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

FULL BENCH

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

ON APPEAL FROM:

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

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

Representation:

Counsel:

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

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Case(s) referred to in reasons:

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

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

City of Wanneroo v Holmes (1989) 30 IR 362

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

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

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

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

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

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

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

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

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

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

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

Re Harrison; ex parte Hames [2015] WASC 247

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

McCourt v Cranston [2012] WASCA 60

Mifsud v Campbell (1991) 21 NSWLR 725

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

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

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

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

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

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

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

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

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

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

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

Case(s) also cited:

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

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

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

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

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

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

Re Clothing Trades Award (1950) 68 CACR 597

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

Reasons for Decision

SCOTT CC and KENNER SC:

Background

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

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

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

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

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

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

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

Decision at first instance

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

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

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

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

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

The grounds of the appeal

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

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

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

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

Clause 3 – Scope and its construction

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

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

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

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

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

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

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

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

concluded that "the Shop Award's scope is inherently ambiguous and it is appropriate for the Commission to interpret it" (par 34 reasons AB213).

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

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

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

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

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

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

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

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

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

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

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

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

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

32 So too, this must be the case for the purposes of s 83 of the Act, dealing with the enforcement of an award. It is the enforcement of the award as it is as at the time of the alleged contravention or failure to comply, that is the "award" as referred to in s 83(2)(a) of the Act. This necessarily recognises that an award is a dynamic instrument and one that is not just fixed in time, but whose terms may be added to, altered, amended or rescinded as the definition of

"vary" in s 7 of the Act makes clear. This is also supported to an extent by s 38(3) of the Act, which expressly contemplates that the scope of an award may change over time.

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

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

Effect of other Award provisions

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

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

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

38 It was therefore contended at first instance, concluded by the learned Commissioner and argued by the Union on the appeal, that these provisions support the principal conclusion that the retail

pharmacy industry is still covered by the Award, despite there being no named respondents to the Award who are engaged in this industry since April 1995. For the following reasons, we are unable to accept this contention.

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

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

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

42 The language of cl 40 is supportive of this approach to its meaning. The clause does not say that a person who is employed in a "Chemist Shop" is covered by the Award, which would be the case if a full stop appeared after the word "award" and nothing further was said. However, cl 40 goes on to say, "up to the time he or she becomes indentured into the profession". When read in this way, as a provision excluding a class of employees from coverage by the Award, it

is entirely consistent with cl 3 – Scope, cl 28 – Wages and Schedule 'C'. As with clauses 9 and 28 Part III(5)(b), it will only have work to do if the terms of cl 3 and Schedule 'C' are engaged.

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

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

The s 47 order of the Commission

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

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

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

48 Under the Act, the Commission may exercise a number of powers having the effect of varying an award. The general variation power is found in s 40. This power is only able to be exercised on the application of persons party to or bound by an award: s 41 of the Act. Other powers, more particular in nature, are found in ss 38(2), 40B and 47 of the Act. The distinction between the general and specific powers to vary an award were recognised by the Full Bench in ***Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty Ltd*** (1984) 64 WAIG 1926 per O'Dea P at 1927.

In the case of the latter two powers, the Commission is able to exercise those powers on its own motion. Where the Commission exercises powers on the application of a party to or person bound by an award under s 40 or on its own motion, under ss 40B or 47 of the Act, regardless of which power is exercised, the resulting order is a "variation" to an award in terms of the definition of "vary" in s 7 of the Act, referred to earlier in these reasons. In the case of an order under s 38(2), to add an employer as a named party to an award or to strike out an employer as a named party to an award under s 47(2), in both cases, this constitutes the adding to, alteration or amendment of, an existing provision of an award. The schedule of respondents to an award is, in the context of common rule awards in particular, a key provision.

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

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

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

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

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

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

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

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

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

the Commission effectively refers the industrial matter to itself. In our view also, with respect, ***Re Dardanup Butchering*** must also be considered to have been wrongly decided on this point.

