TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Quill v Statewide Independent Wholesalers Ltd [2023] TASIC 35

PARTIES: Daniel Quill (Applicant)

Statewide Independent Wholesalers Ltd (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T14973 of 2022

DATE REASONS ISSUED: 4 October 2023

MEMBER: Deputy President Ellis

CATCHWORDS: Industrial dispute – dispute relating to long service leave - deemed transmission of business - meaning of business – labour-hire employment not considered same business as wholesale distributor - continuous service - application dismissed.

Matter determined on the papers.

REPRESENTATION:

Applicant: J Katarzynski

Respondent: A Wells

DANIEL QUILL v STATEWIDE INDEPENDENT WHOLESALERS LTD

REASONS FOR DECISION **4 OCTOBER 2023**

[1] The applicant is permanently employed with Statewide Independent Wholesalers Ltd (the respondent) ('SIW') and commenced in August 2004. A dispute has arisen as to whether the applicant's work with the labour hire firm, Skilled Engineering ('SE'), at the respondent's site between 2001 and 2004 counts towards his continuous employment with the respondent for the purposes of determining his long service leave entitlement.

[2] The applicant seeks a determination as to whether there was a deemed transmission of business between the former employer, SE and his current employer on 9 August 2004, when he commenced employment with the respondent, pursuant to s 2(2) of the *Long Service Leave Act 1976* (Tas) ('the Act').

Background

[3] The applicant was initially employed with Skilled Engineering, a labour hire company where he was outsourced to work as a Storeperson at the Prospect site of the respondent. There was no crystallisation of long service leave with this employer as he only worked a total of 3.36 years.

[4] The applicant's employment history is summarised in the table below:

Employment Period	**Time Worked**	**Employer**	**Nature of employment**	**Role Undertaken**
22 January 2001 – 14 June 2002	16 Months, 24 days, 1.39 years	Skilled Engineering Pty Ltd	Casual, working no less that 32 hours in each consecutive 4 week period	Storeperson
21 August 2002 - 8 August 2004	23 Months, 19 days, 1.96 years	Skilled Engineering Pty Ltd	Casual, working no less that 32 hours in each consecutive 4 week period	Storeperson
9 August 2004 - Present	19 Years (as of 9/08/2023)	Statewide Independent Wholesalers Limited	Permanent	Storeperson
9 August 2014	LSL taken: 19 January 2015 to 14 February 2016 8 2/3 weeks	Statewide Independent Wholesalers Limited	First tranche of Long Service Leave used	N/A
~9 August 2019	LSL taken: 28 December 2020 to 24 January 2021 3.6 weeks	Statewide Independent Wholesalers Limited	Second tranche of Long Service Leave used	N/A

Relevant Legislation

[5] At the outset, it is important to lay out the legislation governing the applicant's long service leave entitlements.

[6] The *Long Service Leave Act 1976* (Tas) (the Act) defines a business as :

> **business** includes any trade, process, profession, or occupation, and any part thereof;

and relevantly to this case, provides interpretation of the deeming of transmission of business in s 2(2) as:

> "Where an employee is employed in or about any place in the business of an employer and the employment of the employee with that employer is terminated, and, not later than the expiration of a period of 2 months from the date on which that employment was so terminated, the employee becomes employed in or about that place in the business of some other employer, the business of the employer by whom his employment has been terminated shall, for the purposes of this Act, be deemed to have been transmitted to the employer by whom he so becomes employed if the business in which he so becomes employed is of the same, or substantially the same, kind as the business in which he was employed in the employment that has terminated."

[7] The parties have identified the four conditions set out in s 2(2) which are required to deem a transmission of business for the purpose of the application of the provision and calculation of long service leave. The required conditions for deeming the transmission of business to the employer by whom he so became employed, are as follows:

a. Where an employee is employed in or about any place in the business of an employer; and
b. the employment of the employee is terminated; and
c. not later than the expiration of two months from the date on which that employment was so terminated the employee becomes employed in or about that place in the business of some other employer; and
d. the business in which he so becomes employed is of the same, or substantially the same, kind as the business in which he was employed in the employment what has terminated.

[8] It is agreed the employee was employed by SE and he resigned, terminating his employment on the 8 August 2004. One day later, on 9 August, he became employed in or about the business of some other employer being SIW, meeting the time criteria of within two months.

[9] The dispute arises in the application of the fourth criteria of whether the business where he became employed, being SIW, is the same or substantially the same kind as the preceding business he was employed, when he terminated his employment. If found to be the same or substantially the same, there will be a deemed transmission of business resulting in his employment with SE counted towards his LSL entitlement.

[10] If deemed a transmission of business has occurred, the respondent has conceded the entire period of employment with Skilled between the 2001-2004 period will be accepted as

continuous service, resulting in an entitlement to a further period of LSL upon his completion of 16.64 years of service with SIW.

[11] The applicant worked over 20 hours per week and regularly worked close to or in excess of full-time hours, despite being employed on a casual basis by SE. His service for SE met the criteria for continuous employment despite the break in service, which was under three months.

[12] For clarity, the Act provides the nature of continuous employment in section 5 as set out below:[1]

> "**5. Nature of continuous employment**
>
> (1) For the purposes of this Act, employment (whether before or after the commencement of this Act) shall be deemed to be continuous notwithstanding –
>
> (a) the taking of any annual leave or long service leave;
>
> (b) any absence from work of the employee on a public holiday in accordance with the terms of his employment;
>
> (c) any absence from work on account of illness or injury that has been certified as necessary by a medical practitioner;
>
> (ca) the taking of any maternity leave by the employee in accordance with the terms of her employment;
>
> (d) any interruption or ending of the employment by the employer, if the interruption or ending is made with the intention of avoiding obligations in respect of long service leave or annual leave;
>
> (e) any interruption arising directly or indirectly from an industrial dispute, but only if the employee returns to work in accordance with the terms of settlement of the dispute;
>
> (f) any absence from work, by leave of the employer, for the purpose of the employee attending a meeting of a committee established under the Training and Workforce Development Act 2013 ;
>
> (g) the termination of the employment of an employee for any reason other than on account of slackness of trade, but only if he is re-employed by the same employer within 3 months after the date of that termination;
>
> (h) the standing down for a period not exceeding 6 months of an employee on account of slackness of trade, or the termination of employment of an employee who returns to work within a period not exceeding 6 months after the termination of his employment on account of slackness of trade, but only if the return to work by the employee is made within 14 days after –
>
> (i) receiving from the employer an offer of re-employment; or

[1] Emphasis added.

