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FULL BENCH—Appeals against decision of Commission—

2019 WAIRC 00825

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 86/2017 GIVEN ON 21 JANUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2019 WAIRC 00825
CORAM	:	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	:	MONDAY, 6 MAY 2019, TUESDAY, 7 MAY 2019
DELIVERED	:	THURSDAY, 21 NOVEMBER 2019
FILE NO.	:	FBA 2 OF 2019
BETWEEN	:	THE PHARMACY GUILD OF WESTERN AUSTRALIA Appellant AND THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH Respondents
FILE NO.	:	FBA 3 OF 2019
BETWEEN	:	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH Appellant AND THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, PHARMACY GUILD OF WESTERN AUSTRALIA Respondents

ON APPEAL FROM:

Jurisdiction	:	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	:	**COMMISSIONER T EMMANUEL**
Citation	:	**2019 WAIRC 00016**
File No	:	**APPL 86 OF 2017**

CatchWords	:	*Industrial Law (WA) – Appeal against a decision of the Commission – Award interpretation – The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 – Award coverage of retail pharmacy industry* – Whether Award terms are ambiguous – *Glover scope clause – Going beyond scope clause and respondency schedule to determine scope of an Award – Effect of other Award provisions on scope – effect of s 47 order of the Commission – FBA 2 of 2019 appeal upheld – FBA 3 of 2019 appeal upheld*
Legislation	:	*Industrial Relations Act 1979 (WA)*; *Retail Trading Hours Act 1987*; *Retail Trading Hours Regulations 1988*
Result	:	Appeals upheld

Representation:

Counsel:

Pharmacy Guild of Western Australia Organisation of Employers	:	Mr T Dixon of counsel and Mr A Drake-Brockman, industrial agent
Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth	:	Mr N Tindley of counsel
The Shop, Distributive and Allied Employees' Association of Western Australia	:	Mr D Rafferty of counsel
The Minister for Commerce and Industrial Relations	:	Mr R Andretich of counsel

Case(s) referred to in reasons:

Australasian Meat Industry Employees' Union, Industrial Union of Workers, West Australian Branch v Stewart Butchering Co Pty Ltd (1993) 73 WAIG 1196

Bowrell v Goldsborough, Mort & Co Ltd (1905) 3 CLR 444

City of Wanneroo v Holmes (1989) 30 IR 362

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1981-1982) 149 CLR 337

Commission's Own Motion [2007] WAIRC 00318; (2007) 87 WAIG 903

Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2010] FCAFC 90; (2010) 186 FCR 88

Re Dardunup Butchering Co and Ors [2004] WAIRC 10864; (2004) 84 WAIG 465

Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640

Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No. 4) [2015] FCCA 1178

Federated Miscellaneous Workers' Union of Australia, Hospital Salaried Officers Association of Western Australia and Others (1985) 65 WAIG 2033

Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty Ltd (1984) 64 WAIG 1926

Federated Miscellaneous Workers' Union of Australia, Hospital, Services and Miscellaneous, WA Branch v Wormald International (Australia) Pty Ltd and Others (1990) 70 WAIG 1287, 1289

Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch (1991) 71 WAIG 1746

Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd [2012] WASCA 216

Re Harrison; ex parte Hames [2015] WASC 247

Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70; (2001) 210 CLR 181

McCourt v Cranston [2012] WASCA 60

Mifsud v Campbell (1991) 21 NSWLR 725

Mount Lawley Pty Ltd v Western Australian Planning Commission [2004] WASCA 149

Norwest Beef Industries Limited and Derby Meat Processing Co Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124

Re Powter; Ex parte Powter; (1945) 46 SR (NSW) 1

R.J. Donovan and Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers WA Branch (1977) 57 WAIG 1317

Short v F W Hercus Pty Ltd [1993] FCA 51; (1993) 40 FCR 511

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Anodisers WA; Dardanup Butchering Co, Bradford Insulation [2001] WAIRC 03164; (2001) 81 WAIG 1598

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2017] WAIRC 00830 [83]; (2017) 97 WAIG 1689

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers; Application to vary the Concrete Masonry Block Manufacturing Award (1981) 61 WAIG 628

The Chief Secretary and The Hospital Employees' Industrial Union of Workers of W.A. (Coastal Branch) (1931) 11 WAIG 105

The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd (1970) 50 WAIG 704

United Voice WA v Director General, Department of Education [2013] WAIRC 00053; (2013) 93 WAIG 80

Case(s) also cited:

Australian Timber Workers Union v W Angliss & Co Pty Ltd (1924) 19 CAR 172

Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR 430

Director General, Department of Education v United Voice WA [2013] WASCA 287

Flannery v Halifax Estate Agencies Ltd [2001] 1 WLR 377

Kucks v CSR Ltd (1996) 66 IR 182, 184

Pickard v John Heine & Son Ltd (1924) 35 CLR 1

Re Clothing Trades Award (1950) 68 CACR 597

Seymour v Stawell Timber Industries Pty Ltd (1985) 13 IR 289 at 290; 9 FCR 241

Reasons for Decision

SCOTT CC and KENNER SC:

Background

1 The application at first instance by the Shop, Distributive and Allied Employees' Association of Western Australia (the Union) was for a declaration under s 46 of the *Industrial Relations Act 1979* that the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (the Award) applied to the retail pharmacy industry.

2 There is no dispute as to the relevant history. The Award was made in 1977. It contained, and still contains, clause 3 – Scope in the following terms:

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

3 At the time it was made, Schedule 'C' – RESPONDENTS included Boans Ltd and Perth United Friendly Society Chemists (PUFSC), which were engaged in the retail pharmacy industry. In December 1988, Boans Ltd was removed from Schedule 'C'. Some other variations to the Award, making reference to the pharmacy industry, were also made (Application No 1519 of 1987, (1988) 69 WAIG 1215). Those variations dealt with arrangements relating to various categories of shops and their respective trading hours and the types of goods and services that could be sold from those shops, to reflect the trading hours legislation, namely the *Retail Trading Hours Act 1987* and the *Retail Trading Hours Regulations 1988.*

4 In April 1995, PUFSC was removed from Schedule 'C' of the Award by an order of the Commission made under s 47 of the Act (File No 76 80 105, (1995) 75 WAIG 954). Accordingly, from this time, there were no employers named in Schedule 'C' engaged in the industry of retail pharmacy.

5 The Commission amended the Award, on the application of the Union, to replace the then existing Schedule 'C' of respondents with an entirely new Schedule 'C' – RESPONDENTS (Application No 423B of 1995, (1995) 75 WAIG 2836). None of these respondents was engaged in the retail pharmacy industry.

6 For completeness, we note that other provisions of the Award may have a bearing on this matter. Clause 40 – CHEMISTS SHOPS provides that 'Any worker employed in a chemist's shop shall be subject to the terms of this award up to the time he or she becomes indentured to the profession.' As noted earlier, the Award also contains provisions arising from trading hours legislation, and some of these provisions refer to chemists shops or pharmacies as a type of 'Special Retail Shop'. These provisions relating to chemists shops or pharmacies were not removed when the respondency schedule was amended.

Decision at first instance

7 The learned Commissioner at first instance concluded that, having regard to the relevant authorities, relevant provisions of the Award, in particular cl 40, still extend to the retail pharmacy industry. She found that in determining the scope of an award, the Commission is not limited to considering the scope clause, but that she should interpret the Award's scope in light of all the clauses in the Award.

8 The learned Commissioner held that the relevant test of the scope of the Award is to ascertain both the identified named respondents and their relevant activities, as at the time the Award was made in 1977. This meant that, despite the subsequent variations to the Award to remove both Boans Ltd and PUFSC as named respondents, the Award still applied to the retail pharmacy industry.

9 The Commission further concluded that the removal of PUFSC under s 47 of the Act, in circumstances where s 29A of the Act was not complied with, was ineffective to alter the scope of the Award. The Commission found that while s 40 of the Act is a general power, s 47 is a special power. When the Commission removes a listed respondent no longer carrying on business in an industry to which the Award applies, the effect goes no further than removing the listed respondent, and does not have the effect of removing an industry, thereby reducing the award's coverage. This was said to be 'supported by the limited notice provisions that apply to s 47 of the IR Act' [73].

10 The learned Commissioner referred to the application under s 47, the transcript and the Commissioner's reasons for decision in 1995, saying that they did not suggest that the parties contemplated that the removal of PUFSC would have the effect of removing the retail pharmacy industry from the Award's scope [74]. The order to remove PUFSC 'did no more than remove PUFSC as a named respondent because it no longer carried on business in an industry to which the Shop Award applied. The retail pharmacy industry itself continued to be an industry to which the Shop Award applied' [75].

11 Accordingly, a declaration was made as sought by the Union. The employers now appeal to the Full Bench against that declaration.

The grounds of the appeal

12 Grounds 1 and 2 of the appeals assert that the learned Commissioner erred in going beyond the scope clause and respondency schedule to determine the scope of the Award. They say that the decisions in ***The Western Australian Carpenters and Joiners, bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd*** (1970) 50 WAIG 704 (***Glover***) and ***Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers, WA Branch*** (1991) 71 WAIG 1746 ***(Freshwest)*** do not support the approach taken by the Commission. The Union says that the approach taken by the learned Commissioner was orthodox and according to well-established principles.

13 The appellants also say that the Reasons for decision do not disclose the Commission's reasoning in considering clauses beyond the scope clause and respondency schedule.

14 Grounds 3 and 4 of the appeals assert that the learned Commissioner's conclusion regarding the effect of the provisions of the Act and the removal of the named respondents is in error. It is said that the Commission's approach was contrary to the established principles and unprecedented.

15 Ground 5 of the appeals is in the alternative and asserts that the learned Commissioner erred in constructively failing to exercise jurisdiction by not dealing with the submission of the Pharmacy Guild as to the effect of the Commission's order in the application by the Union, made under s 40 of the Act in No 423 of 1995. This order was made subsequent to the order under s 47, to remove PUFSC from Schedule 'C', to replace the entire schedule of respondents.

Clause 3 – Scope and its construction

16 The effect and scope of awards are set by the terms of s 37 – Effect, area and scope of awards subsections (1) and (4) of the Act, which provide:

> (1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section –
>
> (a) extend to and bind –
>
> (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
>
> (ii) all employers employing those employees;
>
> and
>
> (b) operate throughout the State, other than in the areas to which section 3(1) applies.
>
> *[(2), (3) deleted]*
>
> (4) An award, and any provision of an award, whether or not it has been made for a specified term, shall, subject to any variation made under this Act, remain in force until cancelled, suspended, or replaced under this Act unless, in the case of an award or a provision made for a specified term, it is expressly provided that the award or the provision, as the case may be, shall cease to operate upon the expiration of that term.

17 The appellants assert that the learned Commissioner was in error in concluding that the Award covered the retail pharmacy industry. The appellants contend by the terms of cl 3 – Scope, that the Award extended to the industries carried on by the named respondents to the Award in Schedule C. As no respondents to the Award are now engaged in the industry of retail pharmacies, the scope of the Award, properly construed, no longer extended to this industry.

18 It seemed to be common ground that the scope clause in the Award is of a kind discussed in the decision of the Industrial Appeal Court in ***Glover***. In this case, Burt J observed at [705] that:

> Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.

> An award if made in terms 'to relate to the ship-building industry' would be of the first-mentioned kind. An award expressed to relate, as the one under construction here is expressed to relate, to 'the industries carried on by the respondents set out in the schedule attached to this award' is of the other kind. In such a case the industry to which the award relates cannot be made known without definition of the industries carried on by the respondent. And this is necessarily a question of fact.
>
> …
>
> Be this as it may the application of (the) doctrine (of the common object which it is sought to attain by the combined efforts of the employer and the workers which indicates the industry in which they are engaged) requires that one makes a finding – which I emphasise is a fact finding – as to the industry carried on by the named respondents as at the date of the award. This having been done, the limits of the industry are then established.

19 This approach to the ascertainment of the scope of an award contrasted to that of the first-mentioned example in Burt J's decision above, as illustrated in ***R.J. Donovan and Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers WA Branch*** (1977) 57 WAIG 1317 ***(Donovan)***. In that case the scope clause of the award under consideration contained a schedule of named industries. The Industrial Appeal Court held that as such, the award had application to the industries so named and it was not necessary to embark on a fact finding as to the activities carried on by named respondent employers. All that was required was to ascertain whether the employer concerned could be fairly described as operating in the industry so stated in the schedule of respondents.

20 Thus, in the case where the scope clause of an award is of the second kind discussed in ***Glover***, as is the scope clause the subject of this appeal, the ascertainment of whether an industry is covered by the award, is a two-step process. The first step is to confirm that the scope clause is of the ***Glover*** kind. The second step, as Burt J states in ***Glover***, is to embark on a fact finding, as to the industry or industries carried on by the named respondents as at the time the award was made.

21 The learned Commissioner identified the terms of cl 3 – Scope of the Award. She accepted the parties' contentions that the terms of the scope clause of the Award was of the second kind discussed in ***Glover***. This is clearly so. At the time of the s 46 proceedings, cl 3 – Scope provided that "This Award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule 'C' and to all employers employing those workers". That the scope clause was of the second kind discussed by Burt J in ***Glover***, was identified by the learned Commissioner when at pars 26 and 34 of her reasons, she referred to the fact that neither cl 3 nor Schedule C identified the industries to which the Award applied. Because of this, the learned Commissioner then concluded that "the Shop Award's scope is inherently ambiguous and it is appropriate for the Commission to interpret it" (par 34 reasons AB213).

22 In ***re Harrison; ex parte Hame***s [2015] WASC 247 (20 August 2015), Beech J set out the approach to be taken to the determination of the meaning of industrial instruments. His Honour said:

> The general principles relevant to the proper construction of instruments are wellknown. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) the objectively ascertained purpose and objective of the transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) 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.
>
> These general principles apply in the construction of an industrial agreement. The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed.
>
> In ***Director General v United Voice***, Buss JA cited with approval the following observations of Madwick J in ***Kucks v CSR Ltd*** about the construction of industrial instruments:
>
> > It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evidence purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

> The starting point of the task of construction is the text. The need to avoid a narrow or pedantic approach to construction does not detract from the fact that construction is a textbased activity [50] – [53].

23 In ***City of Wanneroo v Holmes*** (1989) 30 IR 362 at 378, French J said that:

> The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words: ***Re Clothing Trades Award*** (1950) 68 CACR 597 (Aust Indus Ct, Full Ct). The words are to be read as a whole and in context: ***Australian Timber Workers Union v W Angliss & Co Pty Ltd*** (1924) 19 CAR 172. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: ***Pickard v John Heine & Son Ltd*** (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all**:** ***Seymour v Stawell Timber Industries Pty Ltd*** (1985) 13 IR 289 at 290; 9 FCR 241 at 244 (Northrop J) (13 IR at 299; 9 FCR at 254) (Keely J) cf 13 IR at 309; 9 FCR at 265 (Gray J).

24 The first question to arise in this matter is whether the Award is ambiguous, that is, is it genuinely capable of two meanings (see ***Federated Miscellaneous Workers' Union of Australia, Hospital, Services and Miscellaneous, WA Branch v Wormald International (Australia) Pty Ltd and Others*** (1990) 70 WAIG 1287, 1289, per Sharkey P.).

25 With respect, the Commission's conclusion that the Award is inherently ambiguous is in error. Simply because the scope clause of an award is of the second kind identified in ***Glover***, such that when read with the schedule of respondents to the award it does not reveal the industries covered by the award, does not mean that the scope clause is ambiguous. What is required, as Burt J stated in ***Glover***, when dealing with a scope clause of the present kind, is to embark upon a fact finding as to the industry or industries carried on by the named respondents to the award. This is an orthodox process of construction.

26 In this sense, the terms of cl 3 – Scope of the Award are expressed in language which is clear and unambiguous. The question to be asked and answered is "is the industry of retail pharmacies an industry carried on by any of the named respondents to the award?" It seemed to be common ground that the two named respondents to the Award from when the Award was made, Boans Ltd and PUFSC, were carrying on the industry of retail pharmacies. As mentioned, Boans Ltd was removed from the list of respondents in 1988 and the PUFSC was removed as a named respondent in 1995, under s 47(2) of the Act.

27 In ***Freshwest***, the issue before the Industrial Appeal Court was whether the appellant in that case was bound by the Transport Workers (General) Award 1961. It was common ground that cl 3 – Scope of the award was of the ***Glover*** type, as it referred to "industries carried on by respondents to this award". Franklyn J (with Rowland and Walsh JJ agreeing) held at 1748, that the approach of Burt J in ***Glover*** was apposite and "The enquiry must be directed to the industries carried on by the respondents to the award and at the time of making the award". His Honour added that this approach also drew general support from ss 38(3) (as it then was) and 47(2) of the Act.

28 There was much debate at first instance and on this appeal as to what was meant by the Industrial Appeal Court in both ***Glover*** and ***Freshwest***, as to the reference to "activities of named respondents as at the date of the award". The learned Commissioner concluded at pars 66 to 68 of her reasons, that the cases just referred to should be taken to apply to both the actual named respondents as at the date of the award making, and also their activities at that time too. This was consistent with the approach urged upon the Commission by the Union and contrary to the approach of the appellants. The appellants argued that the issue is to be decided by reference to the activities of the present named respondents to an award, at the time the question is asked. That is, whilst accepting as they must do, that the test is the common object of the activities of the employee and employer assessed as at the time the award is made, this test applies to the extant list of named respondents. Otherwise, according to the submissions of the appellants, the scope of an award as it was at the time the award was made, would be forever so and immutable. It was contended that this is not only at odds with ***Glover*** and ***Freshwest***, properly understood, but is also contrary to s 37 of the Act, dealing with the common rule effect of awards. It was contended by the appellants, that s 37 must be applied as "always speaking". The section applies to an award as varied and not just as originally made.

29 We note that the authorities to which we have referred make reference to the industries carried on by the named respondents at the time the award was made. However, those authorities did not consider the present issue of respondents having subsequently been deleted.

30 The application at first instance sought a declaration under s 46, as to the true meaning of the terms of the award. Plainly, by s 37 (*Note – ss (2) of s 37 was deleted*) of the Act, this must be the Award as it was at the time of the s 46 proceedings, because an award as made by the Commission under the Act, includes one that has been varied by the Commission. This is so, because an award, so made *or varied*, "will remain in force until cancelled, suspended or replaced under this Act": s 37(4) Act (emphasis added). This must mean that an award of the Commission, remaining in force until it is cancelled, suspended or replaced under the Act, is an award which includes any of its terms which have been the subject of a variation under the Act. In the case of an award that has been "varied" by an order of the Commission, it is the resulting award of which s 37 speaks and to which s 46 of the Act, dealing with applications for a declaration as to an award's true interpretation, has application.

31 We note that while the authorities to which we have referred make reference to the industries carried on by the named respondents at the time the award was made. However, those authorities did not consider the present issue of respondents having subsequently been deleted.

32 So too, this must be the case for the purposes of s 83 of the Act, dealing with the enforcement of an award. It is the enforcement of the award as it is as at the time of the alleged contravention or failure to comply, that is the "award" as referred to in s 83(2)(a) of the Act. This necessarily recognises that an award is a dynamic instrument and one that is not just fixed in time, but whose terms may be added to, altered, amended or rescinded as the definition of "vary" in s 7 of the Act makes clear. This is also supported to an extent by s 38(3) of the Act, which expressly contemplates that the scope of an award may change over time.

33 Accordingly, we see no reason to not approach the task of interpretation of the Award, in terms of its scope of application, any differently. As Burt J observed in ***Glover***, the task at hand is primarily a question of construction. As a matter of plain

meaning, a reading of cl 3 of the Award is that the industry or industries to which it applies are those that are "*carried on* by the Respondents *named in Schedule 'C'* and to all employers employing those workers" (emphasis added). For the purposes of the "common rule" provisions of the Act in s 37(1)(a), the "industry or industries to which the award applies" is or are those "carried on" by the named respondents in Schedule 'C'. Such an inquiry leads to no ambiguity. As mentioned above, the terms of cl 3 of the Award require an orthodox process of fact finding, as identified in ***Glover***. In this case such a fact finding was not necessary because it was accepted by the Union at first instance that as at the time of the s 46 application, none of the named respondents to the Award carried on the industry of retail pharmacy. Therefore, subject to what follows, the Award does not extend to this industry.

34 Two qualifications were raised by the Union at first instance and raised by the grounds of appeal. The first relates to other provisions of the Award, in particular cl 40 and also clauses 9 and 28 and Schedule B. These were said by the Union at first instance and on the appeal, to impact on the scope of the Award for the purposes of s 37 of the Act. The second relates to the removal of PUFSC under s 47 of the Act which was said not to affect the scope of the Award because of non-compliance with s 29A of the Act.

Effect of other Award provisions

35 The learned Commissioner referred to the arguments of the Union and the Minister as second intervenor, that regard should be had to other clauses of the Award to determine its scope which is not limited by cl 3 and Schedule C. Particular emphasis was placed on cl 40. Clause 40 – Chemists Shops provides that "Any worker employed in a chemist's shop shall be subject to the terms of this award up to the time he or she becomes indentured to the profession".

36 It seemed common ground that this provision was originally introduced into the Award as the proposed cl 38, by the employers at the time of the award making proceedings, by way of a counterproposal. This also seemed to be against the background of the existence of another award that covered employees who were either qualified pharmacists or trainees, the Retail Pharmacists' Award 1966. The terms of the then cl 38 (which later became cl 40) came into effect, along with cl 3 – Scope which has remained in the same terms since the Award was made.

37 Clause 9 – Hours in Part II(1)(d)(ii) makes reference to particular hours of work for "Special Retail Shops (Pharmacies)". Clause 28 – Wages in Part III (5)(b) provides for a loading of 20 per cent for each hour worked for part-time or casual employees who work in such shops.

38 It was therefore contended at first instance, concluded by the learned Commissioner and argued by the Union on the appeal, that these provisions support the principal conclusion that the retail pharmacy industry is still covered by the Award, despite there being no named respondents to the Award who are engaged in this industry since April 1995. For the following reasons, we are unable to accept this contention.

39 We note that the orthodox approach to determining the construction of an award requires consideration of the whole of the award and its terms. However, the determination of the scope of this award requires consideration of no more than the scope clause and respondency schedule. The other clauses are not clauses that define the scope of the Award but have other purposes. In any event, as we note, they come into operation only if the conditions to which they relate first fall within the scope of the Award.

40 The terms of clauses 9 and 28 are in the nature of entitlement provisions that specify ordinary hours of work and rates of pay for employees who are otherwise covered by the Award. In order for these terms of the Award to have any work to do, the question must first be asked whether the Award, by its scope provisions, extends to and applies to the retail pharmacy industry. If the answer to the question is yes, and it was not contended that "Small Retail Shops (Pharmacies)" were not in the retail pharmacy industry, then clauses 9 and 28 would have application. This is in principle, no different to other provisions of the Award, setting out other terms and conditions of employment having application too. They only operate if the Award, by its scope and area of operation, applies to the employees in question. Therefore, we do not think that clauses 9 and 28 and also Schedule B for that matter, provide the assistance in determining the scope of the Award contended by the Union and as concluded by the Commission at first instance.

41 We regard cl 40 in a similar vein. This provision is to be regarded as definitional in nature. It is a term of exclusion and not one of inclusion. There was no suggestion that at the time that the Award was made, when both Boans Ltd and PUFSC were named as respondents in Schedule 'C', that they did not operate businesses that could be regarded as "Chemists Shops". That is, retail pharmacies. As it was common ground that cl 38 (now cl 40) was in the Award as made and by cl 3 and Schedule 'C', it then extended to the retail pharmacy industry, cl 40 operated to delineate that certain persons, ie those who enter the profession of pharmacists, would no longer be covered by the Award once they so qualify. This is understandable in the context of the background at the time of the making of the Award, as earlier mentioned, of the existence of an award extending to professional pharmacists and trainees. Understood in this way, cl 40 operated as a line of demarcation between persons engaged in classifications in cl 28 – Wages in Chemists Shops, on the one hand, and those engaged as qualified pharmacists and those training to become so, under the Retail Pharmacists' Award, on the other.

42 The language of cl 40 is supportive of this approach to its meaning. The clause does not say that a person who is employed in a "Chemist Shop" is covered by the Award, which would be the case if a full stop appeared after the word "award" and nothing further was said. However, cl 40 goes on to say, "up to the time he or she becomes indentured into the profession". When read in this way, as a provision excluding a class of employees from coverage by the Award, it is entirely consistent with cl 3 – Scope, cl 28 – Wages and Schedule 'C'. As with clauses 9 and 28 Part III(5)(b), it will only have work to do if the terms of cl 3 and Schedule 'C' are engaged.

43 Therefore, we consider that the learned Commissioner was in error by relying on cl 40, in particular, to support her conclusion that the Award still has application to the retail pharmacy industry.

44 We would uphold grounds 1 and 2 of the appeals.

The s 47 order of the Commission

45 The next issue raised on the appeal is that the learned Commissioner's conclusion at pars 73 to 75 of her reasons, that the effect of the Commission's order under s 47 of the Act to remove PUFSC from the list of respondents did not affect the scope of the Award, was in error. It was contended by the appellants that the effect of the Commission's order made in April 1995 did have the consequence that the last-named respondent that was engaged in the retail pharmacy industry was removed as a named respondent. This meant, consistent with the appellants' submissions as to the proper construction of cl 3 – Scope of the Award, that it ceased from that point, to have any application to the retail pharmacy industry.

46 The appellants contended that contrary to the learned Commissioner's conclusions, the s 47 power to remove an employer as a named respondent is the exercise of a power to vary an award. In the circumstances of this case, s 29A of the Act, dealing with applications to vary an award under s 40 in relation to scope, had no application. This was contrary to, in particular, the submissions of the Minister as the second intervenor who maintained that, on the strength of the decision of the Commission in Court Session in the ***Commission's Own Motion*** ([2007] WAIRC 00318; (2007) 87 WAIG 903), where the Commission acts on its own motion, as it does under s 47(2) of the Act, this attracts s 29A of the Act. As in this case, the Commission, when removing PUFSC in 1995 did not comply with s 29A of the Act and acted without jurisdiction, as the submission went.

47 The Union contended, largely to the same effect, that the removal of PUFSC as a named respondent to the Award did not affect the scope of the Award. No application was made under s 40 of the Act and there was no compliance with s 29A of the Act, to expressly provide that the Award would no longer apply to the retail pharmacy industry. Accordingly, it was submitted that the learned Commissioner was correct to conclude that the removal of PUFSC under s 47 of the Act did not affect the scope of the Award and that it continued to apply to the retail pharmacy industry.

48 Under the Act, the Commission may exercise a number of powers having the effect of varying an award. The general variation power is found in s 40. This power is only able to be exercised on the application of persons party to or bound by an award: s 41 of the Act. Other powers, more particular in nature, are found in ss 38(2), 40B and 47 of the Act. The distinction between the general and specific powers to vary an award were recognised by the Full Bench in ***Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty Ltd*** (1984) 64 WAIG 1926 per O'Dea P at 1927. In the case of the latter two powers, the Commission is able to exercise those powers on its own motion. Where the Commission exercises powers on the application of a party to or person bound by an award under s 40 or on its own motion, under ss 40B or 47 of the Act, regardless of which power is exercised, the resulting order is a "variation" to an award in terms of the definition of "vary" in s 7 of the Act, referred to earlier in these reasons. In the case of an order under s 38(2), to add an employer as a named party to an award or to strike out an employer as a named party to an award under s 47(2), in both cases, this constitutes the adding to, alteration or amendment of, an existing provision of an award. The schedule of respondents to an award is, in the context of common rule awards in particular, a key provision.

49 In this case, the learned Commissioner concluded, in accepting the Union's and Minister's submissions, that the only basis on which the scope of the Award could have been varied was by an application under s 40, complying with s 29A of the Act. As s 47 is not concerned with such an outcome, but only the deletion of a named party not affecting scope, the 1995 order of the Commission did not mean that the Award ceased to have effect of extending to the retail pharmacy industry. For the following reasons, we consider that the learned Commissioner was in error in reaching this conclusion.

50 In February 1995, the Commission gave notice to the Union of its intention to strike out a number of named respondents to the Award under s 47 of the Act. A copy of the Registrar's Report was provided to the Union at the same time (see tab 11(c) AB). PUFSC was identified as an employer which was believed to no longer be in operation. Notice of intention to remove a number of named respondents was published, some time before the ultimate proceedings, in September 1993 (tab 11(d) AB). Following the notice to the Union, proceedings took place before Beech C on 5 April 1995. In those proceedings, the Union foreshadowed an application to replace in its entirety, the list of respondents in Schedule 'C' to the Award, to be made a short time later. No objection was raised by the Union to the removal of PUFSC by order of the Commission, at that time. The Commission issued its order to strike out a number of respondents, including PUFSC, on 5 April 1995 (tab 10(a) AB). It was not controversial that from this time, none of the respondents to the Award was engaged in the retail pharmacy industry.

51 As foreshadowed in the proceedings in April 1995, the Union shortly thereafter, made an application to the Commission to replace Schedule 'C' of the Award in its entirety (see tab 10(c) AB). Given that it was plainly a variation to the Award, all of the then-named respondents were served with a copy of the application (see tab 10(d) AB). By order dated 20 September 1995, Beech C varied the Award by the deletion of the former Schedule 'C' and replacement with a new Schedule 'C' (see tab 10(b) AB). It was common ground that none of the named respondents in the new Schedule 'C' was engaged in the retail pharmacy industry. From the transcript of proceedings before the Commission at that time, the parties and the Commission were alive to the prospect of s 38(3), as it then was, being engaged. The Union and employers informed the Commission that none of the respondents in the new Schedule 'C' was engaged in an industry to which the Award did not previously have application (see tab 11(f) AB). On this basis, orders were made by the Commission as sought.

