WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00210
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 16 MARCH 2016
DELIVERED	**:**	WEDNESDAY, 13 APRIL 2016
FILE NO.	**:**	M 117 OF 2015
BETWEEN	**:**	MARTIN VENIER **CLAIMANT** AND BAKER HUGHES AUSTRALIA PTY LTD (ABN 20 004 752 050) **RESPONDENT**

Catchwords	**:**	Long service leave – Preliminary issue - Whether claimant's prior employment with related bodies corporate and his employment with the respondent is 'continuous employment with one and the same employer' for the purpose of calculating long service leave entitlements under s 8(1) of the *Long Service Leave Act 1958* (WA).
Legislation	**:**	*Long Service Leave Act 1958* *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* *Corporations Act 2001* (Cth) *Interpretation Act 1984* *Tobacco Products Control Act 2006* *Long Service Leave Amendment Act 1973* *Industrial Arbitration Act 1912* *Labour Relations Legislation Amendment Bill 2006* *Companies Act 1961*
Case(s) referred to in reasons	**:**	***R v Young*** [1999] NSWCCA 166 ***Taylor v Owners – Strata Plan No 11564 and Ors*** [2014] HCA 9 ***The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd (No 2)*** [2014] WASC 345 ***Marshall v Watson*** [1972] HCA 27

Van Heerden v Hawkins
[2016] WASCA 42
The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd
[2016] WASCA 36

Result	**:**	Preliminary issue resolved

Representation:

Claimant	**:**	Mr M Cox (counsel) as instructed by MDC Legal
Respondent	**:**	Mr A Sharpe (counsel) as instructed by K & L Gates

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REASONS FOR DECISION

Preliminary Issue

1 The parties have asked that a preliminary issue be determined as is permitted by reg 7(1) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005. In that regard they seek the answer to the following question:

> *Is the applicant's* (claimant's) *prior employment with related body corporates (as that term is defined in section 50 of the Corporations Act (Cth)) of the respondent, and his subsequent employment with the respondent, 'continuous employment with one and the same employer' for the purposes of calculating long service leave entitlements under section 8(1) of the Long Service Leave Act 1958 (WA)*?

Background

2 Before setting out the facts which have been agreed for the purpose of determining the preliminary issue it will be useful to consider other background information.

3 Mr Martin Venier (the claimant) asserts that he was employed by "Baker Hughes" or its related body corporates from 28 November 1988 until 16 July 2015.

4 He says that on 28 November 1988 whilst in the United Kingdom, he began employment with Teleco Oilfield Services. In 1992 Teleco Oilfield Services became a division of Baker Hughes but that did not interrupt the continuity of his service. In December 1996, the claimant was promoted to a position within INTEQ Drilling Services, a division of Baker Hughes. Then on 29 July 2005 he assumed a different role within a Baker Hughes' related body corporate, namely International Professional Resources, S, de R.L. (IPRS). Subsequently, on 7 May 2006 the claimant was promoted within IPRS and relocated to China. On 30 July 2008 he was transferred in his employment to Baker Hughes Australia Pty Ltd (the respondent).

5 The claimant entered into a written employment agreement with the respondent prior to commencing with it. Clause 12 of that employment agreement provided that he was entitled to long service leave in accordance with the legislation that was applicable in Western Australia.

6 Sections 8(1) and 8(2) of the *Long Service Leave Act 1958* (WA) (LSL Act) provide an entitlement to 8 2/3 weeks of long service leave after 10 years' continuous employment with one and the same employer, and 4 1/3 weeks of long service leave for each five years' continuous service completed thereafter. Section 8(3) of the LSL Act provides that an employee who has, since commencement, completed at least seven years of continuous

employment, and whose employment is terminated by reason other than death or serious misconduct, is entitled to a proportionate amount of long service leave on the basis of 8 2/3 weeks for 10 years of such continuous employment.

7 The claimant says that he is entitled to 23.01 weeks' long service leave, not taken or paid out, on the basis of 26.64 years' continuous service with the respondent and/or its related body corporates.

8 The respondent denies that the claimant is entitled to long service leave and says that he has not met the threshold requirement of seven years of continuous service with the respondent. It says that the claimant's previous service with various Baker Hughes entities prior to 30 July 2008 cannot be considered for the purposes of calculating long service leave entitlements.

