

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2020 WAIRC 00967

**CORAM** : INDUSTRIAL MAGISTRATE D. SCADDAN

**HEARD** : FRIDAY, 16 OCTOBER 2020

**DELIVERED** : FRIDAY, 4 DECEMBER 2020

**FILE NO.** : M 29 OF 2020

**BETWEEN** : BRIAN ROBERT CLIFFORD-SMITH  
**CLAIMANT**

AND

KEEN BROS. (WA) PTY LTD  
**RESPONDENT**

**FILE NO.** : M 60 OF 2020

**BETWEEN** : STEPHEN MUTCH  
**CLAIMANT**

AND

KEENBROS WA PTY LTD  
**RESPONDENT**

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**CatchWords** : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – Determination of preliminary issue – Whether the *Educational Services (Post-Secondary Education) Award 2010* (Cth) cover the claimants and the respondent and applies to the claimants’ employment

**Legislation** : *Fair Work Act 2009* (Cth)  
*Industrial Relations Act 1979* (WA)  
*Motor Vehicle Drivers Instructors Act 1963* (WA)  
*National Education and Training Regulator Act 2011* (Cth)  
*Vocational Education and Training Act 1996* (WA)  
*Vocational Education and Training (General) Regulations 2009* (WA)

**Instrument** : *Educational Services (Post-Secondary Education) Award 2010* (Cth)

**Case(s) referred to in reasons:** : *City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union* [2006] FCA 813

*Kucks v CSR Ltd* (1996) 66 IR 182  
*Amcor Ltd v CFMEU* [2005] HCA 10  
*Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148  
*TAL Life Ltd v Shuetrim* [2016] NSWCA 68  
*Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd* [2016] FCCA 621  
*Director of Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No7)* [2013] FCCA 1097  
*Logan and Otis Elevator Company*, Moore J, 1997 IRCA 200 (20 June 1997)  
*Ware v O'Donnell Griffin (Television Services) Pty Ltd* [1971] AR (NSW) 18  
*Fair Work Ombudsman v Da Adamo Nominees Pty Ltd No4* [2015] FCCA 1178  
*Mildren and Anor v Gabbusch* [2014] SAIRC 15  
*Miller v Minister of Pensions* [1947] 2 All ER 372  
*Briginshaw v Briginshaw* [1938] HCA 34  
*Fedec v The Minister for Corrective Services* [2017] WAIRC 00828  
*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638

**Result** : Preliminary issue determined

**Representation:**

Claimants : Self-represented  
 Respondent : Mr S. Kemp (of counsel) from Kemp & Associates

**REASONS FOR DECISION**

- 1 Keen Bros (WA) Pty Ltd (Keen) operates a business, which provides two services: (1) heavy vehicle driving training; and (2) practical driving assessments (PDA) on behalf of the Director-General of the Department of Transport (Department) for Heavy Rigid (HR), Heavy Combination (HC) and Multi Combination (MC) driving licences.
- 2 Mr Stephen Mutch (Mr Mutch) and Mr Brian Clifford-Smith (Mr Clifford-Smith) were employed by Keen as truck driving instructors and assessors conducting PDAs. Mr Mutch and Mr Clifford-Smith commenced an originating claim alleging Keen contravened the *Educational Services (Post-Secondary Education) Award 2010* (the Award) and the *Fair Work Act 2009* (Cth) (FWA).
- 3 In both cases, Keen's response is that the Award does not cover Mr Mutch and Mr Clifford-Smith and Keen, and the Award does not apply to their employment by Keen.
- 4 The Western Australian Industrial Magistrates Court (IMC) determined that there was an identified preliminary issue for resolution and, to that end, ordered that M 29 of 2020 and M 60 of 2020 be heard on the same occasion.
- 5 In each case, the questions to be determined are:

- Whether the Award covers Mr Clifford-Smith and Keen and applies to Mr Clifford-Smith's employment; and
  - Whether the Award covers Mr Mutch and Keen and applies to Mr Mutch's employment.
- (the Preliminary Issues)

- 6 In part, resolution of the Preliminary Issues requires construction of certain clauses of the Award.
- 7 Schedule I outlines the jurisdiction and practice and procedure relevant to the IMC.
- 8 Relevant to the matters identified under the heading, 'Jurisdiction' in Schedule I of this decision, I am satisfied that:
- Keen is a corporation to which paragraph 51(XX) of the Constitution applies and it is a '*national system employer*'; and
  - Mr Mutch and Mr Clifford-Smith are individuals who were employed by Keen and are '*national system employees*'.
- 9 Schedule II outlines the principles relevant to construction of an industrial instrument. In summary, the interpretation of an award begins with consideration of the natural and ordinary meaning of the words used.<sup>1</sup> An award is to be interpreted in light of its industrial context and purpose, and must not be interpreted in a vacuum divorced from industrial realities.<sup>2</sup> An award must make sense according to the basic conventions of the English language.<sup>3</sup> Narrow and pedantic approaches to the interpretation of an award are misplaced.<sup>4</sup>

### **Issues For Determination**

- 10 The following issues require determination:
- (a) What '*post-secondary educational service*' industries are covered by the Award?
  - (b) In determining (a), what is meant by '*vocational education and training*'?
  - (c) Having determined what is meant by vocational education and training, what is meant by this training '*leading to qualifications recognised within the AQF*'?
  - (d) Is Keen in an industry included in cl 4.3 of the Award, specifically in cl 4.3(a) of the Award?
  - (e) Are Mr Mutch and Mr Clifford-Smith employed by Keen in the classifications listed in sch B, C or D of the Award, specifically teachers in sch C?
  - (f) Having regard to the functions and tasks undertaken by Mr Mutch and Mr Clifford-Smith as heavy vehicle driving instructors and PDA assessors, are they properly classified as '**teachers**' as that term is defined in cl 3.1 of the Award? Alternatively, is another classification appropriate?

### **Construction Of Cl 4 Of The Award - Coverage**

- 11 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee: s 46 of the FWA. An award *applies* to the employer and the employee if the award *covers* each of them: s 47 of the FWA. An award *covers* an employer and an employee if the award is expressed to cover each of them: s 48(1) of the FWA. It follows that the starting point to determine award coverage are the words of the award itself. More specifically, it is '*the objective meaning of the words used [in the relevant award] bearing in mind the context in which they appear and the purpose they are*

*intended to serve*': *Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148 [22].