52 We return then to the contentions of the Union and the Minister that the s 47 order made by the Commission in April 1995 was not able to impact upon the scope of the Award because s 29A of the Act was not complied with. For the following reasons, this contention must be rejected.

53 Sections 29A and 47, as at 1995, were helpfully reproduced at tab 25 of the Supplementary Appeal Book. Those provisions, subject to some variation, were largely in the same terms as they are in the current Act. Importantly, s 29A was prefaced in subsection (1), as it still is, with the words "Where an industrial matter *has been referred to the Commission pursuant to s 29*…" (emphasis added). At the time, s 29(a), which was the same as it is now, specified those persons who may refer an industrial matter to the Commission. This included an employer with a sufficient interest in the matter; an organisation with constitutional coverage of employees affected, and the Minister. Section 29(b), relating to claims by individual employees, is not relevant.

54 Sections 29A(2), (2a), (3) and (4), as they do now, were all prefaced with the words "if the reference of an industrial matter to the Commission…". The subject matter of s 29A(2) is relevant for present purposes, being the seeking of a "variation of the area of operation or the scope of an award…". Notably, s 29A(2) did not, and still does not, merely refer to the variation of the *scope clause* (emphasis added) of an award, in recognition that other parts of an award, such as the schedule of respondents, may bear upon the issue of the scope of the application of an award. As an aside, this distinction is now expressly recognised in the current ss 29A(1a) and (1b) of the Act.

55 In our view, as a matter of construction of the Act, the reference to "Where an industrial matter has been referred to the Commission" and "the reference of an industrial matter to the Commission" in s 29A, must be taken to be and intended to have been by the draftsperson of the legislation, the industrial matter referred to the Commission under s 29. This logically follows. The sections in the Act follow one another and deal with the referral and service of an industrial matter brought before the Commission.

56 The referral of an industrial matter in the manner outlined above stands in contrast to the power of the Commission to act of its own motion under s 47 of the Act. As a matter of construction of the Act, the exercise of such a power by the Commission involves no referral of an industrial matter to the Commission. The "reference of an industrial matter to the Commission" in ss 29A(2), (2a), (3) and (4), speaks of a referral to the Commission by those persons specified in s 29 of the Act, as it then was.

57 Therefore, the conclusions reached by the Commission in Court Session in the ***Commission's Own Motion*** [2007] WAIRC 00318; (2007) 87 WAIG 903 at pars 9 to 11, to the effect that s 29A(1b) applied to the Commission acting on its own motion under s 40B of the Act and, by inference, s 47 of the Act, should not be followed. The Commission in Court Session in that case adopted, without further consideration, the earlier decision of the Commission in Court Session **in *Re Dardanup Butchering Co and Ors*** [2004] WAIRC 10864; (2004) 84 WAIG 465. In that case, it was held that under s 40B where the Commission acts on its own motion, the Commission effectively refers the industrial matter to itself. In our view also, with respect, ***Re Dardanup Butchering*** must also be considered to have been wrongly decided on this point.

'Parties' to an award and s 47(2) of the Act

58 By s 29B of the Act, 'parties' to proceedings before the Commission include all 'persons, bodies, organisations or associations upon whom or which a copy of the claim or application is served'. Those 'parties' to proceedings in award making matters become the parties to the award and are listed as named parties: s 38(1) Act. These 'parties' are taken to be so by operation of the Act if they are not listed as named parties under s 38(1): s 38(1a) Act.

59 By s 47(2) of the Act, the Commission may of its own motion strike out 'a party' to an award a named employer who no longer is engaged in business as an employer in the industry to which the award applies. The Commission may order the striking out of the employer as a named party to the award.

60 In the case of the Award in question in this appeal, both Boans Ltd and PUFSC were served with the original claim for the Award and became respondents to it once the Award was made. Also, they were, because of the operation of ss 38(1) and (1a) of the Act, 'named parties' to the Award. As the Award scope clause is of the ***Glover*** type, such that the named parties to the Award were also the named employers in the list of respondents in Schedule 'C', the effect of an order under s 47(2) made by the Commission in 1995 to remove PUFSC as a 'named party' to the Award, as an employer who no longer was engaged in the industry to which the Award applied, had the effect of also removing PUFSC as a named respondent in Schedule 'C'. This therefore changed the scope of the Award by the removal of the last-named respondent in Schedule 'C', when read with the scope clause, engaged in the industry of retail pharmacy.

61 Thus, in the context of an older award containing a ***Glover*** type of scope clause, given that the schedule of respondents will also invariably be one and the same as the 'named parties' to the award under s 38(1) and (1a) of the Act, the removal of a named party (and hence the removal of one of the named respondents) under s 47(2) of the Act, will affect the scope of the award. The type of area and scope clause of the award in question, and the effect of the removal of a named party was recognised by the Commission in Court Session in ***Commission's Own Motion*** ([2007] WAIRC 00318; (2007) 87 WAIG 903 at par 49). In that case, critically, the award in question was not an award with a ***Glover*** type clause rather, it was an award with a ***Donovan*** type scope clause, which had a schedule setting out named industries as opposed to the type of respondents listed in Schedule 'C' to the Award in this appeal. At par 49 of its reasons, the Commission in Court Session expressly recognised this distinction when it was said:

> We observe that whether this manner of dealing with the problem of out-of-date addresses in this award is applicable to other awards will be dependent on the wording of the area and scope clause of the award in question. Where the scope of the award is determined by reference to the industry as carried on by the respondents to the award, in contrast to this award, care will need to be exercised in order to achieve the same result.

62 We note also, as pointed out by the appellants in their submissions, that s 40 of the Act dealing with applications to the Commission to vary an award, is expressly subject to s 29A of the Act. No such provision is contained in s 47, or for that matter, s 40B of the Act.

63 Therefore, for the foregoing reasons, we consider the learned Commissioner's acceptance of the Union's and Minister's submissions in relation to the application of s 29A to s 47 proceedings to be erroneous. The removal of PUFSC in 1995, as the last-named respondent to the Award to be engaged in the retail pharmacy industry, had the effect of removing that industry from the scope of the Award from that time. This was the legal consequence of the events as they then occurred. Contrary to the submissions of the Union, whether this was the express intention of the parties at that time, is not relevant to the determination of this question. The relationship between the terms of cl 3 – Scope and Schedule C of the Award, on the established authorities is that they are, as pointed out by the appellants in their submissions at first instance (see tab 7(c) AB) "legally indivisible concepts". The latter is determined by the former. Also, for the reasons advanced by the appellants on this

appeal, there is in our view, no substance to the Union's contention that in some way, the April 1995 s 47 order of the Commission to delete PUFSC was merely an administrative step, with no legal consequences.

Failure to deal with submissions

64 The final point raised by the appellants is that the learned Commissioner did not deal with their further submissions on the effect of the Commission's September 1995 order, that to replace Schedule 'C' of the Award in its entirety, put beyond doubt the question of whether the Award no longer applied to the retail pharmacy industry.

65 It is the case that the learned Commissioner did not consider and deal with this line of argument. It may well be that she did not consider that this needed to be dealt with because of her view that the seemingly only relevant list of respondents was that in existence at the time when the award was first made. However, the learned Commissioner ought to have considered the matter. The application leading to the September 1995 order was made under s 40 of the Act by the Union. It did not, by its terms, seek to extend the scope of the Award to add any employer engaged in an industry to which the Award did not previously apply. However, and importantly, no employer engaged in the industry of retail pharmacy was included in the new list of respondents in the new Schedule 'C'. In our view, this put beyond doubt the earlier variation to the award to remove PUFSC as the sole respondent carrying on that industry.

66 For the foregoing reasons, we would uphold the appeal and vary the decision of the Commission at first instance. We are of the opinion, as required by s 49(6a) that the Full Bench is able to make its own decision on the matter and that it is not necessary to remit the matter to the Commission. We would declare that the Award does not apply to the industry of retail pharmacy as carried on by Boans Ltd or PUFSC.

67 We have noted that the Award makes references to chemists shops and pharmacies in provisions which have become obsolete given that the Award does not apply to those shops. It may be that the presence of those other clauses causes confusion.

68 We invite the parties' submissions, within 21 days, as to whether, in accordance with s 46(1)(b) and 49(6) of the Act, we should now, by order, vary the Award to remedy what might be described as the defect of having those provisions remain in the award.

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69 The grounds of appeal, background, evidence and findings at first instance are set out in the reasons for decision of the Chief Commissioner and the Senior Commissioner at [1] - [15].

70 The Appellants say the Commission erred in fact and law in deciding (including at [32], [68] and [82] - [84]) that the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (**Shop Award)** covered the retail pharmacy industry. They say the Commission should have found that, on a proper construction, cl 3 of the Shop Award determined the Shop Awards' scope be reference to the industries relevantly carried on by the list of respondents. The relevant paragraphs referred to in Ground 1 of FBA 2 of 2019, Pharmacy Guild of Western Australia and Ground 2 of FBA 3 of 2019 Samual Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth, in of the Reasons for Decision are:

> [32] Construing the Shop Award as a whole and giving its words, in particular those of cl 40, their ordinary meaning, I consider the Shop Award is intended to cover the retail pharmacy industry.
>
> [68] I do not agree with Chemist Warehouse that a strict grammatical interpretation of cl 3 should be adopted when interpreting scope. The language used by the parties to the Shop Award is not the sole determinant of the Shop Award's legal effect in relation to scope.
>
> [82] The Shop Award has always applied to the retail pharmacy industry and continues to apply to it.
>
> [83] For these reasons, the answer to the question is 'yes'
>
> [84] The Commission declares *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* as varied applies to workers employed in any calling or callings mentioned in the award in the retail pharmacy industry and to.

71 The appellants assert that the Award no longer extends to the pharmacy industry because the named respondents to the Award in Schedule C no longer contain a respondent engaged in the pharmacy industry. They say the Commission should have found that, on a proper construction, cl 3 of the Shop Award determined the Shop Awards' scope by reference to the industries relevantly carried on by the current list of respondents found in Schedule C.

72 The scope clause of the award is cl 3 of the Shop Award and states:

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

73 It is not a contest that the award was and is a 'common rule' award in accordance with s 37(1) of *Industrial Relations Act 1979* (WA) (the Act) and that it is a "Glover" type of clause and explained in [18] – [21] of the Chief Commissioner's and Senior Commissioner's reasons for decision.

74 The Appellants say that the interpretation of the scope of the awards is to be determined by reference to cl 3, the Scope Clause, of the Shop Award and by identification of the industries carried on by the respondents presently named by reference to their common objects at the date of the award. That is, the Commission ought to look to the industries at the date the award was made and at respondents currently named. They say the task of the Commission is limited to interpreting cl 3 and its text, and the Commission erred in finding ambiguity exists, where none exists, and then considering text of the whole of the award and extrinsic material.

Principles

75 The relevant legislation is s 37(1) of the Act which provides that an award has effect according to its terms and by subsection (4) remains in force until cancelled, suspended, or replaced under this Act:

> 37. Effect, area and scope of awards
>
> (1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section –
>
> (a) extend and bind –
>
> (i) all employers employed in any calling mentioned therein in the industry or industries to which the award applies; and
>
> (ii) all employers employing those employees:
>
> and
>
> (b) operate throughout the State, other than in the areas to which section 3(1) applies.
>
> *[(2), (3) deleted]*
>
> (4) An award, and any provision of an award, whether or not it has been made for a specified term, shall, subject to any variation made under this Act, remain in force until cancelled, suspended, or replaced under this Act unless, in the case of an award or a provision made for a specified term, it is expressly provided that the award or the provision, as the case may be, shall cease to operate upon the expiration of that term.

76 An award has effect "according to its terms" and is to be interpreted applying the same principles that are applied in Courts of law for the construction of deeds, instruments and statues as established by the Western Australian Industrial Appeal Court in ***Norwest Beef Industries Limited and Derby Meat Processing Co Ltd v West Australian Branch, Australian Meat Industry Employees Union, Industrial Union of Workers, Perth*** (1984) 64 WAIG 2124.

77 The Full Bench of this Commission set out the principles to be applied when interpreting an award in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2017] WAIRC 00830 [83]; (2017) 97 WAIG 1689:

> the Commission's task pursuant to s 46 of the Act is to determine the objective intention of the parties to the Award as it is embodied in the words they have used.

and at [79] citing ***Re Harrison: Ex parte Hames*** [2015] WASC 247 Smith AP, as she was then, with Scott CC agreeing, set out the principles to be adopted when undertaking the tasks of interpreting an Award:

> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument;
>
> (2) it is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean;
>
> (3) the objectively ascertained purpose 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;
>
> (4) the apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances;
>
> (5) an instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ; and
>
> (6) an instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation (***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640.

78 At [77] Smith AP citing ***United Voice WA v Director General, Department of Education*** [2013] WAIRC 00053; (2013) 93 WAIG 80 at [53] further explained the approach to be adopted when construing the intention of the parties:

> In that matter, Beech CC and I observed that [52]:
>
> To construct the intention of the parties, regard must be had to the principles that apply to the construction of contracts: ***Short v F W Hercus Pty Ltd*** [1993] FCA 51; (1993) 40 FCR 511, 518 - 519 (Burchett J); ***Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*** [2010] FCAFC 90; (2010) 186 FCR 88 [90] - [96] (Logan J). Importantly, regard cannot be had to the actual intention of parties or their expectations. Evidence of such matters is usually inadmissible: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1981-1982) 149 CLR 337, 352 (Mason J). Ascertaining the presumed intention of the parties requires the objective determination of what a reasonable person would have understood the contract (in this matter the 2010 agreement) to mean, *as at the date that it was made*, taking into account the object of the contract and the surrounding

> circumstances known to the parties: ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] HCA 70; (2001) 210 CLR 181 [11]. (my emphasis).

79 The Industrial Appeal Court considered the interpretation of a similar clause to that in the current matter, in ***Glover*** and held that that the scope of an award requires a finding "*as to the industry carried on by the named respondents as at the date of the award*". This case concerned the finding of the industries carried on by the named respondents and the effect of the respondents ceasing operations in one industry or commencing operations in another industry.

80 Subsequently, the Industrial Appeal Court in ***Freshwest*** further considered the approach to be adopted when determining the industries for an award with a similar scope clause to that in this matter. Franklyn J [1748] set out the nature of the fact-finding enquiry to be made to identify the industries:

> For the industries to which it applies to be determined with certainty – an essential to any award – it is necessary, in the absence of clear intention to the contrary, to define them by what they were at the date of the award. That is the industry of which the parties to the award were speaking. That does not mean that any variation in the conduct of a named respondent's industry changes the nature of that industry.
>
> …
>
> The enquiry must be directed to the industries carried on by the respondents to the award and at the time of the making of the award. That this is so gains support, if it is necessary, from the provisions of s 38(3) - which provides that where an employer is added subsequent to the making of an award as a named party thereto and is engaged in an industry to which the award did not previously apply, the resulting variation to the scope of the award is expressly limited to that employer – and s 47(2) which provides for the striking out of a named employer as a named party to the award if he is no longer carrying on business as an employer in the industry to which the award applies or for any other reason is not bound thereby.

Consideration

81 The appellants say that ***Glover*** and ***Freshwater***, properly understood, are authorities for the contention that it is the industry at the date of the award and not the respondents; that it is, the respondents are those at the date of enquiry. In both of those cases the question to be ascertained concerned the specific industries and the question of the currency or otherwise of the named respondents was not a question to be answered nor was it specifically addressed. The question of the industry was answered by applying the principles that apply to the interpretation of awards as set out above.

82 I find that the learned Commissioner correctly applied the principles of interpretation of awards and found that this required an inquiry or fact finding of the respondents at the time the award was made at [66]. That is, the answer to the question concerning the scope of the award and the employees it applies to with respect to the industry undertaken by respondents is answered by a factfinding enquiry of the respondents at the time the award was made. The objective intention of the parties found in the words used in the scope clause and its reference to respondents at the time the award was made was that they intended the award to have a practical application of a common rule award to certain industries including the retail pharmacy industry.

83 The appellants contends that the "and" in the sentence of Franklyn J in ***Freshwest*** at (1748) of 'The enquiry must be directed to the industries carried on by the respondents to the award *and* at the time of the making of the award' (my emphasis) is significant in that it results in a different relevant date being applied by using the current named respondents and using the activities being undertaken by the respondents at the time of the award being made. I am not persuaded that the use of the conjunction "and" is to be read as the appellants contend. The sentence reads as requiring the enquiry "at the date of the award" applying to both the activities and the respondents. I do not find the learned Commissioner erred in finding that at [66] "the qualification 'at the date of the award' applies to the respondents *and* their activities".

Ambiguity

84 The Appellants contend that the Commissioner at first instance erred in considering clauses in the Award other than the "Scope Clause", cl 3. The Appellant (FBA 3 of 2019) says that ambiguity means that the award provision must be capable of more than one meaning and this requires that an analysis of the industries of the respondents listed in Schedule C must be capable of more than one outcome for cl 3 of the Shop Award to be ambiguous.

Principles

85 In ***McCourt v Cranston*** [2012] WASCA 60 at [24], Pullin JA defined 'ambiguity' as "*ambiguity is to be found when an instrument is genuinely capable of two meanings or is susceptible of more than one meaning or difficult to understand.*" Similarly, in ***Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd*** [2012] WASCA 216 at [77]: Ambiguity *maybe found where the scope or application of an instrument is doubtful*: ***Bowrell v Goldsborough, Mort & Co Ltd*** (1905) 3 CLR 444, 456-457. Ambiguity is not confined to grammatical or syntactical ambiguity.

86 In ***The Chief Secretary and The Hospital Employees' Industrial Union of Workers of W.A. (Coastal Branch)*** (1931) 11 WAIG 105 at (106) the predecessor of the Commission, the Court of Arbitration considered the task of interpretation of an award:

> A perusal of section 88 of the Act (precursor to s 46) above quoted will show that in an interpretation case this Court is exercising not only its judicial but also its arbitral functions, and consequently where there is in an award any doubt or uncertainty or ambiguity as to any of its provisions, or when there has been an accidental omission or where something has been inserted in error, the Court is entitled to look into the whole of surrounding circumstances and explore what avenues it may deem necessary even to the extent, where desirable, of appointing experts to investigate and report, in order to ascertain the true intention and to remedy a defect in the award…

Consideration

87 When "ambiguity" is not limited to a conclusion that the text is capable of two meanings and is also given to the situation where the instrument is difficult to understand or there is doubt over its application the reasons the learned Commissioner found that the Shop Award was ambiguous are evident. The deletion of respondents in accordance with one power of the Commission having created uncertainty and doubt for the effect of the award required the interpretation of the award. Having found ambiguity the Commissioner then considered the whole of the award, in line with the principles established for interpretation of awards, finding that the inclusion of clauses relevant to the retail pharmacy industry supported the contention that the scope of the award had effect and applied to the retail pharmacy industry.

88 I find the learned Commissioner was not in error in finding the award was ambiguous and therefore the whole text of the award, it's history and extrinsic materials was available to be considered.

89 For the foregoing reasons I would dismiss Ground 1 of FBA 2 of 2019 and Ground 2 of FBA 3 of 2019.

Ground 2 in FBA 2 of 2019 and Ground 3 in FBA 3 of 2019

90 In relation to Ground 1 (FBA 2 of 2019) and Ground 2 (FBA 3 of 2019) the appellants say there was a further error (Ground 2 in FBA 2 of 2019 and Ground 3 in FBA 3 of 2019) in that the Commission failed to give adequate reasons for deciding (at [32]) that the Shop Award was intended to cover the retail pharmacy industry.

Principles

91 The Full Court of the Supreme Court of Western Australia set out the principles to be applied for reasons for decisions in ***Mount Lawley Pty Ltd v Western Australian Planning Commission*** [2004] WASCA 149:

> 27 Where there is a right of appeal, the reasons must be sufficient to give effect to that right. The basis for the decision must be apparent, as otherwise the losing party cannot know whether there has been a mistake of law or of fact. Just what that will involve depends upon the nature of the case. Some cases turn upon a simple contest of credibility between two witnesses. Others involve detailed and complex factual and legal issues requiring close reasoning and analysis.
>
> 28 Reasons need not be lengthy and elaborate: ***Re Powter; Ex parte Powter;*** (1945) 46 SR (NSW) 1 at 5; ***Beale*** at 443; nor do they need to refer to all the evidence led in the proceedings: ***Mifsud v Campbell*** (1991) 21 NSWLR 725 at 728. However, relevant evidence should be referred to (albeit not necessarily in detail) and, where there is conflicting evidence of significance to the outcome, both sets of evidence should be referred to. Where one set of significant evidence is preferred over another, the trial judge should set out findings sufficient to explain why: ***Beale*** at 443. Similarly, where a dispute involves a form of "intellectual exchange, with reasons and analysis advanced on either side", the judge "must enter into the issues canvassed before him and explain why he or she prefers one case over the other": ***Flannery*** at 382.
>
> 29 Inadequacy of reasons does not necessarily amount to an appealable error. An appeal court will only intervene when no reasons have been given in circumstances in which they were required, or when the inadequacy is such as to give rise to a miscarriage of justice: ***Beale*** at 444. Nor does an appealable error arising from inadequate reasons necessarily result in a new trial. The appeal court is entitled to consider the matter and, if it can do so (where, for example, only one conclusion is reasonably open on the available evidence), it may itself decide the matter: ***Beale*** at 444.

Consideration

92 The learned Commissioner outlined the submission of the parties in [15] through to [25] and then set out her application of the principles of award interpretation as it applied to the Shop Award in [26] to [31] and then set out her conclusion at [32], [33] and [34]. Subsequently the Commissioner sets out her preference for one competing position over the other, along with her reasons, at [61] to [70]. The reasons for decision, whilst they may not have been set out in the same manner and order of the submissions the Appellants had argued at first instance, do provide the basis for the decision and I consider they are adequate in the terms established in ***Mount Lawley Pty Ltd v Western Australian Planning Commission***.

93 For these reasons I would dismiss Ground 1 and Ground 2 of FBA 2 of 2019 and Ground 2 and Ground 3 of FBA 3 of 2019.

Ground 3 of FBA 2 of 2019 (Ground 4 of FBA 3 of 2019) and Ground 4 of FBA 2 of 2019 (Ground 5 of FBA 3 of 2019)

94 The Appellants contend that the Commission's order under s 47 of the Act made in 1995 had the effect of changing the scope of the award and the learned Commissioner erred in law in deciding that

> (a) section 29A of the Act required certain steps to occur in order to vary the scope of the Shop Award (at [70] and [71]); and in the absence of such steps being taken
>
> (b) the Commission goes no further than removing a listed respondent, with the consequence that an order under s 47 does not have the effect of removing an industry, thereby reducing an award's scope (at [73]).

95 The Appellants further ground in a similar vein is that the Commission erred in fact and law in deciding (at [75]) that the 1995 order made under s 47 of the Act did no more than remove PUFSC as a listed respondent to the Shop Award, with the consequence that the retail pharmacy industry continued to be an industry to which the Shop Award applied. The Commission should have found that PUFSC was removed as a listed respondent with the consequence that, on a proper construction of its terms, the Shop Award thereafter ceased to apply to the retail pharmacy industry.

Principles

96 Section 37 of the Act set out at [16] and [75], provides that the cessation of the application of common rule to a specified industry or industries requires the amendment of existing provisions, or the insertion of new provisions, to "expressly provide otherwise" (s 37(I)). The phrase "expressly provide otherwise" in s 37(I) was considered by the Federal Circuit Court of Australia in ***Fair Work Ombudsman v D'Adamo Nominees Pty Ltd*** (No. 4) [2015] FCCA 1178 [213] and held that these

words required any variation seeking to unbind any industry or industries to which the award applied to have the effect of plainly, clearly or explicitly indicating the award does not apply to that industry.

97 Section 29A of the Act provides for the variation of the area and scope of the award and prescribes specific processes to be undertaken when variations to the area and scope provisions of an award are to be made. That is s 29A provides the means by which a variation to the area and scope provisions of an award will be plain, clear and explicit in indicating an award does not apply, or no longer applies, to that industry.

> 29A. Proposed award etc., service of etc.
>
> (1) Where an industrial matter has been referred to the Commission pursuant to section 29, the claimant or applicant shall specify the nature of the relief sought.
>
> (1a) In this section —
>
> **area and scope provisions** means the parts of an award or industrial agreement that relate to the area of operation and scope of the award or industrial agreement.
>
> (1b) Subject to subsection (2A) —
>
> (a) area and scope provisions of a proposed award or industrial agreement; and
>
> (b) proposed variations to the area and scope provisions of an existing award or industrial agreement,
>
> shall be published in the required manner.
>
> (2) Subject to any direction given under subsection (2A), if the reference of an industrial matter to the Commission seeks the issuance of an award or the registration of an industrial agreement, or the variation of the area and scope provisions of an existing award or agreement, the Commission shall not hear the claim or application until the area and scope provisions of the proposed award or industrial agreement have, or the proposed variation has, been published in the required manner and a copy of the claim or application has been served —
>
> (a) in the case of a proposed award or variation of an award, on —
>
> (i) UnionsWA, the Chamber, the Mines and Metals Association and the Minister; and
>
> (ii) such organisations, associations and employers as the Commission may direct being, in the case of employers, such employers as constitute, in the opinion of the Commission, a sufficient number of employers who are reasonably representative of the employers who would be bound by the proposed award or the award as proposed to be varied, as the case may be;
>
> (b) in the case of the proposed registration or variation of an industrial agreement, on UnionsWA, the Chamber, the Mines and Metals Association and the Minister.
>
> (2A) The Chief Commissioner may, if of the opinion that it is appropriate to do so in the circumstances, direct that the area and scope provisions of the proposed award or industrial agreement —
>
> (a) need not be published in the Industrial Gazette; or
>
> (b) need not be published at all.
>
> (2b) Nothing in subsection (2A) affects or dispenses with any requirement of subsection (2) that a copy of a claim or application be served on any person, body or authority referred to in subsection (2)(a) or (b).
>
> (2c) The area and scope provisions of an award may be amended under section 40A without the proposed variation having been published in the required manner.
>
> (3) Unless otherwise directed by the Commission, where the reference of an industrial matter to the Commission seeks the variation of an award or industrial agreement, other than a variation of the kind mentioned in subsection (2), the Commission shall not hear the claim or application until the named parties to the award or the parties to the industrial agreement, as the case requires, have been served with a copy of the claim.
>
> (4) Where the reference of an industrial matter to the Commission seeks the issuance or variation of an order or declaration, other than of a kind referred to in subsection (2) or (3) the Commission shall not hear the claim or application until the persons sought to be bound by the decision in the proceedings have been served with a copy of the claim or application.
>
> *[Section 29A inserted: No. 94 of 1984 s. 19; amended: No. 119 of 1987 s. 8; No. 15 of 1993 s. 31; No. 20 of 2002 s. 115; No. 53 of 2011 s. 41 and 48.]*

98 Section 40 of the Act is a general power that permits the Commission to vary an award by adding a new provision, or by adding to, varying or rescinding an existing provision:

> 40. Varying and cancelling awards
>
> (1) Subject to subsections (2), (3) and (4) and to sections 29A and 38, the Commission may by order at any time vary an award.
>
> (2) An application to the Commission to vary an award may be made by any organisation or association named as a party to the award or employer bound by the award.

(3) Where an award or any provision thereof is limited as to its duration the Commission —

(a) may, subject to such conditions as it considers fit, reserve to any party to the award liberty to apply to vary the award or that provision, as the case may be; and

(b) shall not, within the specified term, vary the award or that provision, as the case may be, unless and to the extent that —

(i) it is satisfied that, by reason of circumstances which have arisen since the time at which the specified term was fixed, it would be inequitable and unjust not to do so; or

(ii) on an application made under paragraph (a), it is satisfied that it is fair and right so to do; or

(iii) the parties to the award agree that the award or provision should be varied;

and

(c) may within the specified term cancel the award if the parties to the award agree that it be cancelled.

(4) Section 39 applies, with such modifications as are necessary, to and in relation to an order made under this section.

[Section 40 amended: No. 94 of 1984 s. 66.]

99 In ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers; Application to vary the Concrete Masonry Block Manufacturing Award*** (1981) 61 WAIG 628 ***(Concrete Masonry)*** the Full Bench held that s 40 of the Act that the power to vary awards is on application of a union, association or employer bound by the award.

100 Section 47 provides for the cancellation of an award where the Commission is of the opinion that there is no employee to whom the award applies. The Commission may also remove a named employer if an employer is no longer carrying on business as an employer in the industry to which the award applies.

101 Section 47 of the Act provides:

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

(1) Subject to subsections (3), (4) and (5), where, in the opinion of the Commission, there is no employee to whom an award or industrial agreement applies, the Commission may on its own motion, by order, cancel that award or industrial agreement.

(2) Subject to subsections (3), (4) and (5), where the Commission is of the opinion that a party to an award who is named as an employer is no longer carrying on business as an employer in the industry to which the award applies or is, for any other reason, not bound by the award, the Commission may on its own motion, by order, strike out that party as a named party to the award.

(2a) Subject to subsections (3), (4) and (5), where the Commission is of the opinion that a party to an industrial agreement is no longer carrying on business as an employer referred to in section 41(4)(a)(ii) in relation to the agreement or is, for any other reason, not bound by the agreement, the Commission may on its own motion, by order, strike out that party to the agreement.

(3) The Commission shall not make an order under subsection (1), (2) or (2a) unless before making the order —

(a) it has directed the Registrar to make such enquiries as it considers necessary, and the Registrar has reported on the result of those enquiries to the Commission in writing; and

(b) after receiving the report of the Registrar, the Commission has —

(i) caused the Registrar to give general notice by publication in the required manner of the intention of the Commission to make the order; and

(ii) directed the Registrar to serve copies of the notice on such persons as the Commission may specify.

