[2021] WASCA 76

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

FILE NO/S	**:**	IAC 1 of 2020
BETWEEN	**:**	THE MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS Appellant AND SAMUEL GANCE T/AS CHEMIST WAREHOUSE PERTH First Respondent PHARMACY GUILD OF WESTERN AUSTRALIA ORGANISATION OF EMPLOYERS Second Respondent THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION OF WESTERN AUSTRALIA Third Respondent

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ON APPEAL FROM:

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

Catchwords:

Employment law - Industrial award - Scope of coverage of award - Retail pharmacy industry - Industries covered by award identified by the industries of the scheduled respondents at date of award - 'Glover clause' - Subsequent

cessation of only respondents in a covered industry when award issued by order of the Commission - Whether Commission had ascertained jurisdiction to vary scope of the award - Declaration as to continued coverage of that industry sought in 2018 - Decision as to affirmative coverage by single Commissioner - Appeal to Full Bench of Commission - Decision reversed - Appeal to Industrial Appeal Court

Legislation:

Industrial Arbitration Act 1912 (WA)
Industrial Relations Act 1979 (WA)

Result:

Appeals allowed

Category: B

Representation:

IAC 3 of 2019

Counsel:

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

Solicitors:

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

IAC 1 of 2020

Counsel:

Appellant	:	Mr R Andretich
First Respondent	:	Mr N Tindley

Second Respondent	:	Mr T J Dixon & Mr H Pararajasingham
Third Respondent	:	Mr H J Dixon SC & Mr D Rafferty

Solicitors:

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

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

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

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

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

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

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

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

Josephson v Walker (1914) 18 CLR 691

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

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

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

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

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

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

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

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance [2019] WAIRC 00869
The West Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd (1970) 50 WAIG 704

BUSS J:

1 I agree with Kenneth Martin J.

MURPHY J:

2 I agree with Kenneth Martin J.

KENNETH MARTIN J:

Introduction

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

Background

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

5 The SDA's 2018 application pursuing declaratory relief had been issued against Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth (Chemist Warehouse), as respondent. There followed two interventions in the Commission in that proceeding. First, was by

the Pharmacy Guild of Western Australia (the Pharmacy Guild). Second saw an intervention of the Minister for Commerce and Industrial Relations (the Minister).

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

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

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

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

> (a) DECLARE that [the] *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* does not apply to the retail pharmacy industry.
>
> (b) ORDER that the *Shop and Warehouse (Wholesale and Retail) Establishments State Award 1977* be varied in accordance with the following schedule and that the variations have effect from 6 January 2020.

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[1] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00015.
[2] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00016.
[3] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00825.
[4] ***The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance*** [2019] WAIRC 00869.

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

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

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

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

14 The essential difficulty, as I will seek to explain, is jurisdictional. It arises from what I assess to be the lack of any jurisdiction in the Commission at April 1995, and also in September 1995, to then alter the scope of the Award. This result follows from the absence at relevant times in 1995 of any prior compliance with the publication, notification and service requirements at that time under s 29A(2) of the 1979 Act - which were required to be met before a variation of operation or scope of the Award could be effected by the Commission. The Award was an industry common rule award whose scope clause from inception was framed by reference to coverage of the industries as then carried on by any of the respondent employers as were then named in a schedule to the Award (cl 3). The Commission's April and September 1995 orders were within power and valid to achieve the as then sought alterations made to the list of employer respondents who were to be identified in the schedule to the Award. But ultimately,

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

there was no greater jurisdiction in the Commission in 1995 to effect any further change, so as to reduce the scope of the Award's industry coverage. That result follows essentially as a result of an exercise in statutory construction directed at relevant terms of the 1979 Act, as they prevailed during April and September 1995.

The Award

History

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

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

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

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

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

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

> (1) ... subject to this Act, an award while it is in force is binding -
>
> (a) on all workers employed in the calling or callings mentioned therein in the industry to which the award relates; and

[6] Award No 32 of 1976; (1977) 57 WAIG 1324, 26 October 1977.
[7] I note that, unless explicitly stated, references to the Former Act in this judgment are to the reprint of 16 May 1974, being the legislation in force when the Award was issued.
[8] I note the 1979 Act was initially named the *Industrial Arbitration Act 1979* and was renamed to its current short title in 1984.

(b) on all employers employing those workers.

(2) Where the operation of an award or any part thereof is limited to any particular locality it is not, as regards matters to which the limitation applies, binding beyond that locality.

Relevant terms at 1977

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

22 Clause 3 of the Award, under the heading 'Scope' read in terms:

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

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

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

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

25 Clause 38 as enacted read:[9]

> 38 - Chemist Shops
>
> Any worker employed in a chemist's shop shall be subject to the terms of this award up to the time he or she becomes indentured to the profession.

