APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER APPL 58/2018 GIVEN ON 16 DECEMBER 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00758
CORAM	**:**	SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS COMMISSIONER T B WALKINGTON
HEARD	**:**	ON THE PAPERS. APPELLANT'S WRITTEN SUBMISSIONS FILED 7 APRIL 2020; RESPONDENT'S WRITTEN SUBMISSIONS FILED 5 MAY 2020; APPELLANT'S WRITTEN SUBMISSIONS IN REPLY FILED 12 MAY 2020
DELIVERED	**:**	WEDNESDAY, 2 SEPTEMBER 2020
FILE NO.	**:**	FBA 14 OF 2019
BETWEEN	**:**	PROGRAMMED INDUSTRIAL MAINTENANCE PTY LTD Appellant AND THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**The Western Australian Industrial Relations Commission**
Coram	**:**	**Chief Commissioner P E Scott**
Citation	**:**	**2019 WAIRC 00843**
File No	**:**	**APPL 58 of 2018**

Catchwords	:	Industrial law (WA) - Appeal against decision of Commission determining preliminary questions as to meaning of statute – Relevant principles of statutory interpretation applied – Meaning of "site" having regard to statutory context - Use of dictionary meanings - Re-enactment presumption - Preliminary question answered correctly
Legislation	:	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA) *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA) Schedule 1 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) *Industrial Legislation Amendment Act 2011* (WA) *Industrial Relations Act 1979* (WA) s 49 *Industrial Relations Commission Regulations 2005* (WA) reg 103(12) *Interpretation Act 1984* (WA), in ss 18 and 19 *Long Service Leave Act 1958* (WA)
Result	:	Appeal dismissed

Representation:

Counsel:

Appellant	:	Mr S M Davies SC
Respondent	:	Mr J B Blackburn SC

Solicitors:

Appellant	:	Herbert Smith Freehills
Respondent	:	Jackson McDonald

Case(s) referred to in reasons:

ACT Construction Ltd v Customs and Excise Commissioners [1981] 1 WLR 1542

Australian Capital Territory (Chief Minister's Department) v Coe [2007] ACTSC 15; (2007) 208 FLR 448

Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board (1995) 62 IR 412

Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board [2001] WAIRC 02000; (2001) 81 WAIG 665

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

Commissioner of Police v Ferguson [2019] WASCA 14; (2019) 54 WAR 177

Commonwealth v Baume (1905) 2 CLR 405

Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Limited [1992] Library 920130

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

Construction Industry Long Service Leave Payments Board v Doug Ritchie Brickpaving (1991) 71 WAIG 576

Esso Australia Resources Pty Ltd v Commissioner of Taxation [2011] FCAFC 154; (2011) 199 FCR 226

FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board (1992) 59 SAIR 381

Fremantle Lawyers Pty Ltd and Ors v Sarich as executor of the estate of Saric and Ors [2019] WASCA 48; (2019) 54 WAR 113

Harrison v Melhem (2008) 72 NSWLR 380

Healy Airconditioning Pty Ltd v Construction Industry Long Service Leave Payments Board (1999) 79 WAIG 560

Huntlee Pty Ltd v Sweetwater Action Group Inc [2011] NSWCA 378; (2011) 185 LGERA 429

Konecranes Pty Ltd v Construction Industry Portable Paid Long Service Leave Board [2006] WAIRC 04331; (2006) 86 WAIG 1092

Mackay v Davies (1904) 1 CLR 483

Minister Administering the Environmental Planning and Assessment Act 1979 v Carson (1994) 35 NSWLR 342

Owners of Shin Kobe Maru v Empire Shipping Co Inc [1994] HCA 54; (1994) 181 CLR 404

Palgo Holdings Pty Ltd v Gowans [2005] HCA 28; (2005) 221 CLR 249

PMT Partners Pty Ltd (In Liquidation) v Australian National Parks and Wildlife Service [1995] HCA 36; (1995) 184 CLR 301

Programmed Industrial Maintenance Pty Ltd ACN 133892350 v The Construction Industry Long Service Leave Payments Board [2019] WAIRC 00843; (2020) 100 WAIG 40

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme [2019] WAIRC 00860; (2019) 100 WAIG 125)

Re Bolton and Anor; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514

R v Regos & Morgan [1947] HCA 19; (1947) 74 CLR 613

Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees [1994] HCA 34; (1994) 181 CLR 96

Resmed Limited v Australian Manufacturing Workers' Union [2015] FCAFC 106; (2015) 232 FCR 152

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252

Sparks 'N' Security Pty Ltd and Ritzline Pty Ltd t/a IC Cool Refrigeration, Mechanical and Electrical Services v Construction Industry Long Service Leave Payments Board [2017] WAIRC 00164; (2017) 97 WAIG 366

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362

Taylor v Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531)

Thompson v Smith [1976] HCA 56; (1976) 135 CLR 102

Wacal Developments Pty Ltd v Realty Developments Pty Ltd [1978] HCA 30; (1978) 140 CLR 503

Williams v The Official Assignee of the Estate of William Dunn [1908] HCA 27; (1908) 6 CLR 425

Wilson v State Rail Authority of New South Wales [2010] NSWCA 198; (2010) 78 NSWLR 704

WorkCover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation [2002] NSWIRComm 281; (2002) 117 IR 99

Reasons for Decision

1 The appellant, Programmed Industrial Maintenance Pty Ltd, is part of the Programmed Group of companies. In Western Australia, the appellant provides maintenance services under contract at established operational locations, principally in the resources sector. The respondent, The Construction Industry Long Service Leave Payments Board, is the statutory body responsible for the administration of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) in this State. The respondent notified the appellant it had to register under the Act. This was because the respondent considered that the appellant was an employer covered by the Act, as it employed employees in the construction industry. The Act requires contributions to be made to the respondent, under the statutory scheme, to confer long service leave entitlements on those employees.

Application to review

2 The appellant objected to the respondent's decision requiring it to register. It lodged an application to review the decision of the respondent under s 50(1)(b) of the Act. Such reviews are heard by the Commission.

3 The application to review came before the Commission constituted by the Chief Commissioner and by decision of 6 December 2019, the application to review was dismissed: ***Programmed Industrial Maintenance Pty Ltd*** ACN 133892350 ***v Construction Industry Long Service Leave Payments Board*** [2019] WAIRC 00843; (2020) 100 WAIG 40. The principal issue raised in the proceedings at first instance was whether the appellant's employees, who perform work on its clients' premises, do so "on a site" for the purposes of the definition of "construction industry" in s 3(1) of the Act. If so, two further questions were posed in relation to the exclusion provision in par (f) of the definition of "construction industry". The questions posed for determination at first instance were set out at par [3] of the reasons:

> 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 The learned Chief Commissioner concluded that the work performed by the appellant's employees was performed "on a site" within the definition of "construction industry". She held that on its proper construction, the words "on a site" means the site at which the activities in the first part of the definition are performed on the buildings and works etc that follow in sub pars (i) to (xviii). She rejected the appellant's principal contention that "on a site" and "on site" where used in the Act, means a "building site" or a "construction site". The learned Chief Commissioner also concluded that the exclusion in the definition in par (f) had no application. The application to review was dismissed.

5 The appellant now appeals to the Full Bench under s 49 of the *Industrial Relations Act 1979* (WA) from the decision to dismiss the application to review.

Grounds of appeal

6 The grounds of appeal are in these terms:

2. The learned Chief Commissioner erred in law in:

(a) failing to find that the term "site", as it is used in the definition of "construction industry" in section 3 of the Act, means a construction site;

(b) failing to have to regard or, alternatively, sufficient regard, to the rule of statutory construction that, where words are used in a group and a word in the group is ambiguous, an ambiguous word is to be construed *eiusdem generis*(sic). While the expression "construction industry" is a defined term in the Act, within the definition a word group is used ("of carrying out on a site construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to"), such that it is necessary to construe them *eiusdem generis*(sic). The word "construction" appears in its natural and ordinary sense in each of parts (a), (b), and (by way of incorporation by reference) (c) of the definition and, therefore, it was necessary to have regard to the ordinary and natural meaning of the word "construction" in construing the meaning of the terms "site" and "maintenance of or repairs to";

(c) further to ground 2(b) above, failing to find that the term "maintenance of or repairs to" in the definition of "construction industry" in section 3 of the Act solely refers to maintenance of and repairs to construction or building projects;

(d) failing to follow the decision of the Supreme Court of Western Australia in *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) WASC 718, which, properly understood, held that the expression "site", in the Act meant a "construction site" or "building site";

(e) failing to have regard to the mischief to which the Act was aimed to address, as explained by Owen J in *Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd* (unreported, Library No 920130, 4 March 1992) at page 9 and *Healy Air Conditioning Pty Ltd v Construction Industry Long Service Leave Payments Board* [1999] WAIRComm 17 at page 7. Accordingly, the Chief Commissioner erred by failing to interpret the meaning of "site" and "on a site" in a manner consistent with the purpose of the Act, and the mischief to which it is aimed at addressing;

(f) finding that the re-enactment presumption rule of statutory construction had an application to determining the proper construction of "construction industry" in section 3 of the Act in circumstances where the relevant re-enactment did not amend the definition of "construction industry" (at [134]) .

3. In finding that the Appellant is "substantially engaged in the construction industry as defined" the Act, the learned Chief Commissioner erred in law by:

(a) failing to have regard or, alternatively, sufficient regard, to the rule of statutory construction that all words in a statute are to be taken to have work to do by rendering the exception in paragraph 3(f) of the definition of "construction industry" nugatory in finding that a person can be "substantially engaged in the construction industry" as defined solely by reason of the fact that they perform work identified in the exception (at [135]-[137]);

(b) failing to find that, on a proper construction of the Act, the activity of maintenance and repairs of a routine or minor nature does not fall within the defined term "construction industry" in section 3 of the Act.

