 The weekly wage rate for junior trainees shall be the undermentioned percentages of the total ordinary weekly rates, prescribed in the award for a Tradesperson, Level 1.

[Table not reproduced]

22.3.5 Alteration of nominal period

22.3.5(a) The nominal period referred to above may be altered to take into account such appropriate competencies as the trainee may have gained prior to the commencement of the program (RPL).

22.3.5(b) These will be recognised using guidelines and criteria as approved by the industrial parties.

22.3.6 Management of project and provision of reports

22.3.6(a) The project will be managed by a Project Officer and monitored by the project management committee, to assess progress.

22.3.6(b) The management committee will provide regular reports to the Commonwealth and National Furnishing Industry Restructuring Committee during the life of the project. Such reports shall be provided at intervals not exceeding six months.

22.3.7 Training modules

22.3.7(a) Broad based skills

[List not reproduced]

22.3.7(b) Core skills

[List not reproduced]

22.3.7(c) Specific skills

[List not reproduced]

[249] Having considered the submissions made by the parties to the award we are unable to conclude that clause 21.3 is obsolete. The CFMEU and at least some of the employers strongly opposed its deletion. The same can be said of the remainder of the clauses under challenge with the exception of clause 22.3, which the CFMEU conceded is obsolete. Even in the case of clause 22.3, however, the FIAA (Vic/Tas) submitted that the pilot training programme has not yet been cancelled and that the provision therefore is not obsolete. It is not in the public interest that we exercise our powers under s.109 in relation to any of these provisions.

LIMITATIONS ON EMPLOYMENT

[250] A number of provisions allegedly containing limitations on employment were challenged on the basis that they should have been deleted pursuant to items 49(7) or (8). In relation to some of the provisions the challenge was supported on the basis that they are not allowable, contain an absolute prohibition on work or are contrary to s.89A(4)(a).

Vehicle Industry - Kenworth Trucks - Award 1998 (C No. 90272 of 1998)

[251] *4.6.3 Is an employee prohibited from performing certain work?*

A junior employee is not to be employed:

(a) If under the age of 16 years, on oil or gas burners or fires used for heating of small articles, or using electric arc or oxyacetylene blow pipe; or

(b) If under the age of 18, on die setting on power presses or as an operator of power driven guillotines.

6.3.6 Can a junior be employed on shift work?

No. A person under the age of 16 years will not be employed on shift work.

[252] In relation to clause 4.6.3 the Minister relied in particular on items 49(7)(b) and 49(7)(c). It was also submitted that because the clause deals with occupational health and safety it is not allowable. In the *Hospitality Decision* [at p.12] the Commission deleted a clause which read as follows:

"14.2.1 Any bar attendant or cellarman shall not be required to scrub or wash floors or tables; such work shall be performed by the useful."

The Bench's comments on that clause included the following:

"Clause 14.2.1 has a number of unusual features. It is a direct restriction on the performance of work of a particular kind. The prohibited work would clearly not be beyond the skill and competence of the persons employed in other classifications and no safety issue is involved. No reason was advanced for retaining the restrictions."

[253] In this case the restriction on the performance of the work in question to employees over a specified age seems to involve implicit safety considerations. In the *Hospitality Decision* there was no obvious rationale for the restriction. In our view the clause should be characterised as dealing with the duties of employees of a particular kind, an allowable award matter pursuant to s.89A (2)(a). We reject the Minister's alternative submission that the clause is not allowable because it deals with occupational health and safety. Whilst safety may be an element in the provision, as we have already said the provision is allowable pursuant to s.89A(2)(a). Furthermore there is no evidence that would lead us to delete the provisions under item 49(7)(b) or 49(7)(c). In our opinion it is not in the public interest that we exercise our powers pursuant to s.109 in relation to this provision.

[254] The Minister relied upon items 49(7)(b) and (c) in relation to the challenge to clause 6.3.6 also. While it was acknowledged that a similar clause was left undisturbed by the *Hospitality Decision* [pp.15 and 112], it was pointed out that this clause contains an absolute prohibition on employees under the age of 16 being employed on shift work, whereas the clause considered in the *Hospitality Decision* prevented employees under the age of 18 from being compelled to work shift work without their consent. The Minister and ACCI also submitted that the clause is not allowable nor a s.89A(6) provision. In addition the AI Group submitted that the clause offends s.89A(4)(a) because it restricts the number or proportion of employees that an employer may employ on shift work. In our view the provision is allowable. Shift work is an allowable award matter pursuant to s.89A(2)(r). The provision is not intended to restrict the number or proportion of employees that an employer may employ on shift work, its purpose being to prevent the employment of minors on shift work. In the absence of any submission by a party to the award that we should act under item 49(7) we are reluctant to do so. In the circumstances it is not in the public interest that we exercise our powers under s.109 in relation to this clause.

Toyota Australia Vehicle Industry Award 1988 (C No. 90274 of 1998)

[255] *13(e) Prohibition of juniors*

No employee under the age of sixteen years shall be required or permitted to work on afternoon or night shift.

[256] For the reasons given in relation to clause 6.3.6 of the *Vehicle Industry - Kenworth Trucks - Award 1998* it is not in the public interest that we exercise our powers pursuant to s.109 to review the provision.

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[257] *10(e) Prohibited work*

A junior non trade employee shall not be employed:

(i) on die setting on power presses, as a furnaceperson; or as an operator of power driven guillotines; or

(ii) if under the age of 16 years, on oil or gas burners or fires used for heating of small articles, or using electric arc of oxyacetylene blowpipes.

15(h) Prohibition on juniors/trainees (trade, non trade, technical and clerical employees)

No employee under the age of sixteen years shall be required or permitted to work on afternoon or night shift.

[258] In so far as clause 10(e) is concerned, we apply the same reasoning as that we have set out in dealing with clause 4.6.3 of the *Vehicle Industry - Kenworth Trucks - Award 1998* . We reject the Minister's submissions. In relation to clause 15(h) for the reasons given in relation to clause 6.3.6 of the *Vehicle Industry - Kenworth Trucks - Award 1998* it is not in the public interest that we exercise our powers pursuant to s.109 in relation to this provision.

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998)

[259] *15.4 Limitation of Employment*

15.4.1 An employee working on weekly engagement for an employer bound by this Award shall not perform work (except under the prescribed conditions for payment by results in clause 38) by contracting, sub-contracting, sub-letting or other similar systems.

15.4.2 Except as hereinafter provided, no weekly employees shall work for more than one employer during any week nor shall an employee make or assist in the production of goods for sale on his/her own account.

15.6.3 Junior Workers

In classifications for which no apprenticeship is provided, one junior worker shall be allowed to each four adult workers or fraction thereof.

[260] The terms of clause 15.4.1 and 15.4.2 are not allowable award matters. No submission was made that they are s.89A(6) provisions. We will delete them. We have already decided that restrictions on the proportion of juniors to be employed are contrary to s.89A(4)(a) (see the section headed Limitations on the Type of Employment). We will delete the provision.

