From: Ralph Clarke
Sent: Tuesday, 21 February 2017 11:29 AM
To: Chambers - Hatcher VP
Cc: 'greg'; 'Sascha Cook'; Stephen.Farrell@cciwa.com; 'Arvin Bisbal'; 'Tom French'; 'Henry Lewocki'
Subject: FW: AM 2016/6 4 Year Review Real Estate Award 2010
Importance: High

Dear Associate

In RRESSA's submission with respect to the abovementioned 4 Year Review of the Real Estate Award 2010, I referred to a decision of Industrial Magistrate Ardlie of the Industrial Relations Court of SA in the matter of Parsons and Others v Pope Nitschke Pty Ltd [2016] SAIRC 17, re Long Service Leave and the debiting of same from an salespersons commission. (Paragraph 8 (c), page 9 of RRESSA submission). That decision as mentioned at the review hearing in November 2016 was subject to an appeal before a single Judge of the IRCSA.

The appeal decision on the above matter was given on the 8th February 2017 by Judge Hannon and I attach a copy of that decision for your information without comment.

Regards

Ralph Clarke

Industrial Advisor RRESSA

South Australian Industrial Relations Court

Pope Nitschke Pty Ltd (as Trustees for Pope Nitschke Unit Trust) v Parsons & Ors [2017] SAIRC 6 (8 February 2017)

Last Updated: 13 February 2017

Pope Nitschke Pty Ltd (as Trustees for Pope Nitschke Unit Trust) v Parsons & Ors **[2017] SAIRC 6**

INDUSTRIAL RELATIONS COURT (SA)

POPE NITSCHKE PTY LTD (as Trustees for POPE NITSCHKE UNIT TRUST)

v

PARSONS, Sharon
SMART, David
PAPINI, Ans

JURISDICTION: Single Judge Appeal

FILE NOS: 8075, 8754 and 8755 of 2014

HEARING DATE: 30 August 2016, written submissions 20 and 23 September 2016

JUDGMENT OF: His Honour Judge PD Hannon

DELIVERED ON: 8 February 2017

CATCHWORDS:

*The respondents were employed as commission only real estate salespersons - They made claims for amounts including annual leave, personal carer's leave and long service leave alleged to be due in accordance with their terms and conditions of employment under a Collective Agreement governed by Commonwealth law - The claim for annual leave and personal carer's leave was dismissed but it was found that the appellant was not entitled to debit long service leave entitlements against commission due to the respondents - On appeal a jurisdictional question arose as to whether the court below was a court exercising summary jurisdiction for the purposes of s 565(1A) of the Fair Work Act 2009 (Cth) thus allowing for an appeal within the State court hierarchy - **Held** that there was jurisdiction to hear the appeal - **Held** that*

on a proper construction of the Collective Agreement the appellant was obliged to pay to the respondents their accrued long service leave entitlements - Appeal dismissed - Sections 539, 546 and 565 Fair Work Act 2009 (Cth); s 2B Acts Interpretation Act 1901 (Cth); s 79 Judiciary Act 1903 (Cth); ss 11, 14, 154 and 187 Fair Work Act 1994 (SA); Long Service Leave Act 1987 (SA)

Vincent Lee Consulting Services Pty Ltd t/as Fernwood Fitness Centre v Bourne [2009] SAIRC 61
Simon v The Bowen Family Trust t/as Pod Squared Podiatry Centre [2016] SAIRC 21
Bragg & Ors v GWA Group Holdings Ltd [2016] SAIRC 32
John L Pierce Pty Ltd v Kennedy [2000] FCA 1729
Construction, Forestry, Mining and Energy Union v Clarke [2005] FCA 986
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170
Griggs v Noris Group of Companies [2006] SASC 23
Parsons v Pope Nitschke Pty Ltd [2016] FWCFB 375
Ardino v Count Financial Group Pty Ltd (1994) 57 IR 89
City of Charles Sturt v Australian Services Union [2011] SAIRC 73
Short v FW Hercus Pty Ltd (1993) 40 FCR 511

On appeal from the decision of Ardlie IM [2016] SAIRC 17

REPRESENTATION:

Appellant: Mr A Manos
Respondent: Mr A Knox
Solicitors/Agents:
Appellant: Crawford Legal
Respondent: Cognisage Australia Industrial Relations

Introduction

1. Ms Parsons, Mr Smart and Mr Papini ("the respondents") instituted proceedings in the Industrial Relations Court of South Australia ("IRCSA") against Pope Nitschke Pty Ltd ("the appellant") claiming amounts due to them by way of annual leave, long service leave and other payments with respect to their employment by the appellant as real estate commission salespersons.
2. The terms and conditions of employment of the respondents over the period of the alleged accrual of unpaid entitlements were governed by the Pope Nitschke First National Employee Collective Agreement ("the Agreement"). It was a collective agreement approved in 2008 under the *Workplace Relations Act 1996* (Cth) ("the WRA 1996"), the predecessor legislation to the *Fair Work Act 2009* (Cth) ("the FWA 2009"). The Agreement was preserved by the operation of transitional provisions[1] and continued in operation until 7 December 2014 when it was terminated by the Fair Work Commission ("FWC).
3. A learned Industrial Magistrate ("the Magistrate") who heard the application considered that the Agreement provided for a system of payment for employees as regards long service leave which prevailed over the State legislation otherwise giving rise to that entitlement, being the *Long Service Leave Act 1987* ("the LSL Act").[2] However he found that a process under the Agreement which permitted the appellant to make advance payments to the respondents of

annual and other leave as part of their agreed commission, and to debit other entitlements and expenses against commission payable to the respondents, did not extend to long service leave entitlements, and that the appellant had breached the Agreement by making debits in this regard.[3] The Magistrate dismissed all claims but for that relating to long service leave. The appellant has appealed against that decision.

4. The question is whether on a proper interpretation of the Agreement the Magistrate erred in concluding that the appellant was not permitted to deduct long service leave from commissions owing to the three former employees ("the respondents").

