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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2021] WASCA 76

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA -v- SAMUEL GANCE T/A CHEMIST WAREHOUSE PERTH [No 2] [2021] WASCA 76
CORAM	:	BUSS J MURPHY J KENNETH MARTIN J
HEARD	:	18 JANUARY 2021 AND BY FURTHER WRITTEN SUBMISSIONS OF 20 JANUARY 2021
DELIVERED	:	3 MAY 2021
FILE NO/S	:	IAC 3 of 2019
BETWEEN	:	THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA Appellant AND SAMUEL GANCE T/A CHEMIST WAREHOUSE PERTH First Respondent THE PHARMACY GUILD OF WESTERN AUSTRALIA Second Respondent THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS Third Respondent
FILE NO/S	:	IAC 1 of 2020
BETWEEN	:	THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS Appellant AND SAMUEL GANCE T/AS CHEMIST WAREHOUSE PERTH First Respondent PHARMACY GUILD OF WESTERN AUSTRALIA ORGANISATION OF EMPLOYERS Second Respondent THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA Third Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
Coram	**:**	P E SCOTT CC S J KENNER SC T B WALKINGTON C
Citation	**:**	2019 WAIRC 00825
File Number	**:**	FBA 2 of 2019 & FBA 3 of 2019

Catchwords:

Employment law - Industrial award - Scope of coverage of award - Retail pharmacy industry - Industries covered by award identified by the industries of the scheduled respondents at date of award - 'Glover clause' - Subsequent cessation of only respondents in a covered industry when award issued by order of the Commission - Whether Commission had ascertained jurisdiction to vary scope of the award - Declaration as to continued coverage of that industry sought in 2018 - Decision as to affirmative coverage by single Commissioner - Appeal to Full Bench of Commission - Decision reversed - Appeal to Industrial Appeal Court

Legislation:

Industrial Arbitration Act 1912 (WA)

Industrial Relations Act 1979 (WA)

Result:

Appeals allowed

Category: B

Representation:

IAC 3 of 2019

Counsel:

Appellant	:	Mr H J Dixon SC & Mr D Rafferty
First Respondent	:	Mr N Tindley
Second Respondent	:	Mr T J Dixon & Mr H Pararajasingham
Third Respondent	:	Mr R Andretich

Solicitors:

Appellant	:	Eureka Lawyers
First Respondent	:	FCB Workplace Law
Second Respondent	:	Allan Drake-Brockman
Third Respondent	:	State Solicitor for Western Australia

IAC 1 of 2020

Counsel:

Appellant	:	Mr R Andretich
First Respondent	:	Mr N Tindley
Second Respondent	:	Mr T J Dixon & Mr H Pararajasingham
Third Respondent	:	Mr H J Dixon SC & Mr D Rafferty

Solicitors:

Appellant	:	State Solicitor for Western Australia
First Respondent	:	FCB Workplace Law
Second Respondent	:	Allan Drake-Brockman
Third Respondent	:	Eureka Lawyers

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

Airlite Cleaning Pty Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers' Unions Western Australian Branch [2001] WASCA 19

Australian Boot Trade Employees' Federation v Whybrow & Co (1910) 11 CLR 311

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

Eastern Goldfields Butchers' Industrial Union of Workers v Black Brothers (1913) 12 WAAR 14

Electrical Trades Union of Workers Australia (Western Australia Branch) v Goldsworthy Mining Ltd (1970) 50 WAIG 22

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

Josephson v Walker (1914) 18 CLR 691

Melrose Farm Pty Ltd t/as Miles Away Tours v Milwood [2008] WASCA 175; (2008) 175 IR 455

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

Re Dardanup Butchering Co [2004] WAIRC 10864; (2004) 84 WAIG 465

The Shop, Distributive and Allied Employees Association of Western Australia v Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth [2020] WASCA 36

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance [2019] WAIRC 00015

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance [2019] WAIRC 00016

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance [2019] WAIRC 00825

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance [2019] WAIRC 00869

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

BUSS J:

1 I agree with Kenneth Martin J.

MURPHY J:

2 I agree with Kenneth Martin J.

KENNETH MARTIN J:

Introduction

3 This appeal arises from a divided decision of the Full Bench of the Western Australian Industrial Relations Commission (the Commission). The essential issue of statutory construction which presents is whether the original scope of industry coverage, as established in 1977 under *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (the Award), subsequently came to be reduced, as a result of variation orders made by the Commission in either or both of April or September 1995 - so as then to end any further coverage of the retail pharmacy industry in Western Australia under the Award.

Background

4 The application of 23 February 2018 in the Commission by The Shop, Distributive and Allied Employees' Association of Western Australia (the SDA) had sought a declaration pursuant to s 46(1)(a) of the *Industrial Relations Act 1979* (WA) (as amended) (the 1979 Act) to the effect that the Award applied to 'workers employed in any callings or callings mentioned in the award in the retail pharmacy industry and to employers employing those workers'.

5 The SDA's 2018 application pursuing declaratory relief had been issued against Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth (Chemist Warehouse), as respondent. There followed two interventions in the Commission in that proceeding. First, was by the Pharmacy Guild of Western Australia (the Pharmacy Guild). Second saw an intervention of the Minister for Commerce and Industrial Relations (the Minister).

6 Commissioner T Emmanuel heard the application at first instance. She delivered reasons for decision on 18 January 2019, effectively finding for the SDA.[1] On 21 January 2019, Emmanuel C formally made declarations sought by the SDA to the effect that the Award (as varied) continued to apply to those employed in any calling or callings mentioned in the retail pharmacy industry in Western Australia and to employers employing those workers.[2]

7 In the wake of Emmanuel C's 21 January 2019 declaration, two appeals were taken against that decision to the Full Bench, by Chemist Warehouse and the Pharmacy Guild.

8 In due course, the Full Bench in October 2019 by majority (Chief Commissioner Scott and Senior Commissioner Kenner, with Commissioner Walkington dissenting) concluded the Award had ceased to cover workers and employers in the retail pharmacy industry during 1995. The Full Bench published reasons for decision effectively allowing the two appeals, varying the decision of the Commission at first instance.[3]

9 On 13 December 2019, the Full Bench issued a declaration and orders to the effect the appeals be upheld.[4] Pursuant to s 49 of the 1979 Act it ordered the decision at first instance be varied to:

(a) DECLARE that [the] *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.

10 In the wake of the December 2019 declaration and order by the Full Bench, two appeals were filed with the Industrial Appeal Court. First by the SDA on 18 December 2019 (IAC 3 of 2019) and a further appeal of the same date (IAC 4 of 2019). The SDA's two appeals were subsequently consolidated under orders of this court as IAC 3 of 2019. Likewise, further appeals to this Court against the Full Bench decision were lodged by the Minister, on 2 January 2020 (IAC 1 of 2020 and IAC 2 of 2020). Those appeals were also consolidated, so as to be pursued effectively as IAC 1 of 2020. The SDA's and Minister's appeals will be referred to collectively in these reasons as 'the appeals'.

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[1] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00015.

[2] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00016.

[3] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00825.

[4] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00869.

11 On 3 January 2020, Buss J granted the SDA's application for a stay, in effect, of the December 2019 declaration and order of the Full Bench pending a hearing and determination of the appeals in this court. The stay application of the SDA was supported then by the Minister. This is explained in the reasons upon that stay application by Buss J, published 24 March 2020.[5]

12 Hence, the declaration and order of the Full Bench remain afoot, albeit presently stayed in their effects, pending a determination of these appeals.

13 For the reasons expressed below, I am of the end view that the Full Bench has erred and that each of the appeals of the SDA and the Minister must be allowed.

14 The essential difficulty, as I will seek to explain, is jurisdictional. It arises from what I assess to be the lack of any jurisdiction in the Commission at April 1995, and also in September 1995, to then alter the scope of the Award. This result follows from the absence at relevant times in 1995 of any prior compliance with the publication, notification and service requirements at that time under s 29A(2) of the 1979 Act - which were required to be met before a variation of operation or scope of the Award could be effected by the Commission. The Award was an industry common rule award whose scope clause from inception was framed by reference to coverage of the industries as then carried on by any of the respondent employers as were then named in a schedule to the Award (cl 3). The Commission's April and September 1995 orders were within power and valid to achieve the as then sought alterations made to the list of employer respondents who were to be identified in the schedule to the Award. But ultimately, there was no greater jurisdiction in the Commission in 1995 to effect any further change, so as to reduce the scope of the Award's industry coverage. That result follows essentially as a result of an exercise in statutory construction directed at relevant terms of the 1979 Act, as they prevailed during April and September 1995.

The Award

History

15 The Award in final form had issued as award number R32 of 1976 by Commissioner G A Johnson on 2 September 1977.[6]

16 It was expressed then to be issued under the powers and jurisdiction conferred upon Commissioner Johnson by s 50 of the *Industrial Arbitration Act 1912* (WA) (the Former Act).[7]

17 The Award will, therefore, be seen to have issued under the Former Act. This prior industrial legislation had been in force in Western Australia from January 1913, until it came to be repealed and was replaced in March 1980. That was effected under the current legislation, namely, the 1979 Act, taking effect, essentially, from 1 March 1980.[8]

18 The Former Act had expressly provided for an issuing of awards by the Commission: see generally Pt IV div II of the Former Act and, in particular, s 79, s 80, s 82, s 83 and s 84.

19 Section 85 of the Former Act provided, in effect, for the availability of the phenomenon of industry common rule awards in Western Australia.

20 At September 1977, when the Award issued, s 85 had then provided, relevantly:

> (1) ... subject to this Act, an award while it is in force is binding -
>
> (a) on all workers employed in the calling or callings mentioned therein in the industry to which the award relates; and
>
> (b) on all employers employing those workers.
>
> (2) Where the operation of an award or any part thereof is limited to any particular locality it is not, as regards matters to which the limitation applies, binding beyond that locality.

Relevant terms at 1977

21 It is necessary to mention several key clauses found in the Award when it first issued and was published, on 26 October 1977.

22 Clause 3 of the Award, under the heading 'Scope' read in 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 ('B') and to all employers employing those workers.

23 Clause 4, dealing with the subject of 'Area', provided that the Award was to apply over the whole of the State.

24 Clause 5, in relation to 'Term', provided:

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

25 Clause 38 as enacted read:[9]

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[5] ***The Shop, Distributive and Allied Employees Association of Western Australia v Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth*** [2020] WASCA 36.

[6] Award No 32 of 1976; (1977) 57 WAIG 1324, 26 October 1977.

[7] I note that, unless explicitly stated, references to the Former Act in this judgment are to the reprint of 16 May 1974, being the legislation in force when the Award was issued.

[8] I note the 1979 Act was initially named the *Industrial Arbitration Act 1979* and was renamed to its current short title in 1984.

38 - Chemist Shops

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

Types of scope clauses in an award

26 There is no dispute the Award as issued by the Commission at September 1977 had extended to apply to relevant workers in the retail pharmacy industry and to their employers at that time.

27 The Award's scope clause (cl 3) as now seen above, by adopting an industry or industries coverage approach - by reference to those industries as carried on by the named respondents in Schedule ('B'), had used a coverage drafting technique by displaying what, since 1970, had become known as a 'Glover clause'.

Glover clause

28 The term 'Glover clause' took its name from the decision of the Industrial Appeal Court comprised of Neville J as President, Burt J (as his Honour then was) and Wickham J. This was ***The West Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd***.[10] As explained by Burt J in that decision, there had been used for some years in Western Australia a drafting technique that expressed an award's coverage as being applicable to all workers (in identified callings in the award) within an industry or industries that were then the industries of the scheduled respondents to the award.

29 Under a Glover clause, neither the award, nor its schedule by express terms will actually identify the industry or industries being covered. Consequently, for a reader of an award instrument to reliably comprehend the precise scope of its industry application, there was a correlative need for a fact finding exercise as to the industries in question that were engaged in at the time by each of the scheduled respondents. This fact finding exercise needed to be undertaken in relation to all different industries as they were being carried on by each of the respondents at the time an award was made.

30 By his reasons in ***Glover***, Burt J identified what was, in effect, a taxonomy as between differently drafted scope clauses as then used within local awards at that time (when the Former Act was still applicable).[11] Burt J had explained:[12]

> 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 respondents. And this is necessarily a question of fact.

31 Burt J then explained further that the 'received doctrine of awards' addressed the 'common object' that was sought to be attained by the combined efforts of an employer and the worker to indicate the industry in which they were engaged.[13] Burt J observed on the sometimes practical difficulties encountered with the common object approach.[14]

32 Burt J then continued in ***Glover***:[15]

> Be this as it may, the application of that doctrine 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. This may be done upon the consideration of the industry carried on by one respondent, or it may be done by, so to speak, adding the industry of one respondent to that of another, so creating an industry to which the award relates, which is wider in its spread than the industry carried on by any single respondent.

A Donovan clause

33 Another key decision of the Industrial Appeal Court delivered in 1977 (but still under the regime of the Former Act), ***R J Donovan & Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, WA Branch***,[16] provided an illustration of a contrasting style of award scope clause drafting technique. The approach displayed an express reference within its scope clause to the actual industry or industries that were to be covered (giving

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[9] In the current award, cl 38 is renumbered cl 40 but is otherwise in identical terms.

[10] ***The West Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd*** (1970) 50 WAIG 704 (***Glover***).

[11] By the 23 May 1969 reprint.

[12] ***Glover***, 705.

[13] ***Glover***, 705.

[14] ***Glover***, 705.

[15] ***Glover***, 705.

[16] ***R J Donovan & Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, WA Branch*** (1977) 57 WAIG 1317 (Burt CJ (President), Wickham and Brinsden JJ) (***Donovan***).

rise from then to the nomenclature of 'Donovan clause', by contrast to a Glover clause used in relation to industry award coverage).

34 Wickham J had explained in ***Donovan***:[17]

> In this instance, the scope clause specifically refers to 'the industry' as set out in the Schedule and in my opinion the naming of an employer under the headings of an industry or industries, relieves the prosecution from proving that a relevant employer is in fact engaged in that industry.[18]

35 Wickham J continued in ***Donovan***:[19]

> This approach to the case is not inconsistent with anything which was said in Glover's case. The difference in the two scope clauses is dramatic. In Glover's case it was necessary to find that the worker was employed in a calling in one of 'the industries carried on by the respondents' and it was therefore necessary to show as a matter of fact that at least one respondent did carry on such an industry. In the present case the attention is focused on the industry described in the Schedule, as distinct from the industry carried on by the employer named in the Schedule.

Other

36 Further drafting methodologies were also open to parties towards the framing of award coverage scope clauses in industrial awards. In a later decision of the Industrial Appeal Court, ***Freshwest Corporation Pty Ltd v Transport Workers' Union***,[20] Franklyn J had explained towards that particular scope clause that the deployed clause, albeit similar to a Glover clause, was somewhat different.[21] In ***Freshwest*** there had been no schedule of respondents expressly identified by that scope clause. The scope clause in ***Freshwater*** merely referred to:

> ... the industries carried on by the respondents to this award in connection with the transportation of goods and materials.

37 Nevertheless, in ***Freshwest***, an exercise of fact finding to identify the relevant industries that were covered was also required, akin to the exercise that is required where a Glover clause is used.

38 The ***Freshwest*** decision, additionally, was a decision rendered by reference to the new regime of the 1979 Act.

39 A further genre of scope clause emerged after it became possible under the 1979 Act. A scope clause by its terms could, if clear enough, expressly exclude the application of award coverage under common rule. In illustration, see the facts of ***Airlite Cleaning Pty Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers' Union Western Australian Branch***.[22]

40 In ***Airlite*** the scope clause (cl 3) to that award said:[23]

> This Award shall apply to:
>
> (a) Cleaners who are employed by the named respondents in the industry of Contract Cleaning of Government Schools in the State of Western Australia; and
>
> (b) To all those employers employing those Cleaners.

41 The potential for an award under the 1979 Act by its terms to expressly 'provide otherwise' and so, only bind the nominated employee and/or employer, and thereby, to negate any wider common rule application, was a result of s 37(1) of the 1979 Act.

Observations on some pragmatic aspects of a Glover clause

42 A drafting decision to use a Glover clause to identify the scope of industry coverage by an award with a schedule of respondents necessarily carried with it some practical difficulties.

43 First, as Burt J had explained in ***Glover***, there arose a need to find as a matter of fact which was the actual industry or industries that were engaged in by each of the scheduled employer respondents as identified by such a scope clause (via its schedule) at the time the award was made.[24] There could be many such scheduled employers who could be engaged in multiple and diverse industries as a matter of fact.

44 Here, for instance, the Award, as it presented in 1977 sees at least some 378 named Schedule 'B' employer respondents. None of the industries as then engaged in by those persons at the time are explicitly identified by that Schedule. Scrutiny of the terms of the Award itself does not reliably answer the essential question as to identifying all of the industry or industries then covered.

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[17] ***Donovan***, 1318.

[18] Referring to the observations of Neville J in ***Glover***, 705.

[19] ***Donovan,*** 1318.

[20] ***Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers*** (1991)71 WAIG 1746 (Rowland, Franklyn & Walsh JJ) (***Freshwest***).

[21] ***Freshwest***, 1747.

[22] ***Airlite Cleaning Pty Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers' Unions Western Australian Branch*** [2001] WASCA 19 (Scott J, Kennedy J, as presiding judge, agreed) (***Airlite***) [1].

[23] ***Airlite*** [3].

[24] ***Glover,*** 705.

45 No doubt relevant employer organisations or union participants as moving parties seeking the issue by the Commission of an award at the time it is issued, may be expected to have the record keeping resources and factual insights upon those vital industry coverage facts. However, outsider employers and employees who may still be covered by the award as a matter of its industry common rule wider application may not have ready access to such recorded knowledge as to the industries then being carried on by all the scheduled respondents to the award when it is made.

46 As time passes, for an award using a Glover clause to identify its industry coverage scope, there presents the potential that the knowledge as to the initially covered industries (which may be a diverse range) could become increasingly inaccessible, even in the minds of the direct participants to the making of the award at the time it issued. Experience teaches that organisational personnel come and go over time. Records of the day may be lost or misplaced.

47 Contrast those practical difficulties with the use of a Glover clause with the simplicity and transparency of using a Donovan clause in the award - which explicitly refers to, say, 'the ship-building industry' (the example given by Burt J in ***Glover***).

48 A second pragmatic difficulty with a Glover clause is illustrated by the position as presents here in 2021, when looking back at a scope clause in the 1977 Award which came into operation some 44 years ago and under the regime then of the Former Act. The lack of explicit specificity in relation to the precise industries that were covered by the Award at the time of its making has provided a nurturing environment for the present difficulties and disputes.

49 Third, a passage of time inevitably sees some employers as initially assembled and named in a schedule to an award depart as industry participants change over time. There will be the usual various reasons for that, including solvency issues, restructurings, takeovers, mergers or diversifications as routinely occur across an economy over time.

An industry common rule award

50 I now turn to elaborate upon the legal concept of an industry common rule award. An appreciation of the breadth of application of such an award and the consequent wider delivery of rights and obligations to unnamed persons bears contextually upon the outcome in the appeals.

51 When the Former Act was first introduced (effective from 1 January 1913) it allowed the then Court of Arbitration to issue an 'industrial award' to be binding upon industry workers and their employers generally, by common rule.

52 The common rule concept had found a local statutory expression under what was then s 78 (later renumbered s 85). As introduced, it read:

> 78. An award shall, whilst in force, be a common rule of any industry to which it applies, and shall, subject as hereinafter provided, become binding on all employers and workers whether members of an industrial union or association or not, engaged at any time during its currency in that industry within the State.

53 The Former Act also provided for 'industrial agreements' and, in certain circumstances, for such agreements to carry the effect of an award and then, for it to be a common rule of any industry to which the agreement related. To that end, see s 38(1) and s 40 of the Former Act.

54 Section 40 of the Former Act in that context of an industrial agreement provided a convenient explanation upon the effects of an application of common rule to an industry. It read:

> The Court [meaning then the Court of Arbitration] may declare that any industrial agreement shall have the effect of an award, and be a common rule of any industry or industries to which it relates, and the agreement shall thereupon, subject as hereinafter provided, become binding on all employers and workers, whether members of an industrial union or association or not, engaged at any time during its currency in any such industry within the locality specified in the agreement.
>
> Provided that before acting under this section the Court shall give all parties likely in its opinion to be affected, notice by advertisement or otherwise of its intention to extend the operation of such agreement, and shall hear any parties desiring to be heard in opposition thereto.

55 Consequently, an employment law relationship concept of an industrial award operating by force of common rule across particular industries, so as to be binding upon all workers and their employers in these industries was a well-established phenomenon in Western Australia by the early 20th Century as, indeed, it was also in the other states of Australia.

56 The High Court of Australia, in ***Australian Boot Trade Employees' Federation v Whybrow & Co***, had explained that a common rule award:[25]

> … is a general ordinance, which so far as it is accepted puts an end to individual bargaining between man and man, and thus excludes from influence on the terms of employment the exigencies of particular workmen, and usually also those of particular firms. 'It establishes in short' [referring to the authors of *Webb's Industrial Democracy*] 'like collective bargaining a common law for the industry concerned'.

57 Under that decision the High Court (Griffiths CJ, Barton, O'Connor, Isaacs and Higgins JJ) had unanimously concluded that Commonwealth legislation of the time then seeking to provide for application of an industry common rule, was beyond the parameters of Commonwealth legislative power.

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[25] ***Australian Boot Trade Employees' Federation v Whybrow & Co*** (1910) 11 CLR 311, 336 (Isaacs J).

58 A subsequent decision of the High Court, ***Josephson v Walker***,[26] saw Griffiths CJ consider New South Wales industrial legislation. His Honour observed upon a State common rule award, that:[27]

> ... But in this case that which is called an award is of an entirely different character. The obligation created by it does not depend upon any agreement of the parties express or implied, and may arise without their knowledge. If by the award it is determined that journeyman plumbers shall receive not less than a certain rate of wages, each journeyman plumber is entitled to those wages, and, although the employer and the employee have gone on for a long time the one paying and the other receiving what each honestly believes to be the proper rate for wages, nevertheless if it is afterwards found that the wages paid are less than those fixed by the award, the right of the employees to receive the wages so fixed has accrued.