- 12 Clause 4.1 of the Award provides that the Award '*covers employers throughout Australia in the post-secondary educational services industry and their employees*' employed in various classifications. The classification relied upon by Mr Clifford-Smith and Mr Mutch is Schedule C – Classifications – Teachers and Tutors/instructors.
- 13 The Award does not apply to:
- any secondary school;
  - employers where the Higher Education Industry – Academic Staff – Award 2010 or the Higher Education Industry – General Staff – Award 2010 applies; or
  - any employer whose principal function is the provision of labour market assistance programs.<sup>5</sup>
- 14 Clause 4.3 of the Award lists a number of industries which encompass post-secondary educational services and Mr Clifford-Smith and Mr Mutch rely upon '*(a) vocational education and training (VET) teaching leading to qualifications recognised within the AQF*' to support their contention that Keen is an industry employer in the '*post-secondary educational services*'.
- 15 '**[P]ost-secondary educational services industry** means the provision of education and training to persons over the age of 16 years who have exited the school education system'.<sup>6</sup>
- 16 '**[T]eacher** means an employee engaged to teach students where a teaching qualification is mandatory or required by the employer, and where the work required involves teaching a course of study or units of work recognised within or pursuant to the ... [AQF] or accredited by a relevant state or territory authority and which is neither the work of an academic teacher nor a tutor/instructor'.<sup>7</sup>
- 17 '**[T]utor/instructor** means an employee engaged in providing tutoring/instruction to students where the course is not accredited and where the employer may not require a teaching qualification and which is neither the work of an academic teacher nor a teacher'.<sup>8</sup>

### **The Meaning Of Vocational Education And Training In Cl 4.3 Of The Award**

- 18 '*[V]ocational education and training ... teaching leading to qualifications recognised within the AQF*' is not defined in the Award. Similarly, I note that other post-secondary educational services referred to in cl 4.3 of the Award are not defined, and the impression formed is that the various industry sectors are well known to those who are familiar with them because they either teach or learn in the industry. Perhaps it is a case of '*it is so obvious it goes without saying*', until it is not.
- 19 The breadth of possible industry sectors is clearly wide and varied. For example, '*community and adult education teaching not leading to qualifications recognised by the AQF*' (referred to in cl 4.3(f)) could, arguably, include pottery, woodwork or knitting classes either as a one off lesson or as a course.
- 20 The reference to '*vocational education and training*' must mean something in the context of the post-secondary educational services. The fact that the words appear in relation to '*leading to qualifications recognised by the AQF*' suggests that the context is a more formal one than that of '*community and adult education teaching not leading to qualifications recognised by the AQF*'.

- 21 The Australian Qualifications Framework (AQF) is the national policy for regulated qualification in Australian education and training.
- 22 I note the reliance by the parties on dictionary definitions in an attempt to persuade the IMC of the meaning of various words used in the Award. *'Dictionary definitions may assist in identifying the range of possible meanings a word may bear in various contexts, but will not assist in ascertaining the precise meaning the word [or words] bears in a particular context'*.<sup>9</sup>
- 23 Noting that the Award is an Australia wide industry award concerning formal and informal education services delivered to people over the age of 16 years outside of secondary and tertiary education, in my view, some guidance about the meaning of *'vocational education and training'* comes from the various Acts regulating vocational education and training in Australia.
- 24 In Western Australia, it is the *Vocational Education and Training Act 1996 (WA) (VET Act)*. Section 5(1) of the VET Act defines ***'vocational education and training'*** to mean *'education, instruction, training or experience that encompasses the development of skills, knowledge and attitudes in any vocation, or in any academic or practical discipline relevant to a particular occupation, business, employment or trade, but, subject to section 6, does not include education, instruction, training or experience provided by a school or a university'*.
- 25 Further, s 5(1) defines ***'VET course'*** to mean *'a course of study or training or both study and training in which vocational education and training is provided'* and ***'approved VET course'*** to mean that is:
- *accredited by the [Training Accreditation Council] under Part 7A; or*
  - *accredited under a corresponding law; or*
  - *prescribed by the regulations.*
- 26 In other jurisdictions, *'vocational education and training'* has a number of slightly different meanings.<sup>10</sup> However, there are common characteristics throughout the jurisdictions, namely it includes:
- skills or work or vocation based learning;
  - in a wide range of occupational areas generally outside of secondary and tertiary academic institutions;
  - with courses or units of competency referable to the AQF; and
  - where statements of attainment<sup>11</sup> demonstrate satisfactory completion.
- 27 I do not consider that it is possible to provide an all-encompassing definition of *'vocational education and training'* for the Award, but the purpose of canvassing the definitions across the jurisdictions is to attempt to distil indicia by which it is possible to determine whether employees and employers are involved in education and training that may come within the scope generally considered *'vocational education and training'*.
- 28 In Western Australia the provision of *'vocational education and training'* is carried out in colleges,<sup>12</sup> other vocational and education institutions (not colleges),<sup>13</sup> registered training providers,<sup>14</sup> and training contracts (apprenticeships and the like).<sup>15</sup> I note that other jurisdictions have similar arrangements with respect to the provision and regulation of *'vocational education and training'*.

- 29 Therefore, I would add to the indicia in [26], namely that the ‘*vocational education and training*’ is undertaken by people or organisations that are subject to a regulatory regime or oversight body.
- 30 I also note the *Vocational Education and Training (General) Regulations 2009* (WA) (Regulations) provides three relevant definitions:
- reg 4(1) – ‘*listed means listed on the national register*’ [the national register maintained under s 216 of the *National Education and Training Regulator Act 2011* (Cth)].
  - reg 4(2) – ‘*approved VET course*’ prescribed for the purposes of s 5(1) of the VET Act means, relevantly, ‘*each listed unit of competency that forms part of a listed training package*’.
  - reg 5(1) – outlines the ‘*corresponding law*’ meaning the corresponding law in each jurisdiction in Australia.

### **Is Keen In An Industry Referred To In Cl 4.3 Of The Award?**

Does Keen provide vocational education and training?

#### Evidence

##### *Keen’s Business*

- 31 The uncontroverted evidence of Mr Paul Ernest Charles Keen (Mr Keen), director of Keen, is that Keen is registered under s 27 of the VET Act as a Registered Training Organisation (RTO)<sup>16</sup> and is approved to deliver training and assessment in a number of AQF units of competency.<sup>17</sup> Mr Keen lists the AQF units of competency, which include:
- Drive MC vehicle (TLIC4006);
  - Drive HR vehicle (TLIC3004);
  - Drive HC vehicle (TLIC3005);
  - Drive Medium Rigid (MR) vehicle (deliver only) (TLIC3003); and
  - Drive Medium Rigid (LR) vehicle (deliver only) (TLIC2002).
- 32 Further, according to Mr Keen, Keen was required to be a RTO to be an authorised provider to carry out PDA for the Department.<sup>18</sup>
- 33 Mr Keen says that Keen is not approved to deliver any qualifications recognised by the AQF.<sup>19</sup> Further, Keen does not deliver accredited courses and does not carry on any other business as a RTO.<sup>20</sup>
- 34 Mr Keen is the only person who is authorised to sign a Statement of Attainment for units of competency issued by Keen, which he says is an adjunct to its primary business of truck driving training and PDA for the Department.<sup>21</sup>
- 35 There are five classes of heavy vehicle driver’s licence: MC, HR, HC, MR and LR.<sup>22</sup> Save for a MC driver’s licence, a person seeking to obtain a heavy vehicle driver’s licence need not complete any unit of competency or be supervised by a licenced driving instructor (the example used in the Court was a farmer teaching his child to drive a truck).<sup>23</sup>
- 36 Similarly, a learner heavy vehicle driver is not required to hold a learner’s permit to commence truck driving training, but must be accompanied by a supervisor, who may be one of three people:

- ‘a licenced driving instructor employed by an RTO ... who holds the [relevant] class of licence ... to the [licence under] supervision’;
- a licenced driving instructor not employed by a RTO who holds the relevant class of licence to the licence under supervision; or
- ‘a person who is not a licenced driving instructor or employed by an RTO ... [who] has held a Relevant Licence for at least 4 years’ (although this person cannot charge for supervision).<sup>24</sup>

37 Pursuant to the Department guidelines and the *Motor Vehicle Drivers Instructors Act 1963* (WA) (MVDI Act), if a person wants to derive some form of payment for driving instructing, they must be a licenced driving instructor. There are three options to becoming a licenced driving instructor, two of which involve recognition of prior learning:

1. assessment by the Department – this option involves no recognition of prior learning (such as a Certificate IV) and includes a written theory test and practical assessment by the Department;
2. recognition of prior learning – this option involves recognition of a Certificate IV in Transport and Logistics exempting the applicant from having to undertake the written theory test and practical assessment; and
3. recognition of prior learning – this option is an extension of option 2 applicable to recognising driving instructors from other States.<sup>25</sup>

38 The most significant difference between options 1 and 2 is that driving instructors initially assessed by the Department need to be reassessed every three years, whereas driving instructors with a Certificate IV are generally exempt from this process.

39 Just as there is more than one option to learning to drive a truck and to being licenced as a licenced driving instructor, there is more than one option to being assessed for a heavy vehicle driving licence.<sup>26</sup>

- HR and HC
  - The PDA can be undertaken by the Department or by a RTO. If the PDA is undertaken by the Department, a person can attend the Department and be assessed by one of the Department’s employed assessors. In this case the person need not present a Statement of Attainment prior to the PDA being undertaken. The successful person is issued with the relevant heavy vehicle driver’s licence.
  - If the PDA is undertaken by the RTO, the person must first obtain a Statement of Attainment in a relevant unit of competency (e.g. Drive HC vehicle (TLIC3005)), then the person undertakes the PDA assessed by an authorised provider (who must have completed three prescribed AQF units of assessment, but not necessarily hold a Certificate IV in Training and Assessment), who issues a Certificate of Competency to a successful person. The Certificate of Competency is presented to the Department who issues the relevant heavy vehicle driving licence.
- MR and LR
  - The PDA must be conducted by a driving assessor employed by the Department.

- MC

- The PDA must be conducted by an authorised provider and not the Department. Similar to a PDA undertaken by a RTO for HR and HC licences, the person must first obtain a Statement of Attainment in a relevant unit of competency, then the person undertakes the PDA assessed by an authorised provider (who must have completed three prescribed AQF units of assessment, but not necessarily hold a Certificate IV in Training and Assessment), who issues a Certificate of Competency to a successful person. The Certificate of Competency is presented to the Department who issues the MC licence.

- 40 According to Mr Keen, Keen's 'predominant' business is to provide 'one on one' vehicle supervision to learner truck drivers so that they can obtain a heavy vehicle driver's licence issued by the Department. This involves the learner driving a Keen truck under supervision of one of the driving instructors, who observes the learner and provides oral feedback.<sup>27</sup>
- 41 The usual driving session is one hour, but can be up to three hours or be delivered in a block of sessions. The learner driver is called from a waiting room and unless the learner driver is taken to a particular area to commence driving, the learner driver will commence driving and continue driving for the session, with oral feedback delivered by the driving instructor. Save for the driving session interaction between the learner driver and the driving instructor, there is no interaction between the two outside of the driving session. Other administrative tasks are carried out by administrative staff.<sup>28</sup>
- 42 The units of competency delivered by Keen do not require any instruction beyond the usual supervision to prepare a learner driver to pass the PDA. Keen does not deliver planned classes or lessons and the amount of driving instruction given depends on the learner driver's prior experience or skill level. There is no minimum number of sessions that must be undertaken prior to carrying out the PDA.<sup>29</sup>

*The Terms of the PDA Heavy Vehicles Agreement with the Department*

- 43 Clause 3.1 of the External Provision of Practical Driver Assessments Heavy Vehicles between the Department and Keen (the PDA Agreement) provides, amongst other things, that Keen must conduct PDA in accordance with the Service Specifications in sch 2 to sch 5.
- 44 In consideration of conducting the PDA, Keen may charge certain fees.
- 45 As part of the PDA Agreement, Keen is required, amongst other things, to maintain registration as a training organisation with the Australian Skills Quality Authority (ASQA) or the Training Accreditation Council (TAC), and ensure certain approved nationally recognised training units or qualifications (located at [www.training.gov.au](http://www.training.gov.au)) are on the scope of registration (applicable to the vehicles for which Keen is approved), namely: Drive HR; Drive HC; and Drive MC.
- 46 Schedule 2 of the PDA Agreement under 'Standards and Procedures' provides, in brief, that Keen is to verify an applicant '*has successfully completed the approved Unit of Competency Module relevant to the class of vehicle and retain the Statement of Attainment*'.
- 47 Thereafter, Keen is to assess an applicant against the HC or MC competency standard, relevant to the vehicle type set out on the Department's website to assess the ability of the applicant to demonstrate that they possess the ability to perform correct driving practices. The PDA Agreement provides the assessment criteria.
- 48 Upon completion of a PDA, Keen provides the applicant with a Certificate of Competency.



49 The service specifications in the PDA Agreement are prescriptive about how the PDA is to be conducted. Further, sch 3 to sch 5 set out the assessors' requirements for HR, HC and MC driving licences and, in summary, the assessor is required to have three AQF units of competency, an unrestricted licence in the relevant class of licence, and be approved by the Department.

*Mal Davey*

50 Keen adduced evidence from Mr Mal Davey (Mr Davey), Director of Commercial Management, Driver and Vehicle Services for the Department. Mr Davey manages the commercial relationship between the Department and PDA contracts.