A jurisdictional issue

5. The summons issued in the IRCSA on behalf of the respondents as amended asserted that the claimed entitlements were due in accordance with the provisions of the FWA 2009 and the Agreement. The application alleged that the failure to pay the amounts claimed constituted a breach by the appellant of civil remedy provisions contrary to s 539 of the FWA 2009, and sought pecuniary penalty orders under s 546 of the FWA 2009.
6. As the applications claimed sums alleged to be due to the respondents under an agreement made under a Commonwealth Act they fell within the jurisdiction of the IRCSA under s 14(a)(ii) of the *Fair Work Act 1994* (SA) ("the State Act"), and by virtue of the IRCSA's status under the FWA 2009 as an eligible State court.[4]
7. Upon finding that the respondents were entitled to be paid long service leave entitlements calculated in accordance with the Agreement and the LSL Act, the Magistrate directed that the parties calculate the amount due. It would appear that no formal order was made in that regard before the appeal now before the IRCSA was lodged.
8. Subject to the jurisdictional point addressed below, I am satisfied that there has been a judgment, order or decision by the Magistrate in relation to which an appeal lies under s 187 of the State Act, for the reasons set out in *Vincent Lee Consulting Services Pty Ltd v Bourne*.[5] That does not necessarily mean there was a "decision" for the purposes of an appeal direct to the Federal Court. That is a question which may need to be addressed if this matter eventually proceeds to the Federal Court.
9. At the outset of the hearing, I drew the attention of the parties to a decision of Judge Farrell of the IRCSA in *Simon v The Bowen Family Trust*[6] in which she concluded that there was no jurisdiction to hear an appeal in that matter as, although the appeal before her was from a decision of a magistrate sitting as a member of the IRCSA in the exercise of jurisdiction under the FWA 2009 as an eligible State court, the court so constituted was not "exercising summary jurisdiction", and that the exception in s 565(1A) did not apply.
10. The parties then proceeded to make submissions on the merits of the appeal, and filed written submissions on the jurisdictional issue at a later date. Since that time Judge Farrell has delivered another decision to the same effect: *Bragg v GWA Group Holdings Ltd*.[7]
11. The FWA 2009 provides as follows with respect to appeals from a decision of an eligible State court exercising jurisdiction under the FWA 2009:

"565 **Appeals from eligible State or Territory courts**

Appeals from original decisions of eligible State or Territory courts

(1) An appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act.

(1A) No appeal lies from a decision of an eligible State or Territory court exercising jurisdiction under this Act, except:

(a) if the court was exercising summary jurisdiction—an appeal, to that court or another eligible State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or

(b) in any case—an appeal as provided for by subsection (1).

Appeals from appellate decisions of eligible State or Territory courts

(1B) An appeal lies to the Federal Court from a decision of an eligible State or Territory court made on appeal from a decision that:

(a) was a decision of that court or another eligible State or Territory court of the same State or Territory; and

(b) was made in the exercise of jurisdiction under this Act.

(1C) No appeal lies from a decision to which subsection (1B) applies, except an appeal as provided for by that subsection.

Leave to appeal not required

(2) It is not necessary to obtain the leave of the Federal Court, or the court appealed from, in relation to an appeal under subsection (1) or (1B)."

12. In this case each party contended that I should find that the Magistrate was exercising summary jurisdiction in making the decision at first instance and that I had jurisdiction to hear the appeal. The appellant provided detailed and helpful submissions which included an analysis of earlier authorities which had addressed the meaning of a "court of summary jurisdiction" for the purposes of the *Federal Court of Australia Act 1976* ('the FCA Act").
13. *John L Pierce Pty Ltd v Kennedy*[8] was a decision of the Full Federal Court on an appeal against a decision of the Chief Industrial Magistrate of New South Wales under s 178 of the WRA 1996 in proceedings for the imposition of a civil penalty for contravention of an industrial instrument. The question before the Full Court was whether jurisdiction to hear the appeal vested only with the Full Court or could be exercised by one judge in light of s 25(5) of the FCA Act which was in the following terms:

> "Subject to any other Act, the jurisdiction of the Court in an appeal from a judgement of a Court of summary jurisdiction may be exercised by one Judge or by a Full Court."

14. Two members of the Court, Whitlam and Madgwick JJ, gave separate reasons

for concluding that the judgment of the Chief Industrial Magistrate was a judgment of "a court of summary jurisdiction", and that the appeal could have been heard by a single Judge. O'Connor J agreed with the reasoning of each of them.

15. Madgwick J first considered what a court of summary jurisdiction was for the purposes of s 25(5) of the FCA Act. He observed that the object of the provision could be understood to be to facilitate the rational and appropriate use of the judicial resources of a superior court, in the context of the usual arrangement involving a hierarchy of courts extending upwards from the magistrates court, to a District Court, then to a Supreme Court, where appeals from magistrates usually were heard by a single judge of a higher court.
16. Madgwick J noted that whilst statutory arrangements differed, and that magistrates may make decisions in accordance with procedural steps and formalities that characterise the higher courts, it was reasonable to impute to the authors of s 25(5) of the FCA Act:

> "the assumption that, in general, the degree of the formality of the procedures of a court would be a workable guide to its placement within the judicial hierarchy for the purposes of determining whether all appeals from that court, or only the most important, should require the attention of the Full Federal Court."[9]

17. In considering the effect of s 25(5), Madgwick J had regard to the definition of a "court of summary jurisdiction" then set out in s 26(d) of the *Acts Interpretation Act 1901* (Cth) ("the AI Act") as follows:

> "Court of summary jurisdiction' shall mean any justice or justices of the peace or other magistrate of the Commonwealth or part of the Commonwealth, or of a State or part of a State, or of an external Territory, sitting as a court (other than the Federal Magistrates Court) for the making of summary orders or the summary punishment of offences under the law of the Commonwealth or part of the Commonwealth or under the law of the State or external Territory or by virtue of his or their commission or commissions or any Imperial Act;"

18. As can be seen, this definition directs attention to two matters. First, the constitution of the court, being that of a justice of the peace or a magistrate. Second, to the purpose of the court, that is, whether it is sitting as a court for the making of summary orders or the summary punishment of offences. Madgwick J agreed with Whitlam J's conclusion that this provision did not mean that there could be an exercise of summary jurisdiction in criminal cases only. It could include the exercise of civil jurisdiction by the court.
19. Madgwick J then considered the ordinary meaning of the phrase a "court of summary jurisdiction" putting the definition in the AI Act to one side. In his view it captured the notion of a relative lack of formality of the proceedings, or proceedings which involved expeditious determination.
20. Madgwick J then turned to the question as to whether the Chief Magistrate's court from which the appeal arose was a court of summary jurisdiction. He noted in this regard the terms of s 79(1) of the *Judiciary Act 1903* (Cth) which provided:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