(ii) the date on which the employer posts to the employee, by registered letter addressed to the employee at his last-known address, a notice to resume work;
referred to in subparagraph (ii) , whether as a party to any proceedings or as a witness or otherwise; or(i) any absence from work of the employee for the purpose of –

(i) complying with a summons to appear as a juror;

(ii) appearing to give evidence before any court or body before which or person before whom persons may by law be required to appear to give evidence; or

(iii) complying with any requirement or exercising any right to appear before such a court, body, or person as is

(j) any other absence of the employee from work by leave of the employer.

(2) In calculating the period of continuous employment of an employee, an interruption or absence of any of the kinds to which paragraphs (a) , (b) , (c) , (d) , (f) , and (i) of subsection (1) relate shall be counted as part of the period of his employment, but an interruption or absence of any of the kinds to which paragraphs (ca) , (e) , (g) , (h) , and (j) of that subsection relate shall not be counted as part of the period of his employment.

(3) Without limiting subsections (1) and (2) , where an employee is regularly employed by an employer for not less than 32 hours in each consecutive period of 4 weeks, the employee shall be deemed for the purposes of this Act to be continuously employed by the employer, notwithstanding –

(a) that any of the employment is not full-time employment;

(b) that the employee was so employed under 2 or more contracts of employment separately entered into;

(c) that, apart from this subsection, the employee would be regarded as being engaged in casual employment; or

(d) that the employee engaged in other employment during that period.

(4) Where a business is, whether before or after the commencement of this Act, transmitted from an employer (in this subsection referred to as "the transmittor") to another employer (in this subsection referred to as "the transmittee") and a person who at the time of the transmission was an employee of the transmittor in that business becomes an employee of the transmittee –

(a) the continuity of the employment of that employee shall be deemed not to have been broken by reason of the transmission; and

(b) the period of employment of the employee with the transmittee shall be deemed to include the period of his employment, and any period deemed to be a period of his employment, with the transmittor.

(5) Where an employee transfers from employment with a corporation to employment with a corporation associated with that corporation –

(a) the continuity of his employment shall be deemed not to have been broken by reason only of his so transferring; and

(b) the period of his employment with the corporation to employment with which he so transfers shall be deemed to include the period of his employment, and any period deemed to be a period of employment, with the corporation from employment with which he so transfers.

(6) For the purposes of subsection (5) a corporation shall be deemed to be associated with another corporation if those corporations are related to each other within the meaning of section 50 of the Corporations Act.

(7) Without prejudice to the provisions of subsection (6) , where –

(a) an employee is transferred from employment with one corporation to employment with another;

(b) the directors of each of those corporations are substantially the same or the corporations are under substantially the same management; and

(c) the employee believes on reasonable grounds that he has remained in employment with the same employer –
this Act has effect in relation to that transfer as if those corporations were associated corporations within the meaning of subsection (5) .

(8) In this section the expressions "corporation" and "director" have respectively the same meanings as they have for the purposes of the Corporations Act.

(9) Where the employment of an employee who is apprenticed to an employer has been continued by that employer upon or at any time within 3 months after the completion of the apprenticeship, the period of the apprenticeship shall be counted as part of the period of continuous employment of that employee with that employer.

(10) A period of service by an employee as a member of the naval, military, or air forces (other than as a member of the permanent force) of the Commonwealth shall be deemed to be employment with the employer by whom the employee was last employed before he commenced to serve as a member thereof.

(11) For the purposes of subsection (10) , in the case of an employee whose last employment was temporary employment during a stand down period the expression "employer by whom the employee was last employed" means the employer who stood down the employee.”

[13] The key issue for determination is whether there has been a deemed transmission of business on 9 August 2004 between the applicant’s former employer, Skilled Engineering and his current employer, Statewide Independent Wholesalers Ltd., by operation of s 2(2) of the Act.

The applicant's position

[14] The applicant submitted the interpretation of a provision in the Act must promote the purpose or object of the Act.[2]

[15] Relying on the High Court decision in *SZTAL v Immigration and Border Protection*[3] (SZTAL), context and purpose in addition to the text of the statue must be considered. In this case it was stated[4]:

> "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 regraded at this first stage and not at some later stage and it should be regarded in its widest sense."

[16] It was stated the context and purpose of s 2(2) is clear. It is a deeming provision setting up a "legal fiction" where it sets up a transmission of business between two employers, although there is no actual or commercial transaction between the two employers.

[17] In *Commonwealth v SCI Operations Pty Ltd*,[5] Kirby J stated, in respect to deeming provisions, that: "conventionally, a deeming provision, being inherently artificial, is confined to the achievement of the purpose for which Parliament has enacted it."[6]

[18] The applicant contests the purpose or work of s 2(2) is to effect a deemed transmission of business between a Putative Transmittor and Putative Transmittee, where the criteria are met. It is not, he argues, a mechanical provision. Rather, following SZTAL, the deeming provision must meet the purpose in the broader context of the Act.

[19] The applicant states the purpose of the provision is to extend the circumstances in which s 5(4) of the Act may operate to allow continuity of employment for LSL purposes. This is consistent with the broader purpose of the Act, the conferral of LSL after the required period of employment to employees in Tasmania. This is notwithstanding a change of employer after a deemed transmission of business.

[20] It was stated this extension in s 2(2) applied to s 5(4) to capture the situation where the employee remained employed in a place (or re-employed in that place within two months) but the identity of the employer changed without any commercial transmission of business taking place between the two employers.

[21] The words of s 2(2) must be considered in a way that best achieves this purpose. The applicant submitted that the word "business" has been defined in the Act, stating this definition gives a different meaning to its ordinary meaning. The Macquarie Dictionary, Eighth Edition defines "business" as "one's occupation, profession or trade; the sale of goods and services for the purpose of making a profit; a person, partnership, or corporation engaged in business; an established or going enterprise or concern, one's place of work…".

