IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
EMPLOYMENT AND INDUSTRIAL LIST

Not Restricted

S ECI 2022 05293

ENERGYAUSTRALIA YALLOURN PTY LTD (ACN 065 325 224) — Plaintiff

v

COINVEST LIMITED (ACN 078 004 985) — Defendant

JUDGE:	Watson J
WHERE HELD:	Melbourne
DATES OF HEARING:	23 & 24 September 2024
DATES OF JUDGMENT:	25 March 2025
CASE MAY BE CITED AS:	EnergyAustralia Pty Ltd v CoInvest Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 100

EMPLOYER AND EMPLOYEE – Long service leave – Whether plaintiff required to make contribution to portable long service leave fund – Plaintiff seeking declaration that employees are not covered by portable long service leave scheme – No declaration should be made – Whether plaintiff is 'in the construction industry' – Whether work is 'of a routine or minor nature' – Whether work performed is 'of a kind' for which a rate of pay is fixed by a prescribed award – Plaintiff is in the construction industry – Work performed is 'construction work' – *Construction Industry Long Service Leave Act 1997* ss 4, 6 and 7.

Aust-Amec Pty Ltd v Construction Industry Long Service Leave Payments Board (1995) 15 WAR 150; *Baytech Trades Pty Ltd v CoInvest Ltd* [2015] VSCA 342; *CFMEU v Dyno Nobel Asia Pacific Ltd* [2005] AIRC 622; *Coal Mining Industry (Long Service Leave Funding) Corporation v Hitachi Construction Machinery (Australia) Pty Ltd* (2023) 322 IR 129; *CoInvest Ltd v Celsius Corporate Service Pty Ltd* [2017] VCC 796; *Healy Airconditioning Pty Ltd v Construction Industry Long Service Leave Payments Board* (1999) 79 WAIG 560; *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2023] FCA 1515; *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123; *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290; *R v Isaac; Ex parte Transport Workers Union* (1985) 159 CLR 323; *R v Moore; Ex parte Australian Workers' Union* (1976) 11 ALR 449; *R v Moore; Ex*

parte Federated Miscellaneous Workers' Union of Australia (1978) 140 CLR 470; *The Australian Workers' Union v Construction, Forestry, Mining and Energy Union* [2001] AIRC 177 considered.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Ternovski	Lander & Rogers
For the Defendant	Mr P Hanks KC Ms M Brady	Maddocks

HIS HONOUR:

1 This case concerns the portable long service leave scheme established by the *Construction Industry Long Service Leave Act 1997* (Vic) ('the Act'). The plaintiff, EnergyAustralia Yallourn Pty Ltd ('EnergyAustralia') operates the Yallourn Power Station ('the power station').

2 The defendant, CoInvest Limited, currently trades as LeavePlus ('LeavePlus') and is the trustee of the Construction Industry Long Service Leave Fund ('the fund').

3 A dispute has arisen between EnergyAustralia and LeavePlus regarding whether EnergyAustralia is required to make contributions to the fund in respect of certain maintenance employees ('the maintenance workers'). LeavePlus says contributions are required. EnergyAustralia says they are not.

4 EnergyAustralia seeks declarations to the effect that none of its maintenance workers are covered by the portable long service leave scheme established by the Act. LeavePlus says that those declarations should not be made.

The portable long service leave scheme

5 The Act establishes a portable long service leave scheme for workers employed to perform construction work in the construction industry. Section 4 of the Act obliges an employer to pay to LeavePlus a long service leave charge in respect of every such worker employed by them. Section 4 also provides that the charge must not be more than 3% of the ordinary pay of the worker.

6 Section 6 of the Act creates an entitlement to long service leave for workers in respect of their continuous service in the construction industry.

7 The Act contains a number of relevant definitions:

(a) **fund** means the Construction Industry Long Service Leave Fund established under the trust deed;

(b) **trust deed** means the trust deed executed by [LeavePlus] as trustee on 1 April

1997 as amended and in force for the time being; and

(c) **trustee** means [LeavePlus] or any new trustee appointed under, and in accordance with, the trust deed.

8 Critically, however, the Act does not define the terms construction industry or construction work. Instead, s 3(2) of the Act provides:

> Words and expressions used in the rules set out in Schedule 2 of the trust deed and in this Act have the same respective meanings in this Act as they have in those rules as amended and in force for the time being.

9 Section 7 of the Act provides an important limitation on the powers of LeavePlus. It provides as follows:

> **Restriction on powers of trustee**
>
> (1) The trustee must not, without the prior approval of the Governor in Council, exercise any power, authority or discretion given to the trustee by the trust deed the exercise of which would have the effect of enlarging the class of persons capable of being paid benefits out of the fund.
>
> (2) Without limiting subsection (1), that subsection —
>
> (a) has effect with respect to any addition to, or any amendment, modification, variation, deletion, revocation, substitution or replacement of, the whole or any part of the trust deed by which —
>
> (i) the meaning or scope of the expressions "construction work" or "construction industry" is enlarged, whether directly or indirectly; or
>
> (ii) an award is prescribed for the purposes of the fund;
>
> (b) does not have effect with respect to a decision as to whether or not a particular person is within a class of persons then capable of being paid benefits out of the fund (whether as a result of an amendment of a prescribed award or otherwise) or as to the amount of any benefit to which such a person is entitled;
>
> (c) does not have effect with respect to a decision as to the amount of any benefit capable of being paid out of the fund.

10 The rules set out in schedule 2 of the trust deed ('the Rules') provide definitions of the critical terms 'construction industry' and 'construction work'. Those definitions are quite long and detailed and, where necessary, are set out below.

11 EnergyAustralia's application raises three distinct questions:

(a) Whether EnergyAustralia is 'in the construction industry'?;

(b) Whether the maintenance workers are carrying out maintenance or repairs of a 'routine or minor nature' and, as a result, excluded from the definition of construction work; and

(c) Whether the work performed by the maintenance workers is excluded from the definition of construction work because it is not work of a kind for which a rate of pay was fixed by a prescribed award as at 6 May 2014?