Types of scope clauses in an award

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

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

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

Glover clause

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

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

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

> Each and every award must relate to an industry and what the industry is, is in every case primarily a question of construction of the particular award. It may be that the question is not only primarily but finally a question of construction, and it may be that the award as a matter of construction fails to give the final answer and requires for that purpose that findings of fact be made.
>
> An award if made in terms 'to relate to the ship-building industry' would be of the first-mentioned kind. An award expressed to relate, as the one under construction here is expressed to relate, to 'the industries carried on by the respondents set out in the schedule attached to this award' is of the other kind. In such a case the industry to which the award relates cannot be made known without definition of the industries carried on by the respondents. And this is necessarily a question of fact.

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[10] ***The West Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers v Terry Glover Pty Ltd*** (1970) 50 WAIG 704 (***Glover***).
[11] By the 23 May 1969 reprint.
[12] ***Glover***, 705.

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

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

> Be this as it may, the application of that doctrine requires that one makes a finding - which I emphasise is a fact finding - as to the industry carried on by the named respondents as at the date of the award. This having been done, the limits of the industry are then established. This may be done upon the consideration of the industry carried on by one respondent, or it may be done by, so to speak, adding the industry of one respondent to that of another, so creating an industry to which the award relates, which is wider in its spread than the industry carried on by any single respondent.

A Donovan clause

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

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

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

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[13] ***Glover***, 705.
[14] ***Glover***, 705.
[15] ***Glover***, 705.
[16] ***R J Donovan & Associates Pty Ltd v Federated Clerks Union of Australia Industrial Union of Workers, WA Branch*** (1977) 57 WAIG 1317 (Burt CJ (President), Wickham and Brinsden JJ) (***Donovan***).
[17] ***Donovan***, 1318.
[18] Referring to the observations of Neville J in ***Glover***, 705.

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

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

Other

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

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

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

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

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

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[19] ***Donovan,*** 1318.
[20] ***Freshwest Corporation Pty Ltd v Transport Workers' Union, Industrial Union of Workers*** (1991)71 WAIG 1746 (Rowland, Franklyn & Walsh JJ) (***Freshwest***).
[21] ***Freshwest***, 1747.
[22] ***Airlite Cleaning Pty Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers' Unions Western Australian Branch*** [2001] WASCA 19 (Scott J, Kennedy J, as presiding judge, agreed) (***Airlite***) [1].

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

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

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

Observations on some pragmatic aspects of a Glover clause

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

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

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

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

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[23] ***Airlite*** [3].
[24] ***Glover,*** 705.

industries then being carried on by all the scheduled respondents to the award when it is made.

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

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

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

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

An industry common rule award

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Hitherto an industrial agreement has been binding only between the parties to it, otherwise it would have the force of an award of the Court.

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[26] ***Josephson v Walker*** (1914) 18 CLR 691.
[27] ***Josephson v Walker***, 696.
[28] ***Eastern Goldfields Butchers' Industrial Union of Workers v Black Brothers*** (1913) 12 WAAR 14. 14.

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

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

61 Burt J explained:[31]

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

The Award and its scope clause

62 Here, it was undoubtedly the case, factually, that two of all the many (ie, 378) initially named Schedule 'B'[32] respondents to the Award were then engaged in the retail pharmacy industry at the time the

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[29] ***Electrical Trades Union of Workers Australia (Western Australia Branch) v Goldsworthy Mining Ltd*** (1970) 50 WAIG 22, 27 (***Electrical Trades***).
[30] See the *Industrial Arbitration Amendment Act (No 2) 1963* (WA) s 81.
[31] ***Electrical Trades***, 22, 27.
[32] Schedule 'B' was subsequently named 'Schedule C'.

Award had issued in 1977. These two respondents were Boans Ltd (Boans) and Perth United Friendly Society Chemists (PUFSC).

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

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

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

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

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

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

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

The parties' grounds of appeal and formal written submissions

Appellants' position

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

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

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

> 3. The Full Bench erred in law in holding that the exercise of the power by the Commission on its own motion in April 1995 pursuant to s 47(2) of the Act ((1995) 75 WAIG 954) to strike out PUFSC as a party who was named as an employer respondent in the industry to which the Award applied when made, namely, the retail pharmacy industry, because that employer was no longer carrying on business as an employer in that industry, when:

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

(i) the determination of the scope of the Award was to be made by reference to the industry carried on by the named respondents at the date of the Award, namely, 1977, and not, as held by the Full Bench by reference to the Award as varied in 1995, or by reference to the terms of the Award at the date of the hearing of the application the subject of this appeal;

(ii) the striking out of an employer who was a named respondent and a party to the Award, when made, but was no longer carrying on business at some later time, did not remove the binding common rule effect of the Award as made (as represented by that employer and the application of s 37(1) of the Act) on other unnamed employers engaged in the industry, or have that effect;