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[261] *16.4 Limitation of employment*

16.4.1 An employee working on weekly engagement for an employer bound by this award shall not perform work (except under the prescribed conditions for payment by results in clause 25 - Payment by Results) by contracting, sub-contracting, sub-letting or other similar systems.

16.4.2 Except as hereinafter provided, no weekly employees shall work for more than one employer during any week nor shall an employee make or assist in the production of goods for sale on his/her own account.

[262] This clause is identical to clause 15.4 of the *Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996* . For the reasons given in connection with that clause, this clause will be deleted also.

Furniture & Furnishing Trades (New South Wales) Award 1998 (C No. 90290 of 1998)

[263] *16.4 Work for other than employer*

16.4.1 No worker shall make or assist in making goods for sale either on the worker's own account or for any other employer.

[264] The Minister, supported by ACCI and the AI Group, submitted that this clause should be deleted pursuant to item 49(7)(b) or (c) because it restricts work requirements and is neither allowable nor a s.89A(6) provision. The clause is not allowable nor a s.89A(6) provision. We shall delete it.

Furnishing Trades - General - Victoria, South Australia and Tasmania Award 1998 (C No. 90291 of 1998)

[265] *16.4 Limitation of employment*

16.4.1 An employee working on weekly engagement for an employer bound by this Award shall not perform work (except under the prescribed conditions for payment by results in clause 23 of this award) by contracting, sub-contracting, sub-letting or other similar systems.

16.4.2 Except as hereinafter provided, no weekly employee shall work for more than one employer during any week nor shall an employee make or assist in the production of goods for sale on his/her own account.

[266] The Minister, supported by ACCI, submitted that this clause should be deleted pursuant to item 49(7)(b) or (c) or both because it restricts work requirements and is neither an allowable award matter nor a s.89A(6) provision. The clause is not allowable, nor a s.89A (6) provision. We shall delete it.

OTHER PROVISIONS

[267] In this part of our decision we consider challenges made to a range of award provisions which do not fall easily into any of the groupings which we have dealt with so far.

Water Ecoscience Award 1998 (C No. 90271 of 1998)

[268] *6. INDIVIDUAL AGREEMENTS*

6.1 Where Water Ecoscience and an employee agree, an individual employment agreement may be negotiated and shall take precedence over the terms of this award.

6.2 The overall benefits of any individual employment agreement shall be at least equivalent in total value to those contained in this award.

6.3 An employee may elect to have a Union Official or another representative to assist him/her in negotiations with Water Ecoscience.

6.4 All individual agreements shall be committed to writing and shall be signed by both parties and exchanged, and shall remain confidential.

6.5 Any dispute in relation to an individual employment agreement may be dealt with in accordance with the disputes settling procedures in clause 10 - Procedure to avoid Industrial Disputation, of this award

27. LEAVE WITHOUT PAY

27.1 Water Ecoscience may approve a period of leave without pay on the application of an employee for any reasons considered warranted. While such leave will not be considered a break in service, any period in excess of 152 hours shall not be counted as service for the purpose of calculating sick leave, annual leave and long service leave entitlements.

27.2 Water Ecoscience shall not contribute the employer contribution for superannuation fund while an employee is on leave without pay, and such leave shall not count as service for superannuation purposes, provided that the employee may elect to contribute to the fund.

[269] The Minister, supported by ACCI and the AMWU, submitted that clause 6 is not allowable. No submission was made that the clause is allowable or a s.89A(6) provision. The Minister submitted, in addition, that the clause is not a facilitative provision within the meaning of item 49(8)(a) or the definition of a facilitative provision adopted in the *Hospitality Decision* [at p.39]. It was submitted in particular that the clause provides for individual agreements which may override any term of the award and so change the level of entitlement provided by that term.

[270] We have concluded that clause 6 is not an allowable award matter, nor a s.89A(6) provision. Our primary reason for that conclusion is that the clause permits the complete abrogation of the rights and obligations in the award by individual agreement. Whilst item 49(8)(a) (and s.143(1C)(a)) contemplate provision for variation of award rights and obligations, they do so in a limited way. The variations they provide for relate to how the award provisions are to apply. The distinction between variations of that kind and variations which completely bypass the award is one of substance. We will delete the clause.

[271] The Minister, supported by ACCI, submitted that clause 27 is not an allowable award matter pursuant to s.89A(2)(g) and is not a s.89A(6) provision. The AMWU submitted that the provision is *"incidental to annual leave and personal/carers' leave, etc. and necessary to the effective and efficient operation of the award."* In our view the provision is not allowable within either s.89A(2)(e) or s.89A(2)(g); nor is the provision incidental to the allowable award matters those sections contain. We shall delete it. Whilst the *Leave Allowability Decision* examined the scope of s.89A(2)(g) with reference to various types of leave, it is unnecessary to have regard to that decision because clause 27 permits leave to be granted for any purpose whatsoever.

Research & Supply Vessel (Aurora Australis) Award 1998 (C No. 90273 of 1998)

[272] *22.3 Medicals*

22.3.1 Each employee will undertake medical examinations as required in accordance with the standards deemed appropriate by the chief medical officer of the Antarctic Division having due regard to the climatic conditions and geographic remoteness of Antarctica.

[273] AMMA, on behalf of the employer, and the MUA submitted that this clause is a s.89A(6) provision being incidental to classifications of employees and skill-based career paths (s.89A(2)(a)) and necessary for the effective operation of the award. It was also submitted that the attainment and maintenance of good health and physical fitness can enable an employee to be categorised and identified within the classification structure in this particular award. The AMOU submitted the clause is an allowable award matter pursuant to s.89A(2)(a) and in addition that it is a s.89A(6) provision being incidental to termination of employment and dispute settling and necessary for the effective operation of the award. The Australian Institute of Marine and Power Engineers (AIMPE) submitted that the clauses are necessary for the effective operation of the award but did not specify any allowable award matter to which they might be incidental.

[274] An award requirement imposing a certain standard of physical fitness as a condition of entry to or progression through a classification structure might be allowable pursuant to s.89A(2)(a) or even conceivably a s.89A(6) provision. Clause 22.3.1, however, is

not of that character. It purports to require employees to undertake medical examinations. It is not allowable nor a s.89A(6) provision.