51 Mr Davey's evidence is similar to Mr Keen in that he confirmed the Department requires:

- (a) PDA for an MC '*licence to be conducted by one of its authorised providers*' (who is also a RTO);
- (b) PDA for HR and HC licences can '*be conducted by one of its authorised providers*' or an assessor '*employed by the Department*'; and
- (c) PDA for MR and LR licences to be conducted '*by a driving assessor employed by the Department*'.<sup>30</sup>

52 Therefore, exclusivity of conducting PDA by an authorised provider is in relation to MC licences only. All other heavy truck licence PDA can be conducted by an authorised assessor or a driving assessor employed by the Department.

53 Mr Davey's evidence is otherwise consistent with [39] above.

54 Other than for an MC licence, at its most basic, for any other heavy vehicle driver's licence a person can be supervised by a friend who holds the relevant licence for the requisite period of time and present for a PDA at the Department. If the person successfully completes the PDA, the Department will issue the relevant heavy vehicle driver's licence.<sup>31</sup>

*Mr Clifford-Smith*

55 Mr Clifford-Smith was employed by Keen from 24 July 2015 to 2 October 2019 as a full-time instructor and assessor working from Monday to Thursday and paid at the rate of \$35 per hour.<sup>32</sup>

56 Mr Clifford-Smith is an authorised assessor for the Department.<sup>33</sup>

57 According to Mr Keen, Mr Clifford-Smith was engaged predominantly to provide supervision to learner driver's wanting to obtain a MR or LR driver's licence. This involved a four hour engagement, of which three hours was supervised driving by Mr Clifford-Smith and a one hour PDA conducted by an assessor employed by the Department. Mr Clifford-Smith had no engagement with the learner driver during the PDA conducted by the Department.<sup>34</sup>

58 Mr Clifford-Smith also supervised HR driving sessions from time to time and undertook assessments of learner drivers who had been supervised by other driving instructors employed by Keen.<sup>35</sup>

59 Save for noting the standard of performance of the learner driver during each session, Mr Clifford-Smith did not:<sup>36</sup>

- undertake any classroom instruction;
- present any course;
- undertake any preparation prior to the driving sessions; and

- have any ongoing liaison with any learner driver or carry out any administrative duties.
- 60 Mr Clifford-Smith says Keen offers nationally recognised vocational training courses in heavy vehicle operation as a RTO (under s 27(1) of the VET Act).
- 61 Mr Clifford-Smith says that he taught and assessed students enrolled in AQF recognised courses leading to LR, MR and HR licences.<sup>37</sup> Mr Clifford-Smith has a Certificate IV in Training and Assessment.<sup>38</sup>
- 62 Similar to the evidence given by Mr Keen, Mr Clifford-Smith says applicants received nationally recognised Statement of Attainment prior to '*facilitated access to the appropriate vehicle licence*'.<sup>39</sup>
- 63 Mr Clifford-Smith described before and after work duties, which involved checking vehicles, returning keys to the office, looking at the appointments for the following day and some minor administrative duties. In terms of his substantive duties, Mr Clifford-Smith says that this involved '*ascertaining candidates' credentials and prior learning, performing demonstration exercises, designing, implementing and monitoring student skill development and programs, providing learning and feedback as to skill acquisition levels, and recording learning outcomes*'.<sup>40</sup>
- 64 Mr Clifford-Smith provided examples of his training record forms.<sup>41</sup>
- 65 Mr Clifford-Smith says Keen employs '*appropriately qualified staff*' within Federal and State frameworks as provided in its Policy and Procedure Manual.<sup>42</sup>
- 66 Mr Clifford-Smith gave an example of a typical session with a learner truck driver, which included introducing himself to the person, verifying their driving experience and evaluating their level of expertise. He would then take the person to a truck and describe the process and follow Keen's procedures. The ultimate outcome was to ensure the person pass the PDA.
- 67 The person's performance was recorded on assessment sheets related to nationally recognised standards (I note that this is a form provided by the Department). Mr Clifford-Smith was occasionally asked to verify competencies for third party organisations (in a similar manner to Mr Mutch).
- 68 Mr Clifford-Smith said that a Statement of Attainment could be taken anywhere to do the PDA and some people did not end up doing the PDA. The person could also be assessed by the Department with or without a Statement of Attainment, or if they failed to achieve the Statement of Attainment.
- 69 Mr Clifford-Smith agreed Keen delivered units of competency, and did not issue qualifications. However, Keen provided Statements of Attainment.
- 70 Mr Clifford-Smith denied Keen wanted (in the alternative) equivalent experience to the Certificate IV qualification, referring to the Policy and Procedure Manual. Mr Clifford-Smith agreed people might complete any training in a short period of time.

#### *Mr Mutch*

- 71 Mr Mutch was employed by Keen from February 2008 to May 2019, initially as a heavy vehicle driving instructor and from 2016 as an assessor. He has a Certificate IV in Training and Assessing.

- 72 According to Mr Keen, Mr Mutch was engaged predominantly to provide supervision to learner driver's wanting to obtain an HR or HC driver's licence. Mr Mutch also undertook assessments of learner drivers who had been supervised by other driving instructors employed by Keen.<sup>43</sup>
- 73 Save for noting that the standard of performance of the learner driver during each session, Mr Mutch did not:<sup>44</sup>
- undertake any classroom instruction;
  - present any course;
  - undertake any preparation prior to the driving sessions; and
  - have any ongoing liaison with any learner driver or carry out any administrative duties.
- 74 According to Mr Mutch, he taught and assessed students enrolled in AQF recognised courses, resulting in them being issued with a Statement of Attainment enabling the student to be assessed in order to obtain a qualification in a number of courses.<sup>45</sup>
- 75 Mr Mutch (and Mr Clifford-Smith) also conducted verification of competence and driver evaluation assessment as part of pre-employment requirements for third parties.<sup>46</sup> In simple terms, other organisations would engaged Keen to verify that heavy vehicle truck drivers were assessed as competent as part of the organisations pre-employment process.
- 76 Mr Mutch says that he '*covered all aspects of safe driving practices and operating a vehicle in accordance to the manufacturers specifications and in compliance Occupational Health and Safety ... whilst teaching and conducting assessments...designed, implemented and delivered training dependent upon the individual's learning requirements*' including recording learning progress, providing verbal feedback and training outcomes '*taught and assessed complex procedures*'.<sup>47</sup>
- 77 Mr Mutch says Keen '*issued students with a resource guide that ... demonstrated the level of instruction and knowledge required by a student ... to obtain a Certificate of Attainment [Mr Mutch agreed that he had erroneously referred to the Statement of Attainment as a 'Certificate'] to progress to undertake a PDA*'.<sup>48</sup>
- 78 Further, Keen developed a Policy and Procedure Manual about its operations and training packages and informing students that its driving instructors possess the appropriate qualifications and that training and assessments are to national standards leading to AQF qualifications.<sup>49</sup>
- 79 Mr Mutch gave an example of a typical driving session, describing a session similar to that provided by Mr Clifford-Smith.
- 80 Mr Mutch agreed that the period of time to prepare a person for the PDA was variable and depended on the person, the type of licence and other such factors.
- 81 Mr Mutch said he monitored each lesson and the person's progress.
- 82 Mr Mutch disagreed that he only supervised a person's driving, although he agreed that some people presented having an ability to drive a truck (that is, they had previous driving experience). He agreed the minimum session was one hour, but said that for a HC and MC licence it was a minimum of two hours although this was, again, dependent on the person's existing level of skill. That is, a more competent student may progress more quickly.

