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

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

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| CatchWords | **:** | Industrial law (WA) – Review of a decision of the Construction Industry Long Service Leave Payments Board – Requirement to register as an employer under the *Construction Industry Portable Paid Long Service Leave Act 1985* – Statutory Construction – Use of Second Reading Speeches and Explanatory Memoranda and previous judicial statements – Priori assumption – Parliamentary intention and object of legislation – Re-enactment presumption – Definition of 'construction industry' – Definition of 'on site' or 'on a site' – Scope of Act extends beyond work on construction sites |
| Legislation | **:** | *Construction Industry Portable Paid Long Service Leave Act 1985* (WA); *Construction Industry Portable Paid Long Service Leave Regulations 1985* (WA); *Industrial Relations Act 1988* (Cth); |
| Result | **:** | Preliminary questions answered |

**Representation:**

Counsel:

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| Applicant | **:** | Mr S M Davies SC |
| Respondent | **:** | Mr J B Blackburn SC |

Solicitors:

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| Applicant | **:** | Herbert Smith Freehills |
| Respondent | **:** | Jackson McDonald |

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

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

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

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

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

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

***Commonwealth v Baume*** (1905) 2 CLR 405

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

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

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

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

***Harrison v Melham*** [2008] 72 NSWLR 380

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

***Northrope v City of Hawthorn*** [1941] VRL 178

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

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

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

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

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

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

**Case(s) also cited:**

***Alcan NT Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27
***Australian Education Union v Department of Children's Services*** (2012) 248 CLR 1
***Catlow v Accident Compensation Commission*** (1989) 167 CLR 543
***Lacey v Attorney-General*** (Qld) (2011) 242 CLR 573
***Pepper v Hart*** [1993] AC 593
***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355
***Wik Peoples v Queensland*** (1996) 187 CLR 1

**Texts cited:**

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

*Decision*

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

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

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

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

**The issues for current determination**

3 The questions for determination are:

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

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

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

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

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

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

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

## BACKGROUND

### PIM's operations in Western Australia

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

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

(a) Boilermakers/welders;

(b) Riggers;

(c) Scaffolders;

(d) Mechanical fitters/pipefitters;

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

(f) Painters and blasters (industrial);

(g) Crane operators;

(h) Trades assistants.

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

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

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

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

1. Ongoing maintenance;
2. Shutdown maintenance; and
3. Project work.

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

**Ongoing maintenance work**

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

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

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

of the performance of plants are key methods of identifying when reactive maintenance needs to take place.

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

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

**Shutdown maintenance**

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

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

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

**Project work**

21 Examples of project work include:

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

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

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

## Workshops

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

## Work locations

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

## The contracts

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

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

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

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

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

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

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

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

**Evidence of Bruce Noel Kennedy**

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

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

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

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

Wales, to the heavy industry sector; and to the port operations sector in Western Australia, Victoria and Queensland.

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

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

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

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

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

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

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

44 In summary, the works undertaken by PIM's employees is either or both of the repair, maintenance or replacement of established plant and equipment or the components of the plant

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

## Statutory construction

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

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

> It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reason of the plurality in ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue***:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself . Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> The context and purpose of a provision are important to its proper construction because, as the plurality said in ***Project Blue Sky Inc v Australian Broadcasting Authority***, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in ***Project Blue Sky:***

> Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to read in a way that does not correspond with the literal or grammatical meaning.

To similar effect, the majority in ***Lacey v Attorney-General*** (Qld) (33) said:

> Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

(Footnote omitted.) The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention.

A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. As Spigelman CJ, writing extra-curially, correctly said:

> Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case.* (Emphasis added)

And as the plurality said in ***Australian Education Union v Department of Education and Children's Services****:*

> In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose

[23 – 26](Footnote omitted).

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

> As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative 'intention' is to be ascertained, 'what is involved is the 'intention manifested' by the legislation'. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.
>
> …
>
> Regard was had by the Full Court in this case to what was said in *Re Bolton; Ex Parte Beane*. Nevertheless, it is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident*

> *Compensation Commission* it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction [31, 33].

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

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

(See also Mason P at [172]).

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

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

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

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

## CONSIDERATION

### The Act – the text and structure

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

53 However, inferences may be drawn from the Act read as a whole. The scheme of the Act provides for the establishment of the Board for the purposes of the Act (s 5). The Board carries out the administration of the Act (s 14). Employers and employees, who meet the definitions in the Act, are registered with the Board (Part IV – Registration). An employer is required to

keep certain records and make reports to the Board, and to make payments to the Board as contributions calculated by reference to the ordinary pay payable to each employee (s 31).

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

**Meaning of construction industry and site**

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

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

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

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

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

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

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

***construction industry*** *means the industry –*

(a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following –

(i) buildings; and

(iia) swimming pools and spa pools; and

(ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and

(iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and

(iv) works for the storage or supply of water or for the irrigation of land; and

(v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and

(vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and

(vii) bridges, viaducts, aqueducts or tunnels; and

(viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and

(ix) pipelines; and

(x) navigational lights, beacons or markers; and

(xi) works for the drainage of land; and

(xii) works for the storage of liquids (other than water) or gases; and

(xiii) works for the generation, supply or transmission of electric power; and

(xiv) works for the transmission of wireless or telegraphic communications; and

(xv) pile driving works; and

(xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and

(xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and

(xviii) fences, other than fences on farms;

(b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;

(c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,

but does not include –

(d) the carrying out of any work on ships; or

(e) the maintenance of or repairs or minor alterations to lifts or escalators; or

(f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation;

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

62 The Macquarie Dictionary defines 'site' as:

***Noun*** 1. the position of a town, building, etcetera., especially as to its environment.

2. the area on which anything, as a building, is, or has been or is to be situated.