(iii) contrary to the determination of the Full Bench, the absence of any named respondents to the Award carrying on business in the retail pharmacy industry at the time of the determination of the present application pursuant to s 46 of the Act (as opposed to the time of the making of the Award in 1977) did not narrow the scope and binding effect of the Award to exclude that industry or employers engaged in that industry, or have that effect;

(iv) contrary to the determination of the Full Bench, the striking out of any employer as a named respondent and a party to an Award under s 47(2), after it was made, did not by reason of such steps being a variation to the Award (as defined in s 7 of the Act) vary the scope of the Award as made and the Commission lacked the power to effect such an outcome.

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

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

75 The jurisdictional obstacle, as it is advanced by both the SDA and the Minister, is directed against the majority reasoning in the Full

Bench. This challenge is fully explained under par 49 of the SDA's written submissions, which read in terms:

> 49. In so holding the Full Bench erred for the following reasons:
>
> a) the **Award** as made extended to and applied to employees and employers in the retail pharmacy industry ... ;
>
> b) there was at no time following the making of the **Award** any application to vary the scope of the **Award** so as to remove the retail pharmacy industry to which the **Award** applied;
>
> c) the proceedings conducted by, and at the initiative of the Commission in 1995 pursuant to s 47(2) of the Act ... did not and could not vary the scope of the **Award** so as to delete the retail pharmacy industry to which the **Award** applied:
>
> (i) the power given to the Commission under s 47(2) of the Act is not directed at varying the scope an award but is only directed in a separate and confined issue, namely, of its own motion by order to strike out a party as a named party to the award upon satisfaction that that party is no longer carrying on business as an employer in the industry to which the award applies;
>
> (ii) as is clear from the express wording of s 47(2), the power under s 47(2) is not addressed at altering *the industries to which the award applies* but simply with removing the named respondents no longer carrying on business in the industry to which the award applies;
>
> (iii) in contrast, there were specific provisions in the **Act** addressing specifically the variation of the scope of an award, s40, together with s49A and s38;
>
> (iv) any variation to the scope of an award pursuant to s.40 (and hence the industry or industries to which it applies) were subject to:
>
> (aa) limited standing to bring an application, namely any organisation or association named as a party to the

award or employer bound by the award, and not the Commission;

(bb) the jurisdictional precondition in s.29A and the prohibition on the Commission hearing an application to so vary an award absent the publication and service requirements there set out;

(v) the circumstances where a variation to the scope of an award were not subject to the requirements of s.29A were confined to where the particular employers, organisations or associations are added as a named party to the award (s.31(1) and (2)) resulting, however, in respect of the adding of an employer engaged in an industry to which the award did not previously apply, and a variation of scope expressly limited to that employer (s.38(3));[34]

(vi) the analysis by the Commission at first instance as to the nature of the powers under s.47 and the scope variation power under s.40, complying with s.29A of the **Act** as the only basis for the variation of the scope of an award was not erroneous and was a correct interpretation of the relevant provisions of the Act;

(vii) that the exercise of the power by the Commission pursuant to s.47 does not involve a referral of an industrial matter to the Commission pursuant to s.29, and hence the absence of a requirement under s.47 of the **Act** that the Commission comply with s.29A of the **Act**, is a strong indication that the power under s.47 is a narrow power and is not directed at affecting the rights and obligations of employers and employees employed by those employers, including unnamed employers bound by common rule, by the alteration of the

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

scope of the industries to which the award applies;

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

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

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

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

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

f) in the absence of compliance with the requirements in s 29A in the SDA proceedings the Commission was without jurisdiction to reduce the scope of the **Award**

to exclude the retail pharmacy industry and [the] September 1995 Order must be interpreted in that light;

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

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

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

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

Respondents' positions

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

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

78 The respondents further raise the suggested force of the Commission's September 1995 order issued under s 40, and varying the Award then, by replacing the existing schedule with a revised and updated Schedule C list of employers, none of whom were then

engaged in the retail pharmacy industry. The respondents argue that the April or September 1995 orders of the Commission delivered a necessary legal consequence that the scope of Award coverage had, indeed, then been reduced. The practical consequence, they say, was that employers of employees in relevant callings within the retail pharmacy industry from then, were no longer covered by the Award.