83 Mr Mutch also agreed that a unit of competency is not a qualification and that most of the learning and assessment was undertaken in the truck cabin and that he was ensuring that the person was able to successfully complete the PDA.

*General information from Keen's website*

84 Mr Mutch and Mr Clifford-Smith both referred to general information from Keen's website.<sup>50</sup>

85 The general information provides that:

*You will be taught all aspects of safe and legal driving techniques together with correct vehicle operations, whilst giving you the confidence and skill required to advance in your driving career.*

...

*KeenBros [sic] Truck Driving School is **Authorised Provider Number 500**, for the Department of Transport, allowing us to provide in-house training and assessing for **HR, HC, MC**, and training for **LR and MR**.*

...

*Units of Competency provided are: TLIC2002, TLIC3003, TLIC3004, TLIC3005, TLIC4006, TLIB0002 & TLIB2008*

*Keen student resource guide*

86 Mr Mutch said that Keen issued students with a resource guide for learning to drive HC vehicles, which demonstrated the level of instruction and knowledge required by a person to enable them to obtain a Statement of Attainment.<sup>51</sup>

87 The student resource guide provides for the RTO entry requirements and under the heading 'Staff to be involved' states:

*Assessor must have all relevant qualifications & Instructors the relevant license [sic]*

88 Thereafter, various qualifications are listed, as is the assessment process to be carried out by the instructor and assessor.

89 Notably, under the heading of 'Mapping of Assessment', the training package code and title for the unit of competency for a HC vehicle is noted to be 'TLI10 Transport and Logistics Training Package'.

*Keen's policies and procedure manual*

90 Mr Mutch and Mr Clifford-Smith referred to various sections in a Keen's Policies and Procedure Manual.<sup>52</sup> They both placed particular emphasis on Standard 7 entitled 'Competence of RTO staff' and the purported (only) requirement by Keen's for training to be delivered by a person holding a Certificate IV in Training and Assessment from the Training and Assessment Training Package, and assessments being conducted by a person who has certain competencies as identified.

91 The particular references made by Mr Mutch and Mr Clifford-Smith, as it relates to RTO staff, is selective in its emphasis where Standard 7 also sets out alternative staff competency requirements not requiring a Certificate IV in Training and Assessment, consistent with the Department's requirements for authorised assessors and driving instructors.<sup>53</sup>

92 The Policies and Procedures Manual at Standard 2 entitled 'Compliance with Commonwealth, state/territory legislation and regulatory requirements' provides that Keen 'complies with relevant Commonwealth and State/Territory legislation' as it relates to, amongst other things,

VET (presumably meaning vocational education and training). Further, that Keen's policies and procedures will meet Commonwealth and State/Territory requirements including the client being *'provided with information about current legislation and regulatory requirements that significantly affect their participation in VET'* (again, presumably meaning vocational education and training).

- 93 In Standard 5 of the Policies and Procedure Manual, Keen *'recognises the AQF qualification and statement of attainment issued by other [RTOs]'*.
- 94 In Standard 7, referred to above, Keen outlines the requirements for assessments carried out by Keen's authorised assessors and the requirements for training delivered by a person. As previously stated, consistent with the Department's requirements for authorised assessors and driving instructors.
- 95 In Standard 8 of the Policies and Procedure Manual, Keen will ensure that assessments will *'[l]ead to the issuing of a statement of attainment or qualification under the AQF when a person is assessed as competent against nationally endorsed unit(s) of competency in the application Training Package'*.
- 96 In Standard 10 of the Policies and Procedure Manual, Keen will *'issue AQF qualifications and statements of attainment that are within its scope of registration'* and *'identify the units of competency from Training Packages or competencies or modules from accredited courses'*.

#### Findings of fact

- 97 In my view, Mr Mutch and Mr Clifford-Smith over-stated the complexities of their employment duties and the need for Certificate IV qualifications to carry out their dual role as authorised assessors to conduct PDA for the Department and as driving instructors. Again, in my view, they did so to bolster their job description and to shoehorn their employment duties into certain classifications under the Award. As will be discussed, this was unnecessary and casts some doubt on the authenticity of aspects of their evidence.
- 98 For example, Mr Mutch's and Mr Clifford-Smith's evidence is that they *'designed, implemented and delivered training dependent upon the individual's learning requirements [including recording learning progress, providing verbal feedback and training outcomes] ... taught and assessed complex procedures'*.
- 99 Mr Keen's and Mr Davey's evidence was credible and truthful. It was apparent that Mr Keen adopted a different approach to the heavy vehicle driver training to that of Mr Mutch and Mr Clifford-Smith. In many respects, I found his evidence about the features of the training more authentic, although, for reasons that will shortly become apparent, this does not have a material effect on the outcome.
- 100 When regard is had to the surrounding documents and to Mr Mutch's and Mr Clifford-Smith's oral evidence concerning a typical driving session and Mr Keen's evidence, it was apparent, and I find on the balance of probabilities, that:
- the heavy vehicle driver training delivered by Keen was prescribed by the Department or the AQF and certainly not designed by either Mr Mutch or Mr Clifford-Smith;
  - to the extent that Mr Mutch and Mr Clifford-Smith recorded learning progress and provided training outcomes this was in an unsophisticated manner, which included such comments as *'Not a good start to-day [sic]. Not listening. Pulled out on traffic @ Kelvin Rd after I told him not to'*<sup>54</sup> being no more than a running dialogue of a session;

- the typical driving session was very much dictated by the past experience of the learner driver, which did not require an in depth analysis of learner driver's ability. In my view, this would have been readily apparent after asking a few short questions and a casual observation of the first driving session;
- the driving sessions were generally one hour time slots and the goal in most, if not all, cases was to facilitate the learner driver to attain the necessary skills and knowledge to pass a driving test to obtain a heavy vehicle driving licence;
- this required Mr Mutch and Mr Clifford-Smith to follow a series of steps designed with an end goal of attaining a heavy vehicle driving licence;
- the Department and Keen did not require Mr Mutch or Mr Clifford-Smith to have a Certificate IV in Training and Assessment to undertake their duties as driving instructors or their duties as authorised assessors for PDA. However, the fact that Mr Mutch and Mr Clifford-Smith did have a Certificate IV in Training and Assessing was no doubt a good selling point for Keen and it meant that they did not have to comply with other Department requirements; and
- the PDA was prescribed by the Department and Mr Mutch and Mr Clifford-Smith were obliged to follow the Department's guidelines in carrying out their functions as authorised assessors. They exercised no autonomy in that regard.