Agreed Facts for the Purpose of Determining the Preliminary Issue

9 For the purpose of determining the preliminary issue, the parties are agreed on the following facts:

1. The claimant entered into an employment agreement with the respondent on 30 July 2008 and had commenced employment by or about 2 November 2008.
2. The termination of the claimant's employment with the respondent was effected on 16 July 2015.
3. The claimant's employment with the respondent was for a term of less than seven years.
4. The respondent is a related body corporate (as defined in s 50 of the *Corporations Act 2001* (Cth)) (Corporations Act) of Baker Hughes Incorporated, a company incorporated in the United States of America.

Construction of Section 8(1) of the LSL Act

10 The determination of the preliminary issue will turn on the meaning given to the phrase *one and the same employer* in s 8(1) of the LSL Act.

11 Section 8(1) of the LSL Act provides:

> *An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee is deemed pursuant to section 6(4) to be one and the same employer.*

12 The claimant contends that a *related body corporate* (as defined in s 50 of the Corporations Act) of an employer comes within the meaning of one and the same employer in s 8(1) of the LSL Act. The respondent maintains that the suggested construction is untenable.

Claimant's Contention

13 The phrase *one and the same employer* is not defined in the LSL Act.

14 'One' is defined in the Macquarie Dictionary as 'being a single unit or individual rather than two or more'. 'Same' is defined as 'being one or identical, though having different names, aspects, etc.' As a matter of ordinary language the phrase 'one and the same' read together contemplates more than the singular but requires commonality. This construction is evidently intended in the LSL Act given that 'employer' is defined in s 4 of the LSL Act to include the plurals "*persons, firms, companies and corporations".*

15 The definition is framed in the plural which is consistent with a construction of the phrase 'one and the same employer' that contemplates employment with related entities.

16 Even if a literal construction of the phrase *one and the same employer* per se does not mean employment with related entities, literalism no longer rules the day because a purposive approach to interpretation prevails.

17 A construction of the LSL Act that promotes its purpose or object is to be preferred to the construction that does not.

18 In ***R v Young*** [1999] NSWCCA 166 Spigelman CJ said at [15]:

> *If a court can construe the words actually used by the Parliament to carry into effect the Parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the Court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.*

19 The court should give the phrase *one and the same employer* an ambulatory operation so that it includes employment with related entities, in fulfilment of Parliament's intent and purpose in creating and amending the LSL Act. Doing so requires neither an unreasonable nor an unnatural interpretation of the phrase.

20 The LSL Act is beneficial legislation which permits a liberal interpretation, particularly having regard to the purpose of the LSL Act, and in light of remedial amendments made to it in 2006 which had the effect of extending benefits.

Respondent's Position

21 The phrase *one and the same employer* is emphatic statutory language. The use of either 'one employer' or the 'same employer' would have achieved the purpose of conveying that terms of employment with different employers could not be aggregated for the purpose of calculating long service leave entitlements. When a statute employs words of emphasis to impose a limit on the scope of an expression, then the words of emphasis should be given effect.

22 The use of such emphatic language tells very strongly against an interpretation of this phrase in which employment by different legal entities is to be recognised as being *one and the same employer*. The emphatic limitation in the expression *one and the same employer* is inconsistent with the claimant's contention that employment by a related body corporate is to be included in calculating long service leave entitlements.

23 Section 8(1) of the LSL Act, by reference to s 6(4) of that Act, already identifies the circumstance in which employment by more than one employer is deemed to be employment by one and the same employer; that is in the case of the transmission of a business. The plurality in the definition of employer in s 4 of the LSL Act can relate to that circumstance only and not the wider scenario advanced by the claimant.

24 The claimant's construction of the LSL Act requires words to be read into that Act which are not there.

25 Section 4 of the LSL Act defines an employer as follows:

> ***employer*** *includes-*

> *(a) persons, firms, companies and corporations; and*
>
> *(b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees*.

26 The claimant is either seeking to read words into the definition of 'employer', as defined by s 4 of the LSL Act, or to read words into s 8 of the LSL Act so that the concept of employment of 'a related body corporate' of that employer as defined in s 50 of the Corporations Act becomes part of the LSL Act.

