

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN  
MATTER NO. M 46/2018 GIVEN ON 28 FEBRUARY 2019  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**FULL BENCH**

**CITATION** : 2019 WAIRC 00889

**CORAM** : SENIOR COMMISSIONER S J KENNER  
COMMISSIONER T EMMANUEL  
COMMISSIONER T B WALKINGTON

**HEARD** : FRIDAY, 12 JULY 2019  
WRITTEN SUBMISSIONS SATURDAY, 30  
NOVEMBER 2019 AND MONDAY, 9 DECEMBER  
2019

**DELIVERED** : FRIDAY, 20 DECEMBER 2019

**FILE NO.** : FBA 5 OF 2019

**BETWEEN** : SHERYL REARDON  
Appellant

AND

GAETANO ANTHONY LAGANA (ABN 85 867 757  
829) T/A STRATTON PARK PHARMACY  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : **Industrial Magistrate's Court**  
**Coram** : **Magistrate D Scaddan**  
**Citation** : **[2019] WAIRC 00104**  
**File No** : **M 46 of 2018**

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Catchwords : *Industrial Law (WA) - Appeal against decision of the Industrial Magistrate in relation to overtime payments - Effect of Full Bench decision overturning declaration of Commission relied upon by Industrial Magistrate at first instance - Whether s 84 of the Act constitutes a strict appeal or an appeal by way of rehearing - Appeal under s 84 by way of rehearing and error must be established - decision at first instance given in legal and jurisdictional error - Award did not apply to the parties at material times and appellant had no standing to enforce Award - Decision varied*

Legislation : *Industrial Relations Act 1979 (WA) ss 26, 27(1)(n), 46, 49, 84, 90*

*Conciliation and Arbitration Act 1904 (Cth) s 35*

*Industrial Arbitration Act 1912-1963 (WA) ss 103A, 108C(5)(b)*

*Long Service Leave Act 1958 (WA)*

Result : Decision varied. Order issued.

**Representation:**

Counsel:

Appellant : Mr D Rafferty of counsel

Respondent : Mr R Jones as agent

Solicitors:

Appellant : The Shop, Distributive & Allied Employees' Association,  
Western Australian Branch

Respondent : Atwick Ferres

**Case(s) referred to in reasons:**

*Allesch v Maunz* (2000) 203 CLR 172; [2000] HCA 40

*Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557

*AWU v Poon Bros (WA) Pty Ltd* (1983) 4 IR 394

*CSR Ltd v Delle Maddalena* (2006) 80 ALJR 458

*Director General, Department of Education v United Voice WA* [2015] WASCA 195; (2015) 95 WAIG 1600

*Duralla Pty Ltd v Plant* (1984) 54 ALR 29

*Eastman v The Queen* (2000) 203 CLR 1

*Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited* (1990) 70 WAIG 3040

*Fox v Percy* (2003) 214 CLR 118

*FMWU v Sunny West Co-Operative Dairies Ltd and Ors* (1965) 45 WAIG 246

*Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, WA Branch* (1984) 64 WAIG 852

*House v The King* (1936) 55 CLR 499

*Minister for Health v Denise Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203

*The Pharmacy Guild of Western Australia v The Shop, Distributive and Allied Employees' Association of Western Australia; Samuel Gance T/as Chemist Warehouse Perth v The Shop, Distributive and Allied Employees' Association of Western Australia* [2019] WAIRC 00825

*Pharmacy Guild of Western Australia Organisation of Employers v The Shop, Distributive and Allied Employees' Association of Western Australia, Minister for Commerce and Industrial Relations, Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth* [2019] WAIRC 00098; (2019) 99 WAIG 252

*Re Rates of Pay for Engineers: and CSIRO Technical Association* 167 CAR 497

*The Shop, Distributive and Allied Employees Association of Western Australia v Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth* [2019] WAIRC 00015; (2019) 99 WAIG 121

*SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760

*Sheryl Reardon v Gaetano Anthony Lagana (ABN 85 867 757 829) T/A Stratton Park Pharmacy* [2019] WAIRC 00104; (2019) 99 WAIG 258