101 However, the following is also relevant and I find on the balance of probabilities that:

- Keen was a RTO registered under the VET Act;
- Keen was registered to deliver training in units of competency recognised by the AQF in learning to drive a heavy vehicle of a particular class or classes;
- if a person passed the particular unit of competency, Keen provided a Statement of Attainment that is recognised in Australia as part of a national framework of vocational education and training;
- while not able to issue any qualifications under the AQF, Keen delivered training in units of competency that potentially lead to such qualifications being attained by a person (if they wished to do so); and
- as part of its service delivery in conducting PDA and truck driver training, Keen was required to adhere to certain statutory and regulatory requirements under Commonwealth and State and Territory legislation as it related to, amongst other things, vocational education and training.

102 In respect of Keen's business, I accept two things:

- (1) Keen's principle business was to facilitate learner truck drivers to get a heavy vehicle driving licence and, in doing so, it did not devise a course or series of lessons, but followed a script set out by the Department and the AQF (in terms of the unit of competencies); and
- (2) the Department required Keen to be a RTO so as to conduct PDA and, in doing so, it was required to comply with a series of steps including the provision of a Statement of Attainment, which could be converted to a heavy vehicle driver's licence.

103 I also accept that, other than for a MC driver's licence, all other heavy vehicle driver's licences can be obtained without formal training or instruction and by the PDA being conducted by the Department without a Statement of Attainment.

#### Determination

104 Be that as it may, and as unsophisticated as the training appears to have been, I also find on the balance of probabilities that Keen was engaged in '*vocational education and training*':

- where it provided skills based learning;
- enabling people to potentially be employed as a heavy vehicle truck driver outside of secondary and tertiary academic institutions;
- which was based on units of competency referable to the AQF;
- where a Statement of Attainment provided by Keen demonstrated satisfactory completion of a unit of competency and that Statement of Attainment could be converted to certain AQF recognised qualifications upon completion of a training course, albeit not one conducted by Keen; and
- which was recognised and regulated by the VET Act and in the context of nationally recognised training.

105 Further, I also find that, notwithstanding Keen could not issue qualifications recognised by the AQF or conduct accredited courses, it did deliver training in units of competency recognised by the AQF and these units of competency could form part of qualifications recognised by the AQF.

106 That is, merely because a person did not obtain qualifications from Keen, did not prohibit them from adding to any Statement of Attainment provided by Keen and in time obtaining AQF qualifications. In that sense, any Statement of Attainment provided by Keen was potentially one step in a series of steps to qualification in some other area.

107 I find Keen provides '*vocational education and training*' in respect of heavy vehicle truck driver training.

#### **Does The Vocational Education And Training Provided By Keen Lead To Qualifications Recognised Within The AQF?**

108 There is no ambiguity or technical meaning to be applied to the meaning of '*leading to qualifications recognised within the AQF*'. The clear intention of these words in the context of the cl 4.3 of the Award recognises a range of learning options. Were this not the case, then delivering units of competency and providing Statement of Attainment for the units of competency would have no value.

109 That is, what would be the point of delivering training for single units of competency if they could not be converted to a qualification if a person so desired at some point?

110 Further, while the heavy vehicle truck driver training provided by Keen, of itself, does not provide a qualification recognised within the AQF, the units of competency delivered by Keen enable a person to obtain qualifications recognised within the AQF if the person goes on to undertake further units of competency.

111 In that sense, the vocational education and training by Keen leads to qualifications recognised within the AQF, in that it is a step in a series of steps to qualification.

112 I do not accept the narrow construction advanced by it to the effect that Keen does provide a final or complete qualification, therefore the units of competency delivered by Keen do not lead to qualifications recognised by the AQF.

113 In my view, that is not what is intended with respect to ‘*vocational education and training*’, particularly when regard is had to units of competency capable of being completed in a staged manner.

#### Determination

114 Therefore, I find on the balance of probabilities that Keen is an employer within the ‘*post-secondary educational services industry*’ where it provides ‘*vocational education and training teaching leading to qualifications recognised within the AQF*’ by providing heavy vehicle driver training. It is not to the point that Keen does so primarily to enable someone to obtain a heavy vehicle driver’s licence.

#### Were Mr Mutch And Mr Clifford-Smith Employed By Keen As Teachers Or Tutor/Instructors?

115 Clause 4.1 of the Award provides that the Award covers employers ‘*in the post-secondary educational services industry and their employees ... employed in the classifications listed in sch B, sch C and sch D.*’

116 Mr Mutch and Mr Clifford-Smith contend that they were employed by Keen as ‘teachers’ in Schedule C – Classifications – Teachers and Tutor/instructors of the Award.

117 The following principles, drawn from decided cases, are relevant to determining the appropriate classification of Mr Mutch’s and Mr Clifford-Smith’s position:

- ‘*Where the particular issue is whether an employee is engaged in a particular classification or class of work, then the Court takes a practical approach and will consider the aspect of the employee’s employment which is the principal or major or substantial aspect*’.<sup>55</sup>
- Determining the major or substantial aspect of an employee’s employment is ‘*not merely a matter of quantifying the time spent on the various elements of work performed...; the quality of the different types of work done is also a relevant consideration*’.<sup>56</sup>
- The focus is upon the identification of the skills and duties required of an employee who is called upon to perform the function that is required to be performed by the employer. The individual performance of a particular employee (e.g. quality and quantity of work, capacity for more complex work et cetera) is less relevant than the skills and duties necessary to perform the function required to be performed by the employer.<sup>57</sup>

118 Mr Mutch’s and Mr Clifford-Smith’s evidence has been discussed above and findings made with respect to their roles and duties.

119 It is necessary to focus on the skills, duties and tasks required of a heavy vehicle driving instructor and authorised assessor in the context of the meaning of ‘**teacher**’ and ‘**tutor/instructor**’ in the Award.

120 While it was not quantified during the hearing, my overall impression, and I find, was that heavy vehicle truck driver training occupied substantially more work time than PDA. That is, depending on the learner driver’s experience actual time in the cabin of a truck occupied more time than the PDA (which appeared to be approximately an hour).