(4) Any person may, within 30 days of the day on which the notice referred to in subsection (3) is first published, object to the Commission making the order referred to in the notice.

(5) If the Commission does not uphold an objection to the making of the order referred to in the notice the Commission may make the order and shall, as soon as practicable thereafter, direct the Registrar to serve a copy of the order —

(a) where the order relates to an award, on each organisation of employees that is a named party to the award, on such other persons as are bound by the award as the Commission thinks fit, and on UnionsWA, the Chamber and the Mines and Metals Association;

(b) where the order relates to an industrial agreement, on each party to the agreement.

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

102 The general power for the Commission to vary an award's scope is on application pursuant to s 40(1) and (2) of the Act by a party to the award or employer bound by the award, and is subject to compliance with s 29A of the Act. This involves service and notification requirement which were, and continue to be, mandatory and appealable for non-compliance.

103 In the case of ***Australasian Meat Industry Employees' Union, Industrial Union of Workers, West Australian Branch v Stewart Butchering Co Pty Ltd*** (1993) 73 WAIG 1196 ***(Stewart Butchering)***, an employer who was not a named respondent sought to insert a clause into the award, the *Meat Industry (State) Award, 2003* that would exempt them from the award: "This Award shall not apply to Stewart Butchering Co. Pty Ltd". The majority held the purpose and effect of the application was for the award to be varied to provide otherwise, that is, for the award to be varied to expressly provide that the award did not apply by common rule to the employer. The Full Bench quashed the Commission's initial decision to approve the variation sought because the Commission did not comply with s 29A:

> If one looks at the application on its face, what it seeks to do, quite plainly, is to seek an order which has the effect of absolving it from the binding effect of the award. The award's binding effect is contained in s 37. Section 37, by prescribing the common rule effect of awards, does so with reference to the Scope clause, because the Scope clause determines the industry or industries to which the award applies, and thus the employers and employees bound by the award.
>
> …
>
> We think that the words of s 37 are quite plain. The award is a common rule award until it prescribes otherwise.

Consideration

104 I agree with the determination of the learned Commissioner that in 1995 in accordance with s 47, the Commission deleted the PUFSC as a named respondent because it no longer carried on business in an industry to which the Shop Award applied and in so doing only did that and did not change the scope of the award.

105 The Pharmacy Guild submits that the decision in ***Stewart Butchering***, in particular, the observation of the Full Bench at (1200) that "the exemption of a respondent, whether named or not, who would otherwise be bound by the award narrows the scope of the award" supports the contention that s 47(2) of the Act can narrow the scope of an Award because the effect of granting the application, in that matter, would have been to narrow the scope of the Award. I do not agree that this case is an authority for such an assertion. The Full Bench refers to the explicit exemption of employers, named or unnamed, who would otherwise be bound by common rule. This matter is concerned with a determination of removing a named employer who as a matter of practical reality are no longer operating in the industry. It is not explicit application or determination to exempt an employer who is bound by common rule.

106 An application to vary an award to amend the scope of an award required the application be made in accordance with s 29 and in compliance with the *Industrial Relations Commission Regulations 1985* reg 11, which required such an application to attach a statement of the persons affected by the proposed variation and the grounds for the application, and regulation 1.2(3), which, if the award applied to more than one industry and the proposed variation only sought to affect a specified industry or industries, required the application to state this.

107 Similar to the matter in ***Stewart Butchering*** a variation to the scope of an award requires that variation to be explicitly made and be made in accordance with s 29A of the award. The deletion of the named respondents was not made pursuant to s 29A and, therefore, did not vary the scope of the award.

108 It is not that Beech C acted beyond his jurisdiction; it is that the effect of his action was limited to removing the employer as a named respondent because they are no longer operated in that industry. The Commission's determination did not effect a change to the industry common rule.

109 The appellants say the observations of Gregor C. in ***The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Anodisers WA; Dardanup Butchering Co, Bradford Insulation*** [2001] WAIRC 03164; (2001) 81 WAIG 1598 at [6] **(*Anodisers*)** are compelling in the support for their contentions that the deletion of a named respondent will result in the reduction of the scope of the award if that respondent is the only respondent engaged in that industry. I agree with the learned Commissioner reasons at [78] in finding that the ***Anodisers*** case was not an authority as the Commission as then constituted was not required to decide the issue before this Commission and the parties were not heard on this issue.

110 For these reasons I would dismiss Ground 3 and Ground 4 of FBA 2 of 2019 and Ground 4 and Ground 5 of FBA 3 of 2019.

Ground 5 of FBA 2 of 2019 and Ground 6 of FBA 6 of 2019

111 Following the order issued by the Commission pursuant to s 47 The Shop, Distributive and Allied Employees' Association of Western Australia (SDA) made application to vary Schedule C to update the names and remove the addresses of the named parties. This was a consent variation that continued the process initiated under s 47 with the objective of reducing unnecessary notifications which resulted in returned mail as observed by Beech C.

112 The appellants say that the Commissioner erred in:

(a) constructively failing to exercise jurisdiction by not dealing with the submission made by the intervenor (Pharmacy Guild) in relation to the effect of the SDA's application made under s 40 of the Act in No. 423 of 1995 and the orders subsequently made; and

(b) failing to find the SDA's application made under s 40 of the Act in No. 423 of 1995 and the orders subsequently made changed the respondency list in schedule C and accordingly the scope of the Award with the consequence that, on a proper construction of its terms, the Shop Award did not apply to the retail pharmacy industry.

Principles

113 In ***Federated Miscellaneous Workers' Union of Australia, Hospital Salaried Officers Association of Western Australia and Others*** (1985) 65 WAIG 2033, Brinsden J held that it is not necessary to that a decision deal with every matter which might have been raised in proceedings.

114 The principles set out in [96] to [103] are also relevant to this ground.

Consideration

115 The learned Commissioner set out in her reasons at [70] and [71] for finding that the requirements for a variation to the scope of an award, including those made under s 40(1), s 29A of the Act must be engaged. The learned Commissioner reasoned that the s 40 application did not alter the scope of the award because s 29A needs to be engaged to amend the scope of an award.

116 The purpose of the application made under s 40 by the SDA to update the list of named respondents by amending the names of respondents where the business or registered name had changed and deletion of addresses for all respondents was to reduce the number of items posted by the Commission being returned undelivered. It was not an application that sought to expressly change the scope of the award.

117 The s 40 application was made after the deletion of the PUFSC as a result of the determination of the s 47 matter. The learned Commissioner, whilst not ignoring the effect of the s 40 application, was correct to focus on the issues raised by the s 47 application. That is, the reasoning for finding that the deletion of respondents resulting from a determination under s 47 did not change the scope of the award are the same as the reasoning applied for finding the subsequent updating of respondents' names and deletion of all addresses did not change the scope of the award.

118 The learned Commissioner did consider the effect of the s 40 application and did not fail to exercise jurisdiction.

119 For the foregoing reasons I would dismiss Ground 5 of FBA 2 of 2019 and Ground 6 of FBA 3 of 2019.

CONCLUSION

120 For the reasons given by Scott CC and Kenner SC, the appeals should be upheld. The parties are to make further submissions to the Full Bench as set out at paragraph 68 of these reasons.

NOTE: [28] and [120] amended by corrigenda (2019 WAIRC 00866)

2019 WAIRC 00848

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 86/2017 GIVEN ON 21 JANUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2019 WAIRC 00848
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
HEARD	**:**	SUBMISSIONS IN WRITING 28 NOVEMBER 2019, 29 NOVEMBER 2019
DELIVERED	**:**	MONDAY, 9 DECEMBER 2019
FILE NO.	**:**	FBA 2 OF 2019
BETWEEN	**:**	THE PHARMACY GUILD OF WESTERN AUSTRALIA
		Appellant
		AND
		THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH
		Respondents
FILE NO.	**:**	FBA 3 OF 2019
BETWEEN	**:**	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH
		Appellant
		AND
		THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, PHARMACY GUILD OF WESTERN AUSTRALIA
		Respondents

ON APPEAL FROM:		
Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER T EMMANUEL**
Citation	**:**	**2019 WAIRC 00016**
File No	**:**	**APPL 86 OF 2017**

Catchwords	**:**	Industrial Law (WA) – Supplementary reasons for decision in an appeal against a decision of the Commission – Award interpretation – *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* – Award coverage of retail pharmacy industry – Whether Full Bench should vary the award to remedy any defect or give fuller effect to declaration – Glover scope clause and difficulty in identifying industry of respondents – Declaration of true interpretation of award and award varied
Legislation	**:**	*Industrial Relations Act 1979 (WA)*
Result	**:**	Minute of proposed declaration and orders issued
Representation:		
Counsel:		
Pharmacy Guild of Western Australia Organisation of Employers	**:**	Mr T Dixon of counsel and Mr A Drake-Brockman, industrial agent
Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth	**:**	Mr N Tindley of counsel
The Shop, Distributive and Allied Employees' Association of Western Australia	**:**	Mr D Rafferty of counsel
The Minister for Commerce and Industrial Relations	**:**	Mr R Andretich of counsel

Supplementary Reasons for Decision

SCOTT CC AND KENNER SC:

1 By Reasons for Decision issued on 21 November 2019 [2019 WAIRC 00825], the Full Bench by majority upheld the appeals in these matters and said that it would declare that the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (the Award) does not apply to the industry of retail pharmacy as carried on by Boans Ltd and Perth United Friendly Society Chemists (PUFSC) (paragraph 67). It proceeded to note 'that the Award makes reference to chemist shops and pharmacies in provisions which have become obsolete given that the Award does not apply to those shops. It may be that the presence of those other clauses causes confusion' (paragraph 68).

2 Accordingly, the parties were invited to make submissions as to whether, in accordance with s 46(1)(b) and s 49(6) of the *Industrial Relations Act 1979* (the Act), an order should be made varying the Award to remedy the defect. Those submissions have now been received.

3 The Pharmacy Guild of Western Australia and Samuel Gance trading as Chemist Warehouse Perth submit that the Award should now be varied to remove references to pharmacies (however described) and chemist shops, and have set out the relevant clauses and variations.

4 The Shop, Distributive and Allied Employees' Association of Western Australia (the Union) raised two particular issues. In the first, it submits that as a matter of law, the scope of the Award, as made, had not been reduced to exclude the retail pharmacy industry as an industry to which the Award applies. It says that the Commission lacked the power to reduce the industry scope of the Award by striking out PUFSC (or any other named respondent) in April 1995, in the exercise of its power under s 47 of the Act. Further it says that the steps taken by the Commission in 1995 of its own motion, to strike out PUFSC under s 47, did not reduce the scope of the Award, and says that it continued to extend to the retail pharmacy industry.

5 The Union also asserts that the Commission lacked power to vary the industry scope of the Award as made, or to reduce the common rule effect of the Award either of its own motion or at all. It says that that power is exercisable only by the Commission upon the application of parties who have standing pursuant to ss 38 and 40 and in compliance with s 29A of the Act. It says that no such application has been made.

6 The second issue raised by the Union is that it conducted its case at first instance on the basis that the naming of Boans and PUFSC as original named respondents to the Award was effective to bind unnamed retail pharmacy employers and their employees to the Award by force of common rule. It says that at first instance, it conceded it did not know of any presently named respondents listed in Schedule C to the Award having carried on the retail pharmacy businesses when the Award was made. However, the Union says it did not and could not concede that, as a matter of fact, none of the presently named respondents listed in Schedule C to the Award carried on retail pharmacy businesses at the time the Award was made. It refers to page 18 of the transcript of the hearing at first instance on 30 October 2018. It says that as such the proposal to delete reference to all chemist shops and pharmacies would require evidence to establish that none of the originally named respondents to the Award, who continue to be listed in Schedule C to the Award, carry on retail pharmacy businesses. It says that this issue was not before the Commission at first instance, and therefore it could not have been open for the Commission at first instance to delete all references to chemist shops and pharmacies.

7 The Union says that the Full Bench should not remove the references to chemist shops and pharmacies. It says the provisions are not obsolete and to delete them would disentitle relevant retail pharmacy employees of the benefits of the Award. However, the Union seeks the declaration foreshadowed in paragraph 66 as soon as practicable.

Consideration

8 Section 46 – *Interpretation of Awards and Orders by Commission*, subsection (1)(a) of the Act provides that "the Commission may, on the application of any employer, organisation, or association bound by an award, declare the true interpretation of the award." In accordance with paragraph (b) the Commission may, 'where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.'

The First Issue

9 The first issue raised by the Union ignores that the decision of the majority of the Full Bench dealt with these questions in paragraphs 45 to 57 of the Reasons. It is not now open, or proper, to seek to challenge those Reasons and conclusions in dealing with an invitation by the Full Bench to make submissions about what ought to occur as a consequence of that decision. It may be for another time and place.

The Second Issue

10 The matter before the Commission at first instance was an application for a declaration under s 46(1)(a) that the Award 'applies to workers employed in the chemist shop/pharmacy industry and to employers employing those workers' (Form 1 – Notice of application (general) filed on 3 November 2017). The same question was set out in the amended application filed on 23 February 2018. In paragraph 2 of the Reasons for decision at first instance [2019 WAIRC 00015], the learned Commissioner noted that 'the parties agree that in the current version of the Shop Award, there are no known respondents carrying on the retail pharmacy industry. They disagree about whether other clauses that reference chemist shops or pharmacies, for example cl 40, can have an effect on one scope of the Shop Award.' At paragraph [3], the learned Commissioner set out the question the Union sought to be answered as 'does the Award as varied apply to workers employed in any calling or callings mentioned in the award in the Retail Pharmacy Industry and to employers employing those workers'.

11 There has been no appeal or challenge to the learned Commissioner's comment at paragraph [2]. The only named respondents considered in the matter at first instance, for the purpose of determining whether it applies to the retail pharmacy industry, were Boans Ltd and PUFSC.

12 The majority of the Full Bench has found that the Award does not apply to the industry of retail pharmacy as carried on by Boans Ltd and PUFSC. What the Union now seeks to do in its submission is refer back to an exchange between its counsel and the Commission at first instance, on 30 October 2018. In that exchange, Mr Rafferty for the Union said that the Union had not conceded that none of the current named respondents were ever engaged in retail pharmacy. He said that:

> [Y]ou'll see in the evidence I'm about to take you to there's reference to David Jones and Myer having pharmacies in or around the time the Award was made and they were listed as named respondents to the Award.
>
> Now, it seems to us that those department stores didn't actually own those pharmacies. It may have been that there was, as you will see from the evidence of Geoffrey Bingemann an arrangement like Boans has in its suburban department stores where this place was leased to a private pharmacist but because of those matters we're not in a position to concede the point. So if I can take you – so now we're going to deal with the evidence concerning Boans – Boans Limited of Murray Street Perth.

13 The Union now says that it would not have been open for the Commission at first instance to delete all reference to chemist shops and pharmacies because the Union did not and could not concede that as a matter of fact, none of the presently named respondents listed in Schedule C to the Award carried on retail pharmacy businesses at the time the Award was made.

14 Given the manner in which the question to be answered was set out by the Union, the hearing at first instance proceeded, the question was answered by the learned Commissioner and the grounds of the appeals were couched and answered, it is clear that it was always presumed, apart from the brief extract from transcript, that the issue was about whether the Award covered the retail pharmacy industry by reference to the only two known chemist shops/retail pharmacies named in Schedule C. It cannot be seriously suggested that there were respondents other that Boans Ltd and PUFSC, who could now be identified as being in the retail pharmacy industry.

15 Given the significance to the Union of the answer to the question it posed in its application for interpretation, we assume that it would have made every endeavour to identify any such employers. If the Union has been unable to identify any such named respondents, we find it difficult to accept that there may be any. For it to now, at this stage of the proceedings, say that there may be other employers engaged in the retail pharmacy industry who cannot be identified is not, in our view, appropriate, proper or credible.

16 In any event, we note that the arrangement Mr Rafferty for the Union raised in the extract from transcript at first instance was that David Jones and Myer leased premises to pharmacists, but did not themselves operate retail pharmacies or employ workers in these pharmacies.

17 We understand the Union's strong desire to maintain its position regarding the scope of the Award. However, this is not the point in the proceedings for this matter to be raised. We also recognise that the issue arose because of the problematic nature of ***Glover*** clauses (***Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union v Terry Glover Pty Ltd*** (1970) 50 WAIG 704) with the passage of time.

18 However, as the Union has raised this matter, it is now appropriate that we reconsider the declaration that we foreshadowed issuing in paragraph [66] of the substantive Reasons in the appeal. We had concluded in paragraph [65] that "In our view, this put beyond doubt the earlier variation to the Award to remove PUFSC as the sole respondent carrying on that industry". We concluded paragraph [68] with the proposed declaration "that the Award does not apply to the industry of retail pharmacy as carried on by Boans Ltd or PUFSC".

19 We are now, as we note above, confirmed in the view that there are no other identifiable respondents listed in Schedule C to whom the Award applies who operate in the retail pharmacy industry and therefore the declaration ought to make this clear, and not to include reference to Boans Ltd or PUFSC.

20 Further, as we have already noted, the question asked in the application was whether the Award applies to workers employed in any calling or callings mentioned in the Award in the retail pharmacy industry and to employers employing those workers. It was not conditioned by reference to Boans Ltd or PUFSC.

21 The declaration made by the learned Commissioner at first instance answered that question in the positive, also without the qualification relating to Boans Ltd and PUFSC.

22 Therefore in upholding the appeal and issuing a declaration, the Full Bench ought to declare the negative answer to the question asked, without qualification relating to Boans Ltd and PUFSC. The declaration ought to read that the Award does not apply to employees employed in the retail pharmacy industry and to employers employing those employees. (We note for completeness that we have used the term *employees* rather that *workers* because that is the term now used in the *Industrial Relations Act 1979*, not *workers* as was used in the Award when it issued in 1977).

Conclusion

23 Section 49(6) provides that where the Full Bench varies a decision under subsection (5)(b), the decision as so varied shall be in the terms which could have been awarded by the Commission that gave the decision.

24 The Commission at first instance could have declared the true interpretation of the Award and where the declaration so required, by order vary any provision of the Award for the purpose of remedying any defect or giving fuller effect to the Award. Therefore, the appropriate conclusion of these matters, in accordance with the powers of the Full Bench is to declare the true interpretation of the Award and to vary the Award to give effect to that declaration. In our view the disposition of the appeals ought to be that;

1. the appeals be upheld;
2. a declaration issue, answering the question raised, that the Award does not apply to employees employed in the retail pharmacy industry and to employers employing those employees;
3. the Award be varied to remove references to pharmacies and chemist shops in accordance with those amendments set out by the Pharmacy Guild and Samuel Gance trading as Chemist Warehouse Perth in their submission and consequential re-numbering.

25 A Minute of Proposed Declaration and Orders now issues. The parties are asked to advise by no later than Monday, 16 December 2019 whether they require a speaking of the minutes.

WALKINGTON C:

26 I have read the Reasons for decision of Chief Commissioner Scott and Senior Commissioner Kenner. I agree and have nothing to add.

2019 WAIRC 00869

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
FILE NO.	**:**	FBA 2 OF 2019
BETWEEN	**:**	THE PHARMACY GUILD OF WESTERN AUSTRALIA
		Appellant
		AND
		THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH
		Respondents
FILE NO.	**:**	FBA 3 OF 2019
BETWEEN	**:**	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH
		Appellant
		AND
		THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, PHARMACY GUILD OF WESTERN AUSTRALIA
		Respondents
DATE		FRIDAY, 13 DECEMBER 2019
CITATION NO.		2019 WAIRC 00869

Result		Declaration issued and Award Varied
Representation:		
Counsel:		
Pharmacy Guild of Western Australia Organisation of Employers	**:**	Mr T Dixon of counsel and Mr A Drake-Brockman, industrial agent
Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth	**:**	Mr N Tindley of counsel
The Shop, Distributive and Allied Employees' Association of Western Australia	**:**	Mr D Rafferty of counsel
The Minister for Commerce and Industrial Relations	**:**	Mr R Andretich of counsel

Declaration and Order

HAVING HEARD Mr T Dixon of counsel and Mr A Drake-Brockman, industrial agent on behalf of the Pharmacy Guild of Western Australia Organisation of Employers, Mr N Tindley of counsel for Samuel Gance trading as Chemist Warehouse Perth, Mr D Rafferty of counsel for the Shop, Distributive and Allied Employees' Association of Western Australia and Mr R Andretich of counsel for the Minister for Commerce and Industrial Relations,

NOW THEREFORE the Full Bench, pursuant to section 49 of the *Industrial Relations Act 1979*, hereby orders —

1. THAT the appeals be upheld.
2. THAT the decision at first instance be varied to:
   (a) DECLARE that that *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* does not apply to the retail pharmacy industry.

(b) ORDER that the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* be varied in accordance with the following schedule and that the variations have effect from 6 January 2020.

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

SCHEDULE

1. Clause 2. – Arrangement: Delete this clause and insert in lieu thereof the following:

2. - ARRANGEMENT

1. Title
1B. Minimum Adult Award Wage
2. Arrangement
2A. No Extra Claims
3. Scope
4. Area
5. Term
6. Definitions
7. Casual Workers
7A. Nightfill Duty
8. Part Time Workers
9. Hours
10. Display of Rosters
11. Meal Breaks and Rest Periods
12. Meal Money
13. Overtime
14. Holidays
15. Annual Leave
16. Change Rooms
17. No Reduction
18. Higher Duties
19. Casual Limitations
20. Contract of Employment and Termination
21. Time and Wages Record
22. Uniforms and Overalls
23. Board of Reference
24. Supported Wages Employees
25. Country Work and Travelling Time
26. Junior Worker's Certificate
27. Sick Leave
28. Wages
28A. Structural Efficiency Agreement - Cold Storage Industry
29. Easter Week
30. Right of Entry
31. Other Provisions
32. Motor Vehicle Allowance
33. Long Service Leave
34. Shift Work
35. Payment of Wages
36. Posting of Award
37. Stand Down
38. Bereavement Leave
39. Location Allowance
40. Liberty to Apply
41. Parental Leave
42. Union Notice Board
43. Introduction of Change
44. Superannuation
45. First Aid Allowance
46. Traineeships
47. Additional Loading for Late Night Trading Establishments
48. Trade Union Training Leave
49. Enterprise Level Award Change Procedure
50. Redundancy

Appendix 1 - Parental Leave Entitlements

Appendix - Resolution of Disputes Requirement

Schedule "A"

Schedule "B"

Schedule "C"

Schedule D - Union Party

Appendix - S.49B - Inspection Of Records Requirements

2. Clause 9. – Hours: Delete paragraph (d) of subclause (1) of Part II - Ordinary Hours of this clause and insert in lieu thereof the following:

(d) "Special Retail Shops" - except as provided in placitum (ii) herein, the ordinary hours of work may be worked on any or all days of the week between the hours of 7.00 a.m. and 6.00 p.m. excepting on the day of late night trading when the ordinary hours of work may be worked between 7.00 a.m. and 9.00 p.m.

3. Clause 28. – Wages: Delete subclause (5) of Part II of this clause and insert in lieu thereof the following:

(5) (a) A worker (full time, part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. Monday to Friday inclusive in a "small retail shop" as defined or a "special retail shop" as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

For casual workers such loading shall be paid in addition to the rates prescribed in Clause 7(4) of this award.

(b) A worker (part time or casual) who is required to work any of his or her ordinary hours between 6.00p.m. and 11.30p.m. on Saturday in a "small retail shop" as defined or a "special retail shop" as defined shall be paid at a loading of 20% for each hour worked after 6.00p.m.

(i) A casual worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by subclause (5) of Clause 7. - Casual Workers.

(ii) A part time worker employed under paragraph (b) of this subclause shall be paid the 20% loading as calculated on the rates as determined by paragraph (b) of subclause (7) of Clause 8. - Part Time Workers.

4. A. Clause 40. – Chemists Shops: Delete this clause in its entirety.

B. Clause 41. - Liberty to Apply: Delete the heading of this clause and insert the following in lieu thereof:

40. - LIBERTY TO APPLY

C. Clause 42. - Parental Leave: Delete the heading of this clause and insert the following in lieu thereof:

41. - PARENTAL LEAVE

D. Clause 43. - Union Notice Board: Delete the heading of this clause and insert the following in lieu thereof:

42. - UNION NOTICE BOARD

E. Clause 44. - Introduction of Change: Delete the heading of this clause and insert the following in lieu thereof:

43. - INTRODUCTION OF CHANGE

F. Clause 45. - Superannuation: Delete the heading of this clause and insert the following in lieu thereof:

44. - SUPERANNUATION

G. Clause 46. - First Aid Allowance: Delete the heading of this clause and insert the following in lieu thereof:

45. - FIRST AID ALLOWANCE

H. Clause 47. - Traineeships: Delete the heading of this clause and insert the following in lieu thereof:

46. - TRAINEESHIPS

I. Clause 48. - Additional Loading for Late Night Trading Establishments: Delete the heading of this clause and insert the following in lieu thereof:

47. - ADDITIONAL LOADING FOR LATE NIGHT TRADING ESTABLISHMENTS

J. Clause 49. - Trade Union Training Leave: Delete the heading of this clause and insert the following in lieu thereof:

48. - TRADE UNION TRAINING LEAVE

K. Clause 50. - Enterprise Level Award Change Procedure: Delete the heading of this clause and insert the following in lieu thereof:

49. - ENTERPRISE LEVEL AWARD CHANGE PROCEDURE

L. Clause 51. - Redundancy: Delete the heading of this clause and insert the following in lieu thereof:

50. - REDUNDANCY

5. Clause 21. – Time and Wages Record: Delete paragraph (g) of subclause (1) of this clause and insert the following in lieu thereof:

(g) the amount of superannuation contributions made to the superannuation fund in accordance with Clause 44. - Superannuation of this Award by the employer.

6. Schedule "A": Delete paragraph (o) of this Schedule and insert in lieu thereof the following:

(o) goods and services prescribed under Schedule "B" in relation to a special retail shop.

7. Schedule "B": Delete this Schedule and insert in lieu thereof the following:

SCHEDULE "B"

The following goods and services are prescribed for the purposes of sale at a special retail shop.

	Column 1 Shop Categories	Column 2 Goods and Services
1	Art and craft (shops engaged n the sale of art and craft works)	Original art and craft works; prints and reproductions of original works; art and craft related reading materials.
2	Souvenirs (shop offering items of tourism significance)	Souvenirs featuring Australian flora, fauna, locations, characteristics or events of national significance; souvenirs projecting the flavour of the pioneering era or Aboriginal culture; original Australian art and craft works, reading materials and video cassettes of tourism significance; souvenirs and jewellery featuring Australian minerals and pearls valued at not more than $1000.00 per item; souvenirs crafted from unique Australian woods, hides or skins; Australian coins.
3	Home improvements (shops engaged in the sale of major domestic improvements)	Swimming pools; spas; patios; garages; home additions; household fixtures and fittings (excluding free standing furniture, carpets and electrical items).
4	Nurseries, florists and landscaping (shops principally engaged in the sale of floral arrangements and products for the establishment and maintenance of gardens).	Flowers; greenstocks; seeds and bulbs; reticulation equipment; hoses, sprinklers and fittings fertilizers, pesticides, herbicides, applicators and related personal protective items; garden related tools and ancillary items excluding power operated tools; compost tumblers; garden sheds; landscaping and garden decorative products (excluding furniture items); plant containers and household items for the display of garden produce; garden related books and video cassettes.
5	Video Shops	Video cassette tapes and video head cleaning products.
6	Hardware (shops principally offering items for the purposes of domestic construction and maintenance.)	Domestic construction and maintenance materials; paint and wallpaper products and accessories; tools; household fixtures and fittings (excluding free standing furniture [other than wooden outdoor furniture and accessories], carpets and electrical items); household cleaning products (excluding powered equipment); reticulation equipment, hoses, sprinklers and fittings; fertilizers, pesticides and herbicides; swimming pool chemicals and accessories; garden sheds; extension cords and electrical fittings (excluding decorative light fittings); maintenance related books and video cassettes; barbecues; kitchenware (excluding electrical items); solid fuel space heaters; outdoor lighting; water heaters; gas powered camping equipment and accessories; awnings and blinds; nursery and landscaping products (excluding fresh flowers and plants).

NOTE: amended by corrigenda (2019 WAIRC 00874)

2019 WAIRC 00866

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 86/2017 GIVEN ON 21 JANUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FILE NO.	**:**	FBA 2 OF 2019
BETWEEN	**:**	THE PHARMACY GUILD OF WESTERN AUSTRALIA Appellant AND THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH Respondents
FILE NO.	**:**	FBA 3 OF 2019
BETWEEN	**:**	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH Appellant AND THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, PHARMACY GUILD OF WESTERN AUSTRALIA Respondents
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
DATE		(CORRIGENDUM FRIDAY, 13 DECEMBER 2019)
CITATION NO.		2019 WAIRC 00866

CORRIGENDUM

1. At [28], lines 7, 12 and 16 [2019] WAIRC 00825 of the Reasons for Decision dated 21 November 2019, delete ‘and the Minister’.

2. At [120], line 2 [2019] WAIRC 00825 of the Reasons for Decision dated 21 November 2019, delete ‘our’ and insert ‘out’ in lieu thereof.