12 For the reasons which follow, I have held that EnergyAustralia is in the construction industry and that the work performed by the maintenance workers ('the repair and maintenance work') falls within the definition of construction work.

The evidence

13 The evidence before me comprised:

(a) an agreed statement of facts, dated 26 April 2024;

(b) an affidavit of Gregory Houston dated 27 May 2024, exhibiting an expert report of Mr Houston dated 23 May 2024;

(c) an affidavit of Malcolm James Stevenson dated 27 May 2024;

(d) a second affidavit of Malcolm James Stevenson dated 22 August 2024;

(e) an affidavit of Jordana Lorelle Maserow dated 22 August 2024;

(f) a third affidavit of Malcolm James Stevenson dated 10 September 2024;

(g) a second affidavit of Gregory Houston dated 11 September 2024;

(h) an affidavit of Catryn Josephine Tuckwell dated 16 July 2024;

(i) an affidavit of Vujan Bruce Krunic dated 17 July 2024; and

(j) oral testimony from Mr Malcolm Stevenson.

The power station

14 A lot of things about the power station are big. EnergyAustralia operates the power station at a site in Yallourn covering approximately 2,330 hectares. Also on site is a coal mine which supplies coal exclusively for the power station. The coal mine is operated by a contractor engaged by EnergyAustralia. The power station has four base load steam turbine generator units, each of which consists of a boiler, turbines, generator and ancillary equipment. The power station burns coal which turns water into steam inside the boilers. The steam then turns a series of turbines which drive the generator, producing electricity.

15 The power station burns about 58,000 tonnes of coal per day. The boilers are 112 metres high and contain 180 tonnes of water. The turbine hall is 400 metres long and 50 metres high.

16 The power station supplies about 22% of Victoria's electricity. It is due to be retired in June 2028.

The repair and maintenance work

17 The agreed statement of facts provides necessary detail in relation to the nature of the repair and maintenance work (the subject of consideration in these proceedings) and the occupational categories of worker who perform that work. Mr Stevenson, in his affidavits, gave evidence primarily in relation to a 'reference period' from 2017 to 2021. The agreed facts reflected that focus. It was agreed between the parties that this period was broadly representative of the subsequent years to date.

Nature of the Work

18 The types of repair and maintenance work are described as follows:

> **Repair and Maintenance Work**
>
> In the Relevant Period, EnergyAustralia employed workers (**Maintenance Workers**) under contracts of employment to perform maintenance of, and repairs to, plant and machinery at the Power Station (**Repair and Maintenance Work**).
>
> Repair and Maintenance Work at the Power Station comprises 'Day-to-Day Maintenance Work' and 'Outage Work':
>
> a. **Day-to-Day Maintenance Work** is conducted every day on weekdays

and, when required, on weekends. Day-to-day Maintenance Work involves routine preventative maintenance (for example, addressing general wear and tear at the Power Station, such as replacing gaskets or filters, and recording data or undertaking inspections for the purpose of future maintenance activities, such as to identify materials or equipment required) and defect or corrective maintenance (such as replacing a motor or pump that has failed).

b. **Outage Work** is conducted while one or more of the four Power Station units is offline. Outage Work comprises the following:

   i. **Major Outage Work:** Major Outage Work is conducted during scheduled major outages, which are organised to enable planned capital works on the Power Station units. Major outages were scheduled to occur on each unit every six years until about 2019. They are now scheduled to occur on each unit every four years. Scheduled major outages typically last for at least 40–70 days. Major Outage Work involves capital works (for example, replacement of a large piece of equipment) or other routine preventative or corrective maintenance work that cannot be done while the Power Station is online (for example, a full major strip down of the turbine generator), as well as maintenance work required to comply with regulatory and statutory requirements regarding health and safety (for example, testing of particular equipment).

   ii. **Integrity Outage Work:** Integrity Outage Work was conducted during scheduled integrity outages, which typically occurred two years prior to a major outage to undertake safety, integrity and reliability inspections and to scope the upcoming Major Outage Work and also to undertake other maintenance work that required a Unit to be taken offline but did not require a major outage. Scheduled integrity outages typically lasted for 15–20 days. The last integrity outage occurred in 2022 and, because major outages are now scheduled to occur every four years, integrity outages are unlikely to be required. Integrity Outage Work involved scoping and inspection for the purposes of a future major outage (to enable the necessary materials and equipment to be ordered and planning to occur for the major outage).

   iii. **Boiler Clean Outage Work:** Boiler Clean Outage Work is conducted when Power Station units are brought offline for regular cleaning of the boiler tubes. Boiler clean outages are scheduled every 3,500–4,000 hours of operation (that is, about every 5–6 months). Boiler clean outages typically last for 5–7days. Boiler Clean Outage Work involves routine preventative maintenance and corrective maintenance work on the boilers (such as cleaning and replacing filters on the oil coolers, cleaning and clearing the air lines for instrumentation and recalibration), as well as inspection of the boilers, if required, and conducting air tests to identify any tube leaks.

   iv. **Forced Outage Work:** Forced Outage Work is conducted when

> a Power Station unit is brought offline in an unplanned manner (for example, due to a break down). Forced outages have typically occurred between 30–50 times per year and usually last for 1–4 days. Forced Outage Work involves corrective maintenance work. The vast majority of forced outages arise from a failed boiler tube that requires repairs or replacement.

The Maintenance Workers carry out both the Day-to-Day Maintenance Work and the Outage Work.[1]

Scale and significance of the work

19 Mr Stevenson provides some indication of the expenditures involved in performing the repair and maintenance work. The budget for maintenance work in 2024 is $142 million excluding expenditure on Major Outages.[2] The evidence, discussed below, shows expenditure on Major Outages is also considerable. In the reference period total expenditures by EnergyAustralia at the power station (excluding the costs of the coal burnt) ranged between approximately $278 million and $378 million.[3] In the same period, combined capital maintenance and Major Outage expenditure ranged from $61 million up to $136.6 million and from 21% to 36% of total expenditures.[4] It is possible some expenditure on maintenance work is classified as operational expenditure. The amounts spent on maintenance including Major Outages are substantial and comprise a significant proportion of EnergyAustralia's total expenditures.