59 Hence, in the early 20th century in Australia, the breadth of a common rule award or even (by s 38(2) of the Former Act) any industrial agreement that was declared as having the effect of a common rule award, could carry significant ramifications for industry workers generally and also, for their employers - if either found themselves engaged at the time in an industry the subject of such an award or agreement. In ***Eastern Goldfields Butchers' Industrial Union of Workers v Black Brothers*** Burnside J, President of the then Court of Arbitration, observed upon the breadth of application of an industrial agreement that carried the force of common rule application as an award, observing:[28]

> Hitherto an industrial agreement has been binding only between the parties to it, otherwise it would have the force of an award of the Court. However, under this new Act [referring to the *Industrial Arbitration Act 1912*] which came into operation on the 1st of January last, Section 38(2) makes the agreement 'extend to and bind every worker who is at any time whilst it is in force employed by an employer on whom the agreement is binding'. It is a most extraordinary piece of legislation; a man may be bound by an agreement of which he has never heard. ...

60 In ***Electrical Trades Union of Workers Australia (Western Australia Branch) v Goldsworthy Mining Ltd***[29] Burt J, sitting again as a member of the Industrial Appeal Court, addressed the issue of awards by common rule. His Honour noted the change which had occurred under the amendments in 1963 which had removed former s 78 (cited above) and had replaced it then with a new s 85.[30]

61 Burt J explained:[31]

> The notion of common rule was in the year 1963 well entrenched and one can assume well understood. And the way in which it operated and the essential character of it had by then been considered in numerous cases decided not only by State industrial authorities but also by the High Court. As a notion it pre-dated the industrial arbitration system itself. 'What is called the device of the common rule was known in English industry long before there was any legislative enactment on the subject.' See ***Australian Boot Trade Employees Federation v Whybrow & Co*** (1910) 11 CLR 311 at 336 per Isaacs J. And so long as the law required that every award should be a common rule, the power of the Arbitration Court to make by award for an industry a rule which was not common was necessarily denied.
>
> The position was, I believe, entirely changed by the 1963 Amendment Act (No 76 of 1963) by which section 85 as it then was, was replaced and re-enacted in its present form. The requirement that every award should be a 'common rule' was deleted and this was done not only in its application to awards but also in its application to industrial agreements ...

The Award and its scope clause

62 Here, it was undoubtedly the case, factually, that two of all the many (ie, 378) initially named Schedule 'B'[32] respondents to the Award were then engaged in the retail pharmacy industry at the time the Award had issued in 1977. These two respondents were Boans Ltd (Boans) and Perth United Friendly Society Chemists (PUFSC).

63 An inclusion of those two employers engaged in that industry and their naming in Schedule 'B' under the Award's scope clause, being, as seen, a Glover clause, therefore captured the retail pharmacy industry within the scope of award coverage.

64 But the named presence in 1977 of Boans and PUFSC as participants operating in the retail pharmacy industry carried with it by law a wider series of award derived rights and obligations. This, of course, followed by reason of the Award being an industry common rule award, which in its reach came then to extend well beyond merely to those two named respondent employers and their employees (in relevant callings) within the retail pharmacy industry.

65 But at December 1988 Boans was removed from (the then renamed) Schedule C to the Award. Later, PUFSC was also removed from the Schedule, at April 1995.

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[26] ***Josephson v Walker*** (1914) 18 CLR 691.

[27] ***Josephson v Walker***, 696.

[28] ***Eastern Goldfields Butchers' Industrial Union of Workers v Black Brothers*** (1913) 12 WAAR 14. 14.

[29] ***Electrical Trades Union of Workers Australia (Western Australia Branch) v Goldsworthy Mining Ltd*** (1970) 50 WAIG 22, 27 (***Electrical Trades***).

[30] See the *Industrial Arbitration Amendment Act (No 2) 1963* (WA) s 81.

[31] ***Electrical Trades***, 22, 27.

[32] Schedule 'B' was subsequently named 'Schedule C'.

66 Under its April 1995 orders, the Commission had struck out from Schedule C the name of the last then remaining retail pharmacy industry participant, namely, PUFSC. Later, by its September 1995 orders, the Commission upon application of the SDA, had replaced the entirety of Schedule C to the Award with a fresh list of scheduled employers. But, as is accepted factually, none of the employers in the replaced Schedule C were engaged in the retail pharmacy industry.

67 So, then, what were the ramifications for the scope of the Award vis-à-vis the retail pharmacy industry, if any, as a legal consequence of the making of the orders of the Commission as issued in April and September 1995?

68 For the respondents to these appeals, it is said it is necessary, in effect, as a matter of logic, that by choosing to define industry coverage under a Glover clause, that the choice of award designation coverage technique must carry with it a necessary risk. That is, they say, that the risk was when any last remaining industry participant ceases to be active in that industry and is then removed from the schedule to the award, so then correlatively must the reach of the common rule industry coverage to that respondent's no longer engaged in industry likewise come to an end.

69 That result is put by the respondents as the necessary legal consequence of proceeding on a basis of defining industry coverage in indirect fashion, by reference only to the assembled list of participant employers and their unnamed industries. Again by contrast, had, say, a Donovan clause approach been used instead for this Award, then such a ramification would be avoided. With a Donovan clause, then absent a formal variation to the express scope of the Award and which variation complied with all the specified pre-requisites in the Act in order to reach that end, no such reduction in scope could occur. With a Glover clause used it is put that the departure of the last retail pharmacy industry named respondent in 1995 delivered then an excision of that industry upon the ordered excision of the PUFSC from the Schedule by the Commission.

The parties' grounds of appeal and formal written submissions

Appellants' position

70 The SDA's grounds of appeal, filed on 18 December 2019, display four grounds of appeal in each case. As mentioned, its dual appeals of that day were subsequently consolidated. The essence, however, of the SDA's appeal is essentially a jurisdictional challenge, articulated by reference to the provisions of the 1979 Act and their asserted non-fulfilment.[33]

71 By the appeal, the SDA effectively seeks to reverse the decision of the majority of the Full Bench and so, to reinstate the declaration of Commissioner Emmanuel that had issued at first instance - as to the Award's continued coverage of employees within relevant callings (and their employers) in the retail pharmacy industry.

72 Ground three of the SDA's notice of appeal comprehensively encapsulates the overall jurisdictional challenge. It reads in the following terms:

> 3. The Full Bench erred in law in holding that the exercise of the power by the Commission on its own motion in April 1995 pursuant to s 47(2) of the Act ((1995) 75 WAIG 954) to strike out PUFSC as a party who was named as an employer respondent in the industry to which the Award applied when made, namely, the retail pharmacy industry, because that employer was no longer carrying on business as an employer in that industry, when:
>
> (i) the determination of the scope of the Award was to be made by reference to the industry carried on by the named respondents at the date of the Award, namely, 1977, and not, as held by the Full Bench by reference to the Award as varied in 1995, or by reference to the terms of the Award at the date of the hearing of the application the subject of this appeal;
>
> (ii) the striking out of an employer who was a named respondent and a party to the Award, when made, but was no longer carrying on business at some later time, did not remove the binding common rule effect of the Award as made (as represented by that employer and the application of s 37(1) of the Act) on other unnamed employers engaged in the industry, or have that effect;
>
> (iii) contrary to the determination of the Full Bench, the absence of any named respondents to the Award carrying on business in the retail pharmacy industry at the time of the determination of the present application pursuant to s 46 of the Act (as opposed to the time of the making of the Award in 1977) did not narrow the scope and binding effect of the Award to exclude that industry or employers engaged in that industry, or have that effect;
>
> (iv) contrary to the determination of the Full Bench, the striking out of any employer as a named respondent and a party to an Award under s 47(2), after it was made, did not by reason of such steps being a variation to the Award (as defined in s 7 of the Act) vary the scope of the Award as made and the Commission lacked the power to effect such an outcome.

73 The grounds of appeal relied upon by the Minister, filed 2 January 2020, in effect, raise the same jurisdictional objection against the legal capacity of the Commission in 1995 to alter, by variation, the scope of the Award, absent prior conformity with s 29A(1) of the 1979 Act.

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[33] By reference to the 11 May 1994 reprint, being the legislation in force at the time of the May and September 1995 orders.

74 The core jurisdictional objection as raised by both the SDA and the Minister under their mutual grounds of appeal, was elaborated upon by the SDA's written outlines of submissions filed 4 February 2020. The Minister also filed written submissions on the same date.

75 The jurisdictional obstacle, as it is advanced by both the SDA and the Minister, is directed against the majority reasoning in the Full Bench. This challenge is fully explained under par 49 of the SDA's written submissions, which read in terms:

> 49. In so holding the Full Bench erred for the following reasons:
>
> a) the **Award** as made extended to and applied to employees and employers in the retail pharmacy industry ... ;
>
> b) there was at no time following the making of the **Award** any application to vary the scope of the **Award** so as to remove the retail pharmacy industry to which the **Award** applied;
>
> c) the proceedings conducted by, and at the initiative of the Commission in 1995 pursuant to s 47(2) of the Act ... did not and could not vary the scope of the **Award** so as to delete the retail pharmacy industry to which the **Award** applied:
>
> (i) the power given to the Commission under s 47(2) of the Act is not directed at varying the scope an award but is only directed in a separate and confined issue, namely, of its own motion by order to strike out a party as a named party to the award upon satisfaction that that party is no longer carrying on business as an employer in the industry to which the award applies;
>
> (ii) as is clear from the express wording of s 47(2), the power under s 47(2) is not addressed at altering *the industries to which the award applies* but simply with removing the named respondents no longer carrying on business in the industry to which the award applies;
>
> (iii) in contrast, there were specific provisions in the **Act** addressing specifically the variation of the scope of an award, s40, together with s49A and s38;
>
> (iv) any variation to the scope of an award pursuant to s.40 (and hence the industry or industries to which it applies) were subject to:
>
> (aa) limited standing to bring an application, namely any organisation or association named as a party to the award or employer bound by the award, and not the Commission;
>
> (bb) the jurisdictional precondition in s.29A and the prohibition on the Commission hearing an application to so vary an award absent the publication and service requirements there set out;
>
> (v) the circumstances where a variation to the scope of an award were not subject to the requirements of s.29A were confined to where the particular employers, organisations or associations are added as a named party to the award (s.31(1) and (2)) resulting, however, in respect of the adding of an employer engaged in an industry to which the award did not previously apply, and a variation of scope expressly limited to that employer (s.38(3));[34]
>
> (vi) the analysis by the Commission at first instance as to the nature of the powers under s.47 and the scope variation power under s.40, complying with s.29A of the **Act** as the only basis for the variation of the scope of an award was not erroneous and was a correct interpretation of the relevant provisions of the Act;
>
> (vii) that the exercise of the power by the Commission pursuant to s.47 does not involve a referral of an industrial matter to the Commission pursuant to s.29, and hence the absence of a requirement under s.47 of the **Act** that the Commission comply with s.29A of the **Act**, is a strong indication that the power under s.47 is a narrow power and is not

[34] The position articulated above concerning s 38(3) under the 1979 Act was applicable at 1995. Subsequently, however, more changes were effected under amendments to the 1979 Act as introduced in 2002 (see the *Labour Relations Reform Act 2002* (WA) Amendment Act No 20 of 2002, s 117(1)). These changes in relation to the addition of an employer to an award then expanded the ramifications of such an addition by replacing, in effect, the last word used in the former s 38(3), namely, 'employer', by the word 'industry'. The consequence is that s 38(3) now reads (post 2002) '... the variation shall for the purposes of s 37(1) be expressly limited to that industry.' See also s 38(4)).

directed at affecting the rights and obligations of employers and employees employed by those employers, including unnamed employers bound by common rule, by the alteration of the scope of the industries to which the award applies;

(viii) proceedings under s 47(2) do not seek to identify or deal with the unnamed employer respondents bound by an award by reason of s 37, and the absence of a requirement to comply with s 29A to put employers and employees of unnamed employer respondents on notice that their rights and obligations may be affected by reason of the striking out of a named respondent, who is no longer carrying on business in an industry to which an award applies, further reinforces the conclusion that a reduced scope cannot be achieved pursuant to s 47(2) of the **Act**;

(ix) to the extent that striking out an employer as a named party to an award on the basis that the employer is no longer carrying on business as an employer in the industry or industries to which the **Award** applies constitutes a 'variation' of the award (as defined in s 7 of the Act), it is a variation of a particular kind and it does not constitute a variation of the scope of an award, and the relevant industry to which it applies remains unaffected by such a variation;

(x) there was an absence of contextual indication that the Commission can of its own motion vary the scope of an award so as to reduce the industries to which it applies and, as outlined above, every indication that such a power was not available to the Commission in 1995 pursuant to s 47;

d) the proceedings brought by the SDA and the September 1995 Order did not seek to, and did not vary scope of the **Award**;

e) the jurisdictional requirement that there be compliance with s 29A (and Regulation 11 of the **Regulations**) was not complied with, or required to be complied with by the Commission), and absence [sic] such compliance the express prohibition on the hearing of an application to vary the scope of an award applied;

f) in the absence of compliance with the requirements in s 29A in the SDA proceedings the Commission was without jurisdiction to reduce the scope of the **Award** to exclude the retail pharmacy industry and [the] September 1995 Order must be interpreted in that light;

g) the absence of identification of employers listed in Schedule 'C' to whom the **Award** applies (other than Boans or PUFSC) in the retail pharmacy industry during the hearing and determination of the proceedings pursuant to s.46 of the Act, the subject of this appeal:

(i) could not affect the conclusion which ought to have been reached that the two sets of 1995 proceedings referred to by the Commission could not, and did not vary the scope of the **Award** to exclude the retail pharmacy industry or have that effect;

(ii) the proceedings under s.46 for an interpretation of the **Award** did not require the identification of employers in fact carrying on business in that industry;

(iii) did not enliven any power in the Commission to make a declaration varying or having the effect of varying the scope of the award and thereby removed from its operation unnamed employer respondents bound by common rule and the entitlements of employees of those respondents under the **Award**. (emphasis in original)

Respondents' positions

76 Written outlines of submissions resisting the appeals of the SDA and the Minister were filed on 25 February 2020 on behalf of each of the respective respondents, Chemist Warehouse and the Pharmacy Guild.

77 In brief terms, each respondent seeks to defend the position of the majority of the Full Bench concerning the effects and consequences of the April 1995 order of the Commission (made then upon its own motion) under s 47(2) of the 1979 Act and striking out PUFSC as a named respondent in the Schedule to the Award at that time.

78 The respondents further raise the suggested force of the Commission's September 1995 order issued under s 40, and varying the Award then, by replacing the existing schedule with a revised and updated Schedule C list of employers, none of whom were then engaged in the retail pharmacy industry. The respondents argue that the April or September 1995 orders of the Commission delivered a necessary legal consequence that the scope of Award coverage had, indeed, then been reduced. The practical consequence, they say, was that employers of employees in relevant callings within the retail pharmacy industry from then, were no longer covered by the Award.

79 The Commission's April and September 1995 orders are said to be obviously valid and effective when made in 1995. They are not said to have been made under any degree of error. Whether or not the SDA had then subjectively intended to bring about a truncation in Award coverage of 1995 is wholly irrelevant. The evaluation exercise is objective. The truncation in coverage result follows necessarily in law from the force of the 1995 orders as made, as a matter of law.

80 The written submissions by Chemist Warehouse effectively contend for the force of s 47 of the 1979 Act in its own right - as a jurisdictional platform for the Commission, when acting of its own motion, to vary an award when appropriate, as occurred here. Since a Glover clause had been used to define (by cl 3) the scope of the Award, a deletion of the named employer from out of Schedule C necessarily bore upon the scope of the Award.

81 Chemist Warehouse's submissions contended further:

> 17. The process under section 47 was not merely a housekeeping process with no legal consequences. This is incongruous with the significant notification provisions required under section 47, including the requirement, not present in section 29A, to give notice of its intention to make an order removing a party or parties in a newspaper circulating in the area of the State in which the award applies. While the notification provisions of [section] 29A and 47 differ, they are of similar effect, impose similar obligations and it is reasonably apparent that they have a similar intent. They are not reflective of a diminished power under section 47 (when compared with section 40) but rather of the different basis on which the process under the provisions is initiated.
>
> 18. It is implicit in the Appellants' submissions (setting aside the question of immutability of scope) that had PUFSC been removed as a respondent for the 1977 Award as a result of an order issued by a process initiated under section 40 and including compliance with section 29A, then it would have validly been removed and the 1977 Award would, from the date of such order, no longer applied [sic] to the retail pharmacy industry. What the Appellants are essentially saying is that it is the process rather than the outcome which determines a scope. This should not be accepted. Such an approach would lead to an outcome where a person or business covered by the award cannot rely on the plain terms of the award to determine scope, but rather must interrogate not only the fact of the removal of a respondent but also the process under which that removal occurred.
>
> ...
>
> 21. The majority of the Full Bench aptly summarised the impact of the September 1995 Order of the Commission at paragraph [65] of the Appeal Decision when it said:
>
> > '*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.*'

82 Addressing these written submissions at the appeal hearing in this Court, counsel for Chemist Warehouse, Mr Tindley, characterised the as contended truncation in the scope as a necessary repercussion of the 1995 orders of the Commission in delivering the contended removal (then) of the retail pharmacy industry from award coverage. The result was simply one of the risks of defining industry coverage by a Glover clause.[35] It was, in effect, the logical and necessary downside consequence (whether subjectively intended or not at the time by anyone) of there being no remaining named employer respondent to be found in the revised Schedule C to the Award after September 1995 that was still engaged in the retail pharmacy industry.

83 The Pharmacy Guild's arguments were similar. Particular attention as a matter of statutory interpretation was drawn to s 37(1) of the 1979 Act. Emphasis was directed at this clear text as a declaration by the legislature, in effect, that an award must have effect 'according to its terms'.[36] A reduction in scope conclusion as reached by the majority of the Full Bench was the necessary consequence of giving effect to the terms of the Award, as it was varied in 1995, and was a result driven by the deliberate choice to use a Glover clause to define industry coverage.

84 Under its written submissions, the Pharmacy Guild emphasised an unquestioned validity of the April 1995 order made by the Commission, observing:

> 16. The Appellants do not submit that the Commission erred in removing PUFSC when making its April 1995 order, or otherwise seek to quash that order. That is, there is no challenge that [PUFSC] had in fact ceased to carry on business in the relevant industry, or that the Commission had the power to remove PUFSC from Schedule C as a result.
>
> ...
>
> 20. Rather, the construction of an award involves ascertaining what a reasonable person would have understood the parties to mean based on the text of the award. Applying orthodox methodology,

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[35] ts 41.

[36] See counsel's oral submissions at ts 54 - 57.

> the Full Bench found that, as a matter of construction, the removal of PUFSC changed the Award's scope such that it no longer applied to the pharmacy industry. That was the correct result.

85 Emphasis was also directed at the significance of the September 1995 order being made at the SDA's own behest, seeking then to delete and wholly replace Schedule C. By pars 36 - 37 of its written submissions the Pharmacy Guild contended:

> … In an application under s.40, it was always open to the SDA to vary the Award's scope. However, for reasons unknown, it chose not to despite the fact that a number of respondents had been struck out in April 1995. Any issues concerning the April 1995 order were overtaken by the SDA's application and the September 1995 order.
>
> The scope of the Award, determined as it is by clause 3 and Schedule C, crystallised following the SDA's own motion.

Melrose Farm

86 During the course of arguments,[37] counsel for the Pharmacy Guild, Mr T J Dixon, directed the court's attention to a further decision of the Industrial Appeal Court, namely, ***Melrose Farm Pty Ltd t/as Miles Away Tours v Milwood***.[38] This was to suggest some support therein for the respondents' position in the (dissenting) reasons of Pullin J.[39]

87 Because of what was the late emergence of this further case authority, during the course of the hearing, leave was given for the appellants, to respond by way of brief written submissions concerning the contended implications of this decision in the appeal.

88 It became clear, however, from the written responsive materials as eventually received on behalf of the SDA and the Minister,[40] that ***Melrose Farm*** carries no real bearing to the present arguments. The primary issue in ***Melrose Farm*** was whether, for the purposes of s 37(1) of the 1979 Act, an identification of an industry to which an award applies could be ascertained from references in an award to the calling of employees.[41] In ***Melrose Farm*** the majority (Le Miere J with whom Steytler J agreed) determined that for the purpose of s 37, a relevant industry could be ascertained from references within an award to a calling of employees.[42] But that position concerning s 37 is unique to the facts of that appeal. ***Melrose Farm*** delivers no material considerations of relevance to the distinct jurisdictional issues which present for determination in the present appeals.

The essential question

89 The core issue requiring resolution in these appeals is whether a necessary legal consequence of a common rule award that establishes industry scope coverage by using a Glover clause will, by a parity of reasoning, see its scope of coverage indirectly reduced at a later time upon the excision of the name of the last employer entity whose presence in the schedule to the award had delivered that industry coverage outcome in the first place.

90 In addressing that issue, the essential question is whether or not the Commission at April or September 1995 was then jurisdictionally empowered (where there had been no prior compliance with s 29A(2) of the 1979 Act by reference to publication, notification and service requirements) to validly issue orders which had the legal effect of reducing the scope of the Award - so that afterwards, the Award would, being an industry common rule award, no longer extend to cover employees in the callings as identified (and their employers) within the retail pharmacy industry.

History of the scope of the Award

91 There has been no factual controversy at any level, either below or within the arguments of the appeals before this court, that this Award, as introduced in 1977, did then extend to cover workers and their employers in the retail pharmacy industry - in relevant callings as designated under the Award. Relevantly, those callings could be identified from cl 25 (the 'Wages' clause) and seen there to include the various employee callings of Shop Assistant, Salesperson, Demonstrator; Storeman, Packer, Despatch Hand; Canvasser and/or Collector; Window Dresser and Wholesale Salesman. Note also the definitions under cl 6 in the Award, concerning the terms, Shop Assistant, Storeman, Storeman Working Singly, Despatch Hand and Packer.

92 Coverage in 1977 of the identified callings under the Award to employees within the retail pharmacy industry of Western Australia is a conclusion that is effectively reinforced by the terms of cl 38 ('Chemists Shops') of the Award, seen earlier. Commissioner Emmanuel's reasons direct some level of significance at a continued ongoing presence of cl 38 within the Award and there addressing the retail pharmacy industry.[43] Its presence, however, in my view, is ultimately equivocal upon the main issue in question in these appeals. Clause 38 carried obvious reference when the retail pharmacy industry was undoubtedly covered by the Award in 1977. But if it is the case that the events of 1995 have

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[37] ts 76.

[38] ***Melrose Farm Pty Ltd t/as Miles Away Tours v Milwood*** [2008] WASCA 175; (2008) 175 IR 455.

[39] ***Melrose Farm*** [11].

[40] Both filed 20 January 2021.