*Transport Workers' Union of Australia WA Branch v Arrow Holdings Pty Ltd* (1989) 69 WAIG 1050

*Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73

*WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union v Izzo* (1984) 64 WAIG 411

*Warren v Coombes* (1979) 142 CLR 531

**Case(s) also cited:**

*ALHMU v Great Southern Regional College of TAFE and Others* (1994) 74 WAIG 2327

*Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* [2003] HCA 55

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

*Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] FCAFC 84

*George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498

*Grunwick Processing Laboratories Ltd v Advisory, Conciliation & Arbitration Service* [1978] AC 655

*Kezich v Leighton Contractors Pty Ltd* (1974) 131 CLR 362

*Kucks CSR Ltd* (1966) 66 IR 182

*Re Steel Works Employees (Australia Iron and Steel Limited) Conciliation Committee* [1941] AR (NSW) 445

*Spring 2002 Pty Ltd v Katherine Sampson* [2006] WAIRC 05864; (2007) 87 WAIG 110

*Spring 2002 Pty Ltd v Katherine Sampson* [2007] WAIRC 00083; (2007) 87 WAIG 122

*State of New South Wales v Stockwell* [2017] NSWCA 30

*Thompson v Roche Bros Pty Ltd* [2004] WASCA 110

*United Voice v Wilson Security Pty Ltd* [2019] FCAFC 66

*Reasons for Decision***KENNER SC:****The appeal and background**

- 1 In proceedings before the Industrial Magistrates Court on 23 January 2019, the appellant contended that the respondent had contravened or failed to comply with the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 in relation to payment of overtime under cls 7(1) and 13 of the Award, in respect of her casual employment by the respondent from 8 April 2012 to 13 October 2017. Another claim made by the appellant to the Court, for payment of long service leave under the *Long Service Leave Act 1958* (WA), is not relevant for present purposes. By its decision and order of 28 February 2019, the Court dismissed the part of the appellant's claim that related to overtime payments: *Sheryl Reardon v Gaetano Anthony Lagana* (ABN 85 867 757 829) *T/A Stratton Park Pharmacy* [2019] WAIRC 00104; (2019) 99 WAIG 258.
- 2 The appellant now appeals against the rejection of her claim for overtime payments. The appellant complained that the learned Industrial Magistrate erred in her construction of the relevant provisions of the Award. It was contended that the appellant, as a casual employee, who regularly worked more than 30 hours per week, was entitled to be paid overtime for those additional hours of work beyond 30 each week. Despite the grounds of appeal being limited in scope to this issue, another matter now arises for consideration by the Full Bench.
- 3 That issue relates to the application of the Award to the retail pharmacy industry. This has been contentious for some time. Prior to the hearing before the Court, in November 2017, proceedings were commenced by the Shop, Distributive and Allied Employees' Association of Western Australia, for a declaration under s 46 of the *Industrial Relations Act 1979* (WA) that the Award applied to employees employed in retail pharmacies. Those proceedings culminated in a decision of the Commission in January 2019, that the Award did so apply and a declaration to this effect was made by the Commission: *The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance* (ABN 50 577 312 446) *T/A Chemist Warehouse Perth* [2019] WAIRC 00015; [2019] WAIRC 00016; (2019) 99 WAIG 121. The declaration was in the following terms:

THAT *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 employers employing those workers.