21. By reference to s 79, and the NSW industrial laws and regulations governing the procedures applying to the court of the Chief Industrial Magistrate in proceedings for the imposition of a civil penalty, and the Justices Act 1902 (NSW), and after giving these provisions a "purposive and practical interpretation", Madgwick J concluded that the proceedings were of a summary kind, and that the Chief Industrial Magistrate was sitting as a court of summary jurisdiction.
22. Madgwick J also expressed the view that the fact that the court below was a court of record was of little account in determining whether it was a court of summary jurisdiction. In his view, a court sitting for the making of summary orders, as referred to in the then s 26(d) of the AI Act, included "any court for the giving of civil relief which operates by way of summary, that is to say, relatively informal procedures."[10]
23. The approach taken by Madgwick J in Pierce was followed by Nicholson J of the FCA in Construction orestry ining and nergy Union v Clarke.[11] That matter involved an appeal from the Western Australian Industrial Magistrate's Court under s 422 of the WRA 1996. The proceedings alleged breach of a term of a certified agreement and sought a monetary penalty. A preliminary question arose as to whether under s 25(5) of the FCA the appeal should be heard by a single judge or the Full Court.
24. Nicholson J agreed with Madgwick J's approach in concluding that the expression "court of summary jurisdiction" may refer to proceedings under statute for payment of money in the context of the exercise of civil jurisdiction, that orders made at the end of summary proceedings will fit the description of summary orders, and that the reference to "summary" should be understood to refer to the notion of lack of formality in the proceedings.[12]
25. In Plancor Pty Ltd v Li uor ospitality and iscellaneous Union[13] the Full Federal Court heard an appeal from a decision of the IRCSA constituted by a magistrate. Although it was not necessary to do so, given the appeal was before the Full Court heard, Gray J dealt with a submission as to whether the IRCSA was a court of summary jurisdiction such that the appeal could have been heard by a single judge. He said that doubts may have arisen because the IRCSA consisted of both judges and magistrates and was a court of record. Further, he observed that the definition of "court of summary jurisdiction" in s 26(d) of the AI Act did not focus on the nature of the institution, but on the nature of the judicial officer constituting the court and the nature of the work done by the court so constituted.
26. Gray J accepted that the fact that the IRCSA in the matter under appeal was constituted of a magistrate fulfilled part of the AI Act definition, but stated that the question as to the nature of the function being performed by the magistrate posed greater difficulty given the indeterminate nature of the word "summary". He had regard to the comments in this regard made in Pierce, but felt that relative informality of procedures was not a test that gave certainty of meaning to the word "summary" in s 26(d) of the AI Act given what he described as the

recent tendency of magistrates courts to model their procedures on those of superior courts.

27. Gray J took into account s 154 of the State Act and the obligation of the IRCSA to act without regard to technicalities, legal forms or the practice of the courts, and accepted that informality was obviously required. He concluded:

> "On the basis of existing authority, therefore, it would seem that the IRCSA, constituted by an industrial magistrate, making orders for the imposition of penalties pursuant to s 719 of the WR Act, is a court of summary jurisdiction for the purposes of s 25(5) of the Federal Court Act, and the appeal could have been heard by a single judge."[14]

28. Gray J qualified this general observation by stating that it seemed the question must be determined on a case by case basis, given that the definition in s 26(d) of the AI Act addressed both the nature of the judicial officer constituting the primary court, and the nature of the task of that court. Thus the IRCSA might be a court of summary jurisdiction only when constituted in a particular way when dealing with particular types of cases. As the case before him involved a magistrate as a member of IRCSA imposing penalties for breaches of a collective agreement, he concluded that the IRCSA was a court of summary jurisdiction for that purpose.
29. There have been a number of changes in the statutory context since Plancor and the other decisions referred to above. The FWA 2009 was introduced with effect from 1 July 2009. New appeal provisions were set out in s 565. As initially enacted, they allowed only for an appeal from an eligible State or Territory court exercising jurisdiction under the FWA 2009 to the Federal Court. The definition of "an eligible State or Territory court" included the IRCSA or a magistrates court. The Explanatory Memorandum relating to s 565 indicated that where an eligible State or Territory court was a court of summary jurisdiction, it would include a magistrate's court.[15]
30. When the National Industrial Relations System was established from 1 January 2010 by the air ork Amendment (State Referrals and other easures) Act 200 , subsection (1A) was inserted into s 565 and, in the event that there was a decision of an eligible State court which "was exercising summary jurisdiction", allowed for the option of an appeal to that eligible State court as provided for by a law of that State instead of an appeal direct to the Federal Court. These changes took place in the context of s 25(5) of the FCA Act remaining in the same terms as it was at the time of Pierce and the other decisions cited above.
31. The following year amendments were made to the AI Act which included the repeal of s 26 and the insertion of a new definition of "court of summary jurisdiction" in s 2B of the AI Act so that it now meant:

> "any justice of the peace, or magistrate of a State or Territory, sitting as a court of summary jurisdiction."

32. The relevant item in the Explanatory Memorandum stated that the former definition was considered to be cumbersome and not reflective of the current operation of Australian courts, with the purpose of the amendment being to simplify the definition to reflect the status quo.[16]
33. The change in definition is important in that it now directs attention only to the

constitution of the court "sitting as a court of summary jurisdiction" and not also to the specific nature of the orders being made. As the appellant correctly contended, this change focuses on the formality or lack of formality of the court from a general perspective rather than on the nature of the orders being made in a particular case. That said, however, it is to be noted that whilst s 2B defines the meaning of "a court of summary jurisdiction" under s 565(1A), the question is whether the decision under appeal was from a "court exercising summary jurisdiction", which does require that regard be had to the "exercise" of the jurisdiction.

34. In Simon and ragg, the learned Judge had particular regard to the observation of Gray J in Plancor that the question of whether the court was a "court of summary jurisdiction" was to be decided on a case by case basis. She noted that in coming to this view Gray J was referring to the earlier AI Act definition of a court of summary jurisdiction, but she did not appear to consider that the change in the definition was of any import.[17]
35. In Simon the learned Judge held that the IRCSA was not exercising summary jurisdiction having regard to various matters indicative of formality. These included that the amount claimed was substantial and was higher than the amount which the FWA 2009 would allow to be dealt with as a small claim; the applicant was represented throughout the hearing; the hearing was conducted in a formal way with rules of evidence and procedure being applied in taking evidence from witnesses; and that there was no utilisation of s 154 of the State Act to conduct proceedings in a more informal way.
36. In ragg the learned Judge had the benefit of more detailed submissions on the jurisdiction question from counsel appearing for each party. Counsel for the appellant in that matter, in contending that there was jurisdiction to hear an appeal, pointed to the change in the definition in the AI Act, and to the fact that there was no formal hearing in the proceedings before the Magistrate, who reached his decision on the documents before him with the assistance of written submissions of the parties.
37. The learned Judge held that despite the decision in ragg being made without the calling of oral evidence, there was a level of formality in the proceedings which counted against a finding that the court below was exercising summary jurisdiction. She had regard to the fact that the pleadings were in the usual form, the matter was not dealt with as a small claim, the parties were legally represented, and that formal written submissions were filed. She said "the most influential factor" was that the magistrate delivered a formal judgement setting out the factual background, the law and his decision.
38. In support of this conclusion the learned Judge observed that an exercise of summary jurisdiction was more likely to occur where an immediate summary order was made on the basis that a party to the proceedings had no arguable case, or had failed to attend a hearing. She disagreed with the view of Gray J in Plancor as to the effect of s 154 of the State Act having regard to the interpretation of that provision by the Full Supreme Court in riggs v Noris roup of Companies.[18]
39. With respect to the learned Judge, I do not agree with her reasoning in Simon or ragg in concluding that in neither case was the IRCSA exercising summary jurisdiction.
40. In ragg counsel for the party contending that the IRCSA was not exercising summary jurisdiction submitted that the effect of s 7 of the agistrates Act 1 1 (SA) was that a magistrates court in its civil division could not be taken to be a court of summary jurisdiction. Section 7 stated that the Magistrates Court was

divided into a number of divisions, including various civil divisions, and a criminal division, and that in the criminal division it was a court of summary jurisdiction. The contention was that the express statement in this regard implied that the magistrates court was not otherwise involved in the exercise of summary jurisdiction.