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2019 WAIRC 00874

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 86/2017 GIVEN ON 21 JANUARY 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FILE NO.	**:**	FBA 2 OF 2019
BETWEEN	**:**	THE PHARMACY GUILD OF WESTERN AUSTRALIA Appellant AND THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH Respondents
FILE NO.	**:**	FBA 3 OF 2019
BETWEEN	**:**	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH Appellant AND THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS, PHARMACY GUILD OF WESTERN AUSTRALIA Respondents

CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T B WALKINGTON
DATE		(CORRIGENDUM MONDAY, 16 DECEMBER 2019)
CITATION NO.		2019 WAIRC 00874

CORRIGENDUM

1. At [3.] of the SCHEDULE in [2019] WAIRC 00869 delete:

3. Clause 28. – Wages: Delete paragraph (a) of subclause (5) of Part II of this clause and insert in lieu thereof the following:

and insert the following in lieu thereof:

3. Clause 28. – Wages: Delete subclause (5) of Part II of this clause and insert in lieu thereof the following:

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

FULL BENCH—Appeals against decision of Industrial Magistrate—

2019 WAIRC 00870

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RACHEL CLARE SWANSON
	APPLICANT/APPELLANT
	-and-
	AGENCY FISH PTY LTD
	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER P E SCOTT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 13 DECEMBER 2019
FILE NO/S	FBA 13 OF 2019
CITATION NO.	2019 WAIRC 00870

Result Discontinued

Order

WHEREAS on 6 November 2019, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 4 December 2019, the appellant filed a notice of application for leave to discontinue the appeal;

NO THEREFORE, the Full Bench, pursuant to powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders –

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2019 WAIRC 00871

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2019 WAIRC 00871
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	THURSDAY, 7 NOVEMBER 2019
DELIVERED	**:**	THURSDAY, 12 DECEMBER 2019
FILE NO.	**:**	M 234 OF 2018
BETWEEN	**:**	ADRIAN MANESCU

CLAIMANT

AND

BAKER HUGHES AUSTRALIA PTY. LIMITED ABN: 20 004 752 050

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Application of Federal and State limitation periods to the claim – Accrual of cause of action – Alleged contraventions of *Fair Work Act 2009* (Cth) and *Professional Employees Award 2010* (Cth) – Jurisdiction of Industrial Magistrates Court under *Industrial Relations Act 1979* (WA) – Application of *Minimum Conditions of Employment Act 1993* (WA)
Legislation	**:**	*Corporations Act 2001* (Cth) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Limitation Act 2005* (WA) *Minimum Conditions of Employment Act 1993* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA)
Instruments	**:**	*Professional Employees Award 2010* (Cth) *Western Australian Professional Engineers (General Industries) Award 2004* (WA)
Case(s) referred to in reasons:	**:**	***Cigna Insurance Asia Pacific Ltd v Packer*** [2000] WASCA 415 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27
Result	**:**	Claim is dismissed
Representation:		
Claimant	**:**	Mr. A. Manescu (in person)
Respondent	**:**	Mr J. Parkinson (of counsel) from K&L Gates

REASONS FOR DECISION

1 On 16 December 2016, Mr Adrian Manescu's (Mr Manescu) employment with Baker Hughes Australia Pty Ltd (the respondent) was terminated by reason of redundancy.

2 Mr Manescu was employed by Western Atlas International Incorporated (Western Atlas) in July 1997 as a data processor.[1] Western Atlas was acquired by the respondent and Mr Manescu's employment was transferred to that organisation in January 1999.[2]

3 On 1 December 2005, Mr Manescu was promoted to Geoscientist Staff, Grade 13.[3]

4 On 1 November 2010, Mr Manescu's employment was transferred to the respondent and his current terms and conditions of his employment remained the same.[4]

5 Between 23 and 29 March 2016, Mr Manescu's employment terms were varied to part-time with his base salary and any allowances paid pro rata.[5]

6 On 19 December 2018, Mr Manescu lodged a claim in the Industrial Magistrates Court of Western Australia (IMC), alleging the respondent failed to:

- comply with the *Professional Employees Award 2010* (Cth) (Professional Award) and/or the *Western Australian Professional Engineers (General Industries) Award 2004* (WA) (WA Engineers Award); and

- pay overtime and 'respect its bonus promises' made in writing.

7 The claim was purported to be made under the *Fair Work Act 2009* (Cth) (FWA), the *Industrial Relations Act 1979* (WA) (IR Act) and the *Minimum Conditions of Employment Act 1993 (WA)* (MCE Act).

8 The basis for Mr Manescu's claim is that he was not paid:

- overtime during his 20 years of service with the respondent and its predecessors; and
- an incentive bonus until the second half of 2005, when he was promised a bonus payment which was cancelled and replaced with the promise of stable and continuous employment.

9 To that end Mr Manescu says that the underpayments or non-payments occurred on 16 December 2016 when the promise of stable employment was not honoured, and he was made redundant. Further, while Mr Manescu accepts the payment of a bonus payment is discretionary, he says it should not be exercised whimsically. Mr Manescu says that his employment is covered by either the Professional Award or the WA Engineers Award.

10 Mr Manescu claims an amount to be paid between $35,000 and $100,000 depending upon which calculation he uses.

11 The respondent denies Mr Manescu's claim in its entirety because it says:

- the claim for an underpayment related to the bonus payment and a portion of overtime is outside the applicable statutory limitation periods under the FWA, the IR Act and the MCE Act for the period claimed by him; and
- Mr Manescu's total remuneration represented full payment and compensated him for all entitlements, benefits or additional payments that may otherwise have been due under any applicable industrial instrument or law.

12 At the commencement of the hearing IMC clarified, and Mr Manescu confirmed, what he was seeking in his claim, namely:

- a bonus payment from 2001 to the first quarter of 2005 according to an employee/employer agreed incentive bonus scheme pursuant to the IR Act or at common law; and
- payment for overtime worked in excess of ordinary hours from 4 January 2011 to 3 January 2017 pursuant to the Professional Award or WA Engineers Award or the FWA.

13 The respondent accepts that:

- Mr Manescu was an employee of the respondent;
- Mr Manescu is a national systems employee within the meaning of s 13 of the FWA;
- Mr Manescu is an employee within the meaning of s 15 of the FWA;
- it is an Australian proprietary company limited by shares registered pursuant to the Corporations Act 2001 (Cth) that engaged in substantial activity trading maintenance services for fees;
- it is a constitutional corporation within the meaning of s 12 of the FWA;
- it was Mr Manescu's employer until his employment was terminated by reason of redundancy; and
- accordingly, it is a national systems employer within the meaning of s 14(1)(a) of the FWA.

14 Schedule I outlines the jurisdiction, practice and procedure of the IMC under the FWA.

15 Schedule II outlines the jurisdiction of the IMC under the IR Act.

Issues For Determination

16 To resolve the claim, the following issues require determination:

- When did the cause of action accrue with respect to the payment of an incentive bonus and any purported overtime?
- Is Mr Manescu subject to any limitation period with respect to any aspect of his claim?
- Does the Professional Award contain any terms applicable to Mr Manescu and the respondent, and do the terms of the award cover his employment?
- Is Mr Manescu otherwise entitled to overtime under the FWA, IR Act or MCE Act?
- What entitlements, if any, are payable by the respondent to Mr Manescu?

When Did Mr Manescu's Cause Of Action Accrue?

17 A cause of action accrues when all the facts have occurred which the claimant must prove in order to succeed: ***Cigna Insurance Asia Pacific Ltd v Packer*** [2000] WASCA 415 [31] (Malcolm CJ) (other references omitted).

18 The principle issue for determination in answering this question is identifying the date on which any cause of action accrued, both with respect to the payment of a bonus or incentive payment and any alleged underpayment of overtime.

19 Mr Manescu says this date is 16 December 2016 when he was made redundant and the respondent broke its promise to provide him with stable and continuing employment.

20 The respondent says that s 545(5) of the FWA, s 83A(2) of the IR Act and s 13(1) of the *Limitation Act 2005* (WA) (Limitation Act) applies and Mr Manescu is statute barred in relation to both aspects of his claim for any alleged underpayment that may have accrued prior to 19 December 2012.

What is the applicable date with respect to the accrual of a cause of action related to the alleged failure to pay a bonus or incentive payment?

21 According to Mr Manescu:[6]

- in the first half of 2001, David Barr, company president for Baker Atlas, informed Geoscience employees at a town hall meeting that a bonus would be paid, and Mr Manescu was provided with a letter confirming his qualification in the quarterly bonus plan to be implemented in 2001;
- on 10 August 2001 the bonus was cancelled by email, which Mr Manescu described as done for 'bogus reasons';
- no performance bonus was paid between 2001 and the second quarter of 2005; and
- the payment of a performance bonus resumed in the third quarter of 2005 and was paid thereafter for the remainder of 2005 to 2016.

22 In clarifying his evidence, Mr Manescu stated that he thinks there is a contractual failure by the respondent where in December 2016 he was 'let go' contrary to a previous comment made by someone that he would have 'stable employment'. As I understood his evidence, Mr Manescu's assertion is that once the respondent broke its purported promise to him of stable employment and made him redundant, the bonus payments from 2001 to 2005 were required to be paid to him.

23 I do not accept Mr Manescu's submission that the applicable date on which the cause of action accrued for the alleged failure to pay an incentive payment for the period 2001 to the second quarter of 2005 was 16 December 2016.

24 Leaving aside his eligibility for a bonus or incentive payment or what the terms of any bonus or incentive payment might have been, it is clear from Mr Manescu's evidence that when a bonus or incentive payment was paid from the third quarter of 2005 to sometime in 2016, it was paid as and when it fell due under the terms of any bonus scheme.

25 Further, Mr Manescu was aware from August 2001 that the incentive payment that he thought would be paid was not paid and he was aware of the reasons, bogus or otherwise, for why it had not been paid. Thereafter, he was aware that he had not been paid a bonus payment from August 2001 to the third quarter of 2005.

26 Therefore, the date on which his cause of action (leaving aside whether he has one or not) accrued for any purported failure to pay a bonus or incentive payment was the date on which the payment would be paid but was not paid. The latest date that this must have been was sometime in mid-2005. That is, on Mr Manescu's evidence a bonus payment for the second quarter of 2005 would be paid on or around 30 June 2005 where he received a performance bonus in the third quarter of 2005.

27 In this case the exact date in 2005 is unimportant because Mr Manescu lodged his claim on 19 December 2018, which is some 13 years after the latest bonus payment Mr Manescu says that he was entitled to receive.

What is the applicable date with respect to the accrual of a cause of action related to the alleged failure to pay overtime?

28 Mr Manescu clarified his claim for overtime which he claims is for hours worked in excess of 38 hours per week from 4 January 2011 to 3 January 2017 and he stated:

- on his conservative guess he worked about 5% more than the minimum 38 hours per week which he says equates to around 42 hours per week every week; that is between two and four hours per week overtime every week;
- this additional work comprised attendance at technical meetings, conferences and carrying out scientific work; and
- he did not maintain any personal records of overtime hours he says he worked but says the respondent has a time writing procedure and this should reflect the overtime hours he worked.

29 Mr Manescu says that his entitlement to be paid overtime is under the Professional Award and/or the FWA.

30 Again, leaving aside his eligibility for overtime payment, on Mr Manescu's evidence he was not paid overtime for hours he says he worked in excess of 38 hours per week every week from 4 January 2011 to 3 January 2017. That is, each alleged non-payment or underpayment of overtime gives rise to a separate cause of action.

31 Mr Manescu was paid on the fifteenth of each month.[7]

32 Therefore, on the fifteenth of each month, on Mr Manescu's evidence, he expected he should be paid overtime for the preceding month's overtime hours worked.

33 Mr Manescu lodged his claim for failure to pay overtime for hours worked in excess of 38 hours per week on 19 December 2018.

34 Therefore, the first date on which his cause of action accrued for any purported failure to pay overtime for hours worked in excess of 38 hours per week was 15 January 2011 and the fifteenth of each month thereafter.

Is Mr Manescu Subject To Any Limitation Period With Respect To Any Aspect Of His Claim?

Limitation period applicable to the payment of a bonus or incentive payment

35 Section 544 of the FWA provides:

> *A person may apply for an order under this Division in relation to contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:*
>
> *(a) a civil remedy provision;*
>
> *(b) a safety net contractual entitlement;*
>
> *(c) an entitlement arising under subsection 542(1).*

36 The Division referred to in s 544 of the FWA is Division 2 in Chapter 4, Part 4.1, which contains the power of courts to make orders.

37 The IMC has limited powers to make orders under the FWA. Relevant to Mr Manescu's claim, the orders the IMC can make are contained in s 545(3) of the FWA. That is, the IMC may order an employer to pay an amount to an employee if the court is satisfied that:

> *(a) the employer was required to pay the amount under this Act or a fair work instrument; and*
>
> *(b) the employer has contravened a civil remedy provision by failing to pay the amount.*

38 For the purposes of determining whether s 544 of the FWA applies to Mr Manescu's claim, it is assumed that the failure to pay a bonus or incentive payment is a contravention of a civil remedy provision and the respondent is required to pay the amount claimed under the FWA or Professional Award. That is, for the purposes of determining a preliminary issue of whether Mr Manescu's claim is subject to a limitation period, I accept Mr Manescu's claim most favourable to him under the relevant provisions of the FWA.

39 Mr Manescu's claim for a bonus or incentive payment must fail under the FWA where his application was made well outside the six-year time limit on which the contravention occurred. With respect to the payment of a bonus payment, the date on which the contravention was found to have occurred was between 2001 to mid-2005, some 13 to 17 years out of time.

40 Therefore, if Mr Manescu's claim for the failure to pay a bonus or incentive payment is made under the FWA, he is statute barred from doing so pursuant to s 544 of the FWA and this aspect of his claim must be dismissed.

41 Section 82A of the IR Act provides:

> *An application under section 77, 83, 83B, 83E or 84A shall be made within 6 years from the time of the alleged contravention or failure to comply.*

42 The IMC has limited jurisdiction under the IR Act: s 81A of the IR Act. Relevant to Mr Manescu's claim, the IMC's enforcement jurisdiction is contained in s 83 of the IR Act and applies to the enforcement of an award, an industrial agreement, an employer-employee agreement and an order made by the Western Australian Industrial Relations Commission (WAIRC) (which has no application in this case): s 83(1) and s 83(2) of the IR Act.

43 Again, for the purposes of determining whether s 82A of the IR Act applies to Mr Manescu's claim, it is assumed that the failure to pay a bonus or incentive payment is a contravention of one of the instruments in s 83(2) of the IR Act.[8] That is, again for the purposes of determining a preliminary issue of whether Mr Manescu's claim is subject to a limitation period, I accept Mr Manescu's claim most favourable to him under the relevant provisions of the IR Act.

44 Mr Manescu's claim for a bonus or incentive payment must also fail under the IR Act as his application was made well outside the six-year time limit on which the contravention occurred for the reasons already given.

45 Therefore, if Mr Manescu's claim for the failure to pay a bonus or incentive payment is made under the IR Act, he is statute barred from doing so pursuant to s 82A of the IR Act and this aspect of his claim must be dismissed.

46 Further, pursuant to s 83A(2) of the IR Act, an order for the payment of an entitlement to be paid under an industrial instrument referred to in s 83(2) of the IR Act can only be made under s 83A(1) provided the amount relates to a period not being more than six years prior to the commencement of proceedings. For reasons already given, where Mr Manescu commenced proceedings in the IMC on 19 December 2018, any payment for a bonus or incentive payment from 2001 to mid-2005 is outside the limitation period referred to in s 83A(2) of the IR Act.

47 Section 7 of the MCE Act provides:

> *A minimum condition of employment may be enforced –*
>
> *(aa) where the condition is implied in an employer-employee agreement, under section 83 of the IR Act; or*
>
> *(b) where the condition is implied in an award, under Part III of the IR Act; or*
>
> *(c) where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.*

48 Further, s 13(1) of the Limitation Act provides:

> *An action on any cause of action cannot be commenced if 6 years have elapsed since the cause of action accrued* [subject to any exemptions that do not apply in this case or have not been applied in this case].

49 Thus, if Mr Manescu's claim for a failure to pay a bonus or incentive payment from 2001 to mid-2005 is made under s 7 of the MCE Act, any application to the IMC for the enforcement of minimum conditions of employment is subject to the same legislative regime contained in s 83 of the IR Act, and, accordingly, s 82A and s 83A(2) of the IR Act apply to statute bar the enforcement proceedings or the making of an order to pay an amount of money purported to be owed.

50 However, if Mr Manescu relies upon principles applicable to common law breach of contract, the IMC has no jurisdiction to consider a claim for breach of contract or denial of contractual benefits which is within the jurisdiction of the WAIRC or the IMC. Further to this, Mr Manescu would then be subject to the limitation period in s 13(1) of the Limitation Act.

Limitation period applicable to the payment of overtime

51 Subject to one further point related to the application of the FWA, the reasons stated from [35] to [46] apply equally to the limitation period applicable to the alleged failure to pay overtime.

52 The further point related to the FWA is the application of s 545(5) of the FWA which provides that

> [a] *court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced*.

53 The effect of s 545(5) of the FWA means the IMC, even if satisfied of the factors in s 545(3), cannot make an order for the payment of an amount of money relating to a period more than six years before Mr Manescu made his claim in the IMC.

54 Therefore, leaving aside the merits of the claim, Mr Manescu's claim for failure to pay overtime for hours worked in excess of 38 hours is subject to a six-year limitation period (and thus is statute barred) from 19 December 2018. The effect of this limitation period is that Mr Manescu can make a claim for overtime for the period after 19 December 2012 only.

Outcome of the applicable limitation periods to Mr Manescu's claim

55 Mr Manescu's claim for the alleged failure by the respondent to pay a bonus or incentive payment for the period 2001 to mid-2005 is statute barred under the FWA, the IR Act and the MCE Act, and this part of the claim is dismissed.

56 The IMC has no jurisdiction to consider Mr Manescu's claim for the payment of a bonus or incentive payment for the period 2001 to mid-2005 under the common law principles applicable to breach of contract.

57 Mr Manescu's claim for the alleged failure by the respondent to pay overtime as it relates to the period prior to 19 December 2012 is statute barred under the FWA, the IR Act and the MCE Act, and this part of the claim is dismissed.

Is Mr Manescu Entitled To Overtime Under The Professional Award Or WA Engineers Award?

58 In simple terms, Mr Manescu's claim in the IMC, as it relates to the respondent's alleged failure to pay overtime, can only succeed if Mr Manescu demonstrates on the balance of probabilities:

- the FWA or one of the awards referred to by him apply to his employment with the respondent;
- the FWA or a term of the award has been contravened by the respondent; and
- the IMC can make an order for payment under the FWA or the IR Act.

59 As previously stated, the IMC has no jurisdiction to consider a bare common law breach of contract claim.

60 During the hearing, Mr Manescu referred principally to the respondent's failure to comply with the Professional Award and/or the FWA by not paying him overtime for hours worked in excess of 38 hours per week. Mr Manescu made no reference in evidence or submission about the applicability of the WA Engineers Award and relied solely on the terms of the Professional Award.

Do overtime rates apply under the Professional Award?

61 It is convenient to consider whether overtime rates in the manner claimed by Mr Manescu apply under the Professional Award. If overtime rates do not apply there can be no contravention of the Professional Award. If there is no contravention of the Professional Award then there is no contravention of a civil penalty provision under the FWA and no contravention of an industrial instrument under the IR Act, and, therefore, no power to make an order for a payment of an amount of money purported to be owed.

62 Again, for the purposes of determining whether Mr Manescu is entitled to overtime pay for hours worked in excess of 38 hours per week under the Professional Award, it is assumed that the Professional Award applies to his employment with the respondent.

63 Clause 2.2 of the Professional Award provides that

> [t]*he monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment*.

64 Clause 18 of the Professional Award details ordinary hours of work and rostering. In cl 18.1 the ordinary hours of work are 38 hours per week. In cl 18.2 the employer is to compensate for, amongst other things:

> *(a) time worked regularly in excess of ordinary hours of duty;*
>
> *(d) time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or*
>
> *(e) time worked on afternoon, night or weekend shifts*.

In cl 18.3 of the Professional Award the compensation may include, amongst other things:

> *(c) taking this factor into account in the fixation of annual remuneration.*

65 Clause 18.3 of the Professional Award requires that any compensation or remuneration for additional work in cl 18.2 of the Professional Award will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed. Further, under cl 18.4 of the Professional Award the compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in cl 18 of the Professional Award.

66 The minimum wage payable to full-time employees is contained in cl 15 of the Professional Award (varied from time to time). The minimum wage is an annual wage. No other provision or clause of the Professional Award contemplates the payment of hourly overtime rates.

67 Mr Manescu's evidence concerning the payment of overtime is outlined in [28] to [31] above.

68 Mr Manescu's claim in relation to an alleged failure to pay overtime is not referrable to any clause in the Professional Award, and, to the extent that he sought to clarify his claim in his evidence, it is apparent that he seeks to be paid for the hours he says he worked in excess of 38 hours per week.

69 The Professional Award makes no provision for an hourly rate payable for hours worked in excess of 38 hours per week. The Professional Award contemplates two things:

(1) as a professional employee, the employee will be paid an annualised salary; and

(2) where the employee regularly works in excess of 38 hours per week the employer will compensate the employee for doing so and such compensation can be considered in the fixation of the annual remuneration.

70 Therefore, where the Professional Award does not contain, nor does it contemplate, the payment of an hourly rate for hours worked in excess of 38 hours per week, the respondent cannot have contravened the Professional Award in the manner alleged by Mr Manescu.

An alternate argument under the Professional Award

71 Mr Manescu does not allege the respondent contravened the Professional Award by failing to pay him compensation in accordance with cl 18.3 and cl 18.4 for time worked in accordance with cl 18.2 of the Professional Award. Further, he led little, or no, evidence consistent with this allegation, save, without more, he says the respondent failed to keep track with salary increases in the oil and gas industry and to provide promotions.[9]

72 But even if Mr Manescu's oblique reference in submission documents enables consideration of an alleged contravention of cl 18.2 or cl 18.3 of the Professional Award for failing to compensate him for overtime worked, Mr Manescu's claim is, arguably, deficient.

73 In cross-examination, Mr Manescu was asked about salaried amounts he was paid, which included the following annual amounts:

- April 2013 - $132,230
- March 2014 - $137,518
- April 2015 - $140,957 (Mr Manescu disagreed with this figure saying it was closer to $134,000)
- April 2016 - $140,957 (again, Mr Manescu disagreed with this figure saying it was closer to $134,000)

74 Notably the above figures do not include bonus or incentive payments.

75 The minimum wage for a level 4 professional/experienced medical research employee in July 2019 was $74,885 (gross) based on a 38-hour week.[10]

76 Having regard to Mr Manescu's evidence that he estimates he was working between two and four hours per week more than the ordinary 38 hour working week, he was paid an annualised salary in excess of the applicable minimum wage for July 2019 (which is the minimum wage for the same position three years after Mr Manescu's cessation of employment) as follows:

- April 2013 - $57,345
- March 2014 - $62,633
- April 2015 - $66,072 (or $59,115 if Mr Manescu's oral assertion is accepted)
- April 2016 - $66,072 (or $59,115 if Mr Manescu's oral assertion is accepted)

77 On the assumption that Mr Manescu never took annual leave in any year from 2013 to the end of 2016, on his own estimate of hours worked per week, he worked an additional maximum 208 hours per year, which equates to the equivalent of between approximately $275 to $298 per hour for purported overtime hours worked over the minimum wage for July 2019.

78 Beyond this, however, Mr Manescu:

- led no evidence consistent with his assertion his annualised salary was in the range of academia rather than industry standard (whatever that might be);
- led no evidence how the annualised salary he was paid failed to compensate him for purported work undertaken outside of the ordinary 38 hours per week;
- led no evidence of what the applicable compensation was having regard to comparable positions in the same or similar industry working under the same or similar terms or conditions; and
- at best, estimated what he thought he should be paid based on an estimate of purportedly between two and four hours per week worked in excess of 38 hours per week.

79 With respect to Mr Manescu, he has made an oblique assertion that in some way he was not properly compensated, which, when regard is had to the minimum wage in July 2019 that would be applicable to him if the Professional Award applied to his employment and to the annualised salary he was paid each year from 2013 to 2016, is not proven to the requisite standard on the evidence before the IMC.

Outcome Of The Payment Of Overtime Under The Professional Award And The WA Engineers Award

80 There is no provision or clause in the Professional Award requiring the payment of overtime rates on an hourly basis for work done over the ordinary hours of 38 hours per week.

81 The respondent cannot contravene a clause of the Professional Award that does not exist.

82 While Mr Manescu's claim was for an alleged failure to pay overtime for hours worked in excess of 38 hours per week, when consideration is given to a possible alternate argument referrable to cl 18.2 or cl 18.3 of the Professional Award, Mr Manescu has not proven to the requisite standard that the respondent did, in fact, contravene either of these clauses of the Professional Award by failing to compensate him for time worked in excess of his ordinary hours of duty.

83 As stated, Mr Manescu led no evidence about the applicability of the WA Engineers Award to his employment with the respondent. Mr Manescu's claim always applied the Professional Award to his employment. Accordingly, I have not considered, nor do I intend to consider, the WA Engineers Award where Mr Manescu has made no other reference to this award save for writing it on the front of the claim form and referring to it in the alternative to Professional Award on page 2 of a document entitled 'Statement on The Grounds of Contractual Entitlement Underpayment'. The IMC is not required to discover a claimant's claim.

84 I am not satisfied that Mr Manescu has proven his claim to the requisite standard that the respondent has contravened a term of the Professional Award as it relates to an alleged failure to pay overtime (based on the assumption that the Professional Award applies to him and the respondent).

Is Mr Manescu Entitled To Payment For Overtime Under The FWA?

85 Mr Manescu's claim makes no substantive reference to how he says the respondent has breached the FWA in failing to pay him overtime as alleged.

86 While the National Employment Standards apply to Mr Manescu and his employment by the respondent, none of the minimum standards in s 61(2) of the FWA refer to the requirement to pay overtime in the way alleged by Mr Manescu.

87 Mr Manescu's claim otherwise makes no other reference to how he says the respondent has breached the FWA.[11]

88 Accordingly, I am not satisfied that Mr Manescu has proven his claim to the requisite standard that the respondent has contravened the FWA as it relates to an alleged failure to pay hourly rates of overtime for hours worked in excess of 38 hours per week.

Is The IR Act Or MCE Act Relevant To Mr Manescu's Claim?

Enforcement of an alleged provision of an industrial instrument under the IR Act

89 Pursuant to s 83 of the IR Act, an application to the IMC for enforcement can only be made in respect of an instrument to which subsection (1) applies. These instruments are detailed in s 83(2) of the IR Act and include an award, an industrial agreement, an employer-employee agreement or an order made by the WAIRC. This provision is also referrable to s 7 of the MCE Act.

90 To invoke the IMC's enforcement jurisdiction, a claimant must first identify which instrument he or she says they are seeking to enforce. In Mr Manescu's case, he can only rely upon the Professional Award as there is no other applicable industrial agreement (referred to him in any substantive way), there is no employer-employee agreement (as that term is defined in s 7 of the IR Act) and no order made by the WAIRC.

91 Thereafter, once the instrument is identified, consistent with the words in s 83(1) of the IR Act, Mr Manescu must also identify the provision he says has been contravened or not complied with by the respondent.

92 Relevant to Mr Manescu's claim, he refers to a failure to comply with the Professional Award.

93 One of the orders sought by Mr Manescu is the payment of an amount of money he says he was entitled to be paid under the Professional Award, namely overtime rates for hours worked in excess of 38 hours per week. Any such order can only be made by the IMC under s 83A(1) of the IR Act in proceedings under s 83, where the employee has not been paid an amount to which they are entitled under the relevant instrument.

94 Leaving aside the IMC's jurisdiction to consider an application under s 83 of the IR Act for an alleged contravention of a Federal Modern Award, Mr Manescu has made an ambit claim. He has not identified the provision he says has been contravened by the respondent.

95 Further, for the same reasons stated in [63] to [69] above, the Professional Award contains no clause referrable to the payment of hourly overtime rates for work undertaken in excess of 38 hours per week. Further, for the same reasons stated in [71] to [78] above, even if Mr Manescu relied upon the alternative argument, he has failed to prove his claim to the requisite standard that his annualised salary failed to compensate him in the manner provided in cl 18.2 and cl 18.3 of the Professional Award.

96 But in any event, the definition of '***award***' in s 7 of the IR Act means '*an award made by the Commission under that Act*'. An '***employee-employer agreement***' means '*an employer-employee agreement provided for by section 96UA*'.

97 The Professional Award is an award made under the FWA and not by the WAIRC under the IR Act. It is not a state-based award. There is no employer-employee agreement, or other industrial agreement or order made by the WAIRC, applicable to Mr Manescu and the respondent. Therefore, there is no instrument to which s 83(1) of the IR Act applies capable of enforcement in the IMC.

Enforcement of an alleged condition implied by the MCE Act

98 There are two reasons why the MCE Act does not apply to Mr Manescu's claim for the payment of overtime for time worked in excess of 38 hours per week:

- Section 3 of the MCE Act contains the definition of ***minimum condition of employment*** which includes:

  (aa) the requirement as to maximum hours of work prescribed in Part 2A; or

(a) a rate of pay prescribed by this Act; or

(b) a requirement as to pay, other than a rate of pay, prescribed by this Act; or

(c) a condition for leave prescribed by this Act; or

(d) the use, in a manner prescribed by this Act, of a condition for leave prescribed by this Act; or

(e) a condition prescribed by Part 5.