[22] The definition in the Act sets out the meaning of "business" as intended by legislature, as "includes any trade, process, profession, or occupation, and any part thereof;" It was

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[2] *Acts Interpretation Act 1931* (Tas), s 8A.
[3] [2017] HCA 34.
[4] Ibid [3].
[5] [1998] HCA 20.
[6] Ibid [95].

submitted the commonality of "trade", "profession" and "occupation" as used in this definition is that they all refer to one's occupation or calling. They are references to the "business" of the employee.

[23] The applicant submitted the drafting intent was to extend the dictionary definition by using the word "process" capturing a broad range of types of work and the inclusion of "any part thereof" of the aforementioned terms. The word "process" extends the meaning of business to generalise and cover any form of work or calling in employment.

[24] The use of the word "includes" within the definition, differentiates this from other definitions in the Act which use the word "means". The applicant contends that the use of "includes" is not intended to be exhaustive, however it excludes the commercial or economic meaning of that word based on the *ejusdem generis* rule which applies on the basis that the meaning is limited in application to words which fit into the category given in the first meaning.

[25] This is expressly conditioned in s 2(1) on a "contrary intention" appearing where the onus is on the party asserting it[7]. The applicant further argues that defined words in a statute are not to be displaced without good reason. It was submitted this definition was intended to give the word "business" a different meaning from its ordinary meaning. It was alleged it is synonymous with the work that a person does for employment for their employer, such as the building trade, the legal profession or the occupation of optometrist.

[26] It was asserted that within the definition of "employee", the word business appears to refer to the work to be learned or taught any business. The definition is: "employee means a person who is employed by an employer to do any work for hire or reward and includes an apprentice or any other person whose contract of employment requires him to learn or be taught any business."

[27] Where an ambiguity exists, reference to extrinsic materials may assist to construe the provision. The applicant submitted the Act was amended in 1960, where a new subsection was included in s 2 of the Act.

[28] The *Mercury Newspaper*, reporting on the parliamentary debate, described the clause as one "which sought to provide that if an employee served at the same place, under a succession of employers, with breaks of no more than two months, he qualified for long service."[8]

[29] A further amendment to replace the word "premises" with the word "place" was enacted through the amendment to the 1982 Act. The Second Reading Note to the Long Service Leave Amendment Bill 1982[9] states:

> "The first of the proposed changes seeks to clarify the application of section 2(2) of the Act which provides for a worker to retain continuity of employment for Long Service Leave purposes where his services are terminated and within two months, he is employed in the same premises as previously and in substantially the same kind of business.
> In practice the term "premises" has proven rather restrictive in its precise dictionary definition- "A house or building with its grounds or other appurtenances"-and it is

[7] *Anti-Doping Rule Violation Panel v XZTT* [2013] FCAFC95, [92].
[8] Mercury, Thursday 8 December 1960, 58, Annexure B.
[9] Annexure A, Applicant's Outline of Submissions.

proposed that the subsection be amended to refer to employment "…in or about any premises or place in the business of an employer..."

[30] The applicant relies on T11851 *Kelly and Link National Transport Pty Ltd*, where Shelley DP analysed s 2(2) of the Act. She found:[10]

> "[37] Under the provisions of the Act, there are there are two types of transmission, an actual transmission, that is, where there is a commercial transmission. In that case, the transmission is based on what happens to the business. Then there is deemed transmission, provided for in section 2(2), which is based on what happens to the employee. If, within two months after the termination of their employment the employee is then employed by another employer and provided that they are employed in essentially the same work in the same place as they were employed before, then the business is deemed to have been transmitted to the new employer (for the purposes of the Act).
>
> [38] When establishing whether or not there has been a deemed transmission pursuant to section 2(2) the address out of which the business operates is immaterial to the proper questions to be decided, which are: is the work of the employee being performed in or about the same place as it was before; and, is the work undertaken work of the same nature as that performed previously?"

[31] The applicant submitted this analysis is purposive, taking into account the beneficial nature of the legislation.

[32] The applicant submitted the conditions precedent to a deemed transmission of business are present. The parties agreed in the Statement of Agreed Facts[11] ('SOAF') that the nature of the work was the same or substantially the same[12] in the role as Storeperson and the work performed by the applicant for both employers was in the same place, namely the Prospect site,[13] until 2012 when the Western Junction site was commissioned.[14]

[33] The applicant also relied on the findings of Commissioner Gozzi in T 1807 *Lynette Anne Marney and Croucher Pty Ltd,* where he found the words "'any place in the business of an employer' extends to where the work of that business is undertaken" noting that the emphasis was on the work being carried on, not the type of business.

[34] It was contended that the meaning given to "business" is synonymous with the "work" being carried on by the employees in that place, which is fictionally transferring. The final comparison required is between the business in which the employee was engaged before and after the fictional transfer, and whether it was substantially the same.

[35] The wording in the provision states: "…if the business in which he so becomes employed is the same or substantially the same", noting the use of the word "he" referring to the employee. Employee is defined in the Act as "a person who is employed by an employer to do any work for hire or reward..." The applicant submitted that the comparison to be made is the work being carried out in that place.

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[10] Applicant's emphasis added.
[11] SOAF, signed and dated 9 November 2022.
[12] Ibid [12].
[13] Ibid [6], [9].
[14] Ibid [13].

[36] Conversely, the applicant submitted if Parliament wanted to confine the fourth criterion, as the respondent argues, it could have drafted the provision to read: "if the business of the first employer was of the same, or substantially the same, kind as the business of the second employer".

[37] Relevant to this application is the work of SE at the respondent's site at Prospect, which was the labour work the respondent required to be carried out at that site for the distribution operations. SE did not carry out any other work at that place. The applicant submits that he did not carry out "labour hire" business at that site. The relevant comparison is that the applicant carried out the work as a Storeperson at the Prospect site in the employment of SE and later in the employment of the respondent. The work was the same at the same site.