4. The learned Chief Commissioner erred in law in finding that the Appellant is substantially engaged in the "construction industry" (at [137]):

(a) as a consequence of the Chief Commissioner's finding that the Appellant's employees performing work at the Appellant's clients' premises are engaged in the "construction industry'' as defined in section 3 of the Act and, in so doing, failed to have regard or, alternatively, sufficient regard, to the decision of the Supreme Court of Western Australia in *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) WASC 718 at [161.E], to the effect that the relevant employees, by reason of the nature of work they perform, may be 'in the construction industry', but their employer may not be;

(b) in circumstances where the only relevant evidence was unchallenged evidence led by the Appellant that it was solely engaged in the provision of "industrial maintenance services" (at [36]).

7 The appellant seeks orders it not be required to register as an employer under the Act or the matter be remitted back to the respondent for further determination according to law. Second, declarations are sought that the appellant engages no employees who work "on a site"; engages no employees in the "construction industry"; and is not an "employer" as provided in the Act.

Notice of contention

8 Besides the grounds of appeal, the respondent has filed a notice of contention under reg 103(12) of the *Industrial Relations Commission Regulations 2005* (WA) by which it says that the decision of the learned Chief Commissioner may be upheld on further grounds to those relied upon by her in her reasons for decision. Whilst grounds 3(d) and 4(b) were not pressed in the respondent's written outline of submissions, the grounds as filed are:

Grounds relied on

3. Other factors which supported the Chief Commissioner's finding that the word site is not confined to a construction site or building site included:

    (a) In case the contrary is suggested, that it is not permissible to construe a statutory definition by reference to the term being defined;

    (b) That of the 19 sub-paragraphs in paragraph (a) of the definition of construction industry, only one refers to a building or buildings;

    (c) That paragraph (d) of the definition excludes the carrying out of work while on a ship, which indicates that but for the exclusion the definition is broad enough to include such work;

    (d) That if the word site meant only a construction site or building site, the words "maintenance" and "repairs" in paragraph (a) of the definition would have little or no work to do (and the exceptions in paragraphs (e) and (f) even less).

4. Other factors which supported the Chief Commissioner's finding (at [106]) that the legislative intention was to provide a long service leave system to apply to employees who work in the construction industry and not only to itinerant workers included:

(a) that, in addition to s 21(2)(c) of the *Construction Industry Portable Paid Long Service Leave Act 1985* **(the Act)** to which the Chief Commissioner referred, s 51 of the Act envisages that an employee may accrue an entitlement to long service with the one employer; and

(b) that the *Construction Industry Portable Paid Long Service Leave Regulations 1986,* which commenced on the same day as the Act and formed part of a legislative scheme, when prescribing awards and classifications of work for the purpose of the statutory definition of employee, expressly limited the prescribed classifications of work for each of the prescribed Government awards to "temporary employees" (defined by reg 3(3) to mean "a person who does not hold a permanent position but whose continuity of employment depends on the availability of work") but placed no such limitation on the prescribed private sector awards.

5. The Applicant's contention that it was not substantially engaged in the construction industry, because (as was assumed for the purpose of the separate question) the majority of its work was maintenance work of a routine or minor nature, misconstrued paragraph (f) of the definition and gave it a circular operation. Whether an employer engaged on maintenance work is substantially engaged in the construction industry cannot be answered by reference to whether that work is routine or minor. It will depend on whether and the extent to which the work done by the employer is maintenance of the type described in paragraph (a) of the definition. In arguing that the work which its employees perform is not in the construction industry because the work, or the majority of it, is maintenance or repairs of a routine or minor nature, the Applicant in effect seeks to construe the exclusion in (f) as if it read simply "the carrying out of maintenance or repairs of a routine or minor nature", which gives the remaining words in the paragraph no work to do.

Factual background

9 For the proceedings at first instance, the facts were not in dispute. An extensive statement of agreed facts was filed, setting out the operations of the appellant, the categories of employees employed and their scope of work, the locations where the work is mainly engaged in and an outline of the contractual arrangements between the appellant and relevant clients in Western Australia. In addition, evidence was given by witness statement from Mr Kennedy, the appellant's Regional Manager Western Australia. Mr Kennedy described the operations of the company as principally the provision of industrial maintenance services in the main, to companies operating in the mining and resources sector in the State.

10 It was common ground that the work undertaken by the appellant for its clients falls into three broad categories, they being ongoing maintenance work, shutdown maintenance work and project work. This work was described by

Mr Kennedy as performed on existing operational assets and was not work performed on a "greenfields" construction site or other site, involving the construction of new buildings, plant, or infrastructure.

11 As of July 2018, the appellant employed 1,694 employees in Western Australia in a range of classifications including boilermaker/welders; riggers; scaffolders; mechanical fitters/pipe fitters; mechanical tradespersons; painters and blasters; crane operators and trades assistants. It was also common ground that the employees were employed in classifications in prescribed awards set out in Schedule 1 to the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA).

12 The evidence also was most of the appellant's work is performed on its clients' premises. The appellant does have two workshops in WA that provide support to those engaged on the client's premises. Mr Kennedy outlined some of this work for example for Alcoa at its Kwinana Refinery and at the BHP Nickel Refinery, amongst others. With the former, this involves more minor and routine maintenance work. With the latter, this involves more substantial maintenance work including the replacement of pipelines and structural beams under a schedule of works prepared by the client.

Decision at first instance

13 In her decision at first instance the learned Chief Commissioner relevantly found on the facts:

(a) that the appellant undertakes maintenance and repair work to existing operations. These existing operations including buildings, plant and equipment and structures of long standing;

(b) the work involved includes ongoing maintenance; shutdown maintenance and project maintenance work;

(c) the appellant undertakes ongoing maintenance work at its client premises by providing its labour who work side by side with the client's employees. This is ongoing, planned, and routine and most of it is mechanical maintenance work;

(d) shutdown maintenance involves work by the appellant's employees when the client's operations or parts thereof are shut down and are not in operational mode. This work sustains the client's assets;

(e) the third type of work, project work, is larger in scale and is "one off" type work typically costing in the region of $200,000 - $300,000;

(f) besides its work on its client's premises, the appellant also operates two mechanical workshops, one in Kwinana and one in Kalgoorlie. These workshops provide a support to the appellant's workforce in performing repairs and maintenance for a client; and

(g) in terms of its contractual arrangements, the appellant typically has "umbrella" agreements with its clients setting out schedules and rates for types of work and services, which are themselves indicative rather than prescriptive. The contracts do not provide for construction of new plant and equipment.

14 At [44] the learned Chief Commissioner concluded:

> 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.

15 After referring to principles of statutory interpretation in her reasons, the learned Chief Commissioner, in relation to the meaning of "construction industry" and "site" concluded:

(a) the Act does not define "employer" in terms of whether an employer is engaged in the construction industry, rather, by reference to its employment of employees so engaged. In applying the observations of Ipp J in ***Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board*** (1995) 62 IR 412 at 413, there may be employees within the meaning of the Act, not employed by employers as defined in the Act;

(b) that "the preliminary words of the definition of 'construction industry' mean the industry of carrying out, 'at a position, area, location, place or situation, a range of activities being construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to a range of buildings, structures, works etc and for specified purposes or works'";

(c) on this basis "construction industry" also includes "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 by-products from material. Each activity is carried out on a site, or at a place; and

(d) that taken in its 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 etc or works listed in (i) - (xviii). Work performed away from where those buildings, swimming pools, roads etc 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".

16 In terms of the mischief to be addressed on the enactment of the legislation, the learned Chief Commissioner concluded:

(a) in referring to the observations of Owen J in ***Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd*** [1992] Library 920130, that protecting the interests of itinerant workers does not form an express purpose of the Act and to confine it to such a purpose would be to introduce an artificial constraint on the description of the "construction industry";

(b) that the purpose of the Act from its terms is to provide a single scheme of long service leave for persons working in the construction industry as defined in the Act;

(c) that the re-enactment presumption, based on prior decisions of the Commission in relation to the definition of "construction industry" under the Act, informed the Parliament's consideration of the amendments to the definition of "employer" in 2011 and supported the conclusions as to the meaning of "on a site" and "onsite" for the definition of the construction industry; and

(e) the answer to question 1 posed is "yes" in that the appellant's employees performing work at the appellant's clients' premises are carrying out work "on a site" within the meaning of the construction industry in s 3(1) of the Act.

17 Finally, as to the exclusion provision in par (f) of the definition of the construction industry in s 3(1) of the Act, the learned Chief Commissioner concluded that despite the appellant's own description of being engaged in the industry of "maintenance services predominantly to the mining and resources sectors", on the evidence, the activities of the appellant fitted the description of the construction industry in s 3 and therefore, the appellant was "substantially engaged" in that industry.