27 In ***Taylor v Owners – Strata Plan No 11564 and Ors*** [2014] HCA 9 the majority judgment of French CJ, Crennan and Bell JJ stated:

> *The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".*

28 As Edelman J observed in reviewing that judgment in ***The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd*** **(No 2)** [2014] WASC 345 [143]:

> *…the more substantial the words to be implied the more difficult it will be to reach the conclusion that the words used by Parliament manifest an intention to include the words omitted.*

29 The majority's quotation of 'gaps disclosed in legislation' was taken from the following passage of Stephen J (with whom Menzies J agreed) in ***Marshall v Watson*** [1972] HCA 27:

> *Granted that there may seem to be lacking in the legislation powers which it might be thought the Legislature would have done well to include, it is no power of the judicial function to fill gaps disclosed in legislation…*

30 Even if it was thought to be an oversight on the part of Parliament to not include employment by a related body corporate in the calculation of long service leave entitlements (which is not conceded), it is not the role of the courts to correct such oversights.

31 Although long service leave legislation in other states and territories provide that employment by a related body corporate is to be specifically included in the calculation of long service leave entitlements, there is no consistency. Queensland and the Northern Territory incorporate the definition of 'related body corporate' from s 50 of the Corporations Act whereas the Victorian and South Australian Acts adopt a broader definition.

32 Even if the absence of a reference to related bodies corporate in the LSL Act was an oversight, it is not possible to determine the alternative or additional words the Western Australian Parliament would have used. In the circumstances, it is not appropriate to imply words concerning related bodies corporate into the LSL Act.

33 Further, the definition of 'employer' not only includes companies and corporations, but also persons, firms and public authorities. The interpretation advanced by the claimant only applies to employers who are corporations but does not explain how the phrase is to be interpreted when the employer is not a corporation. There is no justification evident in the legislation which gives an extended meaning to 'employer' when the employer is a corporation.

34 The claimant's construction requires an irregular interpretation of the legislation because he seeks to interpret the phrase *one and the same employer* in the LSL Act by reference to the

definition of the term 'related body corporate' in an Act of the Commonwealth Parliament. The LSL Act makes no reference to the Corporations Act.

35 Further, as well as 'related body corporate', the Corporations Act also defines the term 'associated entity' which includes entities which are associated in other ways, such as by control. The text of the LSL Act provides no assistance in choosing between the definitions. In the circumstances, choosing one definition over another would amount to an arbitrary approach to the interpretation of s 8 of the LSL Act.

36 Additionally, although the LSL Act is beneficial legislation which attracts a liberal interpretation, it must nevertheless be restrained within the confines of the actual language used. A court should not give a provision a construction which is unreasonable or unnatural.

37 In the LSL Act the Parliament of Western Australia determined that long service leave was to be paid to employees for continuous employment of a specified length with *one and the same employer*. Those words were chosen by the Parliament to limit when an entitlement arises. Those words should be interpreted according to their terms. Even though the LSL Act is beneficial in nature, the construction of *one and the same employer* should not be such as to override or ignore the limitation expressed in those words.

38 The task of statutory construction begins and ends with the text (see ***Van Heerden v Hawkins*** [2016] WASCA 42 [93], [173]). Section 18 of the *Interpretation Act 1984* (Interpretation Act) requires a court to construe a written law and not to rewrite it by reference to its purpose or objects (see ***Van Heerden*** [100], [181]).

39 The phrase *one and the same employer* is unambiguous. Even if the term 'employer' is defined by reference to plurals it does not mean that the phrase *one and the same employer* can be read as meaning multiple employers. The word 'one' cannot mean more than one.

40 Given that the text is clear and unambiguous it is not permissible to use extrinsic materials to alter the meaning of the LSL Act to bring it into line with other states and territories. If the law is to change, it must be by a parliamentary amendment.

41 Reading words into a statute is permissible 'in the case of a simple grammatical drafting error' but not to fill 'gaps disclosed in legislation' or to make an insertion which is 'too big or too much at variance' with the language in fact used by the legislature (see ***The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd*** [2016] WASCA 36 [127]).

42 It would be inconsistent with the principle to read into the LSL Act the concept of a 'related body corporate' to extend the scope of the phrase *one and the same employer*.

Determination

43 The basic principles of statutory construction are that:

1) statutory construction must begin with a consideration of the statutory text;

2) context and purpose are also important as surer guides to meaning; and

3) the modern approach to statutory interpretation uses 'context' in its widest sense.