[41] ***Melrose Farm*** [13] and [42(1)].

[42] ***Melrose Farm*** [81].

[43] As mentioned, cl 38 is now reflected under cl 40.

the legal effect of delivering a truncation in scope coverage for cl 3, then a retention of cl 38 can be rationalised as a mere historical redundancy.

93 So it is fully accepted factually that the Award as introduced in 1977 saw its undoubted scope extend to cover workers (in relevant callings) and their employers in the retail pharmacy industry of Western Australia - albeit some such employers at the time were not then named as respondents in Schedule 'B' to the Award. That is a legal consequence of the effect of the award extending by force of s 85(1) of the Former Act, as an industry common rule award.

94 When the 1979 Act was introduced to repeal and replace the predecessor legislation (effective from 1 March 1980), it carried a transitional provision (subject to an immaterial qualification). I refer to s 117(1)(g) of the 1979 Act which had provided:[44]

> (1) On and after the proclaimed date -
>
> …
>
> (g) each award, order or decision which, immediately prior to the proclaimed date, was in force under the repealed Act shall be deemed to have been made under this Act and shall continue in force under and subject to this Act ...

95 Consequently, there has been no submission put at any level to the effect that the Award as it had issued in 1977 under the Former Act had not continued on with full force its applicability to all industries within its scope of coverage under the new regime of the 1979 Act after March 1980. The only real questions of controversy arose around the legal effects of the orders of the Commission by way of its ordered variations to the Award effected in April and then September 1995.

Earlier 1988 variations to the Award

96 It was also not in dispute factually that after 1977 there had followed some adjustments and variations to the Award.

97 At 23 December 1988 a number of variations were made to the Award, including:[45]

(a) the original Schedule 'B' as was referred to by cl 3, was re-lettered to become Schedule C;

(b) a replacement Schedule B was inserted (by reference to cl 6(14)) which listed the goods and services prescribed for the purposes of sale at a special retail shop. At item 3 there is seen reference to Pharmaceutical shops and also to the goods and services able to be sold in that category of shop as those prescribed by s 40A of the *Pharmacy Act 1964* (WA); and

(c) the name of Boans was removed at this time as a named respondent in the (new) Schedule C to the Award.[46]

98 The 1988 removal of Boans, however, is essentially immaterial for the purposes of evaluating the Award's (Glover clause) scope, since PUFSC had continued to be a named respondent.[47] Consequently, there is no dispute that all relevant workers in callings identified and their employers (even if not named) within the retail pharmacy industry were as a result of the common rule character of the award, still fully bound after 1988 and until the controversial events of 1995.

April 1995

99 At April 1995, however, the position changed. On 5 April 1995 the name of the PUFSC was removed as a scheduled respondent to the Award by an order of the Commission.[48] That development had been at the initiative of the Commission, acting then under s 47 of the 1979 Act.[49]

100 It is, of course, necessary to view closely the events of April and then September 1995. As seen, they provide the foundation for the contentions of both respondents in these appeals towards upholding the conclusions reached by the majority of the Full Bench - that the 1995 removal of the PUFSC as a named respondent in Schedule C had delivered then a correlative reduction in scope of the Award by the excision of the retail pharmacy industry of Western Australia at then from the scope of the Award's industry coverage.

101 On 9 April 1995, Commissioner A R Beech, at the end of a process which had been unfolding since at least September 1993, issued an order under s 47(2) of the 1979 Act varying the Award.

102 The order, relevantly, had amended what was then the list of employers found in Schedule C to remove (ie, 'strike out') some of those respondents on a basis that they were no longer then still carrying on business in the industry to which the Award applied (ie, a step taken by the Commission pursuant to s 47(2) of the 1979 Act).

103 Commissioner A R Beech's order of 5 April 1995 reads (in part):[50]

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[44] As passed and assented to on 21 December 1979.

[45] Application No 1519 of 1987; (1989) 69 WAIG 1215.

[46] See (1989) 69 WAIG 1215, 1233.

[47] See (1989) 69 WAIG 1215, 1236.

[48] See R 32 of 1976.

[49] As at the 11 May 1994 reprint.

[50] (1995) 75 WAIG 954.

> WHEREAS the Commission on its own motion and pursuant to s 47 of the Industrial Relations Act 1979 gave notice of its intention to strike out a number of respondents to The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 on the grounds that they are no longer carrying on business in an industry to which the award applies (see (1993) 73 WAIG 2784);
>
> AND WHEREAS the Commission, being satisfied that subsection (3) of s 47 has been complied with, is of the opinion that the respondents set out in the schedule attached hereto are no longer carrying on business in an industry to which the award applies;
>
> …
>
> NOW THEREFORE I, the undersigned, Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred on me under the Industrial Relations Act 1979, hereby order:-
>
> > That the respondents listed in the schedule attached hereto be struck out as respondents to the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977.

104 One of the as then scheduled 'struck out' respondents was PUFSC.[51]

105 Upon that deletion of PUFSC in April 1995, there is no factual dispute that there were then no longer any remaining cl 3 Schedule C respondent employers carrying on business in the retail pharmacy industry.

September 1995

106 The second key event of 1995 was initiated by the application of the SDA (made 12 April 1995) seeking 'the variation of the above award'. The 'award' is, of course, the Award in question in these appeals.

107 The proposed variation then sought by the SDA was to, effectively, replace the existing Schedule C of the Award by an updated and revised schedule, in lieu. Again it is fully accepted as a matter of fact that none of the listed respondents as then identified in the replacement schedule submitted by the SDA were engaged in the retail pharmacy industry.

108 On 20 September 1995, Commissioner A R Beech, having heard from the SDA and a representative of some Award respondents, then ordered, by consent:[52]

> THAT The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 6th day of September 1995.

109 I next can turn to the essential question in these appeals. That is, of course, whether by reference to the terms of the 1979 Act as it was in force at the times of the making of respective orders of the Commission in April and September 1995, did one or other (or both) of those 1995 orders then varying the Award's Schedule C deliver a legal consequence of removing the retail pharmacy industry from the scope of coverage of the Award.

110 But to fully appreciate the rival stances concerning the dispute (which, since 2018, has seen a 2:2 division of Industrial Commissioners over the question) it is first necessary to find and examine a number of the key provisions of the 1979 Act, as it was in force at 1995.

Provisions of the 1979 Act in 1995

111 Conveniently, those 1979 Act provisions of 1995 (some of which have since altered very materially in the ensuing 26 years to 2021) may be accessed in the reprint of the *Industrial Relations Act 1979* effected at 11 May 1994.

112 Relevant provisions of the 1979 Act under scrutiny include s 29, s 29A, s 37, s 38, s 40, s 46 and s 47.

113 It is also necessary to see the definition of the term 'vary' under the Act at the time. This was found in s 7(1) which provided then (unless the contrary intention appeared within the Act) in the following terms:

> '**vary**' in relation to an award or industrial agreement means to add a new provision or to add to, alter, amend or rescind an existing provision;

114 The abovementioned sections of the 1979 Act during 1995 then read as follows:

> **By whom matters may be referred**
>
> **29.** (1) An industrial matter may be referred to the Commission -
>
> (a) in any case by -
>
> (i) an employer with a sufficient interest in the industrial matter;
>
> (ii) an organization in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organization; or
>
> (iii) the Minister;
>
> ...

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[51] (1995) 75 WAIG 954, 954 and 955.

[52] (1995) 75 WAIG 2836.

Service of claims and applications

29A. (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.

(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 variation of the area of operation or the scope of an award or industrial agreement, or the registration of an industrial agreement, the Commission shall not hear the claim or application until those parts of the proposed award, variation or industrial agreement that relate to area of operation or scope have been published in the *Industrial Gazette* 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) the Council, the Chamber, the Mines and Metals Association and the Minister; and

(ii) such organizations, 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 the Council, the Chambers, the Mines and Metals Association and the Minister.

(2a) The Chief Commissioner may, if the reference of an industrial matter to the Commission seeks -

(a) the issuance of an award or the registration of an industrial agreement in substitution for an existing award or industrial agreement the area of operation and scope of which are the same as those of the award or industrial agreement sought to be issued or registered, as the case requires; or

(b) the registration of an industrial agreement -

(i) the area of operation and scope of which are the same as those of; and

(ii) the parties to which are the same as the named parties to,

an existing award,

direct that those parts of the proposed award or industrial agreement that relate to area of operation and scope -

(c) may, instead of being published in the *Industrial* Gazette, be published in a newspaper circulating throughout the State; or

(d) need not be published at all,

as he thinks fit.

(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 paragraph (a) or (b) of subsection (2).

(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 (1), 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.

Effect, area and scope of awards

37. (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.

…

Named parties to awards

38. (1) The parties to proceedings before the Commission in which an award is made, other than the Council, the Chamber, the Mines and Metals Association and the Minister, shall be listed in the award as the named parties to the award.

(1a) If after the commencement of section 12 of the *Industrial Relations Amendment Act 1993* -

(a) any party to proceedings in which an award is made, other than the Council, the Chamber, the Mines and Metals Association and the Minister, is not listed in the award as a named party as required by subsection (1); and

(b) the Commission has not ordered that the party is not to be a party to the award,

the party is taken to be a named party to the award.

(1b) In subsections (1) and (1a) '**party**' does not include an intervener.

(2) At any time after an award has been made the Commission may, by order made on the application of -

(a) any employer who, in the opinion of the Commission, has a sufficient interest in the matter;

(b) any organization which is registered in respect of any calling mentioned in the award of in respect of any industry to which the award applies; or

(c) any association on which any such organization is represented,

add as a named party to the award any employer, organization or association.

(3) Where an employer who is added as a named party to an award under subsection (2) is engaged in an industry to which the award did not previously apply, the variation to the scope of that award by virtue of that addition shall for the purposes of section 37(1) be expressly limited to that employer.

...

Power to vary or cancel award

40. (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 an organization 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,

(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;

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

...

Interpretation of awards and orders

46. (1) At any time while an award is in force under this Act the Commission may, on the application of any employer, organization, or association bound by the award -

(a) declare the true interpretation of the award; and

(b) 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.

Cancellation of defunct awards, and deletion of employers from awards in certain cases

47. (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 in a newspaper circulating in the area of the State in which the award or industrial agreement operates and in the *Industrial Gazette* 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 publication in the newspaper or in the *Industrial Gazette*, whichever is the later, of the notice referred to in subsection (3), 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 organization 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 the Council, the Chamber and the Association; and

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

Some insights towards the Commission's jurisdiction to vary a Glover scope clause in an award

115 It is necessary to turn back to two of the decisions of the Industrial Appeal Court already mentioned.

116 Neither explicitly addresses the present issue concerning a contended truncation in the scope of an award's industry coverage - where a Glover clause is used to designate scope and where, some years subsequent to the award being made, as a result of a variation effected under an order of the Commission, there no longer remain any scheduled respondents who are still operating in an industry that was originally within the scope of coverage. Nevertheless, some helpful insights to that question may be discerned from the decisions.

Freshwest

117 In ***Freshwest***, Franklyn J, delivering the lead reasons of the Court, and with whom Rowland and Walsh JJ agreed, had canvassed the earlier decisions in ***Glover*** and ***Donovan***.[53]

118 Franklyn J had identified the true temporal focus for the required findings of fact towards the industry of a named respondent to an award. The current focus for the exercise, he explained, was 'at the date of the award'. To that end, his Honour said:[54]

> The evidence led in this case, however, is entirely unspecific as to the point of time to which it refers, a matter drawn to the attention of the Full Bench. As a result that Bench considered the various judgments in ***Glover*** and commented that no other member of the court in that appeal held it was necessary to

[53] ***Freshwest***, 1747.

[54] ***Freshwest***, 1748.

> determine the industries as at the date of the award. Whilst it is true that neither of the other members so held, it does not follow that they did not agree with Burt J ... The Full Bench, whilst conceding that ***Glover*** 'has been a leading authority in this jurisdiction for many years', concluded that it was arguable 'that one does not and ought not determine the relevant industries as at the date of the award. The best evidence of what an industry is and what is an award may well be what it is now, although we would require substantial argument.'

119 Franklyn J expressly rejected the Full Bench's efforts below to extend the temporal focus of the Glover scope clause to a later time, observing:[55]

> In my opinion, in that observation, the Full Bench missed the point of his Honour's statement in ***Glover*** which, as I understand it, arose out of the particular wording of the particular scope clause. That clause applies the award to all workers ' ... in the industries carried on by the respondents set out in the schedule'. 'Industry' is defined by s 7 to include 'any business, trade, manufacture undertaking or calling of employers'. The clause speaks specifically of what might be called 'the respondents' industries' and not generally of an industry or industries ... For the industries to which it applies to be determined with certainty - an essential to an 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 fact that diverse activities are carried on in any such industry and from time to time may be varied and some even abandoned does not, of itself, mean that it is no longer the same industry.

120 His Honour concluded:[56]

> The present case, in my opinion, is one to which his Honour's statement in ***Glover*** is appropriate. 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 reason is not bound thereby.

121 The observations by Franklyn J in ***Freshwest*** above illuminate two key legal points. First, is the significance of the temporal applied focus in ascertaining the industries the subject of the award's coverage, to the time an award is made, not at any later time.

122 The second key point illuminated by ***Freshwest*** is as to the terms of s 38(3) and s 47(2) of the 1979 Act (as they then applied in 1991). Out of s 38(3) there was discerned a legislative sentiment that the effect of adding an extra employer to the schedule to an award as a named party was explicitly confined, under the 1979 Act, to merely delivering an augmentation in coverage of award scope limited to the newly added employer (and not the newly added employer's industry, if that industry were not already covered). Emerging from that conclusion was a discernible legislative sentiment, in effect, entrenching the ongoing importance of the original parameters of the award - by s 38(3) only allowing a very limited basis of expansion.[57]

Airlite

123 The second decision by the Industrial Appeal Court that requires some elaboration is ***Airlite***.

124 I have already mentioned this decision as an illustration of the potential allowed for in the Commission, after 1979, to issue an award which by its express terms was said not to be a common rule industry award in its reach.[58]

125 Nevertheless, the ***Airlite*** decision is also significant in greater respects of some present reference. In that decision, Scott J (with whose reasons Kennedy and Parker JJ expressly agreed), in the course of dealing with the issue raised as to whether the Commission held jurisdiction to vary the Cleaning (Ministry of Education) Award 1990, found to the contrary.[59] The Court had been considering facts where there had been an adding of additional respondents to those as already named.

126 The Industrial Appeal Court in ***Airlite*** was unanimously of the view that the Commission, by force of s 29A(2) of the 1979 Act, had lacked any jurisdiction to effect the augmentation of the additional respondents. To do that would inevitably 'amend the scope of the award'.[60] The enlargement in scope consequence meant that s 29A(2) of the 1979 Act had been applicable as a necessary pre-requisite to the Commission obtaining jurisdiction and problematically, in that case, its requirements had not been met.

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[55] ***Freshwest***, 1748.

[56] ***Freshwest***, 1748.

[57] Subsequently, however, by changes introduced in 2002 to the 1979 Act, the reach of s 38(3) was extended - with the word 'employer' being replaced then by a reference to 'that industry'. But then see s 38(4).

[58] See Burt J's observations in ***Electrical Trades***, 27.

[59] ***Airlite*** [23].

[60] ***Airlite*** [4] (Kennedy J).

127 The force of s 29A(2), where it applies, explained in ***Airlite*** by the concurring reasons of Kennedy J, was:[61]

> ... 'the Commission shall not hear the ... application until those parts of the proposed ... variation ... that relate to ... scope have been published in the Industrial Gazette and a copy of the ... application has been served' in accordance with par (a) of s 29A(2).

128 Towards that jurisdictional constraint, Scott J had said:[62]

> The first thing to notice about s 29A(2) of the Act is that it is jurisdictional in nature. The section prohibits the Commission from exercising jurisdiction in such cases in mandatory terms by providing that the Commission 'shall not hear the claim or application until those parts of the proposed award, variation or industrial agreement that relate to the area of operational scope have been published in the *Industrial Gazette*'.

129 In ***Airlite***, an unsuccessful argument had been put to the Industrial Appeal Court that the s 29A(2) requirements would not apply, because that award was not a common rule award.[63] The contention was unanimously rejected, with Scott J observing the submission was directly contrary to the express words of s 29A(2).[64]

130 Emerging out of the ***Airlite*** decision was the clear confirmation, in effect, of the vital significance seen as being given by the legislature towards any potential variation in the scope of an award. Correlatively confirmed was the need for what were quite onerous s 29A(2) mandated measures to first be fully complied with - in order for the Commission, only at then, to obtain the jurisdiction to validly vary the scope of an existing award (in ***Airlite***, by an increase of scope coverage to further persons).

131 Finally, whilst the ***Airlite*** decision had been concerned with a proposed variation towards the scope of an award by the addition of further respondents and the consequent expansion in scope, the implications potentially carried were wider. The appeal in ***Airlite*** was allowed and the matter remitted to a single Commissioner:[65]

> to be dealt with according to law after the provisions of s 29A of the *Industrial Relations Act* have been complied with.

132 In the course of Scott J's reasons in ***Airlite***, his Honour cited with express approval extensive passages from joint reasons of Sharkey P and Parkes C rendered in an earlier decision of the Full Bench. This was the decision ***Australian Meat Industry Employees' Union, Industrial Union of Workers West Australian Branch v Stewart Butchering Co Pty Ltd***.[66] Factually, the facts of that appeal to the Full Bench are closer to those of the present appeals, regarding a submitted truncation outcome to the scope of coverage of an award. The decision by the Full Bench concerned a situation of an award respondent being removed from the coverage of that award.

133 By reason of what I assess is their wider assistance to the resolution of these appeals, the Full Bench's reasons in the ***Stewart Butchering*** decision are discussed discretely below.

Stewart Butchering

134 The decision of the Full Bench in ***Stewart Butchering*** concerned an attempted removal of a respondent from the coverage of that award. Those facts, of course, are closer to the present appeal facts. The attempt failed at the jurisdictional level.

135 This 1993 decision of the Full Bench is of dual significance, first, for the ultimately negative jurisdictional conclusion reached by reason of a s 29A(2) non-compliance.[67] Second, the facts in ***Stewart Butchering*** uniquely address a situation under which that particular respondent (who was not a named respondent to that common rule award but, nonetheless, was covered under common rule application) had sought to have the award varied by the Commission by its proposed exemption.

136 The respondent in ***Stewart Butchering*** had succeeded before a single Commissioner by obtaining a variation to that award to have itself exempted. The award's scope clause had been drawn in the form of a Donovan clause. That is, it was a scope clause which identified industry coverage for that award by reference to explicitly named industries.

137 The Commission, at first instance varied the award, adding a new 'Clause 45 - Exemption', which read:[68]

> This award shall not apply to Stewart Butchering Co Pty Ltd.

138 An appeal followed to the Full Bench against the decision. It was upheld by all members of the Full Bench, Sharkey P, Parks and Kennedy CC. One of the appeal grounds upheld (amended ground 15) bears upon the current appeals.

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[61] ***Airlite*** [4].

[62] ***Airlite*** [17].

[63] ***Airlite*** [18].

[64] ***Airlite*** [19].

[65] ***Airlite*** [24].

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

[67] See as mentioned ***Airlite*** [22].

[68] ***Stewart Butchering***, 1198.

139 Ground 15 contended for an error of law made by the Commissioner who had held that the application at first instance sought no alteration in the scope of the award. It was further contended the Commissioner at first instance failed to comply with the requirements of s 29A(2) of the 1979 Act. Ground 15 also contended the Commissioner at first instance failed to consider or correctly apply principles governing the variation of awards. Those challenges were upheld.

140 The reasons of the Full Bench (Sharkey P and Parks C, with Kennedy C writing separate reasons) carry insights, in a negative jurisdictional sense, towards attempted award variations seeking to reduce the scope of an award for a particular (non-party) employer who was once covered, later being removed from coverage. Whilst the result was achievable (under s 40), the s 29A pre-requisites first needed to be addressed and met, in order for such a variation in scope application to even be heard by the Commission.

141 Addressing the jurisdictional appeal ground raising non-compliance with s 29A, Sharkey P had rendered a series of observations I have set out below. Part of the observations, for clarity's sake, I have highlighted in bold, since they were later the subject of citation and express approval by Scott J in ***Airlite*** in the Industrial Appeal Court (with whose reasons Kennedy J agreed).[69]

142 The observations of the Full Bench in ***Stewart Buchering*** carry a wider importance in this appeal. Because of that, I have included some of the preceding passages of the reasons, so that their full import upon a common rule award may be appreciated.

143 In ***Stewart Butchering***, Sharkey P had said:[70]

> ... This was an award which, by common law rule under s 37 of the Act, covers the respondent and its employees, all of whom are bound by it. That was not in issue. It was not in issue that the employees were bound, that the employer was bound, and that therefore the Scope clause, clause 3, was the instrument under s 37 achieving the binding. An award has effect according to its terms, but unless, and to the extent that those terms expressly provide otherwise, it shall, subject to s 37, extend to and bind all employees employed in any calling mentioned therein in the industry or industries to which the award applies and the employers employing those employees, etc (see s 37(1)(a) and (b)).
>
> …
>
> 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. S.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. S 37 recognises that an award can provide otherwise than common law rule coverage, because it provides as follows:
>
> ' ... but unless and to the extent that those terms expressly provide otherwise ... '
>
> This is an application that the award be varied to provide otherwise, (ie) to be otherwise than the common rule award in relation to one excluded employer. What the variation seeks to effect, therefore, is a variation of the Scope clause. This Scope clause is the key to the award's coverage and that is recognised in ***WACJBSIU v Terry Glover Pty Ltd*** 50 WAIG 794 and ***R J Donovan and Associates Pty Ltd v FCU*** 57 WAIG 1317, amongst others.
>
> We think the words of s 37 are quite plain. The award is a common rule award until it prescribes otherwise.
>
> [Next follow in bold the observations cited by Scott J in ***Airlite***.]
>
> **S 38(2) of the Act authorises the addition of named parties in certain circumstances. However, the exemption of a respondent, whether named or not, who would otherwise be bound by the award, narrows the scope of the award by reducing, by one in this case, those employers in the industry or industries denoted or designated by the Scope clause and therefore bound by the award under s 37, upon a reading of clause 3 of the award. This application plainly sought to vary the award by varying the Scope clause. It was not a variation to any other clause in the award and its effect is plain.**
>
> **S 29A(2) of the Act provides that subject to any direction given under s 29A(2)(a) [sic, (2a)], if the reference of an industrial matter to the Commission seeks, inter alia, the variation of the scope of an award, then the Commission shall not hear the claim or application until those parts of the proposed award, variation or industrial agreement which related to the scope, etc, was published in the Industrial Gazette and a copy served on the Trades and Labour Council of Western Australia, the Chamber of Commerce and Industry of Western Australia, the Australian Mines and Metals Association (Inc) and the Minister, as well as such other organisations, associations and employers as the Commission may direct under s 29A(2)(a)(ii) (but see s 29A(1) and (2) generally).**
>
> It was not in issue that none of those events had occurred or that s 29A had not been complied with.
>
> There was, in addition, no suggestion of any direction having been made by the Chief Commissioner as to publication in a newspaper (see s 29A(2a)).