- 4 On 31 January 2019, the respondent to the declaration proceedings and the Pharmacy Guild of Western Australia Organisation of Employers, commenced appeals to the Full Bench. The Minister for Industrial Relations was an intervenor in the proceedings. A stay of the declaration under s 49(11) of the Act was sought and on 28 February 2019, the date of the decision and orders from which the present appeal is brought, the stay application was granted by the Chief Commissioner and an order was made: [2019] WAIRC 00098; (2019) 99 WAIG 252.
- 5 The present appeal to the Full Bench was commenced on 20 March 2019. The appeal was heard on 12 July 2019 and the decision was reserved. Since then, on 21 November 2019 the Full Bench, in the declaration proceedings, handed down its decision. Both appeals were upheld and the declaration made by the Commission in January 2019 has been reversed: *The Pharmacy Guild of Western Australia v The Shop, Distributive and Allied Employees' Association of Western Australia; Samuel Gance T/as Chemist Warehouse Perth v The Shop, Distributive and Allied Employees' Association of Western Australia* [2019] WAIRC 00825. In addition to a declaration that the Award did not apply to the retail pharmacy industry, orders were also made by the Full Bench, in relation to consequential variations to the Award, giving effect to the Full Bench's declaration, by the removal of references to pharmacies and chemists shops, where they appear in the Award. The orders made by the Full Bench in the declaration proceedings included a declaration as follows:

DECLARE that that *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* does not apply to the retail pharmacy industry.

- 6 The issue that now arises is what is the effect of the Full Bench decision in the declaration proceedings on the decision of the Court and this appeal? In order to give the parties an opportunity to be heard, the Full Bench wrote to the parties on 25 November 2019 alerting them to the decision of the Full Bench in the declaration proceedings and inviting further written submissions as to the effect, if any, on the present appeals. The parties have provided further submissions.

### **Contentions of the parties**

- 7 In summary, the appellant, by letter dated 30 November 2019, contended that an appeal to the Full Bench under s 49 of the Act is to be heard as a strict appeal. Reliance was placed on a decision of the Commission in Court Session in *FMWU v Sunny West Co-Operative Dairies Ltd and Ors* (1965) 45 WAIG 246 at 246-247 per Schnaars CC. It was submitted that the then s 108C(5)(b) of the *Industrial Arbitration Act 1912-1963* (WA), dealing with the powers of the

Commission in Court Session on an appeal were like s 84(4)(a) of the Act. Applying this approach, it was submitted that as a strict appeal, the Full Bench must consider the appeal on the evidence and law as it stood at the time of the proceedings at first instance before the Court and at the time of the Court's decision: *Allesch v Maunz* [2000] HCA 40 at pars 22-23; *Eastman v The Queen* (2000) 203 CLR 1. Reference was also made to a decision of the Full Bench in *Minister for Health v Denise Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 per Smith AP and Beech CC, citing and relying on a decision of the Industrial Appeal Court in *Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, WA Branch* (1984) 64 WAIG 852.

- 8 Even though in *Samuel Gance*, a stay of the declaration issued on the same day as the decision of the Court the subject of this appeal, that being 28 February 2019, the order granting the stay was made in the afternoon, after the Court's reasons and orders were handed down earlier that morning. Thus, it was said by the appellant, that the stay had no effect on the decision of the Court at first instance.
- 9 For the respondent, in a letter dated 9 December 2019, it was submitted that the decision of the Full Bench in *Samuel Gance* does affect these proceedings. The submission was made that the effect of the declaration of the Full Bench in those proceedings is that the Award does not apply to the respondent. If this situation had been settled at the time of the appellant's claim being made before the Court, those proceedings could not have continued. Given the present appeal is still before the Full Bench, from the terms of s 84 of the Act, which empowers the Full Bench to vary or to amend a decision of the Industrial Magistrates Court, the Full Bench must be able to rehear the matter, which means that it can consider other material and is required to apply the law as it stands now. This being so, the respondent submitted that the decision of the Court at first instance must be set aside.

### **The declaration**

- 10 The effect of the decision of the Full Bench in the declaration proceedings is that from April 1995, the Award must be taken to have ceased to have application to the retail pharmacy industry. Thus, as at the time of the employment of the appellant by the respondent, and at the time of the alleged contraventions of the Award, the Award must be taken to have had no binding effect on either the appellant or the respondent. A declaration of the Commission, however constituted, is, under s 46(3) of the Act, binding on all courts and persons with respect to the matter the subject of the declaration.