44 The statutory text is the starting point.

45 Section 8(1) of the LSL Act provides:

An employee is entitled…to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.

46 Sections 6(4) and 6(5) of the LSL Act provide:

*(4) Where a business has,….been transmitted from an employer (herein called **the transmittor**) to another employer (herein called **the transmittee**) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee- the period of the continuous employment which the employee has had with the transmittor (including any such employment with any prior transmittor) shall be deemed to be employment of the employee with the transmittee.*

(5) In subsection (4)-

***transmission** includes transfer, conveyance, assignment or succession, whether voluntary or by agreement or by operation of law, and **transmitted** has a corresponding meaning.*

47 The LSL Act does not define *one and the same employer*, but it does, in s 4. define 'employer' to include:

(a) persons, firms, companies, and corporations.

48 It is of considerable significance that the definition of employer is framed in plurals. It could quite easily have been framed in the singular but was not. That is because it contemplates more than one. There is no other viable explanation.

49 The respondent says that the plurality in the definition of employer in s 4 of the LSL Act can only relate to the circumstance of transmission and not to the wider situation advanced by the claimant.

50 I observe however, that sections 6(4) and 6(5) of the LSL Act are couched in the singular. The employer in those provisions includes any number of previous employers in the chain of transmission. That being the case, there would have been no need for the term employer to have been defined as it has. The circumstance of transmission does not require plurality in the definition of employer.

51 It follows that the phrase *one and same employer* is not as clear and unambiguous as is suggested. What is meant by it having regard to the definition of employer is obscure and requires construction. Further, the phrase is not so definitive as to import the limitations which the respondent asserts.

52 It will be necessary to construe the term having regard to context and purpose. The objects of the LSL Act must be considered and resort may be had to its historical context in order to achieve that end.

53 A liberal construction is necessary to give the words used an ambulatory operation. That process is neither unreasonable nor unnatural given that the LSL Act is beneficial legislation. In that regard, such legislation is to be distinguished from the *Tobacco Products Control Act 2006* considered in ***Van Heerden***.

54 Resort may be had to extrinsic material which assists in the construction process. Such is permitted by s 19 of the Interpretation Act. The phrase *one and the same employer* must be construed according to its true specific intent and meaning (s 8 of the Interpretation Act).

55 The LSL Act commenced operation on 24 December 1958. Section 8(1) of the LSL Act has, other than for a stylistic change, remained unchanged since then. However, the current meaning of employer is different to the meaning given to that term when the LSL Act was first enacted.

56 In 1973, s 8A (now repealed) was inserted into the LSL Act by the *Long Service Leave Amendment Act 1973* (LSLA Act). It provided:

> *8A. Notwithstanding any other provision in this Act in the event of an agreement between the Western Australian Employers' Federation (Incorporated) and the Trades and Labor Council of Western Australia or a determination of the Commission in Court Session varying from time to time any of the provisions for qualifications or entitlement to long service leave as contained in volume fifty-two of the Western Australian Industrial Gazette at pages sixteen to twenty-one, both inclusive, for the majority of awards which those provisions have been incorporated in and form part of, the qualifications and entitlement of employees to long service leave shall forthwith thereafter be varied accordingly.*

57 On 15 December 1977, the Commission in Court in Session of the Western Australian Industrial Commission (as it was then known), under s 94A of the (now repealed) *Industrial Arbitration Act 1912* (WA), made the Long Service Leave General Order (1978) 58 WAIG 120 (General Order) varying awards and industrial agreements to incorporate new long service leave provisions.

58 The General Order expressly stated an intention that service with related entities be considered as service with *one and the same employer*. Order 4 of the General Order states:

> *Where, over a continuous period, a worker has been employed by two or more companies each of which is a related company within the meaning of Section 6 of the Companies Act 1961 the period of the continuous service which the worker has had with each of those companies shall be deemed to be service of the worker with the company by whom he is last employed.*

59 Section 6 of the *Companies Act 1961* (WA) (Companies Act) defined when a corporation was deemed to be a subsidiary of another and when corporations were deemed to be related. That definition was adopted for the purpose of order 4 of the General Order.