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[69] ***Airlite*** [22].

[70] ***Stewart Butchering***, 1200 (Parks C agreeing).

> **The direction contained in the section is mandatory, the word 'shall' is used (see s 3 and s 56 of the Interpretation Act 1984), and the Commission is prohibited from hearing the matter if s 29A(2) is not complied with by such publication and services are [sic] prescribed.**
>
> **In hearing the matter when s 29A was not complied with, the Commission at first instance erred in law. It had no power to hear the matter and was expressly prohibited from hearing it if s 29A(2) had not been complied with.**

144 To the same effect in ***Stewart Butchering*** were observations by Kennedy C, who also upheld jurisdictional ground 15, by reference to the non-compliance with s 29A(2) of the 1979 Act and so, by the ensuing lack of jurisdiction in the Commission to vary the scope of that award as a result. Kennedy C had observed:[71]

> In the reasons for decision at first instance the Commission found that the Respondent's application was not caught by s 29A(2) of the Act because 'no alteration to the area of operation or the scope of the award itself results if the variation sought was made to the award'.
>
> In my opinion, this conclusion is wrong.
>
> ...
>
> The test is not just whether a proposed variation **is to the scope clause** of an award. It is whether the proposed variation would alter the scope of the award. Thus a variation to a wages clause of an award to add classifications may have the effect of extending the scope of that award. Such an application would be caught by the provisions of s 29A(2). The application at first instance is no less caught on the same basis. (emphasis in bold)

Implications of *Stewart Butchering*

145 In ***Airlite***, Scott J (with whose reasons Kennedy J expressly agreed) said of the passages by Sharkey P as cited from ***Stewart Butchering***:[72]

> I respectfully agree entirely with what Sharkey P said in that judgment, particularly with respect to the provisions of s 29 [sic - the intended reference was to s 29A] being mandatory. In addition, I agree with the learned President's observation that the alteration of named respondents to an award is a variation to the 'scope' of the award so as to attract the provisions of s 29A.

146 It is clear then that a variation to an award (in ***Stewart Butchering*** a common rule award, but in ***Airlite*** an award that was applicable only for the as named parties), to the extent the proposed variation was by adding extra parties (and thereby extending scope, as in ***Airlite***), or by removing a party (and thereby reducing scope as in the case of ***Stewart Butchering***), is to be assessed as in the character of a variation that requires certain specified jurisdictional pre-requisites under s 29A of the Act be met, before the Commission is able to hear the application.

147 The s 29A(2) pre-requisites as to publication, notice and service all need to be first satisfied in order, only then, to afford the Commission with the jurisdiction to validly effect a variation to an award that bears upon the scope of coverage of the award. Hence, the s 29A pre-requisite requirements are no small thing in the overall legislative scheme of the 1979 Act.

148 As a matter of the orthodox interpretation of the 1979 Act, there is a clearly discernible legislative 'gateway' to jurisdiction that is very clearly imposed, before any variation impacting upon the scope of an award can be heard. No doubt this, from a policy perspective, is because of the potential ramifications on a wider basis that such changes may deliver for others who are unseen, but whose rights and obligations may well be impacted upon by a variation of such a character to an award's scope of coverage.

Non-compliance with s 29A of the 1979 Act

149 The orders of Commissioner Beech in April and September 1995 did not follow upon any prior compliance with the requirements of s 29A(2). There was no factual debate over that omission at these appeals. There had been no prior publication (in the *Industrial Gazette*), and no notification or service upon the Council (that is, the Trades and Labour Council of Western Australia), the Chamber (that is, on the Chamber of Commerce and Industry of Western Australia), on the Mines and Metals Association, or upon the Minister.

150 Hence, the s 29A(2) publication, notification and service pre-requisite requirements to jurisdiction for the Commission were not satisfied prior to the Commission's variation orders to the Award of April and, again, in September 1995.

151 As now seen, the primary award variation power of the Commission under the 1979 Act at the time in 1995, was under s 40.

152 By s 40(1) the power of the Commission by order to vary an award is seen as explicitly subjugated, relevantly, to s 29A (and s 38). For present purposes, s 38 (which deals with adding parties to an award under s 38(2) and s 38(3)), is immaterial. However, the subjugation of the s 40 variation power of the Commission to s 29A is highly significant.

153 Commissioner Beech's April 1995 order was not made under s 40. It was made then under s 47(2), with the Commission then acting on its own motion.

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[71] ***Stewart Butchering***, 1204.

[72] ***Airlite*** [23].

154 The April 1995 order which struck out PUFSC as a named respondent in Schedule C to the Award, was by s 47(2). The reason for the order was that PUFSC, amongst other entities as subject of the order, was then 'no longer carrying on business as an employer in the industry to which the award applies'. Factually, that was undoubtedly so.

155 The power of the Commission of its own motion to strike out a party under s 47(2) was, as earlier seen, expressly rendered as being made subject to subsections (3), (4) and (5).

156 There is no contention within the present controversy that the s 47 requirements for a report from the Registrar (by s 47(3)(a) after a making of enquiries), and the giving of a general notice under s 47(3)(b)(i) and (b)(ii), were not fully complied with. So also does it appear that service concerning notice of the making of the order envisaged under s 47(5), was met. Nevertheless, it is clear that there are quite distinct requirements for service and publication in the *Industrial Gazette* that are applicable under s 29A(2) and which were not even attempted to be met prior to Commissioner Beech's orders of April and September 1995.

157 The September 1995 order issued as a result of the SDA's own application then to vary the Award, effectively replacing the existing Schedule C (and which it is accepted did not include any respondent then carrying on business in the retail pharmacy industry) to the Award. The application of the SDA[73] (albeit not specified on the form 1 Notice of Application of 12 April 1995) must have been then by s 40(2). Specifically, by s 40(1) the power of the Commission to vary an award by order is rendered subject to a prior satisfaction of s 29A requirements. That did not happen.

158 I turn back then specifically to s 29A as it applied at April and September 1995. I highlight again its 'gateway' jurisdictional constraints for the Commission concerning any award variation that bears on the area of operation or on the scope of an award.

Section 29A: Gradations in the pre-requisites to Commission jurisdiction to vary an award in different circumstances

159 The terms of s 29A were earlier set out, specifically in relation to how this provision had applied during April and September 1995.

160 There is to be discerned, on my assessment of s 29A overall, what is a descending hierarchy of onerous prior compliance requirements, depending upon the level of significance of the proposed variation to an award.

161 At the highest and most onerous level are seen the terms of s 29A(2) - imposing the highest level of publication as well as widespread and prior notification requirements for the significant industry associations of employer and employee organisations in Western Australia.

162 Relevantly, as to such level of award variations, s 29A(2) had provided:

> Subject to any direction given under subsection (2a), if the reference of an industrial matter to the Commission **seeks ... the variation in the area of operation or the scope of an award or industrial agreement** ... the **Commission shall not hear the claim or application** until those parts of the proposed award, **variation** or industrial agreement that **relate to area of operation or scope have been published** in the *Industrial Gazette* 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) the Council, 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; (emphasis in bold)

163 In descending contrast, s 29A(3) had relevantly provided:

> 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 (1)** [sic][74] 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. (emphasis in bold)

164 Pausing at this point, there can already be seen a clear textual distinction of emphasis, as between two kinds of variations to an award - with the genre of variation to the area of operation or scope of an award under s 29A(2), distinguished and made a subject of the elevated publication and service requirements and to the identified four key industrial relations stakeholders. That regime was not otherwise required for a lesser level of award variation under s 29A(3), being a variation sought other than to the area of operation or scope of an award.

165 Last, I mention by way of the further internal contrast, s 29A(4). It provided, relevantly as to variations of orders or declarations of the Commission:

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[73] Appeal book, tab 19 page 221.

[74] Note the intended reference under s 29A(3) above was obviously to s 29A(2), there being no kind of variation at all to be found mentioned in s 29A(1).

> Where the reference of an industrial matter to the Commission seeks the ... 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.

166 The terms of s 29A(4) as regards a variation of an order or declaration look to impose by their terms an even less stringent level of pre-requisites for service than under s 29A(3).

167 Nevertheless, it will now be readily seen that for each of s 29A(2), (3) and (4), as these requirements applied during April and September 1995, that for each instance of proposed variation for or concerning an award, the legislation has imposed some level of anterior jurisdictional pre-requisite threshold upon the Commission. This is seen textually through the repeated use of terminology, namely, 'the Commission shall not hear' under the different gradations of publication or service pre-requisite requirements, as applicable in each case and in different terms.

168 Emerging out of the text of s 29A(2), (3) and (4) is a discernible legislative hierarchy of relative importance towards a potential category of variation to an award or to an order or declaration of the Commission in reference to an industrial matter. The pursued variation bearing on the scope of operation of an award is afforded the highest order of importance by reason of the most onerous level of publication, notification and service pre-requisite requirements within s 29A.

169 The elevated significance of a potential variation within the area of operation or scope of an award under s 29A(2), is demonstrable. The legislative policy underlying that hierarchy is also relatively clear. The possible ramifications of a potential change in the area of operation or the scope of an award, particularly for an award that is applicable to an industry generally by common rule, could carry potentially very far reaching employment relationship implications upon rights and obligations in unseen quarters. Changes to award coverage are capable of affecting rights and obligations of workers and employers extending well beyond the range of the participant and identified parties who are claimants or applicants seeking the variation before the Commission.

170 The text of s 29A(2) speaks loudly as to the gravity and importance of the protections to be afforded, before effecting any potential change in the scope of application of an award. A policy need for widespread earlier published notice and notification given to the significant local industrial representative stakeholder organisations of employers, employees and, indeed, a Minister, is express.

171 Given that these s 29A(2) pre-requisites are accepted in these appeals as not being met before the variation orders of the Commission issued in April and September 1995, I turn to address how the Commission dealt with that issue below.

The decision of Commissioner Emmanuel at first instance

172 The SDA's application seeking a declaration pursuant to s 46(1)(a) of the 1979 Act reached Commissioner Emmanuel during 2018. She delivered reasons for decision on 18 January 2019, declaring then, in accord with the application by the SDA, that the award as varied, nevertheless still:[75]

> ... applies to workers employed in any calling or callings mentioned in the award in the retail pharmacy industry and to employers employing those workers.

173 Reaching that determination, Emmanuel C reasoned as follows:[76]

> Where the scope of an award is to be varied, s 29A of the IR Act requires certain steps to occur. No evidence or argument is put that those steps occurred when Boans and PUFSC were removed as respondents to the Shop Award. I have been given no reason to think those steps occurred.
>
> Section 40 of the IR Act is a general power that allows the Commission to vary an award on application by the parties. Section 47 is a special power: ***Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty Ltd*** (1984) 64 WAIG 1926 at (1927). Variations to an award under s 40(1) are subject to s 29A and s 38 of the IR Act.
>
> ...
>
> To the extent the Commission acts under s 47 of the IR Act to remove a listed respondent that no longer carries on business in an industry to which the award applies, the Commission exercises a special power. It goes no further than removing a listed respondent. Such an order does not have the effect of removing an industry, thereby reducing the award's scope. In my view, that reasoning is supported by the limited notice provisions that apply to s 47 of the IR Act.
>
> ...
>
> I consider the 1995 order under s 47 of the IR Act did no more than remove PUFSC as a named respondent because it no longer carried on business in an industry to which the Shop Award applied. The retail pharmacy industry itself continued to be an industry to which the Shop Award applied.

Appeal to the Full Bench

174 There followed the appeals to the Full Bench by the Pharmacy Guild and by Chemist Warehouse.

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[75] 2019 WAIRC 00015 [84].

[76] 2019 WAIRC 00015 [70], [71], [73] and [75].

175 By majority, Scott CC and Kenner SC with Walkington C dissenting, the Full Bench concluded that the appeals be allowed. Two tranches of reasons supporting that conclusion were delivered

176 I would observe that no reference appears in any of the reasons to earlier decision of the Full Bench in the ***Stewart Butchering***, or to the decision of the Industrial Appeal Court in ***Airlite***.

177 In a first tranche of reasons delivered on 21 November 2019 Scott CC and Kenner SC noted the submission put on behalf of the appellants.[77] It is apparent that significant reference was made before the Full Bench to the effects of the decisions in ***Glover*** and ***Freshwest***. As to that issue, Scott CC and Kenner SC had observed:[78]

> 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.
>
> The application at first instance sought a declaration under s 46, as to the true meaning of the terms of the award. Plainly, via s 37 ... 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. That 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 to 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 the award's true interpretation, has application.
>
> ...
>
> ... It is the enforcement of the award as it is 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.
>
> 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' provision 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 enquiry 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 in the industry of retail pharmacy. Therefore, subject to what follows, the Award does not extend to this industry.

178 Ultimately, Scott CC and Kenner SC concluded:[79]

> Therefore, for the foregoing reasons, we consider the learned Commissioner's acceptance of the Union's and the 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 at 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 ... '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.

179 Components of the reasoning of Scott CC and Kenner SC, ultimately leading to their conclusion s 29A(2) was not applicable for a striking out order made by the Commission under s 47(2), were tied to a perceived significance for a phrase 'reference of an industrial matter to the Commission seeks', used in s 29A. To that, they had observed:[80]

> The referral of an industrial matter in the manner outlined above stands in contrast to the power of the Commission to act on its own motion under s 47 of the Act. As a matter of construction of the Act, the

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[77] 2019 WAIRC 00825 [28].

[78] 2019 WAIRC 00825 [29] - [30], [32] - [33].

[79] 2019 WAIG 00825 [63].

[80] 2019 WAIG 00825 [56] - [57].

> 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.
>
> 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 - 11, to the effect that s 29A(1)(b) 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 ...

180 Scott CC and Kenner SC declined to follow an earlier decision of the Commission in Court Session in ***Re Dardanup Butchering Co***[81] observing:[82]

> 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.

Consideration

181 With due respect, I cannot accept the fundamental conclusion expressed by the majority Full Bench reasons to the effect that the removal of PUFSC in 1995 as a scheduled respondent to the Award 'had the effect of removing that industry from the scope of the Award from that time'.[83]

182 I do accept, of course, that the subjective intentions of parties or, indeed, of the SDA upon such a consequence, are wholly irrelevant to a determination of the legal question. But the core problem of principle is that the majority position effectively elevates and, in the end, misreads s 47 - particularly s 47(2) (as it was at April and September 1995) - beyond its proper context, when read and assessed alongside other provisions concerning award variations in the 1979 Act.

183 The relevant context within which s 47 and, accordingly, the power for the Commission under s 47(2) to strike out an employer who is no longer carrying on business as an employer in the industry, cannot be evaluated alone, as a plenary stand-alone variation power that is afforded to the Commission, enabling it then to act of its own motion so as to impact against the scope of an existing award.

184 Section 47, if read and assessed within its overall surrounding context within Pt II div 2 of the 1979 Act, as it stood in 1995, was not freed of the jurisdictional constraints that otherwise were expressly made applicable by the legislature under s 40(1) to the circumstances of a potential variation in the area of operation or scope of any award, by s 29A(2).

185 The express subjugation to s 29A of the more general variation power concerning awards under s 40(1) of the 1979 Act speaks loudly as to what the Commission of its own motion might achieve under s 47. Section 47, it may be seen, allows only a striking out of a party as a named party to an award. But such an order could carry no further implications towards either an expansion or a contraction to the scope of application of the award, be it a common rule industry award, or otherwise.

186 The contrary arguments of the respondents adopt the approach of the Full Bench majority, contending a reduction in scope outcome is the necessary and logical legal consequence of a scope clause that chooses to define scope of industry coverage, indirectly, by a Glover clause. The truncation result is supported merely as the downside consequence, in effect, of identifying the scope of coverage by reference to the industries that were engaged in by any one or more of all named respondents as named and scheduled to the Award.

187 Correctly understood, however, particularly by reference to the temporal focus towards the founding establishment of the covered industries under the observations of Burt J in ***Glover***, then later, as highlighted by Franklyn J in ***Freshwest***, the bounds of industry coverage for the award are significantly set at the time of the making of the award. But after that creation, it is primarily the terms of the governing industrial legislation that will determine how the founding parameters of an established industry award coverage might expand or contract thereafter. Reasoning as to theoretical down side consequences of choosing to use a Glover clause, is not really to the point. Rights and obligations have then been created. Upon establishment, an award, particularly an industry common rule award, may carry very widespread employment relationship repercussions, extending well beyond the identified participants. Changes which may bear upon such rights and obligations of many persons potentially affected, both employees and employers, should only be implemented with an appropriate array of safeguards so to protect those vested rights and obligations once established.

188 As now seen, at 1995 the governing legislation was (and remains) protective, careful and cautious about the permitting of variations to the scope of award coverage - for very good reason. Multiple rights, obligations and interests of persons both seen and unseen stand to be affected by such changes. Accordingly, any change in award scope brought about by the Commission must first surmount some onerous gateway pre-requisites. That did not happen here. Recourse to s 47 by the Commission acting of its own motion is no sufficient answer to an obvious policy safeguard impediment directed to Awards by the 1979 Act.

189 Given the overall scheme of the 1979 Act, particularly its Pt II div 2, and recognising the undoubted widespread rights and obligations potentially impacted by a change to the scope of a common rule award, extending to many

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[81] ***Re Dardanup Butchering Co*** [2004] WAIRC 10864; (2004) 84 WAIG 465.

[82] 2019 WAIRC 00825 [57].

[83] 2019 WAIRC 00825 [63].

unnamed and unseen other persons within a covered industry, changes by way of variation in the scope of the award once established, either by way of expansion or contraction, are capable of delivering significant knock on implications against rights and obligations in unseen quarters. Such rights and obligations are simply too important and widespread to be swept away, indirectly.

190 Because of all that, a variation in the scope of an award first needs to be meticulously progressed through what are undoubtedly onerous publication, notification and service requirements under s 29A(2). Those requirements were not met during 1995. Whilst other and different notification and publication requirements by s 47 were met that is not to the point. The legislation speaks firmly upon this issue and governs the Commission's very jurisdiction to hear and effect such changes. The requirements of s 29A(2) were not met and, consequently, the Commission has never obtained jurisdiction to validly issue an order that could vary the scope of this Award.

191 The jurisdictional debarment to a scope variation by the Commission was explicitly highlighted under the observations of the Full Bench in the ***Stewart Butchering*** decision and after, under the observations of Scott J in the ***Airlite***.[84]

Conclusion

192 The necessary consequence is that the appeals of the SDA and the Minister must be allowed. The majority of the Full Bench was in error in upholding the appeals from Emmanuel C and further by the attempted making of declarations under subsequent orders excising references to the retail pharmacy industry in the Award.

193 Consequently, the Award remains applicable to workers employed in any calling or callings as mentioned in the retail pharmacy industry and to employers employing those workers. The declaration of Emmanuel C to that effect was correct and should be restored.

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

DW

Associate to the Honourable Justice Martin

3 MAY 2021

2021 WAIRC 00118

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	KENNETH MARTIN J
DATE	FRIDAY, 30 APRIL 2021
FILE NO/S	IAC 3 OF 2019
CITATION NO.	2021 WAIRC 00118

Result Confidentiality Order Issued

Order

WARNING

Failure to comply with these orders may be a contempt of court and render you liable to punishment.

The court orders that:

1. Until judgment is delivered in this matter only the following persons (authorised persons) may view the advance reasons in this matter or be informed of any information from those advance reasons:
    a) each party who is an individual;
    b) where any party is not an individual:
        i. one representative of that party who is authorised to represent the party or to instruct its legal advisers (if any) with respect to the orders properly made at judgment delivery; and

[84] Relevantly see ***Airlite*** [4] and [23].

ii. any legal practitioner who is employed by the party to provide the party with legal advice generally, even if that legal practitioner is not representing the party in the matter;

c) if any party is legally represented, the party's legal advisers including barristers or counsel; and

d) if the case has been conducted on behalf of a party by its insurer, one representative of the insurer who is authorised to represent the party or to instruct the legal advisers (if any) with respect to the orders properly made at judgment delivery.

2. Until judgment is delivered in this matter:

a) a person who has a copy of the advance reasons or any information from those reasons is personally responsible to take all reasonable steps to maintain the confidentiality of those reasons except as otherwise provided in this order;

b) an authorised person may only provide a copy of the advance reasons, or disclose information from the advance reasons, to an authorised person; and

c) any authorised person who provides a copy of the advance reasons, or discloses information from the advance reasons, to any other authorised person is personally responsible to take all necessary steps to ensure that the advance reasons remain confidential in the hands of any and all of those to whom they provide the advance reasons, including but not limited to providing a copy of these confidentiality orders.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

2021 WAIRC 00117

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	KENNETH MARTIN J
DATE	FRIDAY, 30 APRIL 2021
FILE NO/S	IAC 1 OF 2020
CITATION NO.	2021 WAIRC 00117

Result	Confidentiality Order Issued

Order

WARNING

Failure to comply with these orders may be a contempt of court and render you liable to punishment.

The court orders that:

1. Until judgment is delivered in this matter only the following persons (authorised persons) may view the advance reasons in this matter or be informed of any information from those advance reasons:

a) each party who is an individual;

b) where any party is not an individual:

i. one representative of that party who is authorised to represent the party or to instruct its legal advisers (if any) with respect to the orders properly made at judgment delivery; and

ii. any legal practitioner who is employed by the party to provide the party with legal advice generally, even if that legal practitioner is not representing the party in the matter;

c) if any party is legally represented, the party's legal advisers including barristers or counsel; and

d) if the case has been conducted on behalf of a party by its insurer, one representative of the insurer who is authorised to represent the party or to instruct the legal advisers (if any) with respect to the orders properly made at judgment delivery.