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

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

81 Chemist Warehouse's submissions contended further:

> 17. The process under section 47 was not merely a housekeeping process with no legal consequences. This is incongruous with the significant notification provisions required under section 47, including the requirement, not present in section 29A, to give notice of its intention to make an order removing a party or parties in a newspaper circulating in the area of the State in which the award applies. While the notification provisions of [section] 29A and 47 differ, they are of similar effect, impose similar obligations and it is reasonably apparent that they have a similar intent. They are not reflective of a diminished power under section 47 (when compared with section 40) but rather of the different basis on which the process under the provisions is initiated.
>
> 18. It is implicit in the Appellants' submissions (setting aside the question of immutability of scope) that had PUFSC been removed as a respondent for the 1977 Award as a result of an order issued by a process initiated under section 40 and including compliance with section 29A, then it would have validly been removed and the 1977 Award would, from the date of such order, no longer applied [sic] to the retail pharmacy

> industry. What the Appellants are essentially saying is that it is the process rather than the outcome which determines a scope. This should not be accepted. Such an approach would lead to an outcome where a person or business covered by the award cannot rely on the plain terms of the award to determine scope, but rather must interrogate not only the fact of the removal of a respondent but also the process under which that removal occurred.
>
> ...
>
> 21. The majority of the Full Bench aptly summarised the impact of the September 1995 Order of the Commission at paragraph [65] of the Appeal Decision when it said:
>
> > '*The application leading to the September 1995 order was made under s 40 of the Act by the Union. It did not, by its terms, seek to extend the scope of the Award to add any employer engaged in an industry to which the Award did not previously apply. However, and importantly, no employer engaged in the industry of retail pharmacy was included in the new list of respondents in the new Schedule 'C'. In our view, this put beyond doubt the earlier variation to the Award to remove PUFSC as the sole respondent carrying on that industry*.'

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

83 The Pharmacy Guild's arguments were similar. Particular attention as a matter of statutory interpretation was drawn to s 37(1) of the 1979 Act. Emphasis was directed at this clear text as a declaration by the legislature, in effect, that an award must have effect 'according to its terms'.[36] A reduction in scope conclusion as reached by the majority

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[35] ts 41.
[36] See counsel's oral submissions at ts 54 - 57.

of the Full Bench was the necessary consequence of giving effect to the terms of the Award, as it was varied in 1995, and was a result driven by the deliberate choice to use a Glover clause to define industry coverage.

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

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

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

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

Melrose Farm

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

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[37] ts 76.

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

therein for the respondents' position in the (dissenting) reasons of Pullin J.[39]

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

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

The essential question

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

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

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[39] ***Melrose Farm*** [11].
[40] Both filed 20 January 2021.
[41] ***Melrose Farm*** [13] and [42(1)].
[42] ***Melrose Farm*** [81].

employees in the callings as identified (and their employers) within the retail pharmacy industry.

History of the scope of the Award

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

92 Coverage in 1977 of the identified callings under the Award to employees within the retail pharmacy industry of Western Australia is a conclusion that is effectively reinforced by the terms of cl 38 ('Chemists Shops') of the Award, seen earlier. Commissioner Emmanuel's reasons direct some level of significance at a continued ongoing presence of cl 38 within the Award and there addressing the retail pharmacy industry.[43] Its presence, however, in my view, is ultimately equivocal upon the main issue in question in these appeals. Clause 38 carried obvious reference when the retail pharmacy industry was undoubtedly covered by the Award in 1977. But if it is the case that the events of 1995 have the legal effect of delivering a truncation in scope coverage for cl 3, then a retention of cl 38 can be rationalised as a mere historical redundancy.

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

94 When the 1979 Act was introduced to repeal and replace the predecessor legislation (effective from 1 March 1980), it carried a

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

transitional provision (subject to an immaterial qualification). I refer to s 117(1)(g) of the 1979 Act which had provided:[44]

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

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

Earlier 1988 variations to the Award

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

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

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

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

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

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[44] As passed and assented to on 21 December 1979.
[45] Application No 1519 of 1987; (1989) 69 WAIG 1215.
[46] See (1989) 69 WAIG 1215, 1233.

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

April 1995

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

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

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

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

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

> WHEREAS the Commission on its own motion and pursuant to s 47 of the Industrial Relations Act 1979 gave notice of its intention to strike out a number of respondents to The Shop and Warehouse (Wholesale

[47] See (1989) 69 WAIG 1215, 1236.
[48] See R 32 of 1976.
[49] As at the 11 May 1994 reprint.
[50] (1995) 75 WAIG 954.

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

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

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

September 1995

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

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

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

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[51] (1995) 75 WAIG 954, 954 and 955.
[52] (1995) 75 WAIG 2836.

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

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

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

Provisions of the 1979 Act in 1995

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

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

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

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

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

> **By whom matters may be referred**
>
> **29.** (1) An industrial matter may be referred to the Commission -
>
> (a) in any case by -

(i) an employer with a sufficient interest in the industrial matter;

(ii) an organization in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organization; or

(iii) the Minister;

...