- Pursuant to s 5(1) of the MCE Act, the minimum conditions of employment are deemed to be implied into any employer-employee agreement, any award or if a contract of employment is not governed by an employee-employer agreement or an award, in that contract.
- Pursuant to s 5(1) of the MCE Act,

  [a] *provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.*
- Section 7 of the MCE Act provides that a minimum condition of employment is enforceable as provided in (aa), (b) and (c).
- Mr Manescu claims payment of overtime worked in excess of 38 hours per week. The payment of overtime is not a minimum condition of employment as that term is defined in the MCE Act and thus is not implied in a contract of employment under s 7(c) of the MCE Act. Therefore, an alleged non-payment of overtime for hours worked in excess of 38 hours per week cannot be enforced under s 7 of the MCE Act.
- The definition of 'award' in s 3 of the MCE Act means 'an award made under the IR Act and includes any industrial agreement or order of the Commission under that Act'. An 'employee-employer agreement' in s 3 of the MCE Act means 'an employer-employee agreement under Part VID of the IR Act'.
- As stated previously, the Professional Award is an award made under the FWA and not the IR Act. There is no other industrial agreement or order of the WAIRC or employer-employee agreement applicable to Mr Manescu and the respondent.

99 Therefore, s 7(aa) and s 7(b) of the MCE Act does not apply to the Professional Award or to Mr Manescu and any condition (if it existed) cannot be enforced under s 83 of the IR Act.

Outcome Of The Payment Of Overtime Under The FWA, The IR Act And The MCE Act

100 Mr Manescu has not identified an applicable provision of the FWA that he says the respondent has contravened with respect to the alleged failure to pay hourly overtime for hours purported to have been worked in excess of 38 hours per week.

101 Further, and in any event, I am not satisfied that Mr Manescu has proven his claim to the requisite standard that the respondent has contravened the FWA as it relates to an alleged failure to pay hourly rates of overtime for hours worked in excess of 38 hours per week.

102 The IMC does not have jurisdiction under s 83 of the IR Act to consider Mr Manescu's application for enforcement of an alleged failure to pay overtime rates for purported hours worked in excess of 38 hours per week in contravention of instrument to which s 83(1) of the IR Act applies, as it relates to a provision of the Professional Award or as a deemed minimum condition of employment.

103 Further, and in any event, I am not satisfied that Mr Manescu has demonstrated that any such condition of employment (if it exists) is a minimum condition of employment or a term of the Professional Award capable of enforcement under s 83 of the IR Act.

Result

104 Having regard to the reasons provided, Mr Manescu's claim is dismissed.

D SCADDAN

INDUSTRIAL MAGISTRATE

[1] Exhibit 2 - witness statement of Ignatius Jayapragasam dated 24 October 2019 at annexure IJ-1.

[2] Exhibit 2 at annexure IJ-2.

[3] Exhibit 2 at annexure IJ-3.

[4] Exhibit 2 at annexure IJ-4.

[5] Exhibit 2 at annexure IJ-5.

[6] Exhibit 1 - witness statement of Adrian Manescu lodged on 17 October 2019 at [13] to [24].

[7] Exhibit 2 at annexures IJ-2, IJ-3.

[8] For the avoidance of doubt, this assumption in no way reflects a determination that an alleged failure to pay an incentive bonus is a contravention of one of the industrial instruments referred to in s 83(2) of the IR Act.

[9] Exhibit 1 at [40].

[10] Mr Manescu's employment type is not level 5 because he is not a medical research employee, experienced or otherwise.

[11] In particular, any reference to s 323 of the FWA as it may relate to consideration of 'safety net contractual entitlements'. However, the definition of 'safety net contractual entitlement' in s 12 of the FWA is referable to s 61(2) of the FWA in any event.

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

Jurisdiction

[1] An employee, an employee organisation 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. IMC being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': s 12 of the FWA (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); the IR Act, s 81, s 81B.

[2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.

[3] The civil penalty provisions are identified in s 539 of the FWA.

[4] 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': s 14, s 12 of the FWA. 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': s 13 of the FWA. It is not in dispute and it was found that the respondent is a corporation to which paragraph 51(xx) of the Constitution applies and that the claimant was employed by the respondent.

[5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

Burden And Standard Of Proof

[6] In an application under the IR Act, the claimant carries the burden of proving the claim. 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.*

[7] In the context of an allegation of the breach of a civil penalty provision of the IR Act 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].*

[8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice And Procedure Of The Industrial Magistrates Court

[9] The IR Act provides that, except as prescribed by or under the FWA, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA. Relevantly, regulations prescribed under the IR Act provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: reg 35(4).

[10] In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (omitting citations):

> *… The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40].*

Schedule II: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The *Industrial Relations Act 1979* (WA)

Jurisdiction

[1] The IMC has the jurisdiction conferred by the IR Act and other legislation. Section 83 and s 83A of the IR Act confer jurisdiction on IMC to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.

[2] The same principles referred to in Schedule 1 at [6] to [10] otherwise apply.

2019 WAIRC 00880

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2019 WAIRC 00880
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	THURSDAY, 19 DECEMBER 2019
FILE NO.	**:**	M 128 OF 2018
BETWEEN	**:**	THE AUSTRALIAN WORKERS' UNION
		CLAIMANT
		AND
		VESCO FOODS PTY LTD, TRADING AS VESCO FOODS
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Application of clause 33.1(e) of the *Food, Beverage and Tobacco Manufacturing Award 2010* – Determinations on quantum
Instruments	**:**	*Vesco Foods Pty Ltd (Production Employees, Western Australia) Enterprise Agreement 2017* (Cth)
		Food, Beverage and Tobacco Manufacturing Award 2010 (Cth)
Result	**:**	Determinations made
Representation:		
Claimant	**:**	Mr C. Young (industrial officer)
Respondent	**:**	Mr J. Raftos (of counsel) as instructed by Minter Ellison

SUPPLEMENTARY REASONS FOR DECISION

1 On 21 August 2019, the Industrial Magistrates Court of Western Australia (IMC) delivered its reasons for decision in answering specified questions for determination identified by the parties (Reasons for Decision).

2 The purpose in answering the parties' questions was to resolve the Australian Workers' Union's (the claimant) claim (on behalf of an employee) where the IMC understands that there are other similar claims. In part, the intention was for the parties to use the methodology in the Reasons for Decision to quantify the claimant's claim and potentially in any other similar claim.

3 To that end, following publishing of the Reasons for Decision the IMC informed the parties that, if necessary, rulings could be given with respect to quantum. It has now become necessary to give a ruling. It is not an opportunity for the parties to relitigate the original questions for determination, although in saying that, arguably, a new issue has been identified by Vesco Foods Pty Ltd, trading as Vesco Foods (the respondent).

4 The parties lodged submissions in the IMC, including example calculations relevant to the Example Week.

5 These supplementary reasons are limited to ruling on issues of quantum raised by the parties and should be read in conjunction with the Reasons for Decision.

6 In the Reasons for Decision, I found that had Deng Atack Ken Agany (Mr Agany) been paid for work undertaken in the Example Week by reference to the *Vesco Foods Pty Ltd (Production Employees, Western Australia) Enterprise Agreement 2017* (Cth) (Agreement) he would have been paid $1,412.14.

7 The respondent paid $1,444.81 to Mr Agany in the same week.[1]

8 In Table 5 of Schedule IV of the Reasons for Decision, I set out the calculation of what Mr Agany could have expected to be paid had the Agreement been applied consistent with the undertakings and the applicable award, namely the *Food, Beverage and Tobacco Manufacturing Award 2010* (Cth) (Award).

9 The purpose of Table 5 of Schedule IV of the Reasons for Decision was to identify any potential shortfall, consistent with the Reconciliation Undertaking and the decision by Commissioner Gregory on 18 August 2017 that the undertakings will not cause financial detriment to any employees covered by the Agreement.

10 The IMC found that a shortfall did exist, but the parties now dispute the amount of the shortfall and, further, the computation of the shortfall.

Question For Determination On Quantum

11 The principal question for determination is the amount of the shortfall referrable to the Example Week.

12 To answer that question the IMC is asked to consider the effect of cl 33.1(e) of the Award on the computation in Table 5 of Schedule IV of the Reasons for Decision, specifically as it relates to overtime paid on Saturday in the Example Week.

13 I have inserted into these reasons Table 6 at Schedule IV which reflects the respondent's alternative calculation with the amended calculation on Saturday.

14 If the respondent's contention is accepted, the effect of the amended calculation in Table 6 of Schedule IV of these reasons is to reduce the shortfall payment to Mr Agany in the Example Week by approximately $30 (from $1,559.17 to $1,528.75).

15 A second question for determination is the amount to be paid in week 28 where Mr Agany worked 37.6 hours on weekdays and then worked 8.5 hours on Saturday. The respondent says 0.4 hours of the hours worked on Saturday should be paid at ordinary rates of pay (or in the alternative at time and a half of the ordinary rates of pay). The claimant says 0.4 hours of the hours worked on Saturday should be paid at double time.

Claimant's Contentions

16 The claimant contends that:

(a) clause 33.1(e) of the Award has no effect on the computation in Table 5 of Schedule IV of the Reasons for Decision where cl 33.1(a) of the Award provides that '*…the overtime rate is 150% for the first three hours and 200% thereafter until the completion of the overtime work…*' (emphasis added);

(b) the IMC's conclusion at [99] of the Reasons for Decision is correct and cl 33.1(e) of the Award does not undermine the IMC's reasons; and

(c) when read as a whole, cl 33.1(a) to cl 33.1(e) 'make sense' as each subclause deals with a different subject matter.

Respondent's Contentions

17 The respondent contends that:

(a) any calculation of overtime in the Example Week must have regard to the way overtime is calculated under the Award in order to determine whether a shortfall exists and, if it does, by how much and, therefore, cl 33.1(e) of the Award is relevant to that calculation;

(b) the IMC in its reasons did not consider the effect of cl 33.1(e) (if any); and

(c) the effect of cl 33.1(e) is to limit the payment of applicable overtime rates to day by day – the computation for Saturday in Table 6 of Schedule IV of these reasons versus the computation for Saturday in Table 5 of Schedule IV of the Reasons for Decision demonstrates how cl 33.1(e) operates.

The Agreement and Associated Undertakings

18 It is useful to restate the relevant undertakings in the Agreement:

> ***Base rates of pay***
>
> *Notwithstanding the base rates of pay in Schedule 1 of the Agreement, employees will receive at least the base rate of pay in Food, Beverage and Tobacco Manufacturing Award 2010* ***(Award)*** *or the rate set out in the Agreement relevant to their classification, whichever is the higher rate.*
>
> ***Overtime***
>
> *Employees who are required to work overtime will receive at least the amount that they would receive under the Award for working the same hours, calculated on a weekly basis.*
>
> ***Overtime – part-time employees***
>
> *Part-time employees are entitled to overtime rates (to be paid in accordance with the overtime undertaking above) for hours worked in excess of their agreed hours, calculated on a weekly basis.*
>
> ***Reconciliation***
>
> *Vesco Foods Pty Ltd will establish a system to ensure that any shortfalls in payments to employees arising from the Overtime, Overtime – part-time employees, and Allowances undertakings are reconciled and paid to employees at the following frequency (remainder omitted).*

19 Clause 17 of the Agreement outlines the payment of overtime and penalty rates, relevantly, as follows:

> *17.1. If an Employee works more than 38 hours in one weekly pay period, inclusive of paid leave entitlements (leave omitted), then the additional hours will be paid as follows:*
>
> *a) 38.01 to 45.0 hours – the Employee's Base Rate plus 50% penalty.*
>
> *b) 45.01 hours to 55.0 hours inclusive – the Employee's Base Rate plus 65% penalty.*
>
> *c) 55.01 hours and above – the Employee's Base Rate plus 81% penalty.*
>
> *17.3. If the Employer requires an Employee to work on a Saturday, the Employee shall be paid time and a half the Employee's Base Pay Rate for all hours worked, and the total hours are included in the minimum rostered hours for the week.*
>
> *17.7. All hours worked after 6.00pm and before 10.00pm Monday to Friday will be paid at an additional 15% of the Employee's Base Rate. This 15% will be known as Shift Allowance 1 and will not be payable when either penalty rates or overtime rates are applied to these hours worked.*
>
> *17.10. Refusal to Work Overtime*
>
> *It is a term of this agreement that employees will make themselves available to work reasonable overtime in order to meet the operational requirements of the Employer. Where practical, employees will be notified of the requirement for overtime within the first 3 hours of the shift.*

The Award

20 Clause 33.1 of the Award provides for the payment of overtime as follows:

> *(a) Except as provided for in clauses 33.12, 33.1(d), 33.7 and 33.8, for all work done outside ordinary hours on any day or shift, as defined in clauses 30.2, 30.3 and 30.4, the overtime rate is 150% for the first three hours and 200% thereafter until the completion of the overtime work. For a continuous shift worker the rate for working overtime is 200%* (emphasis added).
>
> *(b) For the purpose of clause 33 – Overtime, **ordinary hours** means the hours worked in an enterprise, fixed in accordance with clause 30 – Ordinary hours of work and rostering.*
>
> *(c)* …
>
> *(d)* …
>
> *(e) In computing overtime each day's work stands alone.*

21 The Award terms are not readily referrable to the Agreement terms. However, the Agreement, provides at cl 4.3 '[t]*his Agreement operates to the exclusion of any modern award or other industrial instrument'*.

22 The purpose of the Award is to reconcile certain allowances under the Agreement to ensure employees are not worse off financially, but this can only be done in the context of the Agreement terms applicable to the employee.

23 The Award terms cannot otherwise be shoehorned in to the Agreement. By way of example, Mr Agany does not work '*ordinary hours'* as that term is generally understood in cl 30.2(b) and cl 30.2(c) of the Award. That is, Mr Agany does not work Monday to Friday (and thereafter with agreement on Saturday or Sunday) with a spread of hours from 6.00 am to 6.00 pm. As specified in the Agreement, Mr Agany's ordinary hours of work are shifts commencing Monday to Saturday based on a production roster where the maximum length is 12 hours: cl 12 of the Agreement.

24 Therefore, certain terms of the Award may have a different effect on an employee who works *ordinary hours* as contemplated under cl 30.2 of the Award to that of Mr Agany and the *ordinary hours* (or agreed hours) worked by him under the Agreement.

25 Clause 33.1(e) of the Award, as it applies to an employee working overtime under the Award, appears to reset overtime each day, possibly because it anticipates an employee working defined *ordinary hours* within the defined spread of hours between 6.00 am and 6.00 pm. Thereafter, the employee is eligible for overtime outside of *ordinary hours*. The requirement for a rest period after overtime seems to support this interpretation: cl 33.3 of the Award.

26 While this interpretation might appear to conflict with cl 33.1(a) of the Award as it relates to Mr Agany and the Example Week, in my view, it does not conflict when applied in the context of cl 12 of the Agreement and the hours worked by Mr Agany.

Application Of Cl 33.1(a) And Cl 33.1(e) Of The Award To The Example Week

27 In the Example Week, Mr Agany commenced working in excess of 38 hours on Friday after 0.5 hours. Thereafter, he continues to work overtime for the remainder of the week until he finished on Saturday at 11.30pm (recalling that for the Example Week the published weekly agreed hours were 60 hours of which he was paid 56 hours of which 18 hours was overtime pursuant to cl 17.1 of the Agreement).

28 Having regard to the analysis in the Reasons for Decision at [94] to [99], in the Example Week, Mr Agany never resets overtime in the manner envisaged if he was employed under the Award and he continues to work until the *completion of the overtime work* in that week.

29 When viewed in this context, cl 33.1(a) and cl 33.1(e) of the Award operate such that each day Mr Agany works overtime in the Example Week does, in fact, stand alone, but he has already exhausted the ordinary hours contemplated under cl 17.1 of the Agreement and only ever works in excess of that on Friday and Saturday of the Example Week (save for 0.5 hours on Friday).

30 Therefore, in my view, in the Example Week there is no tension between cl 33.1(a) and cl 33.1(e) of the Award where Mr Agany works continually in excess of his agreed hours (which are also his *ordinary hours*) for the week and the whole of remaining time after, this is overtime.

31 The outcome is that the calculation in Table 5 of Schedule IV of the Reasons for Decision (and not the alternative calculation in Table 6 of Schedule IV of these reasons) is the applicable calculation with the effect that the amount Mr Agany would have been paid under the Award (referrable to the Agreement and to the undertakings) is $1,559.17.

Payment For Week 28

32 For the following reasons I find that the disputed 0.4 hours worked on Saturday in week 28 should be paid at time and a half of the ordinary rates of pay (150%):

- the starting point is contained in cl 17.3 of the Agreement, which provides that if the employer requires an employee to work on a Saturday, the employee shall be paid time and a half of base rate of pay for all hours worked, and the total hours are included in the minimum rostered hours for the week;
- thus, while the ordinary hours in cl 12 of the Agreement includes shifts on a Saturday (based on a production roster), penalty rates in cl 17.3 of the Agreement apply to the Saturday shift;
- reference to the Award applies for the purposes of reconciling any shortfall (if there is any). In week 28 it is assumed the agreed hours were approximately 49.1 hours of which hours worked in excess of 38 hours are overtime hours under the Agreement;
- however, 0.4 of those overtime hours were worked on Saturday and cl 17.3 of the Agreement applies in any event;

- referrable to cl 30.2(b) and cl 30.2(e) of the Award, had Mr Agany worked *ordinary hours* (by agreement) between midnight on Friday and midnight on Saturday he would have been paid 150% (or time and a half) in any event; and
- therefore, in my view, in respect of the 0.4 hours worked on Saturday in week 28, the Award and the Agreement have the same effect, that being the rate of pay is time and a half irrespective of whether it is under 38 hours (noting also that the time falls within the first three hours under cl 33.1(a) of the Award).

Result

33 The following determinations on quantum apply:

- The calculation in Table 5 of Schedule IV of the Reasons for Decision is maintained.
- 0.4 hours worked on Saturday in week 28 should be paid at time and a half of the ordinary rates of pay.

34 I will hear from the parties in respect of orders to be made.

D SCADDAN

INDUSTRIAL MAGISTRATE

[1]Table 1 in Schedule IV of the Reasons for Decision as replicated at the end of these supplementary reasons.

Schedule IV – Tables Of Calculations

Table 1: The respondent's actual payment to Mr Agany

M128/2018
AWU v Vesco Foods Pty Ltd
Summary of Hours and Rates

Day	Hours worked	Number of hours worked	Hours at single time	Hours attracting Clause 17.3 Saturday rate(1.5x)	Hours attracting 17.1(a) overtime (150%)	Hours attracting 17.1(b) overtime (165%)	Hours attracting 17.1(c) overtime (181%)	Hours attracting Clause 17.7 6pm-10pm loading (15%)	Hours attracting Clause 17.8 loading
Monday 28/8	1.30pm – 10.00pm	8	8	0	7 Hours in total	1.5 Hours in total	Nil	3.5	
Tuesday 29/8	2.30pm – 12.45am	9.75	9.75	0				3.5	2.75
Wednesday 30/8	2.30pm – 1.15am	10.25	10.25	0				3.5	3.25
Thursday 31/8	2.30pm – 1.30am	9.5	9.5	0				3.5	2.5
Friday 01/9	2.30pm – 1.30am	10.5	9	1.5				3.5	
Saturday 02/9	3.00pm – 11.30am	8	8	8				3.5	

Notes:

1. 30 minutes unpaid meal break each shift.
2. Total hours worked Monday – Friday = 46.5, made up of:
   (a) 38 hours at ordinary time.
   (b) 7 hours at 1.5 x (Clause 17.1(a)).
   (c) 1.5 hours at 1.65 x (Clause 17.1(b)).
3. All hours worked on Saturday (9.5 hours) attracts the 17.3 rate (1.5x) which includes the last 1.5 hours of the Friday shift.
4. The shift loadings in clause 17.7 and 17.8 have been applied to all hours worked after 6.00 pm, although strictly the Agreement does not require them to be paid on hours which otherwise attract an overtime or weekend loading. This appears to be an overpayment but not one relevant to the proceedings.

Summary of Payment

38 hours at 1 x 20.20	= $ 767.60
9.5 hours at 1.5 x 20.20 (Saturday late)	= $ 287.85
7 hours at 1.5 x 20.20 (17.1(a) overtime)	= $ 212.10
1.5 hours at 1.65 x 20.20 (17.1(b) overtime)	= $ 50.00
21 hours at 15% loading (17.7)	= $ 63.63
10.5 hours at 30% loading (17.8)	= $ 63.63
TOTAL	**$1,444.81**

Table 5: IMC's calculation of overtime in accordance with the Agreement (consistent with the undertakings and the Award)

	Hours	**100%** $20.21	**150%** **OT1**	**200%** **OT2**	**15%** **SA1**	**30%** **SA2**	**Total** **$**
Mon	8	8			3.5		161.68 + 10.61
Tues	9.75	9.75			3.5	2.75	197.05 + 10.61 + 16.67
Wed	10.25	10.25			3.5	3.25	207.15 + 10.61 + 19.70
Thurs	9.5	9.5			3.5	2.5	191.99 + 10.61 + 15.15
Fri	10.5	.5	3	7			10.10 + 90.94 + 282.94
Sat	8			8			323.36
Total:		**38**	**3**	**15**	**14**	**7**	**1,559.17**

SA1 = Shift Allowance 1 pursuant to cl 17.7 of the Agreement

SA2 = Shift Allowance 2 pursuant to cl 17.8 of the Agreement

OT1, OT2 = Overtime pursuant to cl 33.1(a) of the Award

Table 6: Alternative calculation of overtime by the respondent

	Hours	**100%** $20.21	**150%** **OT1**	**200%** **OT2**	**15%** **SA1**	**30%** **SA2**	**Total** **$**
Mon	8	8			3.5		161.68 + 10.61
Tues	9.75	9.75			3.5	2.75	197.05 + 10.61 + 16.67
Wed	10.25	10.25			3.5	3.25	207.15 + 10.61 + 19.70
Thurs	9.5	9.5			3.5	2.5	191.99 + 10.61 + 15.15
Fri	10.5	.5	3	7			10.10 + 90.94 + 282.94
Sat	8		3	5			90.84 + 202.10
Total:		**38**	**3**	**15**	**14**	**7**	**1,528.75**

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2019 WAIRC 00843

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 JULY 2018
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00843
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 8 APRIL 2019
DELIVERED	**:**	FRIDAY, 6 DECEMBER 2019
FILE NO.	**:**	APPL 58 OF 2018
BETWEEN	**:**	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD ACN 133892350 Applicant AND THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

CatchWords	**:**	Industrial law (WA) – Review of a decision of the Construction Industry Long Service Leave Payments Board – Requirement to register as an employer under the *Construction Industry Portable Paid Long Service Leave Act 1985* – Statutory Construction – Use of Second Reading Speeches and Explanatory Memoranda and previous judicial statements – Priori assumption – Parliamentary intention and object of legislation – Re-enactment presumption – Definition of 'construction industry' – Definition of 'on site' or 'on a site' – Scope of Act extends beyond work on construction sites
Legislation	**:**	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA); *Construction Industry Portable Paid Long Service Leave Regulations 1985* (WA); *Industrial Relations Act 1988* (Cth);
Result	**:**	Preliminary questions answered
Representation:		
Counsel:		
Applicant	**:**	Mr S M Davies SC
Respondent	**:**	Mr J B Blackburn SC
Solicitors:		
Applicant	**:**	Herbert Smith Freehills
Respondent	**:**	Jackson McDonald

Case(s) referred to in reasons:

AMT Planning Consultants Pty Ltd t/as Coastplan Consulting v Central Coast Council [2018] NSWCA 289

Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board 1995 WASC 718

Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board (2001 WAIRC 02000

Centurion Industries Limited v Construction Industry Long Service Leave Payments Board (1991) 71 WAIG 1300

Certain Lloyd's v Cross [2012] 248 CLR 378

Commonwealth v Baume (1905) 2 CLR 405

Construction Industry Long Service Leave Payments Board v Positron Pty Limited (*Positron*) (1990) 70 WAIG 3062

Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd (unreported, Library No 920130, 4 March 1992)

Electrolux Home Products Pty Ltd v Australian Workers Union [2004] HCA 40; (2004) 209 ALR 116

FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board ([1992] SAIRC 20; (1992) 59 SAIR 381)

Harrison v Melham [2008] 72 NSWLR 380

Minister Administering the Environmental Planning and Assessment Act 1979 v Carson [1994] 35 NSWLR 342

Northrope v City of Hawthorn [1941] VRL 178

Ogden Industries Pty Ltd v Lucas [1968] 118 CLR 32

R v Bolton; ex parte Beane [1987] 162 CLR 514

Re Alcan Australia Ltd; ex parte Federation of Industrial, Manufacturing and Engineering Employees (1994) 181 CLR 96

Reg v Portus; ex parte Australia & New Zealand Banking Group Ltd [1972] 127 CLR 353

Saeed v Minister for Immigration and Citizenship [2010] 241 CLR 252; 2010 HCA 23; 267 ALR 204

Sparks N Security Pty Ltd and Ritzline Pty Ltd trading as IC Cool Refrigeration, Mechanical and Electrical Services v Construction Industry Long Service Leave Payments Board 2017 (97 WAIG 366)

Case(s) also cited:

Alcan NT Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27

Australian Education Union v Department of Children's Services (2012) 248 CLR 1

Catlow v Accident Compensation Commission (1989) 167 CLR 543

Lacey v Attorney-General (Qld) (2011) 242 CLR 573

Pepper v Hart [1993] AC 593

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Wik Peoples v Queensland (1996) 187 CLR 1

Texts cited:

Pearce and Geddes' *Statutory Interpretation in Australia* (8th ed)

Decision

1 The applicant, Programmed Industrial Maintenance Pty Ltd (PIM), seeks a review of the decision of the Construction Industry Long Service Leave Payments Board (the Board), dated 12 July 2018, requiring it to register as an employer under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act). PIM says that this decision is in error because PIM does not engage employees 'in the construction industry' as defined by the Act because:

(a) Its employees do not perform work 'on a site', as that term is used in the Act;

(b) Further, or alternatively, its employees only perform maintenance or repairs of a routine or minor nature, in circumstances where PIM is not 'substantially engaged' in the construction industry.

2 There are preliminary questions to be determined which may enable the resolution of the matter.

The issues for current determination

3 The questions for determination are:

1. (a) Whether the applicant's employees performing work at the applicant's clients' premises carry out work 'on a site' within the meaning of the definition of construction industry in section 3(a) of the Act.

(b) If the answer to (a) is 'yes':

(i) whether if the majority of the work performed by the applicant is maintenance work carried out at the applicant's clients' premises, the applicant is 'substantially engaged in the industry described in this interpretation' such that paragraph 3(f) of the definition of construction industry in the Act does not apply and the question of whether the maintenance work is of a routine or minor nature does not arise;

(ii) whether if the majority of the work performed by the applicant is maintenance work of a routine or minor nature carried out at the applicant's clients' premises, the applicant is not 'substantially engaged in the industry described in this interpretation' for the purposes of paragraph 3(f) of the definition of construction industry in the Act.

4 PIM says that it does not engage employees 'in the construction industry' because its employees do not work 'on a site' and, or alternatively, they only perform maintenance or repairs of a routine or minor nature, in circumstances where PIM is not 'substantially engaged' in the construction industry. In those circumstances, it says that it is not an employer for the purposes

of the Act, and accordingly has no obligation to register with the Board, nor make any contributions in respect of its employees.

5 The Board says that PIM is an employer for the purposes of the Act and is required to register as an employer because it engages persons as employees in the construction industry, as those terms are defined in the Act. The first part of the dispute is whether the employees are engaged in the construction industry.

BACKGROUND

PIM's operations in Western Australia

6 The parties provided a detailed statement of agreed facts (SOAF) for the purpose of the determination of the preliminary questions. They set out an overview of PIM's operations in Western Australia as at 12 July 2018. This is the date of the Board's decision, the subject of this application. The SOAF includes that employees performed duties mainly for core clients pursuant to commercial contracts which PIM has with those clients to perform maintenance work at the clients' premises. As at 12 July 2018, PIM employed 1,694 employees in Western Australia, 787 of whom were permanent and 907 were casual employees. The average length of service of the employees was 3.4 years.

7 The particular types of employees engaged by PIM varies from location to location, depending on the nature of services provided in each location. Generally speaking, those employees (excluding managerial and supervisory employees) include:

(a) Boilermakers/welders;

(b) Riggers;

(c) Scaffolders;

(d) Mechanical fitters/pipefitters;

(e) Mechanical tradespeople (ie, machinists/diesel fitters/motor mechanics);

(f) Painters and blasters (industrial);

(g) Crane operators;

(h) Trades assistants.

8 The types of work performed by PIM are said to 'involve the provision of maintenance services at established operational locations in the resources sector'. The labour supplied is comprised of skilled and supervisory labour, such as crew supervisors, superintendents, operations managers and location managers. Clients have the option of contracting skilled labour only through another company within the Programmed Group of companies, Programmed Skilled Workforce (PSW).

9 PIM undertakes maintenance of and repairs to existing operating assets. The various locations at which PIM operates predominantly comprise established buildings, structures and plant and equipment that have been operating for many years.

10 The parties agree that 'the owners of these locations have expended significant capital in establishing the plant and equipment, (so) continued maintenance is vital to the ongoing viability of the relevant operations, as replacing such plant or equipment would be expensive and would involve stoppages of work'.

11 The precise scope of work performed by PIM's employees varies slightly from location to location but falls within three main categories:

1. Ongoing maintenance;

2. Shutdown maintenance; and

3. Project work.

12 In WA, approximately 60 per cent of PIM's revenue is generated from ongoing maintenance work, 30 per cent from shutdown maintenance work and 10 per cent from project work. The proportions of employees employed in each of these functions is split along approximately the same lines.

Ongoing maintenance work

13 The ongoing maintenance work involves PIM supplying supervised labour to work within crews of workers at clients' locations to undertake routine, planned, reactive or ongoing maintenance. PIM employees work side by side, in the same teams, as its client's employees. They are subject to directions from the client's supervisory staff and work the same rosters and hours of work. This is said to be largely mechanical maintenance. The employees concerned are generally boilermakers, trades assistants, fitters, welders and scaffolders, while those engaged in electrical maintenance are mainly electricians and trades assistants.