[38] The applicant submits the type of work carried out, or business of SIW is the same or substantially the same kind as work performed or the business of SE, in which he was employed but was terminated.

[39] The applicant argues that the business should be deemed to have transmitted, and that therefore the years of employment with SE should be included in the overall continuity of employment for the purpose and calculation of LSL entitlements.

The respondent's position

[40] The respondent contests the periods worked with Skilled Engineering, in both the first and second employments, should not be included in the provision of continuous service as set out in s 2(2), 5(1)(g) and 5(4) of the Act.

[41] As stated above, it was agreed there are four criteria of s 2(2) of the Act to be satisfied in order for a deemed transmission to be found. It was agreed the first three criterion are satisfied:

a. the employee is employed in or about the business of an employer through the applicants second Skilled Employment;

b. the employment of the employee with that employer is terminated by virtue of the applicant resignation on 8 August 2004; and

c. not later than 2 months from the above date, the employee becomes employed in or about the place in the business of some other employer which is met through the commencement of employment with the respondent on 9 August undertaking work performed at the same said respondent workplace.

[42] However, it was contended the fourth criteria, the business in which he became employed was not of the same or substantially the same kind as the business in which he was employed in the employment which has terminated.

[43] The respondent submits the businesses of the putative transmitter (SE) and the transmittee (SIW) must be the same or substantially the same. SE is a labour hire business[15] and the respondent is a distribution business.[16] The two businesses are not the same or substantially the same.

[15] SOAF, [6].
[16] Ibid [3]-[4].

[44] The respondent relied on a number of decisions of the Commission dealing with s 2(2) of the Act. In *Ben Vaughan and Aberfeldy Cellars Pty Ltd, T1798 of 1989*, Mr Vaughan acted as manager for the entire period, however changed in employment status to work in his management consulting company, Auvergne Enterprises for around a three year period before being re-employed with Aberfeldy Cellars. Robinson DP found that the two businesses were not the same; one being a liquor retailer and the other business being the provision of management consulting services, despite the duties remaining virtually the same in the same place, the businesses were not substantially the same and during this period of employment with the consultancy, he did not meet the employer/employee relationship between Aberfeldy and Ben Vaughan.

[45] The respondent submitted the correct interpretation of s 2(2) requires consideration of the two employing entities to satisfy the fourth criterion. It submitted that the two businesses in question were determined not to be the same.

[46] In the case *Lynette Anne Marney and Croucher Pty Ltd T1807 of 1989*, Ms Marney was employed as a cleaner working at Anglesea Barracks over an 8-year period and during this time, was employed by three different entities but her duties and place of work remained the same. It was argued the registered business addresses were different and therefore there was no deemed transmission of business. However, it was found there was a deemed transmission of business as she was employed in the same place of work.

[47] Commissioner Gozzi determined the relevant place of work was the place where the employee performed the duties, which remained unchanged for Ms Marney. He determined the business of all the other employers was of the same kind or substantially the same as the business in which she was employed.

[48] It was submitted Gozzi C assumed that the correct consideration was whether the consecutive employers were of the same or substantially the same kind of business. He took into consideration the Second Reading Speech in support of the amendment contained in the *Long Service Leave Amendment Act 1982* (Tas).

[49] The third case relied on was *Scott Elkin and Barminco Pty Ltd T9906 of 2002* where Mr Elkin had performed the same work at the same site under four different employers. It was argued the LSL entitlement crystallised and was payable at the time of termination with the third employer. Abey C determined the criterion for determination of a deemed transmission of business was whether the businesses were the same or substantially the same and he found so. He also determined the pro-rata entitlement crystallised and became payable by the third employer due to seven years continuous service.

[50] In *Anthony Terrence Kelly and Link National Transport*,[17] a truck driver worked for the first employer for 6 years and 8 months when the business was sold to Link. Link provided him with a redundancy as it went into voluntary administration 18 months later.

[51] It was found the entitlement had crystallised triggering a pro rata entitlement under the Act. Deputy President Shelley relied on the reasoning by Abey C in *Kelly* that a pro-rata entitlement crystallised due to the accrued entitlement, regardless of whether the employment is deemed to be transmitted to a subsequent employer. The respondent submitted consideration of the deemed transmission provision was not required in this decision and that further comments made by Shelley DP were obiter.

[17] T11851 of 2005.

[52] It was stated the above construction has not been followed in subsequent decisions of the Commission. In *United Voice Tasmanian Branch and Captive Services T 14111 of 2013*, a cleaner, Ms Carr, had performed cleaning services at the University for over 10 years under two different employers. Her duties remained unchanged.

[53] Deputy President Wells found that a pro-rata entitlement had crystallised on termination of her employment, relying on s 2(2) of the Act to provide continuity of employment. The respondent submitted the assessment of the fourth criterion was whether the business of the employee's consecutive employers were the same of substantially the same.

[54] In *Geoffery Phillip Heaney and AGS Logistics T14218 of 2014,* Mr Heaney was employed as an Aircraft Service Operator, employed by a labour hire company Blue Collar Australia Pty Ltd providing services to Qantas and Jetstar in 2004. AGS won the tender to provide these services in 2009. Mr Heaney was employed with AGS with no material break in continuity of service. He was terminated in 2014 on the loss of the contract.

[55] Abey P determined Mr Heaney had completed the requisite period of continuous employment due to a deemed transmission of business. He determined the first three criterion were satisfied. In response to the fourth criterion, he referred to the definition of business in the Act and determined that Blue Collar and AGS are both in the business of providing passenger ground handling services on a contract basis. Abey P found that Mr Heaney performed substantially the same roles for both employers and that a change of emphasis in duties performed was not material.

[56] The respondent contended that this decision relied on the business of employing entities and to the type of work performed by the employee. Abey P determined that the putative transmitter (Blue Collar) and the putative transmittee (AGS) were in the same or substantially the same business.

[57] The respondent claimed the decisions of *Vaughan, Croucher, Captive* and *Heaney* adopted the construction that the businesses of the putative transmittor and the putative transmittee need to be the same or substantially the same to be a deemed transmission of business, in contrast to the applicant's submissions which relies on the nature of the work performed by the employee. It was submitted it is the nature of the business which needs to be considered to satisfy the fourth criterion.