Service of claims and applications

29A. (1) Where an industrial matter has been referred to the Commission pursuant to section 29, the claimant or applicant shall specify the nature of the relief sought.

(2) Subject to any direction given under subsection (2a), if the reference of an industrial matter to the Commission seeks the issuance of an award, or the variation of the area of operation or the scope of an award or industrial agreement, or the registration of an industrial agreement, the Commission shall not hear the claim or application until those parts of the proposed award, variation or industrial agreement that relate to area of operation or scope have been published in the *Industrial Gazette* and a copy of the claim or application has been served -

(a) in the case of a proposed award or variation of an award, on -

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

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

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

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

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

(b) the registration of an industrial agreement -

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

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

an existing award,

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

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

(d) need not be published at all,

as he thinks fit.

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

(3) Unless otherwise directed by the Commission, where the reference of an industrial matter to the Commission seeks the variation of an award or industrial agreement, other than a variation of the kind mentioned in subsection (1), the Commission shall not hear the claim or application until the named parties to the award or the parties to the industrial agreement, as the case requires, have been served with a copy of the claim.

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

decision in the proceedings have been served with a copy of the claim or application.

Effect, area and scope of awards

37. (1) An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section -

(a) extend to and bind -

(i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and

(ii) all employers employing those employees;

and

(b) operate throughout the State, other than in the areas to which section 3(1) applies.

…

Named parties to awards

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

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

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

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

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

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

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

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

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

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

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

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

...

Power to vary or cancel award

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

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

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

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

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

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

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

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

and

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

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

...

Interpretation of awards and orders

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

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

(b) where that declaration so requires, by order vary any provision of the award for the purpose of remedying any defect therein or of giving fuller effect thereto.

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

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

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

(2a) Subject to subsections (3), (4), and (5), where the Commission is of the opinion that a party to an industrial agreement is no longer carrying on business as an employer referred to in section 41 (4)(a)(ii) in relation to

the agreement or is, for any other reason, not bound by the agreement, the Commission may on its own motion, by order, strike out that party to the agreement.

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

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

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

(i) caused the Registrar to give general notice in a newspaper circulating in the area of the State in which the award or industrial agreement operates and in the *Industrial Gazette* of the intention of the Commission to make the order; and

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

(4) Any person may, within 30 days of the publication in the newspaper or in the *Industrial Gazette*, whichever is the later, of the notice referred to in subsection (3), object to the Commission making the order referred to in the notice.

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

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

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

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

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

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

Freshwest

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

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

> The evidence led in this case, however, is entirely unspecific as to the point of time to which it refers, a matter drawn to the attention of the Full Bench. As a result that Bench considered the various judgments in ***Glover*** and commented that no other member of the court in that appeal held it was necessary to determine the industries as at the date of the award. Whilst it is true that neither of the other members so held, it does not follow that they did not agree with Burt J ... The Full Bench, whilst conceding that ***Glover*** 'has been a leading authority in this jurisdiction for many years', concluded that it was arguable 'that one does not and ought not determine the relevant industries as at the date of the award. The best evidence of what an industry is and what is an award may well be what it is now, although we would require substantial argument.'

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[53] ***Freshwest***, 1747.
[54] ***Freshwest***, 1748.

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

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

120 His Honour concluded:[56]

> The present case, in my opinion, is one to which his Honour's statement in ***Glover*** is appropriate. The enquiry must be directed to the industries carried on by the respondents to the award and at the time of the making of the award. That this is so gains support, if it is necessary, from the provisions of s 38(3) - which provides that where an employer is added subsequent to the making of an award as a named party thereto and is engaged in an industry to which the award did not previously apply, the resulting variation to the scope of the award is expressly limited to that employer - and s 47(2) which provides for the striking out of a named employer as a named party to the award if he is no longer carrying on business as an employer in the industry to which the award applies or for any reason is not bound thereby.

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

122 The second key point illuminated by ***Freshwest*** is as to the terms of s 38(3) and s 47(2) of the 1979 Act (as they then applied in 1991). Out of s 38(3) there was discerned a legislative sentiment that the effect

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

of adding an extra employer to the schedule to an award as a named party was explicitly confined, under the 1979 Act, to merely delivering an augmentation in coverage of award scope limited to the newly added employer (and not the newly added employer's industry, if that industry were not already covered). Emerging from that conclusion was a discernible legislative sentiment, in effect, entrenching the ongoing importance of the original parameters of the award - by s 38(3) only allowing a very limited basis of expansion.[57]

Airlite

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

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

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

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

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[57] Subsequently, however, by changes introduced in 2002 to the 1979 Act, the reach of s 38(3) was extended - with the word 'employer' being replaced then by a reference to 'that industry'. But then see s 38(4).
[58] See Burt J's observations in ***Electrical Trades***, 27.
[59] ***Airlite*** [23].
[60] ***Airlite*** [4] (Kennedy J).