14 Most of the maintenance work performed by PIM's employees is mechanical maintenance. Electrical maintenance is a small part of PIM's capability because electrical maintenance is generally done by another company within the Programmed Group, Programmed Electrical Technologies. The mechanical maintenance work performed by PIM employees may involve, but is not limited to, changing valves, flanges, motors, and the lagging, cladding and insulation on pipework that has worn away. This maintenance work is to maintain the relevant plant and equipment in a state that enables it to continue to safely and efficiently serve the purpose for which it has been installed.

15 The maintenance is either planned or reactive. Planned maintenance is where it is possible for the owner of the plant to know in advance when components will require replacement or other maintenance tasks to be performed. Reactive maintenance is responding to issues or faults as and when they arise. Inspections of plant and equipment during operations and the monitoring of the performance of plants are key methods of identifying when reactive maintenance needs to take place.

16 A category of maintenance, called 'Asset Integrity Work', is marketed by PIM as a stand-alone function. PIM's employees assist clients to plan and execute work designed to ensure the integrity of existing operating assets.

17 PIM also undertakes industrial painting and blasting as part of its maintenance and asset integrity functions, for the purpose of extending the effective working life of an operating asset.

Shutdown maintenance

18 Shutdown work is scheduled maintenance that occurs when some or all of a client's operating plant and equipment is shut down, in the sense that it stops production for a period in order that the necessary maintenance on the plant and equipment can be performed. It is designed to sustain the operation of current operating assets.

19 PIM provides casual labour to top up the labour provided by its clients and other contractors to assist with the shutdowns to undertake scheduled maintenance and scheduled downtime maintenance. These arrangements are designed and scheduled to minimise downtime.

20 PIM generally has notice of the timing and requirements of a particular shutdown, although there is some flexibility in timing, for example, if an incident happens and a shutdown is required earlier than scheduled. The nature of the maintenance work conducted during a shutdown is similar to ongoing maintenance work. It could involve, for example, repairing and replacing pumps, valves or conveyor belts or rollers.

Project work

21 Examples of project work include:

(a) fabricating a new steel beam in a workshop and then installing the beam at the client's location to replace a steel beam that has worn away or corroded due to normal operations of the locations;

(b) Fabricating in its workshops, handrails to replace handrails on a client's location that have degraded.

22 The project work generally has a capital expenditure of between $200,000 to $300,000. The largest such project work performed by PIM in the last 12 months was worth around $180,000 to $200,000. PIM does not undertake work on any 'greenfields' projects, that is, projects in their construction phase. It has 'the ability to undertake sustaining capital 'brownfields' projects; that is, projects aimed at sustaining the operation of existing plant and equipment' by maintaining or replacing structures or plant on a 'like for like' basis.

Workshops

23 PIM owns and operates two mechanical workshops in Western Australia, one at Kwinana (Naval Base) and one at Kalgoorlie. The work undertaken at these workshops is by PIM employees and overwhelmingly supports PIM's various maintenance activities in the ongoing maintenance, shutdown maintenance and project work undertaken by the business. This might include the fabrication of or repairs to various components in a specialist workshop. The workshops do not operate on a standalone basis but operate as part of the overall business.

Work locations

24 As at 12 July 2018, PIM's work was performed in Western Australia at a range of locations. The SOAG, section D, contains a schedule setting out the work performed by PIM as at 12 July 2018. In addition, PIM undertook work in its workshops to support the work it performs at its clients' premises. These premises included the Kwinana and Pinjarra Alumina Refineries for Alcoa of Australia Limited; the Kwinana Nickel Refinery and the Kalgoorlie Nickel Smelter for BHP Billiton Nickel West Pty Ltd; the CSBP Kwinana Industrial Complex for Wesfarmers Chemicals, Energy and Fertilisers Limited; the Tronox Titanium Dioxide Pigment Processing Plant for Tiwest Pty Ltd; the Murrin Murrin Nickel and Cobalt Mine and Refinery for Minara Resources Pty Ltd; the Telfer Gold Mine for Newcrest Operations Pty Ltd; the Boddington Gold Mine for Newmont Mining Services Pty Ltd; the Roy Hill Iron Ore Mine for Roy Hill Holdings Pty Ltd; Fimiston Open Pit Mine (Super Pit) for Kalgoorlie Consolidated Gold Mines Pty Ltd; the Karara Mine for Karara Mining Ltd; the Fremantle Port Container Terminal for Patrick Stevedores Operations Pty Ltd; and the Granny Smith Gold Mine for Gold Fields Limited.

The contracts

25 PIM is usually engaged by its clients under 'umbrella' agreements that contain a schedule of rates. The contracts do not stipulate a guaranteed volume of work.

26 The scope of services described under the relevant contract is indicative of but may not perfectly reflect the actual work performed at a particular location.

27 The parties agree that the Kwinana and Pinjarra Alumina Refineries' contractual arrangements provided for maintenance work by 12 PIM contract coordinators designated to provide the services to Alcoa. Most, if not all, of the contract coordinators had a trades background in mechanical or rigging work; however, they did not directly perform any maintenance work for Alcoa, rather, they supervised other contractors who performed such work.

28 It is agreed that PIM has occasionally provided a smaller number of fitters and boilermakers to work under the supervision of the contract coordinators and perform maintenance work. This is described as 'either pure maintenance work, i.e. to enhance the life span of a part or structure in the asset, or to replace or repair damaged parts or structures. Repair works are required when, for example, an existing pipeline forms a leak, or a pump packs up.'

29 The maintenance work performed by PIM at Alcoa locations has included replacing pipework; replacing pumps; replacing valves; steel replacement on tanks, and 'like for like' replacement of any plant and equipment but not high voltage electrical equipment.

30 Project work at Alcoa's Pinjarra location is described as including the replacement of a bottom section of a tank. The tank is used to store chemicals which corrode the bottom section of the tank and the old section must be pulled out and a new section built in. Alcoa has approximately 220 of these tanks and each tank's bottom section must be replaced in this way.

31 Similar descriptions are provided for work at other places where work is undertaken by PIM for its clients on their particular assets. None of that work involves the construction or building of new plant or equipment. Rather, it is the maintenance, either on a scheduled or ad-hoc basis, as I have described above.

32 The parties provided 37 attachments to the SOAF which includes 'Programmed Industrial Maintenance – Trades Booklet' which sets out the abilities, responsibilities, training and qualifications of the various trades, and copies of contracts between PIM and its clients, either as overarching contracts or those which deal with particular works under the general coverage of those overarching contracts.

Evidence of Bruce Noel Kennedy

33 PIM also provided a witness statement of Bruce Noel Kennedy, Regional Manager WA for PIM. His role involves looking after all the sites at which PIM operates across Western Australia, looking after the Western Australian profit and loss account, and managing relationships with PIM's clients.

34 Mr Kennedy provided and described a diagram of the corporate structure of the Programmed Group of Companies and an overview of work performed or services provided. The diagram shows that PIM is one of nearly 60 subsidiaries of Persol Holdings Co. Ltd (801100105817). The parties agree that PIM is wholly owned by Programmed Maintenance Services Limited and is part of the Programmed Group of Companies (SOAF [3]).

35 According to the diagram, all but a handful of the companies operate in Australia. Other Programmed Group of Companies appear to provide labour and staffing; facility management; property maintenance and prevention services; recruitment services; safety consultancy; construction and maintenance services to the golf and horse racing industries; technical and vocational training; personnel and logistics services to the oil and gas industry; labour hire in skilled health professions, and audio-visual, communications and electrical services generally.

36 Mr Kennedy says that PIM is 'a provider of industrial maintenance services, which are predominantly provided to the mining and resources sectors. The overwhelming majority of PIM's activities in Western Australia involve the provision of supervised labour to conduct maintenance and shutdown services at established operational locations in the mining and resources sectors'. Mr Kennedy also set out the work that is undertaken by PIM in Victoria and Tasmania, being maintenance services to the food manufacturing sector; in New South Wales, to the heavy industry sector; and to the port operations sector in Western Australia, Victoria and Queensland.

37 Mr Kennedy says that PIM only undertakes maintenance of and repairs to existing operating assets and does not provide any maintenance services to the building and construction industry. By that, it is meant that none of PIM's employees is involved in or deployed to locations where the owner of the location, or any other person, builds or constructs buildings, structures or plant and equipment which was not already in place on the location before PIM was engaged to provide people to that location. It does not provide any services in respect of any 'greenfields' projects, including in the mining and resources sectors. Its employees are deployed on sites where new buildings and construction occurs, however PIM is not involved in those activities.

38 Mr Kennedy described the nature of the ongoing maintenance work, shutdown maintenance work and project work undertaken by PIM employees at various sites.

39 Mr Kennedy described PIM as having a large workforce of permanent employees, supplemented by a pool of casual employees. He says, '(t)he requirement for PIM to engage a pool of casual employees is due to the cyclical nature of the work performed by PIM, particularly the shutdown work it performs. That is, most of the locations at which PIM perform [sic] shutdown work undertake scheduled shutdowns either monthly or twice a year at certain sites'.

40 During the shutdowns, a significant amount of maintenance is undertaken and this requires a large workforce. The large pool of casual employees is said to mean that PIM has flexibility to meet those requirements. Mr Kennedy says, however, that 'PIM's casual employees are not generally dismissed once the shutdown work is completed, they remain as employees of PIM and are regularly brought back to further engagements'.

41 Mr Kennedy described the nature of the work undertaken by PIM for Alcoa at its Kwinana refinery. This was overseeing and assisting with maintenance work. It was said to be minor in nature, either planned and routine, or reactive due to a specific breakdown. It had not provided shutdown maintenance or capital/construction work at these locations.

42 The work at BHP Nickel Refinery – Kwinana was described as asset integrity work, of regularly replacing deteriorating or damaged bunding, structural beams and pipelines. The process involves BHP Nickel inspecting the entire plant, providing to PIM a list of 'extreme' repairs required and PIM attending to the work in a scheduled manner.

43 Mr Kennedy's statement proceeded to describe the work undertaken for CSBP Kwinana Industrial Complex; Tronox Titanium Dioxide Pigment Processing Plant at Kwinana; Newcrest Gold Mine and processing facility at Telfer, Newmont's Boddington Gold Mine, Roy Hill Iron Ore Mine, Kalgoorlie Consolidated Gold Mine and the Fremantle Port Container Terminal. In very general terms, it involved maintenance services either on a shutdown or daily basis or project work involving repairing or replacing existing equipment.

44 In summary, the works undertaken by PIM's employees is either or both of the repair, maintenance or replacement of established plant and equipment or the components of the plant and equipment. It is done on either a planned preventative basis or to deal with repairs, maintenance or replacements as issues arise. The work is conducted on the plant and equipment of PIM's clients on the clients' premises at mines, refineries, smelters, factories and at a port. Some, but a smaller part, is work undertaken at PIM's workshops to support the work at clients' premises.

Statutory construction

45 The requirement in this application is to ascertain the meaning of terms used in the Act, in particular the term 'construction industry' and the terms used within that term of 'on a site' or 'on site'. It is then necessary to consider whether PIM is an 'employer' under the Act.

46 In ***Certain Lloyd's v Cross*** [2012] 248 CLR 378 at 388, French CJ and Hayne J set out 'some basic principles' in respect of construing a statute and giving meaning to it. Their Honours said:

> It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reason of the plurality in ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue***:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself . Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> The context and purpose of a provision are important to its proper construction because, as the plurality said in ***Project Blue Sky Inc v Australian Broadcasting Authority***, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in ***Project Blue Sky***:
>
> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to read in a way that does not correspond with the literal or grammatical meaning.
>
> To similar effect, the majority in ***Lacey v Attorney-General*** (Qld) (33) said:
>
> > Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.
>
> (Footnote omitted.) The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.
>
> A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. As Spigelman CJ, writing extra-curially, correctly said:
>
> > Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.* (Emphasis added)
>
> And as the plurality said in ***Australian Education Union v Department of Education and Children's Services***:
>
> > In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose
>
> [23 – 26](Footnote omitted).

47 Second Reading speeches and Explanatory Memoranda are no substitutes for the text of the legislation. In ***Saeed v Minister for Immigration and Citizenship*** [2010] 241 CLR 252; 2010 HCA 23; 267 ALR 204 French CJ, Gummow, Hayne, Crennan and Kiefel JJ dealt with the legislative intention being manifested by the legislation itself. Their Honours said:

> As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative 'intention' is to be ascertained, 'what is involved is the 'intention manifested' by the legislation'. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.
>
> …

> Regard was had by the Full Court in this case to what was said in *Re Bolton; Ex Parte Beane*. Nevertheless, it is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident Compensation Commission* it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction [31, 33].

48 In ***R v Bolton; ex parte Beane*** [1987] 162 CLR 514, the Court said '(t)he words of a Minister must not be substituted for the text of the law … (t)he function of the Court is to give effect to the will of Parliament as expressed in the law'. See also ***Harrison v Melham*** [2008] 72 NSWLR 380 at [12] where Spigelman CJ noted:

> I wish to express my agreement with the analysis by Mason P of the House of Lords judgment in ***Pepper v Hart*** [1993] AC 593. Statements of intention as to the meaning of words by ministers in a Second Reading Speech, let alone other statements in parliamentary speeches are virtually never useful. Relevantly, in my opinion, they are rarely, if ever, "capable of assisting in the ascertainment of the meaning of the provisions" within s 34(1) of the *Interpretation Act* 1987. I only refrain from using the word "never" to allow for a truly exceptional case, which I am not at present able to envisage.

(See also Mason P at [172]).

49 In the same way, judicial statements do not replace the proper construction of the legislation. In ***Ogden Industries Pty Ltd v Lucas*** [1968] 118 CLR 32, Lord Upjohn said at [39]:

> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be laid down by the judge in construing the Act rather than found in the words of the Act itself.

50 This is confirmed by Basten JA in ***AMT Planning Consultants Pty Ltd t/as Coastplan Consulting v Central Coast Council*** [2018] NSWCA 289 at [31] where his Honour said '(i)t is not appropriate to apply a judicial exegesis in place of the statutory language.'

51 Therefore, the first step must be an examination of the language used in the Act, that is the text. The language used within the statute must be the basis for the identification of the statutory purpose and legislative intent, not a subjective purpose or intent either described by the legislature or by preceding decisions of courts, albeit that precedents may provide confirmation or give guidance where the circumstances are appropriate.

CONSIDERATION

The Act – the text and structure

52 The Act is described in its title as 'An Act to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes'. It does not otherwise express a purpose or policy.

53 However, inferences may be drawn from the Act read as a whole. The scheme of the Act provides for the establishment of the Board for the purposes of the Act (s 5). The Board carries out the administration of the Act (s 14). Employers and employees, who meet the definitions in the Act, are registered with the Board (Part IV – Registration). An employer is required to keep certain records and make reports to the Board, and to make payments to the Board as contributions calculated by reference to the ordinary pay payable to each employee (s 31).

54 Each person registered as an employee under the Act is entitled to specified periods of long service leave in respect of service in the construction industry, and is entitled to be paid ordinary pay for such leave (s 21). Service in the construction industry is not required to be continuous nor is it required to be with one employer (s 21(2)(c)).

Meaning of construction industry and site

55 An 'employee' is defined in s 3(1) as:

> (a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or
>
> (b) an apprentice;

56 There is no dispute about that definition in this matter. The parties agree that as at July 2018, PIM employed employees under contracts of service who performed work described in the prescribed classifications in the *Construction Industry Portable Paid Long Service Leave Regulations 1985* (WA) (Regulations), including classifications from a range of awards that are specified in the agreed facts. In those circumstances, the employees meet the definition of employee under the Act.

57 An 'employer' is defined amongst other things, but relevantly for this purpose, as 'a natural person, firm or body corporate who or which engages persons as employees in the construction industry (s 3(1)).

58 The first point I make then is that an employer, regardless of the corporate form it takes, is defined by reference to the industry in which those persons who it engages as employees work. That is, it engages employees in the construction industry as defined. It does not define them by reference to the industry in which the employer is engaged, but rather by reference to the employees. It does not define the employer as one engaged in the construction industry, except in respect of the exclusions in (f), which I will deal with later.

59 As noted by Ipp J in ***Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board*** [1995] WASC 718; (1995) 62 IR 412 at [413] (*Aust-Amec*), '(t)he definition of 'employee' therefore has a different ambit to that of 'employer'. The consequence of this that there may be persons who are 'employees' within the meaning of the Act who are not employed by 'employers' within the meaning of the Act.'

60 PIM describes itself as being in a particular industry. For the purposes of the Act, the issue is whether the employees are in the construction industry. The meaning of that term does not rely on common understandings or dictionary definitions of *construction industry*. It means, for the purposes of the Act, what the Act says it means. The construction industry is defined by the Act in the following way:

> ***construction industry*** *means the industry –*
>
> (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following –
>
> (i) buildings; and
>
> (iia) swimming pools and spa pools; and
>
> (ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and
>
> (iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and
>
> (iv) works for the storage or supply of water or for the irrigation of land; and
>
> (v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and
>
> (vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and
>
> (vii) bridges, viaducts, aqueducts or tunnels; and
>
> (viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and
>
> (ix) pipelines; and
>
> (x) navigational lights, beacons or markers; and
>
> (xi) works for the drainage of land; and
>
> (xii) works for the storage of liquids (other than water) or gases; and
>
> (xiii) works for the generation, supply or transmission of electric power; and
>
> (xiv) works for the transmission of wireless or telegraphic communications; and
>
> (xv) pile driving works; and
>
> (xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and
>
> (xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and
>
> (xviii) fences, other than fences on farms;
>
> (b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;
>
> (c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,
>
> but does not include –
>
> (d) the carrying out of any work on ships; or
>
> (e) the maintenance of or repairs or minor alterations to lifts or escalators; or
>
> (f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation;

61 The term 'on a site' is used twice within the definition. The term 'of sites' is used once and 'on site' twice. As noted in ***Commonwealth v Baume*** (1905) 2 CLR 405, sense is to be made of the whole statute, and 'no clause, sentence, or word shall prove superfluous, void, or insignificant' (p 414 per Griffith CJ). These terms of 'on a site', 'of sites' and 'on site' must have work to do. None of the three terms is defined in the Act. The first step must be to ascertain the meaning of the word common to them all of 'site'.

62 The Macquarie Dictionary defines 'site' as:

> ***Noun*** 1. the position of a town, building, etcetera., especially as to its environment.
>
> 2. the area on which anything, as a building, is, or has been or is to be situated.
>
> …
>
> ***Verb (t)*** (sited, siting)
>
> 4. to locate; place; provide with a site: ***they sited the school next to the oval***.
>
> [Latin ***situs*** position]

63 It also records terms incorporating 'site' as including building site, camp site, dating site, … sacred site … site specific', and 'offsite' and 'onsite'.

64 The Macquarie Dictionary also defines 'situate' as 'to give a site to; locate,' as an adjective. It defines 'onsite' as, an adjective, 'located or done at a particular site: an onsite inspection'.

65 The Australian Concise Oxford Dictionary defines site as, (a noun and verb):

1. the ground chosen or used for a town or building.
2. a place where some activity is or has been conducted (camping site; launching site).

66 It is also 'locate or place' and 'provide with a site'.

67 The Shorter Oxford English Dictionary on Historical Principles 3rd edition 1973 provides a helpful expansion, beyond merely a place, to include '(t)he situation or position of a place, town, building, etcetera', and 'the ground or area upon which a building, town, etcetera., has been built, or which is set apart for some purpose. Also, a plot, or number of plots, of land intended or suitable for building'.

68 Therefore, the preliminary words in the definition of construction industry mean that of the industry of carrying out, *at a position, area, location, place or situation,* a range of activities being the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to a range of buildings, structures, works etcetera, and for specified purposes or works.

69 The definition of construction industry is in two parts which need to be read together. The first part, disjunctively, includes the activities of construction, erection, installation etcetera in the preamble of paragraphs (a) and (b). The second part is made up of types of things to which those activities are performed, such as buildings, swimming pools, roads, etcetera. These, too, are described disjunctively. I propose to set out a number of examples of what is included in the construction industry when one item from the first part and one from the second are read together as the structure of the definition requires. The first example is the construction of buildings; the second, the erection of a breakwater; the third, the renovation of works for the storage or supply of water.

70 Using this approach, the construction industry also means the carrying out, at a location, position, place or situation, of the maintenance of or repairs to, works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and bi-products from materials. This last example is just as valid, then, as any of the others. Each of these activities is carried out on a site, or at a place.

71 In ***Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board*** (2001 WAIRC 02000; (2001) 81 WAIG 665) at [26] – [27], Smith C (as she then was) noted that the applicant contended 'that s 3(1)(a) of the Act defines the 'construction industry' to include maintenance or repairs only where the maintenance or repairs are carried out on a site where construction work is carried out'. The learned Commissioner noted Ipp J's observations in ***Aust-Amec***, and said:

> The definition is as Ipp J in ***Aust-Amec*** at 419 points out, complex. However the construction suggested by the Applicant of the definition of 'construction industry' is in my view erroneous. The opening words of s 3(1)(a) are plain and unambiguous. The opening words are plainly expressed as disjunctive, so that a 'site' is to be construed as a place where any activities are carried out, that can be characterised as, construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the categories in subparagraphs (i) to (xviii) of s 3(1)(a) of the Act.

72 I respectfully agree with those observations.

73 Everything and every activity is located or done somewhere. This gives the term 'on a site' or 'on site' no work to do that adds any meaning to the legislation. If the meaning of 'on a site' is at a 'location', then it would have no purpose.

74 Rather, I conclude that, read in context, 'on a site' means the site at which the activities in the first part of the definition are performed to the buildings, swimming pools, structures etcetera or works listed in (i) – (xviii). Work performed away from where those buildings, swimming pools, roads etcetera and works are located (that is, away from the site or off-site) is not work in the construction industry within the meaning of the Act.

75 While paragraph (b) of the definition of construction industry uses the phrase 'of carrying out of works on a site of *the* construction, erection, etcetera and paragraph (c) is 'of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site', the meaning I suggest can be consistently applied throughout the definition of construction industry.

76 The meaning I have attributed to the term 'on a site' is also consistent when applied to the exclusion in paragraph (f) of 'the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation'.

77 The scope of the construction industry as defined in s 3 is very broad. It encompasses those activities normally considered to be construction work such as, explicitly, construction, erection, reconstruction, re-erection and demolition. However, it also encompasses installation, renovation, alteration and maintenance of or repairs to items. All of those activities form part of the construction industry where they are done to buildings; swimming pools and spa pools; roads, railways etcetera; breakwaters; works for the storage of water etcetera.

78 In paragraph (b), it includes work on the site of the construction etcetera for the fabrication, erection or installation of plant, plant facilities or equipment for the buildings or works. It includes that work normally performed on site but which is not necessarily carried out on site. It is only by reference to the exclusions in paragraphs (d) – (f), but most particularly paragraph (f), that the industry of the employer is considered, that is, where the work of 'maintenance or repairs of a routine or minor

nature by employees of an employer … who is not substantially engaged in the industry described in this interpretation', (that is, the construction industry) which the definition sets out in detail.

Work location – other decisions

79 It is helpful to look at other decisions to see if they add to this construction or throw a different light on the terms construed. The only decision of a superior court in Western Australia about the locations of work for the purposes of the Act is that Ipp J in ***Aust-Amec***. The plaintiffs were businesses which undertook a range of testing services for clients at either the client's premises or in the plaintiff's premises. They sought declaratory relief in relation to the Act.

80 Aust-Amec Pty Ltd had three divisions. The first to be examined by his Honour was Metlab Mapel. It carried on the business of providing non-destructive testing, heat treatments, consultant metallurgy, mechanical testing and inspection and expediting services. Some of the non-destructive testing may be on existing plant or in the course of construction. The work also included testing machinery for the owner of the machinery or the insurance company to determine why the various components had failed. It also tested mining equipment that was being dismantled for maintenance purposes. His Honour noted that:

> Overall, approximately 60 to 70 per cent of Metlab Mapel's work is carried out on site, rather than at its own laboratory or at its own workshop. On specific site darkrooms and other facilities are used by the technicians concerned and once the material has been tested on site they return to the office with films where other technicians interpret them and reports are written (415).

81 His Honour then distinguished between 'Shop heat treatment' carried out at Metlab Mapel's premises and 'on-site heat treatment'. Other work was done at Metlab's office, while inspection services of welding was carried out on site (416).

82 SRC Laboratories was the next division of Aust-Amec considered by Ipp J. He noted that this business undertook testing of soil, rock, concrete and other civil engineering materials. These materials were used by SRC's clients in the construction of roads, airport runways, dams, and other civil engineering projects. 'Sometimes employees of SRC Laboratories make field excursions to collect samples of materials' which were tested at SRC's main laboratory. Alternatively, SRC 'establish[ed] temporary testing laboratories at construction sites, but largely its work is carried out away from the site at its permanent laboratory' (416).

83 Wishaw Engineering Services was the third of *Aust-Amec's* divisions. It carried out 'condition monitoring and vibration analysis of machinery at operational sites'. Its employees attended its client's building construction sites to undertake testing while the equipment was being commissioned.

84 ETRS Pty Ltd was another of the plaintiffs in ***Aust-Amec***. It carried out four types of non-destructive testing for clients. Some of the testing was undertaken at its own laboratory and some at the client's premises or other steel fabrication companies, some at construction sites.

85 Passrust Pty Ltd was the third plaintiff and it undertook non-destructive testing and visual inspection. Non-destructive testing was typically performed:

> (a)t its clients' premises, whether that is the site at which components are fabricated, or premises at which equipment is in use. On some occasions, Passrust will carry out testing on equipment which is being installed at construction sites. A small percentage of tests is [sic] conducted at its own laboratory, that is when components are sufficiently small for them to be transported. The interpretation of the results and the preparation of reports is done at its office.

86 Passrust also undertook 'condition monitoring' of equipment constructed by or on behalf of its clients. This work was 'carried out on site, that is, either at the site at which components are fabricated or the premises at which equipment is in use', … 'on site at the client's premises' (418).

87 In his considerations, Ipp J did not expressly give a particular meaning to the term 'on site' or 'on a site'. However, it is clear, without room for doubt in my mind, that his Honour's descriptions of where work was performed distinguished only between the employers' premises and the employers' clients' premises in determining whether the work was on site or on a site. He described the sites concerned. His Honour made 'specific reference to whether those businesses are carried out on 'a site' or at the plaintiffs' premises, as the place where the activities in question are performed is accorded substantial significance in the definition of 'construction industry' under the Act' (414).

88 In respect of Metlab Mapel, his Honour noted that part of the non-destructive testing was undertaken 'on site' and films were taken to Metlab's office for interpretation and preparation of reports. Some related to materials used in the course of construction of buildings, plant and equipment, or on pipelines, vessels and tanks on new work or existing plant.

89 The remainder of his Honour's descriptions of the locations where work was performed continued the distinction between on site (at the client's premises) or where the client was working, and at the employer's premises. The site could be a location where new buildings, structures or civil works were being undertaken, or new equipment or machinery being installed, commissioned and tested. The site could also be an already operational mine, building, structure or factory where components were being fabricated or equipment manufactured.

90 In respect of Metlab Mapel's employees, his Honour concluded that those employees who carried out shop heat treatment 'carried out at Metlab Mapel's premises (and not 'on a site') and for that reason alone those employees do not perform work in the construction industry' (423).

91 In respect of ETRS's mechanical testing business, his Honour noted that 'as all jobs are performed in its own laboratory, none of its employees engaged in that industry perform work 'on a site' and in my view none is in the construction industry' (425).

92 While Ipp J distinguished between work on the employer's premises and 'on a site', in my respectful view, that is not the complete answer. It is part of that answer in circumstances where the work is performed on the premises of the contractor or service provider rather than on the premises of the client. The work is construction work if it is on the site of the works. In my interpretation, 'on a site' would be better described as 'on the site of' the construction, erection etc. This is confirmed by his Honour's use of the example of a bricklayer performing work on his employer's premises, when his employer is not engaged in the construction industry.

93 The Board refers to my decision in ***Sparks N Security Pty Ltd and Ritzline Pty Ltd trading as IC Cool Refrigeration, Mechanical and Electrical Services v Construction Industry Long Service Leave Payments Board 2017*** (97 WAIG 366) (***Sparks N Security***) as applying the same approach as was used by Ipp J in ***Aust-Amec***. In that case, permanent employees installing air conditioning units at established residential homes and apartments were held to be working on site and to be engaged in the construction industry.

94 The Board also refers to comparable legislation, whilst in different terms, in South Australia, the *Construction Industry Leave Service Act 1987* (SA). In ***FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board*** ([1992] SAIRC 20; (1992) 59 SAIR 381) the appellant was an electrical business carrying out electrical maintenance and repairs at its customers' established premises. Parsons IM noted the breadth of the definitions in the SA Act and found that:

> (t)he purpose of these definitions is to provide the broadest possible definition of building work and electrical and metal trades work which form the components of the construction industry. Rather than giving the Act a narrow interpretation, the words used indicate that the intention of Parliament was to give 'construction industry' a comprehensive definition.

95 Her Honour also determined that '(t)he phrase 'building site' is not confined, in this Act, to the place at which some new building work is being performed, it simply identifies a place at which work to which the Act applies is carried out, namely a place other than the employers' place of business. Similarly, the reference to 'on site' in … the definition of electrical and metal trades work is not confined to the site of new building work'.

96 These decisions are not inconsistent with the approach that I have applied in this interpretation, even though in this matter I have refined what I decided in ***Sparks N Security***.

Itinerant work and the mischief to be addressed

97 PIM says that it is uncontroversial that 'the mischief which the Act attacks is the difficulty that employees in the construction industry face in qualifying for long service leave because of the itinerant nature of the work in that industry" (Applicant's Outline of Submissions [10].)