[58] It was stated it would be unfair and inequitable to all businesses which utilise labour hire arrangements to change the understood employer obligations under the Act and it would not be in the public interest.

[59] The respondent relies on the provisions of the *Acts Interpretation Act 1931 (Tas)* to guide construction. Sections 8A and 8B relevantly provide that the purpose and object of the Act must be preferred and the use of extrinsic material in interpretation is to be considered if the provision is ambiguous. Interpretation is in accordance with the ordinary meaning, having regard to its context and purpose or object of the Act.

[60] The Act does not expressly state its purpose. However, it is acknowledged the purpose of the Act is beneficial and where there is ambiguity, the intention of the Act should be considered in interpretation. The intention is to provide an entitlement to paid long service leave upon completion of the prescribed period of continuous service.

[61] Turning to the construction of the fourth criterion, the respondent submitted the construction of the word "business" is the sole determinant. It states the word "business" refers to one or the other of the two businesses or the two employers repeatedly referred to in the text of s 2(2) of the Act. The word "business" is to be construed from the ordinary meaning of the words having regard to their context in the Act and the purpose of the Act.

[62] It was stated the fourth criterion appears in the section 2(2) of the Act, a provision which has the objective and purpose or "work" of effecting a deemed transmission of business between two employer entities. The reference to "business" cannot be considered in a vacuum and can only mean a reference to one of other of the businesses of the Putative Transmittor and Putative Transmittee.

[63] Additionally, the respondent submitted the words "employed" and "employment" are all references to the worker's employment. It was contended that the "employer" should be construed as reference to the Putative Transmittee through interpretation and application of the words; "the employer by whom he so becomes employed"

[64] The drafter then refers to "the business in which he so becomes employed". Repeating these words while referring to the Putative Transmittee, "he so becomes employed" are both references to the employer and business which are in fact references to the one and the same entity, the Putative Transmittee.

[65] The respondent contends this interpretation meets the principles, accords the ordinary meaning of the words, achieves the purpose of the provisions of the deemed transmission of business, is internally consistent and accords with multiple decisions of the Commission.

[66] It was contested the applicant's construction ignores the legislative context, the prior use and meaning of "business" and the required change of meaning part through, from a reference to one or the other businesses of the employer entities, to a reference to the work and duties performed by the worker.

[67] Addressing the definition of "business" in the Act, the respondent contends the definition found in s 2(1) of the Act which states: "**business** includes any trade, process, profession or occupation and part thereof", commences with "includes" rather than "means" found in the majority of other definitions in the section.

[68] Citing from *Statutory Interpretation in Australia*,[18] the Respondent submits the difference is the word "means" is used if the definition is intended to be exhaustive while "includes" is intended to enlarge the ordinary meaning of the word. The use of the word "includes" evinces an intention to expand the meaning of business to both the meaning as prescribed in the definition and the ordinary meaning of business as defined in the Macquarie Dictionary (first 8 of 26 definitions):

> "**business** noun 1. one's occupation, profession, or trade. 2. Economics the sale of goods and services for the purpose of making a profit. 3. Commerce a person, partnership, or corporation engaged in business; an established or going enterprise or concern; a clothing business. 4 Volume of trade; patronage. 5. one's place of work. 6 that which one is principally and seriously concerned. 7. that with which one is rightfully concerned. 8. affair, matter."

[18] Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) Australis, [6.5].

[69] It was conceded "business" is capable of a number of different meanings and that ambiguity may arise, as the applicant argues, as to the meaning as it appears in the fourth criterion.

[70] However, the respondent contests the ambiguity is falsely conceived and applying consideration of the context of the balance of the text and the purpose of the Act results in "business" referring to the Putative Transmittor and Transmittee employers and not a reference to the work or duties of the employees.

[71] If the respondent is wrong, then recourse to extrinsic material is permitted and includes the Second Reading Speech of a Bill.[19]

[72] Section 2(2) of the Act was inserted in 1960 with an amendment in 1982. Prior to 1979, Tasmanian Parliamentary proceedings were reported in *The Mercury Newspaper* but there was no official Hansard of parliamentary debate. This amendment predates Hansard in Tasmania.

[73] *The Mercury* reported Parliamentary debate relating to s 2(2) of the Act in the following terms:

> "a clause which sought to provide that if an employee served at the same place, under a succession of employers, with breaks of not more than two months, he qualified for long service leave."

[74] The respondent submitted there is nothing in the *Mercury* report to support the interpretation of "business" in the fourth criterion as argued by the applicant.

[75] The respondent contended the correct construction of the fourth criterion relies on the word "business" to mean one or the other of the two businesses of the two employers, which are not the same. Therefore, it is submitted there is no deemed transmission of business between Skilled Engineering and the respondent by operation of s 2(2) of the Act.

Consideration

[76] The entitlement to payment of long service leave is governed by the Act. The Act prescribes conditions based on continuous employment.[20]

[77] The purpose and object of the Act is to provide employees who have worked the required years of service with additional leave benefits in recognition of their lengthy service. The object is not to provide additional benefits, rather leave payment is at the ordinary pay rate.

[78] The nature of continuous employment is set out in s 5 of the Act. The parties have agreed the period between 22 January 2001 and 8 August 2004 meets the requirements of continuous employment in accordance with s 5(1)(g) and (3), noting the break in employment was less than 3 months (2 months and 8 days) and he was a casual regularly employed by SE for not less than 32 hours in each consecutive periods of four weeks. This is a total of 3.35832 years. No entitlement crystallised during his employment with SE.

[19] *Acts Interpretation Act 1931* (Tas), s 8B(3).
[20] The Act, s 7A.

[79] During this time, the applicant worked as a Storeperson at the respondent's Prospect site subject to their direction and control, while employed by Skilled Engineering.[21] The applicant was employed as "labour hire" at this site and undertook the same kind of duties as required with the successive employer as Storeperson.