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

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

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

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

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

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

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

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

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[61] ***Airlite*** [4].
[62] ***Airlite*** [17].
[63] ***Airlite*** [18].
[64] ***Airlite*** [19].
[65] ***Airlite*** [24].

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

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

Stewart Butchering

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

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

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

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[66] ***Australian Meat Industry Employees' Union, Industrial Union of Workers West Australian Branch v Stewart Butchering Co Pty Ltd*** (1993) 73 WAIG 1196 (***Stewart Butchering***).
[67] See as mentioned ***Airlite*** [22].

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

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

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

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

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

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

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

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[68] ***Stewart Butchering***, 1198.
[69] ***Airlite*** [22].

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

> ... This was an award which, by common law rule under s 37 of the Act, covers the respondent and its employees, all of whom are bound by it. That was not in issue. It was not in issue that the employees were bound, that the employer was bound, and that therefore the Scope clause, clause 3, was the instrument under s 37 achieving the binding. An award has effect according to its terms, but unless, and to the extent that those terms expressly provide otherwise, it shall, subject to s 37, extend to and bind all employees employed in any calling mentioned therein in the industry or industries to which the award applies and the employers employing those employees, etc (see s 37(1)(a) and (b)).
>
> …
>
> If one looks at the application on its face, what it seeks to do, quite plainly, is to seek an order which has the effect of absolving it from the binding effect of the award. The award's binding effect is contained in s 37. S.37, by prescribing the common rule effect of awards, does so with reference to the Scope clause, because the Scope clause determines the industry or industries to which the award applies, and thus the employers and employees bound by the award. S 37 recognises that an award can provide otherwise than common law rule coverage, because it provides as follows:
>
> > ' ... but unless and to the extent that those terms expressly provide otherwise ... '
>
> This is an application that the award be varied to provide otherwise, (ie) to be otherwise than the common rule award in relation to one excluded employer. What the variation seeks to effect, therefore, is a variation of the Scope clause. This Scope clause is the key to the award's coverage and that is recognised in ***WACJBSIU v Terry Glover Pty Ltd*** 50 WAIG 794 and ***R J Donovan and Associates Pty Ltd v FCU*** 57 WAIG 1317, amongst others.
>
> We think the words of s 37 are quite plain. The award is a common rule award until it prescribes otherwise.
>
> [Next follow in bold the observations cited by Scott J in ***Airlite***.]
>
> **S 38(2) of the Act authorises the addition of named parties in certain circumstances. However, the exemption of a respondent, whether named or not, who would otherwise be bound by the award, narrows the scope of the award by reducing, by one in this case, those employers in the industry or industries denoted or designated by the Scope clause and therefore bound by the award under s 37, upon a reading of clause 3 of the award. This**

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

> **application plainly sought to vary the award by varying the Scope clause. It was not a variation to any other clause in the award and its effect is plain.**
>
> **S 29A(2) of the Act provides that subject to any direction given under s 29A(2)(a) [sic, (2a)], if the reference of an industrial matter to the Commission seeks, inter alia, the variation of the scope of an award, then the Commission shall not hear the claim or application until those parts of the proposed award, variation or industrial agreement which related to the scope, etc, was published in the Industrial Gazette and a copy served on the Trades and Labour Council of Western Australia, the Chamber of Commerce and Industry of Western Australia, the Australian Mines and Metals Association (Inc) and the Minister, as well as such other organisations, associations and employers as the Commission may direct under s 29A(2)(a)(ii) (but see s 29A(1) and (2) generally).**
>
> It was not in issue that none of those events had occurred or that s 29A had not been complied with.
>
> There was, in addition, no suggestion of any direction having been made by the Chief Commissioner as to publication in a newspaper (see s 29A(2a)).
>
> **The direction contained in the section is mandatory, the word 'shall' is used (see s 3 and s 56 of the Interpretation Act 1984), and the Commission is prohibited from hearing the matter if s 29A(2) is not complied with by such publication and services are [sic] prescribed.**
>
> **In hearing the matter when s 29A was not complied with, the Commission at first instance erred in law. It had no power to hear the matter and was expressly prohibited from hearing it if s 29A(2) had not been complied with.**

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

> In the reasons for decision at first instance the Commission found that the Respondent's application was not caught by s 29A(2) of the Act because 'no alteration to the area of operation or the scope of the award itself results if the variation sought was made to the award'.
>
> In my opinion, this conclusion is wrong.

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

...