…

***Verb (t)*** (sited, siting)

4. to locate; place; provide with a site: ***they sited the school next to the oval***.

[Latin ***situs*** position]

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

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

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

1. the ground chosen or used for a town or building.

2. a place where some activity is or has been conducted (camping site; launching site).

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

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

68 Therefore, the preliminary words in the definition of construction industry mean that of the industry of carrying out, *at a position, area, location, place or situation*, a range of activities being the construction, erection, installation, reconstruction, re-erection, renovation, alteration,

demolition or maintenance of or repairs to a range of buildings, structures, works etcetera, and for specified purposes or works.

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

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

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

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

72 I respectfully agree with those observations.

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

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

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

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

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

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

**Work location – other decisions**

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

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

> Overall, approximately 60 to 70 per cent of Metlab Mapel's work is carried out on site, rather than at its own laboratory or at its own workshop. On specific site darkrooms and other

> facilities are used by the technicians concerned and once the material has been tested on site they return to the office with films where other technicians interpret them and reports are written (415).

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

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

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

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

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

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

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

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

activities in question are performed is accorded substantial significance in the definition of 'construction industry' under the Act' (414).

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

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

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

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

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

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

94 The Board also refers to comparable legislation, whilst in different terms, in South Australia, the *Construction Industry Leave Service Act 1987* (SA). In ***FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board*** ([1992] SAIRC 20; (1992) 59 SAIR 381) the appellant was an electrical business carrying out electrical maintenance and

repairs at its customers' established premises. Parsons IM noted the breadth of the definitions in the SA Act and found that:

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

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

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

**Itinerant work and the mischief to be addressed**

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

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

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

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

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

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

102 I note that the Commission in Court Session's decision in ***Construction Industry Long Service Leave Payments Board v Positron Pty Limited*** (*Positron*) (1990) 70 WAIG 3062 at 3065 took

account of the issue of itinerancy. In that decision, Martin C with whom Kennedy and Parks CC agreed, said that the exclusion of

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

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

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

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

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

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

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

**Maintenance work as part of "construction industry"**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

122 Therefore, the answer to question 1 is yes.

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

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

> they indicate the common view of those members of the Commission and Boards of Reference on the question which the Applicant now raises, but also because it may be presumed that, when the legislation was comprehensively reviewed and amended in 2011, (*Industrial*

> *Legislation Amendment Act 2011*) (WA), (Part 2) the legislature was content with the understanding consistently applied over many years by the Commission and Boards of Reference (footnote omitted).

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

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

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

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

> The ***Alcan Australia*** case arose under the *Industrial Relations Act 1988* (Cth). Two years after it was decided, the *Workplace Relations Act 1996* (Cth) was enacted. In ***Electrolux Home Products Pty Ltd v Australian Workers' Union*** [2004] HCA 40; (2004) 209 ALR 116 at [81] McHugh J noted the similarity between a provision in the earlier Act that had been interpreted in the ***Alcan Australia*** case and a provision in the later Act and added:
>
> > The principle that the re-enactment of a rule after judicial consideration is to be regarded as an *endorsement* of its judicial interpretation has been criticised, and the principle may not apply to provisions re-enacted in 'replacement' legislation [see, eg, ***Flaherty v Girgis*** (1987) 162 CLR 574 at 594; 71 ALR 1 at 14 per Mason ACJ, Wilson and Dawson JJ; ***Zickar v MGH Plastic Industries Pty Ltd*** (1996) 187 CLR 310 at 329; 140 ALR 156 at 169 per Toohey, McHugh and Gummow JJ]. However, industrial relations is a specialised and politically sensitive field with a designated Minister and Department of State. It is no fiction to attribute to the Minister and his or her

> Department and, through them, the Parliament, knowledge of court decisions – or at all events decisions of this Court – dealing with that portfolio. Indeed, it would be astonishing if the Department, its officers and those advising on the drafting of the Act would have been unaware of ***Re Alcan***.

Gleeson CJ (at [7]-[8]), Gummow, Hayne and Heydon JJ (at [161]) and Callinan J (at [251]) reached similar conclusions; cf Kirby J at [206].

In ***Workcover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation*** [2002] NSWIRComm 28; (2002) 117 IR 99 at [62] Haylen J observed that the criticism of the presumption that were based on its artificially applied with less strength 'where Parliament deals with statutes administered by specialist tribunals or where there is a legislative history of frequent review and amendment'. Numerous examples of the application of the presumption are to be found in the decisions of the Australian Industrial Relations Commission and state Industrial Relations Commissions. See ***Paul Fishlock v Campaign Palace Pty Ltd*** [2013] NSWSC 531 at [317]-[319]. See also the discussion of ***Australian Capital Territory (Chief Minister's Department) v Coe*** [2007] ACTSC 15 at 3.47. In more recent examples of the possible application of the re-enactment presumption the courts have considered the subject matter of the legislation and the context of its enactment, looking for indications as to the likelihood that parliament, the minister or the department knew or would have known of a judicial interpretation of language that has been repeated in the later enactment. See ***Informax International Pty Ltd v Clarins Group Ltd*** [2012] FCAFC 165 at [174]; ***R v Aubrey*** [2012] NSWCCA 254; (2012) 82 NSWLR 748 at [48]-[50] per Macfarlan JA, with whom Johnson and Davies JJ agreed at [64] and [65] respectively (p 143 - 144).

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

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

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

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

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

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

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

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

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

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

136 Although PIM describes itself as being engaged in the provision of maintenance services predominantly to the mining and resources sectors, the construction industry, as defined by the Act, encompasses the carrying out of maintenance of or repairs to works for the extraction,

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

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

## Conclusion

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

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