[80] He was employed by the respondent on 9 August 2004 pursuant to a contract dated 30 July 2004. The role with the new employer was a Storeperson position and the parties have agreed the duties of the positions "are the same or substantially the same"[22] at the same place, the Prospect Site.[23]

[81] It is common ground that the applicant has been continuously employed with the respondent since 9 August 2004 and has taken two periods of LSL in accordance with the Act.

[82] It is my view there has been no actual commercial transmission of the business between Skilled Engineering and the respondent.

[83] The actual transmission of business is defined in s 2(1) of the Act as:

> **"Transmission**, used in relation to an employer's business, includes any transfer, conveyance, assignment, or succession, whether by agreement or operation of law" (emphasis added).

[84] Applying this definition to the transmission question, I am satisfied there has been no sale, transfer, assignment or succession of the business of SE to the respondent, a commercial enterprise in the wholesale distribution industry. There has been no exchange of capital, plant, or assets. There has been no actual transmission of business. These are different commercial businesses. There has been re-employment of the applicant by the respondent.

[85] To consider this period of employment with SE, s 5(4) of the Act states the continuity of employment shall be deemed not to have been broken if a business is transmitted from an employer (transmittor) to another employer (transmittee) and the employee becomes an employee of the transmittee. The parties have conceded that, if found, a deemed transmission of business results in continuity of employment.

[86] In the absence of an actual transmission of business, as defined, to apply the continuous employment provisions, it must be considered if there has been a deemed transmission of business to provide the entitlement of continuous employment.

Was there a deemed transmission of business?

[87] The conditions of a deemed transmission of business as provided in s 2(2) of the Act must be satisfied. In this matter, was there a deemed transmission of business on 9 August 2004 between the applicant (the employee) and the respondent (the employer)?

[88] I accept the parties' identification of the four criterion which must be satisfied to determine a deemed transmission of business has occurred pursuant to s2(2) of the Act. The four criteria are:

a. Was the employee employed in or about any place in the business of an employer?

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[21] SOAF, [12].
[22] Ibid.
[23] Ibid [9].

b. Was the employment of that employee terminated?

c. Did he become employed in or about the place of some other employer, not later than the expiration of a period of 2 months from the first termination?

d. Did "the employee become employed in or about that place in the business of some other employer, the business of the employer by whom his employment had been terminated shall, for the purposes of this Act, be deemed to have been transmitted to the employer by whom he so becomes employed if the business in which he so becomes employed is of the same, or substantially the same, kind as the business in which he was employed in the employment that has terminated."? (emphasis added)

[89] Applying the above criterion, I am satisfied the applicant has met the first three criterion. He was employed as a casual employee by SE and worked under the direction and on the respondent's Prospect Site as a Storeperson. (Criterion 1) The employment with SE was terminated by the applicant on 8 August 2004. (Criterion 2) He was employed by the respondent on 9 August 2004 to work at the same site at Prospect, in the same of substantially the same role as Storeperson. (Criterion 3)

[90] The key issue is the construction of the term relating to the business in which he was employed and becomes employed and whether the businesses were of the same, or substantially the same kind as the previous business, where he was employed. The fourth criterion requires determination based on the statutory construction.

[91] It is well established the starting point in statutory construction is to consider the ordinary and grammatical sense of the words, having regard to their context and legislative purpose. Both parties concur with this approach in their respective submissions and I adopt these principles.

[92] As to the task of construction itself in *SZTAL v Minister for Immigration and Border Protection* the plurality said at [14]:

> "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." [Citations omitted]

[93] In the same case Gageler J said further at [24]:

> "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." (Citations omitted

[94] Having regard to the parties' submissions and materials provided, I have considered the context and purpose of the Act and this section of the Act. It is clear the Act provides an entitlement to additional leave in the form of long service leave in recognition of lengthy continuous service.

[95] There cannot be a deemed transmission of business when only the employee changes employer, without the transfer of operations between businesses. The applicant has always worked at Prospect in the same role, under the direction of the respondent, but initially employed by a labour hire company, with his work as a Storeperson outsourced to the business of the respondent.

[96] I concur with both parties, that the purpose of the Act is beneficial to employees. It is an Act set out to provide a reward in the form of extra leave (which may be taken as payment in lieu[24]) in recognition of lengthy service.

[97] The definitions in the Act obviously assist interpretation. I focus on the meaning of this phrase in subsection 2: "the employee following termination of one position is then employed in or about that place in the business of some other employer and whether the business in which he becomes employed is the same or substantially the same kind."

[98] Business is defined in the Act. The definition utilises the word "includes" and defines business as any trade, process, profession, or occupation, and any part thereof.

[99] The applicant submitted that the word "includes" instead of the word "means", as used in other definitions, extends the dictionary meaning of "business" to a range of different types of work as in the "business" of the employee or the work performed for employment for their employer.

[100] Guidance from *Statutory Interpretation in Australia*[25] supports the principle that the use of "includes" expands the defined word beyond the ordinary meaning for application of that relevant legislation. It states:

> "It is inherent in the approach that the use of 'includes' is intended to be expansionary that the word defined has an ordinary meaning. In its pristine form, 'includes' is used to make it clear that the word is not limited to that ordinary meaning. If, therefore, the word defined to include something has no ordinary meaning but is a term used only in the legislation in which it appears, to say that it 'includes' various matters is only another way of giving meaning to the term. It cannot have some meaning independently of the meaning that it is given by the legislation. The use of 'includes' in this context does mean that the definition is to be exhaustive: *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235; 299 ALR 246 at [69]–

[24] The Act, s 10.
[25] Dennis Pearce (n 18) [6.8].

[72] ('application for a protection visa')."

[101] I do not concur with the applicant's proposition that it excludes the ordinary meaning of that word. The inclusion of process and professions also accords with the ordinary meaning of business as found in the dictionary and described at paragraph [73].

[102] In my view, the interpretation of the word "business" includes both the definition inclusive of the ordinary meaning, resulting in no appearance of contrary intention or displacement of the definition of business. This has been confirmed by Handley AJ who stated in *Qantas Airways Ltd v Chief Commissioner of State Revenue*:[26]

> "There is a presumption that defined words in a statute have their defined meanings which is not to be displaced without good reason."