41. The learned Judge rejected that submission, and with respect, I agree with her. I consider that the statement in s 7 was to make it clear that the Magistrates Court, as a court of summary jurisdiction in its criminal division, had jurisdiction to hear and determine summary offences under the Summary Procedure Act 1 21.[19] It ought not to be taken to indicate that there cannot be an exercise of summary jurisdiction in the civil jurisdiction. That is consistent with the complementary provisions in s 23 of the Statutes Repeal and Amendment (Courts) Act 1 1, enacted on the same day as the Magistrate's Act 1991,[20] which relevantly provided:

"23—Interpretation of Acts and instruments

The following provisions apply to the interpretation of Acts and instruments (whether of a legislative character or not):

...

(b) a reference to a court of summary jurisdiction or a local court of limited or special jurisdiction will be construed as a reference to the Magistrates Court;..."

42. In any event, what is in issue here is not the nature of the exercise of the jurisdiction of a magistrates court as such, but of the IRCSA constituted by a magistrate. The IRCSA is established under Chapter 2 Part 2 of the State Act as a court of record. Its judiciary includes both judges who are or are eligible to be judges of the District Court, and industrial magistrates who are appointed under the agistrates Act 1 3.
43. The IRCSA is subject to general principles with respect to "the exercise" of its jurisdiction under s 154 of the State Act which provides as follows:

"1 eneral principles affecting e ercise of urisdiction

(1) In exercising its jurisdiction, the Court or the Commission—

(a) is governed in matters of procedure and substance by equity, good conscience, and the substantial merits of the case, without regard to technicalities, legal forms or the practice of courts; and

(b) is not bound by evidentiary rules and practices but may, subject to subsection (2), inform itself as it thinks appropriate.

(2) The Court and the Commission must observe the rules of natural justice."

44. As observed above, in ragg the learned Judge disagreed with the weight Gray J gave this provision in coming to his view in Plancor. His comment was that in light of s 154 "informality is obviously required".[21] The learned Judge observed that this was a superficial interpretation of the effect of s 154 having regard to

the observations of White J as a member of the Full Supreme Court in riggs.

45. It is correct that in riggs White J cautioned that s 154 did not permit the IRCSA to ignore statutory and common law principles in dealing with a s 14 claim, or allow the IRCSA in deciding such a claim to exercise a second jurisdiction, and impose liability in an arbitrary way because it considered it fair and reasonable to do so.[22] However, that does not detract from the level of informality available to the IRCSA in dealing with the exercise of its s 14 jurisdiction. Section 154 is not merely a provision to which resort may be had on an optional basis. It sets out principles affecting the exercise of jurisdiction, and "governs" the IRCSA in matters of both procedure and substance. It is a significant indicator of a jurisdiction to be conducted with a level of informality, albeit in the context of applying common law and statutory principles relevant to the claim before it. The effect of s 79(1) of the udiciary Act 1 03, referred to above, is that a provision such as s 154 of the State Act is binding on the IRCSA when exercising federal jurisdiction.
46. In addition, there are specific provisions directed to the conduct of monetary claims heard under s 14 of the State Act. These claims in practice are assigned for hearing at first instance by magistrates. Decisions with respect to such claims must be delivered expeditiously under s 186 of the State Act which provides:

"186 ecisions to e given e peditiously

(1) The Court must hand down its judgment, and its reasons for the judgment, on a monetary claim within three months after the parties finish making their final submissions on the claim.

(2) The Senior Judge may extend the time for handing down a judgment or reasons for a judgment but only if there are special reasons in the circumstances of the individual case for doing so."

47. The IRCSA has detailed rules which reflect practices and procedures similar to those adopted in higher courts.[23] This is to be expected given the variety of matters which come before the IRCSA and the different levels of the court at which such matters might be heard. It can be expected that in the initial hearing of claims where the IRCSA is constituted of a magistrate, the level of formality or informality will be adapted to suit the circumstances. For example, where each party is legally represented, proceedings are likely to be conducted more formally in accordance with practices and procedures familiar to legal practitioners compared to matters where one or both parties are unrepresented, which occurs frequently in the s 14 jurisdiction.[24] Be that as it may, the magistrate must exercise that jurisdiction in light of the principles and obligations imposed by ss 154 and 186. This will be the case whether or not the parties invoke the small claims procedure available under the FWA 2009.[25] The exercise of the jurisdiction of the IRCSA by a magistrate in a claim under s 14 of the State Act, whether or not it also involves an exercise of jurisdiction under the FWA 2009, involves an exercise of summary jurisdiction of the nature identified by Madgwick J in Pierce, and Gray J in Plancor, regardless of the variations in the level of formality or informality in each matter.
48. Accordingly, the answer does not lie in a case by case scrutiny of the informality or formality of the procedures adopted in each particular case. It can be readily

appreciated that if that were so there would be major practical difficulties for litigants and the courts in determining the appropriate court in which an appeal from a decision of the IRCSA could be brought. It would require close consideration in each particular proceeding of whether the level of formality or informality indicated an exercise of summary jurisdiction or not. Views may well differ as to whether a particular case fitted within one category or the other, leading to inconsistency and uncertainty in the appeal process. Those difficulties are amply illustrated by the competing submissions of the parties in both *Simon* and *Bragg*, and by the minute examination by the learned Judge of the course of the proceedings of matters which she considered weighed one way or the other with respect to formality or the lack of it.

49. On the approach taken by the learned Judge, there would be likely to be very few cases where there was found to be an exercise of summary jurisdiction. Such an outcome would not be consistent with what can be taken to be the general intent of Parliament in inserting subsection (1A) into s 565 at the time of the establishment of the National Industrial Relations System. That is, that the transfer of industrial jurisdiction to the Commonwealth with respect to unincorporated employers and their employees, in a context where the IRCSA was an eligible State court entitled to exercise jurisdiction under the FWA 2009, would be accompanied by the option of bringing an appeal against a first instance decision to a further level of the State court before the parties were required to access the Full Federal Court. Nor would it be consistent with the more expansive definition of a court of summary jurisdiction in the AI Act focusing on the exercise of jurisdiction from a general perspective.
50. As a final point, it is my respectful view that the learned Judge took into account an irrelevant consideration when observing that an exercise of summary jurisdiction was more likely to be found in circumstances where a summary order was made to strike out a case. That is to conflate the adjective “summary” as applied to “summary jurisdiction” with the different process of a summary order, such as to strike out a case on the basis that it had no reasonable prospect of success. That process is available to the IRCSA constituted either by a judge or a magistrate under r 60 of the *Industrial Proceedings Rules 2010*. It is a process available in any event to the IRCSA or an ordinary court at any level of the judicial hierarchy as part of the inherent power of a court to control its own procedures and to prevent an abuse of process. Of itself it is not an indication of an exercise of summary jurisdiction.
51. I conclude that the IRCSA, when constituted by a magistrate, and exercising its jurisdiction under s 14 of the State Act, which also involves it exercising jurisdiction under the FWA 2009, is a court exercising summary jurisdiction for the purposes of s 565(1A) of the FWA 2009.
52. I am satisfied that I have jurisdiction to hear the appeal.