Journalists (Television) Award 1998 (C No. 90280 of 1998)

[275] *9. CLASSIFICATION OF MEMBERS*

9.1 Provisions applicable to members employed by respondents named in schedule 1

All members other than news editors, cadets, casuals and members employed outside the Commonwealth, shall be classified by their employer in accordance with the following table:

Members Grade Grades Grade Grades Grade Grade
Classified 8 6 & 7 5 3 and 4 2 1
5% 15% 15% 35% 15% 15%

1 - - - 1 - -
2 - - - 1 1 -
3 - - - 1 1 1
4 - - - 2 1 1
5 - 1 - 2 1 1
6 - 1 - 2 2 1
7 - 1 - 3 2 1
8 - 1 1 3 2 1
9 - 1 1 4 2 1
10 1 1 1 4 2 1
11 1 1 1 4 2 2
12 1 1 1 5 2 2
13 1 1 1 6 2 2
14 1 1 1 6 3 2
15 1 2 1 6 3 2
16 1 2 2 6 3 2
17 1 2 2 6 4 2
18 1 2 2 7 4 2

19 1 2 3 7 4 2

20 1 2 3 8 4 2

21 1 2 3 8 4 3

22 1 2 3 9 4 3

23 1 3 3 9 4 3

24 1 3 3 10 4 3

25 1 3 3 11 4 3

and thereafter in a similar manner.

9.2 Provisions applicable to members employed by respondents named in schedule 2

Members, other than cadets and casuals, shall be classified by his or her employer in accordance with the following table:

Members Grades Grade Grade Grade

4-8 3 2 1

20% 40% 20% 20%

1 - - - -

2 - 1 - 1

3 1 1 - 1

4 1 1 1 1

5 1 2 1 1

6 1 2 2 1

7 1 3 2 1

8 1 3 2 2

9 2 3 2 2

10 2 4 2 2

and thereafter in a similar manner.

9.3 Provisions applicable to all members

9.3.1 Any excess in any grade may be used to make up the proportion prescribed for any lower grade in the tables referred to in subclauses 9.1 and 9.2 hereof.

9.3.2 Classification shall be for the purpose only of determining the minimum rates of payment to which members shall be entitled and not for the purpose of controlling or regulating the qualifications, work or duties of the member.

9.3.4 Members solely employed on a full-time basis by an employer in any city or town outside the city of the television station shall be included in the classification table as provided for in subclauses 9.1 and 9.2 hereof.

10. PART-TIME EMPLOYMENT

...

10.3 Every part-time employee shall be allocated a grade provided for in the classification tables specified in clause 9 Classification of members, and for the purposes of the application of that table to part-time employees:

10.3.1 The ordinary weekly hours of work of each part-time employee shall be expressed as a percentage of 38;

10.3.2 The percentage so calculated for each part-time employee in the same grade shall be totalled and each part of such total that is 50 per cent but not greater than 100 per cent shall be treated as one employee for the purposes of the relevant classification table;

10.3.3 An employer shall be permitted a period of eight weeks to ensure compliance with the classification table following the employment/ cessation of employment of any part-time employee.

27. TECHNOLOGY, VDT BREAKS AND RELATED MATTERS

27.1 Where training in the use of new equipment is not given in the course of normal working hours, such time shall be paid for at overtime rates.

27.2 Eye Examinations etc.

Prior to operating a visual display terminal, and at least once every two years thereafter, a member shall be reimbursed for the cost of a full eye examination by an opthamologist or an optometrist nominated by the employer, or as otherwise agreed.

This clause shall not apply where the employer pays for the eye examination.

27.2.1 Results of the examination shall be available to the member. Should this examination disclose that spectacles are needed, the cost of these is to be met by the member unless the opthalmologist or optometrist confirms in writing that the spectacles so prescribed are necessary for the use of VDT work. Where such confirmation is given, the employer shall pay the cost of the lenses and up to $100.00 on the cost of frames.

27.2.2 Where such follow-up examination or examinations the ophthalmologist or optometrist prescribes spectacles, or a lens change, for visual display terminal operation, the employer shall pay the cost of the lenses and up to $100.00 on the cost of frames.

27.2.3 Where the member receives or is entitled to receive a health fund or other benefit towards the cost of spectacles which the employer is by this clause required to meet or contribute to, the employer shall pay the difference between the cost of the spectacles and the benefit, with a maximum of $100.00 on the frames.

27.3 VDT breaks

Except in an emergency, where the maximum time of operation shall be two and a half hours, no member shall be required to operate a visual display terminal for more than two hours straight without a break. At the end of two hours a member shall be entitled to a ten minute paid break form operating a VDT.

Subclause 27.3 is to be applied in accordance with the following agreed procedure:

27.3.1 An employer may require a member to engage in non-VDT work during the break provided for in the subclause.

27.3.2 The break shall fall during a shift or part of a shift. The VDT break shall not be taken at the end of a shift (that is, a ten-minute `early cut') nor at the end of a half shift (that is, an extra ten minutes added to the meal break).

27.3.3 An employer and members may agree to have different arrangements for VDT breaks, provided that the limit of two and a half hours set out in the first paragraph is adhered to .

[276] The Minister submitted that clause 9 is not a classification structure consistent with s.89A(2)(a) but rather a device to ensure that proportions of employees are employed in particular grades. Both the MEAA and FACTS submitted that the clause is allowable pursuant to s.89A(2)(a). We agree with this submission. Clause 9.1 applies to one classification only, that of journalist, and makes

provision for dispersion of the total number of journalists throughout the grades. In our opinion the substantive operation of the clause is directed to the creation of a skill-based career path. Whether the percentages prescribed for each grade are appropriate is not relevant to the question of allowability. Whilst the Minister also challenged the clause on the basis that it contains matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level (item 49 (7)(a)) that submission was contradicted by the parties to the award. In the circumstances it is not in the public interest we exercise our powers pursuant to s.109 to review the award pursuant to item 49(7)(a).

[277] Clause 10.3 is challenged on the same basis as clause 9 but on the additional ground that it contains a limitation on part-time employment contrary to s.89A(4)(a). We have already rejected the Minister's arguments in relation to clause 9. On their proper construction, the parts of clause 10.3 which are challenged do not limit the number or proportion of employees that an employer may employ on a regular part-time basis. The provisions are designed to ensure the classification structure for journalists operates effectively. It does that by requiring that part-time employees are taken into account when the proportion of journalists in each grade is being calculated. Clause 10.3 is a s.89A(6) provision, being incidental to a matter which is allowable pursuant to s.89A(2)(a) and necessary for the effective operation of the award in that respect.

[278] The only part of clause 27 which is challenged is clause 27.3. The Minister submitted that provision for VDT (visual display terminal) breaks is neither allowable nor a s.89A(6) provision. In particular it was submitted that such breaks are not *"rest breaks"* for the purposes of s.89A(2)(b), the clause being properly classified as dealing with occupational health and safety which is not an allowable award matter. It was also submitted that the clause prescribes matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level (item 49(7)(a)). The clause provides for rest breaks within s.89A(2)(b) and accordingly is allowable. It is not in the public interest we exercise our powers pursuant to s.109 to review the provision under item 49(7).

Journalists (Book Industry) Award 1998 (C No. 90281 of 1998)

[279] *26. TECHNOLOGY AND HEALTH MATTERS*

26.1 Members shall when required by their employer use all available functions of computer equipment to perform any work which can be performed by persons within the scope of the Constitution of the Alliance.