[103] The dictionary definition includes both one's profession, trade and the commercial application of the economics of a business. I accept the applicant's submissions that the commonality of the meaning refers to one's occupation or calling. The inclusion of process in the definition further extends the meaning of business to cover any form of work or "and any part thereof", that a person does for employment. However, I concur with the respondent that the commercial operations or business as provided in the dictionary definition of: "economics the sale of goods and services for the purpose of making a profit" can also be applied in context.

[104] In *HSUA v North Eastern Health Care Network*,[27] Marshall J found the word ""business" is also a word of wide import." The word "business" cannot be isolated and must be considered in context and with the purpose of the Act.

[105] Based on the definition of employee in s 2 of the Act, as one employed to do any work for hire or reward, including an apprentice whose contract of employment requires him to be taught any business, it is my view, the use of the word "business" in this definition uses the meaning as expressed in the definition in the Act, as including any trade, process or occupation of the employee. In this context, I find that the business relates to the work an employee must learn in their employment.

[106] Section 2(2) of the Act, however, refers to the business of the employer with no mention of the business of the employee in the following phrases as follows: "any place in the business of an employer" "in the business of some other employer" "the business in which he so becomes employed" "same of substantially the same, kind as the business in which he was employed."

[107] Reviewing the extrinsic material, *The Mercury Newspaper* reported in 1960 that the Legislative Council had proposed to delete the "clause which sought to provide that if an employee served at the same place, under a succession of employers, with breaks of not more than two months, he qualified for Long Service Leave." It further reported that the "House of Assembly accepted all amendments except that relating to an employee who has served at the same place under a succession of employers." I find this persuasive relating to the purpose of the Act, based on the parliamentarian's debate that the employee served at the same place under a succession of different employers, the place of employment being the important consideration.

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[26] [2008] NSWSC 1049, [38].
[27] (1997) 79 FCR 43, 55.

[108] Section 2(2) was further amended in 1982 where the restrictive word "premises" was replaced with the word "place". I refer to the Second Reading Speech No 61 of 1982 and clause notes 1982 to seek further clarification of this section. It states that s 2(2) provides for a worker to retain continuity of service where he is terminated and reemployed "in the same premises as previously and in substantially the same kind of business which was amended to read "in or about that place in the business of an employer", clarifying the workplace could be broader than just the registered business premises. This was the key issue in the *Marney* decision where it was found any place in the business included the place of employment not the registered offices of the business premises. The kind of business of an employer is still required to be the same or substantially the same as the previous employer.

[109] The drafting notes include: "an employee is employed in or about any place in the business of an employer" and "the employee becomes employed in or about that place in the business of some other employer" I am satisfied the employee has been employed at the Prospect site of the respondent's business during the relevant period of time and meets the condition of employment in or about a place in the business of the employer.

[110] The applicant states in context, the act of deeming a transmission of business between two employers sets up a "legal fiction" as there is not an actual commercial transaction. I concur with Kirby J's statement[28] that deeming provisions are "inherently artificial".

[111] The conditions still to be met are employment in the same "place" and that the employee is working or employed in the business of an employer, which is the same of substantially the same kind of "business" as that which they were previously employed.

[112] The applicant relies on Shelley DP's finding of a deemed transmission of business in *Kelly v Link National Transport Pty Ltd*.[29] In this case, a truck driver continued to work on a One Steele contract in the same role for successive business. The business was sold by Freight Management Services to Link who continued the operations. Link terminated his employment by reason of redundancy but incurred the long service leave liability as the entitlement had crystallised. The issue in this case was the place of business. However, Shelley DP commented on the application of the deeming provision found in s 2(2) and said:

> "[36] Deemed" is a legal fiction in which, although there may have been no actual or commercial transmission of business, for the purposes of the Act it is to be treated as though the business has been transmitted.
>
> [37] Under the provisions of the Act, there are there are two types of transmission, an actual transmission, that is, where there is a commercial transmission. In that case, the transmission is based on what happens to the business. Then there is deemed transmission, provided for in section 2(2), which is based on what happens to the employee. If, within two months after the termination of their employment the employee is then employed by another employer and provided that they are employed in essentially the same work in the same place as they were employed before, then the business is deemed to have been transmitted to the new employer (for the purposes of the Act).
>
> [38] When establishing whether or not there has been a deemed transmission pursuant to section 2(2) the address out of which the business operates is immaterial to the proper questions to be decided, which are: is the work of the employee being

[28] *Commonwealth v SCI Operations Pty Ltd* [1998] HCA 20.
[29] 10 May 2005.

> performed in or about the same place as it was before; and, is the work undertaken work of the same nature as that performed previously?"

[113] In contrast to the proposed consideration outlined in obiter comments by Shelley DP, I am satisfied the final consideration must include whether the business in which he becomes employed "is of the same or substantially the same, kind as the business" of the first employer. These words directly link the requirement to assess the kind of business of the employers, as the Act prescribes in s 2(2).

[114] I will now turn to some of the case law that has been raised, addressing s 2(2) of the Act.

[115] The first case dealing with s 2(2) of the Act was *Lynette Anne Marney and Croucher Pty Ltd* T1807 in 1989. Commissioner Gozzi found employment in an identifiable workplace other than premises was included in s 2(2) of the Act. The nature and location of the work as a cleaner working at the same site under successive employers (cleaning contractors) was found to be the same. He stated: "any place in the business of an employer extends to where the work of that business is undertaken," The work being carried on and where it was undertaken, or the "place" of employment, was a constant in Mrs Marney's employment history. The applicant states this emphasised the work carried on, however, I find the context was in relation to the important question of whether he was employed: "in or about that place of business" or in the same place of employment in the successive employment. This does not exclude consideration of the type of business of the employers.

[116] It was found the businesses of all the successive employers were the same or substantially the same and there was a deemed transmission of business, and her employment was found to be continuous service.