An overview of the Agreement

53. It was common ground that the Agreement is a convoluted document. The comment of the Full Bench of the FWC in *Parsons v Pope Nitschke Pty Ltd*[26] when dealing with an appeal from an unfair dismissal application by one of the respondents to these proceedings, which required consideration of the Agreement, is apposite:

> “The drafting of the Agreement was highly complex, to the extent we suspect it would be close to unintelligible to a

layperson".[27]

54. It is helpful to summarise the structure of the Agreement before turning to the reasons for the decision at first instance and the submissions on appeal. The summary focuses on the provisions of the Agreement relevant to the entitlement of commission only employees.
55. Before the Agreement was certified in 2008 the terms and conditions of employment of the respondents were governed by the Real Estate Award. The Agreement replaced that award in its entirety and any other applicable award or legislation except where otherwise stated.[28] The Agreement was drafted in the context that its author endeavoured to ensure that it would pass the "fairness test" then in place under the WRA 1996.[29]
56. The Agreement applied to various classifications including that of qualified/registered real estate salespersons.[30] Each of the respondents fell into this category, and had each signed an "employee letter" under cl 3 of the agreement which recorded that they were to be remunerated as commission only employees.
57. The general terms and conditions of employment were contained in 38 clauses of the Agreement. These included a number of clauses providing for leave and superannuation entitlements.
58. Clause 14 provided that the "entitlement to annual leave will be in accordance with the Act and the Regulations as amended from time to time", with the process for payment being dealt with in the Schedule. Clause 15 was a similar provision with respect to personal and carer's leave.[31] Under cl 16 parental leave was to be in accordance with the WRA 1996.
59. Clause 17 referred to long service leave. It provided as follows:

"17.1 You will receive the following entitlement to long service leave:

Whatever is specified in the applicable State legislation with the following modifications:

(a) We may agree in writing (signed and dated) for you to cash out long service leave including for pro rata leave once you have seven complete years of service

(b) If you take or cash out long service leave you will be paid at your basic rate of pay. Long service leave will not be payable on commissions/ incentives/bonuses. Cashing out long service leave means you lose the entitlement to take long service leave and you receive the cash in lieu. A commission only salespersons basic rate of pay will be calculated as the same as for annual leave." [32]

60. Schedule 1 to the Agreement set out arrangements with respect to two categories of employees, those on Basic Periodic Rate of Pay, and those on Basic Piece Rate of Pay. The latter category encompassed commission only salespersons such as the respondents. The commission entitlements of this category were dealt with in S1.1(F) of Schedule 1. Sub-clause (viii) required that such an employee be paid a minimum of at least 35% of the employer's net commission for selling a property. The intent was that payment of this amount would meet the minimum to which such an employee was entitled on a weekly basis in accordance with the Australian Pay and Classification Scale under the WRA 1996.

61. In accordance with their letters of engagement, each respondent was to be paid a commission in excess of the 35% minimum, one at 50%, and the other two at 55%.
62. Under S1.1(F) of Schedule 1, any adjustments in the relevant pay scale were to be absorbed into any over scale payment, and further, any "over pay scale payment" was to go towards satisfying the pay scale for the guaranteed hours applicable to the particular employee, or work performed, or any protected award conditions.[33] The commission paid over the minimum 35% was also to accommodate the pre-payment of various entitlements or debiting of expenses and entitlements as permitted under Schedule 2.
63. The submissions of the parties focused in particular on two clauses in Schedule 2, being S2.4 and S2.8.
64. S2.4 was entitled "Debits from your share of commission". It relevantly provided:

> "Any of the following debits, providing they are relevant, may be debited by the employer... from your commission...for your work performed:
>
> (a) Wages/salary (however described) and paid for any purpose
> (b) Any type of allowance (which includes car or telephone allowance)
> (c) Employer's superannuation contributions (unless they are inclusive in your commission)
> (d) Any payments made for protected award conditions
>
> ...
> (h) If any wages or allowances or entitlements are ever found during or after your employment to be payable then such wages or allowances or entitlements will be totally off settable against your incentives earned for the entire period of your employment."

65. S2.8 was entitled "Interaction between your commission payments and other payments". Subparagraph (b) had the heading "Annual leave and paid personal/carer's leave payments". S2.8(b)(iii) provided:[34]

> "If you are guaranteed a basic piece rate of pay (commission only) for your work performed then your actual commission rate is a loaded rate in that 11.54% of your actual commission rate represents the employer's advanced payment for annual leave and paid personal/carer's leave. This means when you take annual leave or you have accrued annual leave when your employment ends or when you take paid personal/carer's leave, you have already been paid in advance for such leave. However, when you actually take such leave (or have accrued annual leave when your employment ends) the employer must make up any difference if what you have been paid in advance for such leave is less than the amount as calculated in accordance with the piece rate formula prescribed in the Regulations."

66. Subparagraph (c) then continued as follows:

> "If your commission is a package for the purposes of superannuation and/or is a loaded rate for the purposes of advanced payment for annual leave and personal/carer's leave, then the employer has offered you a higher rate of commission than would have otherwise have been the case had your commission not been a package or loaded rate."

67. Subparagraph (d) was entitled "Minimums" and provided:

"Despite:

> (i) What debits or deductions come out of the employer's commission or the employee's commission; and
> (ii) What salesperson's commission will be a loaded rate for advanced payment of annual leave or personal/carer's leave; and
> (iii) What salesperson's commission is a package inclusive of superannuation

the salesperson must always receive at least as a minimum the relevant pay scale and that superannuation is paid in addition to the pay scale."

68. Schedule 4 contained provisions with respect to allowances, loadings, and penalty rates. S4.3 identified the "protected award conditions" which the appellant was entitled to debit from the employee share of commission in accordance with S1.1(F), 1.2 and 1.5, and S2.4(d). S4.4 identified the award coverage prior to the Agreement and contained some transitional provisions in relation to continuing entitlements under protected award conditions in any "over pay scale payment".