Such work will include, but not be limited to:

· Computer-assisted editorial layout and all other computer-assisted editorial functions;

· Computer-assisted artwork;

· Use of personal computers capable of operating software designed for editorial use.

26.2 Where training in the use of new equipment is not given in the course of normal working hours, such time shall be treated as overtime and compensated as such.

26.3.1 Each member required to operate a visual display terminal shall receive a full eye examination by an opthalmologist or an optometrist nominated by the employer, or as otherwise agreed, at no cost to the member. This test should be arranged before the member is required to use a visual display terminal in production.

26.3.2 Results of the test shall be made available to the member.

26.3.3 A follow-up examination shall be arranged 6 months after the member first uses VDTs in production and thereafter at a minimum of every 2 years if required by the member.

26.3.4 Where the opthalmologist or optometrist prescribes spectacles, or a lens change, specifically for visual display terminal operation, the employer shall pay the cost of the lens and up to $95.00 on the first frames.

26.3.5 Where the member receives a health fund or other benefit towards the cost of spectacles, the employer shall pay the difference between the cost of the spectacles and the benefit, with a maximum of $95.00 on the first frames.

[280] Turning first to clause 26.1, the Minister submitted that the clause is not an allowable matter nor a s.89A(6) provision. ACCI submitted that the clause involves an inappropriate demarcation of work. In our view the clause does not limit the duties to be performed, rather it makes explicit the obligation to perform the work described without limiting the total range of work that can be required of employees. The clause is allowable pursuant to s. 89A(2)(a). It was also submitted that the clause deals with matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level (item 49 (7)(a)). The parties to the award refute this submission. In the circumstances it is not in the public interest that we exercise our powers pursuant to s.109 to review the clause under item 49.

[281] The Minister submitted that because clause 26.3.1, clause 26.3.2 and clause 26.3.3 contain requirements for eye examinations, which is not an allowable award matter, they should be deleted. We agree with this submission. They will be deleted.

Holden Limited Consolidated Award 1998 (C No. 90283 of 1998)

[282] *6 - PAYMENT OF WAGES/SALARIES*

Wages and salaries statement

(*i) On or prior to payday the company shall state to each employee, in writing, the total amount of wages to which the employee is entitled, the amount of deductions made therefrom and the net amount being paid.*

[283] In seeking the deletion of this provision the Minister submitted that it is not allowable, nor a s.89A(6) provision and he also relied on items 49(7)(a) and 49(8)(c). In the *Hospitality Decision* the Commission rejected a submission that time and wages records are not an allowable matter [at p.28]. Regulation 132C empowers the Commission to issue a certificate stating that an award complies with certain requirements relating to payslips. Once the certificate is issued regulation 132B ceases to apply provided the employer provides payslips in accordance with the award. These regulations contemplate award provisions as to payslips and we think such provisions are s.89A(6) provisions. In the *Hospitality Decision* the award respondents agreed that the payslip provisions should be deleted from the award and the Commission did so pursuant to item 49(7)(a). In this case the award parties oppose the deletion of the clause. The award applies to one company only and the parties are involved in a further review of its terms. In the circumstances it is not in the public interest that we exercise our powers pursuant to s.109 to review the award under items 49(7) and 49(8).

Glass Industry - Glass Merchants and Glazing Contractors - Victoria - Consolidated Award 1996 (C No. 90286 of 1998)

[284] *29.3 Reasonable Overtime*

29.3.1 An employer may require an employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

29.3.2 The union shall not in any way whether directly or indirectly be party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of this provision.

[285] The Minister and ACCI submitted that clause 29.3.2 is not an allowable matter nor a s.89A(6) provision. The CFMEU did not submit otherwise. We agree. The clause should be deleted.

Ford Motor Company (Vehicle Industry) - Consolidated Award 1998 (C No. 90287 of 1998)

[286] *4.1.1 Demarcation*

A fundamental element of the classification structure is to encourage and facilitate optimum labour flexibility. Consistent with this employees will perform work to the level of their training, including a wider range of duties and work which is incidental or peripheral to their main task or function. In support of this, the parties are committed to overcoming demarcation problems within this award and agreements applying to the Company.

[287] The Minister submitted that the first and third sentences of this provision concern demarcation and are neither allowable award matters nor s.89A(6) provisions. Reference was made to the following passage in the *Hospitality Decision* :

> *"General statements which describe objectives or philosophies rather than establishing entitlements are generally speaking not allowable. Even if such provisions were allowable they would be of no utility because the characteristics of safety net awards are clearly set out in the WRA Act itself. We can discern no sound basis for retention of such provisions pursuant to s.89A(6)."* [at p.8]

[288] We have concluded that the first and third sentences are neither allowable nor s.89A(6) provisions. They will be deleted. The Minister also submitted that the second sentence of the clause duplicates provisions found elsewhere in the award. For reasons already given we reject the submission that it is in the public interest that we exercise our powers under s.109 to delete that sentence. It will remain, although the first three words of the sentence should be deleted.

Glass Industry - Glass Merchants and Glazing Contractors, General, South Australia Award 1998 (C No. 90288 of 1998)

[289] *20. WORK PERFORMED AWAY FROM EMPLOYER'S PREMISES*

All work covered by this award shall be done in a factory, shop or place duly registered under the laws of the State but this shall not prevent an employer bound by this award sending an employee from the factory, shop or place to any building or shop for the purposes of repairing, completing, fixing or fitting any work covered by this award.

22. WAGE RATES

...

22.1.5 Overaward Payment

Overaward payment is defined as the amount, whether it be termed overaward payment, attendance bonus, service increment or any term whatsoever, which an employee would receive in excess of award wage which applied immediately prior to the introduction of supplementary payments for the classification in which such employee is engaged. Provided that such payment should exclude overtime, shift allowances, penalty rates, disability allowances, fares and travelling time allowances and any other ancillary payments of a like nature prescribed by this award.

31.3 Reasonable Overtime

31.3.1 An employer may require an employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

31.3.2 The union shall not 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 provision .

[290] The Minister, supported by ACCI, submitted that clause 20 is not allowable nor a s.89A(6) provision. The CFMEU submitted that the provision assists in defining the scope of the award and is designed to prevent those employed pursuant to the award from working in areas where employees are covered by other awards of the Commission. We reject this submission. We agree with the Minister and ACCI that the clause is not allowable nor a s.89A(6) provision. We shall delete it.

[291] The Minister submitted that clause 22.1.5 is obsolete and should be deleted pursuant to item 49(8)(d). ACCI submitted that the clause is not allowable. The CFMEU submitted that the definition is not obsolete and still has work to do with respect to the determination of whether living wage increases should be absorbed into overaward payments. It noted that the Minister had not sought to have a similar provision deleted from a Furnishing Award. The clause is allowable. It is not in the public interest that we exercise our powers pursuant to s.109 to review this provision under item 49(8)(d).