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

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

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

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

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

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

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

63 Therefore, for the foregoing reasons, we consider the learned Commissioner's acceptance of the Union's and Minister's submissions in relation to the application of s 29A to s 47 proceedings to be erroneous. The removal of PUFSC in 1995, as the last-named respondent to the Award to be engaged in the retail pharmacy industry, had the effect of removing that industry from the scope of the Award from that time. This was the legal consequence of the events as they then occurred. Contrary to the submissions of the Union, whether this was the express intention of the parties at that time, is not relevant to the determination of this question. The relationship between the terms of cl 3 – Scope and Schedule C of the Award, on the established authorities is that they are, as pointed out by the appellants in their submissions at first instance (see tab 7(c) AB) "legally indivisible concepts". The latter is determined by the former. Also, for the reasons advanced by the appellants on this appeal, there is in our view, no substance to the Union's contention that in some way, the April 1995 s 47 order of the Commission to delete PUFSC was merely an administrative step, with no legal consequences.

Failure to deal with submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

Principles

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

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

76 An award has effect "according to its terms" and is to be interpreted applying the same principles that are applied in Courts of law for the construction of deeds, instruments and statues as established by the Western Australian Industrial Appeal Court in ***Norwest Beef***

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

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

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

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

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

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

> In that matter, Beech CC and I observed that [52]:
>
> To construct the intention of the parties, regard must be had to the principles that apply to the construction of contracts: ***Short v F W Hercus Pty Ltd*** [1993] FCA 51; (1993) 40 FCR 511, 518 - 519 (Burchett J); ***Construction, Forestry, Mining and Energy Union v John Holland***

> ***Pty Ltd*** [2010] FCAFC 90; (2010) 186 FCR 88 [90] - [96] (Logan J). Importantly, regard cannot be had to the actual intention of parties or their expectations. Evidence of such matters is usually inadmissible: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1981-1982) 149 CLR 337, 352 (Mason J). Ascertaining the presumed intention of the parties requires the objective determination of what a reasonable person would have understood the contract (in this matter the 2010 agreement) to mean, *as at the date that it was made*, taking into account the object of the contract and the surrounding circumstances known to the parties: ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] HCA 70; (2001) 210 CLR 181 [11]. (my emphasis).

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

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

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

Consideration

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

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

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

Ambiguity

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

Principles

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

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

> A perusal of section 88 of the Act (precursor to s 46) above quoted will show that in an interpretation case this Court is exercising not only its judicial but also its arbitral functions, and consequently where there is in an award any doubt or uncertainty or ambiguity as to any of its provisions, or when there has been an accidental omission or where something has been inserted in error, the Court is entitled to look into the whole of surrounding circumstances and

> explore what avenues it may deem necessary even to the extent, where desirable, of appointing experts to investigate and report, in order to ascertain the true intention and to remedy a defect in the award…

Consideration

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

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

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

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

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

Principles

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

> 27 Where there is a right of appeal, the reasons must be sufficient to give effect to that right. The basis for the decision must be apparent, as otherwise the losing party cannot know whether there has been a mistake of law or of fact. Just what that will involve depends upon the nature of the case. Some cases turn upon a simple contest of credibility between two witnesses. Others involve detailed and complex factual and legal issues requiring close reasoning and analysis.
>
> 28 Reasons need not be lengthy and elaborate: ***Re Powter; Ex parte Powter;*** (1945) 46 SR (NSW) 1 at 5; ***Beale*** at 443; nor do they need to refer to all the evidence led in the proceedings: ***Mifsud v Campbell*** (1991) 21 NSWLR 725 at 728. However, relevant evidence should be referred to (albeit not necessarily in detail) and, where there is conflicting evidence of significance to the outcome, both sets of evidence should be

referred to. Where one set of significant evidence is preferred over another, the trial judge should set out findings sufficient to explain why: ***Beale*** at 443. Similarly, where a dispute involves a form of "intellectual exchange, with reasons and analysis advanced on either side", the judge "must enter into the issues canvassed before him and explain why he or she prefers one case over the other": ***Flannery*** at 382.

29 Inadequacy of reasons does not necessarily amount to an appealable error. An appeal court will only intervene when no reasons have been given in circumstances in which they were required, or when the inadequacy is such as to give rise to a miscarriage of justice: ***Beale*** at 444. Nor does an appealable error arising from inadequate reasons necessarily result in a new trial. The appeal court is entitled to consider the matter and, if it can do so (where, for example, only one conclusion is reasonably open on the available evidence), it may itself decide the matter: ***Beale*** at 444.