20 In his first affidavit, Mr Stevenson provided figures which give an indication of the proportion of maintenance employees to EnergyAustralia's total workforce at the plant. Those figures were the subject of correspondence between the parties. The affidavit of Mr Krunic contains figures which are the result of that interchange. They give an indication of the extent to which EnergyAustralia's workforce was very substantially comprised of maintenance workers until some of the work was outsourced in 2021 to a contractor called Ventia. The table below shows the figures from Mr Krunic's affidavit as to the numbers of workers, together with the

1 Court Book ('CB') 37-38.
2 CB 1796.
3 CB 4819.
4 Ibid.

percentage the maintenance workers comprise of the total number of power station employees:[5]

Maintenance Workers and Total Workforce

Year	Total Workers	Maintenance Workers	% Maintenance Workers
2017	511	345	67.5%
2018	597	441	73.9%
2019	611	450	73.6%
2020	319	143	44.8%
2021	222	42	18.9%

21 The maintenance workers comprised a significant number of employees and a significant percentage of the total number of employees at the power station. As to the proportion of the workforce employed, maintenance workers comprised:

(a) in 2017, approximately two thirds of the total number of employees;

(b) in 2018 and 2019, close to three quarters of the total number of employees;

(c) in 2020, about 45% of the total number of employees; and

(d) in 2021, approximately one fifth of the total number of employees.

Occupational categories

22 The occupational categories of the maintenance workers are described in the agreed statement of facts as follows:

> **Maintenance Workers**
>
> During the Relevant Period, the Maintenance Workers … were employed in the following positions …:
>
> a. Utility Worker – Maintenance (also known as Rigger/Scaffolder and Utility – Coal Disposal)
>
> b. Fitter
>
> c. Electrician (also known as Shift Electrician, depending on the roster pattern)

5 CB 5893-5894.

d. Electrician/Instrumentation (Dual Trade)

e. Boilermaker

f. Condition Monitoring Technician[6]

23 The agreed statement of facts summarises the repair and maintenance work carried out by the maintenance workers:

i. Utility Worker (also known as Rigger/Scaffolder and Utility - Coal Disposal): the workers engaged in this role provide maintenance expertise to ensure the routine and planned maintenance requirements of the team are met. They provide day-to-day assistance and support to the trades (e.g. building and removing scaffolds, all rigging and crane duties, operation of mobile plant including forklifts and elevator work platforms, plus general trades assistance duties, such as cleaning, replacing welding bottles for boilermakers, and mobilising and demobilising work fronts for trades). Outage work performed by Utility Workers is similar to their day-to-day work.

ii. Fitter: the workers engaged in this role make and fit parts to machinery and fixed plant, install and overhaul, conduct routine, corrective and breakdown maintenance within the power station, generation units, auxiliaries and identified plant and equipment and contribute to achieving the desired availability and reliability of the Power Station. They work as part of a multidiscipline team applying both core competencies and assisting others with varied tasks both technical and menial to ensure team objectives are met. They provide maintenance expertise to ensure the asset management plan and business plan are delivered. They respond to outage work and breakdown call ins. They conduct day-to-day preventative or corrective maintenance and repairs, such as replacing a gasket or pump or repairing an oil leak. Fitters also provide assistance with fault finding at the Power Station. Outage Work involves planned corrective maintenance that generally requires a unit to be offline (for example, works undertaken on draught plant such as forced draught fans and induced draught fans and repairing or replacing rotary air heater seals).

iii. Electrician (also known as Shift Electrician, depending on the roster pattern): the workers engaged in this role provide maintenance expertise to ensure the routine and planned maintenance requirements of the team are met. They work as part of a multidiscipline process team, applying both core competencies and assisting others with varied tasks, both technical and routine, to ensure team objectives are met. They carry on day-to-day preventative maintenance activities (for example, testing of actuators and maintenance of electrical cubicles), planned corrective maintenance (for example, replacing an actuator or repairing cables), and fault finding (for example, identifying a faulty junction box). Outage work

6 CB 43.

is similar to day-today work and includes some high-risk fault-finding work to remove the risk of a plant or unit trip.

iv. Electrician/Instrumentation (Dual Trade): the workers engaged in this role provide maintenance expertise to ensure the asset management plan and business plan are delivered. They work as part of a multidisciplinary team applying inherent competencies while supporting their own team and the maintenance organisation with varied tasks both technical and business related to deliver the desired objectives. They also respond to outage work and breakdown call ins. They carry out day-to-day preventative and corrective maintenance activities (for example, wiring upgrades and modifications to electrical systems and recalibration of instrumentation equipment) as well as fault finding (for example, identifying a faulty transmitter). Outage work is similar to day-to-day work, but also includes some high-risk fault finding work (for example, an employee may be working on a thermocouple or critical piece of plant that has the potential to cause a plant or unit trip if repaired online).

v. Boilermaker: the workers engaged in this role make and fit parts to machinery and fixed plant. They install and overhaul, conduct routine, corrective and breakdown maintenance within the Power Station, generation units, auxiliaries and identified plant and equipment. They work as part of a multidiscipline team, applying core competencies and assisting others with varied tasks both technical and menial to ensure team objectives are met. They carry out day-to-day temporary repairs of metal parts (for example, repairing a hole on a piece of duct work) and defect or preventative maintenance activities (for example, replacing protective armour inside a mill). Outage work includes repair or replacement work (for example, replacing duct work) and occasional pressure welding activities.

vi. Condition Monitoring Technician: the workers engaged in this role conduct condition monitoring activities and provide advice for the effective maintenance and operation of plant and machinery. They carry out day-today thermography to inspect plant, equipment and machinery for the purposes of fault finding and planned maintenance and undertaking preventative and condition-based maintenance (for example, monitoring vibration and temperature trends, analysing oil sample data and providing technical support and recommendations). The majority of the work performed by Condition Monitoring Technicians occurs day-to-day. Outage work involves inspections undertaken while plant, equipment and machinery is offline, as well as providing technical advice during an outage.[7]

[7] CB 43-45.