> The test is not just whether a proposed variation **is to the scope clause** of an award. It is whether the proposed variation would alter the scope of the award. Thus a variation to a wages clause of an award to add classifications may have the effect of extending the scope of that award. Such an application would be caught by the provisions of s 29A(2). The application at first instance is no less caught on the same basis. (emphasis in bold)

Implications of *Stewart Butchering*

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

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

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

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

148 As a matter of the orthodox interpretation of the 1979 Act, there is a clearly discernible legislative 'gateway' to jurisdiction that is very clearly imposed, before any variation impacting upon the scope of an award can be heard. No doubt this, from a policy perspective, is because of the potential ramifications on a wider basis that such

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

changes may deliver for others who are unseen, but whose rights and obligations may well be impacted upon by a variation of such a character to an award's scope of coverage.

Non-compliance with s 29A of the 1979 Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[73] Appeal book, tab 19 page 221.

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

> Subject to any direction given under subsection (2a), if the reference of an industrial matter to the Commission **seeks ... the variation in the area of operation or the scope of an award or industrial agreement** ... the **Commission shall not hear the claim or application** until those parts of the proposed award, **variation** or industrial agreement that **relate to area of operation or scope have been published** in the *Industrial Gazette* and a copy of the claim or application **has been served** -
>
> (a) in the case of a proposed award **or variation of an award**, on -
>
> (i) the Council, the Chamber, the Mines and Metals Association and the Minister; and
>
> (ii) such organisations, associations and employers as the Commission may direct being, in the case of employers, such employers as constitute, in the opinion of the Commission, a sufficient number of employers who are reasonably representative of the employers who would be bound by the proposed award or the award as proposed to be varied, as the case may be; (emphasis in bold)

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

> Unless otherwise directed by the Commission, where the reference of an industrial matter to the Commission seeks the variation of an award or industrial agreement, **other than a variation of the kind mentioned in subsection (1)** [sic][74] the **Commission shall not hear the claim or application** until the named parties to the award or the parties to the industrial agreement, as the case requires, have been served with a copy of the claim. (emphasis in bold)

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

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

variation sought other than to the area of operation or scope of an award.

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

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

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

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

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

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

well beyond the range of the participant and identified parties who are claimants or applicants seeking the variation before the Commission.

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

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

The decision of Commissioner Emmanuel at first instance

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

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

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

> Where the scope of an award is to be varied, s 29A of the IR Act requires certain steps to occur. No evidence or argument is put that those steps occurred when Boans and PUFSC were removed as respondents to the Shop Award. I have been given no reason to think those steps occurred.
>
> Section 40 of the IR Act is a general power that allows the Commission to vary an award on application by the parties. Section 47 is a special power: ***Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Nationwide Food Service Pty Ltd*** (1984) 64 WAIG 1926 at (1927). Variations to an award under s 40(1) are subject to s 29A and s 38 of the IR Act.
>
> ...

[75] 2019 WAIRC 00015 [84].
[76] 2019 WAIRC 00015 [70], [71], [73] and [75].

> To the extent the Commission acts under s 47 of the IR Act to remove a listed respondent that no longer carries on business in an industry to which the award applies, the Commission exercises a special power. It goes no further than removing a listed respondent. Such an order does not have the effect of removing an industry, thereby reducing the award's scope. In my view, that reasoning is supported by the limited notice provisions that apply to s 47 of the IR Act.
>
> ...
>
> I consider the 1995 order under s 47 of the IR Act did no more than remove PUFSC as a named respondent because it no longer carried on business in an industry to which the Shop Award applied. The retail pharmacy industry itself continued to be an industry to which the Shop Award applied.

Appeal to the Full Bench

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

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

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

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

> We note that the authorities to which we have referred make reference to the industries carried on by the named respondents at the time the award was made. However, those authorities did not consider the present issue of respondents having subsequently been deleted.
>
> The application at first instance sought a declaration under s 46, as to the true meaning of the terms of the award. Plainly, via s 37 ... of the Act, this must be the Award as it was at the time of the s 46 proceedings, because an award as made by the Commission under the Act, includes one that has been varied by the Commission. That is so, because an award, so made *or varied*, 'will remain in force until

[77] 2019 WAIRC 00825 [28].
[78] 2019 WAIRC 00825 [29] - [30], [32] - [33].