98 The issue of the itinerant nature of workers was first referred to in the Second Reading Speech for the ***Construction Industry Portable Paid Long Service Leave Bill*** (Assembly, Tuesday 17 September 1985 (1026)). It was noted that:

> Cabinet approved the establishment of a scheme of portability of long service leave entitlements within the building and construction industry in WA (1026).

99 Reference was made to the nature of the industry being such as to 'effectively (deny) the opportunity of enjoying the entitlement' (1028). 'The short term nature of employment contracts' (1029), and the 'intermittent nature of employment in the industry' were also noted (1030).

100 However Parliament did not use the words 'building and construction industry' in the statute. Nor did it make explicit in any statement of object or purpose that the sites referred to were the sites of new building or construction works. It defined the construction industry in such a way that goes well beyond the ordinary meaning of 'building and construction industry' as it would normally be understood.

101 Had Parliament meant to limit the Act to employees engaged in short term contracts or intermittent work, or to such employment on building sites, it could easily have expressed that intention. However, it did not.

102 I note that the Commission in Court Session's decision in ***Construction Industry Long Service Leave Payments Board v Positron Pty Limited*** (*Positron*) (1990) 70 WAIG 3062 at 3065 took account of the issue of itinerancy. In that decision, Martin C with whom Kennedy and Parks CC agreed, said that the exclusion of

> any regular maintenance employee of an employer substantially engaged in the retail trades for example who utilised his or its regular maintenance employees on a construction project, say the remodelling of a showroom, in the Act's 'broad' definition 'the construction industry' and such a person not being the itinerant construction worker to whom the Act is obviously directed.

103 The Board of Reference in ***Centurion Industries Limited v Construction Industry Long Service Leave Payments Board*** (1991) 71 WAIG 1300, at 1301, referred to the comment quoted above from ***Positron***. It then concluded that it was 'clear that none of the employees of Centurion Industries Ltd could be considered to be … 'the itinerant construction workers to whom the Act is obviously directed.'

104 In 1992, in ***Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd*** (unreported, Library No 920130, 4 March 1992) (***Precision***), Owen J considered the definition of 'construction industry' contained in the Act. The relevant parts of the definitions are unchanged from that time. However, his Honour expressed the view of the purpose of the legislation and the mischief it aimed to address as being related to 'the itinerant nature of workers' in the construction industry meaning that they had difficulty in qualifying for long service leave.

105 However, I respectfully note that the Act itself does not express that purpose, and this view has, in my view, placed artificial boundaries around the description of the industry which is not actually reflected in the Act. The conclusion that the Act is directed to itinerant workers is, in my respectful opinion, in error. It creates a priori assumption. Rather, it is necessary to derive the purpose from what the legislation says. Whether the nature of the work, the employees and employers meet the definitions in the Act are the determining factors, rather than a subjective purpose not expressed in the Act.

106 The purpose of the Act, in accordance with its title and other clauses to which I have referred, is to create one long service leave system to apply to employees who work in the construction industry. It is and can only be that industry as defined by the statute.

107 As I noted earlier in these Reasons, the Act provides a definition that encompasses the wide variety of activities which are performed to a range of buildings, structures and works. The Act provides that it is service in the industry not service with the employer that counts (s21(1). It does not have to be continuous service (s21(2)(c)), but it may be (s21(2)(d)). An employee may serve one or more employers for lengthy periods of times, even to the point of accruing sufficient service to accrue a period of leave with one employer.

108 There is no requirement in any of the terms of the Act that either the place of work varies regularly or that the employment itself is of a limited duration.

Maintenance work as part of "construction industry"

109 PIM says that the inclusion of maintenance, repairs and alterations in the definition of "construction industry" does not undermine its position. This is said to be because those things are often performed on a construction site before the construction project is completed. That may be so, however, the Act does not limit the maintenance, repairs or alterations in this way. Once again, if Parliament had intended that maintenance, repairs and alterations be limited to that done during the construction phase, it could have said so in the text. The structure of the definition of "construction industry" would, in those circumstances, have been quite different. Rather, it has included activities, along with maintenance of or repairs to the buildings, structure and works which follow, and has not specified that those activities relate only to the building or construction phase.

Is the work of PIM's employees for PIM's clients work in the construction industry as defined?

110 Earlier, I gave four examples of how the two parts of the definition of construction industry work together. The fourth example was the maintenance of or repairs to works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and bi-products from materials.

111 The SOAF and Mr Kennedy's statement indicate that this is the nature of the work undertaken by PIM at Alcoa Alumina Refineries; BHP Nickel Refinery – Kwinana; CSBP Kwinana Industrial Complex, and the other locations of the operations of its clients. The work at Fremantle Port Container Terminal is not in this category. It is repairs of and maintenance to four large gantry cranes located on the wharf, which load and unload shipping containers from vessels.

112 I observe that throughout his descriptions of the work undertaken by PIM and its employees, Mr Kennedy referred to the work being undertaken on site or at the location of PIM's clients.

113 Given the meaning I have attributed to the term 'on a site', or 'on site', in the context of the definition of construction industry, being on the site of the construction etcetera, this would mean that the types of works described in paragraphs (i) – (xviii), while not necessarily being within the generally accepted understanding of the construction industry, are part of the construction industry for the purposes of this Act. It does not require that the work be undertaken on the site of the construction of any buildings or structures. It merely requires that it be on a site where any of the activities in the first part of the definition are being undertaken.

114 The contracts PIM has with its major clients use this language. For example Attachment A2, is a 'Supply Contract for On-Site Service'. Clause 3 sets out the Provision of Services. At 3.1(a), it records that 'The Supplier agrees to provide the Services to Alcoa at, unless otherwise agreed, the Site.' 'Site' is defined in Clause 1 – Interpretation as meaning 'the site or sites specified in Schedule 2.' Schedule 2 lists the sites as 'Alcoa's Sites at Kwinana, Willowdale, and Bunbury Port'. The changes to the contract refer to the provision of 'On-site Services'.

115 The BHPB Nickel West Contract (Attachment A10) contains 'Framework Agreement Specifics'. Apart from setting out the name of the contractor and the company and other details it sets out the 'Sites' as being Kwinana Nickel Refinery and other sites, and contains definitions, including of Site which 'means any or all the places described as such in the Framework Agreement Specifics, as the place or places for the performance of the Services under a Contract', (cl 1 – Definitions).

116 Ravensthorpe Nickel Operations, etcetera, 'and any other site in Western Australia as described and specified in the contract'. In Clause 1 – Definition, it defines 'Site' as meaning 'any or all of the places described as such in the Framework Agreement Specifics, as the place or places for the performances of the Services under the Contract'.

117 The contract with Wesfarmers Chemicals, Energy & Fertilisers for the provision of maintenance services records in Part 1 that 'the Company requires maintenance services to be carried out from time to time at the Site' (A14). Site is defined as 'the site nominated in Part 4 where the work is carried out and any further area as may be designated by the Responsible Officer" (219).

118 Other contracts have similar references. The contracts also contain references to 'site inductions', 'the site at which the work is conducted' or 'the site controlled by the client' of PIM.

119 Attachment A18 is a contract with Tiwest Pty Ltd. It defines 'Site' as meaning 'any place, which is occupied by Tiwest and at which any part of the Works will be carried out'. The 'Works' means the provision of 'Labour Hire Services'. The contract makes a number of references to the 'Tiwest Site'.

120 While not necessary or relevant to the statutory construction, I note that what these contracts do is confirm that the use of the word in the Act is reflected in the practice of industry, in this case the various industries to which PIM contracts. Those places where the client requires work to be done is on a site, that is, a place or location. The work at those sites, performed by the employees of PIM, is maintenance and repairs of various sorts.

121 In that context, it does not require that the work be done on a construction site. The language used in the contracts is also consistent with the site being away from the employer's premises but the location where the work is done. The term makes sense in the context in which it is used.

122 Therefore, the answer to question 1 is yes.

The re-enactment presumption – does it apply, and does it support the construction?

123 The Board says that the history of decisions of the Commission and Boards of Reference as well as ***Aust-Amec*** are significant because:

> they indicate the common view of those members of the Commission and Boards of Reference on the question which the Applicant now raises, but also because it may be presumed that, when the legislation was comprehensively reviewed and amended in 2011, (*Industrial Legislation Amendment Act 2011*) (WA), (Part 2) the legislature was content with the understanding consistently applied over many years by the Commission and Boards of Reference (footnote omitted).

124 Pearce and Geddes' *Statutory Interpretation in Australia* (8th ed) sets out the history, the ebbs and flows of support and exceptions to this presumption. They include whether the presumption applies only to the decisions made by superior courts (***Northrope v City of Hawthorn*** [1941] VRL 178; (1941) ALR 200) or whether it applies to decisions of other courts and specialist tribunals. There is also the issue of ascertaining the likelihood that Parliament, the minister or the department concerned knew of a judicial interpretation of language that had been repeated in a later enactment.

125 In 1994, the High Court in ***Re Alcan Australia Ltd; ex parte Federation of Industrial, Manufacturing and Engineering Employees*** (1994) 181 CLR 96 (106 – 107); 123 ALR 193 at (200)) unanimously applied the re-enactment presumption. At 106, the Court said "(t)here is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]', although the validity of that proposition has been questioned' (footnotes omitted)'.

126 However, the Court said that in that case, the presumption was strengthened by the legislative history of the Act it was considering, namely the *Industrial Relations Act 1988* (Cth). In that case, prior to the enactment of the Act, the Committee of Review into the Australian Industrial Relations Law and System recommended that the jurisdiction of the Australian Industrial Relations Commission be extended to overturn a previous High Court decision in ***Reg v Portus; ex parte Australia & New Zealand Banking Group Ltd*** [1972] 127 CLR 353. It went on to note, however, that 'Parliament adopted, in almost identical terms, the language of the former Act'. The Court found that Parliament in that case did not intend to overturn ***Reg v Portus.***

127 After noting the High Court decision in ***Re Alcan*** the learned authors, Pearce and Geddes, go on to note:

> The ***Alcan Australia*** case arose under the *Industrial Relations Act 1988* (Cth). Two years after it was decided, the *Workplace Relations Act 1996* (Cth) was enacted. In ***Electrolux Home Products Pty Ltd v Australian Workers' Union*** [2004] HCA 40; (2004) 209 ALR 116 at [81] McHugh J noted the similarity between a provision in the earlier Act that had been interpreted in the ***Alcan Australia*** case and a provision in the later Act and added:
>
> > The principle that the re-enactment of a rule after judicial consideration is to be regarded as an *endorsement* of its judicial interpretation has been criticised, and the principle may not apply to provisions re-enacted in 'replacement' legislation [see, eg, ***Flaherty v Girgis*** (1987) 162 CLR 574 at 594; 71 ALR 1 at 14 per Mason ACJ, Wilson and Dawson JJ; ***Zickar v MGH Plastic Industries Pty Ltd*** (1996) 187 CLR 310 at 329; 140 ALR 156 at 169 per Toohey, McHugh and Gummow JJ]. However, industrial relations is a specialised and politically sensitive field with a designated Minister and Department of State. It is no fiction to attribute to the Minister and his or her Department and, through them, the Parliament, knowledge of court decisions – or at all events decisions of this Court – dealing with that portfolio. Indeed, it would be astonishing if the Department, its officers and those advising on the drafting of the Act would have been unaware of ***Re Alcan***.
>
> Gleeson CJ (at [7]-[8]), Gummow, Hayne and Heydon JJ (at [161]) and Callinan J (at [251]) reached similar conclusions; cf Kirby J at [206].
>
> In ***Workcover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation*** [2002] NSWIRComm 28; (2002) 117 IR 99 at [62] Haylen J observed that the criticism of the presumption that were based on its artificially applied with less strength 'where Parliament deals with statutes administered by specialist tribunals or where there is a legislative history of frequent review and amendment'. Numerous examples of the application of the presumption are to be found in the decisions of the Australian Industrial Relations Commission and state Industrial Relations Commissions. See ***Paul Fishlock v Campaign Palace Pty Ltd*** [2013] NSWSC 531 at [317]-[319]. See also the discussion of ***Australian Capital Territory (Chief Minister's Department) v Coe*** [2007] ACTSC 15 at 3.47. In more recent examples of the possible application of the re-enactment presumption the courts have considered the subject matter of the legislation and the context of its enactment, looking for indications as to the likelihood that parliament, the minister or the department knew or would have known of a judicial interpretation of language that has been repeated in the later enactment. See ***Informax International Pty Ltd v Clarins Group Ltd*** [2012] FCAFC 165 at [174]; ***R v Aubrey*** [2012] NSWCCA 254; (2012) 82 NSWLR 748 at [48]-[50] per Macfarlan JA, with whom Johnson and Davies JJ agreed at [64] and [65] respectively (p 143 - 144).

128 In ***Minister Administering the Environmental Planning and Assessment Act 1979 v Carson (Carson)*** [1994] 35 NSWLR 342 (*Carson*) at (362) – (363) Young AJA, with whom Kirby P and Priestly JA agreed on this point, observed:

> Then it is put that parliament must have been intending to legislate according to the then existing state of the law which must have been as laid down by Master Allen, as he then was, in ***T A Field's*** case. There is, of course, some basis for that submission. 'There is a presumption, useful in statutory interpretation, that where a provision of legislation has been passed upon by authoritative decisions of the courts and is later re-enacted, Parliament can be taken, in the absence of a clear intention to the contrary, to know and accept the interpretations given in the legislation': ***Public Service Association of New South Wales v Industrial Commission of New South Wales*** (1985) 1 NSWLR 627 per Kirby P. That presumption applies whether the judicial decisions were decisions of the courts or tribunals ordinarily administering that Act, such as the Industrial Commission in the case I have cited or decisions at District Court level or master level, and in so far as ***Northrope v City of Hawthorn*** [1941] VLR 178 purported to decide the contrary, it should not now be followed.
>
> However, for the principle to apply there must be a series of judicial decisions which make it abundantly clear that a particular view of the preceding legislation has been followed.

129 As noted by Allsop CJ in ***Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union*** [2019] FCAFC 84; (2019) 288 IR 145 at [155]: '(t)he strength of the presumption will depend on the circumstances'.

130 Therefore, I am of the view that if it can be established that Parliament has re-enacted the legislation in terms that continue to apply the approach taken by superior courts as well as by the Commission and Boards of Reference, which deal with the definition of 'on site' or 'on a site', and that Parliament was aware of those decisions at the time, that this has the effect of supporting that interpretation. This, however, does not supplant the need for the Commission to actually apply its own consideration in construing the definition on this occasion by reference to the text, context, purpose and enactment history. It is in this context that the enactment history is relevant.

131 The decision in ***Positron,*** made in 1990, was that maintenance work in the treatment plant of a gold mine and on a mobile plant thereon was within the construction industry as defined. The Board noted that one of the amendments made to the Act in 2011 was to clarify that labour hire agencies were included in the definition of 'employer'. It was said that the amendment would remove any ambiguity. The decision in ***Positron*** was cited and was again referred to in the course of debate on the Bill (Hansard Assembly, 1 November 2011, p 8676, F M Logan; see also Hansard Council, 19 October 2011, p 8311, Hon Alison Xamon).

132 The Board also notes the exchange in Parliament between the Minister for Transport, Mr Buswell and the Member for Cockburn, Mr Logan where Mr Buswell referred to a worker going to 'a mine site or a construction site' requiring the employer to make contributions under the Act (Hansard Assembly, 1 November 2011, p 8673).

133 I conclude that in 2011, when Parliament amended the definition of employer, it was aware of a decision which interpreted the construction industry as going beyond the building construction industry, to maintenance work on sites including mine sites. I note that by that time, the decision in ***Aust-Amec*** had also been made. There is no evidence that Parliament or the Minister were specifically aware of that decision. However, this is likely, in the context of the comments made in ***Electrolux Home Products Pty Ltd v Australian Workers Union*** [2004] HCA 40; (2004) 209 ALR 116 and in ***Carson***.

134 This assists in confirming my earlier conclusion regarding the scope and purpose of the Act, for the purposes of defining the term *on a site.*

Whether if the majority of the work performed by the applicant is maintenance work carried out at the applicant's clients' premises, the applicant is 'substantially engaged in the industry described in this interpretation' such that paragraph 3(f) of the definition of construction industry in the Act does not apply and the question of whether the maintenance work is of a routine or minor nature does not arise?

135 This question appears to be framed on the premise that the majority of the work is of a routine or minor nature. It then requires determination of whether PIM is or is not substantially engaged in the construction industry as defined.

136 Although PIM describes itself as being engaged in the provision of maintenance services predominantly to the mining and resources sectors, the construction industry, as defined by the Act, encompasses the carrying out of maintenance of or repairs to works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and bi-products from materials. It also encompasses the renovation or works of the kind set out in (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings of works. This meets the description of almost all of the work performed by PIM for its clients. I have set out in considerable detail in [6] to [44], the work described in the SOAF and Mr Kennedy's statement for those clients listed in [26] of these Reasons. With the possible exception of work for Patrick Stevedores Operations Pty Ltd, all of this work fits the description of work falling within the construction industry.

137 Therefore, PIM fits the description of being 'substantially engaged in the industry described in' the interpretation of 'construction industry' set out in s 3. To use the language of the Act, although it involves using a double negative, PIM does not then meet the exclusion of being 'not substantially engaged in the 'construction industry' as defined, and the exclusion in paragraph 3(f) does not apply.

Conclusion

138 The answer to question 1(a) is yes, and the exclusion in 3(f) does not apply.

139 As I understand the parties' agreed position as to the various combinations of answers to the questions posed in [3] of these Reasons, my conclusions mean that the Board's decision should be affirmed and the application be dismissed. The parties are asked to confirm or otherwise this understanding within 7 days.

2019 WAIRC 00873

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 12 JULY 2018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD ACN 133892350
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 16 DECEMBER 2019
FILE NO/S	APPL 58 OF 2018
CITATION NO.	2019 WAIRC 00873

Result	Order made
Representation	
Applicant	Mr S M Davies SC and with him Mr G Giorgi of counsel
Respondent	Mr J B Blackburn SC and with him Ms R Harding of counsel

Order

HAVING HEARD Mr S M Davies SC of counsel and with him Ms R Harding of counsel on behalf of the applicant and Mr J B Blackburn SC and with him Ms R Harding of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)*, hereby orders –

1. That the respondent's decision to require the applicant to register as an employer under the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)* be affirmed, and
2. That the application be dismissed.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

SECTION 23—Miscellaneous matters—

2019 WAIRC 00892

APPLICATION TO THE COMMISSION – UNSPECIFIED GROUNDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEEJO GEORGE
	APPLICANT
	-v-
	WA HEALTH
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 20 DECEMBER 2019
FILE NO/S	APPL 46 OF 2019
CITATION NO.	2019 WAIRC 00892

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	Mr A Chapple and with him Ms M Di Lello

Order

There being no appearance for the applicant and having heard from Mr A Chapple and with him Ms M Di Lello on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2019 WAIRC 00877

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00877
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	WEDNESDAY, 18 DECEMBER 2019
FILE NO.	**:**	U 22 OF 2019
BETWEEN	**:**	ELISABETTA MARRAPODI
		Applicant
		AND
		MR ZANE CHARLES NORMAN
		TREWIN NORMAN & CO.
		Respondent

CatchWords	**:**	Harsh, opressive and unfair dismissal, whether dismissal or resignation, no dismissal at initiative of employer - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr J Hammond
Respondent	**:**	Mr M Cox
Solicitors:		
Applicant	**:**	Hammond Legal
Respondent	**:**	MDC Legal

Case(s) referred to in reasons:

Gunnedah Shire Council v Grout (1995) 62 IR 150; (1995) 134 ALR 156

J L v Haydar Family Restaurants t/a McDonalds [2003] WAIRC 09489; (2003) 83 WAIG 3303

Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf (1981) 61 WAIG 611

Mohazab v Dick Smith Electronics Pty Ltd (No. 2) [1995] IRCA 625; (1995) 62 IR 200

Robert Gallotti v Argyle Diamonds Pty Ltd [2003] WAIRC 07928; (2003) 83 WAIG 919

Robert John Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166; (2003) 83 WAIG 3053

The Attorney General v Western Australian Prison Officers' Union of Workers (1995) 75 WAIG 3166

Reasons for Decision

1 On 12 February 2019 Ms Elisabetta Marrapodi made application for unfair dismissal to the Western Australian Industrial Relations Commission claiming to have been harshly, oppressively or unfairly dismissed and seeking compensation.

Background

2 Ms Marrapodi worked at Trewin Norman and Co, the respondent, for 12 years from August 2006.

3 At some time, difficulties in the working relationship developed. On 14 January 2019 Ms Marrapodi attended a meeting with the office manager to discuss complaints from other staff members concerning Ms Marrapodi's behaviour.

4 On 15 January 2019 Ms Marrapodi provided two medical certificates certifying that she was unfit for work until 3 February 2019.

5 On 22 January 2019 Ms Marrapodi sent a letter notifying of her resignation with immediate effect. On 25 January 2019 Ms Marrapodi sent a second letter to her employer expressing her disappointment with her employer and confirming the end of the employment relationship. Ms Marrapodi says she was forced to resign as a result of the conduct of her employer.

6 Trewin Norman and Co assert that it was Ms Marrapodi's attitude and conduct that negatively affected her colleagues and the workplace. The respondent contends that Ms Marrapodi was not forced to resign, did so voluntarily and that being the case the Commission does not have jurisdiction to hear her claim.

Question to be determined

7 A threshold issue arises as to whether Ms Marrapodi was dismissed for there to be jurisdiction of the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (IR Act). This is a jurisdictional fact necessary to be found in order for the Commission to further consider whether any such dismissal is harsh, oppressive or unfair: ***Robert Gallotti v Argyle Diamonds Pty Ltd*** [2003] WAIRC 07928; (2003) 83 WAIG 919, ***Robert John Gallotti v Argyle Diamond Mines Pty Ltd*** [2003] WASCA 166; (2003) 83 WAIG 3053, ***J L v Haydar Family Restaurants t/a McDonalds*** [2003] WAIRC 09489; (2003) 83 WAIG 3303.

8 The question I must decide is whether Ms Marrapodi's employment was terminated as a result of a voluntary resignation by her or at the initiative of the employer.

Principles

9 Fundamental to the Commission's jurisdiction in matters of this kind is for the applicant to be dismissed as a matter of fact and law. That is a matter of jurisdictional fact as set out in the decision of the Industrial Appeal Court in ***Metropolitan (Perth) Passenger Transport Trust v Erhard Gersdorf*** (1981) 61 WAIG 611.

10 The Industrial Appeal Court in ***The Attorney General v Western Australian Prison Officers' Union of Workers*** (1995) 75 WAIG 3166 ***(Attorney General)***, held that the resignation of the employee was in fact a dismissal by the employer. The employee was told that the allegations of the employer, which the employer's agents supported with statements they knew to be false, would be made public unless the employee resigned. The employer's agents stated that they had been directed to obtain the employee's resignation and the letter of resignation was dictated to the employee by the employer's agent. Furthermore, the employee's request for an opportunity to obtain legal advice was denied. The Court found that the employer's conduct had left the employee with the impression that the options were to resign or be dismissed in circumstances of duress or procedural unfairness and held that Western Australian Industrial Commission had jurisdiction to determine the matter.

11 In ***Mohazab v Dick Smith Electronics Pty Ltd (No. 2)*** [1995] IRCA 625; (1995) 62 IR 200 ***(Mohazab)***, the Full Bench of the Industrial Appeal Court held that for a resignation to be considered to be in fact a termination of employment at the initiative of the employer, it is necessary that the conduct of the employer results directly or consequentially in the termination of the employment. In this matter the employer suspected an employee had acted dishonestly and during an interview the employee was told to resign, or the police would be called in. The employee agreed to resign and was escorted out of the premises and left standing in the car park until the respondent prepared a letter of resignation and brought it to him to sign.

12 In some cases where a worker resigns in an emotional state and the employer knew the resigning employee suffered from a medical illness or psychological condition, it might have a duty to "enquire into the employee's status at its own initiative in the period following the resignation before accepting the resignation" as in ***Gunnedah Shire Council v Grout*** (1995) 62 IR 150; (1995) 134 ALR 156. In this matter it was held that an employee suffering severe work-related stress and severe depression was nonetheless capable of acting rationally and had made a considered decision to leave his employment. The employer was entitled to accept the employee's letter of resignation on the basis that although he was stressed, he knew what he was doing.

Consideration

13 Ms Marrapodi asserts that the conduct of her employers and the other members of staff forced her to resign her employment. Ms Marrapodi listed examples of types of behaviour such as being excluded from work events, being ignored or not acknowledged, receiving aggressive notes, disrespectful and rude body language such as looks of hatred and disgust and being yelled at. However, Ms Marrapodi has not supported these claims with any specific examples and evidence of the behaviours. Ms Marrapodi's evidence is that she felt she had no choice other than to resign as a result of alleged bullying toward her.

14 Ms Marrapodi claims a list of complaints from other staff about her behaviour were formulated in an attempt to exacerbate her anxiety. (Witness Statement of Elisabetta Marrapodi [50]). The claim concerning the fabrication of complaints and its purpose is not supported by any evidence. On the contrary evidence submitted by two colleagues of Ms Marrapodi demonstrate that they had concerns about Ms Marrapodi's behaviour and conduct, considered that there was a negative impact on their work and had raised these concerns with their employer. (Witness Statement of Janice Ellen Sarah Row and Alexis Stella Kapoulitsas).

15 Ms Marrapodi's recollection of the process and content of the meeting with the practice manager, held to discuss the complaints of other staff members differs from that of the practice manager. (Witness Statements of Elisabetta Marrapodi and Jacqueline Jo Elizabeth Norman). On either version of this event, I find that it was not inappropriate for Ms Norman to meet with Ms Marrapodi to discuss the concerns colleagues held for Ms Marrapodi's attitude and conduct.

16 I do not find the conduct of the employer to be that which would result directly or consequentially in the termination of Ms Marrapodi's employment. The situation was not those in which an employee would have been left with no option but to resign or be dismissed in circumstances of duress or procedural unfairness as was the case in ***Attorney General.***

17 Ms Marrapodi says she was experiencing trauma at the time she composed her letter of resignation and she was hoping that her resignation would prompt acknowledgement of her circumstances from her employer (Witness Statement of Elisabetta Marrapodi [51-52]). A copy of the letter is attached to the Witness Statement of Zane Norman [ZN-1]. Ms Marrapodi was disappointed that the letter did not invoke a response and three days later wrote a second letter to her employer explaining how she was feeling. (Witness Statement of Elisabetta Marrapodi [56]). This letter is attached to the Witness Statement of Zane Norman [ZN-2]. In the second letter Ms Marrapodi sets out her disappointment with her employer as to the manner in which she had been treated and denies the veracity of the complaints against her. There is no revocation of her earlier notification of her resignation nor does she express any regret in resigning. The purpose of her second letter was apparently to convey her views about the workplace: "I wish you luck in getting another hard working and loyal employee like myself. I just needed to type this letter to get this off my chest so I can move on and put this behind me. It doesn't really matter now whether you believe it or not".

18 Ms Marrapodi may have written her first letter in an emotional state; however, her resignation was not in the heat of the moment. On 22 January 2019 Ms Marrapodi was not in the workplace, having commenced a period of personal leave on 15 January 2019. In the three days between writing the second letter, Ms Marrapodi had time to reflect and consider her options, she had an opportunity to consider her circumstances and obtain advice from others including her union, an employment/community law centre or a lawyer if she wished.

19 In December 2016, Ms Marrapodi attended a psychologist and was diagnosed with "General Anxiety Disorder". Ms Marrapodi says that the respondent's practice manager was provided with correspondence from her psychologist, which I infer was as a result of the consultation in December 2016 and at that time. There is no evidence that Ms Marrapodi nor her psychologist provided any further information concerning her mental wellbeing to her employer after that date. Ms Marrapodi says that despite the information provided by her psychologist she continued to be bullied and harassed at work during her entire employment. Ms Marrapodi provides a letter, dated 14 March 2019 (two months after the employment relationship had ended) from her psychologist that sets out dates of various appointments being three appointments in 2016, eight appointments in 2017 and one appointment almost one year later in 2018. In her record of a meeting with Ms Marrapodi in September 2018 the practice manager acknowledges that she was aware that Ms Marrapodi was anxious, had a bad year personally and was obtaining professional help (Witness Statement of Jacqueline Jo Elizabeth Noman [JN-1]). Following the meeting with Ms Norman on 14 January 2019 Ms Marrapodi left the workplace and did not return. Ms Marrapodi attended her general practitioner and provided two medial certificates for the period 14 January 2019 to 3 February 2019. Ms Marrapodi was clearly unwell and stressed however, similar to ***Gunnedah Shire Council v Grout,*** Trewin Norman & Co was entitled to accept her letter of resignation, particularly when confirmed by the second letter.

20 For the reasons set out herein, therefore I find that the termination was by the applicant and it was not a dismissal. I dismiss the application.