Major Outages

24 The agreed statement of facts gives more detail regarding Major Outages. The table below summarises some key information regarding those outages:[8]

Major Outages – Key Metrics

Year	Duration (days)	Total Cost ($m)	EnergyAustralia labour cost ($m)	Permanent Employees	Casual Employees
2017	71	$50.3m	$25.6m	10	236
2018	71	$56.6m	$31.4m	5	279
2020	126	$91.4m	$31.7m	4	489
2021	95	$87.3m	$7.5m	4	42

25 Again, the reason for the significant reduction in the amount of direct labour used during the 2021 Major Outage compared to previous Major Outages is that a large proportion of the work was outsourced to Ventia.

26 In cross-examination Mr Stevenson confirmed that:

(a) A significant proportion of the casual employees working on any Major Outage would have worked on a previous outage;

(b) Typically, the employment of casuals working on the outage would come to an end once work on the Major Outage was complete; and

(c) Casual employees employed on the Major Outage Work did not have an entitlement to long service leave, though they did receive a casual loading in lieu of weekend penalties and/or paid leave.

27 The agreed facts provide a description of the Major Outage Work in 2021 as indicative of the work required in such outages:

a. Boiler work, including:

i. capital works to the economiser; superheater; Main Stream Supply hanger; attemperator spray control valves; primary Superheater element; secondary reheater element; Main Stream & Reheater spool fabrication/replacement; and

[8] CB 39-41.

ii. inspections of horizontal carrier tubes for tie plate weld cracking and caustic gouging; inspections of secondary economiser element tubes for rubbing wear; inspections of cold reheat pipework & valves cold reheat terminal weld and other critical Main Stream, Main Reheat and Cold Reheat weld inspections; primary economiser and structural inspection; boiler convective elements and tube inspection; drum internal, external and sling inspections; riser tubes and suspension inspection; pressure parts inspection and repairs; drum safety valves inspection and overhaul.

b. Turbo Generator work, including:

i. capital works to generator transformers and turbine oil conditioner replacement; and

ii. routine inspection scopes of work; condenser valves off-site overhaul; and turbine auxiliary plant routines.

c. Combustion work, including:

i. capital works to replace beater wheel; the inspection and repair of upper and lower Pulverised Fuel ducts, flow plates and cruciform repairs; and there placement of the three constant load springs hangers at the top of the burner; and

ii. inert and Pulverised Fuel burner mouth steel repairs and refractory replacement; Emergency Cold Aid Damper and ambient duct replacement; the removal and replacement of burner air duct lower expansion joints; combustion plant routines; and mill air duct cladding and insulation replacement.

d. Coal/Disposal work, including:

i. capital works to replace the bunker shutter rail under the W38 and W48 conveyors; and

ii. the replacement of ash hopper valves; Electrostatic Dry Precipitator's inspections and repairs; electrical/transformer routines; stator water cooler overhaul (major); generator stator overhaul – stator disassembly and rotor removal; generator rotor inspection; additional works to remove blades and do Non-Destructive Testing on Low Pressure A rotor, dovetail and additional work scope on site pending findings.[9]

Is EnergyAustralia in the construction industry?

Relevant definitions in the Rules

28 The Rules provide definitions of 'construction industry' and 'construction work'.

29 Construction industry means:

9 CB 41-42.

any of the industries of:

(a) **carrying out the** construction (including pile driving), erection, installation, reconstruction, re-erection, renovation, alteration, demolition or **maintenance of or repairs to** any of the following:

…

(xiv) **structures or works for the generation, supply or transmission of electric power**;[10]

(emphasis added)

30 Construction work means:

(a) work:

(i) performed in the Construction Industry; and

(ii) which is Building Trades Work, Electrical Trades Work, Metal Trades Work or Other Trades Work; or

….

but does not include work comprising maintenance or repairs of a routine or minor nature by a Worker for an Employer who is not engaged substantially in the Construction Industry.[11]

The contentions of the parties

31 LeavePlus says that EnergyAustralia is in the industry of carrying out maintenance of or repairs to structures or works for the generation, supply or transmission of electric power. EnergyAustralia accepts that it has workers which perform work of maintaining or repairing such structures or works but says that on a proper construction it is not engaged in that industry.

32 The submissions of EnergyAustralia in this regard may be summarised as follows:

(a) The definition of construction industry in the Rules is a definition which refers to the industry of an employer rather than to the occupation or work of employees;

(b) The 'orthodox' approach to determining whether an employer is in an

10 CB 56.
11 CB 56-57.

industry is to determine the 'substantial character' of its enterprise ('substantial character test');

(c) Applying this test, the substantial character of EnergyAustralia's enterprise is the generation of electricity;

(d) The maintenance or repair of its structures for the generation of electric power are integrated with and incidental to the activity of generating electricity;

(e) EnergyAustralia does not charge external clients for services relating to the maintenance of or repairs to structures for the generation of electricity; and

(f) By reason of the above, EnergyAustralia is not in the construction industry as defined by the rules.

33 Both parties accepted that the definition of construction industry in the Rules of the fund is a reference to the industry of the employer. As a matter of construction, that proposition must be right. The juxtaposition of the definition of construction work with the definition of construction industry and the provisions of the Rules as a whole make plain that construction industry refers to the enterprise in which the employer is engaged whilst construction work refers to the activities engaged in by an employee.

The substantial character test does not apply

34 I am not satisfied that in construing the Rules it is appropriate to apply what EnergyAustralia describes as the 'substantial character test' in ascertaining whether it is engaged in the construction industry as defined.

35 EnergyAustralia's contention in this regard is derived from the use of that test in relation to the construction of various union rules and industrial instruments in an industrial context. There are many such authorities and I discuss a number of them in the section of the judgment below where I analyse whether EnergyAustralia's business does have the substantial character of being in the construction industry. Those authorities all emphasise that the Court's ultimate task is one of construction

of the particular union rule or industrial instrument. In this case, my task is one of construing the terms of the Rules.

36 As Wilson J said in *R v Isaac; Ex parte Transport Workers Union of Australia* ('*R v Isaac*'):[12]

> [T]o look for 'the primary and predominant purpose of the activity'… is to allow oneself to be diverted from the proper path of construction. The essential question is simply whether the workers in question are engaged in… any of the industries… described in the rule. Having identified a relevant industry, the question is as to the scope that is to be accorded to that industry in the circumstances of the case.