2. Until judgment is delivered in this matter:

   a) a person who has a copy of the advance reasons or any information from those reasons is personally responsible to take all reasonable steps to maintain the confidentiality of those reasons except as otherwise provided in this order;

   b) an authorised person may only provide a copy of the advance reasons, or disclose information from the advance reasons, to an authorised person; and

   c) any authorised person who provides a copy of the advance reasons, or discloses information from the advance reasons, to any other authorised person is personally responsible to take all necessary steps to ensure that the advance reasons remain confidential in the hands of any and all of those to whom they provide the advance reasons, including but not limited to providing a copy of these confidentiality orders.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

2021 WAIRC 00120

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
	KENNETH MARTIN J
DATE	MONDAY, 3 MAY 2021
FILE NO/S	IAC 3 OF 2019
CITATION NO.	2021 WAIRC 00120

Result	Appeal Allowed
Representation	
Appellant	Mr D Rafferty (of counsel)
Respondent	Mr R Andretich (of counsel)
	Mr N Tindley (of counsel)
	Mr A Drake-Brockman (as agent)

Order

UPON PUBLICATION of *The Shop, Distributive And Allied Employees' Association of Western Australia v Samuel Gance T/A Chemist Warehouse Perth (No 2)* [2021] WASCA 76 and HAVING HEARD Mr D Rafferty of counsel, for the Shop, Distributive and Allied Employees' Association of Western Australia, Mr R Andretich of counsel, for the Minister for Commerce and Industrial Relations, Mr N Tindley of counsel, for Samuel Gance t/as Chemist Warehouse Perth and Mr A Drake-Brockman as industrial agent for the Pharmacy Guild of Western Australia Organisation of Employers, IT IS ORDERED THAT:

1. The appeals be allowed.
2. The declaration and order issued by the Full Bench on 13 December 2019 (2019 WAIRC 00869) be quashed.
3. The appeals to the Full Bench from the decision of Emmanuel C delivered on 18 January 2019 (2019 WAIRC 00015) be dismissed.
4. The declaration issued by Emmanuel C on 21 January 2019 be restored.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

2021 WAIRC 00121

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
	KENNETH MARTIN J
DATE	MONDAY, 3 MAY 2021
FILE NO/S	IAC 1 OF 2020
CITATION NO.	2021 WAIRC 00121

Result	Appeal Allowed
Representation	
Appellant	Mr D Rafferty (of counsel)
Respondent	Mr R Andretich (of counsel)
	Mr N Tindley (of counsel)
	Mr A Drake-Brockman (as agent)

Order

UPON PUBLICATION of *The Shop, Distributive And Allied Employees' Association of Western Australia v Samuel Gance T/A Chemist Warehouse Perth (No 2)* [2021] WASCA 76 and HAVING HEARD Mr D Rafferty of counsel, for the Shop, Distributive and Allied Employees' Association of Western Australia, Mr R Andretich of counsel, for the Minister for Commerce and Industrial Relations, Mr N Tindley of counsel, for Samuel Gance t/as Chemist Warehouse Perth and Mr A Drake-Brockman as industrial agent for the Pharmacy Guild of Western Australia Organisation of Employers, IT IS ORDERED THAT:

1. The appeals be allowed.
2. The declaration and order issued by the Full Bench on 13 December 2019 (2019 WAIRC 00869) be quashed.
3. The appeals to the Full Bench from the decision of Emmanuel C delivered on 18 January 2019 (2019 WAIRC 00015) be dismissed.
4. The declaration issued by Emmanuel C on 21 January 2019 be restored.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

COMMISSION IN COURT SESSION—Matters dealt with—

2021 WAIRC 00088

APPLICATION FOR COVID-19 GENERAL ORDER THAT AIMS TO PROVIDE FURTHER FLEXIBILITY TO MANAGE PRIVATE SECTOR EMPLOYMENT ARRANGEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 30 MARCH 2021
FILE NO	APPL 16A OF 2020
CITATION NO.	2021 WAIRC 00088

Result	Statement Issued
Representation	- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited - Mr B Entrekin, and with him Ms M Hughie-Williams on behalf of the Hon. Minister for Industrial Relations - Dr T Dymond on behalf of UnionsWA

Statement

1. On 14 April 2020, the Commission in Court Session issued a General Order in this matter (2020 WAIRC 00205) to provide for flexible leave arrangements association with the COVID-19 pandemic.
2. Clause 1. – Application, subclause (3) of the Schedule – Provisions Relating to the COVID-19 Pandemic states that the General Order operates from the date it issued until 31 July 2020, unless extended on application or at the initiative of the Commission.
3. On 22 July 2020, the Commission reviewed the operation of the General Order of its own motion and received responses from the Hon. Minister for Industrial Relations, The Chamber of Commerce and Industry of Western Australia Limited and UnionsWA.
4. The parties agreed that, in the then circumstance of the COVID-19 Pandemic and its effects on business and employment, and the continuing uncertainty it had generated, the operation of the General Order should continue until 31 March 2021.
5. In mid-March 2021, the Commission further reviewed the General Order of its own motion and received responses from the parties. Except for the Chamber of Commerce and Industry of Western Australia Limited, the parties considered that the General Order has served its purpose and ought not continue in effect. The Chamber of Commerce and Industry was of the view that the General Order should continue for a further period until 31 October 2021.
6. In the circumstances, and having considered the views of the parties, the Commission in Court Session has concluded that a further extension of the General Order is unnecessary at this point in time. Any issues arising in the community following from the pandemic that require further consideration by the Commission, can be promptly addressed at that time.
7. Accordingly, the General Order will cease to have effect on 31 March 2021.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

2021 WAIRC 00087

APPLICATION FOR COVID-19 GENERAL ORDER THAT AIMS TO PROVIDE FURTHER FLEXIBILITY TO MANAGE PRIVATE SECTOR EMPLOYMENT ARRANGEMENTS

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED **APPLICANT** **-v-** (NOT APPLICABLE) **RESPONDENT**
CORAM	SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
DATE	MONDAY, 29 MARCH 2021
FILE NO/S	APPL 19 OF 2020
CITATION NO.	2021 WAIRC 00087

Result	Statement issued
Representation	- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited - Mr B Entrekin, and with him Ms M Hughie-Williams on behalf of the Hon. Minister for Industrial Relations - Dr T Dymond on behalf of UnionsWA

Statement

1. On 15 May 2020, the Commission in Court Session issued a General Order in this matter (2020 WAIRC 00279).
2. On 30 June 2020, the Commission reviewed the General Order.
3. On 1 July 2020. The Commission in Court Session issued an order in this matter (2020 WAIRC 00384) that the General Order be further reviewed on 15 September 2020.
4. On 15 September 2020, the Commission reviewed the operation of the General Order and issued an order in this matter (2020 WAIRC 00800) that the General Order be further reviewed by mid-March 2021 but no later than 7 days after any changes are made to the Federal JobKeeper Scheme.
5. In mid-March 2021, the Commission reviewed the operation of the General Order of its own motion and sought responses from the Chamber of Commerce and Industry of Western Australia Limited, the Hon. Minister for Industrial Relations and UnionsWA.
6. The parties reported that given that the General Order is directly linked to the Federal JobKeeper Scheme which ended on 28 March 2021 it was considered appropriate that the General Order cease to have effect in accordance with its terms.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

AWARDS/AGREEMENTS—Application for—

2021 WAIRC 00115

LOCAL GOVERNMENT OFFICERS' (WESTERN AUSTRALIA) AWARD 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	CITY OF KALAMUNDA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 29 APRIL 2021
FILE NO/S	A 1 OF 2020
CITATION NO.	2021 WAIRC 00115

Result	New Award
Representation	
Applicant	Mr D Rafferty (of counsel) and Mr W Wood
Parties	Ms T Rowlands, Ms A Egan, Mr M FitzGerald and Ms D Hunter and Ms R Miller
Interveners	Mr M FitzGerald, Ms D Hunter and Ms R Miller on behalf of the interveners

Order

HAVING heard from Mr D Rafferty (of counsel) and with him Mr W Wood on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees; Ms T Rowlands on behalf of the Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees; Ms A Egan on behalf of the City of Kalamunda; Mr M FitzGerald on behalf of the Shire of Bridgetown-Greenbushes, Shire of Harvey, Shire of Laverton, Shire of Murray, Shire of Narembeen, Shire of Ravensthorpe, Shire of Victoria Plains, Shire of Waroona and Shire of Yalgoo; and also on behalf of the Shire of Bruce Rock, Shire of Goomalling, Shire of Leonora, Shire of Sandstone, Shire of Wagin and the Shire of Woodanilling; Ms D Hunter and Ms R Miller on behalf of the Shire of Kondinin; and on behalf of the Shire of Boddington, Shire of Carnamah, Shire of Dalwallinu, Shire of Dowerin, Shire of Halls Creek, Shire of Nannup, Shire of Three Springs, Shire of Wandering; and on behalf of the Shire of Morawa;

WHEREAS on 10 March 2021 the Shire of Goomalling, Shire of Wagin, Shire of Leonora, Shire of Bruce Rock, and Shire of Sandstone, sought leave intervene pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 17 March 2021 the Shire of Woodanilling sought leave to intervene pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 14 April 2021, the Shire of Boddington, Shire of Carnamah, Shire of Dalwallinu, Shire of Dowerin, Shire of Halls Creek, Shire of Nannup, Shire of Three Springs, Shire of Wandering made application to be joined to the application pursuant to s 27(1)(j) of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 23 April 2021, the Shire of Morawa sought leave intervene pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA); and

WHEREAS pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA) the Commission granted leave to intervene to the Shire of Goomalling, Shire of Wagin, Shire of Leonora, Shire of Bruce Rock, Shire of Sandstone, Shire of Woodanilling and Shire of Morawa; and

WHEREAS subsequently at the hearing, the Shire of Goomalling, Shire of Wagin, Shire of Leonora, Shire of Bruce Rock, Shire of Sandstone, Shire of Woodanilling made an oral application pursuant to s 27(1)(j) of the *Industrial Relations Act 1979* (WA) to be joined to the application;

THEREFORE, the Commission, pursuant to the powers conferred on it under s 28 and s 27(1)(j) of the *Industrial Relations Act 1979* (WA) hereby:

(1) ORDERS that the following be and are hereby joined as a party of this application:

- Shire of Boddington
- Shire of Bruce Rock
- Shire of Carnamah
- Shire of Dalwallinu
- Shire of Dowerin
- Shire of Goomalling
- Shire of Halls Creek
- Shire of Leonora
- Shire of Nannup
- Shire of Sandstone
- Shire of Three Springs
- Shire of Wagin
- Shire of Wandering;
- Shire of Woodanilling;

THE COMMISSION being satisfied that the application was properly served on 3 December 2020 in accordance with s 29A(2) of the *Industrial Relations Act 1979* (WA) and the relevant provisions of the proposed award was published in the Western Australian Industrial Gazette on 23 December 2020 in accordance with s 29A(2) of the *Industrial Relations Act 1979* (WA), the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby:

(2) MAKES an award to be known as the **Local Government Officers' (Western Australia) Award 2021** in terms of the schedule hereto, with effect on and from 27 April 2021; and

(3) ORDERS that the **Local Government Officers' (Western Australia) Interim Award 2011** be and is hereby cancelled.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00116

MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES
	APPLICANT
	-v-
	CITY OF KALAMUNDA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 29 APRIL 2021
FILE NO/S	A 2 OF 2020
CITATION NO.	2021 WAIRC 00116

Result	New Award
Representation	
Applicant	Mr D Rafferty (of counsel) and Mr W Wood
Parties	Mr A Johnson, Ms A Egan, Mr M FitzGerald, Ms D Hunter and Ms R Miller
Interveners	Mr M FitzGerald, Ms D Hunter and Ms R Miller on behalf of the interveners

Order

HAVING heard from Mr D Rafferty (of counsel) and with him Mr W Wood on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees; Mr A Johnson on behalf of the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth; Ms A Egan on behalf of the City of Kalamunda; Mr M FitzGerald on behalf of the Shire of Bridgetown-Greenbushes, Shire of Harvey, Shire of Laverton, Shire of Murray, Shire of Narembeen, Shire of Ravensthorpe, Shire of Victoria Plains, Shire of Waroona and Shire of Yalgoo; and also on behalf of the Shire of Bruce Rock, Shire of Goomalling, Shire of Leonora, Shire of Sandstone, Shire of Wagin and the Shire of Woodanilling; Ms D Hunter and Ms R Miller on behalf of the Shire of Kondinin; and on behalf of the Shire of Boddington, Shire of Carnamah, Shire of Dalwallinu, Shire of Dowerin, Shire of Halls Creek, Shire of Nannup, Shire of Three Springs, Shire of Wandering; and on behalf of the Shire of Morawa;

WHEREAS on 10 March 2021 the Shire of Goomalling, Shire of Wagin, Shire of Leonora, Shire of Bruce Rock, and Shire of Sandstone, sought leave intervene pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 17 March 2021 the Shire of Woodanilling sought leave to intervene pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 14 April 2021, the Shire of Boddington, Shire of Carnamah, Shire of Dalwallinu, Shire of Dowerin, Shire of Halls Creek, Shire of Nannup, Shire of Three Springs, Shire of Wandering made application to be joined to the application pursuant to s 27(1)(j) of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 23 April 2021, the Shire of Morawa sought leave intervene pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA); and

Whereas pursuant to s 27(1)(k) of the *Industrial Relations Act 1979* (WA) the Commission granted leave to intervene to the Shire of Goomalling, Shire of Wagin, Shire of Leonora, Shire of Bruce Rock, Shire of Sandstone, Shire of Woodanilling and Shire of Morawa; and

WHEREAS subsequently at the hearing, the Shire of Goomalling, Shire of Wagin, Shire of Leonora, Shire of Bruce Rock, Shire of Sandstone, Shire of Woodanilling made an oral application pursuant to s 27(1)(j) of the *Industrial Relations Act 1979* (WA) to be joined to the application;

THEREFORE, the Commission, pursuant to the powers conferred on it under s 28 and s 27(1)(j) of the *Industrial Relations Act 1979* (WA) hereby:

(1) ORDERS that the following be and are hereby joined as a party of this application:

- Shire of Boddington
- Shire of Bruce Rock
- Shire of Carnamah
- Shire of Dalwallinu
- Shire of Dowerin
- Shire of Goomalling
- Shire of Halls Creek
- Shire of Leonora
- Shire of Nannup
- Shire of Sandstone
- Shire of Three Springs
- Shire of Wagin
- Shire of Wandering;
- Shire of Woodanilling;

THE COMMISSION being satisfied that the application was properly served on 3 December 2020 in accordance with s 29A(2) of the *Industrial Relations Act 1979* (WA) and the relevant provisions of the proposed award was published in the Western Australian Industrial Gazette on 23 December 2020 in accordance with s 29A(2) of the *Industrial Relations Act 1979* (WA), the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby:

(2) ORDERS that the following be granted leave to intervene in this application:

- Shire of Morawa;

(3) MAKES an award to be known as the **Municipal Employees (Western Australia) Award 2021** in terms of the schedule hereto, with effect on and from 27 April 2021; and

(4) ORDERS that the **Municipal Employees (Western Australia) Interim Award 2011** be and is hereby cancelled.

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

INDUSTRIAL MAGISTRATE—Claims before—

2021 WAIRC 00111

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2021 WAIRC 00111
CORAM	:	INDUSTRIAL MAGISTRATE J. HAWKINS
HEARD	:	WEDNESDAY, 10 FEBRUARY 2021
DELIVERED	**:**	FRIDAY, 23 APRIL 2021
FILE NO.	**:**	M 109 OF 2020
BETWEEN	**:**	MARK RYAN
		CLAIMANT
		AND
		WA PALLETS PTY LTD
		RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Whether Employee resigned or terminated – Whether retraction of resignation – Permitted deductions upon resignation where failure to provide notice – Interpretation of cl 14.2 of the *Timber Industry Award 2010* (Cth) and s 326(1)(a) and s 326(1)(b) of the *Fair Work Act 2009* (Cth)
Legislation	**:**	*Corporations Act 2001* (Cth) *Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Instruments	**:**	*Timber Industry Award 2010* (Cth)
Case(s) referred to in reasons:	**:**	***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183 ***Birrell v Australian National Airlines Commission*** [1984] FCA 419 ***Ngo v Link Printing Pty Ltd*** (1999) 94 IR 375 ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)*** [2010] FCA 652 ***Re Minister for Employment and Workplace Relations*** [2008] AIRCFB 1000; (2008) 177 IR 364 ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*** [2015] FCA 1196 ***Mildren v Gabbusch*** [2014] SAIRC 15 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336
Result	**:**	Claim dismissed
Representation:		
Claimant	**:**	Mr P. Mullally (agent) from Workclaims Australia
Respondent	**:**	Mr S. Heathcote (of counsel) from APX Law

REASONS FOR DECISION

Introduction

1 Mr Mark Ryan (Mr Ryan) was employed by WA Pallets Pty Ltd (WAP) on 12 June 2019, as a machine operator.[1]

2 There is no dispute that the employment relationship between the parties came to an end. The dispute relates to how, when, and why that relationship came to an end and what amounts Mr Ryan was entitled to be paid at the end of his employment. Mr Ryan says the employment relationship came to an end on 1 July 2020 when he was dismissed by Mr Jeb Cole (Mr Cole), a managing director of WAP. WAP says that Mr Ryan's employment relationship came to an end on 30 June 2020 when he resigned from his employment without notice.

3 This claim also concerns the final payments Mr Ryan received at the end of his employment and in particular the deduction of two weeks wages from his final entitlements. Mr Ryan claimed that WAP has contravened the FW Act and the Award by failing to pay his entitlements in full up to 1 July 2020.[2] Mr Ryan claims he is owed the following:

- wages for 45 hours work in the week leading up to 1 July 2020, being 45 hours at his base hourly rate of $22, being $990;
- annual leave for 4.15 weeks, being $3,649; and
- payment of two weeks' wages in lieu of notice, being $1,672.

4 In addition, Mr Ryan also seeks payment of interest and a penalty be imposed upon WAP.

5 During the trial, the parties agreed that WAP would pay Mr Ryan's claim for wages ($990) and annual leave (the agreement was that Mr Ryan was owed $3,508.19 in annual leave). The issue that remained was the entitlement to payment of two weeks wages in lieu of notice ($1,672).

6 By consent, it was therefore ordered that WAP pay to Mr Ryan the sum of $2,826.91 being made up as follows:

- $3,508.19 (agreed annual leave) + $990 (agreed wages) = $4,498.19 less $1,672 (disputed deduction of two weeks' wages) = $2,826.91.

7 Accordingly, the issue of WAP's entitlement to deduct two weeks' wages in lieu of notice ($1,672) or Mr Ryan's entitlement to payment of two weeks' wages in lieu remains to be determined. To determine this issue requires determining whether Mr Ryan resigned without notice on 30 June 2020 or whether he was dismissed without notice on 1 July 2020.

8 WAP maintains that Mr Ryan's conduct on 30 June 2020 was problematic and that he was verbally abusive and threatening in the workplace. When confronted about this behaviour by Mr Cole, WAP says Mr Ryan resigned from his employment, requested an Employment Separation Certificate (Certificate) and walked off the job prior to the usual finishing time.

9 However, Mr Ryan says he did not resign on 30 June 2020. Rather he says that he was dismissed when he came to work on 1 July 2020.

10 There is no dispute that on 1 July 2020, Mr Ryan came to the workplace. There is however a dispute as to whether Mr Ryan attended the workplace at the usual commencement time and whether he had been given permission by Mr Cole to commence work at that time. There is no dispute that when Mr Ryan attended the workplace he and Mr Cole had a discussion. During that discussion Mr Ryan was given a letter from WAP dated 30 June 2020, which suggested he was being disciplined for his behaviour in the workplace on 30 June 2020. When given that letter there is no dispute that Mr Ryan took the letter and was then asked by Mr Cole to go home. Mr Ryan submits this constituted a dismissal, whereas WAP says by then, Mr Ryan had resigned on 30 June 2020.

11 WAP says that as Mr Ryan resigned on 30 June 2020 without giving notice, it was entitled, pursuant to cl 14.2 of the Award and s 324(1)(c) of the FW Act, to withhold an amount not exceeding the amount he would have been paid in respect to the period of notice required to serve out his notice.

12 Relevantly, cl 14.2 of the Award states:

> *... If an employee fails to give the required notice the employer may withhold from any moneys due to the employee on termination under this award or the NES* [National Employment Standard]*, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.* (emphasis added)

13 The alternative position of WAP is that even if I am satisfied that Mr Ryan's employment was terminated by WAP on 1 July 2020, Mr Ryan is still not entitled to any payment in lieu of notice as he was dismissed for serious misconduct.

14 Mr Ryan disputes he resigned but, rather, maintains he was terminated without notice on 1 July 2020 when he was told by Mr Cole to go home. Alternatively, Mr Ryan argues that even if he did resign, WAP is precluded from deducting any amounts from his final entitlement and relies on s 326 of the FW Act. Mr Ryan submits that cl 14.2 of the Award is unlawful, as it permits a deduction 'directly or indirectly for the benefit of' WAP and that such deduction was 'unreasonable in the circumstances'.

15 For the reasons that follow I am satisfied that WAP was entitled to deduct $1,672 from Mr Ryan's final entitlements.

Issues To Be Determined

16 The issues for determination are as follows:

(a) Did Mr Ryan resign on 30 June 2020 or was he dismissed on 1 July 2020?

(b) If Mr Ryan resigned on 30 June 2020, was WAP entitled, pursuant to cl 14.2 of the Award, to withhold $1,672 (an amount equal to two weeks' wages) from Mr Ryan's final entitlements?

(c) Alternatively, if Mr Ryan was dismissed on 1 July 2020, was his dismissal for serious misconduct?

(d) If Mr Ryan was dismissed for serious misconduct is he entitled to any payment in lieu of notice?

Evidence

17 The only witness called by Mr Ryan was himself.

18 WAP relied on the evidence from the following:

- Mr Cole;
- Ms Lisa Gendall (Ms Gendall), office manager and Director of WAP; and
- Mr Leon McKenzie (Mr McKenzie), yard manager of WAP.

19 To a large extent the determination of this matter concerns which version of events that occurred on 30 June 2020 and 1 July 2020 is accepted. There is a great divergence between the parties as to what occurred and the sequence of events.

Summary Of Evidence And Assessment Of Credibility

20 The first area of disparity is what occurred on 30 June 2020. WAP maintain that Mr Ryan was abusive to a female co-worker on 30 June 2020. Mr Ryan disputed he was abusive to anyone on 30 June 2020.