Approach to interpretation

18 The issue before the Commission at first instance was largely, if not solely, one of interpretation. Relevant principles of statutory construction were recently set out by Buss J in the Industrial Appeal Court decision in ***Commissioner of Police v Ferguson*** [2019] WASCA 14; (2019) 54 WAR 177. At pars [70] – [73] his Honour referred to these principles:

> 70 In *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd*,[2] French CJ, Hayne, Crennan, Bell and Gageler JJ observed:
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> > 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself [39].
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> See also Saeed v Minister for Immigration and Citizenship;[3] Thiess v Collector of Customs.[4]
>
> 71 The 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. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the existing state of the law, the history of the legislative scheme and the general purpose and policy of the provision (in particular, the mischief it is seeking to remedy). See *CIC Insurance Ltd v Bankstown Football Club Ltd*;[5] *Project Blue Sky Inc v Australian Broadcasting Authority*;[6] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*.[7]
>
> 72 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross*.[8] The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*.[9]
>
> 73 As Crennan J noted in *Northern Territory v Collins*,[10] '[s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (*Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2006] HCA 11), not least because such material may confuse what was "intended … with the effect of the language which in fact has been employed" (*Hilder v Dexter* [1902] AC 474 at 477 per Earl of Halsbury LC)' [99]. That statement of principle applies to extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act 1984* (WA). In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount. See *Nominal Defendant v GLG Australia Pty Ltd*.[11]
>
> (Footnotes omitted)

19 (See too ***Fremantle Lawyers Pty Ltd and Ors v Sarich as executor of the estate of Saric and Ors*** [2019] WASCA 48; (2019) 54 WAR 113 per Buss JA at [137] - [144]). In D Pearce *Statutory Interpretation in Australia* 9th Edition at par 2.1, the learned author refers to and discusses the contemporary approach to interpreting legislation in the following way:

> **2.1** In a statement that has come to be quoted as the present basis for interpreting legislation, the plurality (Kiefel CJ, Nettle and Gordon JJ) in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936 at [14] said:
>
> > The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> The courts recognise that the application of this approach will in most cases lead a court to having to make what is commonly referred to as a 'constructional choice'. The following observations of Gageler J in *SZTAL* at [37]-[39] are important to the making of this choice:
>
> > ... The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.
> >
> > The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.
> >
> > Integral to making such a choice is discernment of statutory purpose ....

20 In addition to these broad principles, are the provisions of the *Interpretation Act 1984* (WA), in ss 18 and 19, requiring first, when interpreting a written law, an approach in accordance with the purpose or object of the legislation (whether stated or not) is to be preferred and second, reference can be made to extrinsic material, including Parliamentary materials, in construing a written law.

Brief history of the Act and statutory scheme

21 Until the substantive provisions of the Act came into effect in December 1986, all employees throughout the State derived long service leave entitlements under the general *Long Service Leave Act 1958* (WA). Under that legislation, employees had to have 15 years of continuous service with one employer, to be eligible for long service leave, and at least 10 years' service to be eligible for pro rata long service leave. In response to what was seen to be the specific features of the construction industry, consistent with similar schemes elsewhere in Australia, the then State Government introduced the *Construction Industry Portable Paid Long Service Leave Bill 1985* into the Parliament. On its introduction, and in the Second Reading Speech accompanying the Bill, the responsible Minister, after referring to the need for continuous service of 10 and 15 years with one employer under the general industry scheme said (Parliamentary Debates, Legislative Assembly, 17 September 1985 at 1029):

> This industry is characterised by the short-term nature of employment contracts. This is an industry in which the mobility of labour is such that most employees are unlikely to become eligible for long service leave. Employers in the industry are able to receive service from their employees as do employers in other industries yet without in most cases having to pay long service leave.
>
> In the absence of any portable arrangements current long service leave provisions in the construction industry are clearly inconsistent with the principles of justice and equity central to this Government's philosophy. This anomalous situation has been recognised and corrected in all of the other States and the ACT - with the exception of Queensland.
>
> This legislation will provide a fair system of long service leave in the construction industry in Western Australia.

22 The responsible Minister further said (at 1030):

> The provisions of this Bill seek to make arrangements whereby employees in the construction industry in Western Australia can actually enjoy an entitlement which is already prescribed but, because of the intermittent nature of employment in the industry, is rarely enjoyed.

23 The scheme introduced by the legislation, provided portable long service leave entitlements to employees engaged in the construction industry. As opposed to the general scheme, whereby service with a single employer for the prescribed period was necessary, the scheme under the Act involved service in the industry, which could mean service with multiple employers. An employer required to be in the scheme makes contributions by way of a levy based on ordinary hourly rates of pay, under minimum prescribed annual hours of work. The payments are made into a fund administered by the respondent, established under s 5 of the Act. Under s 21 of the Act, a registered employee under the scheme is entitled to

eight and two-third weeks of long service leave after 10 years' service and four and one-third weeks pro rata long service leave after 5 years of service. Such service need not be continuous and is to be counted, regardless of whether that service is with one or more employers in the construction industry.

24 There is a registration process set out in Part IV of the Act. An employer, that being as defined in s 3(1) as "a natural person, firm or body corporate who or which engages persons as employees in the construction industry" must register under the Act. The employer is then required to file with the respondent a return setting out employees employed by the employer and amounts assessed by the respondent regarding each employee. For the purposes of the Act, an "employee" relevantly is "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".

25 Under the terms of the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA), there are prescribed awards and prescribed classifications of work set out in Schedule 1. These include awards made under both the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and the IR Act. On a fair reading of the awards, they may be said to reflect generally those "construction industry" type of awards relating to that industry.

26 In relation to the first question posed in the proceedings at first instance, a constructional choice needed to be made as to the meaning of "on site" as set out in the definition of "construction industry" in s 3(1) of the Act. The choice is between its ordinary and natural grammatical meaning, as a place or location at which things occur, or whether it should be construed in an industry context, that being the construction industry, as meaning "a construction or building site", having regard to coherence with any identified statutory purpose.

27 As a definition, s 3(1) should not be read down unless the context in which it is used requires it, or such a reading down is consistent with the evident purposes of the statute: ***PMT Partners Pty Ltd (In Liquidation) v Australian National Parks and Wildlife Service*** [1995] HCA 36; (1995) 184 CLR 301. Section 3(1), as to the definition of "construction industry", is as follows:

> ***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.

28 It is also convenient to mention at this point, as it was considered by the learned Chief Commissioner, and relates to one ground of appeal, that in 2011 amendments were made to the definition of "employer" in s 3 of the Act. By Part 2 of the *Industrial Legislation Amendment Act 2011* (WA), the definition was amended to include labour hire agencies as an employer, in a new par (b), as it is presently.

29 Consistent with the above authorities, despite what may have been said in Parliamentary debates leading to the enactment of the legislation, primacy must be given to the statutory text and not extrinsic materials, to discern the meaning of a written law. A priori assumptions should not be made. Parliamentary materials are not a substitute for the text as actually enacted in the law: ***Saeed; Re Bolton and Anor; ex parte Beane*** [1987] HCA 12; (1987) 162 CLR 514; ***Ferguson*** at [72]-[73], cited above.

Grounds 2(a) and (e)

30 The appellant submitted that the learned Chief Commissioner failed to find that the term "on a site" or "site" when used in the definition of "construction industry" in s 3(1), means a "construction site" or a "building site". The appellant contended that the Commission failed to construe the meaning of "site" consistent with the purpose of the Act.

31 In the latter respect, the appellant submitted that for the exercise engaged in by the learned Chief Commissioner, context is to be understood in its widest sense, which includes the general policy and purpose of a statutory provision. The contextual consideration, it was submitted by the appellant, is to be engaged in as a part of the first step in ascertaining the meaning of words used by Parliament in a statute. It was submitted by the appellant that Parliamentary statements are relevant to determine legislative purpose and ascertain the mischief sought to be addressed by a statute: ***Harrison v Melhem*** (2008) 72 NSWLR 380; ***Palgo Holdings Pty Ltd v Gowans*** [2005] HCA 28; (2005) 221 CLR 249. The appellant referred to observations of Allsop P (Giles, Hodgson, Tobias and Macfarlan JJA agreeing) in ***Wilson v State Rail Authority of New South Wales*** [2010] NSWCA 198; (2010) 78 NSWLR 704, that in resolving a controversy in relation to statutory meaning, a court may consider words used by Parliament in a statute, in both an historical and legal context. This does not mean considering subjective intent of the legislature but, informing the meaning of general words in a statute, by an understanding of context and the mischief to which the legislation is directed: at [12]-[15] appellant's written submissions.

32 The criticism by the appellant of the decision at first instance, was that the learned Chief Commissioner did not, at the commencement of her reasoning

process, consider the legislative context. Rather, it was submitted that she only did so at the end of the process of reasoning which, on the appellant's submissions, led the learned Chief Commissioner to fail to identify and construe the meaning of the contested words in the legislation, having regard to this context and purpose. The appellant submitted that the learned Chief Commissioner failed to have regard or adequate regard to the legislative history of the Act, the Parliamentary materials, including the Second Reading Speeches, and the reference to the mischief that the Act sought to address, as set out by Owen J in ***Precision***.

33 In this respect too, the appellant referred to analogous statutory schemes in other jurisdictions, which, on the appellant's submissions, both at first instance and on this appeal, have similar objectives in enabling those persons employed in the construction industry to enjoy long service leave entitlements, despite the itinerant nature of their work. The appellant also, over the objection of the respondent, sought to refer to the Second Reading Speeches leading to the introduction of the legislation in the other jurisdictions, in aid of its general point about the purposes for which these schemes were developed. The respondent objected because it contended that this material was not put before the learned Chief Commissioner at first instance, and thus, offended against s 49(4)(a) of the IR Act. Given that the existence and purposes of analogous regimes in other States and Territories was raised in the appellant's written submissions at first instance, s 49(4)(a) does not preclude this material being raised by the appellant in its submissions in these proceedings.