## Statutory provisions

- 11 Given the submissions made by the parties and the issues arising, it is convenient at this point to set out both ss 49 and 84 of the Act dealing with appeals to the Full Bench from a decision of the Commission and from an Industrial Magistrate respectively. Section 49, dealing with appeals from the Commission, is in the following terms:

### 49. Appeal from Commission's decision

- (1) In subsections (2) to (6a) the *Commission* means the Commission constituted by a commissioner, but does not include the Commission exercising jurisdiction under section 80ZE or subsection (11).
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission.
- (2a) An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.
- (2b) An appeal does not lie under this section from a determination —
  - (a) of a relevant industrial authority —
    - (i) under section 97VP; or
    - (ii) in an arbitration under any EEA dispute provision of the kind referred to in section 97UP;
 or
  - (b) of the Commission under section 97XC or 97XQ.
- (3) An appeal under this section shall be instituted within 21 days of the date of the decision against which the appeal is brought and may be instituted by —
  - (a) any party to the proceedings wherein the decision was made; or
  - (b) any person who was an intervener in those proceedings.
- (4) An appeal under this section —
  - (a) shall be heard and determined on the evidence and matters raised in the proceedings before the Commission; and
  - (b) shall, if brought by a person referred to in subsection (3)(b), be dismissed unless, on the hearing of the appeal, that person obtains leave of the Full Bench,  
and, for the purpose of paragraph (a), *proceedings* includes any proceedings arising under section 35(3).
- (5) In the exercise of its jurisdiction under this section the Full Bench may, by order —

- (a) dismiss the appeal; or
  - (b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or
  - (c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.
- (6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied shall be in terms which could have been awarded by the Commission that gave the decision.
- (6a) The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.
- .....

<sup>12</sup> Section 84 is as follows:

**84. Appeal from industrial magistrate's court to Full Bench**

- (1) In this section *decision* includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.
- (3) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted by any party to the proceedings wherein the decision was made.
- (4) On the hearing of the appeal the Full Bench —
  - (a) may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal; and
  - (b) may remit the matter to the industrial magistrate's court or to another industrial magistrate's court for further hearing and determination according to law; and
  - (c) subject to subsection (5), may make such order as to costs as the Full Bench considers appropriate.
- (5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

## Nature of appeals - general principles

<sup>13</sup> An appeal is a creature of statute and it is the terms of the statute that govern how an appeal court is to go about its task on an appeal to it. It is trite that appeals can be classified in three ways, which can only be general descriptions, as it will be a question of the terms of the specific statute under consideration that determines the matter. These matters were considered in *Lacey v A-G (Qld)* (2011) 242 CLR 573; (2011) 275 ALR 646; [2011] HCA 10; BC201101794, where French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed as follows at pars 56-58:

[56] Ascertainment of the statutory purpose is to be based on the words of s 669A(1) and, in particular, the word “appeal”, which encompasses the jurisdiction conferred by the subsection. An appeal is a creature of statute and, subject to constitutional limitations, the precise nature of appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context. The purpose of s 669A(1) is to create an appellate jurisdiction exercisable upon the application of the Attorney-General and coupled with a wide remedial power. The question is what kind of jurisdiction does it create?

[57] Appeals being creatures of statute, no taxonomy is likely to be exhaustive.<sup>141</sup> Subject to that caveat, relevant classes of appeal for present purposes are:

- (1) Appeal in the strict sense — in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given.<sup>142</sup> Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.<sup>143</sup>
- (2) Appeal de novo — where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.<sup>144</sup>
- (3) Appeal by way of rehearing — where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error.<sup>145</sup> In some cases in an appeal by way of rehearing there will be a power to receive additional evidence.<sup>146</sup> In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.<sup>147</sup>

[58] Where the court is confined to the materials before the judge at first instance, that is ordinarily indicative of an appeal by way of rehearing, which would require demonstration of some error on the part of the primary judge before the powers of the court to set aside the primary judge’s decision were enlivened.