- 121 Save for some limited administrative office duties, Mr Mutch's and Mr Clifford-Smith's work was predominantly providing supervision and instruction to the learner driver in the cabin of the truck with some ancillary instruction given outside the cabin. A learner driver with limited prior heavy vehicle driving experience would require more instruction than someone who had previous heavy vehicle driving experience. I do not accept that either claimant devised any course or training package. Their role was very much scripted by the Department and the AQF.
- 122 Having regard to the Department's requirements for heavy vehicle driving instruction, the *Motor Vehicle Drivers Instructors Act 1963* (WA) (MVDI Act) and the evidence about what Keen required to enable employees to provide heavy vehicle driving instruction, I am not satisfied that Mr Mutch and Mr Clifford-Smith are properly classified as teachers in sch C of the Award.
- 123 The fact that Mr Mutch and Mr Clifford-Smith have a Certificate IV is not determinative.
- 124 The definition of 'teacher' in the Award has two parts, the first of which applies where a teaching qualification is mandatory or required by the employer.
- 125 A teaching qualification, such as a Certificate IV, is not mandatory to undertake heavy vehicle driving instructing for the purposes of providing a Statement of Attainment for a unit of competency recognised within the AQF. The Department and Keen both recognised prior relevant driving experience and assessment in the particular class of vehicle as an alternative to a Certificate IV (prior learning).
- 126 Further, Keen did not require a Certificate IV for an employee to undertake heavy vehicle driving instructing. Keen's Policy and Procedure Manual in Standard 7 provided for equivalent competencies to a Certificate IV, consistent with the Department's requirements and Mr Keen's evidence. There was also no requirement for Keen to employ employee instructors and assessors with a Certificate IV to meet its obligations under the PDA Agreement both in relation to heavy vehicle instructing and conducting PDA assessments (noting PDA assessments do not form part of the heavy vehicle driving instruction).
- 127 In addition, there was no evidence before the IMC that the units of competency delivered by Keen were required to be taught by an employee with a teaching qualification.
- 128 Therefore, I find that Mr Mutch and Mr Clifford-Smith have not proven on the balance of probabilities that they were employed by Keen in the classification of teachers under sch C of the Award.
- 129 I note that Mr Mutch and Mr Clifford-Smith preferably characterised the classification of their employment as teachers under sch C of the Award, however, they also made reference to tutors/instructors under the same classification. Therefore, I have also considered whether they were employed as tutors/instructors under sch C of the Award having regard to the definition of tutors/instructors in cl 3.1 of the Award.

#### Determination

- 130 I find that Mr Mutch and Mr Clifford-Smith were employed by Keen in the classification of tutors/instructors under sch C of the Award for the following reasons:
- heavy vehicle driving instruction, including the units of competency associated with the relevant heavy vehicle licence, was not an accredited course. Nothing in the evidence demonstrated that the heavy vehicle driving instruction or the units of competency were '*accredited by an authority exercising statutory powers of accreditation*';<sup>58</sup>
  - Keen did not require its employees to have a teaching qualification;

- the work carried out by Mr Mutch and Mr Clifford-Smith was not work of an academic teacher or a teacher; and
- while the words '*students*' and '*tutoring/instruction*' are not defined in the Award, having regard to the actual tasks and functions carried out by Mr Mutch and Mr Clifford-Smith and the approach adopted in constructing the Award terms, it is clear they did not benignly sit in a truck cabin. That is, their role was not limited to mere supervision of a learner driver, which is inconsistent with delivering units of competency in any event. I accept that Mr Mutch and Mr Clifford-Smith were required to provide more instruction and knowledge than that expressed by Mr Keen, albeit not to the level suggested by them. Meaning the amount of instruction may have been little or much more depending on the prior truck driving experience of the learner driver, but that does not necessarily undermine the overall character of what Mr Mutch and Mr Clifford-Smith were required to do. Furthermore, the word '*student*' has numerous meanings, from someone who is engaging in formal academic study to someone who is engaging in learning for pleasure. A pedantic approach to the meaning of '*student*' under the Award is inconsistent with the breath of post-secondary educational service industries intended to be covered, and which are covered, by the Award.

### **Outcome**

131 Therefore, I am satisfied on the balance of probabilities that:

- The Award covered Keen as an employer in the post-secondary educational services industry;
- The Award covered Mr Mutch and Mr Clifford-Smith where they were employed by Keen in the classification of tutors/instructors in sch C of the Award; and
- As a consequence, the Award applies to Mr Mutch and Keen and to Mr Clifford-Smith and Keen.

**D SCADDAN**  
**INDUSTRIAL MAGISTRATE**

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- <sup>1</sup> *City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union* (2006) 153 IR 426, 438.
- <sup>2</sup> *City of Wanneroo* 438, 440.
- <sup>3</sup> *City of Wanneroo* 440.
- <sup>4</sup> *Kucks v CSR Ltd* (1996) 66 IR 182; *Ancor Ltd v CFMEU* [2005] HCA 10.
- <sup>5</sup> Clause 4.2 of the Award.
- <sup>6</sup> Clause 3.1 of the Award.
- <sup>7</sup> Clause 3.1 of the Award.
- <sup>8</sup> Clause 3.1 of the Award.
- <sup>9</sup> *TAL Life Ltd v Shuetrim* [2016] NSWCA 68 [80].
- <sup>10</sup> A table of definitions of ‘*vocational education and training*’ is contained in Schedule III.
- <sup>11</sup> ‘**VET statement of attainment**, in relation to units of competency or modules of a VET course, means a statement given to a person confirming that the person has satisfied the requirements of units of competency or modules specified in the statement’ – see s 3 of the *National Education and Training Regulator Act 2011* (Cth).
- <sup>12</sup> Section 35 of the VET Act.
- <sup>13</sup> Section 57 of the VET Act.
- <sup>14</sup> Part 7A of the VET Act.
- <sup>15</sup> Part 7 of the VET Act.
- <sup>16</sup> Exhibit 4 (in both claims) – Witness Statement of Paul Ernest Charles Keen dated 11 September 2020 [4], [5] and PK2. Keen is registered pursuant to the VET Act.
- <sup>17</sup> Exhibit 4 [5], PK2.
- <sup>18</sup> Exhibit 4 [5], [24], PK1 at clause 7.3(a).
- <sup>19</sup> Exhibit 4 [6], PK2 page 5 of 8.
- <sup>20</sup> Exhibit 4 [24].
- <sup>21</sup> Exhibit 4 [7], [25].
- <sup>22</sup> Exhibit 4 [8].
- <sup>23</sup> Exhibit 4 [9].
- <sup>24</sup> Exhibit 4 [10].
- <sup>25</sup> Exhibit 4 [11] - [13] and PK3. It is further noted that applicants for a driving instructors licence must also hold a current WA driver’s licence for a minimum of three years in the class instruction is to be given, be of good character, be a fit and proper person and be over 21 years of age.
- <sup>26</sup> Exhibit 4 [15] - [18].
- <sup>27</sup> Exhibit 4 [19].
- <sup>28</sup> Exhibit 4 [20] - [23].
- <sup>29</sup> Exhibit 4 [26], [27].
- <sup>30</sup> Exhibit 3 – Witness statement of Mal Davey dated 15 September 2020 [5].
- <sup>31</sup> Exhibit 3 [11].
- <sup>32</sup> Exhibit 1 – Witness statement of Brian Clifford-Smith dated 16 August 2020 [51], [56].
- <sup>33</sup> Exhibit 1 [63].
- <sup>34</sup> Exhibit 4 [29].
- <sup>35</sup> Exhibit 4 [30]. [31].
- <sup>36</sup> Exhibit 4 [32], [33], PK4.
- <sup>37</sup> Exhibit 1 [41].
- <sup>38</sup> Exhibit 1 – Annexure C.
- <sup>39</sup> Exhibit 1 [43].
- <sup>40</sup> Exhibit 1 [47].
- <sup>41</sup> Exhibit 1 [48].
- <sup>42</sup> Exhibit 2 – Keen Policy and Procedure Manual.
- <sup>43</sup> Exhibit 4 [35], [36].
- <sup>44</sup> Exhibit 4 [37], [38], PK5.
- <sup>45</sup> Exhibit 1 [7].
- <sup>46</sup> Exhibit 1 [8], Annexure E (VOC Assessment sheet).
- <sup>47</sup> Exhibit 1 [9] - [11], Annexure F (Department information on assessment for HC).
- <sup>48</sup> Exhibit 1 [12].
- <sup>49</sup> Exhibit 1 [13]; Exhibit 2 Annexure J.
- <sup>50</sup> Exhibit 2 Annexure B (M 60 of 2020).
- <sup>51</sup> Exhibit 2 Annexure G.