34 The appellant contended that had the learned Chief Commissioner considered the foregoing matters contemporaneously with the ordinary grammatical meaning of the relevant text, then the conclusion that she ought to have reached was that the evident purpose of the of the Act was the difficulty that employees in the building and construction industry faced in becoming entitled to long service leave, because of the inherent itinerant nature of that industry. In not addressing these issues from the outset, the appellant contended that the learned Chief Commissioner arrived at a meaning of the expression "on a site", without sufficient regard to this context and purpose. The appellant submitted that despite the mischief identified by Owen J in ***Precision***, that being overcoming the itinerant nature of employment in the construction industry, the learned Chief Commissioner, in concluding that given the Act itself does not express such a purpose, was wrong to conclude that the decision in ***Precision*** placed an artificial restraint on the description of industry. The submission was made by the appellant that ***Precision***, as a decision of a superior court, should have been followed by the learned Chief Commissioner, unless there was a compelling reason to not do so.

35 The appellant thus contended that when regard is had to the evident purpose of the Act, in choosing from possible dictionary definitions of the word "site", as meaning a location in the general sense, when an alternative definition was open, that being "a building or construction site", the learned Chief Commissioner was in error. Having regard to the legislative context, history and purpose, and the mischief sought to be addressed by the Act, the appellant's submission as to the meaning of "site" being a "construction site" is a more natural constraint on the language used and is the conclusion which the learned Chief Commissioner ought to have reached. Because of these errors and by extending the scheme of the Act beyond its intended reach, the appellant contended that inconvenient and absurd results flow. These include the imposition of onerous obligations on employers not engaged in the construction industry proper, as commonly understood, and the conferral of benefits on employees unnecessarily, as they would otherwise qualify under the general long service scheme in the State.

36 The respondent submitted that when the Commission's reasons are considered as a whole, the learned Chief Commissioner did have regard to the relevant legislative context, purpose, and history in construing the Act. Furthermore, that the Commission did not ignore legislative purpose and concluded, correctly, according to the respondent, that the Act contains no express purpose or policy and the conclusion that the purpose of the legislation, being to create a single long service leave system for employees in the "construction industry", as it is defined in s 3(1) of the Act, was the correct conclusion.

37 According to the respondent, it is evident from the definition of "construction industry" in the Act, on its plain terms, that despite what may have been said in the Parliamentary debates, that the evident purpose of the legislation is to cover every employee employed in a prescribed classification in the "construction industry" as defined, not only including those who might be described as working itinerantly or others working in what might be described as the "construction industry" or the "building industry", as those phrases may be commonly understood. The submission was that the learned Chief Commissioner also recognised the limitations on the use of Parliamentary materials in citing ***Saeed***, and she made no error in distinguishing the decision in ***Precision***, because the meaning of the word "site" did not arise for specific consideration in that case. The respondent submitted that the obiter observations of Owen J in ***Precision***, could not reasonably be construed as suggesting that the Act was to be limited to itinerant workers in the building industry. Regardless of what the Parliamentary materials may reveal, and what may have been said by way of obiter observations in ***Precision*** in relation to the plight of itinerant employees, the respondent contended that these considerations cannot detract from the importance of the statutory text as being paramount.

38 In this context, and looking at the Act read as a whole, the respondent submitted that the definition of "construction industry" in s 3(1), cannot be reasonably construed as addressing only the circumstances of itinerant employees. Nor is the Act confined to the "building and construction industry", understood in its ordinary parlance. The respondent said the contention of the appellant that the approach of the learned Chief Commissioner would have unintended and improbable consequences is erroneous, as it presupposes the Act being limited in the manner asserted by the appellant. It was the respondent's submission that contrary to its position, the appellant's approach that the Act only applies on a "construction site" proper, may limit and lead to disadvantage to some employees. An example cited by the respondent is where an employee engaged in a prescribed classification, carries out work for an employer on a construction site, and then undertakes the same work for another employer but on a "shut down" on an established operational site. In the latter case, this would not accrue service towards long service leave and may inhibit the accrual of an entitlement overall. When viewed in this way, the respondent contended this approach contradicts the purposive approach to interpreting the Act adopted by Owen J in ***Precision***, as itinerant employees are less likely, not more likely, to benefit.

39 Under the heading in her reasons, "Act text and structure" the learned Chief Commissioner reached her conclusion as to the meaning of "site", after considering the ordinary and natural meaning of the words used, taken from various dictionary definitions. Having started with the text, the Chief Commissioner reached her conclusions at [61]-[70] in the following terms:

> 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.

40 Finally, on this point, the learned Chief Commissioner concluded at [74]:

> 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.

41 Later in her reasons, under the heading "Itinerant work and the mischief to be addressed" at [97-108], the learned Chief Commissioner considered the mischief sought to be addressed by the Act, and the Parliamentary materials. This also included the decision in ***Precision***.

42 With respect, at the point of considering the various dictionary definitions, it would have been preferable, as a matter of interpretative technique, when presented with the two broad meanings, neither of which were "wholly ungrammatical or unnatural" (***SZTAL*** per Gageler J at [38] citing ***Taylor v Owners - Strata Plan No 11564*** [2014] HCA 9; (2014) 253 CLR 531), to have then considered which of the possible meanings of the word "site" was more consistent with the object or policies of the Act, and also having regard to s 18 of the *Interpretation Act.* That is, considering at the point of reviewing the dictionary meanings, the matters the learned Chief Commissioner did at [97] and onwards of her reasons. However, the learned Chief Commissioner clearly had regard to the primacy of the text, as she was required to do. Furthermore, in any event, the ultimate issue is whether, having adopted the course she did, the learned Chief Commissioner's conclusion in answer to question (1)(a), was correct.

43 It was common ground at first instance that the mischief sought to be addressed by the Act was the difficulty for those engaged in the construction industry to qualify for an entitlement to long service leave. This was accepted to be due to the inherently itinerant nature of the industry, with employees moving from job to job and not remaining in employment with one employer long enough to qualify under the LSL Act applying to employees generally throughout the State. That this was the motivation for bringing the Bill into the Parliament, is evident from the Second Reading Speeches referred to earlier in these reasons.

44 First, as observed by Ipp J in ***Aust-Amec*** at 419, the definition of construction industry inserted into s 3(1) is complex. The definition commences with the words "construction industry *means the industry*…" Whilst it could have been easily done, the draftsperson was not content to simply call the industry the "construction industry" or the "building industry", following the ordinary and

commonly understood meaning of those terms. Instead, the draftsperson defined the industry to which the Act applies and did so expansively.

45 Second, the structure of the definition in s 3(1)(a) comprises a range of activities set out. These activities are all expressed disjunctively. They include, "maintenance of or repairs to" … There follows in pars (i) - (xviii) a range of structures and works upon which the activities in the first part of the definition are to be performed. As noted by the respondent in its notice of contention at par 3(b), only one, in sub-par (i) directly involves "buildings", although sub-pars (xvi) and (xvii) incidentally do so. If, as contended by the appellant, the definition should be read down and limited so the activities in the first part of the definition, of "construction, erection, installation …" are to be confined to performing such activities on a construction site or a building site, as commonly understood, then it is difficult to see why the draftsperson saw the need to extend the definition by including the works in sub pars (i) to (xviii). As submitted by the respondent in relation to this point, the specific things and works would be rendered superfluous.

46 Third, there follows in pars (b) and (c), additional activities to be included as the construction industry. In par (b), is the narrower activity of construction, erection, installation etc "but not maintenance of or repairs to" "on a site" in relation to the fabrication etc of plant and equipment to be used in building and works referred to in par (a). In par (c), is the capture of work within the definition of "construction industry", which would usually or normally be performed on site, but which is not necessarily so performed.

47 Finally, are the exclusions from the definition of construction industry in pars (d), (e) and (f). Notably in par (d) is the exclusion of *any* work on ships. Using the words "any work" must logically include the activities as expressed in the first part of the definition of par (a). That Parliament has considered it necessary to expressly exclude such work on ships, and not limit it to just "construction work", but "any work", including "maintenance of or repairs to" ships is of some significance. As noted in the respondent's notice of contention at par 3(c), this would suggest that without such an express exclusion, then any such work performed on ships would otherwise fall within the broad definition of construction industry, in s 3(1)(a) to (c).

48 Similarly, is the exclusion of work on lifts and escalators in par (e). Again, this suggests that without such an exclusion, this work would fall within the extended definition in s 3(1) on the basis lifts and escalators would be "structures, fixtures, or works for use on or for the use of any buildings or works…" in sub-par (xvi). Given this exclusion in (e), it would also suggest that major alterations to lifts or escalators, which could only conceivably be performed in an existing building, would otherwise fall within the definition of construction work as defined, as the

alteration or repair of "structures, fixtures or works for use on or for the use of any buildings…" in sub-par (xvi).

49 As noted by the learned Chief Commissioner, the word "site" is not defined in the Act. In these circumstances, as she did, dictionary definitions may be resorted to in assisting the resolution of disputes as to meaning. Whilst this may be done, caution has been expressed that in using dictionaries to assist in ascertaining the meaning of a word used in a statute, which might identify a range of possible meanings, statutory context is always of importance (see D. Pearce *Statutory Interpretation in Australia* 9th Ed at pars 3.33 - 3.34). It would appear from the definitions the learned Chief Commissioner referred to, set out above, that the words could support either of a "position, ground or area where a building or a town is to be located" or the more general definition of "a place where some activity is to be conducted". The *Shorter Oxford English Dictionary on Historical Principles* 3rd Ed 1973, goes somewhat further, and specifically refers to "a plot, or number of plots, of land intended or suitable for building". I also note the Macquarie Dictionary definition of "site", referred to above at par 39, citing the learned Chief Commissioner's reasons at [62] – [64].

50 Having undertaken this process, the learned Chief Commissioner at [68] set out above, plainly preferred the more general meaning of "site" as the "position, area, location, place or situation…etc" to the more specific reference to an area or ground chosen for the location of an intended building, for example. She was fortified in this conclusion by reference to an earlier decision of the Commission in ***Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board*** [2001] WAIRC 02000; (2001) 81 WAIG 665 where Smith C (as she then was), adopted the same broader view of the meaning of "site".