37 EnergyAustralia picks up the description of the substantial character test as 'orthodox' from Perram J's analysis in *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* ('*Orica Australia*').[13] That analysis is instructive because:

(a) in the result, his Honour resolved the issue of whether relevant employees were eligible employees under the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) by construing the definition in that Act without recourse to the substantial character test. That was because the relevant definition included what his Honour described as a 'location limb' which did not require recourse to considerations of industry. His Honour's reasons in this respect, like those of Wilson J quoted above, emphasise the importance of construing the particular rules as drafted; and

(b) it was only against the possibility that his preferred construction might be wrong that his Honour needed to consider the question of whether the employees in that case were employed in the coal industry. Whilst his Honour does describe the substantial character test as orthodox, it is important to recognise the inherent limitations he places on the use of the test and its limitations as a conceptual framework.

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12 (1985) 159 CLR 323, 344 ('*R v Isaac*').
13 [2023] FCA 1515.

38 In *Orica Australia* Perram J said:

> Where a firm by means of a single enterprise provides its services to firms which are in more than one industry the question of whether it is engaged in one or more of those industries is usually resolved by seeking to ascertain its substantial character. The conceptual framework for that analysis largely rests on an example given in *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 ('*Thiess*') at 131 by Latham CJ of a firm operating a laundry and providing laundry services to hotels. Chief Justice Latham posited that if the laundry provided its services to hotels but also to other customers such as restaurants it would not be possible to say that it was engaged in the hotel industry. On the other hand, if the hotel employed laundresses at its premises to do work exclusively for it, it was likely that the laundresses were employed in the hotel industry.
>
> The analysis is inherently taxonomic but, like all exercises in taxonomy, is undertaken with a particular purpose in mind. The purpose in *Thiess* was the need to define an industry so as to provide for the regulation of its industrial affairs. If the purpose of the taxonomy were different, say health and safety, the question of characterisation might be approached differently.
>
> In this case, the purposes of cl 4.3(g) remain industrial. Through cl 4.1, cl 4.3(g) is part of a machinery which defines which employers are to be bound by the Award and which are not. Thus, as I have already observed, the substantial character test remains the applicable mechanism for determining the Award's coverage.
>
> ….
>
> The substantial character test in *Thiess* seeks to answer the question of whether such a firm should have its industrial affairs regulated as a participant in the hotel industry. In doing so it converts an essentially normative inquiry as to whether one thinks that a firm should be regulated as part of an industry into an objective analysis of the substantial character of the employer.
>
> The extent of the use of contractors within the economy has expanded far beyond anything contemplated at the time of *Thiess* as firms have realised that lower costs can be achieved through specialisation. For example, in the context of this case, I have no doubt that at one time mine operators provided their own ground support and geotechnical services. But economies of scale mean that these services may be less expensively delivered by firms who specialise in them. Similarly, the modern airline industry more and more consists of the activities of contracting firms which provide specialist services to multiple airlines (for example, firms providing the services of baggage handling).
>
> The time may come (indeed, may have come) when some enterprises are conducted by firms which, whilst in legal form are providing services, in industrial reality consist merely of a conglomeration of third-party contractors. It is possible that this development exceeds the explanatory capacity of the laundry example and a new conceptual framework may be called for.

> In any event, the substantial character test continues to be the orthodox approach to these issues.[14]

39 Here, there is a strong textual indication that a substantial character test does not apply. The definition of construction work specifically excludes 'maintenance or repairs of a routine or minor nature by a worker for an **employer who is not engaged substantially in the construction industry**' ('the routine or minor maintenance carve out'). If an employer could only be in the construction industry if they met a substantial character test, the emphasised words in the routine or minor maintenance carve out would have no work to do.

40 In *CoInvest Ltd v Celsius Corporate Services Pty Ltd*,[15] the County Court left open the question of whether in all instances an employer being substantially engaged in an industry meant the same thing as an employer's enterprise having the substantial character of that industry.[16]

41 EnergyAustralia sought to distinguish between a 'substantial character test' and being substantially engaged 'in' an industry. It said that the former was concerned with the true character of the enterprise and the latter was concerned with the scale of the activities. For that distinction to have meaning and for the routine or minor maintenance carveout to have any work to do, an employer would have to be in the construction industry in the sense that its 'true character' was properly regarded as falling within the industry as defined but have activities at such a small scale that it was not 'substantially' in the industry. I do not accept that the words of the Rules should be given such a strained and unlikely construction.

42 This is, in my view, sufficient to dispose of EnergyAustralia's contention that a substantial character test applies to the construction of the term 'construction industry' in the Rules.

43 Once it is accepted that EnergyAustralia's enterprise can, for the purposes of the

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14 Ibid [81]-[83], [86]-[89].
15 [2017] VCC 796.
16 Ibid [91]-[92].

Rules, be in an industry of repair or maintenance of structures used to generate electricity without needing to be 'substantially' in that industry, it is difficult to see how the evidence in this case leads to any other conclusion. I accept that it is not enough that there be some employees of EnergyAustralia involved in maintenance or repair of structures or works involved in the generation of electricity – that might show that there were employees employed in an occupation of repairing or maintaining structures and the like but not necessarily that EnergyAustralia was in that industry. Even without a substantial character test it is necessary that the activity can be described as something which is part of EnergyAustralia's overall business purpose.

44 EnergyAustralia owns, operates and maintains a power station – that is its business. Its primary purpose, it may be accepted, is the generation of electricity for sale. However, the evidence shows that in order to fulfill that primary purpose it has to devote very considerable resources to the maintenance and repair of the structures or works involved in the generation of that electricity.

45 It makes sense, as a matter of ordinary language, to describe EnergyAustralia's business purpose as including carrying on the maintenance of or repairing the power station's electricity generation equipment and plant. It makes sense, as a matter of ordinary language, to describe it as being in the industry of repairing and maintaining those structures or works as well as being in the industry of generating electricity.