[117] The respondent referred to the decision and consideration by Gozzi C of the Second Reading Notes Long Service Leave Bill No 87 of 1960 which stated:

> "It is sought to extend the definition "continuous employment" so that an employee who continues to be employed in or about any premises by successive employers will be entitled to such employment as a qualifying employment where or not there is a transmission of business"

[118] In my view, the *Marney* decision confirmed contractors working for contract companies can have their continuity of employment recognised where the business of one cleaner contractor was deemed to have transferred to another cleaning contractor. The business of both the employers were found to be the same or substantially the same. They were both cleaner contractors.

[119] *Vaughan and Aberfeldy Cellars Pty Ltd*, T1798 of 1989, relates to an employee employed as a General Manager of a liquor outlet who worked as both a consultant and a direct employee. The duties and location of his work were the same. It was deemed there was no existence of an employer/employee relationship during the contested period when he was working as a consultant through his consultancy company based on the contract between the parties. The two businesses were deemed not to be the same as one was a management consultant service and one was a liquor retailer. No deemed transmission of business was found, based on the contracts.

[120] In *Elkin and Barminco Pty Ltd* T9906 of 2002, Abey C found there had not been a transmission of business "in the legal sense of the word." However, he found two deemed transmissions of business and the payment liability for pro rata entitlement to long service leave crystallised with the end of employment with the second employer. Nevertheless, the obligation for continuity and recognition of prior years of service transferred to Barminco. He found this outcome did not disadvantage the concerned employee. The businesses of all employers were the same or substantially the same as copper miners.

[121] In *United Voice and Captive Services Pty Ltd*, T14111 of 2013, Wells DP commented on employees in contract type situations and stated: "they must be performing ostensibly the same work and commence working with the new employer within two months of being terminated by the last employer" The applicant was a cleaner, contracted to work at the University of Tasmania, working the same hours and days at the same sites for successive companies. She found there was an entitlement to long service leave based on a deemed transmission of business and continuous service. The business of the employers were found to be the same or substantially the same as cleaning contractors.

[122] In *Gary Nilsson and Mercury Walch Pty Ltd*, T14230 of 2014, Abey P found a transaction limited to an asset sale did not constitute an actual transmission of business and instead, found a deemed transmission of business following GEON being placed in receivership and Mercury Walsh purchasing the assets and re-employing the applicant. It dealt with the crystallisation of an entitlement and found the liability did not transfer to a new employer, irrespective of whether there was a deemed or actual transmission of business.

[123] In *Geoffrey Phillip Heaney and AGS Logistics*, T14218 of 2014, the issue of continuity of service was determined through a deemed transmission of business between AGS and Blue Collar Australia, a labour hire company providing ground handling services to Qantas and Jetstar. AGS won this contract and Mr Heaney was employed with AGS within the two-month period. Abey P was satisfied that both Blue Collar and AGS were in the business of providing ground handling services. He found that a change of aircraft models did not materially change the duties required to be provided in a contract of this nature. He found the business of AGS was the same or substantially the same as that of Blue Collar, which were both labour hire businesses and there was a deemed transmission of business.

[124] These decisions all consider the employees' place of work, their timing of re-employment, as well as a comparison of the kind of employer's business and whether the businesses were the same kind or substantially the same. I am persuaded to follow the range of decisions of this Commission, relating to the deeming provision found in s2(2) of the Act.

[125] As such, I am satisfied there has been no actual transmission of commercial business, rather a reemployment of the applicant. The applicant was employed solely to work at the Prospect warehouse as a Storeperson, the nature of the work remains the same and the place at which that work was performed did not change with the successive employer. However, the fourth criterion also needs to be satisfied.

[126] The fourth criterion in s 2(2) of the Act states: "if the business in which he so becomes employed" which, as I have found, can only relate to the business of the employer as the common element for comparison of whether the two businesses are the same or substantially the same kind of business.

Can employment be deemed as a transmission of business based solely on what happens to an employee?

[127] In applying the definition and context of the word "business" in s2(2) of the Act, I reiterate that the section is referring to the "business of the employer" not the "business" of the employee. It follows that for the purposes of interpreting "business", I am satisfied that it is referring to the trade of the business, not the employee. Wholesale distributing is the business of the employer, the respondent, not the employee who is employed as a Storeperson in that business. This is what needs to be assessed when considering the fourth criterion.

[128] In my view, the obiter findings of Shelley DP that the deemed transmission is based on the work of the employee being performed in or about the same place as he worked before (whether the work undertaken is of the same nature as that previously performed for the past employer) neglects to include the fourth criterion, which must be included for completeness to deem a transmission of business between the two businesses. There cannot be a transmission of business between an employee and an employer, and I am satisfied the deemed transmission of business is between the two businesses.

[129] For the business of the employer to be deemed to have transmitted, it must be found that "the employee becomes employed in or about that place in the business of some other employer", "if the business in which he so becomes employed is the same or substantially the same kind as the business in which he was employed in the employment that has terminated".

[130] For example, the deeming provision may cover businesses who go into receivership, provide redundancy for employees, or transfer service contracts and the business is then transferred, bought out or recommenced (by another owner or the same owner) and the workers are offered employment with the new employer. If this occurs with a break of less than two months and the two businesses are the same kind, offered in the same place, it is deemed a transmission of business, and continuity of service for that employee is provided. In my view, this construction meets the purpose of the Act.

[131] I am satisfied this provision of the Act allows employees in contract situations, who are re-employed at the same workplace with a similar contracting business, to maintain continuity of service which can be counted towards a long service leave entitlement, meeting the purpose of the Act.

[132] I am satisfied that the applicant performed the duties of a Storeperson for both employers, in the same place at the Prospect site. However, the business of the first employer was a labour hire company whereas the successive employer operated a wholesale distributing business. While the employee's work undertaken was the same or substantially the same kind of work, the business in which he became employed was not the same or substantially similar. Therefore the "business" is not deemed to have been transmitted for the purpose of the long service leave entitlements.

ORDER

[133] For the above reasons, I find there is no deemed transmission of business between Skilled Engineering and the Wholesale Independent Wholesalers on 9 August 2004, pursuant to s 2(2) of the Act.

[134] Accordingly, the period of employment of 3.6 years previously served by the applicant with Skilled Engineering, is not deemed to be counted as part of continuous employment with the respondent.

[135] The application is dismissed.

Neroli Ellis
Deputy President