51 The legislative history forms part of the context. I have briefly set out the history of the Act earlier in these reasons. As the Parliamentary debates reveal, similar statutory schemes for long service leave in the building and construction industry have existed in other States for many years. All seem to have been introduced to overcome the same mischief with which the Act is concerned, that being the inherent itinerant nature of employment in the building and construction industry, as characterised as project to project employment, meaning employees not having the required length of service to qualify for long service leave under the general schemes applying to all employees. This industry-specific, portable long service leave scheme, was to be set apart from the general long service leave legislation in each State, applying to employees generally which, but for the Act and its corresponding legislation in other States, would cover employees in the construction industry.

52 This mischief sought to be addressed by the Act was considered by Owen J in ***Precision***. The issue arising in ***Precision*** was whether the industry of carrying out the construction and installation of swimming pools and spa pools on a site fell within the definition of construction industry in s 3 of the Act. After setting out the scheme of the Act, and the factual background, his Honour referred to the definition of construction industry and noted that it "is a very wide definition". His Honour then considered the arguments of the parties in relation to the approach to interpreting the Act. Notably, the meaning of "site" or "on a site" did not specifically arise for consideration in ***Precision***. It was accepted by the defendant, that it engaged in the building and installation of swimming pools "on a site". Whilst there was argument before the Court as to whether the Act was remedial legislation or not, and therefore whether it should receive a beneficial interpretation, Owen J did not ultimately need to resolve that issue. His Honour did however, approach the issue before the Court by adopting a purposive approach to interpretation and said at p 9:

> I believe that I can decide this case by looking at the plain meaning of the words used. There is, in my view, no ambiguity. I should say that to the extent which it is necessary I would favour the purposive approach. The mischief which the Act attacks is the difficulty which employees in the construction industry face in qualifying for long service leave because of the itinerant nature of workers in the industry. The dominant purpose of the Act is to provide a mechanism for the employee to transport long service leave credits from employer to employer. The impost on the employers is a secondary, although essential, purpose. It is the means by which the scheme is funded.

53 However, given the issue to be decided in ***Precision***, these were obiter remarks, unnecessary for determining whether the construction and installation of swimming pools and spas fell within the extended definition in s 3(1) of the Act.

54 The learned Chief Commissioner had regard to the decision in ***Precision*** at [104] - [106]. She acknowledged the observations of Owen J as to the mischief sought to be addressed by the Act, which as I have said, appeared to be common ground in these proceedings. However, given the approach she took to the breadth of the definition of construction industry in s 3(1), read in the context of the Act as a whole, the learned Chief Commissioner said the legislation should not be viewed as limited only to itinerant employees. This conclusion was correct. It is one thing to observe that the mischief sought to be addressed by a statute is X, it is another to conclude that a statute is limited to X, when having regard to not only its history and context, but its text, read in its entirety. Put another way, such a conclusion as to the stated mischief to be addressed by the Act cannot, on the authorities, delineate the outer boundaries of the Act, if such a conclusion conflicts with its full text.

55 In this respect, any conflict between non-statutory materials and the text of a statute must be resolved in favour of the latter: ***Ferguson*** per Buss JA at [71] - [73], cited above. Accepting the mischief sought to be addressed as identified in ***Precision***, it is not inconsistent with that mischief, that the legislation extends beyond a building or construction site as commonly understood. An example, is where employees may engage in work on activities as set out in the definition, not on a building or construction site, but are employed on an irregular or "itinerant" basis, so achieving an entitlement to long service leave under the general legislation would be difficult. The Act, in applying to them, is operating no less beneficially to that person(s), as to those engaged on a construction site proper. On the evidence, the average length of service of the appellant's employees is about three and a half years and the majority of the appellant's employees are engaged on a casual basis, many of whom on the evidence of Mr Kennedy, are engaged on cyclical shutdown maintenance work. Taking the broader approach to the reach of the Act, is not to diminish its beneficial effect, rather, it is to extend it.

56 There is nothing in the long title of the Act to suggest that its scope was limited to persons who may not qualify for long service leave from the itinerant nature of their work. Nor is there any such qualification to the definition of "employee" in s 3(1). Nor is there anything to suggest in Schedule 1 in the Regulations, containing the prescribed awards and classifications of work, that "prescribed classifications" is to be limited in this way.

57 As noted by the respondent, in addressing in part its notice of contention at par 4(a), several other provisions of the Act would suggest the legislation is not limited to itinerant employees, as the appellant contended. It may be the case, as contemplated by s 21(2)(c) and (d), that service may be with one employer, however, "service" also contemplates multiple engagements by the same employer. And under s 51, an employer may recover amounts from the respondent where an employee becomes entitled to long service leave under an industrial instrument or other statute. Further, in the transitional provisions in cl 1 and 2, despite s 34 providing for contributions to be made by an employer to the respondent, if before the appointed day, an employee had "at least 10 years' continuous service with the employer", the employer would have to pay the respondent an amount reflecting that period of continuous service.

58 These contextual provisions tend against the contention advanced by the appellant that the Act should be read down to only apply to those itinerant employees engaged in the construction industry or the building industry, on a "construction site" or a "building site", as those terms are understood in ordinary parlance.

59 It is to be accepted that all words used in legislation have some work to do and be accorded some meaning: ***Commonwealth v Baume*** (1905) 2 CLR 405. In this context the appellant contended that in using the words "site" and "on a site", this was a deliberate choice made by the legislature. The submission was made that in choosing the dictionary definition of "site" that she did, at [74] of her reasons, the learned Chief Commissioner left it no work to do. It was said that if it is to simply mean the location or place at which the activities in the first part of the definition are performed on those things or works identified in sub-pars (i) to (xviii), then this adds nothing to the definition. This is so because on the appellant's construction, this occurs already as the works are done "to" the buildings, roads, etc in sub-pars (i) to (xviii).

60 I do not accept that construed in the manner that the learned Chief Commissioner did, the words "site" or "on a site" have no work to do. I consider that interpreting the words used in this manner does provide a linkage and marks out the boundaries of the definition of construction industry. The reference to the "site" is not in a vacuum, as simply a place where work is performed. If this was so, then there would be no distinction between work done in an employer's own premises and work performed outside of its premises, such as at a client's premises, as in the case of ***Aust-Amec*** and in the present case. As illustrated on the facts in ***Aust-Amec***, which I will come to in more detail below, as held by Ipp J, there is a material distinction between work performed of the kind contemplated in s 3(1), at for example, a contractor's client's premises and at a contractor's own premises or workshop. As pointed out by the respondent in its submissions, the facts of this case itself illustrate that distinction. Thus, work performed in an employer's workshop or otherwise on its own premises, to support the performance of work performed on the site of the buildings, plant, roads etc, by way of fabrication of items to be used or installed "on site", fall outside of the definition. There is no incongruity or absurdity, as a matter of constructional choice, when drawing such a distinction. Such an approach follows the breadth of the definition of construction industry, read to its fullest extent.

61 The respondent is correct to say in its written submissions and at par 3(a) of its notice of contention, that the appellant's reliance on using the ordinary and natural meaning of "construction industry", as an aid to interpreting the meaning used in the definition of the same term in s 3(1) of the Act, is with respect, misplaced and falls foul of the rule expressed most recently in ***Esso Australia Resources Pty Ltd v Commissioner of Taxation*** [2011] FCAFC 154; (2011) 199 FCR 226. This rule being that in interpreting a definition in a statute, it is not generally permissible to refer to the ordinary meaning of the term defined as an aid: ***Owners of Shin Kobe Maru v Empire Shipping Co Inc*** [1994] HCA 54;

(1994) 181 CLR 404; ***Wacal Developments Pty Ltd v Realty Developments Pty Ltd*** [1978] HCA 30; (1978) 140 CLR 503.

62 The approach taken by the learned Chief Commissioner to the meaning of "on a site" for the purposes of s 3(1) of the Act, also follows a long line of cases of this Commission. I do not propose to consider them all. Several have considered and rejected similar arguments as to the scope of the Act, as arises in this case, in particular that the Act has no application to works performed on existing buildings, structures or operations, such as mining operations for example. This latter circumstance arose in the decision of the Commission in Court Session in ***Construction Industry Long Service Leave Payments Board v Positron Pty Limited*** (1990) 70 WAIG 3062. This case involved a challenge to a finding of a Board of Reference that employees of an electrical contractor, performing maintenance work on the treatment plant and on mobile equipment at an operational gold mine, were not engaged in the construction industry under the Act.

63 Although the specific issue of the meaning of the words "on a site" was not raised or determined, the Commission in Court Session had no difficulty in concluding that employing employees to engage in electrical maintenance work of the kind in issue, fell withing the meaning of "construction industry" in s 3(1)(a)(vi) of the Act. Whilst in its written submissions in reply the appellant contended that the conclusions reached in ***Positron*** did not establish that the mine concerned was operational, as opposed to being under construction, I do not think that a fair reading of that case supports this contention. Whilst the summary of the facts was brief, there was no reference in the decision of the Commission in Court Session, to the gold mine, or any part of it, being under construction. If this was so, then I have no doubt this would have been a material fact recorded, as part of the Commission's consideration of the definition of "construction industry" under the Act.