<sup>14</sup> Importantly, for present purposes, an appeal court on a rehearing, determines the appeal on the law as it stands when it hears and determines the appeal: *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106-108; *Attorney General (NSW) v World Best Holdings Ltd*

(2005) 63 NSWLR 557 at 567). This means changes in the law since the original decision was made can be considered in the determination of the appeal.

### Consideration of s 49 of the Act

- 15 In *Hamersley Iron*, it was held (per Brinsden and Kennedy JJ) that an appeal to the Full Bench of the Commission, from a discretionary decision, under s 49 of the Act, should be approached in the same way as the Full Bench of the then Australian Conciliation and Arbitration Commission dealt with appeals from discretionary decisions under s 35 of the then federal legislation, the *Conciliation and Arbitration Act 1904* (Cth). Brinsden J adopted the approach of the Australian Commission in *AWU v Poon Bros (WA) Pty Ltd* (1983) 4 IR 394. It was held that the appeal provisions of both the State and federal statutes were very similar. This required the establishment of error, in accordance with principles established in *House v The King* (1936) 55 CLR 499. In the conduct of an appeal under s 49, the Full Bench conducts as full a review of the evidence and materials as the circumstances of the case require. This includes the ability of the Full Bench to draw its own inferences from facts established on the evidence or those not in dispute.
- 16 In *Hamersley Iron*, the Court did not appear to expressly conclude that an appeal under s 49 is a strict appeal or a rehearing. Brinsden J at p 853, noted that the nature of the proceedings is an appeal and no reference is made to a rehearing in s 49 itself. In *Poon Bros*, the Australian Commission considered that consistent with a long line of cases, under the then and predecessor legislation, an appeal to the Full Bench was not a hearing de novo but a reconsideration of the Commission's decision at first instance, and in the case of a discretionary decision, error was necessary to establish. It was not open for the Full Bench of the Australian Commission to simply substitute its view for the Commission at first instance. Brinsden J also referred to an earlier decision of the Full Bench of the Australian Commission in *Re Rates of Pay for Engineers: and CSIRO Technical Association* 167 CAR 497 at 500, cited in *Poon Bros*, where the Commission observed it was not sitting at first instance and that error was required to be established.
- 17 Kennedy J at 855, also referred to *House v The King* and other later decisions of the High Court, in relation to appeals from the exercise of discretion, and concluded the same should apply to the Full Bench of the Commission under s 49 of the Act. Notably his Honour drew a distinction between an "appeal" under s 49 of the Act as established by the Parliament and the Full Bench dealing with a matter as if sitting at first instance, hearing a matter de novo. Olney J approached the matter somewhat differently but came to the same conclusion that the broad

approach in *Poon Bros* was appropriate to adopt in this jurisdiction. Additionally, his Honour commented at 857 that, whilst because of s 49(4) of the Act, except for s 26(1)(b), all the other obligations on the Commission under ss 26(1) and (2) did apply to the Full Bench on an appeal. Olney J therefore considered that this required the Full Bench on an appeal from a discretionary judgment, to make up its own mind, based on the evidence and matters raised at first instance, having regard to these statutory requirements.