[292] The Minister, supported by ACCI, submitted that clause 31.3.2 is neither allowable nor a s.89A(6) provision. We agree. The clause will be deleted.

Entertainment and Broadcasting Industry - Motion Picture Production Award 1998 (C No. 90292 of 1998)

[293] *25.5 Mode of transport*

...

25.5.2 Employees travelling during the course of their employment at the request of an employer in aircraft other than regular passenger carrying aircraft under the command of a pilot holding an appropriately endorsed commercial pilot's

licence, and who are disabled or killed during the course of such travel, will be entitled, in addition to all other rights and entitlements, to payment of a sum of not less than $150,000 to the employee or his or her heirs or dependents. Where the employer effects equivalent insurance cover, the employee, heirs or dependents will not be entitled to this payment.

[294] The Minister, supported by ACCI, submitted that this clause is neither allowable nor a s.89A(6) provision. In our view the clause provides for an allowance. Payment of the allowance is contingent on the circumstances specified, and it is to be noted that the clause only applies to employees travelling during the course of their employment at the request of their employer. It follows that we also reject the submission that the clause is really concerned with insurance which is not an allowable award matter. The clause permits an employer to insure against liability to make the payments required, but this is simply an alternative way to meet the liability established by the substantive provision.

Entertainment and Broadcasting Industry - Actors - (Theatrical) Award 1998 (C No. 90293 of 1998)

[295] *12.11 Requirement to appear nude or semi-nude*

12.11.1 If an employee shall be required to appear nude or semi-nude such requirement shall be specified in the contract of engagement or in the case of employees not specifically engaged for a run of the play or a particular period, specified at the time of engagement.

12.8 Guarantee of minimum employment

The employer guarantees to the employee not less than 23 weeks of employment at the employee's negotiated rate in each period of 26 weeks (pro rata for any period of less than 26 weeks).

14.4 Obtaining other employment while stood down

An employee who is stood down shall be entitled to take other employment. On obtaining other employment the employee shall advise the employer immediately of his or her commitment. If the employer objects to such commitment, and if no agreement is reached, the matter will be dealt under the dispute resolution procedure contained in clause 10.

30.10.2 No employer shall knowingly engage in a local show, an employee whose place of residence is not in the local area.

[296] The Minister and ACCI submitted that clause 12.11.1 is not an allowable award matter nor a s.89A(6) provision. The Minister also submitted that the clause prescribes matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level (item 49(7)(a)). The EIEA submitted that the clause deals with the duties required of actors, is integral to the type of employment actors undertake and is therefore allowable pursuant to s.89A(2)(r). We agree with the EIEA's submission that the clause is concerned with the duties of an actor's engagement, although we doubt the relevance of s.89A(2)(r). The effect of the clause is to exclude from the duties of the classification in the award duties which involve appearing nude or semi-nude unless the employee agrees to performing such duties at the time employment commences. Looked at in this light, we have concluded that the provision is an allowable matter within s.89A(2)(a) - classifications. We reject the Minister's alternative submission that the clause includes matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level. The parties disagree and on what we were told the provision is designed, among other things, to protect employees from embarrassment or exploitation. It is very difficult to see how that end could be achieved in the absence of an award provision.

[297] The Minister and ACCI submitted that clause 12.8 is neither allowable nor a s.89A(6) provision. It was submitted that in substance the clause contains a guaranteed period of engagement. We agree. The clause will be deleted. Whilst the Minister and ACCI submitted that clause 14.4 is neither allowable nor a s.89A(6) provision, we agree with MEAA's submission that the clause is allowable pursuant to s.89A(2)(o) - stand-down provisions.

[298] Clearly clause 30.10.2 is neither an allowable award matter nor a s.89A(6) provision. We will delete it.

Entertainment and Broadcasting Industry - Actors - (Theatrical) Award 1998 (C No. 90293 of 1998)

[299] *Actors Equity Section Entertainment Industry*
Media, Entertainment and Arts Alliance Employers Association

ENTERTAINMENT AND BROADCASTING INDUSTRY-
ACTORS - (THEATRICAL) - AWARD 1998

STANDARD CONTRACT OF SERVICE FOR SINGLE PLAYS
AND/OR PRODUCTIONS

PART 1
This Contract is dated the ..... day of ..... 19..... between
.....of
(name of employer)
.....
(registered address)
and .....Equity Number: .....
(name of artist)
of .....JUST Number: .....
(ordinary place of residence)
Artist's Agent or Contact: .....
Address: .....
Telephone number: ..... Facsimile number: .....
Name of Production: .....
Whereby the employer agrees to engage the Artist under the terms and conditions shown below and overleaf.

1. PART OR PARTS TO BE PLAYED BY THE ARTIST

The artist will be employed in the above Play:

1.1 to rehearse and play the following part: .....

OR

1.2 to rehearse and play the following parts: .....

OR

1.3 to rehearse and play the part(s) of: .....

and to rehearse and play as understudy the part(s) of: .....

OR

1.4 to rehearse and play such parts in the said play as the Management may call upon the Artist to play;

OR

1.5 to rehearse and play such part or parts and rehearse and play as understudy such part or parts in the said play as the Management may call upon the Artist to play;

OR

1.6 to rehearse and play as a swing performer.

N.B. Five (5) of the paragraphs above 1.1, 1.2, 1.3, 1.4, 1.5, 1.6 must be deleted and initialled.

Note: The use of this contract is mandatory for employees engaged below the upper salary limit.

2. TYPE OF ENGAGEMENT

Engagement shall be as defined in the Entertainment and Broadcasting Industry - Actors - (Theatrical) - Award 1998.

2.1 By the week.

2.2 For the specific period up to and including: .....

2.3 For the run of the play in: .....

(venue/city/town and State/cities and/or towns and States)

2.4 For the run of the play in Australia.

2.5 For the run of the play in Australia or New Zealand.

N.B. Four (4) of the paragraphs above, 2.1, 2.2, 2.3, 2.4, 2.5 must be deleted and initialled.

3. COMMENCEMENT

3.1 Date of commencement of engagement shall be: .....

3.2 Date of first real rehearsal shall be (on or about): .....

3.3 Length of rehearsal period (on or about): .....

3.4 Date of opening performance (on or about): .....

4. ENGAGEMENT MONIES

4.1 Rehearsals

Negotiated rate: $..... per week

Loadings:

..... $..... per week

..... $..... per week

..... $..... per week

Total rehearsal rate: $..... per week

4.2 Performance

Negotiated rate: $..... per week

Loadings:

..... $..... per week

..... $..... per week

..... $..... per week

Total performance rate: $..... per week

Note: The only loadings to be listed above are those paid on a regular weekly basis. All other loadings or penalties incurred must be paid in addition to the negotiated rate and listed loadings. Superannuation and annual leave entitlements shall be based on the total salary.