64 Similarly, in ***Construction Industry Long Service Leave Payments Board v Doug Ritchie Brickpaving*** (1991) 71 WAIG 576, the Commission in Court Session upheld an appeal from a Board of Reference and concluded that the work of installing brick paving around mainly existing, but also new houses, constituted works in the construction industry for the purposes of s 3(1)(a)(ii) and (xvi) of the Act (see too ***Centurion Industries Limited v Construction Industry Long Service Leave Payments Board*** (1991) 71 WAIG 1300; ***Healy Airconditioning Pty Ltd v Construction Industry Long Service Leave Payments Board*** (1999) 79 WAIG 560; ***Konecranes Pty Ltd v Construction Industry Portable Paid Long Service Leave Board*** [2006] WAIRC 04331; (2006) 86 WAIG 1092; ***Brown & Root; Sparks 'N' Security Pty Ltd and Ritzline Pty Ltd t/a IC Cool Refrigeration, Mechanical and Electrical Services v Construction***

Industry Long Service Leave Payments Board [2017] WAIRC 00164; (2017) 97 WAIG 366; ***Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme*** [2019] WAIRC 00860; (2019) 100 WAIG 125).

65 Whilst in ***Quantum Blue***, the meaning of "on a site" was not a matter raised or argued, in that case I expressed, by way of obiter remarks, general agreement with the conclusions of Scott CC in ***Sparks***. In ***Sparks,*** the learned Chief Commissioner concluded "on a site" was not restricted to a building site or a construction site. However, despite this, neither party submitted that I would not bring an impartial mind to resolving the present appeal: ***Resmed Limited v Australian Manufacturing Workers' Union*** [2015] FCAFC 106; (2015) 232 FCR 152. I also note the terms of s 15 of the IR Act in this respect.

66 As referred to by the learned Chief Commissioner at first instance, a broad approach to the construction of similar legislation in South Australia has been adopted. Whilst each statute must be considered in accordance with its specific terms, in ***FI & JF Munro (trading as Mega Electrical) v Construction Industry Long Service Leave Board*** (1992) 59 SAIR 381, the Industrial Magistrates Court of South Australia dealt with a case involving an electrical contractor, undertaking electrical maintenance and repairs on its customers' premises. The court adopted a broad interpretation of the definitions under the South Australian equivalent legislation. The phrase "building site" was not confined to the place at which new building and construction work was undertaken. Rather, it extended to "a place at which work to which the Act applies is carried out, namely a place other than the employer's place of business" at 387.

67 I am not persuaded that in terms of the conclusion reached by the learned Chief Commissioner, that error has been demonstrated. When her reasons for decision are read in their totality, she had regard to the context and purpose of the Act, including Parliamentary materials. The learned Chief Commissioner correctly concluded that the statutory text must prevail in the case of any inconsistency. These grounds are not made out.

Grounds 2(b) and (c)

68 These two grounds can be conveniently dealt with together. Ground 2(b) asserted that the word "site" in the definition in s 3(1) should be construed applying the *ejusdem generis* principle of statutory interpretation. Thus, the appellant contended that the word "site", along with the words "maintenance of and repairs to" in s 3(1) should be construed consistently with the specific words of "construction, erection, installation" etc, described by the appellant as specific words particular to the construction industry. The latter words "maintenance of or repairs to" should be read down, as only applying to "construction works" for

example, cases where on a construction project proper, some maintenance or repairs are needed to a building or structure, prior to its commissioning. Reference was made to ***Doug Ritchie Brickpaving***, in which Beech C applied the principle to the interpretation of part of the definition in s 3(1)(a)(ii), albeit, as accepted by the appellant, a part not relevant to determining this appeal. There, Beech C applied the *ejusdem generis* principle to the words "roads, railways, airfields or other works for the passage of persons, animals or vehicles…" to hold that the work, at least making driveways at houses (both existing or new houses) was within sub-par (ii), as being works "for the passage of persons or vehicles": at 578. Given the facts and issues arising in ***Doug Ritchie Brickpaving***, I do not think the case assists the appellant.

69 In a similar vein, the appellant submitted that if this principle does have work to do, then the word "site" should also be read down to mean the site at which the building and construction works are undertaken, as those phrases should be ordinarily understood. If the answer to these two propositions is in the affirmative, then on the agreed facts, the appellant submitted that as the appellant's employees do not engage in maintenance or repairs on a site so construed, then the Act has no application to its employees engaged on this work. I note that from the outlines of submissions and the transcript of the proceedings at first instance, this matter does not appear to have been raised or argued before the learned Chief Commissioner. However, despite this, I will consider the argument on the basis that it may be said to fall within the broader rubric of construction generally.

70 Applying the *ejusdem generis* principle of statutory interpretation requires the identification of a genus as the first step in the process: ***R v Regos & Morgan*** [1947] HCA 19; (1947) 74 CLR 613. Also, whilst the rule normally applies if specific words are followed by general words, this is not always the case. It has been held to also apply where the general words precede the specific words: ***Huntlee Pty Ltd v Sweetwater Action Group Inc*** [2011] NSWCA 378; (2011) 185 LGERA 429.

71 The difficulty with this ground is there does not appear to be an identified genus to provide a hook on which the appellant may hang its coat. Second, and more problematic, the words "on a site" are plainly used in the first part of the definition of construction industry, not to refer to a general type of activity to which these specific types of activity i.e. "construction, erection, installation" etc may attach and qualify the meaning of. Rather, the words "on a site" are used in an entirely different way by the draftsperson, to signify the place, in a geographic sense, at which the activities following are to be performed. As to the words "or maintenance of or repairs to", these words are not any more general in meaning than the words which precede them.

72 As to the further argument that the word "construction" should be elevated and given precedence over and qualify the meaning of the words both preceding and following, I do not accept this construction. There is nothing in the language of the provision to suggest that the range of activities set out in the first part of the definition, all expressed disjunctively, should not be understood in their ordinary and natural sense. They all operate independently on the works set out in sub-pars (i) to (xviii), and there is no more evident reason to single out "construction", as opposed to "renovation" or "demolition", or "maintenance of or repairs to" for example. Nor did Ipp J in ***Aust-Amec***, when considering the meaning of "maintenance" in referring to the authorities at 421, elevate the ordinary and natural meaning of the word, or qualify it, as only applying to maintenance of things being constructed, before completion, under s 3(1) of the Act (see ***ACT Construction v Customs and Excise Commissioners*** [1981] 1 WLR 1542).

73 Therefore, I am not satisfied these grounds of appeal have been made out.

Ground 2(d)

74 This ground contends that the learned Chief Commissioner failed to properly apply and follow the decision of Ipp J in ***Aust-Amec***. The appellant maintained this decision is authority for the proposition that the word "site" in the Act means a "construction site" or a "building site".

75 The decision in ***Aust-Amec*** turned on its own complex facts. The issue arising on this appeal, that being the meaning of the words "on a site" specifically, as set out in the definition of "construction industry" in the Act, was not a matter expressly arising for consideration in ***Aust-Amec***. What was in issue, was whether the employer plaintiffs, which involved three companies, of which one had several separate divisions, had to register under s 30 of the Act, as it then stood. The second issue was whether, if the answer to the first question was no, regardless, the plaintiffs had to contribute to the respondent regarding their employees, because the employees were engaged "in the construction industry". At the time of this decision, s 30 of the Act reflected in part, the definition of "employer" in s 3(1), but with the additional requirement that the employer be "in the construction industry". The third issue was if the plaintiffs had to contribute to the respondent, regarding which employees were they so liable. His Honour recognized that the issues to be determined, turned on the facts. Importantly also, Ipp J observed at the outset of his judgment at 414 that, "I shall make 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…"

76 The first plaintiff, ***Aust-Amec***, operated three divisions; Metlab Mapel, SRC Laboratories and Wishaw Engineering Services. With Metlab Mapel, its business was non-destructive testing, heat treatment, metallurgy, mechanical testing, and inspection and expediting services. The non-destructive testing work could be performed during constructing buildings, plant, or equipment. Most non-destructive testing work was done on tanks, pipelines, and welds etc. A combination of testing on new construction and on existing machinery and equipment, including mining equipment, being dismantled for maintenance, was another activity. Ipp J said that 60% to 70% of the work performed was done "on site", as opposed to at the Metlab Mapel laboratories or workshop. Inspection services also included work on site to inspect and supervise welding work.

77 SRC Laboratories conducted testing of soil, rock, concrete, and other materials used in civil engineering works. At 416, Ipp J outlined this work, most of which was done at its laboratories, but sometimes temporary laboratories were established at construction sites. On the facts, the work of SRC, as set out by Ipp J, was the construction of roads, airports, runways, dams, and other civil engineering projects. The third division, Wishaw, conducted "condition monitoring and vibration analysis of machinery at operational sites". Such machinery included large electric motors, gearboxes, and conveyors. Employees also went to building and construction sites to test equipment as a part of commissioning: at 416 - 417.

78 The second plaintiff, ETRS, also undertook non-destructive testing work. Some of this work was done at its own laboratory premises and some of it was done on the clients' premises or at steel fabrication companies. Occasionally, work was done by employees on construction sites to test welds or equipment being installed: at 417. Most mechanical and metallurgical testing work was done at its laboratory. Occasional metallurgical testing work was done on a construction site. Third party inspection services on items during fabrication, and third-party inspection work, was done at manufacturers' workshops: at 417.

79 The third plaintiff, Passrust, also conducted non-destructive testing of various types. Typically, this involved non-destructive testing on equipment in mining such as on shovels, drills, trucks, or railcars etc. Most non-destructive testing was done on the clients' premises, either where the equipment was in operation or where it was made. On occasions, the company undertook testing on equipment being installed at construction sites. A little testing work was done at its own laboratory. And the business engaged in condition monitoring work, including inspection and surveillance of equipment between design and commissioning. This included supervision of construction and maintenance work by clients normally done at the clients' premises, where the equipment was being fabricated or where it was being used: at 418.