Consideration

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

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

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

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

(a) section 29A of the Act required certain steps to occur in order to vary the scope of the Shop Award (at [70] and [71]); and in the absence of such steps being taken

(b) the Commission goes no further than removing a listed respondent, with the consequence that an order under s 47 does not have the effect of removing an industry, thereby reducing an award's scope (at [73]).

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

consequence that, on a proper construction of its terms, the Shop Award thereafter ceased to apply to the retail pharmacy industry.

Principles

96 Section 37 of the Act set out at [16] and [75], provides that the cessation of the application of common rule to a specified industry or industries requires the amendment of existing provisions, or the insertion of new provisions, to "expressly provide otherwise" (s 37(I)). The phrase "expressly provide otherwise" in s 37(I) was considered by the Federal Circuit Court of Australia in ***Fair Work Ombudsman v D'Adamo Nominees Pty Ltd*** (No. 4) [2015] FCCA 1178 [213] and held that these words required any variation seeking to unbind any industry or industries to which the award applied to have the effect of plainly, clearly or explicitly indicating the award does not apply to that industry.

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

> 29A. Proposed award etc., service of etc.
>
> (1) Where an industrial matter has been referred to the Commission pursuant to section 29, the claimant or applicant shall specify the nature of the relief sought.
>
> (1a) In this section —
>
> **area and scope provisions** means the parts of an award or industrial agreement that relate to the area of operation and scope of the award or industrial agreement.
>
> (1b) Subject to subsection (2A) —
>
> (a) area and scope provisions of a proposed award or industrial agreement; and
>
> (b) proposed variations to the area and scope provisions of an existing award or industrial agreement,
>
> shall be published in the required manner.
>
> (2) Subject to any direction given under subsection (2A), if the reference of an industrial matter to the Commission seeks the issuance of an award or the registration of an industrial agreement, or the variation of the area and scope provisions of an existing award or agreement, the Commission shall not hear the claim or application until the area and scope provisions of the proposed award or industrial agreement have, or the proposed variation has, been published in the required manner and a copy of the claim or application has been served —
>
> (a) in the case of a proposed award or variation of an award, on —

(i) UnionsWA, the Chamber, the Mines and Metals Association and the Minister; and

(ii) such organisations, associations and employers as the Commission may direct being, in the case of employers, such employers as constitute, in the opinion of the Commission, a sufficient number of employers who are reasonably representative of the employers who would be bound by the proposed award or the award as proposed to be varied, as the case may be;

(b) in the case of the proposed registration or variation of an industrial agreement, on UnionsWA, the Chamber, the Mines and Metals Association and the Minister.

(2A) The Chief Commissioner may, if of the opinion that it is appropriate to do so in the circumstances, direct that the area and scope provisions of the proposed award or industrial agreement —

(a) need not be published in the Industrial Gazette; or

(b) need not be published at all.

(2b) Nothing in subsection (2A) affects or dispenses with any requirement of subsection (2) that a copy of a claim or application be served on any person, body or authority referred to in subsection (2)(a) or (b).

(2c) The area and scope provisions of an award may be amended under section 40A without the proposed variation having been published in the required manner.

(3) Unless otherwise directed by the Commission, where the reference of an industrial matter to the Commission seeks the variation of an award or industrial agreement, other than a variation of the kind mentioned in subsection (2), the Commission shall not hear the claim or application until the named parties to the award or the parties to the industrial agreement, as the case requires, have been served with a copy of the claim.

(4) Where the reference of an industrial matter to the Commission seeks the issuance or variation of an order or declaration, other than of a kind referred to in subsection (2) or (3) the Commission shall not hear the claim or application until the persons sought to be bound by the decision in the proceedings have been served with a copy of the claim or application.

[Section 29A inserted: No. 94 of 1984 s. 19; amended: No. 119 of 1987 s. 8; No. 15 of 1993 s. 31; No. 20 of 2002 s. 115; No. 53 of 2011 s. 41 and 48.]

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

40. Varying and cancelling awards

(1) Subject to subsections (2), (3) and (4) and to sections 29A and 38, the Commission may by order at any time vary an award.

(2) An application to the Commission to vary an award may be made by any organisation or association named as a party to the award or employer bound by the award.

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

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

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

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

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

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

and

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

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

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

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

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

101 Section 47 of the Act provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consideration

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

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

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

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

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

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

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

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

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

112 The appellants say that the Commissioner erred in:

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

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

Principles

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

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

Consideration

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

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

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

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

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

CONCLUSION

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