2019 WAIRC 00878

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELISABETTA MARRAPODI
	APPLICANT
	-v-
	MR ZANE CHARLES NORMAN TREWIN NORMAN & CO.
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 18 DECEMBER 2019
FILE NO/S	U 22 OF 2019
CITATION NO.	2019 WAIRC 00878

Result	Application dismissed
Representation	
Applicant	Mr J Hammond (of counsel)
Respondent	Mr M Cox (of counsel)

Order

HAVING HEARD Mr J Hammond (of counsel) on behalf of the applicant and Mr M Cox (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

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

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2019 WAIRC 00885

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00885
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	FRIDAY, 26 JULY 2019
DELIVERED	**:**	FRIDAY, 20 DECEMBER 2019
FILE NO.	**:**	B 139 OF 2018
BETWEEN	**:**	JO ANNE STONES
		Applicant
		AND
		DIRECTOR TROY BARBAGALLO
		THE HOROLOGIST PTY LTD
		Respondent

CatchWords	**:**	Contractual benefits claim - salary review - commission payments - express terms - implied terms - collateral contract
Legislation	**:**	*Industrial Relations Act 1979*
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr John Park (of counsel)

Case(s) referred to in reasons:

Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99

Belo Fisheries v Dennis Terence Froggett (1983) 63 WAIG 2394

B P Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266; (1977) 16 ALR 363

Con-Stan Industries of Australia Proprietary Limited and another* v *Norwich Winterthur Insurance (Australia) Limited [1985-1986] 160 CLR 226

Graham Sargant v Lowndes Lambert Australia Pty Ltd [2001] WAIRC 02603; (2001) 81 WAIG 1149

Hawkins v Clayton and others (1988) 164 CLR 539

Heilbut Symons and Co* v *Buckleton [1912] AC 30

J J Savage & Sons Pty Ltd* v *Blakney (1970) 119 CLR 435

Masters and another v Cameron (1954) 91 CLR 353

Norwich Winterthur Insurance (Australia) Ltd v Con-Stan Industries of Australia Pty Ltd [1983] 1 NSWLR 461

Perth Finishing College Pty Ltd v Susan Watts (1989) 69 WAIG 2307

Price* v *Rhondda Urban District Council [1923] 2 Ch 372

Richardson Pacific Ltd* v *Deborah Anne Miller-Smith [2005] WAIRC 00545; (2005) 85 WAIG 1277

S & K Investments Pty Ltd* v *Cerini [2016] WASC 233

Shepperd v The Council of the Municipality of Ryde (1952) 85 CLR 1

Thornley v Tilley and others (1925) 36 CLR 1

Waroona Contracting v Alan B G Usher (1984) 64 WAIG 1500

Case(s) also cited:

Bottomley's Case (1880) 16 Ch D 681

Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503

Locke v Dunlop (1888) 39 Ch D 387

Re Transport Workers Union of Australia (1993) 50 IR 171

The Council of the Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429

Reasons for Decision

1 Ms Jo Anne Stones claims payment of $35,000 for unpaid commissions and $5,000 for an unpaid salary increase review as entitlements under her contract of service.

Background

2 Ms Stones was employed by Director Troy Barbagallo The Horologist Pty Ltd (the Horologist Pty Ltd) as a Store Manager from 2 November 2016 to 14 September 2018 when she resigned her employment.

3 Prior to Ms Stones' employment the Horologist Pty Ltd engaged a recruitment agency to find a suitable person for appointment to the position of Retail/Store Manager.

4 Ms Stones attended an interview for the position, arranged through the recruitment agency, with Ms Tanya Thomas of the Horologist Pty Ltd on 7 October 2016. During the interview details of the position, including the job description, base salary, commissions and salary review were discussed. Ms Stones says she expressed concerns with the rate of remuneration and Ms Thomas advised that a high income would be earnt, comparable with that of her current job, as a result of the commission structure.

5 On 19 October 2016 the director of the recruitment agency emailed Ms Stones with an offer of employment. The email included, within it, an email from Ms Thomas to the recruitment agency advising that the Horologist Pty Ltd wished to offer Ms Stones the position stipulating the salary would be $60,000 plus super and commissions, with a salary review based on performance after six months and the start date of 2 November 2016. Ms Thomas advised that once accepted she would forward the employment contract to the recruitment agency.

6 On the same day Ms Stones emailed the recruitment agency indicating her acceptance. Ms Stones says she relied on the promised commissions in accepting the offer of employment.

7 On 19 October 2019 the recruitment agency forwarded a contract to Ms Stones that had been provided by the Horologist Pty Ltd.

8 On 20 October 2016 Ms Stones says she emailed the recruitment agency with several questions concerning the written contract: the number of hours per fortnight, annual leave entitlements, personal leave, how frequently the commissions are paid and the requirement to work on public holidays. Ms Stones included in her evidence a written document which incorporated a reproduction of an email exchange. Ms Stones says that on 21 October 2016 the recruitment agency emailed a response to her that included confirmation that "commissions are calculated weekly and paid monthly".

9 The Horologist Pty Ltd evidence is that the email exchange did not include a reference to commissions.

10 The Horologist Pty Ltd submits that to the extent that the email exchange submitted by Ms Stones are true, which they deny, the recruitment agency was not a representative nor agent of the Horologist Pty Ltd and did not have the necessary authority to make binding representations to Ms Stones on their behalf.

11 On 31 October 2016 the recruitment agency email Ms Stones with a revised contract provided by the Horologist Pty Ltd. This version of the contract contained amendments to annual leave and personal leave entitlements. The amended contract did not include a term concerning payment of commissions.

12 Ms Stones says that on 31 October 2016 she emailed a signed copy of the contract to the recruitment agency. Ms Stones submitted into evidence an unsigned written contract that she says she relies on in this matter (Exhibit A9).

13 The Horologist Pty Ltd submitted a written contract signed by Ms Stones on 31 October 2016 (Witness Statement of Troy Anthony Barbagallo [TB2]).

14 The terms of each of these contracts are the same. There is no reference to commissions in either contract. Each of the contracts contains two terms concerning a salary review:

> Remuneration
>
> Your salary is at a rate of $60,000 gross per annum. As discussed, a performance review will be done six months after commencement, as (sic) which time your salary will be reviewed based on performance.
>
> Salary Review
>
> Your remuneration package will be reviewed annually on or about the anniversary of your employment. This is a salary and performance review and no variation to your salary is guaranteed.

15 Ms Stones says that her written contract of employment did not contain all the terms and conditions of her employment, in particular it did not contain a term concerning the payment of commissions and this entitlement arises from oral discussions and email exchanges.

16 Evidence in chief was adduced by signed witness statements in this matter. The two witness statements submitted by the Horologist Pty Ltd were emailed to Ms Stones. It became evident during the hearing that that Ms Stones had not received the witness statements. The hearing was adjourned to provide Ms Stones with an opportunity to review the statements and to consider if she wished time to prepare for cross examination and request the hearing be adjourned to a future date. When the hearing resumed Ms Stones advised that that she did not wish to cross exam the witnesses.

Issue to be Decided

17 Does Ms Stones have a contractual entitlement to a salary increase $5,000 as a result of review of salary.

18 Does Ms Stones have a contractual entitlement to payment of commissions?

Principles

19 In deciding if there is a contractual benefit in this jurisdiction the Commission must determine whether the claim is one for a benefit to which the applicant is entitled under her contract of employment. In an application of this nature, the onus is on the applicant to establish that the subject of the claim is a benefit to which the applicant was entitled under her contract of

employment. It is for the Commission to determine the terms of the contract of employment and to ascertain whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Dennis Terence Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Alan B G Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Susan Watts*** (1989) 69 WAIG 2307; ***Anne Patricia Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)*** (1999) 79 WAIG 1867, 1869).

20 The contractual terms may be express or implied. That is, express terms are those things written or said which reflect the bargain agreed between the parties and which the parties intended to be enforceable.

21 It is necessary to ascertain the terms of the contract so that the benefits and obligations can be ascertained. In ***Graham Sargant v Lowndes Lambert Australia Pty Ltd*** [2001] WAIRC 02603 [67]; (2001) 81 WAIG 1149, 1155, the President observed:

> It is always necessary, if a contract is relied upon, to determine the terms of a contract (whether it is an employment contract or any other contract) (see ***Re Transport Workers Union of Australia*** (1993) 50 IR 171 at 196 per Munro J). A contract may be oral or in writing, partly oral and partly in writing, the contractual terms may be express or implied, there may be a series of contracts, and indeed the written terms of the contract may not reflect the substance of the agreement between the parties. There may be terms of the contract derived from custom and usage too (see *Macken, McCarry & Sappideen's "The Law of Employment" 4th edition*, at page 94).

22 The general principles of interpretation for express terms of a contract are set out in ***Australian Broadcasting Commission v Australasian Performing Right Association Limited*** (1973) 129 CLR 99, 109-110, in which Gibbs, J observed:

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate", to use the words from earlier authority cited in ***Locke v Dunlop*** (1888) 39 Ch D 387, 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also ***Bottomley's Case*** (1880) 16 Ch D 681, 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in ***Hillas & Co Ltd v Arcos Ltd*** (1932) 147 LT 503, 514, that the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf ***Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd*** (1968) 118 CLR 429, 437.

23 Where parties agree to document their agreement in writing it is reasonable to infer that they wished to record the entire terms of their contract, unless there is any indication to the contrary as established in ***S & K Investments Pty Ltd*** **v** ***Cerini*** [2016] WASC 233.

24 In ***Masters and another v Cameron*** (1954) 91 CLR 353, 360, the High Court identified three classes of agreement, being:

a) where the parties reach finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms re stated in a form which will be fuller and more precise but not different in effect;

b) where the parties have completely agreed upon all of the terms of their bargain and intend no departure from or addition to their agreed terms, express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of formal document; and

c) where the intention of the parties is not to make a concluded contract at all, unless and until they execute a formal contract.

Application

25 The written contract relied upon by Ms Stones contains terms for a salary review reproduced at [14] of this decision. The term provides for a review of the remuneration package, it is a review of both salary and performance, variation to salary is not guaranteed and a review will be conducted after six months employment and subsequently, annually on or near the date of commencement of employment.

26 Ms Stones says that at the interview for the position a salary review of $5,000 after six months was discussed. Further Ms Stones submitted an email dated 19 October 2016, she received from the recruitment agency (Exhibit A5) (*19 October Email*) which contained an email from Ms Thomas stating that the offer included a salary review based on performance after six months. The amount of any consequential increase in salary is not stipulated in the email.

27 The *19 October Email* also stated that once Ms Stones had accepted the offer Ms Thomas would provide an employment contract to the recruitment agency.

28 Neither the unsigned written contract relied upon by Ms Stones nor the signed contract tendered by the Horologist Pty Ltd contains a term concerning the payment of commissions.

29 The *19 October Email* indicates that the Horologist Pty Ltd intended that the terms of the contract would be set out in a written contract. Following the *19 October Email*, the terms of the agreement between Ms Stones and the Horologist Pty Ltd were subject to negotiation as evidenced by the amendment to the terms of the written contract provided to Ms Stones.

30 Ms Stones communicated with the recruitment agency concerning changes to the terms of the written contract provided on 19 October 2019. The Horologist Pty Ltd says that the recruitment agency is a third party and not one of the contract parties and therefore any promises or representations made during this process were made by the third party and are not capable of being a term of the contract. This evidence was not challenged. Given there is nothing in evidence before the Commission to enable a finding that the recruitment agency was a representative and had authority to negotiate the terms of a contract on behalf of the Horologist Pty Ltd, it cannot be found that their communications were of a contractual nature as they were not conducted between the parties to the contract.

31 The term concerning a review of salary after six months of employment are not ambiguous and clearly refer to a review of both salary and performance.

32 Sometime in 2017, the Horologist Pty Ltd conducted a review of Ms Stones' salary and declined to increase the salary. Whilst the review may not have been comprehensive, nor meet Ms Stones' expectations based on her discussions with the recruitment agency, the term providing for a review does not guarantee an increase resulting from the review.

33 I find that Ms Stones' contract did not provide for a benefit of an increase in salary of $5,000 on completion of six months employment.

Implied Terms - Principle

34 The written contract/s do not contain a term concerning commissions. The issues to be decided are, then, was there an implied term for commissions, whether the contract was varied to incorporate a term for commissions or whether a collateral contract for commissions existed that is capable of being enforced in this jurisdiction?

35 Implied terms are those terms that by reasons of particular facts arising, the type of contract in question, or by stature, provisions or terms should be read into the contract. In ***B P Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings*** (1977) 180 CLR 266, 267; (1977) 16 ALR 363, the High court established the following criteria for a term to be implied into formal contracts, specified in writing: it must be reasonable and equitable; it must be necessary to give business efficacity to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Where the contract is oral or partly oral and partly in writing the principle to be applied is whether in all circumstances it would be necessary for the effective and reasonable operation of the contract to imply the term contended: ***Hawkins v Clayton and others*** (1988) 164 CLR 539 per Deane J at 571-573.

36 It must be proved that the term to be implied is so notorious that everyone in the industry or trade enters that the parties making contracts for the kind would be presumed to include the term in the contract as per ***Norwich Winterthur Insurance (Australia) Ltd v Con-Stan Industries of Australia Pty Ltd*** [1983] 1 NSWLR 461 or ***Con-Stan Industries of Australia Proprietary Limited and another*** **v** ***Norwich Winterthur Insurance (Australia) Limited*** [1985-1986] 160 CLR 226, 236.

37 The implied term must be uniform as well as reasonable, and it must have quite as much certainty as the contract itself: ***Thornley v Tilley and others*** (1925) 36 CLR 1, 8.

38 For a term to be implied by custom or practice it must be an industry custom or practice and not the practice adopted by an individual employer. ***Richardson Pacific Ltd*** **v** ***Deborah Anne Miller-Smith*** [2005] WAIRC 00545 [73]; (2005) 85 WAIG 1277.

Implied Term - Application

39 Ms Stones says that she did not seek to have the draft written contract of employment amended to include a term for commissions. Ms Stones says that in her previous and current employment she received commission payments regularly despite the written contracts not containing a term for commissions. Ms Stones' claim is based on her expectation that the commission payments would be made because this was discussed and agreed at the time of her acceptance of the offer, confirmed in an email, confirmed on the day she commenced work at the store and some commission payments were made in accordance with the terms agreed.

40 There is nothing before the Commission to support a contention that the specific arrangement for payment of commissions at the Horologist Pty Ltd is an industry wide practice.

41 The basis of the commission payment is not agreed by the parties in this matter. Ms Stones says that on the day she commenced employment she was provided with a table that set out commissions payable on gross profit per week. The same table had also previously been provided to her at the interview. Ms Stones says she was to be paid based on the gross profits for the store. The Horologist Pty Ltd say that the commission was to be paid based on the sales made by Ms Stones individually only.

42 Ms Stones submitted two tables into evidence that are her workings of the commissions, based on the store sales for the period of her employment. I would note that the table provided to Ms Stones on the day of her commencement includes a column "gross profits P/W" whereas the tables created by Ms Stones includes columns for "gross sales" and "net profits" (Exhibits A1 and A7).

43 The evidence of the sales and profits for the store submitted by the Horologist Pty Ltd, which were not challenged, significantly differ from that submitted by Ms Stones.

44 In October 2017 the principle of the Horologist Pty Ltd emailed Ms Stones and the Accounts Manager advising that he had concerns that the calculations for the commission may have been incorrect, that Ms Stones may have been overpaid and requesting this matter be investigated.

45 There is no evidence before the Commission that supports Ms Stones' contention that the commission was to be calculated on the basis of the stores sales or profits and not her individual sales. There is also no evidence before the Commission that calculations or methods of commission payments are of a notorious industry wide practice and, therefore cannot be implied into the contract.

46 In addition, given the doubt over the method for calculating the commission in this matter, as in ***Thornley v Tilley***, the payment of commissions does not have the required certainty to be capable of being implied into the contract.

Variation – Principles

47 A variation to a contract must be supported by consideration, especially when the variation is an improvement to an employee's terms or conditions. An agreement to carry out what is already contracted for is not consideration: ***Price* v *Rhondda Urban District Council*** [1923] 2 Ch 372.

Variation – Application

48 The provision of the table for commission payments on the day Ms Stones commenced employment at the workplace or subsequently, cannot be said to be a variation of the terms of the contract to incorporate a term for commissions because Ms Stones did not provide any consideration necessary for this to be a contractual variation. Ms Stones continued to undertake the work in accordance with the established contractual terms.

49 I find that the contract was not varied to incorporate a term for commissions.

Collateral Contract – Principles

50 A collateral contract is one where there is a separate promise by one party to the other, to induce the other to enter the main contract: ***Shepperd v The Council of the Municipality of Ryde*** (1952) 85 CLR 1. It is not sufficient to simply assert that the representee would not have entered into the contract had the statement not been made. It must also be established that there was an intention that there would be a contractual liability: ***Heilbut Symons and Co* v *Buckleton*** [1912] AC 30. For such a contract to be made there must be an offer and acceptance, supported by consideration and an intention by the parties to enter into legal relations.

51 A statement must be promissory and not merely representational. Whether a statement is a promise is determined objectively. An inducement to enter into a contract is not in itself enough to be a promise: ***J J Savage & Sons Pty Ltd* v *Blakney*** (1970) 119 CLR 435, 442.

Collateral Contract – Application

52 Ms Stones says she would not have accepted the offer of employment had she not been assured that she would earn the equivalent or greater income for her, then, job through the additional commission payments. Ms Stones says she relied on the promise of the commission and this created a contract for payment of commissions (commissions contract).

53 The Horologist Pty Ltd says payment of commissions was an incentive and discretionary and not a contractual obligation. The Horologist Pty Ltd says that the recruitment agency is not an employee, officer, representative nor agent and did not have authority to make a promise on its behalf.

54 There is no evidence before the Commission that establishes an intention to create legal relations. As such I cannot find that the commission arrangements constituted a separate collateral contract between Ms Stones and the Horologist Pty Ltd.

55 Given there is no evidence before the Commission of the arrangements between the Horologist Pty Ltd and the recruitment agency, it cannot be found that the third party (the recruitment agency) benefited from Ms Stones entering into an employment contract with the Horologist Pty Ltd on the promise of the commissions. Therefore, it follows, a tripartite collateral contract cannot be found.

Conclusion

56 For the reasons set out above the application must be dismissed.

2019 WAIRC 00886

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JO ANNE STONES
	APPLICANT
	-v-
	DIRECTOR TROY BARBAGALLO THE HOROLOGIST PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 20 DECEMBER 2019
FILE NO/S	B 139 OF 2018
CITATION NO.	2019 WAIRC 00886

Result	Application dismissed
Representation	
Applicant	Ms Jo Anne Stones
Respondent	Mr John Park (of counsel)

Order

HAVING HEARD the applicant on her own behalf and Mr John Park (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

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

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2019 WAIRC 00872

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS ELSA FRANCOISE AGNES DUPONT
	APPLICANT
	-v-
	MONTE FIORE CAFE RESTAURANT (G AND J UNIT TRUST)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 16 DECEMBER 2019
FILE NO/S	B 80 OF 2017
CITATION NO.	2019 WAIRC 00872

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 16 December 2019;

AND WHEREAS at the hearing on 16 December 2019 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

AND HAVING given reasons for the decision during the hearing on 16 December 2019;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

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

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2018 WAIRC 00408

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BENJAMIN RUDD
	APPLICANT
	-v-
	MENER GROUP PTY LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 11 JULY 2018
FILE NO/S	B 65 OF 2018
CITATION NO.	2018 WAIRC 00408

Result	Order issued
Representation	
Applicant	No appearance required
Respondent	Mr T Buckley

Order

WHEREAS on 11 June 2018 the applicant filed a notice of claim of harsh, oppressive or unfair dismissal;

AND WHEREAS on 6 July 2018 the respondent applied to the Commission for an order extending the time for the filing of a notice of answer in respect of the herein application pursuant to Regulation 36(1) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Commission has considered the application for an extension of time for filing a notice of answer in Chambers;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 10 August 2018.

(Sgd.) S J KENNER,
[L.S.] Senior Commissioner.

2019 WAIRC 00896

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA **APPELLANT** **-v-** SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS **RESPONDENTS**
CORAM	BUSS J
DATE	MONDAY, 23 DECEMBER 2019
FILE NO/S	IAC 3 OF 2019
CITATION NO.	2019 WAIRC 00896

Result	Programming Order Issued

Order

1. By 4.00 pm on 27 December 2019, the appellant is to file and serve written submissions in support of its application for a stay.
2. By 4.00 pm on 2 January 2020, each of the respondents is to file and serve written submissions and any affidavits in opposition to the stay.
3. The application for a stay is listed for hearing on 3 January 2020 at 10.30 am.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

2020 WAIRC 00003

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	RESPONDENTS
CORAM	BUSS J
DATE	FRIDAY, 3 JANUARY 2020
FILE NO/S	IAC 3 OF 2019
CITATION NO.	2020 WAIRC 00003

Result	Application for Stay Granted
Representation	
Appellant	Mr D Rafferty (of counsel)
Respondents	Ms J M Vincent (of counsel) State Solicitor's Office
	Mr N Tindley (of counsel) FCB Workplace Law
	Mr T J Dixon (of counsel) Mapien and Mr A Drake-Brockman

Order

IT IS ORDERED THAT:

1. No party to this appeal and no person referred to in s 46(3) of the *Industrial Relations Act 1979* (WA) (the Act) is to exercise any right or power conferred by or arising under or by virtue of the declaration made by the Full Bench in order 2(a) of the Full Bench's orders dated 13 December 2019 until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
2. No party to this appeal and no person referred to in s 46(3) of the Act is to be subject to any obligation arising under or by virtue of the declaration made by the Full Bench in order 2(a) of the Full Bench's orders dated 13 December 2019 until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
3. The variations to the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 made by the Full Bench in order 2(b) of the Full Bench's orders dated 13 December 2019 are not to have effect until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
4. Any proceedings (other than the proceedings in this appeal) on any of the Full Bench's orders dated 13 December 2019 are stayed until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00013

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019 GIVEN ON 13 DECEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	RESPONDENT
CORAM	BUSS J
DATE	THURSDAY, 9 JANUARY 2020
FILE NO/S	IAC 3 OF 2019
CITATION NO.	2020 WAIRC 00013

Result Order Issued

Order

IT IS ORDERED THAT:

1. The appeals IAC 3 of 2019 and IAC 4 of 2019 be consolidated.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00027

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019 GIVEN ON 13 DECEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPELLANT

-v-

SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

RESPONDENTS

CORAM BUSS J
DATE FRIDAY, 10 JANUARY 2020
FILE NO/S IAC 3 OF 2019
CITATION NO. 2020 WAIRC 00027

Result Programming Orders Issued

Order

1. The appellant in IAC 3/2019 to file 4 copies of submissions and a list of legal authorities and serve a copy on the respondents by 4 February 2020.
2. The respondents in IAC 3/2019 to file 4 copies of submissions and a list of legal authorities and serve a copy on the appellants by 25 February 2020.
3. The appeals in IAC 3/2019 and IAC 1/2020 are to be heard together.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2019 WAIRC 00897

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 3 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA

APPELLANT

-v-

SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

RESPONDENTS

CORAM BUSS J
DATE MONDAY, 23 DECEMBER 2019
FILE NO/S IAC 4 OF 2019
CITATION NO. 2019 WAIRC 00897

Result	Programming Order Issued

Order

1. By 4.00 pm on 27 December 2019, the appellant is to file and serve written submissions in support of its application for a stay.
2. By 4.00 pm on 2 January 2020, each of the respondents is to file and serve written submissions and any affidavits in opposition to the stay.
3. The application for a stay is listed for hearing on 3 January 2020 at 10.30 am.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

2020 WAIRC 00002

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 3 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	RESPONDENTS
CORAM	BUSS J
DATE	FRIDAY, 3 JANUARY 2020
FILE NO/S	IAC 4 OF 2019
CITATION NO.	2020 WAIRC 00002

Result	Application for Stay Granted
Representation	
Appellant	Mr D Rafferty (of counsel)
Respondents	Ms J M Vincent (of counsel) State Solicitor's Office
	Mr N Tindley (of counsel) FCB Workplace Law
	Mr T J Dixon (of counsel) Mapien and Mr A Drake-Brockman

Order

IT IS ORDERED THAT:

1. No party to this appeal and no person referred to in s 46(3) of the *Industrial Relations Act 1979* (WA) (the Act) is to exercise any right or power conferred by or arising under or by virtue of the declaration made by the Full Bench in order 2(a) of the Full Bench's orders dated 13 December 2019 until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
2. No party to this appeal and no person referred to in s 46(3) of the Act is to be subject to any obligation arising under or by virtue of the declaration made by the Full Bench in order 2(a) of the Full Bench's orders dated 13 December 2019 until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
3. The variations to the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 made by the Full Bench in order 2(b) of the Full Bench's orders dated 13 December 2019 are not to have effect until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.
4. Any proceedings (other than the proceedings in this appeal) on any of the Full Bench's orders dated 13 December 2019 are stayed until 4.00 pm on the date on which this court delivers judgment in the appeal or further order.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00014

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 3 OF 2019 GIVEN ON 13 DECEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	RESPONDENT
CORAM	BUSS J
DATE	THURSDAY, 9 JANUARY 2020
FILE NO/S	IAC 4 OF 2019
CITATION NO.	2020 WAIRC 00014

Result	Order Issued

Order

IT IS ORDERED THAT:

1. The appeals IAC 3 of 2019 and IAC 4 of 2019 be consolidated.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00015

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	BUSS J
DATE	THURSDAY, 9 JANUARY 2020
FILE NO/S	IAC 1 OF 2020
CITATION NO.	2020 WAIRC 00015

Result	Order Issued

Order

IT IS ORDERED THAT:

1. The appeals IAC 1 of 2020 and IAC 2 of 2020 be consolidated.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00026

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 2 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENTS
CORAM	BUSS J
DATE	FRIDAY, 10 JANUARY 2020
FILE NO/S	IAC 1 OF 2020
CITATION NO.	2020 WAIRC 00026

Result	Programming Orders Issued

Order

1. The appellant in IAC 1/2020 to file 4 copies of submissions and a list of legal authorities and serve a copy on the respondents by 4 February 2020.
2. The respondents in IAC 1/2020 to file 4 copies of submissions and a list of legal authorities and serve a copy on the appellants by 25 February 2020.
3. The appeals in IAC 3/2019 and IAC 1/2020 are to be heard together.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00016

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 3 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS
	APPELLANT
	-v-
	SAMUEL GANCE (ABN 50 577 312 446) T/AS CHEMIST WAREHOUSE PERTH, THE PHARMACY GUILD OF WESTERN AUSTRALIA, THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	BUSS J
DATE	THURSDAY, 9 JANUARY 2020
FILE NO/S	IAC 2 OF 2020
CITATION NO.	2020 WAIRC 00016

Result	Order Issued

Order

IT IS ORDERED THAT:

1. The appeals IAC 1 of 2020 and IAC 2 of 2020 be consolidated.

(Sgd.) S KEMP,
[L.S.] Clerk of Court.

2020 WAIRC 00022

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 2 OCTOBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHERYL MCDONOUGH
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MS J STONE - BOARD MEMBER
	MR C BROWN - BOARD MEMBER
DATE	FRIDAY, 10 JANUARY 2020
FILE NO.	PSAB 19 OF 2019
CITATION NO.	2020 WAIRC 00022

Result	Direction issued
Representation	
Applicant	Mr M Giles (as agent)
Respondent	Mr J Carroll (of counsel)

Direction

HAVING heard from Mr M Giles (as agent) on behalf of the appellant and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1975* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 7 February 2020.
2. THAT the appellant file outlines of the evidence and documents (other than the agreed documents) on which she intends to rely by 21 February 2020.
3. THAT the respondent file outlines of the evidence and documents (other than the agreed documents) on which it intends to rely by 6 March 2020.
4. THAT the appellant file an outline of submissions by 20 March 2020.
5. THAT the respondent file an outline of submissions by 3 April 2020.
6. THAT discovery be informal.
7. THAT this matter be listed for a two-day hearing not less than seven days after the respondent's written outline of submissions is filed.
8. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2020 WAIRC 00012

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELEESHA COOTE
	APPLICANT
	-v-
	SHIRE OF BROOKTON
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 7 JANUARY 2020
FILE NO.	U 126 OF 2019
CITATION NO.	2020 WAIRC 00012

Result	Direction issued
Representation	
Applicant	Ms Michelle McDiarmid (of counsel)
Respondent	Ms Thalia Kailis (of counsel)

Direction

HAVING heard from Ms M McDiarmid (of counsel) on behalf of the applicant and Ms T Kailis (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs –

1. THAT the parties shall give informal discovery by serving its list of documents on each other by 10 December 2019;
2. THAT inspection of the documents shall be completed by 23 December 2019;
3. THAT the applicant file and serve signed witness statements upon which it intends to rely, no later than 9 January 2020;
4. THAT the respondent file and serve any signed witness statements upon which it intends to rely, no later than 30 January 2020;
5. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely, no later than fourteen clear days prior to the date of hearing, ie. 18 February 2020;
6. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely, no later than seven clear days prior to the date of hearing, ie. 25 February 2020;
7. THAT the matter is listed for a two-day hearing on 4 and 5 March 2020; and
8. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Dental Health Services - Dental Officers - CSA Industrial Agreement 2019 AG 16/2019	01/10/2020	North Metropolitan Health Service	Civil Service Association of Western Australia Incorporated	Commissioner T Emmanuel	Agreement registered
Electorate and Research Employees CSA General Agreement 2019 PSAAG 5/2019	12/19/2019	President of the Legislative Council and Speaker of the Legislative Assembly	Civil Service Association of Western Australia Incorporated	Senior Commissioner S J Kenner	Agreement registered

NOTICES—Appointments—

2020 WAIRC 00004

DESIGNATION

SECTION 16(2A) *INDUSTRIAL RELATIONS ACT 1979*

SECTION 51G *OCCUPATIONAL SAFETY AND HEALTH ACT 1984*

I, the undersigned Chief Commissioner of The Western Australian Industrial Relations Commission, pursuant to s 16(2A) of the *Industrial Relations Act 1979* (the Act), hereby designate Commissioner T B Walkington, being a Commissioner who holds office under s 8(2)(d) of the Act and who satisfies the additional requirements referred to in s 8(3A) of the Act, to exercise the jurisdiction conferred by s 51G of the *Occupational Safety and Health Act 1984* from 1 January 2020. This designation ceases to have effect on 31 December 2020.

Dated the 19th day of December 2019.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.