46 In any event, even if the substantial character test does apply, for the reasons below, I am satisfied that EnergyAustralia is in the industry of carrying out maintenance of or repairs to structures or works for the generation, supply or transmission of electric power.

EnergyAustralia is substantially in the construction industry

47 Before analysing whether EnergyAustralia is substantially in the construction industry as defined by the Rules, it is worth emphasising a matter which it accepted was established by the authorities – that being that even where the substantial

character test applies, it is possible for an employer to be within more than one industry. Here 'substantial' does not mean 'predominant', but rather 'of substance'.

48 As Gibbs CJ said in *R v Isaac*:[17]

> A decision of the question whether a particular description fits an industry or calling involves matters of degree, and the answer may depend on the "substantial character" of the activities carried on: *Reg. v. Moore; Ex parte Federated Miscellaneous Workers' Union of Australia*, and cases there cited. That does not mean that if the enterprise has two purposes, it is necessary to decide which is predominant. **It is quite possible that an industry or calling can accurately be described in a number of ways, and the fact that it comes within one description does not mean that it cannot also come within another.** For example, in *Reg. v. Moore; Ex parte Federated Miscellaneous Workers' Union of Australia*, some of the workers concerned were engaged in road making, as well as in or in connexion with metalliferous mining: see per Jacobs J. In the same case, Aickin J. said:
>
> > "It does not, in my opinion, follow from the fact that it may be said that an employer is engaged in construction work that he may not also properly be regarded as engaged in activities in or in connexion with metalliferous mining."
>
> (citations omitted, emphasis added)

49 Notwithstanding its acceptance of the proposition that the same activity might properly be characterised as being in two industries, elements of EnergyAustralia's argument veered toward the proposition that there could only be one proper characterisation or that, at any rate, if EnergyAustralia was properly characterised as being in the industry of generating electricity then it could not also be characterised as being in the industry of repairing and maintaining structures or works for the generation of electricity.

50 EnergyAustralia primarily relied on four cases as demonstrating that the proper application of the substantial character test in the circumstances of this case would lead to the conclusion that it was not in the construction industry. Properly analysed, I do not accept that those cases lead to that conclusion.

51 In *R v Hibble; Ex parte Broken Hill Proprietary Co Limited* ('*Hibble*'),[18] the High Court

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17 *R v Isaac*, 332-333.

18 (1921) 29 CLR 290.

had to determine whether certain employees of Broken Hill Proprietary Co. Ltd. ('BHP') were engaged in or in connection with the coal and shale industry. The evidence was that BHP carried on business manufacturing iron and steel and, in the course of that business, employed workers who converted coal into coke so that it could be used in the production of iron and steel. The High Court held that they were not. The judgment of the plurality (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) states:

> [S]ome employers extract coal from the earth, convert some of it into coke, and distribute both coal and coke to consumers. Such a business would in point of fact be part of the coal or shale industry, and all persons employed in that business are properly said to be employed in or in connection with that industry. A person, however, who carried on the trade or business of a baker using coal or coke for the purpose of heating his ovens could not, according to the ordinary meaning of words, be said to be engaged in the coal or shale industry, nor could his employees be rightly said to be employed in or in connection with that industry.
>
> The question whether a particular trade or business is or is not part of the coal and shale industry must in all cases be a question of fact. We hold that a steel and iron manufacturer who for the purpose of his business uses coal in its natural state or after it has been transformed by him into coke is not engaged in the coal or shale industry, and that his employees are not employed in or in connection with that industry.[19]

52 EnergyAustralia says that its maintenance employees are in a similar position to the employees under consideration in *Hibble*. It says that its maintenance employees are employed in a business which is in the industry of generating electricity not in the business of providing maintenance or repair services. I am not satisfied that the facts in *Hibble* bear any real resemblance to the facts I am presently required to consider. *Hibble* concerned a situation where employees were using the product of one industry as part of the process of manufacture in a different industry. The example of the baker, referred to in the passage of the judgment extracted above falls into the same category. That is not this case.

53 As I have emphasised, the process of characterisation may lead to a conclusion that an employee is employed in more than one industry where the industry definitions

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19 Ibid 297.

are broad and may seem to be overlapping. In light of that, it is not at all apparent that the employees in *Hibble* could not properly have been said to be engaged in the industry of 'the manufacture of coke for use in iron and steel manufacture'. A description of industry in that form provides a closer analogy to the facts of this case than the description of the industry which the High Court considered in *Hibble*.

54 In *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* ('*Thiess*')[20] the High Court had to consider whether employees of a business which engaged in engineering repairs were in the coal mining industry. Most of the work undertaken by the engineering business was to make major repairs to and overhaul excavating and other mechanical equipment used in an open coal mine. The High Court held that the workers were not employed in the coal mining industry.

55 Latham CJ said:

> The line between industries is in many cases not clear. One industry may be entirely concerned with the service of another industry, and yet may not be part of that other industry. A laundry company may do work for hotels and restaurants but, to take a case at one end of the line, if the laundry business were conducted by a laundry company completely separate from any of the hotels and restaurants for which it did work (as for other customers) upon ordinary commercial terms, it would not be possible to say that the laundry was part of the hotel industry. A case at the other end of the line would be found where a hotel employed some laundresses on the hotel premises who did work exclusively for the hotel and were completely under the control of their employer. In such a case the laundresses might well be held to be working in the hotel industry.
>
> …
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> Many industries supply goods to or provide services for other industries. A motor garage may be almost exclusively engaged in repairing trucks for a transport company, and it may do such work under a contract under which it is entitled to obtain and bound to do all the transport company's work. But it would not follow that the motor garage was in the transport industry. Similarly, an engineering workshop which does all the repairs for a coal mine and a gold mine and a shipping company would not, according to the ordinary use of language, be said to be engaged in the coal-mining industry, the gold-mining industry and the shipping industry. There are obvious difficulties in saying it is at one and the same time in each of these industries

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20 (1948) 77 CLR 123.

and in the engineering industry as well. [21]

56 A number of points should be made regarding *Thiess*:

(a) As in *Hibble*, the High Court emphasises the fact dependency of the relevant inquiry;

(b) The case is primarily concerned with the issue of whether a contractor providing services to a company in an industry can be characterised as being in that industry. That is not this case;

(c) The last sentence of the above passage from the judgment of Latham CJ appears to be predicated on the notion that the task of characterisation requires a determination that employees can only be in one industry. Insofar as his Honour appears to reason in that way, that position has been overtaken by subsequent authority; and

(d) The oft-cited example of the hotel laundresses inherently admits of a spectrum of possibilities beyond the dichotomy of 'a case at one end of the line' and 'a case at the other end of the line'.