5. TRAVEL ALLOWANCE

5.1 Where an employee is required to work away from his or her place of residence as set out in Part 1, the travel allowance provisions of clause 35 of this award shall apply.

5.2 In accordance with clause 4. of the award the production is/is not a local show.

6. SUPERANNUATION

6.1 In accordance with clause 18 - Superannuation - of the Entertainment and Broadcasting Industry - Actors - (Theatrical) - Award 1998, the employer shall pay a superannuation contribution to JUST Super on behalf of the Artist.

6.2 The employer shall take all necessary action to confirm whether or not the artist is a member of JUST Super.

6.3.1 The artist is a member of JUST Super and confirms that his or her membership number is stated in Part I of the contract.

6.3.2 The artist is not a member of JUST Super and has been provided by the employer with an application form to join JUST Super and explanatory material about the fund and has completed the JUST Super application form. The artist agrees that he or she will provide a JUST Super membership number to the employer when it is available.

6.3.3 The artist is not a member of JUST Super and confirms that having been provided with the application form and the information referred to in 3.1. above she/he does not wish to join JUST Super and has signed a disclaimer as provided for in clause 18.

NOTE: Two (2) of the paragraphs above 6.3.1, 6.3.2, 6.3.3 must be deleted and initialled.

6.4 In the event that an artist signs such a disclaimer, the employer shall notify the Fund Administrator and MEAA (Equity Section) in accordance with clause 18.

7. SPECIAL CONDITIONS

Any special conditions agreed upon by the artist and the employer are set out in Schedule A of this contract provided that such special conditions shall not be inconsistent with the terms of the award.

8. ACCURACY OF EMPLOYEE INFORMATION

8.1 In connection with the employees engagement the employer shall ensure that the Artist's name and spelling of the same in this contract will be used for billing and program purposes.

8.2 Where the producer releases biographical material of the artist for the purpose of publicising and/or in any way promoting the production, the artist shall have the right of approval over such material.

9. JURISDICTION

This contract is made and is subject to the Laws of ..... Australia.

For the employer: For the employee:

....

(signature) (signature)

....

(name-please print) (name-please print)

....

(position) (position)

....

(date) (date)

....

(witness) (witness)

N.B. Unless the Artist's Agent can produce Power of Attorney, this contract must be signed by the Artist.

The Producer warrants that this contract is the standard form contract as set out in Appendix A of the Entertainment and Broadcasting Industry - Actors - (Theatrical) - Award 1998.

PART 2 - GENERAL CONDITIONS

1. The terms and conditions of the Entertainment and Broadcasting Industry - Actors - (Theatrical) - Award 1998 as altered and/or replaced shall apply and form part of this agreement as if the same were written herein. In the event of any inconsistency between any term of this contract and the provisions of the award, the award shall prevail.

2. The Artist is engaged exclusively by the employer and shall not during the engagement perform or otherwise exercise his or her talents for the benefit of any other company , institution or person without written consent and such consent shall not be unreasonably withheld.

3. Termination of this contract shall be in accordance with clause 12 - Terms of engagement, of the Entertainment and Broadcasting Industry - Actors - (Theatrical) - Award 1998.

4. A party may elect to continue performance of this contract notwithstanding any breach by the other party of any term or condition of this contract and such performance shall not constitute a waiver of any of the rights of the first party.

5. The employer reserves the right to stand down the Artist in accordance with the provisions of clause 14 - Stand down of employees, of the Entertainment and Broadcasting Industry - Actors - (Theatrical) - Award 1998.

6. This contract may only be varied or modified in writing, signed by all the parties to the contract.

7. This contract is intended to reflect all prior understandings and, subject to clause 6 above, when signed constitutes the totality of the agreement between the parties.

8. The negotiated rate stated in Part 1 herein is the rate agreed between the parties at the point of acceptance of the engagement and pursuant to clause 4 does not include any additional payments payable under the award.

9. Except in the case of an emergency the producer shall provide the artist with a contract at least 21 days prior to the commencement date of the engagement as per clause 3 of Part 1 of this contract.

9.1 Unless there are reasonable grounds for not doing so the artist shall sign and return the contract within 14 days of receipt.

10. Notices concerning employees generally from the employer posted on the usual notice board or addressed to the artist in the care of the stage door keeper or sent to the Artist's last known address will be held to be valid notices.

10.1 Unless the artist otherwise advises in writing, the address for the service of notices under this contract shall be the address of his or her agent or if the artist is unrepresented the artist's contact address as specified in Part 1 of this contract. Unless the Producer otherwise advises in writing, the address for the service of notices under this contract shall be the address of the Producer as specified in Part 1 of the contract. Notices shall be in writing and may be hand delivered or sent by post, or facsimile transmission.

11. One copy of the agreement duly executed by the Artist shall be retained by the employer (a further copy will be retained for office procedures only); one copy duly executed by the employer shall be retained by the Artist.

12. The Artist shall notify the stage manager of any change to his or her address.

13. All parts written or printed are the property of the employer and shall be returned to the Management whenever notice to that effect is given.

14. The Artist shall comply with the rules of the Theatre at which the company may be rehearsing or performing and with all lawful and reasonable rules of conduct made by the employer in so far as such last mentioned rules do not conflict with the terms of the contract and the award.

15. No Artist shall alter his or her part or omit any portion thereof without the express permission of the employer or its representative or disobey or neglect to carry out the reasonable directions of the Stage Manager, Director, Musical Director, Resident Director or Choreographer.

16. The Artist shall not introduce words or any material into his or her performance not in the script unless previously approved by the Management and wherever any additional material is introduced by the Artist with the employer's consent the Artist warrants that he or she has the right to use such material and is not infringing any copyright. When any such material is the property of the Artist it shall remain so.

17. The Artist shall be in the Theatre throughout the half hour immediately before the rise of the curtain and shall remain until the fall thereof unless (in either case) he or she has the express permission of the employer to be absent.

[300] Appendix A - Standard Contract is challenged by the Minister, primarily on the basis that it is neither allowable nor a s.89A(6) provision. In the alternative it is argued that the contents of the Appendix, in particular, clauses 7, 8, 9 and Part 2, are neither allowable nor s.89A(6) provisions. Finally, the Minister submits that the Appendix prescribes matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level. MEAA relied on the fact that a similar provision was found in the *Journalists Television Award* but was not challenged by the Minister. Further, it put that the Appendix came within s.89A(2)(r) or was a s.89A(6) provision. The award could not function properly unless the standard contract was entered into. Further, there was no basis established for any challenge under item 49(7) or 49(8). EIEA submitted that the standard contract did not contain any matters that were not allowable and was a s.89A(6) provision. It raised serious concerns about deleting parts of a contract.

[301] In our view, the standard contract in Appendix A is not allowable. While we accept that some of the clauses in the standard contract (e.g. clause 5) come within s.89A(2), the Appendix looked at as a whole is a standard contract of service for certain plays or productions to be entered into by individual employers and employees. Such a provision does not fall within s.89A(2) and is not a s.89A (6) provision.