21 Mr Ryan's evidence was contrary to the evidence of Ms Gendall and Mr McKenzie. Mr McKenzie's evidence was that on 30 June 2020 he was approached by Ms Simone Lydon (Ms Lydon), another employee of WAP. Mr McKenzie explained that Ms Lydon told him that Mr Ryan had abused her and threatened her (no objection was taken to this hearsay evidence). Mr McKenzie explained that he took Ms Lydon to the office area to try to settle her down and determine what had happened. As they were walking through the office from the back door, Mr McKenzie indicated that Mr Ryan entered through the front door of the office. Mr McKenzie described Mr Ryan as looking angry, looking at Ms Lydon and calling her a 'slut'.[3] It was at that point that Mr McKenzie said he pulled Mr Ryan aside. Mr McKenzie suggested that Mr Ryan continued to call Ms Lydon a 'cunt' and a 'slut'.[4] Mr McKenzie explained that he tried to calm Mr Ryan down but Mr Ryan was not listening and was talking over the top of him. He said Mr Ryan used words to the effect that:

> *He didn't give a fuck about anything or anyone and he won't bow down to no slut or their boyfriend. I will hammer them, you tell them I have been to jail and I know people.*[5]

22 Mr McKenzie said that he asked Mr Ryan to go back to work and his response was, 'fuck it'.[6]

23 Ms Gendall's evidence corroborates the version of events given by Mr McKenzie. She explained that on 30 June 2020 as she walked into 'Unit 10', she discovered Ms Lydon crying and asked her what was wrong. She explained that Ms Lydon indicated that Mr Ryan had threatened her and that she was considering whether she should resign (again, no objection to this hearsay evidence was taken).

24 Mr Cole's evidence is also consistent with Mr McKenzie's evidence and Mr Cole explained he was advised by Ms Gendall of Mr Ryan's interaction with Ms Lydon. As a result, he spoke to Mr Ryan and asked him what had happened. Mr Cole indicated that Mr Ryan said words to the effect, 'I am not going to let some slut talk to my son like that, that bitch better watch her back'.[7]

25 Mr Cole explained that it was at or about this point that he had decided to give Mr Ryan a written warning for serious misconduct in the workplace regarding threatening to physically harm another employee.

26 Mr Ryan completely denied this version of events. In cross-examination, Mr Ryan denied that he had an argument with Ms Lydon, threatened her or used abusive language towards her. In effect, Mr Ryan denied that the incident occurred whatsoever. Rather, he suggested the only reason that he approached Ms Gendall or Mr Cole on 30 June 2020 was to discuss his son's, Mr Dion Ryan (Mr D. Ryan), workload.

27 This of course is at odds with the evidence given by WAP's witnesses.

28 Further, Mr Cole and Ms Gendall's evidence was that later on 30 June 2020 Mr Ryan did approach Ms Gendall in her office. Ms Gendall maintained that Mr Ryan told her that he and Mr D. Ryan were resigning as he was worried about his son's mental health. Ms Gendall indicated that Mr Ryan pointed his finger at her, said that the workplace was a 'fucking joke', that he could not work there anymore and demanded that she give him the Certificate.[8] Ms Gendall stated that because of Mr Ryan's demeanour, she felt intimidated and asked him to speak to Mr Cole. She explained that shortly after as she was sitting at her desk in the office, she heard Mr Ryan and Mr Cole talking. She explained that she heard Mr Ryan yelling, and she saw him walk away. Mr Cole then entered her office and told her that Mr Ryan has resigned, and they need to complete the Certificate.

29 Mr Cole's evidence was consistent with Ms Gendall's evidence. He explained that subsequent to the incident concerning Ms Lydon, he had been told by Ms Gendall that Mr Ryan had resigned, that he had behaved aggressively, pointing and yelling at her, and that he had requested the Certificates for both he and his son. Mr Cole explained that he immediately went to find Mr Ryan and found him outside the office. He explained that he told Mr Ryan he could not speak to anyone in the workplace in that manner, to which he says that Mr Ryan said WAP needed to stop making his son work so much. Mr Cole explained that he said, as Mr D. Ryan was an adult, he could speak for himself. Mr Cole suggested that this enraged Mr Ryan, and it was at that point that Mr Ryan requested the Certificate. Mr Cole explained that he told Mr Ryan that Ms Gendall would prepare it for him, at which point Mr Ryan turned and walked away.

30 In cross-examination Mr Ryan denied that, firstly, he had had any discussion with Ms Gendall except to ask the whereabouts of Mr Cole. This is at odds with and inconsistent with paragraph 9 of his witness statement, wherein he suggests that he only went to the office to speak with Ms Gendall to discuss Mr D. Ryan's workload.[9] Confusingly, Mr Ryan then suggested that what he said in paragraph 9 of his witness statement and his oral evidence were both true.

31 Further, Mr Ryan denied that, in discussions with Mr Cole on 30 June 2020, he asked for the Certificate for himself and Mr D. Ryan.

32 Despite at the outset of his evidence maintaining that what was stated in his witness statement was true and correct, during cross-examination Mr Ryan suggested that what took place in paragraph 10 occurred on 1 July 2020.

33 There was also a divergence between Mr Ryan and WAP in respect to Mr Ryan's starting and finishing times.

34 Mr Ryan was questioned in respect to his start and finish times whilst employed with WAP. Mr Ryan suggested that the starting time varied between 5.00 am to 7.00 am. This was inconsistent with the evidence of WAP's witnesses, who made clear that the starting time was always 5.00 am and the finishing time was 1.00 pm.

35 In respect to the time that Mr Ryan left on 30 June 2020, Mr Cole's evidence was that it was between 11.30 am to 12.00 pm. Likewise, Ms Gendall gave clear and unequivocal evidence that she recalled seeing Mr Ryan walk away and recalls thinking that it was not the end of his shift. Her memory was that Mr Ryan left at 11.00 am. Mr McKenzie, likewise, recalls seeing Mr Ryan walk away on 30 June 2020 before the shift had ended. Mr Ryan, however, suggested he had not left work early on 30 June 2020.

36 In paragraph 12 of Mr Ryan's witness statement, he suggests that he came to work on 1 July 2020 an hour later than his usual start time, being 6.00 am, and suggested he had sent a text to Mr Cole to inform him that he was starting at 7.00 am.

37 Despite producing text messages between himself and Mr Cole that are alleged to have occurred on 1 July 2020, Mr Ryan produced no text message that he referred to at paragraph 12 of his witness statement wherein he stated:

> *I sent a text to Jeb to inform him that I was starting at 7.00am.*

38 As to what was said between Mr Ryan and Mr Cole on 1 July 2020, there is also divergence. Mr Cole suggested he was surprised that Mr Ryan had returned to the workplace on 1 July 2020 as he considered Mr Ryan had resigned the day before. Nonetheless, Mr Cole confirmed that on 1 July 2020 he did speak to Mr Ryan and asked him how he felt about what had occurred on 30 June 2020. Mr Cole suggested Mr Ryan said words to the effect that he was not happy and 'this is that slut's fault'[10] (referring to Ms Lydon). Mr Cole said Mr Ryan asked if he could come back to work and that he would not talk to anyone. Ms Gendall corroborated this evidence. Her evidence was that she had heard Mr Ryan say to Mr Cole, words to the effect, 'I just want to come back to work and I won't speak to anyone'.[11]

39 Mr Cole's evidence was that following Mr Ryan stating that he wanted to return to work, Mr Cole thought that Mr Ryan may have reflected on his actions of 30 June 2020. He explained that he then handed Mr Ryan the written warning letter dated 30 June 2020. Mr Cole explained that when the warning letter was given to Mr Ryan, Mr Ryan scrunched it up and went silent. At this point Mr Cole asked Mr Ryan to go home. Mr Cole explained there was then a discussion as to whether or not Mr Cole was firing Mr Ryan. Mr Cole maintains that he told Mr Ryan he did not have to because Mr Ryan had resigned the day before.

40 That warning letter reads as follows:

> *Dear Mark,*
>
> ***Warning Letter***
>
> *I am writing to you about your performance during your employment with WA Pallets Pty Ltd t/as West Coast Pallets.*
>
> *On 30th June, 2020 you met with your supervisor Jeb Cole at this meeting you were advised that your performance had been unsatisfactory, and that immediate improvement is required. In particular you were advised that threatening behavior towards other staff, bullying in any form of aggressive behavior does not align with our company values and will not be tolerated at this workplace.*
>
> *After considering the situation it is expected that your performance improves and specifically that you pay attention to your communication techniques within the workplace.*
>
> *I propose that we meet again on the week of 7th July, 2020 to review your progress. If you wish to respond to this formal warning letter please do so by contacting me on … or by replying in writing.*

41 Mr Cole was carefully cross-examined with respect to the terms of that warning letter and its effect on the issue of termination. He maintained that he gave the warning letter to Mr Ryan at 7.38 am on 1 July 2020. He denied that when he handed the letter to Mr Ryan he was treating Mr Ryan as an employee. He explained that the misconduct referred in the letter related to Mr Ryan's behaviour on 30 June 2020. This is consistent with the evidence of Ms Gendall who maintains that, following the incident concerning Ms Lydon, Mr Cole instructed her to prepare a written warning for Mr Ryan on 30 June 2020.

42 Mr Cole was also cross-examined in respect to a set of text messages that were exchanged between Mr Ryan and Mr Cole on the afternoon of 1 July 2020. In that set of text messages Mr Ryan writes:

> *You have breached various laws. I have spoken to a lawyer and ombudsman, I have a case.* [A]*pplications are in progress.*
>
> *Two weeks notice, my wages …, it's up to you which direction this takes.*

43 Mr Cole responds:

> *Hi Mark, you have breached your employment contract by serious misconduct. You threatened an employee and 3 people witness it. You were given a verbal warning and then a written warning which you refused to accept your aggressive and threatening behaviour will not be tolerated at this workplace. We've already spoken to fairwork and you are not entitled to anything more than what leave and pay is outstanding which is nothing. Please don't contact us again unless it's through a third party. Feel free to have your lawyer contact us if they need clarification on the events or need documents of the …*

44 Mr Cole was challenged that these comments were not consistent with his evidence that Mr Ryan had resigned on 30 June 2020 but, rather, were more consistent with Mr Cole having dismissed Mr Ryan for serious misconduct. Mr Cole's explanation for his text message was that it followed on from himself and Ms Gendall just having spoken to the Fair Work Commission to discuss their legal options. He explained the Fair Work Commission suggested that he did not have to rely on Mr Ryan quitting but could rely on Mr Ryan's serious misconduct.

45 Mr Cole was also challenged on why Mr Ryan was not given his Certificate on 30 June 2020. There is no real dispute that Mr Ryan did not receive his Certificate until on or about 2 July 2020. Mr Cole maintained that issuing Mr Ryan the Certificate was not on the forefront of his mind given Mr Ryan's aggressive behaviour on 30 June 2020.

46 Mr Cole was fulsome in his evidence. He was not shaken in cross-examination and I found his explanation plausible.

47 Mr Ryan, Mr Cole and Ms Gendall were questioned in respect to the issue of the sale of a motorbike to Mr Ryan. There is no dispute between Mr Ryan and Mr Cole that Mr Ryan purchased a motorbike from Mr Cole during the course of his employment. What is in dispute is whether or not Mr Ryan paid cash of $3,500 for the motorbike or whether or not he was repaying that sum by deductions from his pallet bonus. Mr Ryan maintains he paid cash for the motorbike, whereas Mr Cole and Ms Gendall were adamant that no cash was exchanged and that amounts were being deducted from Mr Ryan's pallet bonus, and that a substantial amount remained outstanding.

48 As to whether or not there was an agreement to purchase the motorbike was not strictly relevant to the issues in dispute in this matter but had some peripheral relevance to the issue of credibility. However, given this Court is not required to determine whether such a contract existed and whether such a repayment occurred I do not consider it assists in my assessment of credibility, and give that evidence no weight.

49 The key issue in dispute between the parties is whether Mr Ryan resigned on 30 June 2020 or whether he was dismissed on 1 July 2020 for serious misconduct. That requires assessing the credibility of the witnesses. I am not satisfied that Mr Ryan is a reliable witness. Rather, I consider that he sought to tailor his evidence to suit the claim made. His oral evidence was inconsistent with his witness statement. In oral testimony, he suggested that on 30 June 2020, the only conversation he had with Ms Gendall was to enquire as to Mr Coles' whereabouts. This is despite paragraphs 6 to 9 of his witness statement stating that he went to the office to discuss his son's workload and that Ms Gendall cut him off.

50 Further, paragraph 10 of his witness statement reads:

> *I then went and met with Jeb Cole the other owner of the business. I said I wanted to talk about Dion's hours and workload, but he too refused and answered aggressively and said that I always had a problem …*

51 In his oral testimony he suggested that the discussion referred to in paragraph 10 of his witness statement did not take place on 30 June 2020. Rather, he says it took place on 1 July 2020. If that is the case it is not consistent with what he then said occurred in paragraph 10 of his witness statement.[12]

52 Mr Ryan was not prepared to concede that he had a conflict with any other employees on 30 June 2020. This is in stark contrast to the evidence of WAP's witnesses. Mr McKenzie's evidence, which was clear and unequivocal, cannot be attacked on the basis of a close tie to either Mr Cole or Ms Gendall. Mr McKenzie was unshaken in his evidence and I found him an impressive witness. He was very clear that not only had it been reported to him on 30 June 2020 that Mr Ryan had been abusive and threatening to Ms Lydon but that indeed Mr Ryan had called Ms Lydon a 'cunt' and a 'slut' in his presence. Ms Gendall, who was also an impressive witness corroborated Mr McKenzie's evidence as to Mr Ryan's abusive behaviour towards Ms Lydon.

53 Further, both Mr Cole and Ms Gendall were clear in their evidence that Mr Ryan, on 30 June 2020 asked for his Certificate. Ms Gendall was clear that Mr Ryan had said that he quit.

54 Unlike Mr Ryan's evidence, WAP's witnesses' evidence was consistent. They consistently confirmed that the start time for work was 5.00 am and the finish time was 1.00 pm. Whereas Mr Ryan sought to suggest that the starting time for work was variable and that he had been given permission previously to come to work late and indeed referred to a text message he had sent to Mr Cole on 1 July 2020 stating that he would be at work late. Not only was this inconsistent with the weight of the evidence but no such text was produced by Mr Ryan.

55 Further, Mr Cole and Ms Gendall were clear in their evidence that on 30 June 2020, Mr Ryan, after having been aggressive to Ms Lydon, was likewise aggressive to Ms Gendall.

56 All three of WAP's witnesses confirmed that Mr Ryan left work on 30 June 2020 before completing his shift.

57 Further, in respect to the events on 1 July 2020, Mr Cole and Ms Gendall's evidence is consistent that they both heard Mr Ryan say words to the effect that he wanted to come back to work and that he would not talk to anyone. This is consistent with Mr Ryan having resigned on 30 June 2020. There is no dispute that Mr Ryan was handed, at that point, a warning letter that had been prepared on 30 June 2020 by Mr Cole to gauge Mr Ryan's reaction. Rather than contrition, Mr Cole says Mr Ryan appeared angry, screwed up the letter and at that point was asked by Mr Cole to leave. Mr Ryan does not dispute he was handed the letter but says he put it in his pocket and when he did so was told to go home.

58 For the reasons above, I do not consider Mr Ryan is a reliable witness. His evidence at trial was inconsistent with his witness statement and on virtually all matters in dispute was in direct conflict with the evidence of WAP's witnesses. Further to a large extent he was indirect and at times argumentative in his evidence.

59 In contrast for the reasons expressed above, I found all three witnesses of WAP to be careful and considered witnesses and find their evidence reliable.

60 Accordingly, where Mr Ryan's evidence is inconsistent with WAP's witnesses, I prefer the evidence of WAP's witnesses.

Issue 1 – Did Mr Ryan Resign On 30 June 2020 Or Was He Dismissed On 1 July 2020?

61 Mr Ryan's resignation was verbally expressed in clear and unambiguous terms to Ms Gendall on 30 June 2020. The words used by Mr Ryan was that he 'can't work here anymore' following which he demanded the Certificate.[13] Shortly thereafter he again requested the Certificate from Mr Cole and left the workplace prior to completing his shift. In demanding his Certificate and using words to the effect that he 'can't work here anymore' and leaving the workplace during work hours, I am satisfied that, when judged objectively, Mr Ryan was clearly and unambiguously terminating his employment.

62 A resignation, if verbally expressed in clear unambiguous terms, subject to any contractual terms, can be an effective resignation.[14] This intention was further corroborated by Mr Ryan's conduct when he returned to the workplace on 1 July 2020 well beyond the time for commencement of his shift and asked if he could 'come back [to work] and he won't talk to anyone'.[15]

63 The remaining issue is whether special circumstances apply which suggest that Mr Ryan withdrew or retracted his resignation. It is generally accepted that if notice of termination is given in a state of emotional turmoil in the heat of the moment then it may be withdrawn if swiftly retracted.[16]

64 In this case, if the words used by Mr Ryan on 1 July 2020 ('he wants to come back [to work] and he won't talk to anyone') amounted to a retraction of his resignation, the question remains as to whether that retraction was made swiftly.

65 I am satisfied that this retraction was not made swiftly. ***Ngo v Link Printing Pty Ltd***[17] held that where an employee gave notice and went home and returned the following day on time for his shift, was insufficient to be characterised a swift retraction.

66 In this case, Mr Ryan's retraction occurred on 1 July 2020, the day after he had resigned and at a time well beyond the commencement of his shift. It therefore cannot be characterised as a swift retraction.

67 I, therefore, find that Mr Ryan resigned from his employment on 30 June 2020 and did not retract that resignation on 1 July 2020.

68 I am satisfied that Mr Ryan, having resigned on 30 June 2020 without giving notice, is not entitled to payment of two weeks' wages in lieu of notice. Having found Mr Ryan resigned without notice, it is unnecessary to determine the alternative issues in respect to serious misconduct.

Issue 2 – Was WAP Entitled To Withhold Any Amounts Owing To Mr Ryan Upon His Resignation?

69 WAP maintains it has the right to withhold an amount equivalent to two weeks' wages, as Mr Ryan resigned without giving notice. WAP relies upon cl 14.2 of the Award which, as previously stated, provides as follows:

> ***Notice of termination by an employee***
>
> *The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any moneys due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.* (emphasis added).

70 Further, WAP submits that such a deduction is permitted pursuant to s 324 of the FW Act. Section 324 of the FW Act deals with permitted deductions and states as follows:

> ***324 Permitted deductions***
>
> *(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:*
>
> *...*
>
> *(c) the deduction is authorised by or under a modern award ...*

71 Mr Ryan, however, argues that by operation of s 326 of the FW Act, cl 14.2 of the Award is unlawful. Section 326 of the FW Act states in summary as follows:

> Unreasonable Deductions for the Benefit of the Employer
>
> *(1) A term of a modern award ... has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:*
>
> *(a) directly or indirectly for the benefit of the employer or a party related to the employer; and*
>
> *(b) unreasonable in the circumstances.*

72 The construction of a statute begins with consideration of the ordinary meaning of the text having regard to the context in which the text appears and the general purpose and policy of the legislation.[18]

73 Mr Ryan points to no authority where similar provisions to cl 14.2 of the Award have been found unlawful, pursuant to s 326 of the FW Act. Clearly s 324 of the FW Act allows for permitted deductions under an Award. Indeed, the standard modern Award termination clause devised by the Australian Industrial Relations Commission[19] provides that if an employee fails to give the required notice, the employer has the right to withhold pay to the maximum amount equal to the amount the employee would have received under the NES.[20]

74 Further, as Stewart et al, Creighton and Stewart's Labour Law (6th ed, 2016) [23.02]:

> *... modern awards now expressly permit an employer to withhold some moneys otherwise due on termination, though only up to the amount the employee would have received for any period of notice they have failed to give under the award.*

75 The purpose of notice periods was discussed by Gray J in ***Birrell v Australian National Airlines Commission***[21] (***Birrell***) where he stated:

> *The purpose of providing in a contract for a period of notice of termination is to enable the party receiving the notice to make other arrangements. An employee given notice by his or her employer has a period of time in which to seek another job; an employer who receives notice has time to arrange for a substitute employee.*

76 Gray J, in ***Birrell***, went on to mention that the primary protective purpose of such notice periods is to prevent the harsh injustice of an employer having to pay wages to an employee at the employee's behest. I, therefore, accept WAP's submissions that the history of clauses like cl 14.2 of the Award is to protect the interests of the party who is entitled to receive notice.

77 Neither party could point to any case law which has specifically found that cl 14.2 of the Award, or similar such clauses, are unlawful due to the application of s 326 of the FW Act.

78 The type of deduction at issue in this matter is the deduction of the equivalent of payment of notice in lieu.

79 Mr Ryan sought to rely on the decision of ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)***[22] (***AEU***) to support the contention that cl 14.2 of the Award is unlawful. That case concerned the ability of the employer to deduct amounts from teachers' wages for supplies and equipment provided to them by the employer. It was therefore dealing with an entirely different type of deduction to that under cl 14.2 of the Award and for that reason is distinguishable.

80 Accordingly, I am not satisfied that when the text, context, and purpose of s 326 of the FW Act is considered that it applies to cl 14.2 of the Award.

81 However, even if I had been so satisfied, I do not consider the deduction was unreasonable. During the trial it was largely conceded by WAP that the deduction was for the benefit of WAP. However, WAP maintained the deduction was not unreasonable.

82 In respect to the issue of whether a deduction was unreasonable, Mr Ryan relied on the decision on ***AEU***. Bromberg J, in ***AEU***, made clear that this was 'a question of fact and degree', and referred to likely relevant factors.[23] Those factors however were addressing a mischief or type of deduction very different to that under cl 14.2 of the Award and are therefore of limited guidance. Nonetheless, in summary those factors are as follows:

- Consideration must be given to the purpose of the deductions and whether an employee has gained a benefit from a deduction out of their remuneration.
- An assessment of benefit is also relevant and whether an employer has benefitted at the expense of an employee. A benefit to an employer is not, of itself, a reason to find a deduction was unreasonable.
- The quality of assent given by an employee to the deduction scheme and, in particular, whether or not there was coercion or duress.
- Whether or not the deduction scheme has limited the genuine choice of an employee to freely apply his or her remuneration in the manner the employee genuinely chooses.
- Consideration of the requirement under s 324(1)(a) of the FW Act requiring any deduction to be pursuant to an employee's written authority. Although Bromberg J called for a 'harmonious construction', this was in respect to s 324(1)(a) (which deals with contracts of employment) and s 326(1)(c) of the FW Act. In this case, of course, the Court is not dealing with such written authority but the deduction being authorised under the Award (s 324(1)(c) of the FW Act).
- Any assessment of unreasonableness of a deduction is simply not an outcomes-based assessment and that wide import is to be given to the phrase 'in the circumstances'.