60 During the whole period of the operation of the General Order from 1977 to 2006, at which time order 4 applied, the original phrase in s 8 of the LSL Act of *one and the same employer* was constant. An employee's service with related entities was deemed continuous service with *one and the same employer*.

61 Section 8A of the LSL Act was repealed in 2006 and the General Order ceased to have effect. The stated intention of the repeal was to consolidate and incorporate all long service leave entitlements under the LSL Act, without loss of any entitlements to employees.

62 In the Explanatory Memorandum to its repealing legislation it was said, at cl 247:

> *It is important that, with the abolition of the LSL General Order, employees are not disadvantaged if their LSL entitlement becomes governed by the LSL Act rather than the LSL General Order.*

63 Parliament's intention in repealing the General Order was to remove the duplication of long service leave entitlements in various instruments and consolidate them and the General Order into the LSL Act. The Explanatory Memorandum states at cl 271:

> *The LSL Act and the LSL General Order do not differ substantially in the entitlements that they offer. However, the minor differences can be confusing for employers and employees alike. This duplication of LSL instruments is unnecessary and cumbersome. An independent review of Western Australian industrial relations legislation recommended that the LSL Act and the LSL General Order be consolidated to remedy this duplication of instruments.*

64 As the terms of the General Order were to be incorporated into the LSL Act, Parliament considered the continued operation of s 8A of the LSLA Act to be unnecessary.

65 The fact that Parliament did not amend the LSL Act to expressly incorporate order 4 of the General Order is attributable to the term *one and the same employer* including related companies. Otherwise, the effect of the amendment would have left some employees worse off. Such an outcome is inconsistent with Parliament's intention, reflected in the second reading of the *Labour Relations Legislation Amendment Bill 2006,* where on 24 May 2006 it was stated:

> *The bill will amend the Long Service Leave Act 1958 and the Construction Industry Portable Long Service Leave Act 1985 to improve long service leave entitlements. Private sector long service leave entitlements in Western Australia lag behind those in all other states and territories.*

66 I accept that in consolidating long service leave entitlements and incorporating the General Order into the LSL Act, Parliament had the intention that service with related entities be considered service with *one and the same employer* under the LSL Act, just as it did in the General Order.

67 Denying long service leave to long serving employees of related entities is inconsistent with the historical application of the LSL Act and is inconsistent with the stated purpose of the amending legislation.

68 In any event, even if it is the case that the LSL Act lacks the words required to give effect to the claimant's contentions, such is an inadvertent oversight. The fact that it is an oversight is explicable by the following:

1. the General Order provided coverage of service with related entities from 1977 until 2006; and
2. Parliament's intention in 2006 was to consolidate all long service leave entitlements without disadvantaging employees whose long service leave entitlements had been governed by the General Order; and
3. the lack of transitional provisions dealing with the loss of entitlement for those who had accumulated continuous service working for related entities.

69 In the circumstances, it will be permissible to read in the words that the Parliament would have used to overcome the omission, provided that there is certainty about the words.

70 In that regard it is possible to state with certainty the words Parliament would have used. In order to overcome the inadvertent omission Parliament would have used the words 'related company', as expressed in the General Order

71 The reference in the General Order to the Companies Act is deemed to include a reference to that law as amended (see s 16 of the Interpretation Act). The Companies Act was repealed and superseded by the Corporations Act. Although the Companies Act was not amended but rather replaced by a Commonwealth Act, the same principle applies. Therefore, defining 'related body corporate' by reference to s 50 of the Corporations Act is entirely appropriate.

72 The reference in the General Order to related company within the meaning of s 6 of the Companies Act restricts the definition to the narrower 'related body corporate' in s 50 of Corporations Act as opposed to the much wider term 'associated entity' contained in s 50AAD of the same Act.

73 The language of s 4 and s 8 of the LSL Act, having regard to the history and purpose of the LSL Act, requires the phrase *one and the same employer* to be construed to contemplate employment with related body corporates. Such is not inconsistent with the definition of employer in the LSL Act because persons, firms and public authorities remain within the definition unaffected.

Answer

74 The claimant's prior employment with related bodies corporate of the respondent (as that term is defined in section 50 of the Corporations Act), and his subsequent employment with the respondent was continuous employment with *one and the same employer* for the purposes of calculating long service leave entitlements under section 8(1) of the LSL Act.

G. CICCHINI

INDUSTRIAL MAGISTRATE