- 18 Despite s 49(4)(a) of the Act, requiring an appeal to be heard on the evidence and matters raised at first instance, the Full Bench has held that it may, in certain very limited circumstances, admit further evidence: *Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Limited* (1990) 70 WAIG 3040. In *George Moss*, the Full Bench had regard to the earlier decision of the Commission in Court Session in *Sunny West*. However, it was held that the conclusion in *Sunny West*, that the then s 108C(5)(a) of the *Industrial Arbitration Act 1912-1963*, which was in the same terms as s 49(4)(a), to the effect that fresh evidence could not be adduced, was overly restrictive. The Full Bench reasoned at 3042, that for example, matters of jurisdiction must always be able to be raised on an appeal, despite not being a matter raised in the original proceedings below. In a similar vein, fundamental matters of law, within the limits of the principle that new points not taken below cannot generally be raised for the first time on appeal, especially if able to be met by evidence, are not precluded by the reference to “matters” in s 49(4)(a) of the Act. I note too however, the observations of the plurality in *Lacey*, in particular at par 58, that where an appeal court is confined to the material at first instance, this is indicative of an appeal by way of rehearing, with the requirement for error to be established.
- 19 In terms of practice and procedure, whilst it cannot be determinative, the Full Bench on an appeal from the Commission under s 49 of the Act, undertakes for itself as full a review of all of the evidence, oral and documentary, and submissions on the law and principle, as the grounds of appeal require in a particular case. This proceeds on a transcript of the proceedings and all relevant documents tendered into evidence. A full review of the case at first instance may be required. On the disposition of the appeal, under s 49(5) of the Act, the Full Bench may do a number of things, including dismissing the appeal; upholding it and quashing the decision or varying it as required by s 49(6); suspending the decision and remitting the matter to the Commission for further hearing and determination. In the latter case, the Full Bench is not to remit a matter, unless it considers that it is not able to decide the matter for itself.
- 20 In *Director General, Department of Education v United Voice WA* [2015] WASCA 195; (2015) 95 WAIG 1600, the issue before the Industrial Appeal

Court was whether s 27(1)(n) of the Act, in relation to the extension of prescribed times, applied to an appeal to the Full Bench under s 49. In the course of considering this issue, Le Miere J (Buss and Murphy JJ agreeing) referred to aspects of the legislation and in relation to s 49 appeals, stated at par 16 that “an appeal under s 49 is an appeal by way of rehearing” and compared it to the very limited appeal to the Court under s 90 of the Act.

- 21 To the extent that the Commission in *Sunny West* and in *Drake-Brockman* reached the conclusion that an appeal under s 49 of the Act is a strict appeal, with respect, I disagree. Whilst not expressed as such in the statute, I consider that an appeal to the Full Bench under s 49 involves a rehearing. The Full Bench is to reach its own view on all of the evidence and the materials before the Commission, subject to error at first instance being established. The principles in relation to such a rehearing were set out by Buss JA in *Lackovic v Insurance Commission (WA)* (2006) 31 WAR 460 477-478; [2006] WASCA 38, citing *Fox v Percy* (2003) 214 CLR 118 and *CSR Ltd v Delle Maddalena* (2006) 80 ALJR 458.

### Consideration of s 84 of the Act

- 22 Section 84 of the Act, set out above, does not contain the equivalent of s 49(4)(a). Nor does it say anything about the ability of the Full Bench to receive, or not receive, further evidence, whether it be fresh or new. This contrasts to the predecessor of s 84 in s 103A of the *Industrial Arbitration Act 1912-1973*. In this section, as it then was, s 103A(4)(a) provided that an appeal was to proceed, like s 49(4)(a), on the evidence and proceedings before the Industrial Magistrate. It contained an additional provision that the Industrial Appeal Court, then with jurisdiction over such appeals, could also call or admit any further evidence in its discretion. The powers of the Court, on the disposition of the appeal in s 103A(4)(e), were the same as the current s 84(4)(a) of the Act. That is, on the disposition of an appeal, as now, the Industrial Appeal Court had a range of powers, including confirming, reversing, varying, amending, rescinding, setting aside or quashing the decision appealed against. This included the further power, expressed conjunctively, to remit a matter to an Industrial Magistrate for further hearing and determination. Currently under s 84 of the Act, whilst there is nothing to suggest, as with s 49, that such an appeal is by way of a rehearing de novo, on their face, these provisions do not seem to limit the Full Bench to only giving the decision that should have been given at first instance and are broad in scope.
- 23 Appeals to the Full Bench under s 84 of the Act from decisions of the Industrial Magistrates Court proceed largely in the same manner as do appeals from the Commission. They are generally heard based on a transcript of the evidence, the

relevant documentary materials tendered in evidence and the submissions of the parties on the relevant law and principle. Again, as with appeals from the Commission, the Full Bench is to undertake as full a review of the case at first instance as the grounds of appeal to it may require. Whilst in the main, an appeal from the Court will not involve reconsideration of discretionary decisions as is the case with many appeals from the Commission, given the Court's primary role in relation to the enforcement of industrial instruments in its general jurisdiction under Part III of the Act, this does not mean that the Full Bench is unable to draw its own inferences from facts as found or those not in dispute. In such cases, the approach as set out in *Warren v Coombes* (1979) 142 CLR 531 at 536-549 applies: *Transport Workers' Union of Australia WA Branch v Arrow Holdings Pty Ltd* (1989) 69 WAIG 1050.