83 Despite having found these factors of limited guidance to the assessment of reasonableness in respect to the deduction referred to in cl 14.2 of the Award, even when applying them, I am not satisfied that the deduction is unreasonable. As made clear in ***AEU***, the assessment of unreasonableness in the circumstances is not an outcome-based assessment and the words 'in the circumstances' need to be given wide import.

84 There was clear evidence from Mr Cole that Mr Ryan, in failing to provide notice in lieu, caused WAP productivity losses. Mr Cole explained that if Mr Ryan had served out his period of notice he would have been able to teach a new employee how to operate the machine he operated in his employment. Mr Cole explained this caused him both financial and productivity losses.

85 The deduction is provided for in the Award and is a common clause in modern awards. There is no evidence that cl 14.2 of the Award arose through coercion or duress. Nor is there any evidence that cl 14.2 of the Award results from WAP taking advantage of Mr Ryan.

86 Accordingly, I am not satisfied that cl 14.2 of the Award is subject to s 326 of the FW Act. Further, I am not satisfied that the deduction by WAP was unreasonable in the circumstances.

87 I am therefore satisfied that WAP was permitted, pursuant to cl 14.2 of the Award, to deduct $1,672 from Mr Ryan's final entitlements. Having said that, ultimately the discretion to deduct two weeks' wages for failure to give notice from Mr Ryan's final entitlements lies with WAP. Often employment relationships come to an end in unsatisfactory ways for both parties, but I note that overall Mr Cole saw Mr Ryan as good at his job. It clearly is always open to WAP to reverse its decision in respect to this deduction.

88 Nonetheless, because of the concessions made and referred to at paragraph 6 of these reasons and the orders made on 10 February 2021, I will order that the remainder of Mr Ryan's claim as it relates to payment in lieu of notice be dismissed.

89 I will hear from the parties in respect to the claim for imposition of penalties and costs.

Orders

90 The Claim for payment in lieu of notice is dismissed.

J. HAWKINS
INDUSTRIAL MAGISTRATE

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[1] There is no dispute that WAP was a trading and financial company carrying on business in Australia and incorporated under the *Corporations Act* 2001 (Cth). Therefore, WAP was a '***national systems employer***' and Mr Ryan was a '***national systems employee***', under the FW Act. Schedule 1 sets out the jurisdiction and procedure of this Court in respect to the FW Act. Schedule 1 is incorporated into these reasons.

[2] The relevant instruments that apply to the employment relationship are:

1. Mr Ryan's employment contract;
2. the *Fair Work Act* 2009 (Cth) (FW Act); and
3. the *Timber Industry Award 2010* (Cth) (Award).

[3] Witness Statement of Leon McKenzie dated 28 January 2021 [7].

[4] Witness Statement of Leon McKenzie dated 28 January 2021 [8].

[5] Witness Statement of Leon McKenzie dated 28 January 2021 [10].

[6] Witness Statement of Leon McKenzie dated 28 January 2021 [11].

[7] Witness Statement of Jeb Cole dated 28 January 2021 [8].

[8] Witness Statement of Lisa Gendall dated 28 January 2021 [35].

[9] Schedule 2 [6] - [11].

[10] Witness Statement of Jeb Cole dated 28 January 2021 [20].

[11] Witness Statement of Lisa Gendall dated 28 January 2021 [45].

[12] See sch 2.

[13] Witness Statement of Lisa Gendall dated 28 January 2021 [35].

[14] ***Kwik-Fit (GB) Ltd v Lineham*** [1992] ICR 183, 191 (Wood J).

[15] Witness Statement of Jeb Cole dated 28 January 2021 [20].

[16] ***Birrell v Australian National Airlines Commission*** [1984] FCA 419 (Gray J).

[17] (1999) 94 IR 375.

[18] ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355; ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)*** [2010] FCA 652.

[19] See ***Re Minister for Employment and Workplace Relations*** [2008] AIRCFB 1000; (2008) 177 IR 364.

[20] Hor J and Keats L, *Managing Termination of Employment: A Fair Work Guide*, (2009) 296.

[21] [1984] FCA 419.

[22] [2015] FCA 1196.

[23] ***Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*** 2015 FCA 1196 [176].

Schedule 1: Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court Under The *Fair Work Act 2009* (Cth)

Jurisdiction and burden of proof

[1] An employee, an employee organization or an inspector may apply to an eligible State or Territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FW Act.

[2] The IMC, being a court constituted by an industrial magistrate, is an '***eligible State or Territory court***': FW Act s 12 (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA) s 81, s 81B.

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

[4] The civil penalty provisions identified in s 539 of the FW Act include contravening a term of the NES and failing to pay in full an amount owed under the FW Act: FW Act s 44(1), s 323 respectively.

[5] An obligation upon an '***employer***' is an obligation upon a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': FW Act s 12, s 14, s 42, s 47. A NES entitlement of an employee is an entitlement of an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed … by a national system employer*': FW Act s 13, s 42, s 47.

Contravention

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for '*an employer to pay* [to an employee] *an amount … that the employer was required to pay*' under the modern award (emphasis added): FW Act s 545(3)(a).

[7] The civil penalty provisions identified in s 539 of the FW Act includes:

- The Core provisions (including s 44(1) and s 45) set out in pt 2 - 1 of the FW Act: FW Act s 61(2), s 539.

[8] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:

- An employer to pay to an employee an amount that the employer was required to pay under the FW Act: FW Act s 545(3).

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

Burden and standard of proof

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

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

[11] In the context of an allegation of the breach of a civil penalty provision of the FW 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].

Schedule 2 – Witness Statement Of Mr Mark Ryan Dated 19 January 2021

Ryan

IN THE INDUSTRIAL MAGISTRATE'S COURT

M109/2020

MARK RYAN

Claimant

and

WA PALLETTS PTY LTD

Respondent

WITNESS STATEMENT OF THE CLAIMANT IN SUPPORT OF HIS CLAIM FOR UNPAID ENTITLEMENTS UNDER THE NES AND THE TIMBER INDUSTRY AWARD 2010

MARK RYAN to state as follows:

1. I am the claimant in these proceedings.

2. I have made a claim for unpaid entitlements due to me under the NES when my employment was terminated by the respondent on the 1st July 2020. This witness statement is my evidence with respect to that claim.

3. I was employed by the respondent in the role of Machine Operator between the 12th June 2019 and the 1st July 2020 when I was summarily dismissed by the respondent. My employment was governed by the *Timber Industry Award 2010* and the NES under the *Fair Work Act 2009*.

4. As I have stated I worked for the company for just over a year. I was reliable and my work attendance was perfect. I still had about a week of sick leave remaining when the employment ended.

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Ryan

5. I would always stay at work until my job was finished for the day. This caused me to be paid overtime.

6. I had a couple of disagreements during the employment, but overall I was happy in the work and operated the pallet machine.

7. My son Dion also worked for the company. He was in another shed in the business. I worked away from him in the main shed.

8. Dion had mentioned to me that his hours and workload was gradually increasing to such a point that he was finding it hard to cope.

9. For this reason on the 30th June 2020 I approached Lisa one of the owners and the office manager of the business to discuss this. I asked her if we could discuss Dion's workload. She refused and cut me off stating that I always had a problem.

10. I then went and met with Jeb Cole the other owner of the business. I said I wanted to talk about Dion's hours and workload, but he too refused and answered aggressively and said that I always had a problem and walked away from me. I followed and tried to talk to him, but he didn't want to listen. I was aggressively told to go home by Jeb which I did. I certainly did not quit my job as is now alleged by the respondent.

11. The next day being the 1st July 2020 when I arrived at work I was confronted by Jeb immediately. He said he wanted to talk to me. I went into his office with him and he said he had a written warning for me from yesterday. I was extremely surprised and asked what it was for. He said that it is all in the letter which he handed to me. I started to open it but he stopped me and said that I could open it at home. He said that my separation certificate would be ready at the end of the day. I immediately asked: "are you sacking me". He replied yes, go home.

12. I came into work that day an hour later than my usual start time of 6.00am. I sent a text to Jeb to inform him that I was starting at 7.00am. I was able to do this because the company did not have a regular start time for

Ryan

everyone and in that week I had already worked 45 hours. I did not come in late to ask for my job back as stated by the respondent.

13. I went out and said good bye to the boys and left and went home.

14. The 1st July 2020 was pay day. I had done 45 hours work that week. The company did not pay me for that or anything else.

15. I was upset by the failure to pay as I was left without pay and my entitlements.

16. I did exchange texts with Jeb Cole regarding this. In a text on the 1st July 2020 he said that I was dismissed due to my aggressive behaviour and serious misconduct.

17. I was not given any warning that there was something wrong with my behaviour. I had no opportunity to defend myself. My warning letter stated that we would meet again on the 7th July 2020 so I was confused when I read that as to why I was fired on the day.

18. There was not a good reason to fire me. I certainly didn't deserve to be deprived of my wages, holiday pay and a payment for not giving me notice.

19. I am currently in receipt of Centrelink payments as I am a Job Seeker. I am looking for work but have not been successful.

20. Lisa one of the directors of the respondent has taken out a VRO against me. I have not had any contact with her other than attending a conference in the Industrial Magistrate's Court for these proceedings.

21. My rate of pay was $22 per hour. This means that my base rate for a 38 hour week was $836.

22. The day that I was dismissed was a pay day. In the preceding week I had worked 45 hours and this was my wages entitlement for that pay day. I was paid nothing. I therefore claim $990.

23. I had not been given annual leave during the employment. At the end of the employment I had worked 1 year and 2 weeks. My annual leave entitlement is therefore 4.15 weeks being $3469.40.

24. I was not given written notice of the termination and I was not paid any money in lieu of notice. I am entitled to 2 weeks' notice which equates to $1672.

25. In addition to the payments which I claim which were deliberately not paid to me, I seek the imposition of penalties for each breach of the NES, and the Award.

Dated this 19th January 2021.

MARK RYAN

CORRECTIONS—

2021 WAIRC 00083

DEPARTMENT OF EDUCATION (RESIDENTIAL COLLEGE SUPERVISORS) CSA AGREEMENT 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF EDUCATION, THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANTS
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
DATE	TUESDAY, 23 MARCH 2021
FILE NO	PSAAG 1 OF 2021
CITATION NO.	2021 WAIRC 00083

Result	Correcting order issued
Representation	
Applicants	Mr S Dane (as agent) and Ms A Wallish (as agent)
Respondent	N/A

Correcting Order

WHEREAS the Department of Education (Residential College Supervisors) CSA Agreement 2021 was registered as an industrial agreement by consent by the order [2021] WAIRC 00080 on 22 March 2021;

AND WHEREAS on 22 March 2021 the parties identified a 'slip' error in the order and informed the Public Service Arbitrator that, as set out in the notice of application, the parties had intended the industrial agreement to have effect from 19 April 2021, being the first day of term two;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders:

THAT the second paragraph of the order [2021] WAIRC 00080, which begins 'THAT', be deleted and replaced with the following –

THAT on 19 April 2021:

1. The agreement made between the parties filed in the Commission on 10 March 2021 entitled Department of Education (Residential College Supervisors) CSA Agreement 2021 attached hereto be registered as an industrial agreement in replacement of the Department of Education (Residential College Supervisors) CSA General Agreement 2017; and
2. The Department of Education (Residential College Supervisors) CSA General Agreement 2017 be cancelled by operation of s 41(8).

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Arbitrator.

PROCEDURAL DIRECTIONS AND ORDERS—

2021 WAIRC 00125

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL JOHN SPRY
	APPLICANT
	-v-
	BEAVER TREE SERVICES AUST PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 5 MAY 2021
FILE NO.	B 1 OF 2021
CITATION NO.	2021 WAIRC 00125

Result	Direction issued
Representation	
Applicant	Ms D van der Westhuyzen (of counsel)
Respondent	Mr G Smith (of counsel) and Ms L Jeffers (of counsel)

Direction

HAVING heard from Ms D van der Westhuyzen (of counsel) on behalf of the applicant and Mr G Smith (of counsel) and with him Ms L Jeffers (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT each party shall give an informal discovery by serving its list of documents on each other by no later than 4:00 pm 19 May 2021;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 4:00 pm 2 June 2021;
3. THAT the applicant file and serve further and better particulars in support of his claim, by no later than 16 June 2021;
4. THAT witness evidence be adduced by signed witness statements which will stand as the evidence in chief on this matter;
5. THAT the applicant file and serve any signed witness statements upon which they intend to rely by no later than 30 June 2021;
6. THAT the respondent file and serve any signed witness statements upon which they intend to rely by no later than 14 July 2021;
7. THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross examination one week before the hearing;
8. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 28 July 2021;
9. THAT the respondent and file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 11 August 2021;
10. THAT the matter be listed for hearing for 3 days on a date to be set; and
11. THAT the parties have liberty to apply.

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

2021 WAIRC 00108

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ASHLEY STEWART
	APPLICANT
	-v-
	UGL OPERATIONS & MAINTENANCE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 22 APRIL 2021
FILE NO.	B 6 OF 2021
CITATION NO.	2021 WAIRC 00108

Result	Directions issued
Representation	
Applicant	Mr B Wilson (of counsel)
Respondent	Mr G Weaver (as agent)

Direction

HAVING heard from Mr B Wilson (of counsel) on behalf of the applicant and Mr G Weaver (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the jurisdictional objection be heard and determined on the papers;
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 19 May 2021;
3. THAT the respondent file written submissions by 2 June 2021.
4. THAT the applicant file written submissions by 17 June 2021.
5. THAT the respondent file any written submissions in reply by 24 June 2021.
6. THAT discovery be informal.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2021 WAIRC 00122

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 9 MARCH 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHEREE MIZEN
	APPELLANT
	-v-
	THE GOVERNING COUNCIL, NORTH METROPOLITAN TAFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MS L WARD - BOARD MEMBER
	MR G THOMPSON - BOARD MEMBER
DATE	WEDNESDAY, 5 MAY 2021
FILE NO	PSAB 11 OF 2021
CITATION NO.	2021 WAIRC 00122

Result	Directions issued
Representation	
Appellant	Ms D Larson (of counsel)
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Ms D Larson of counsel on behalf of the appellant and Mr M McIlwaine of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 11 June 2021;
2. THAT the appellant file outlines of evidence and documents, other than the agreed documents, on which she intends to rely, by 25 June 2021;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which it intends to rely by 9 July 2021;
4. THAT the appellant file written submissions by 23 July 2021;
5. THAT the respondent file written submissions by 6 August 2021;
6. THAT discovery be informal; and
7. THAT the matter be listed for a 3-day hearing.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2021 WAIRC 00124

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AARON RYAN
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 5 MAY 2021
FILE NO/S	U 4 OF 2021
CITATION NO.	2021 WAIRC 00124

Result	Summons set aside
Representation	
Applicant	Mr C Fordham (of counsel)
Respondent	Mr S Pack (of counsel)

Order

WHEREAS this is an application filed under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS this application was listed for hearing on 12 and 13 May 2021;

AND WHEREAS the respondent filed a Form 9 – Summons to Give Evidence and/or Produce Documents on 23 April 2021, which summoned Mr Kristian Scott to give evidence at the Commission on 12 and 13 May 2021 (**Summons**);

AND WHEREAS the hearing listed on 12 and 13 May 2021 is vacated;

AND WHEREAS the respondent has confirmed that it does not object to the Summons being set aside;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) orders –

THAT the Summons be set aside.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2021 WAIRC 00119

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HSIAO-HUA (XANTHE) HSU
	APPLICANT
	-v-
	FRASER SUITES PERTH
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	MONDAY, 3 MAY 2021
FILE NO.	U 16 OF 2021
CITATION NO.	2021 WAIRC 00119

Result	Direction issued
Representation	
Applicant	Mr C Narayanan (as agent)
Respondent	Ms M Brown (of counsel) and Ms P Harrison (of counsel)

Direction

HAVING heard from Mr C Narayanan on behalf of the applicant and Ms M Brown and with her Ms P Harrison on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979,* hereby directs –

1. THAT the preliminary issue of jurisdiction be heard on the papers;
2. THAT the respondent is to file and serve written submissions with respect of the issue of jurisdiction to deal with this application and any evidence upon which it relies in support of its contentions (by way of affidavit or statutory declaration) by 4:00 pm on Monday, 17 May 2021;
3. THAT the applicant is to file and serve written submissions with respect of the issue of jurisdiction to deal with this application and any evidence upon which she relies in support of her contentions (by way of affidavit or statutory declaration) by 4:00 pm on Monday, 31 May 2021;
4. THAT the respondent may file and serve written submissions in reply and any evidence in reply to support its contentions (by way of affidavit or statutory declaration) by 4:00 pm on Monday, 14 June 2021, and;
5. THAT the parties have liberty to apply.

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

2021 WAIRC 00104

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL RICHARD HIGGINSON
	APPLICANT
	-v-
	ALBANY AGRICULTURAL SOCIETY INC.
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 16 APRIL 2021
FILE NO.	U 91 OF 2020
CITATION NO.	2021 WAIRC 00104

Result	Direction issued
Representation	
Applicant	Mr P Higginson
Respondent	Mr R Wright and Ms E Henderson

Direction

HAVING heard from the applicant on his own behalf and Mr R Wright and Ms E Henderson on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the respondent will provide the applicant with informal discovery by providing the requested documents by no later than 28 May 2021;
2. THAT the Executive Committee Meeting documents to be treated as confidential and will be sealed by the Commission;
3. THAT the applicant file and serve further and better particulars in support of his claim by no later than 9 June 2021;
4. THAT the respondent file and serve a response to the applicant's further and better particulars by no later than 23 June 2021;
5. THAT the applicant file and serve any outline of witness evidence and any documents upon which he intends to rely by no later than 7 July 2021;
6. THAT the respondent file and serve any outline of witness evidence and any documents, for each witness, upon which it intends to rely by no later than 21 July 2021;
7. THAT the matter be listed for hearing in Albany for 2 days on a date to be set for August 2021, and;
8. THAT the parties have liberty to apply on short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Education (Residential College Supervisors) CSA Agreement 2021 PSAAG 1/2021	03/22/2021	Department of Education, The Civil Service Association of Western Australia Incorporated	(Not applicable)	Commissioner T Emmanuel	Agreement registered
WA Health System Engineering and Building Services Industrial Agreement 2021 AG 3/2021	04/20/2021	Child and Adolescent Health Service, East Metropolitan Health Service, North Metropolitan Health Service	Electrical Trades Union of Western Australia Branch and others	Commissioner T Emmanuel	Agreement registered
Western Australia Police Force Auxiliary Officers Industrial Agreement 2020 AG 5/2021	04/21/2021	Commissioner of Police	WA Police Union of Workers	Senior Commissioner S J Kenner	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2021 WAIRC 00127

APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2021 WAIRC 00127
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MS L WARD - BOARD MEMBER MR G BROWN - BOARD MEMBER
HEARD	**:**	TUESDAY, 23 FEBRUARY 2021
DELIVERED	**:**	THURSDAY, 6 MAY 2021
FILE NO.	**:**	PSAB 23 OF 2020
BETWEEN	**:**	ALESSANDRA GRANITTO Appellant AND DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Public Service Appeal Board – Interpretation of sections 81(1) and 82A(2) of the *Public Sector Management Act 1994* (WA) – Power to take improvement action in the course of a disciplinary matter
Legislation	**:**	*Industrial Relations Act 1979* (WA): s 26(1)(b), s 26(1)(c) & s 80I(1)(a), *Public Sector Management Act 1994* (WA): s 29(ja), s 76(8), s 81 & s 82A
Result	**:**	*Appeal dismissed*
Representation:		
Appellant	**:**	Ms M Saraceni (of counsel)
Respondent	**:**	Mr D Anderson (of counsel)

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).

2 Mrs Alessandra Granitto is employed by the Director General of the Department of Education (**Director General**) as a Level 2 Administrative Officer. She was the subject of a disciplinary process which began on 16 April 2019.

3 On or about 21 July 2020, Mrs Granitto received a letter from the Department of Education which confirmed that no breach of discipline finding had been made against her and required her to take improvement action 'pursuant to s 82 [sic]' of the *Public Sector Management Act 1994* (WA) (**PSM Act**).

4 Mrs Granitto has appealed this decision to the Board. She says that in the circumstances, the Director General did not have the power to order her to undertake improvement action under s 82A of the PSM Act. Mrs Granitto's central argument is that the Director General made a finding that she did not commit any breach of discipline. Making that disciplinary finding concluded the disciplinary process such that there was no longer any 'disciplinary matter' for the purpose of s 82A and, accordingly, no power to impose improvement action under that section.

5 In her amended notice of appeal Mrs Granitto asks the Board to order:

> 1. The Respondent's decision as to the Disciplinary PIP be quashed; and
>
> 2. The Respondent record on the Appellant's personnel records that no Disciplinary PIP was issued to her following or in any way connected with the PIP.

6 The Director General denies that she made any disciplinary findings, but says that the legislative framework allows the Director General to take improvement action when no disciplinary findings have been made. The Director General says that in any event, she is authorised to take improvement action where appropriate under s 29 of the PSM Act.

What must the Board decide?

7 In her amended grounds of appeal, Mrs Granitto says:

> The question the subject of this appeal is how section 82 [sic] is to be interpreted in respect of the Respondent's decision (recorded in a letter dated 4 May 2020 – see Attachments A and B) not to impose disciplinary action under section 81(1) of the [PSM Act] against the Applicant (after making a finding of no disciplinary breaches) but then proceeding to impose a performance improvement plan (**PIP**) on the Applicant (**Disciplinary PIP**) in accordance with, and in reliance on, s 82A(2)(a).
>
> The questions for interpretation are whether:
>
> (a) Section 81(1) of the PSM Act applies in circumstances where the Respondent, in purported completion of its disciplinary investigation, had concluded that the Appellant has not committed any breach of discipline; and
>
> (b) There is any disciplinary matter to be dealt with under Division 3 of Part 5 of the PSM Act, such that s 82A(2)(a) applies.

8 At the hearing, the Director General raised a concern with the questions that Mrs Granitto had included in her amended notice of appeal. She said that Mrs Granitto's questions were 'premised on the assertion… that the respondent made a finding, a positive finding… that the appellant hadn't committed any disciplinary breaches.' The Director General says there is a distinction to be drawn between a finding of guilt or innocence and no finding. The Director General says that she made no decision in relation to findings.