The Magistrate's decision

69. The Magistrate addressed the terms of the Agreement more extensively given that he was also dealing with claims for entitlements in addition to long service leave such as annual leave and personal/carer's leave. I refer only to those aspects relevant to the long service leave issue.
70. The Magistrate observed that cl 17 of the Agreement provided for its own system of payment for employees as regards long service leave, and allowed the leave entitlement to be cashed out in certain circumstances. Further, he stated that as at 2008, under s 17 of the WRA 1996, workplace agreements prevailed over State laws to the extent of any inconsistency, which meant that the provisions of the Agreement prevailed over inconsistent provisions in the LSL Act.[35]
71. The Magistrate set out in full the provisions of S2.8(b)(iii) and (c) in Schedule 2 relating to the interaction between commission payments and payments for annual leave and personal/carer's leave. He observed that there was no mention in S2.8 of long service leave payments.[36]
72. The Magistrate noted the appellant's contention that S2.4 of Schedule 2 permitted any payments made for long service leave to be debited against any future commission payments by virtue of the fact that a broad interpretation had to be given to the phrase in S2.4(a) "wages/salary (however described) and paid for any purpose". He considered the submission that a payment for long

service leave should be taken to be a payment of wages/salary on the basis that the leave was paid in return for the provision of personal services.

73. The Magistrate had regard to the view expressed by Wilcox J in *Ardino v Count Financial Group Pty Ltd*[37] that the word "wage" contemplated payment for work or services, and payment to a person for services rendered. Having considered the interaction between S2.4 and S2.8, and the detailed arrangements in these clauses with respect to deductions able to be made under the Agreement from commission otherwise payable, and noting that neither provision made any reference to long service leave entitlements, the Magistrate concluded that the meaning of "wage/salary however described" was limited to payment for work or services or for service rendered, as opposed to long service leave, which he categorised to be an entitlement due as a consequence of time spent by a worker in employment with the same or a related employer, and a reward for the duration of employment, as opposed to provision of services.
74. The Magistrate then turned to the provision in S2.4(h) that "if any wages or allowances or entitlements are ever found during or after your employment to be payable..." they would be able to be offset in full against incentives earned for the entire period of employment. He found that this provision could not be taken to encompass long service leave entitlements arising under legislation as noted in cl 17 of the Agreement. He observed that given the complexity of the Agreement it was notable that it made no reference to long service leave payments in either S2.4 or S2.8.
75. Accordingly the Magistrate concluded that the appellant was not entitled to debit the long service leave entitlements of the respondents against commissions due to them.

Consideration

76. The Agreement is to be construed by reading the words as a whole, and giving the words used their natural and ordinary meaning. Regard is to be had to the industrial context in which such documents are drafted, and the understandings of parties as to customs and practice within the industry concerned. This may mean that it will often be appropriate to avoid too literal adherence to the strict meaning of the words used and to view the matter broadly: *City of Charles Sturt v Australian Services Union*.[38]
77. No evidence was presented under s 11 of the State Act which might have allowed the court to ascertain whether the author or the parties had a common intention as to what the parts of the Agreement in dispute were intended to mean when they were drafted.
78. In the circumstances, the intention of the author of the agreement is to be ascertained as a contextual exercise, involving consideration of relevant words and phrases both in their immediate context and by reference to the entirety of the document in which they are found, and if relevant, the history of the provisions in question: *Short v FW Hercus Pty Ltd*.[39]
79. As far as the history of the provisions is concerned, the Real Estate Award provisions in place before the certification of the Agreement in 2008 are of no particular assistance. Some of those provisions were to the effect that various entitlements, such as superannuation, and annual and carer's leave, were not able to be debited against commissions. However, the Agreement replaced the award in its entirety, and expressly provided for either the debiting of various items against commission or for their incorporation within commission as

prepayments in a manner contrary to previous arrangements.

0. Thus the focus of the interpretation e ercise must e on the terms of the Agreement itself in accordance with the a ove principles.
1. The alleged entitlement of the respondents to long service leave was said to have crystallised at various times during 2013 and 2014. The appellant did not make any payment at that time as in accordance with its understanding as to the effect of the Agreement such entitlements were to e understood to either have een pre paid or to e de ita le against the agreed percentage of commission payments due to the respondents.
2. The appellant contended that read as a whole the Agreement should e taken to have esta lished a system that provided commission only employees with payments in advance for all employment entitlements such that the employer was not then re uired to make any payments at the time particular entitlements fell due. Rather entitlements were to e taken to have already een paid through their incorporation within the agreed percentage of commission or to e a le to e de ited against any commission payments which were or ecame paya le. The only e ceptions were said to e if the employer agreed otherwise or if the rate of pay after allowing for prepayments or deductions fell elow the guaranteed minimum commission of 3 .
3. The appellant su mitted that S2. payments for annual leave and personal/carer s leave were de ita le items and were accepted as such y the agistrate.[40] The appellant then noted that neither of these leave entitlements were specifically referred to as items a le to e de ited or offset against commission in S2.4. It contended however that these categories of leave together with long service leave must e taken to e de ita le items under S2.4. It contended that leave entitlements were a species of wages/salary (however descri ed) and paid for any purpose under S2.4(a). Thus each species of leave was paid as a form of wage which provided an employee with a right not to attend work and to receive a wage eing a enefit which accrued with service.[41] Alternatively the appellant su mitted that these leave entitlements were a le to e offset against commission under S2.4(h) eing entitlements found during or after employment to e paya le.
4. The appellant su mitted that the agistrate erred in attaching too much weight to the fact that S2. ( ) in dealing with the interaction etween commission payments and payments for annual leave and personal/carer s leave and fi ing a loaded rate for advance payments of such leave at 11. 4 made no reference to long service leave. The appellant contended that there were many other employment entitlements not uantified y the Agreement such as protected award conditions ut that this did not mean that these employment entitlements were e cluded as de ita le items.
. The appellant put forward some propositions as to why the author of the Agreement may have omitted to refer to long service leave in S2. . It suggested that as long service leave only ecame a lia ility for an employer once the ualifying period of service was reached and given that not all employees would reach this threshold the author of the Agreement may have decided not to uantify any loaded rate for such leave within S2. since it would not e relevant for many employees. Alternatively the appellant speculated that the author of the Agreement may have included a reference to the amount allocated to annual and personal leave to strengthen the case for the Agreement eing considered to have passed the no disadvantage test applied efore certification under the RA 1 6 at the time.
6. In my view the su missions of the appellant in this regard are misconceived in

that the Agreement read as a whole provides that long service leave was to be paid in accordance with the LSL Act, subject to any modifications arising under cl 17, and was not an item which it was contemplated would either be payable in advance by a loading on commission under S2.8, or an entitlement able to be offset under S2.4.