57 In particular, for present purposes, *Thiess* does not stand for the proposition that had the relevant employees been engaged directly by the coal mine they might not have been appropriately characterised as working in both the coal mining industry and an industry of repair and maintenance of coal mining equipment. Nor does it stand for the proposition that laundry workers employed directly by a hotel might not also be characterised as working in the industry of supplying laundry services to hotels.

58 EnergyAustralia also relies on *R v Moore; Ex parte Australian Workers' Union*.[22] In that case the High Court had to consider whether employees of a catering company which provided services to a mining company were employed in or in connection with metalliferous mining. The High Court held that they were not. Like *Thiess*, that

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21 Ibid 130-131, 135.

22 (1976) 11 ALR 449 (Barwick CJ, Gibbs, Stephen, Mason and Jacobs JJ).

case concerns the circumstance of a contractor providing goods or services to an enterprise in a different industry. It does not assist in the characterisation task in this case.

59 Finally, in this regard, EnergyAustralia relies on *The Australian Workers' Union v Construction, Forestry, Mining and Energy Union* ('*AWU v CFMEU*'),[23] a decision of a Full Bench of the Australian Industrial Relations Commission ('AIRC').

60 In particular, EnergyAustralia relies on the following passage from the decision:

> We do not think that 'the construction industry' means the same thing as 'the construction, repair, renovation, maintenance, ornamentation, alteration, removal or demolition of any building or structure or any other works or projects including but not limited to' (the thing specified in paragraphs (i) to (x) of the proposed rule). There will, we think, be many cases when, for instance, the repair of 'any building or structure' etc, would not be work in or in connection with or incidental to the construction industry.[24]

61 EnergyAustralia says *AWU v CFMEU* establishes that persons can be engaged in construction work but not working in or in connection with or incidental to the construction industry. That proposition is uncontroversial – it recognises that there is sometimes a distinction between the occupation, vocation or duties of an employee and the industry in which their employer is engaged. EnergyAustralia might employ an accountant but it is not in the accounting industry.

62 EnergyAustralia rely upon three examples cited by the Full Bench as illustrating the distinction which they draw in the above paragraph.[25] Each of those examples involved an employee performing in-house repair and maintenance work. In each case, the Full Bench determined that that work would be properly characterised as referable to the industry of the employer being the grain, steel and oil industries respectively, rather than the construction industry.[26]

63 *AWU v CFMEU*, however, does not establish some general proposition that all in-

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23 [2001] AIRC 177.
24 Ibid [65].
25 Ibid [66]-[68].
26 Ibid [69].

house repair and maintenance work is not or cannot be described as being within 'the construction industry'. The Full Bench was considering a proposed rule change to the eligibility rules of the CFMEU. Relevantly, that rule change sought to include a proposed rule in the following terms:

> Without limiting the generality of the foregoing and without being limited thereby, persons eligible for membership of the union shall include any worker (other than metal, electrical or plumbing tradespersons) engaged on any work in or in connection with or incidental to the construction, repair, renovation, maintenance, ornamentation, alteration, removal or demolition or any building or structure or any other works or projects including but not limited to:
>
> (i) civil and/or mechanical engineering projects
>
> (ii) power transmission, light, television, radio, communication, radar, navigation, observation towers or structures[27]
>
> [There followed another eight categories of structures, works or projects]

64 At first instance, Williams SDP had granted the rule change describing it in the following terms:

> Broadly speaking… the granting of the application would give the CFMEU the right to enrol, other than in Queensland, all non-trades employees engaged on any work in or in connection with or incidental to the construction industry, whether employed in the building sector or the civil/mechanical engineering sector of that industry.[28]

65 The decision of the Full Bench of the AIRC was, relevantly, directed to the question of whether it was appropriate to describe the proposed rule in the terms which Williams SDP described it. In the passage of the Full Bench's decision on which EnergyAustralia relies and which I have extracted above, the Full Bench held that that description was not apposite.

66 *AWU v CFMEU* does not assist EnergyAustralia in this case:

(a) Insofar as the Full Bench juxtaposed in-house work with the 'construction industry', it is plain that it was juxtaposing in-house work with a description

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27 Ibid [21].
28 Ibid [23].

of the construction industry used by Williams SDP, not by reference to a definition of construction industry in the form I have to consider;

(b) The Full Bench's decision makes plain that drafting in the nature of that considered in *AWU v CFMEU* would mean that construction work encompassed in-house maintenance and repair work; and

(c) The reasons of the Full Bench emphasise the importance of focussing on the particular language utilised in such definitions of work or industry rather than recourse to generalised notions of what would or would not be understood to fall within a particular definition.

67 The Full Bench decision does not provide direct assistance on the question of whether a rule in the terms I have to consider covers employees performing the work that is relevant to this case. It is plain from the manner in which the Rules are drafted that the definition of construction industry does cover employees engaged in repair or maintenance work where the employer is 'substantially' engaged in another industry or industries, otherwise the routine or minor maintenance work carve out would have no work to do.

68 I was taken to a range of other cases in which courts or tribunals construed particular union rules, awards or statutes:

(a) *CFMEU v Dyno Nobel Asia Pacific Ltd*[29] is a case about the coal industry. The AIRC held that employees of a business that provided shot firing services at coal mines were not in the coal mining industry because the substantial character of the business by whom they were employed was the manufacture and supply of explosives. The Full Bench of the Commission emphasised the distinction between an analysis of the work of employees and the industry of the employer;

(b) *Coal Mining Industry (Long Service Leave Funding) Corporation v Hitachi*

29 [2005] AIRC 622.