DRAFT ORDERS

[302] We request the Minister to prepare draft orders to reflect the amendments made by this decision and to confer with the award parties on the drafts prior to lodgment.

BY THE COMMISSION:

PRESIDENT

APPENDIX A

WORKPLACE RELATIONS ACT 1996

Section 89A Scope of industrial disputes

Industrial dispute normally limited to allowable award matters

(1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):

(a) dealing with an industrial dispute by arbitration;

(b) preventing or settling an industrial dispute by making an award or order;

(c) maintaining the settlement of an industrial dispute by varying an award or order.

Allowable award matters

(2) For the purposes of subsection (1) the matters are as follows:

(a) classifications of employees and skill-based career paths;

(b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;

(c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;

(d) piece rates, tallies and bonuses;

(e) annual leave and leave loadings;

(f) long service leave;

(g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave;

(h) parental leave, including maternity and adoption leave;

(i) public holidays;

(j) allowances;

(k) loadings for working overtime or for casual or shift work;

(l) penalty rates;

(m) redundancy pay;

(n) notice of termination;

(o) stand-down provisions;

(p) dispute settling procedures;

(q) jury service;

(r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;

(s) superannuation;

(t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

(3) The Commission's power to make an award dealing with matters covered by subsection (2) is limited to making a minimum rates award.

Limitations on Commission's powers

(4) The Commission's power to make or vary an award in relation to matters covered by paragraph (2)(r) does not include:

(a) the power to limit the number or proportion of employees that an employer may employ in a particular type of employment; or

(b) the power to set maximum or minimum hours of work for regular part-time employees.

(5) Paragraph (4)(b) does not prevent the Commission from including in an award:

(a) provisions setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work; or

(b) provisions facilitating a regular pattern in the hours worked by regular part-time employees.

(6) The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.

Exceptional matters may be included in industrial dispute

(7) Subsection (1) does not exclude a matter (the exceptional matter) from an industrial dispute if the Commission is satisfied of all the following:

(a) a party to the dispute has made a genuine attempt to reach agreement on the exceptional matter;

(b) there is no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation, by the Commission;

(c) it is appropriate to settle the exceptional matter by arbitration;

(d) the issues involved in the exceptional matter are exceptional issues;

(e) a harsh or unjust outcome would apply if the industrial dispute were not to include the exceptional matter.

Anti-discrimination clause

(8) Nothing in this section prevents the Commission from including a model anti-discrimination clause in an award.

Note: A model anti-discrimination clause was established by the Commission in the Full Bench decision dated 9 October 1995 (print M5600).

Interpretation

(9) In this section, ***outworker*** means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

Section 109 Review on application by Minister

(1) The Minister may apply to the President for a review by a Full Bench of an award or order, or a decision relating to the making of an award or order, made by a member of the Commission if it appears to the Minister that the award, order or decision is contrary to the public interest.

(2) Where an application is made to the President under subsection (1), the President shall establish a Full Bench to hear and determine the application.

(3) The Full Bench shall, if in its opinion the matter is of such importance that, in the public interest, the award, order or decision should be reviewed, make such review of the award, order or decision as appears to it to be desirable having regard to the matters referred to in the application.

(4) Subsection **s 45** (4) to (8) (inclusive) apply in relation to a review under this section in the same manner as they apply in relation to an appeal under **section 45** .

(5) In a review under this section:

(a) the parties to the proceeding in which the award, order or decision was made are parties to the proceeding on the review and are entitled to notice of the hearing; and

(b) the Minister is a party to the proceeding.

(6) Each provision of this Act relating to the hearing and determination of an industrial dispute extends to a review under this section.

(7) Nothing in this section affects any right of appeal or any power of a Full Bench under **section 45** , and an appeal under that section and a review under this section may, if the Full Bench considers appropriate, be dealt with together.

WORKPLACE RELATIONS AND OTHER LEGISLATION AMENDMENT ACT 1996

SCHEDULE 5

Item 49 Variation of awards during the interim period

(1) If one or more of the parties to an award apply to the Commission for variation of the award under this item, the Commission may, during the interim period, vary the award so that it only deals with allowable award matters.

(2) For the purposes of this item, an exceptional matters order is taken to relate wholly to allowable award matters.

(3) Special consent provisions cannot be varied under this item before the termination time for those provisions.

(4) The Commission may only deal with the application by arbitration if it is satisfied that the applicant or applicants have made reasonable attempts to reach

agreement with the other parties to the award about how the award should be varied and the treatment of matters that are not allowable award matters.

(5) If:

(a) the award provides for rates of pay that, in the opinion of the Commission:

(i) are not operating as minimum rates; or

(ii) were made on the basis that they were not intended to operate as minimum rates; and

(b) the application under this item seeks to have such rates of pay varied so that they are expressed as minimum rates of pay;

the Commission may vary the award so that it provides for minimum rates of pay consistent with sections 88A and 88B of the Principal Act and the limitation on the Commission's power in subsection 89A(3) of that Act.

(6) If the Commission varies the award under subitem (5), it must include in the award provisions that ensure that overall entitlements to pay provided by the award are not reduced by that variation, unless the Commission considers that it would be in the public interest not to include such provisions.

(7) The Commission must, if it considers it appropriate, review the award to determine whether or not it meets the following criteria:

(a) it does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;

(b) it does not prescribe work practices or procedures that restrict or hinder the efficient performance of work;

(c) it does not contain provisions that have the effect of restricting or hindering productivity, having regard to fairness to employees.

(8) The Commission must also review the award to determine whether or not it meets the following criteria:

(a) where appropriate, it contains facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how the award provisions are to apply;

(b) where appropriate, it contains provisions enabling the employment of regular part-time employees;

(c) it is expressed in plain English and is easy to understand in both structure and content;

(d) it does not contain provisions that are obsolete or that need updating;

(e) where appropriate, it provides support to training arrangements through appropriate trainee wages and a supported wage system for people

with disabilities;

(f) it does not contain provisions that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(9) If the Commission determines that the award does not meet the criteria set out in subitem (7) or (8), the Commission may take whatever steps it considers appropriate to facilitate the variation of the award so that it does meet those criteria.

APPENDIX B

INDEX OF AWARDS REVIEWED IN THIS DECISION

Appearances:

F. Parry, of counsel, and *S.* ***Wood*** , of counsel, with *P. Drever* and *B. Leahy* for the Minister for Employment, Workplace Relations and Small Business.

S. Jones for The Maritime Union of Australia, the National Union of Workers, the Construction, Forestry, Mining and Energy Union and for the Australian Council of Trade Unions (intervening).

D. Staindl , of counsel, and *J. Pagonis* for the Construction, Forestry, Mining and Energy Union and for the Australian Council of Trade Unions (intervening).