87. Under the heading "Annual leave" in cl 14, there is a sentence in parentheses which reads: "[Note: How payment for annual leave is handled for a salesperson earning commission is dealt with in the Schedule]". Clause 14.1 then provides that the entitlement "will be in accordance with the Act and the Regulations as amended from time to time". Clause 14.2 addresses the circumstances in which an employee will be entitled to forego annual leave within a twelve month period or receive a cash payment in lieu of taking annual leave.
88. Clause 15 follows in relation to personal leave/carer's leave. Under that heading, a note in parentheses appears in the same terms as that in cl 14 except for a change in description of the nature of the leave. Clause 15.1 then provides that the entitlement to that leave "will be in accordance with the Act and the Regulations as amended from time to time".
89. Clause 18 relating to "Superannuation" provides that contributions will be paid by the employer as required under the relevant legislation from time to time. That is to be read with S2.8(a) of Schedule 2 which explicitly states that the commission was paid as a package inclusive of the obligation of the employer to make a 9% superannuation contribution, such that, if a commission only employee was entitled to payment of 50% of the employer net commission on a particular sale, 4.13% of that amount would be taken to represent the appellant's superannuation contribution.[42]
90. The above provisions are to be contrasted with cl 17 relating to long service leave which states:

"You will receive the following entitlement to long service leave:

Whatever is specified in the applicable State legislation with the following modifications:..."

Then follow the provisions set out above relating to circumstances in which an employee is able to "cash out" long service leave, and to the calculation of the basic rate of pay at which the leave entitlement was to be calculated, being the same as for annual leave.[43]

91. A process for cashing out long service leave has been available by agreement under the LSL Act since 1997.[44] The only modifications to the entitlement under the LSL Act would appear to be to the process for cashing out, to the extent the Agreement procedures differed from those mandated by the LSL Act, and to the manner of the calculation of the basic rate of pay under the Agreement, to the extent that it provided for an amount different from that applicable under s 8 of the LSL Act.
92. The important point to be drawn from these provisions is that, in contrast to the position with respect to the leave entitlements under clauses 14 and 15, there is no qualification on the entitlement to long service leave by reference to a note indicating that "how payment...is handled" is dealt with in the Schedule. Thus, I reject the appellant's submission[45] that the last sentence in cl 17(1)(b) to the effect that a commission only salesperson's basic rate of pay "will be calculated

as the same as for annual leave" can be taken as an indication that payment of the long service leave entitlement is able to be "handled" in the manner permitted with respect to annual and personal/carer's leave in accordance with the notes to clauses 14 and 15 and S2.8(b)(iii) of Schedule 2 so as to allow for prepayment of a loaded commission rate which includes a long service leave entitlement.

93. I turn to the scheme of the arrangements for commission only employees under the Schedules. Under S1.1(F) of Schedule 1 the commission paid must not be less than at least 35% of the employer's net commission for selling a property. Any adjusted or new pay scale relevant to the employee's classification was to be absorbed into any over pay scale payment, and to go towards satisfying the pay scale for the guaranteed hours, or work performed, or any protected award conditions.[46]
94. Schedule 2 addresses commission arrangements for salespersons. It sets out a scheme which broadly identifies the entitlements, costs and expenses which may be debited from the agreed commission payable to an employee (S2.4), and the interaction between commission payments and other payments (S2.8).This is in the context that each commission only salesperson will have an individual agreement with the appellant as to a specific commission rate in accordance with a written employee letter as noted above. Further, that whatever debits or deductions are made, or loadings placed on commissions for advance payments of leave entitlements, there will be a guaranteed minimum in accordance with S2.8(d) entitled "Minimums".
95. Although S2.8(d) of Schedule 2 is a subclause of S2.8, it is an overarching provision setting minimum entitlements under Schedule 2 as a whole. In effect it provides that despite the debits or deductions that may come out of an employee's commission, which must be taken to be a reference to the offsets or debits permitted under S2.4, and despite the amount of an employee's commission which is to be a loaded rate for advanced payment of annual leave or personal/carer's leave, which must be taken to be the loaded rates comprising prepayment of leave under S2.8(b), and despite the amount of an employee's commission that is attributable to superannuation under S2.8(a), the employee must always receive as a minimum the relevant pay scale with superannuation being paid in addition.
96. Thus S2.8(d) guarantees the minimum pay scale whatever deductions or advance payments are able to be made under Schedule 2. The only species of leave to which S2.8(d) refers as being a loaded rate included in commission are annual leave and personal/carer's leave. The same is the case with S2.8(b)(iii) which fixes that loaded rate at 11.54%. The operation of that provision is limited to annual leave and personal/carer's leave in accordance with clauses 14 and 15 of the Agreement. The clear implication, by reference to clauses 14 and 15, and S2.8(b)(iii) and (d), and the absence of any note to cl 17 containing a cross-reference to the Schedule, is that annual and personal/carer's leave are the only species of leave in relation to which advance payment arrangements apply under S2.8, and that long service leave is to be paid as and when the entitlement arises under the LSL Act.
97. This is the logical explanation for the omission of any reference to long service leave as a species of leave able to be paid as a loaded rate under S2.8(b)(iii). In the case of annual leave and personal/carer's leave, an entitlement would accrue from the outset of employment following what would be a relatively brief qualifying period. It could be anticipated that within a year at most, and probably within a lesser period, an employee may seek to take such leave. Given that the

o ect of the Agreement y and large was to include all entitlements within commission or allow them to e de ited or offset against commission that o ective was accommodated in relation to such leave entitlements y uantifying a figure of 11. as the loaded rate within the commission which was taken as an advanced payment of the leave.

. No similar loaded rate was fi ed in relation to long service leave. The appellant speculated as to why that might e. In my view the e planation is that long service leave was not ever intended to e capa le of incorporation into a loaded commission rate. It is an entitlement contingent upon at least seven years service. It could e e pected that many employees would e engaged for continuous periods of service of less than seven years such that a long service leave entitlement would not accrue. It would present practical difficulties to esta lish a scheme for prepayment of a contingent lia ility in these circumstances. If the employer paid a loaded rate from the outset the employee might leave employment with the enefit of that loading ut without ever ualifying for the leave entitlement. Alternatively if an employee upon ualifying for long service leave was only then deemed to e receiving as part of the previously agreed commission rate an additional loaded rate with respect to long service leave it would reduce the employee s net level of remuneration to accommodate the new lia ility and would render the enefit of the long service leave entitlement illusory.

. In these circumstances resort to S2. as authority to de it any long service leave entitlement from the respondent s commission share is not permissi le. Clauses 1 to 17 of the Agreement e pressly provide that the respondents are entitled in accordance with applica le legislation to various categories of leave. The only ualification in terms of the entitlement to receive that leave as and when it falls due under the applica le legislation is that applying with respect to annual leave and personal/carer s leave given the notes to clauses 1 and 1 which allow the prepayment of those categories of leave at a specified loaded rate of 11. . The clear implication is that the Agreement does not contemplate that process applying to long service leave and further that it does not contemplate the de iting or offsetting of any of these entitlements under S2. noting the a sence of any reference to leave entitlements in the latter provision.