> cancelled, suspended or replaced under this Act': s 37(4) Act (emphasis added). This must mean that an award of the Commission, remaining in force until it is cancelled, suspended or replaced under the Act, is an award which includes any of its terms which have been the subject to a variation under the Act. In the case of an award that has been 'varied' by an order of the Commission, it is the resulting award of which s 37 speaks and to which s 46 of the Act, dealing with applications for a declaration as to the award's true interpretation, has application.
>
> ...
>
> ... It is the enforcement of the award as it is at the time of the alleged contravention or failure to comply, that is the 'award' as referred to in s 83(2)(a) of the Act. This necessarily recognises that an award is a dynamic instrument and one that is not just fixed in time, but whose terms may be added to, altered, amended or rescinded as the definition of 'vary' in s 7 of the Act makes clear. This is also supported to an extent by s 38(3) of the Act, which expressly contemplates that the scope of an award may change over time.
>
> Accordingly, we see no reason to not approach the task of interpretation of the Award, in terms of its scope of application, any differently. As Burt J observed in ***Glover***, the task at hand is primarily a question of construction. As a matter of plain meaning, a reading of cl 3 of the Award is that the industry or industries to which it applies are those that are '*carried on* by the Respondents *named in Schedule* '*C*' and to all employers employing those workers' (emphasis added). For the purposes of the 'common rule' provision of the Act in s 37(1)(a), the 'industry or industries to which the award applies' is or are those 'carried on' by the named respondents in Schedule 'C'. Such an enquiry leads to no ambiguity. As mentioned above, the terms of cl 3 of the Award require an orthodox process of fact finding, as identified in ***Glover***. In this case such a fact finding was not necessary because it was accepted by the union at first instance that as at the time of the s 46 application, none of the named respondents to the Award carried on in the industry of retail pharmacy. Therefore, subject to what follows, the Award does not extend to this industry.

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

> Therefore, for the foregoing reasons, we consider the learned Commissioner's acceptance of the Union's and the Minister's submissions in relation to the application of s 29A to s 47 proceedings to be erroneous. The removal of PUFSC in 1995, as the last-named respondent to the Award to be engaged in the retail pharmacy industry, had the effect of removing that industry from the scope of the Award at that time. This was the legal consequence of the events as they then occurred. Contrary to the submissions of the Union, whether this was

[79] 2019 WAIG 00825 [63].

> the express intention of the parties at that time, is not relevant to the determination of this question. The relationship between the terms of cl 3 - Scope and Schedule C of the Award, on the established authorities is that they are, as pointed out by the appellants in their submissions at first instance ... 'legally indivisible concepts'. The latter is determined by the former. Also, for the reasons advanced by the appellants on this appeal, there is, in our view, no substance to the Union's contention that in some way, the April 1995 s 47 order of the Commission to delete PUFSC was merely an administrative step, with no legal consequences.

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

> The referral of an industrial matter in the manner outlined above stands in contrast to the power of the Commission to act on its own motion under s 47 of the Act. As a matter of construction of the Act, the exercise of such a power by the Commission involves no referral of an industrial matter to the Commission. The 'reference of an industrial matter to the Commission' in ss 29A(2), (2a), (3) and (4), speaks of a referral to the Commission by those persons specified in s 29 of the Act, as it then was.
>
> Therefore, the conclusions reached by the Commission in Court Session in the ***Commission's Own Motion*** [2007] WAIRC 00318; (2007) 87 WAIG 903 at pars 9 - 11, to the effect that s 29A(1)(b) applied to the Commission acting on its own motion under s 40B of the Act and, by inference, s 47 of the Act should not be followed ...

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

> In that case, it was held that under s 40B where the Commission acts on its own motion, the Commission effectively refers the industrial matter to itself. In our view also, with respect, ***Re Dardanup Butchering*** must also be considered to have been wrongly decided on this point.

Consideration

181 With due respect, I cannot accept the fundamental conclusion expressed by the majority Full Bench reasons to the effect that the removal of PUFSC in 1995 as a scheduled respondent to the Award

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[80] 2019 WAIG 00825 [56] - [57].
[81] ***Re Dardanup Butchering Co*** [2004] WAIRC 10864; (2004) 84 WAIG 465.
[82] 2019 WAIRC 00825 [57].

'had the effect of removing that industry from the scope of the Award from that time'.[83]

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

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

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

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

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

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[83] 2019 WAIRC 00825 [63].

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

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

189 Given the overall scheme of the 1979 Act, particularly its Pt II div 2, and recognising the undoubted widespread rights and obligations potentially impacted by a change to the scope of a common rule award, extending to many unnamed and unseen other persons within a covered industry, changes by way of variation in the scope of the award once established, either by way of expansion or contraction, are capable of delivering significant knock on implications against rights and obligations in unseen quarters. Such rights and obligations are simply too important and widespread to be swept away, indirectly.

190 Because of all that, a variation in the scope of an award first needs to be meticulously progressed through what are undoubtedly onerous publication, notification and service requirements under

s 29A(2). Those requirements were not met during 1995. Whilst other and different notification and publication requirements by s 47 were met that is not to the point. The legislation speaks firmly upon this issue and governs the Commission's very jurisdiction to hear and effect such changes. The requirements of s 29A(2) were not met and, consequently, the Commission has never obtained jurisdiction to validly issue an order that could vary the scope of this Award.

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

Conclusion

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

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

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

DW
Associate to the Honourable Justice Martin

3 MAY 2021

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