80 His Honour then set out the definition of "construction industry" under the Act at 419 and referred to the defendant's argument that the plaintiffs were engaged on work on a site and in the "maintenance of" one or more of the structures or works referred to in sub-paragraphs (i) to (xviii) of the definition, which I note is very similar to the contention put by the respondent at first instance in these proceedings. Ipp J considered the meaning of "maintenance" and some cases on the point and concluded at 421, that whilst not determinative, none of the work undertaken by the plaintiffs would ordinarily be described as such. As to whether the plaintiffs had to register (under the then s 30 of the Act), Ipp J concluded that they were not of themselves engaged "in" the construction industry, rather they were engaged in a "service industry relating to the construction industry": at 422.

81 As to the second issue of whether the plaintiff employers had to contribute to the Board under s 34 of the Act regarding their employees, Ipp J drew a distinction at 422, between an employer required to register under the Act and one who is not, and said this meant that an employer may not be "in" the construction industry, but may employ persons as employees, who were in the construction industry. On this point, his Honour observed at 422:

> This, together with the distinction to which I have already referred between an employer who is required to be registered and an employer who is not, contemplates that a mere employer (i.e. an employer who is not required to be registered) may not itself be "in the construction industry" but may employ employees (as defined) in the construction industry. Such an employee may be a person, employed by an organisation falling outside the construction industry, who performs work within the construction industry. An example of this would be, say, a bricklayer employed by a university or a similar institution to maintain and repair existing buildings on a site, and to lay bricks on a site for new buildings.

82 The final issue dealt with by Ipp J was the extent to which employees of the plaintiffs were engaged in the construction industry. This was a question of fact and degree. As to Metlab Mapel, his Honour was not satisfied that employees engaged on non-destructive testing were engaged on work in the construction industry. The shop heat treatment employees did all their work at the employer's premises and thus, were not in the construction industry. The on-site heat treatment employees were also held not to be engaged in the construction industry. The same conclusion was reached in relation to mechanical testing employees: all at 423. The welding inspection service work, which involved inspectors doing on site visual inspections and supervision of welding done by others, may be in the construction industry, but the evidence was insufficient to reach that conclusion: at 424. As to the metallurgical and expediting employees, as the former did most of their work at Metlab Mapel's premises, they were not in the construction industry. As to the latter, the evidence was insufficient to make any findings: at 424.

83 As for SRC Laboratories, only those engaged in extraction of material from a site location (such as soil from a road) which could be by drilling, could be in the construction industry, but its other employees were not: at 424-425. As for Wishaw employees, Ipp J found at 425 they were not engaged in the construction industry. The ETRS employees working on non-destructive testing were not in the construction industry and most of the rest of the work performed was on its own premises and therefore, was not in the construction industry either: at 425. Finally, as for Passrust, Ipp J concluded that consistent with the other plaintiffs, non-destructive testing work was not in the construction industry. For the condition monitoring work, which may be done at premises where equipment is in use (i.e. already built), but most of which was done on site, his Honour found there was insufficient evidence as to the actual work done, and he was not prepared to make the orders sought: at 425.

84 I consider that regarding the appellant's arguments, it is reading too much into the decision of Ipp J to conclude that the case is authority for the proposition that the meaning of "site" in the definition of "construction industry" under s 3(1) of the Act, includes work only on a "construction site" or a "building site", as ordinarily understood. No such clear distinction was made by Ipp J. Apart from reference to ETRS, where it appears on the agreed facts that the work undertaken by this plaintiff took place on a construction site, no such conclusion was open for all the other plaintiffs. Passrust, for example, undertook much of its work at its clients' premises which was, on the facts, in the mining industry, where equipment was in use. Metlab Mapel conducted non-destructive testing on existing plant in use or being dismantled. Similarly, for Wishaw. There was no suggestion by Ipp J that this location of work, aside from the work done, was a disqualifying factor in determining whether the work by the particular employees was work performed in the construction industry, as defined under the Act. I think the most that can be taken from ***Aust-Amec***, as referred to at par 75 above, is the broad distinction, and significance accorded to, work done at an employer's own premises on the one hand, and work done elsewhere on "a site", without the necessity that the site be a "construction site" or a "building site", as commonly understood.

85 The example provided by Ipp J, set out above, of the University bricklayer, to illustrate the distinction between an employee working for an employer engaged "in" the construction industry, as opposed to one not so engaged, is of note. Ipp J did not appear to have any doubt that a bricklayer employed by a University to lay bricks to repair or maintain an existing building, as opposed to a new building, would be an employee engaged "in the construction industry", even though, self-evidently, the University employer would not be so engaged. In this example, his Honour appears to have had no difficulty so concluding, despite the

relevant "site" in the example used, not being a construction site or a building site, as it is understood in ordinary parlance.

86 I therefore do not consider that the appellant can rely on ***Aust-Amec*** to support its principal argument in the way contended. I consider that the case largely turned on its facts; the meaning of "on a site" did not squarely arise for consideration; and at its highest, the case distinguished between work performed at an employer's own premises and work performed elsewhere, such as on a client's premises, or other location.

87 This ground of appeal is not made out.

Ground 2(f)

88 By this ground the appellant contended that the learned Chief Commissioner erred in applying the re-enactment presumption principle, to support her conclusions as to the proper meaning of "construction industry" in s 3(1). In her reasons, the learned Chief Commissioner concluded that when the Act was amended in 2011 to extend the meaning of "employer" in s 3(1), to include labour hire agencies in the definition, Parliament was taken to have known of the prior decision of the Commission in ***Positron***, to the effect that maintenance work on a treatment plant of a gold mine and on mobile plant, was work within the construction industry under the Act. The learned Chief Commissioner also concluded that despite no reference being made to it in Parliamentary materials when considering the 2011 amendments to the Act, it likely knew of the decision in ***Aust-Amec***. The learned Chief Commissioner concluded that applying the re-enactment presumption, assisted in confirming her earlier conclusions as to the scope of the Act.

89 Whilst various bases were advanced by the appellant to support this ground of appeal, as properly conceded by the respondent in its submissions, the re-enactment presumption only applies if the particular words in a statute have been judicially considered and, those same words are retained in a statute or provision of a statute, when repealed and re-enacted: ***Mackay v Davies*** (1904) 1 CLR 483 at 491; ***Williams v The Official Assignee of the Estate of William Dunn*** [1908] HCA 27; (1908) 6 CLR 425 at 452; ***Thompson v Smith*** [1976] HCA 56; (1976) 135 CLR 102 at 109. This does not alter the conclusion that contrary to the appellant's submissions, the presumption applies equally to specialist courts and tribunals, as to superior courts: ***Minister Administering the Environmental Planning and Assessment Act 1979 v Carson*** (1994) 35 NSWLR 342; ***WorkCover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation*** [2002] NSWIRComm 281; (2002) 117 IR 99;

Australian Capital Territory (Chief Minister's Department) v Coe [2007] ACTSC 15; (2007) 208 FLR 448.

90 The re-enactment principle was applied and affirmed in the oft cited case of ***Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees*** [1994] HCA 34; (1994) 181 CLR 96, as referred to by the learned Chief Commissioner. At 106, the High Court observed that:

> Parliament re-enacted, in s 4(1) of the Act, words almost identical to those considered in *Reg. v. Portus.* There is abundant authority for the proposition that where 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]".

91 In the present circumstances, in ***Positron***, the case referred to and relied on by the learned Chief Commissioner to support the presumption, specific consideration was not given to the meaning of the words "on a site" as set out in the definition in s 3(1) of the Act. It was taken as common ground on the facts in that case that the work performed by the employees was done on a mine site on a treatment plant and on mobile plant. As the specific words in issue at first instance and on this appeal were not considered in ***Positron***, then the subsequent reference to ***Positron*** in Parliament, when considering the 2011 amendments to the Act, could not give rise to the presumption and respectfully, the learned Chief Commissioner was in error to hold it did.

92 Therefore, I would uphold this ground of appeal.

Ground 3(a)

93 By this ground, the appellant contended that the learned Chief Commissioner failed to have regard to the rule of statutory construction that all words in a statute are to be given meaning and effect, when she was considering the exception in s 3(f) of the definition of "construction industry". It was submitted that if a person is engaged in the construction industry for the purposes of the Act, only because they perform maintenance work of a routine or minor nature, then s 3(f) has no practical operation. It was submitted that by including the exception in s 3(f), the Parliament intended that a company performing only or mostly this work, is not to be regarded as engaged in the construction industry under the Act.

94 In her reasons, the learned Chief Commissioner approached this question based on the premise that most of the appellant's work for its clients was maintenance work of a routine or minor nature. She found that despite the appellant's own description of its activities as being "the provision of maintenance services predominantly to the mining industry", that on the learned Chief Commissioner's

construction of s 3(1) of the Act, work by the appellant includes 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 by-products from materials". The learned Chief Commissioner also concluded that the appellant's work encompassed "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 (sic) works": at [136].

95 On the appellant's approach to s 3(f), the words "maintenance of or repairs to" in s 3(1)(a) must be construed subject to the exception in s 3(f). Thus, on this basis, the appellant contended that if a company was "substantially engaged" in the construction industry solely on the footing they perform maintenance work of a routine or minor nature, the exception in par (f) would have no practical effect.

96 I do not accept this is the approach to interpreting the exclusion in s 3(f) to be preferred. There is no basis to exclude maintenance work of a routine or minor nature from the meaning of "maintenance of or repairs to" in the first part of the definition in s 3(1)(a). The language of s 3(f) ends with the words "who is not substantially engaged in the industry described in this interpretation", being an employer who does not employ employees substantially engaged in the work set out in s 3(1)(a), (b) and (c). The question to be asked is whether, in a particular case, an employer is substantially engaged in the construction industry, as set out in the definition. The answer to this question will depend on whether the definition of "employer" in s 3(1) is met. If the work done for example, is maintenance of or repairs to buildings or plant or equipment otherwise set out in s 3(1)(a), and that is the substance of the work that the employer performs, then s 3(f) could not be enlivened.