- 24 An appeal to the Full Bench from a decision of the Court under s 84 of the Act is not limited to matters of law or jurisdiction. As with s 49 appeals, they are not confined as are appeals to the Industrial Appeal Court under s 90 of the Act. It is open to the Full Bench to make its own findings of fact based on the evidence before an Industrial Magistrate and it has been held that such findings are not able to be questioned on appeal to the Industrial Appeal Court, as long as there is some evidence to support them: *WA Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union v Izzo* (1984) 64 WAIG 411.
- 25 In terms of the disposition of an appeal under s 84(4) of the Act, as set out above, the Full Bench has broad powers available to it, as it does on an appeal from the Commission under s 49 of the Act. However, on a comparison between the powers of the Full Bench under s 49(5) and under s 84(4), the latter appears to be broader than the former. In the case of an appeal from an Industrial Magistrate, the Full Bench is not limited to quashing or varying a decision, but also may, in addition, "confirm, reverse, amend, rescind, or set it aside". This is in addition to the power of the Full Bench to also remit a matter to the Industrial Magistrate "for further hearing and determination".
- 26 In consideration of the foregoing, as with appeals to the Full Bench under s 49 of the Act, I incline to the view that an appeal to the Full Bench under s 84 is also to proceed by way of a rehearing. As with s 49, on an appeal under s 84, error, of either law or fact or both, must be established for the Full Bench to invoke its powers under s 84(4). It is not sufficient for an appellant to invite the Full Bench to come to its own conclusions on the evidence and materials before the Industrial Magistrate and to simply substitute its own decision, in the absence of error being established. This is of course, subject to the general principle that matters of jurisdiction may be raised on appeal for the first time, either by the parties or by the appeal court itself: *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760.

## Effect of the declaration

- 27 The relevant current law, in terms of the application of the Award to the retail pharmacy industry, must now be taken to be in accordance with the declaration made by the Full Bench and to operate in accordance with its terms. Because of this, in my view, this Full Bench is bound to have regard to and apply the declaration to the effect that the Award does not extend to the retail pharmacy industry. This would appear to be the effect of s 46(3) of the Act in any event.
- 28 Furthermore, the Full Bench, in the declaration proceedings, possessing jurisdiction over the Industrial Magistrates Court on appeal, has found that the Commission's declaration should not have been made and has reversed it. Accordingly, in addition to the matters raised above as to the nature of an appeal under s 84 of the Act, with the authority relied on by the Court at first instance being overruled by the subsequent Full Bench declaration, the original decision of the Court in this matter must be regarded as having been given as a result of legal and jurisdictional error and must be overturned: *Duralla Pty Ltd v Plant* (1984) 54 ALR 29 per Northrop J at 55.

## Conclusion

- 29 The Full Bench must now conclude that the Award did not apply to the appellant and the respondent at the material times. Thus, the appellant had no standing to seek to enforce the Award under s 83(1)(e) of the Act as a person bound by the Award or to whom it applied. The Industrial Magistrates Court had no jurisdiction to enforce the Award. To the extent that the order made did enforce the Award, by making an order for the payment of monies for a late-night trading loading, the order should be varied.

## EMMANUEL C:

- 30 I have had the benefit of reading the draft reasons of the Senior Commissioner. I agree with those reasons and have nothing to add.

## WALKINGTON C:

- 31 I too have had the benefit of reading the draft reasons of the Senior Commissioner. I also agree with those reasons and have nothing to add.