100. The scope of S2. as to the entitlement to make de its from commission share is limited y its conte t. It is a provision which applies not only to commission only salespersons ut also to salespersons on various other remuneration arrangements listed in S1.1(A) to ( ). The right to de it is with respect to Any of the following de its which are then listed from paras (a) to (r). Almost all items relate to various costs and e penses one could e pect to arise in the course of the normal work and promotional activity of salespersons.

101. The first four paragraphs of S2. relate to specific items which the Agreement elsewhere e pressly or implicitly contemplates eing incorporated within commission thus allowing for de iting. It is central to the arrangement for commission only employees that wages/salary as e pansively descri ed in para (a) of S2. is to e part of commission and in that sense a le to e de ited from commission. e iting of any type of allowance under para ( ) such as with respect to car and telephone is consistent with the commission only arrangement agreed with the respondents.[7] Superannuation contri utions may e de ited under para (c) consistently with the terms of S2. (a) to the effect that commission is to e inclusive of superannuation. Under para (d) the appellant may de it any payments made for protected award conditions. This is

consistent with S1.5 which provides that payment of any commission above the minimum pay scale will go towards satisfying such protected award conditions.

102. Paragraph (h) of S2.4 is what could be described as a "catch all" clause. If "any wages or allowances or entitlements are ever found during or after your employment to be payable" they can be offset against commission earned over the entire period of employment. In my view this clause must be understood to encompass the offsetting of any wages allowances or entitlements which were agreed to be items able to be included within or debited against commission but which for some reason were not. It allows the appellant to offset such items after the event. It does not allow the appellant to offset a long service leave entitlement which the appellant expressly stated the respondents "will receive" in accordance with the LSL Act and which was not stated elsewhere within the Agreement to be either prepaid as part of commission or to be debitable.
103. Thus I conclude that neither S2.4 nor S2.8 were intended to encompass or include long service leave entitlements within their scope, and thus that it was not intended that the long service leave entitlement either be prepaid as a loaded commission rate, or that it be the subject of offset or debit against commission received or to be received.
104. On this approach it is not necessary to address the submission the appellant made that the extended meaning of "wages/salary" under S2.4(a) encompassed long service leave entitlements. Had it been relevant, I would have rejected the submission. Wages are paid in exchange for services rendered. Whilst an entitlement to leave will only accrue as a consequence of the wages/service exchange, the payment of the leave itself is not in exchange for the provision of services. It is a payment of an entitlement which allows the employee to receive income whilst not providing services. It cannot be taken to be payment of a wage no matter how broadly that concept is applied.
105. I mentioned above a comment made by the Full Bench of the FWC in Parsons v Pope Nitschke Pty Ltd[48] as to the difficulty in interpreting the Agreement. The appellant referred me to that decision in support of its submissions because the FWC came to a conclusion as to the effect of S2.4(a) and (h) which differed from mine. The Full Bench heard an appeal against a decision on an unfair dismissal application brought by one of the respondents to these proceedings. One of the relevant considerations was the alleged unfairness of actions taken by the employer on the basis of its interpretation as to its liability for payment of long service leave.
106. The FWC had regard to both S2.4 and S2.8 in this context, and expressed the view that S2.4(a) and (h) clearly allowed any payments made for long service leave to act as a debit against any future commission payments of virtue of the plain language of those provisions subject to the overriding requirement in S2.8 (d) that the employee must receive as a minimum the relevant pay scale.
107. I must have regard to this decision as it is of persuasive effect. However, I am not bound by it and I respectfully disagree with it. In my view, the FWC, in commenting that under cl 17 long service leave was to be paid at the employee's basic rate of pay to be calculated by the same method as for annual leave, overlooked the important difference between clauses 14 and 15 on the one hand, and cl 17 on the other, which indicated that special provisions in the Schedule as to the handling of payment for annual leave and personal/carer's leave did not apply to long service leave. It resulted in the FWC giving a greater scope to the operation of S2.4 than I consider was intended for the reasons I have given above.

Conclusion

108. By its express terms, the Agreement contemplated that commission paid to commission only salespersons was to be inclusive of superannuation, and that it be paid at a loaded rate to accommodate the entitlement to annual leave and personal/carer's leave. By implication, having regard to the terms of cl 17 as opposed to clauses 14 and 15, and to the absence of any reference to long service leave in subclauses (b), (c) or (d) of S2.8, or in S2.4, it was not intended that long service leave be incorporated as a loaded rate within commission payments, or that any such entitlement be subject to debit or offset.
109. The appellant has failed to establish any error on the part of the Magistrate. The appeal should be dismissed.

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[1] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[2] Decision at [61].

[3] Decision at [71]-[73].

[4] A claim for a contravention of a civil remedy provision under s 539 of the FWA 2009 may be heard by an eligible State court; both the IRCSA and a magistrate's court are included within the definition of an eligible State court under s 12 of the FWA 2009.

[5] [2009] SAIRC 61 at [20]- [27].

[6] [2016] SAIRC 21.

[7] [2016] SAIRC 32.

[8] [2000] FCA 1729.

[9] At [28].

[10] At [46].

[11] [2005] FCA 986.

[12] At [8].

[13] [2008] FCAFC 170 at [23]- [29].

[14] At [28].

[15] Para 2215.

[16] Item 12.

[17] *Simon* at [14].

[18] [2006] SASC 23.

[19] Section 9(c).

[20] 6 July 1992 – Government Gazette 2 July 1992 p 209.

[21] At [27].

[22] White J at [45] and [52].

[23] Industrial Proceedings Rules 2010.

[24] In part probably due to it being a jurisdiction in which at first instance each party must pay their own legal fees regardless of the outcome.

[25] Under Part 4 Division 5.

[26] [2016] FWCFB 375.

[27] At [63].

[28] Clause 9.1 and Schedule 4.4.1.

[29] Preamble at AB/29,

[30] Clause 4.2.

[31] Clause 15.

[32] It was accepted that to the extent that the second sentence of cl 17.1(b) stated that long service leave would not be payable on commissions, its effect was limited to salespersons other than commission only salespersons. Commission only salespersons were accepted as having an entitlement to long service leave at the basic rate of pay in accordance with the third and last sentences of this subclause – tr 6.

[33] S1.2 and S1.5.

[34] S2.8(b)(iii).

[35] At [44] and [61].

[36] At [42] and [72].

[37] (1994) 57 IR 89.

[38] [2011] SAIRC 73 at [32] to [36] inclusive.

[39] (1993) 40 FCR 511 at 518 per Burchett J.

[40] Decision at [55].

[41] Outline of submissions paras 32-35.

[42] Schedule 2 S2.8(a).

[43] This being as specified in S2.8(b)(ii) by using the formula in Regulations under the WRA 1996 for piece rate employees.

[44] As amended by Act No.50/1997.

[45] Appeal tr 6.

[46] Clause S1.1, 1.2 and 1.5.

[47] Clauses 28 and 29 of the Agreement provide that the commission only employee is to be responsible for all motor vehicle and telephone expenses.

[48] [2016] FWCFB 375.