9 Instead, the Director General says that the question should be 'whether the respondent erred in her interpretation of section 81(1) and 82A(2)(a) of the Act when she decided after the completion of a disciplinary investigation to move away from disciplinary action and take improvement action and to later confirm no disciplinary findings had been made and impose improvement action.'

10 The Board must decide how, in the circumstances, sections 81(1) and 82A of the PSM Act are to be interpreted and whether the Director General erred in deciding to require Mrs Granitto to take improvement action.

Leave granted to amend the appeal

11 Mrs Granitto filed an application to amend her appeal because when she filed her appeal she was not sure who would represent her. Mrs Granitto thought she should prioritise filing her appeal on time. After she received legal advice she made an application to amend her appeal.

12 The Director General objected to the Board granting Mrs Granitto leave to amend her appeal. She argued that although the reason for the amendment is reasonably explained, and the delay and costs are relatively insignificant, the amended grounds of appeal are not able to be reasonably argued as a basis for the relief sought.

13 The Board granted Mrs Granitto leave to amend her appeal because the Board considered that it was not able to conclude, at that preliminary stage and without the benefit of proper arguments from the parties, that the amended grounds of appeal could not be reasonably argued.

The Director General's application to dismiss the appeal

14 At the hearing, the Director General made an application to the Board for the appeal to be dismissed. She argued that:

> [T]he question which is posed in that amended form 8 is premised on the assertion that the respondent made a finding, a positive finding, if you like, that the appellant hadn't committed any disciplinary breaches.
>
> And there's, you know, plainly a distinction to be drawn between a finding of guilt or innocence and no finding and where there's no finding, not only is it not a finding of innocence, it's simply not even a finding. So if you'd answered that question against - in the way that it's framed, it's simply not going to have any application to the appellant's circumstances and it's plainly then not in the public interest. The question that was reformulated overcomes that issue to a point.
>
> …
>
> To the extent that I sought to apply for the Board to refuse leave to amend the question, if there's a distinction to be drawn from that application to an application to strike out the proceedings, then I'll make that application now on the basis that I've just put to the Board, which is that it's plain on the face of the decision that the premise of the question is misconceived.

15 The Board considered that in circumstances where the matter had already been delayed, and the full hearing of the matter would not take much longer, it was appropriate to deal with the Director General's application for the matter to be dismissed as part of the substantive hearing and determination of the appeal.

Evidence before the Board

16 At the parties' request, the Board heard from the parties in writing about programming the appeal. On the basis that there were no material facts in dispute and that the parties would not be calling any witnesses, the Board issued directions that the parties file a statement of agreed facts and bundle of agreed documents, and that each party file an outline of its submissions.

17 Following several months of delay (predominantly on the part of Mrs Granitto) during which the Board granted the parties extensions of time to comply with its directions, Mrs Granitto's representative filed a statement of agreed facts, an affidavit for Mrs Granitto, a bundle of documents that were not agreed and an outline of submissions.

18 The statement of agreed facts contained just one paragraph:

> On or about 21 July 2020 the Appellant received a letter from Mr Nick Wells, A/Executive Director Professional Standards and Conduct, on behalf of the Appellant's employing authority, in which he confirmed that no breach of discipline finding had been made against the Appellant and ordered the Appellant to undertake improvement action pursuant to section 82 of the *Public Sector Management Act 1994* in the terms outlined in the letter sent by Mr Mike Cullen, Director, Standards and Integrity on behalf to the Applicant's employing authority dated 4 May 2020.

19 The parties handed up the two letters referred to in the agreed paragraph at the hearing. These two letters became Agreed Documents 1 and 2. Agreed Document 3 is a letter from Mrs Granitto's union to the Department of Education dated 29 May 2021.

Mrs Granitto's application to file additional documents

20 Two of the four documents that Mrs Granitto sent to the Registry for filing, the 'Statement of Agreed Facts' and the document titled 'WAIRC Outline of Submissions 29-01-2021', were accepted for filing. The other two documents titled 'Signed Affidavit of Alessandra Granitto 29 Jan 2020' and 'Trial Bundle' were not documents that Mrs Granitto was directed to file and so were not accepted for filing by the Registry.

21 In circumstances where the Director General did not consent to the affidavit or bundle of documents being accepted for filing, Mrs Granitto made an application to the Board at the hearing for leave to file the bundle of documents that were not agreed. Mrs Granitto did not seek to file her affidavit.

Mrs Granitto's submissions about the additional documents

22 Mrs Granitto said that under s 26(1)(b) of the *Industrial Relations Act 1979* (WA) (**IR Act**), the Board is not bound by the rules of evidence and under s 26(1)(c) of the IR Act, 'the Board shall have regard for the interests of persons immediately concerned'. She says the Board has 'the power to take into consideration other matters if it is satisfied they are relevant in helping it reach its decision'.

23 Mrs Granitto argued that the Board should accept her bundle of additional documents because the matters raised in her appeal are not hypothetical and it is important that the Board understand how the disciplinary process started. She argued the documents will allow the Board 'to make an informed decision as to the interpretation of sections 81(1)(a) and 82A(2)(a) of the Public Sector management Act.' Mrs Granitto's representative said:

> The point of it really is what is the disciplinary process? We have to go to the Commissioner's instruction number 3 to define what the process is, see what occurred and this issue about whether there were no findings or there was a finding of no breach, to understand that needs to look at all the interlocutory steps that were taken, otherwise I can make a submission to say the document that I've referred you to speaks for itself on its face.
>
> It says there was no findings of breach, no breach findings made. But if there's an issue that my friend is going to raise as to whether there was no finding made or we say there was a finding made and the finding was no breach, then to understand the steps that were taken by the respondent to get to that part, we say is relevant for the Board to be fully informed. There's no need for evidence other than the documents which are the respondent's own documents.

The Director General's submissions about additional documents

24 The Director General opposed Mrs Granitto's application to file additional documents and said that the additional documents Mrs Granitto seeks to tender are inadmissible. They are not relevant to the question of whether the Director General erred in considering that s 82A(2)(a) of the PSM Act allowed her to require Mrs Granitto to take improvement action at the time she did.

25 The Director General argued that at the heart of this dispute are questions of interpretation, not matters of evidence, saying:

> [I]t's not an evidentiary matter. It's not one in which process is an issue. It's a question of whether or not the respondent's at lawful authority or the boundaries of her authority and therefore we say all that evidence is wholly irrelevant.

Consideration – additional documents

26 After hearing from the parties, the Board dismissed Mrs Granitto's application to file additional documents.

27 The Board considers that, in essence, this matter is about interpreting sections 81(1) and 82A(2)(a) of the PSM Act. Specifically, it is about whether the Director General had the power, given those two sections of the PSM Act, to take improvement action, in circumstances where the disciplinary process commenced on 16 April 2019, an investigation had been completed and no finding of breach of discipline had been made.

28 We consider this is a question of legal interpretation. It is not relevant for the Board to consider facts about whether the Director General's decision to take improvement action was fair, nor to consider facts that arose after that decision was made. Accordingly, the additional documents are not necessary for the fair resolution of Mrs Granitto's appeal.

29 The application for leave to file additional documents was dismissed.

Background

30 Mrs Granitto was the subject of several allegations, which the Executive Director, Workforce referred to the Standards and Integrity Directorate as disciplinary matters under s 81(1)(a) of the PSM Act. The Director, Standards and Integrity (Mr Mike Cullen) made 'a number of enquiries regarding the allegations', considered 'a number of documents' and conducted interviews with staff members. Mr Cullen then wrote to Mrs Granitto on 4 May 2020 (**Agreed Document 1**) and said that he had 'formed a view that there was some substance to the allegations'. He then provided examples of the allegations, but did not say which of those allegations had substance. Finally, Mr Cullen informed Mrs Granitto that he had 'decided to move away from disciplinary action' and that he would instead take improvement action. Mr Cullen outlined the improvement action he intended to take and invited Mrs Granitto to provide a written response to his letter.

31 Mrs Granitto's union replied to Mr Cullen's letter on 29 May 2020 (**Agreed Document 3**), complaining about a lack of procedural fairness, ultimately proposing that the Department of Education 'confirm that no findings have been made against Mrs Granitto and that the disciplinary process is ceased.'

32 On 21 July 2020, Acting Executive Director Mr Nick Wells wrote to Mrs Granitto (**Agreed Document 2**). He confirmed that no breach of discipline findings had been made against her and that improvement action 'pursuant to section 82 of the [PSM Act]' in the terms outlined in Agreed Document 1 would be taken.

33 It is not in dispute that references in Agreed Documents 1 and 2 to s 82 of the PSM Act were intended to be references to s 82A of the PSM Act.

Legislative framework

34 Part 5 of the PSM Act deals with substandard performance and disciplinary matters.

35 Section 81(1) provides that where an employing authority becomes aware that an employee may have committed a breach of discipline, the employing authority may decide to deal with the matter as a disciplinary matter.

> **81. Suspected breach of discipline, employing authority's options as to**
>
> (1) If an employing authority of an employee is made aware, or becomes aware, by any means that the employee may have committed a breach of discipline, the employing authority may —
>
> (a) decide to deal with the matter as a disciplinary matter under this Division in accordance with the Commissioner's instructions; or
>
> (b) decide that it is appropriate —
>
> (i) to take improvement action with respect to the employee; or
>
> (ii) to take no action.
>
> …
>
> *[Section 81 inserted: No. 39 of 2010 s. 97.]*

36 Section 82A sets out how disciplinary matters are dealt with.

> **82A. Disciplinary matters, dealing with**
>
> (1) In dealing with a disciplinary matter under this Division an employing authority —
>
> (a) must proceed with as little formality and technicality as this Division, the Commissioner's instructions and the circumstances of the matter permit; and
>
> (b) is not bound by the rules of evidence; and
>
> (c) may, subject to this Division and the Commissioner's instructions, determine the procedure to be followed.
>
> (2) Even though an employing authority decides to act under section 81(1)(a), the employing authority may, at any stage of the process, decide instead that it is appropriate —
>
> (a) to take improvement action with respect to the employee; or
>
> (b) that no further action be taken.
>
> (3) Subject to subsection (4) and section 89, after dealing with a matter as a disciplinary matter under this Division —
>
> (a) if the employing authority finds that the employee has committed a section 94 breach of discipline, the employing authority must take disciplinary action by dismissing the employee; and
>
> (b) if the employing authority finds that the employee has committed a breach of discipline that is not a section 94 breach of discipline, the employing authority must decide —
>
> (i) to take disciplinary action, or both disciplinary action and improvement action, with respect to the employee; or
>
> (ii) to take improvement action with respect to the employee; or

(iii) that no further action is to be taken.

(4) The Minister —

(a) is bound by any finding in a report submitted as directed under section 81(2); and

(b) must, when making a decision under subsection (3)(b), have regard to, but is not bound by, a recommendation submitted as directed under section 81(2).

[Section 82A inserted: No. 39 of 2010 s. 97.]

37 Mrs Granitto also relies on s 76(8) of the PSM Act.

76. Application and effect of Part 5

…

(8) Nothing in this Part limits the power of an employing authority under other provisions of this Act to take improvement action in relation to an employee in circumstances in which the employing authority considers it appropriate to do so.

[Section 76 amended: No. 39 of 2010 s. 94.]

Submissions

Mrs Granitto's submissions

38 Mrs Granitto concedes that the Director General has the power to take improvement action in relation to an employee when the Director General considers it appropriate to do so under other provisions of the PSM Act.

39 Mrs Granitto relies on s 76(8) of the PSM Act:

> [N]ot under the provisions dealing with substandard performance or disciplinary matters, but other provisions. So there's nothing limiting the power of an employing authority to take improvement action in relation to an employee in circumstances in which the employing authority considers it appropriate to do so…Essentially, the respondent, separate and having nothing to do with substandard performance or disciplinary matters, could issue an improvement - or could require improvement action, but not under part 5. When part 5 kicks in - and relevantly, for our purposes, it's the disciplinary matters - division 3 of part 5, we say that that section 76(8) open section doesn't apply, because that deals with other sections.

40 Relying on s 9 of the PSM Act, Mrs Granitto says that the Department of Education is required to comply with Public Sector Commissioner's Instruction No. 3 – Discipline – General (**Instruction**), which sets out 'the minimum procedural requirements to be followed by the employing authorities when dealing with suspected breaches of discipline or disciplinary matters and taking disciplinary action under Part 5 of the Public Sector Management Act'.

41 Mrs Granitto also draws the Board's attention to the Department of Education's discipline policy, submitting that 'when discipline is - an investigation is finished, the process is concluded when it's decided no breach of findings and that's where it should end, nothing further should be - should occur.'

42 Mrs Granitto says that the Board should infer from the letter dated 21 July 2020 that there has been 'a positive finding of no breach of discipline'. The disciplinary process concluded when this finding was made and 'no action can be taken under Division 3 of Part 5'.

43 Mrs Granitto says that, having found there was no disciplinary breach and having 'decided to move away from disciplinary action', the Director General did not have the power to then direct Mrs Granitto to take improvement action under s 82A(2)(a) of the PSM Act. The Director General would only have had that power if she had continued to treat the matter as disciplinary.

44 In summary, Mrs Granitto's argument is:

> 82A(2) says:
>
> > "Even though an employing authority decides to act under section 81(1)(a)" -
>
> and that section is to decide to deal with it as a disciplinary matter -
>
> > "the employing authority may, at any stage of the process, decide instead that it is appropriate to take improvement action with respect to the employee."
>
> It is our submission that 'any stage of the process' is during the process, not once the process is completed. And once the decision is made, that there are no breach of discipline findings. At that stage, the horse has bolted, it is too late. What's not too late is if the Education Department decides, separate from any discipline, relies on section 76(8) to require improvement action, but it's not as a result of the same conduct which it's found there is no breach of discipline as such.

Director General's submissions

45 The Director General argues that the effect of s 82A(2)(a) of the PSM Act 'is to allow an employing authority to re-visit a decision made pursuant to s 81 and re-exercise the discretion to deal with a suspected breach of discipline by taking improvement action.'

46 The Director General says that her decision was not a two-step process 'such that [the Director General]'s decision to take improvement action pursuant to s 82A(2)(a) was only made after…a prior decision to end the process by deciding not to make disciplinary findings.'

47 Further, the Director General says that there was no express decision not to make disciplinary findings. The Director General decided to 'move away from disciplinary action' (being action which would necessitate disciplinary findings as a precursor) and instead take improvement action. Any inferred or implied decision not to make disciplinary findings flows from the re-exercise of her discretion to take improvement action, rather than treating the matter as disciplinary.

48 The language of s 82A(2)(a) is 'plain in that it seems to allow an employing authority to decide to take improvement action at any stage of a process dealing with a disciplinary matter.'

49 The Director General says:

> The respondent did not absolve the appellant of any wrongdoing at the completion of a disciplinary investigation. To the contrary, the respondent considered there was some substance in the allegations and decided to take improvement action in respect of the appellant. Improvement action is not de facto disciplinary action. Improvement action is recognised as action to improve an employee as such for the protection and/or furtherance of an employer's interests. A certain type of activity is designated as improvement action and defined by s 3 of the PSM Act. An employer might otherwise contractually require the same activity of an employee in the course of employment. In that sense, the power to impose appropriate improvement action provided by s 29(ja) of the PSM Act is the codification of the power implied in all employment contracts to allow for the same activity to be directed if appropriate. The respondent respectfully says the appellant is not entitled to the relief sought or any relief at all.

50 The Director General also argues that Mrs Granitto's submission that she was 'declared innocent, is clearly, on the face of all the evidence of the decision, at least, misconceived.'

51 In relation to Mrs Granitto's submissions about the Instruction, the Director General argues that improvement action does not form part of the disciplinary process:

> It's not a - it's important that it's not considered to be a step in that - because it - dealing with it as a disciplinary matter leads you to a conclusion of findings, no findings, action, no action. And that's where it has to tail out. And then, the requirements overlaying the statutory procedure, as to the timeframes to which people are to be informed of such decisions.
>
> But by re-exercising the discretion at 82A not to deal with it as a disciplinary matter, you come outside of that instruction, you get back to square one, and you deal with it on an alternative basis.

52 The Director General says that it is irrelevant that the Instruction suggests there are only two outcomes of a disciplinary matter, being a declaration of guilt or innocence, because the Instruction 'regulates how a disciplinary matter is treated. The whole point of 82A is you're not treating it as a disciplinary matter.'

Consideration

53 While it is agreed that the disciplinary process in relation to Mrs Granitto had started by 16 April 2019, the parties are in dispute about when and how that disciplinary process ended.

54 In the Board's view, Mrs Granitto's questions and submissions are misconceived.

55 Noting that the questions set out in Mrs Granitto's amended notice of appeal are different to the questions set out in her submission, Mrs Granitto's questions and submissions are premised on:

a. the Director General having made a finding or concluded that Mrs Granitto did not commit any breach of discipline; and

b. the disciplinary process having ended as a result of the Director General having made a finding or concluded that Mrs Granitto did not commit any breach of discipline.

56 Contrary to Mrs Granitto's submission, it is clear that the Director General did not 'conclude that the Appellant has not committed any breach of discipline.' The Director General did not make a finding 'of no disciplinary breaches.'

57 The evidence before the Board, being the single agreed paragraph and the three Agreed Documents, makes it clear that the disciplinary process started on 16 April 2019 and an investigation was completed before 4 May 2020.

58 The Board considers that no findings were made by the Director General. There was the absence of a finding. As the Director General submits, the absence of a finding is not the same thing as a finding that something did not occur.

59 Section 82A(2) refers to the employing authority being able to decide that it is appropriate to take improvement action *at any stage of the process*, notwithstanding that the employing authority decided to act under s 81(1)(a) of the PSM Act. The plain wording of s 82A(2) of the PSM Act makes it clear that as long as the employing authority is engaged in the process of dealing with the disciplinary matter, the employing authority may decide instead to take improvement action.

60 The Board does not accept Mrs Granitto's submission that the disciplinary process had ended because the Director General made a finding or concluded that Mrs Granitto had not committed a breach of discipline. The Agreed Documents show that no such findings were made or conclusions drawn. To the extent that the Director General came to a conclusion, it was that after the investigation was complete and before any findings were made, the Director General decided that she should not pursue disciplinary proceedings any further but she should instead take improvement action.

61 That the investigation was complete and no findings were made does not mean that there was no longer any disciplinary matter to empower the Director General to act under s 82A(2) of the PSM Act. The disciplinary matter still existed. The disciplinary process was on foot. At that stage the Director General could have pursued the disciplinary process. Alternatively, instead of pursuing the disciplinary process, under s 82A(2) of the PSM Act it was open to the Director General to decide to move away from the disciplinary process and impose improvement action. The Director General did so in the course of dealing with the disciplinary matter. It was that decision, being a decision to deal with the disciplinary matter by instead imposing improvement action, that ended the disciplinary matter and process.

62 For the reasons outlined at [59], the Board does not accept Mrs Granitto's submission that 'the powers conferred under s 82A(2) of the PSM are only enlivened if the Respondent had continued to treat the matter as a disciplinary matter as defined in section 81(1)(a) of the PSM Act.'. The matter was treated as a disciplinary matter up until the point that the Director General decided to instead impose improvement action. Further, to the extent that Mrs Granitto argues that disciplinary findings are necessary before improvement action can be imposed under s 82A(2) of the PSM Act, the Board does not agree. The legislative framework does not require disciplinary findings before improvement action can be imposed under s 82A(2) of the PSM Act. Indeed the plain wording of s 82A(2), *at any stage of the process*, indicates as much. This is in contrast to s 82A(3), under which the taking of disciplinary action, improvement action or no further action is dependent on disciplinary findings having been made.

63 We do not consider that Mrs Granitto's submissions about s 76(8) of the PSM Act assist her case. Section 76(8) of the PSM Act merely provides that nothing in Part 5 limits the employing authority's power under other provisions of the PSM Act to take improvement action in relation to an employee. Here the Director General took improvement action under s 82A(2), which is in Part 5 of the PSM Act. Accordingly s 76(8) is not relevant.

64 The Board considers that in the circumstances of this matter, the decision to impose improvement action was within power under the PSM Act. In short, it was open to the Director General to do what she did.

65 The Director General did not err in her interpretation of sections 81(1) and 82A(2) of the PSM Act when she decided after completion of a disciplinary investigation to move away from disciplinary action and to take improvement action.

66 This appeal is dismissed.

2021 WAIRC 00126

APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALESSANDRA GRANITTO
	APPELLANT
	-v-
	THE DEPARTMENT OF EDUCATION WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MS L WARD - BOARD MEMBER
	MR G BROWN - BOARD MEMBER
DATE	THURSDAY, 6 MAY 2021
FILE NO	PSAB 23 OF 2020
CITATION NO.	2021 WAIRC 00126

Result	Respondent's name amended
Representation	
Appellant	Ms M Saraceni (of counsel)
Respondent	Mr D Anderson (of counsel)

Order

HAVING heard from Ms M Saraceni (of counsel) on behalf of the appellant and Mr D Anderson (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, orders –

THAT the name of the respondent be amended to Director General of the Department of Education.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2021 WAIRC 00128

APPEAL AGAINST THE DECISION TO TAKE IMPROVEMENT ACTION ON 21 JULY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALESSANDRA GRANITTO
	APPELLANT
	-v-
	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MS L WARD - BOARD MEMBER MR G BROWN - BOARD MEMBER
DATE	THURSDAY, 6 MAY 2021
FILE NO	PSAB 23 OF 2020
CITATION NO.	2021 WAIRC 00128

Result	Appeal dismissed
Representation	
Appellant	Ms M Saraceni (of counsel)
Respondent	Mr D Anderson (of counsel)

Order

HAVING heard from Ms M Saraceni (of counsel) on behalf of the appellant and Mr D Anderson (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT application PSAB 23 of 2020 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2021 WAIRC 00110

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	GEOFFREY RAYMOND MORAN
	APPLICANT
	-v-
	WORKSAFE WA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 22 APRIL 2021
FILE NO/S	OSHT 7 OF 2020
CITATION NO.	2021 WAIRC 00110

Result	Application dismissed
Representation	
Applicant	Ms V Kafentzis (of counsel)
Respondent	Ms S Arif (of counsel)

Order

WHEREAS this is an application pursuant to s 61A of the *Occupational Safety and Health Act 1984* (WA)*;*

AND WHEREAS this matter was set down for hearing and determination for 21 April 2021 to 23 April 2021;

AND WHEREAS on 20 April 2021, the applicant filed a *Form 1A – Multipurpose Form,* to discontinue their application.

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* (WA), hereby orders –

THAT this application be and is hereby dismissed.

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