B. O'Neill for the Australian Liquor, Hospitality and Miscellaneous Workers Union.

A. Sachindis with *S. Schlesinger* , *G. Whitehead* , *A. Cole* , *A. Dettmer* and *M. Addison* for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.

K. Harvey with *P. Verberne* , *B. O'Brien* and *M. Rizzo* for the Australian Municipal, Administrative, Clerical and Services Union.

D. Langmead, of counsel, and *A. Chambers* for the Health Services Union of Australia.

R. Boness for the CPSU, the Community and Public Sector Union.

M. Borowick and *E.J. Phillips* for The Australian Workers' Union.

S. Roach for the Shearers and Rural Workers Union.

L. Benfell for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

N. Hodby for The Australian Maritime Officers' Union.

R. Hamilton for the South Australian Employers Chamber of Commerce and Industry Incorporated, the Queensland Chamber of Commerce and Industry and The National Electrical Contractors Association and for the Australian Chamber of Commerce and Industry (intervening).

G. McDonald for The Australian Industry Group and Respondent Members and for PACCAR Australia Pty Limited.

P. Maskell with *P.P. Carey* for Hawker de Havilland Victoria Limited and Hawker de Havilland Australia Limited.

R. Roy for Spotless Services Australia Limited.

D. Blanksby for Victorian Glass Merchants Association Inc.

D. Hamilton with *J. Bates* for Entertainment Industry Employers Association and Screen Producers Association of Australia.

M. Rahilly for the Service Industry Advisory Group.

K.J. Rice and *R. Calver* for the National Farmers Federation and State Industrial Affiliates.

C. Cleary for the Printing Industries Association of Australia.

M. Georgiou, N. Henderson and *M. Butler* for The Association of Professional Engineers, Scientists and Managers, Australia.

P. Green for The National Electrical Contractors Association.

R. Smith for Water Ecoscience.

M. Ryan for the Media, Entertainment and Arts Alliance.

F. Sutherland for The Shearing Contractors' Association of Australia.

C. Hicks with *D. Gregory* for the Victorian Employers' Chamber of Commerce and Industry.

C. Graham for employer respondents to the *Journalists (Television) Award 1996.*

R. Corboy for the Victorian Hospitals' Industrial Association and the Australian Dental Association Victorian Branch Inc.

J. Forbes for employer respondents in *The State Electricity Commission of Victoria Electrical, Electronic and Engineering Employees Award, 1989* and the

Professional Engineers (Consulting Engineers) Agreement 1988.

G. Smith for various companies in the *Toyota Australia Vehicle Industry Award 1988, General Motors Holden's Automotive Limited (Part I) General Award 1988* and *Ford Australia Vehicle Industry Award 1978.*

A. Coleman for Philip Morris Ltd.

J. Thompson for The Australian Institute of Marine and Power Engineers and the Australian Institute of Car Engineers.

J. Corlett for the Chamber of Manufactures of New South Wales.

W. Wade and *L. Phillips* for Australian Mines and Metals Association and P&O Maritime Services Pty Ltd.

D. Sommerlad for the Country Press of Australia.

J. Williams for the Furnishing Industry Association of Australia.

Hearing details:

1998.

Melbourne:

September 16;

October 20;

December 1, 2, 3, 21.

Decision Summary

Award - review of award - award simplification - s89A Workplace Relations and Other Legislation Amendment Act 1996 - s109 Reviews - full bench - various employees, various industries - extension of time - application made out of time - extension of time opposed by unions - Bench found satisfactory explanation of delay resulting from the magnitude of the task - compelling reasons going to issues of jurisdiction - extension of time granted - s89A(6) - Bench emphasized that the word *'incidental'* applies to *'to the matters in subsection (2)'* - if s*(A(6) is to operate there must be an allowable matter to which the award provision is incidental - s89A(6) does not operate unless provision is both incidental and necessary - in deciding whether matter falls within s89A(2) the Commission is required to identify the matter accurately and then consider whether the matter, properly characterised, falls within paragraphs (a) to (t) - in considering the applicability of items 49(7) and (8) questions of discretionary judgement involved - limitation on type of employment - apprentices - limitation on the proportion of apprentices to tradespersons not allowable or incidental - rejected argument that such provisions relates to supervision and career based skill paths - part-time work - operation of clause to impose limit on the proportion of part-time to full time work not allowable or incidental - requirement to negotiate number of casuals with union provides means for a restriction of the employment of casuals to be employed - not allowable - week-end work - clause granting preference to permanent employees for week-end work favours one group of employees over another - not allowable - limitation on part-time hours - provision which establishes a maximum number of hours for regular part-time employees contrary to s89A(4)(b) - not allowable - provision for minimum payment of ten hours per week sets minimum number of hours per week for regular part-time employees - because clause purports to establish minimum hours on a weekly basis, rather than a consecutive basis, it is not allowable - provision of protective clothing, equipment, tools and materials - provision of such not allowable per *Hospitality decision* - reimbursement of expense to employee for supply of such is allowable - provision of transport - per *Hospitality decision* provision of transport is an allowance - standard of transport - clause does not impose an obligation to provide transport but relates to the standard of transport which must be provided - not allowable - provision of facilities - provision of tea and coffee not allowable - first aid - reference to first aid manual cannot be necessary for the effective operation of an award when they may be altered without reference to the Commission - number of first aides and provision of first aid facilities not allowable - accommodation - provision to find suitable accommodation not allowable - training - adult apprenticeship - giving preference to existing employees for adult apprenticeships not allowable - provision which specify type and duration of experience necessary to qualify for adult apprenticeship allowable - cadetships - while training is not allowable provisions relating to cadetships in journalists award related to classification structure and are necessary for operation of the award - consultation and general dispute resolution - shop stewards - entitlements or role and responsibilities for shop stewards are not allowable - integrated procedures for dealing with grievances are allowable - leave for shop stewards to undertake training to assist in grievance procedure allowable - undesirable that award should contain more than on dispute settling procedure - termination and disciplinary procedures - statement of employment is not allowable - disciplinary and other procedures not allowable - code of conduct not allowable matter - notice of termination - awards should not prescribe entitlements which are less than s170CM(2) - prohibition of termination of employment not allowable - requirement to assist to obtain alternative employment not allowable - summary dismissal - clauses which relate to substantive rights of termination not allowable - obsolete and unnecessary provisions - reference to Jobskills trainees out of date and should be deleted - limitations on employment - restriction on performance of work by persons of a specific age deals with duties an is allowable pursuant to s89A(2) - provision restricting the use of minors on shiftwork allowable - leave without pay - clause permits grant of leave for whatever purpose - not allowable - medical

		test - requirement to undertake medical test not allowable - requirement of certain level of physical fitness for entry or progression might be allowable pursuant to 89A(2)(a) - VDT breaks - are rest breaks and allowable - nudity provisions - integral to type of employment - allowable pursuant to s89A92)(a).

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