97 I consider that the example cited by the respondent in referring to the decision of the Commission in Court Session in ***Positron***, illustrates the intended operation of s 3(f). At 3064 - 3065, Martin C (Kennedy and Parks CC agreeing), considered that an example of the operation of this exclusion would be where a retail employer had its regular maintenance employees perform work, such as the remodeling of a showroom. The employer in that example would be engaged in an industry (i.e. the retail industry) far removed from the construction industry, but the work of the employees could fit the description of "maintenance work of a routine or minor nature". Similarly, is the example referred to by Ipp J in ***Aust-Amec***, set out above, of an employer as a University. If one substituted instead of bricklaying, some routine maintenance to a building or plant, this would also fall within the exclusion in s 3(f), as it would be undertaken by an employer "not substantially engaged in the industry described in this interpretation".

98 I am therefore not persuaded this ground is made out.

Ground 3(b)

99 This ground contends that the work involving "maintenance or repairs of a routine or minor nature" is not caught within the meaning of "maintenance" in the first part of the definition of construction industry in s 3(1)(a). The appellant submitted that when read with the exclusion in s 3(f), this is the correct construction and the learned Chief Commissioner should have found accordingly. This ground brings in for consideration par 5 of the respondent's notice of contention.

100 The appellant referred to the learned Chief Commissioner's conclusions at [136] - [137] of her reasons. At [136] she concluded that:

> 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 [sic] 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.

101 The appellant submitted this conclusion resulted in two errors. The first was said to be that it perpetuates the erroneous conclusions reached by the Commission as to the meaning of "site" and "maintenance and repairs", as considered in grounds 2(b) and (c) above. Second, and as also contended in ground 3(a) above, the approach taken by the learned Chief Commissioner renders the exception in par (f) nugatory. This was so, according to the appellant, because if an employer was in the construction industry solely because they perform maintenance or repair work of a routine or minor nature, then the exclusion in par (f) would have no effective operation. This supports, on the appellant's argument, the need to read s 3(1)(a) in referring to "maintenance of or repairs to", as being subject to the exclusion in par (f), unless the employer is *otherwise* engaged in the construction industry. The appellant cited the example of a company engaged in building and labour services on a construction site, to support its contention. If that company also engaged in some minor maintenance work, such as scaffolding or electrical work, then it would not be excluded by par (f) from the construction industry, because it would otherwise be substantially engaged in the industry.

102 The respondent objected to this approach. It submitted that the legislature's use of the exclusion in par (f), did not indicate an intention to exclude all maintenance work of a routine or minor nature. Rather, only such work if undertaken by an employer not substantially engaged in the construction industry. The respondent

distinguished between par (f) and the exclusions in pars (d) and (e) and submitted that unlike the unqualified exclusions in those two pars, par (f) does not exclude all such maintenance work. It is qualified. There is no basis to read into par (f), the word "otherwise", or words into the phrase "maintenance of or repairs to" in s 3(1)(a), which was the import of the appellant's submissions.

103 Whilst it was not entirely clear from the appellant's written submissions, if the thrust of its argument is that the words used in the first part of the definition in s 3(1)(a) of "maintenance of or repairs to" should be read as excluding work of a "routine or minor nature", then as I have mentioned above at par 96, there is no warrant to read the definition in this way. There is no reason to give the words used in s 3(1)(a), referring to the activities to be performed on the works following in the definition in sub-pars (i) - (xviii), other than their ordinary and natural meaning. The words are not qualified and do not suggest that they mean other than *all* maintenance or repair work, regardless of whether it could be classified as major, minor, routine or not routine.

104 In discussing ground 3(a) above, a focus, if not the focus of the exclusion in s 3(f), is whether the employer is or is not substantially engaged in the construction industry, as that is defined in the definition in s 3(1)(a) to (c) of the Act. The Parliament has not sought to exclude all maintenance or repair work of a routine or minor nature, because this is not what par (f) says. If it were intended to do so, the exclusion would have been easily expressed, in the same terms as the exclusions in pars (d) and (e) for example, as the respondent submitted. In my view, par (f) is intended to exclude those employers who may be said to be only partially engaged in the construction industry, because they are substantially engaged in another industry: ***Positron*** at 3064 - 3065; ***Healy*** at 562.

105 An effect of the appellant's argument, if accepted, would be that an employer, substantially engaged in the industry of renovations and alterations for example, one activity specified in the first part of the definition in s 3(1)(a), could perform maintenance or repair work of a routine or minor nature and be in the construction industry. However, an employer engaged in the industry of maintenance and repairs of a routine nature, an activity also covered, would not be in the construction industry. I do not consider the appellant's construction of the exclusion in par (f), read with s 3(1)(a) of the Act, is the preferred approach.

106 This ground is not made out.

Grounds 4(a) and (b)

107 These two grounds can be conveniently dealt with together. First, it was contended by the appellant that the learned Chief Commissioner was in error by

concluding that the appellant's employees were engaged in the construction industry, and failed to have proper regard to ***Aust-Amec***, to the effect that despite such a finding, the employer may not be in the construction industry. Second, this error occurred because on the unchallenged evidence, the appellant was engaged in the industry of the "provision of industrial maintenance services".

108 The appellant submitted that although s 30(1) of the Act has now been amended to remove the requirement for an employer to be "in" the construction industry, to be registered, ***Aust-Amec*** remains as authority for the proposition that determining whether employees are "in the construction industry" in the definition of "employer" in s 3(1) of the Act, still requires consideration of whether the employer itself is also engaged in the construction industry. This was said to be based on the contention that the definition of "employer" involves an act undertaken by an employer, to engage a person as an employee, and that act must be undertaken "in the construction industry".

109 Based on the evidence before the Commission at first instance, the appellant contended that it was open to find and the learned Chief Commissioner should have found, that the appellant is engaged in the industry of "industrial maintenance", similar to one plaintiff in ***Aust-Amec*** being found by Ipp J, to have been in "the service industry relating to the mining industry".

110 I do not consider these submissions are correct.

111 First, whilst said to be reliant upon the decision of Ipp J in ***Aust-Amec***, the submissions of the appellant on these grounds contradict his Honour's view as to the meaning of "employer" in s 3(1), the first part of which in (a), remains unchanged since the decision. It is clear from his Honour's analysis of the Act, as to the status of an "employer" as then (and as still now) defined and an "employee" as then (and as still now) defined, there is a distinction between an employer who may be in the construction industry and one not in the construction industry. The distinction being that even if an employer is of itself not engaged in the construction industry, its employees may be so, if the substance of the work they perform falls within the definition of "construction industry" in s 3(1). This was the distinction referred to by the learned Chief Commissioner at [58] – [59] of her reasons.

112 As noted by the respondent in its submissions, Ipp J in ***Aust-Amec***, dealt with this distinction at 422, in citing the bricklayer example, set out above, at par 81.

113 Importantly also, Ipp J in ***Aust-Amec*** concluded on the evidence, that the then requirement on an employer to register under s 30(1), that it be "in" the construction industry, was not met because none of the plaintiffs' work, in non-destructive testing, was "maintenance" as referred to in the definition of "construction industry" in s 3(1) of the Act. It was on this basis that the plaintiffs

themselves were not engaged "in" the construction industry. Having so concluded, his Honour then had to consider, as the next step, given the definition of "employer" in s 3(1), focusing as it does on whether the employees themselves are engaged in the construction industry, whether the plaintiff's employees could be so described. At 433 Ipp J posed the question in this way:

> In the circumstances, the plaintiff's entitlement to the orders claimed depends on whether any of their employees are employees "in the construction industry"…Whether a person is an employee in the construction industry depends not only on whether some of the work carried out by him or her is in the construction industry, but, also, on the degree to which that work forms part of the overall duties of the person concerned.

114 It is clear from ***Aust-Amec*** that Ipp J recognised the bifurcation in the definitions of both "employee" and "employer" under the Act. In considering, for the purposes of s 3(1), whether an employee is engaged in the construction industry, so the employer will have to make contributions to the respondent on their behalf, does not necessitate the conclusion that their employer must also be engaged in the construction industry, under the Act.

115 And when considering the definition of "employer" in s 3(1), his Honour noted also at 422, that the exclusion from the definition of "a Minister, authority or council prescribed…", which remains in the definition, supported his construction of the definition of "employer". It did so because in Ipp J's opinion, but for this exclusion, such persons would be within the scope of the definition, although ordinarily, they would not be regarded as being in the construction industry. This supports the conclusions that the learned Chief Commissioner reached at [58]-[59], and that the characterisation of the industry of the employer, contrary to the appellant's submissions, is not a factor in determining whether particular employees are in the construction industry.

116 Finally, the conclusion of Ipp J at 422, that the plaintiffs were engaged in a "service industry to the construction industry", was based on his consideration of the facts, which stand in contrast to the facts in this case. In ***Aust-Amec***, the plaintiffs' non-destructive testing was held not to be "maintenance", as set out in the definition of construction industry, in s 3(1) of the Act.

117 Therefore, these grounds of appeal are not made out.

Conclusions

118 Despite the upholding of appeal ground 2(f), which is not of sufficient moment to disturb the principal conclusions reached by the learned Chief Commissioner, I am not persuaded that the appeal has been made out. I would dismiss the appeal.

MATTHEWS C:

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

WALKINGTON C:

120 I also have read the draft reasons of the Senior Commissioner. I too, agree with those reasons and have nothing further to add.