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<sup>52</sup> Exhibit 2 Annexure J.

<sup>53</sup> Exhibit 2 Annexure J at pages 11 and 12.

<sup>54</sup> Exhibit 4 PK5 .

<sup>55</sup> *Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd* [2016] FCCA 621, [27]; *Director of Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No7)* [2013] FCCA 1097; *Logan and Otis Elevator Company* 1997 IRCA 200 (20 June 1997) (Moore J).

<sup>56</sup> *Ware v O'Donnell Griffin (Television Services) Pty Ltd* [1971] AR (NSW) 18.

<sup>57</sup> *Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd* [2016] FCCA 621, [32]; *Fair Work Ombudsman v Da Adamo Nominees Pty Ltd No4* [2015] FCCA 1178, [256]

<sup>58</sup> Meaning of 'accredited' in cl 3.1 of the Award.

**Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The Fair Work Act 2009 (Cth): Alleging Contravention Of Enterprise Agreement**

Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.
- [2] The IMC being a court constituted by an industrial magistrate, is '*an eligible State or Territory court*': FWA s 12 (see definitions of '*eligible State or Territory court*' and '*magistrates court*'); *Industrial Relations Act 1979* (WA) s 81, s 81B.
- [3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA s 544.
- [4] The civil penalty provisions identified in s 539 of the FWA include the terms of a modern award where the modern award *applies* to give an entitlement to a person and to impose an obligation upon a respondent employer: FWA s 46(2). The modern award *applies* if it *covers* the employee or the employee organisation and the employer, the modern award is in operation and no other provision of the FWA provides that the modern award does not apply: FWA s 47(1) (when read with s 48 of the FWA).
- [5] An obligation upon an '*employer*' covered by a modern award is an obligation upon a '*national system employer*' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA s 42, s 48, s 14, s 12. An entitlement of an employee covered by a modern award is an entitlement of an '*employee*' who is a '*national system employee*' and that term, relevantly, is defined to include '*an individual so far as he or she is employed by a national system employer*': FWA s 42, s 48, s 13.

Contravention

- [6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for '*an employer to pay [to an employee] an amount ... that the employer was required to pay*' under the modern award (emphasis added): FWA s 545(3)(a).
- [7] The civil penalty provisions identified in s 539 of the FWA include:
- Contravening a term of a modern award: FWA s 539, s 45.
  - Contravening a NES.
- [8] An '*employer*' has the statutory obligations noted above if the employer is a '*national system employer*' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FWA s 14, s 12. The obligation is to an '*employee*' who is a '*national system employee*' and that term, relevantly, is defined to include '*an individual so far as he or she is employed by a national system employer*': FWA s 13
- [9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An *employer* to pay to an employee an amount that the employer was required to pay under the FWA: FWA, s 545(3).
- A *person* to pay a pecuniary penalty: FWA s 546.

[10] In contrast to the powers of the Federal Court and the Federal Circuit Court, an eligible state or territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: *Mildren and Anor v Gabbusch* [2014] SAIRC 15.

#### Burden and standard of proof

[11] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

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

[12] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336:

*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].*

[13] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

## Schedule II – Relevant Principles Of Construction

- [1] This case involves construing a modern award. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in *Fedec v The Minister for Corrective Services* [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:
- a. *‘The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement’;*
  - b. *‘The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument. It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties’ subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean’;*
  - c. *‘The objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context. The apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances’;*
  - d. *‘An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ’;*
  - e. *‘An instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation’;* and
  - f. *‘Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect’.*

The following is also relevant:

- g. Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed: *City of Wanneroo v Australian Municipal, Administrative, Clerical And Services Union* [2006] FCA 813 [53] - [57] (French J).
- h. Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate: *City of Wanneroo* [53] - [57] (French J); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 [28] - [30] (Katzmann J).

**Schedule III – Table Definitions – Vocational Education And Training**

<b>State</b>	<b>Legislation</b>	<b>Definition</b>
ACT	<i>Training and Tertiary Education Act 2003</i>	The education and training and qualifications and statements of attainment under the vocational education and training provisions of the AQF.
NSW	<i>Vocational Education and Training (Commonwealth Powers) Act 2010</i>	No separate definition.
NT	<i>Training and Skills Development Act 2016</i>	No separate definition.
Qld	<i>Further Education and Training Act 2014</i>	No separate definition.
SA	<i>Training and Skills Development Act 2008</i>	Education and training for work in relation to which <a href="#">qualifications</a> and statements of attainment are issued under the <a href="#">vocational education and training</a> provisions of the AQF.
Tas	<i>Training and Workforce Development Act 2013</i>	Vocational education and training, and attainment of associated qualifications or statements of attainment, under level 1, 2, 3, 4, 5 and 6 of the AQF.
Vic	<i>Education and Training Reform Act 2006</i>	The education and <a href="#">training</a> and <a href="#">qualifications</a> and statements of attainment under the <a href="#">vocational education and training</a> provisions under the AQF. That part of education and <a href="#">training</a> which is directed towards the development of skills and knowledge in relation to work when it is provided by an <a href="#">adult education institution</a> or a community based organisation which is not a <a href="#">TAFE institute</a> , a commercial provider or industry provider.