Construction Machinery (Aust) Pty Ltd[30] is another case about the coal industry employees. The enterprise of the employer (Hitachi) involved supplying new and used earthmoving and materials handling equipment in a wide range of industries, including the black coal mining industry. The case involved four employees who performed work at various coal mining sites. Hitachi was held not to be in the black coal mining industry. Hitachi's services were supplied to a wide range of industries, its substantial character was not the industry of black coal mining.

(c) *Aust-Amec Pty Ltd v Construction Industry Long Service Leave Payments Board*[31] involved a determination that employers whose employees engaged in non-destructive diagnostic testing to determine whether repairs or maintenance were required, were not in the construction industry because such work was not itself maintenance or repairs of buildings etc.

(d) *Healy Airconditioning Pty Ltd v Construction Industry Long Service Leave Payments Board*[32] considered whether employees of a business which distributed, installed, maintained and repaired packaged air-conditioning systems were employed in the construction industry for the purpose of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA). The Board of Reference determined that they were not. The decision of the Board is, with respect, not a model of clarity or overburdened with reasoning. In any event, the decision falls within that category of case which determines that simply because an employer provides goods or services to an industry, does not mean it falls within that industry.

69 Those cases construed particular forms of words in particular fact situations, they do not provide any real guidance as to my task. Insofar as the coal industry cases analysed the question of whether an employer was in an industry by reference to the

30 (2023) 322 IR 129.
31 (1995) 15 WAR 150.
32 (1999) 79 WAIG 560.

substantial character test, they were not dealing with rules or legislation that contained a textual indication (like the routine maintenance carve out) that that test did not apply. Insofar as the above cases determined the substantial character of the particular enterprise, first, it is to be observed that all consider situations of a contractor supplying goods or service to a range of industries and second, and at the risk of repetition, they construe the relevant rules or legislation by reference to different fact situations.

70 As the foregoing analysis shows, none of the cases on which EnergyAustralia rely require an adverse answer to the question of whether EnergyAustralia is in the construction industry as that term is defined by the Rules. Ultimately, that question has to be resolved by a construction of the Rules applied to the facts of this case.

71 It may be accepted that EnergyAustralia's enterprise is in the industry of the generation of electricity, it has that substantial character. This does not exclude the possibility that the substantial character of the enterprise may also include the maintenance or repair of the structures or works by which EnergyAustralia generates electricity.

72 When regard is had to:

(a) the integral nature of that repair and maintenance work to the functioning of the power station and its capacity to generate electricity;

(b) the scale, size and importance of that work; and

(c) the substantial proportion of the paid workforce of EnergyAustralia who are engaged in that work

it is, in my view, appropriate to characterise EnergyAustralia's enterprise as having the substantial character of being in the industry of repair and maintenance of structures or works for the generation, supply or transmission of electric power.

73 Finally, EnergyAustralia contends that it is not performing work in the construction

industry as defined because it does not supply repair or maintenance services to any other person or entity for reward. EnergyAustralia's contention in this regard is to substitute an inquiry regarding the goods or services for which an employer receives payment for an analysis of the ambit and scope of the relevant rules.

74 EnergyAustralia relies on the decision in *Hibble* for this contention, but as the above analysis shows, *Hibble* does not go so far. *Hibble* establishes that the repair and maintenance workers in this case might be characterised as working in or in connection with the industry of the generation of electric power. It does not establish that so characterising the employees means that they cannot be characterised as working in the industry of carrying out maintenance of or repairs to structures or works for the generation, supply or transmission of electric power.

75 Indeed, the cases show that the industry in which an employer is engaged is not characterised by the activity for which they are paid. In *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia*,[33] for example, the project engineering companies were paid for construction work but held to be in the industry of metalliferous mining.[34]

76 If a substantial character test applies, EnergyAustralia is properly characterised as being in the construction industry as defined, because it is appropriate to characterise its business as having the substantial character of carrying out repairs or maintenance to structures or works for the generation of electricity.

Does the routine or minor maintenance carve out apply?

77 EnergyAustralia contends that the work performed by the maintenance employees is not construction work because it is caught by the following exclusion from the definition in the rules:

> work comprising maintenance or repairs of a routine or minor nature by a worker for an employer who is not engaged substantially in the construction

33 (1978) 140 CLR 470.
34 Ibid 485 (Aickin J).

industry.[35]

('routine or minor maintenance carve out')

78 I have held that EnergyAustralia is 'substantially' in the construction industry so the carve out does not apply.

79 Against the possibility that, contrary to that conclusion, EnergyAustralia is 'in' the construction industry but not 'substantially' in it, I will nonetheless consider whether the repair and maintenance work is properly described as being of a 'routine or minor' nature. On any view, it is not minor. EnergyAustralia argues it is routine.

80 EnergyAustralia says the repair and maintenance work comprises regularly recurring activities that are expected incidents of operating the power station. The Major Outage Work is planned and occurs on each unit every four years. Integrity Outages used to occur two years prior to Major Outages. Boiler clean outages take place on each boiler unit at approximately six month intervals. Whilst Forced Outages are unscheduled, EnergyAustralia says even these are routine because whilst such an outage is not planned it is an expected incident of running the power station.

81 EnergyAustralia relies on various dictionary definitions of routine. Relevantly the online Macquarie Dictionary defines routine (used as an adjective) as 'that is customary or regular' or '(of an activity) dull or boring due to its unvarying nature'. The other definitions on which EnergyAustralia relied were to similar effect. The online Collins dictionary says routine describes 'activities that are done as a normal part of a job' and that 'a routine situation, action, or event is one which seems, completely ordinary, rather than interesting, exciting, or different'. It relevantly defines the noun as 'a usual or regular method of procedure, [especially] one that is unvarying' or 'regular, unvarying, habitual, unimaginative, or rote procedure' and then defines the adjective as of, relating to or characteristic of routine. The

35 CB 57.

Cambridge dictionary describes routine as 'done as part of what usually happens, and not for any special reason' or 'ordinary and boring'.

82 Like all words 'routine' bears shades of meaning and the particular shade of meaning is best discerned from the context in which it is employed. The phrase 'routine or minor maintenance' helps in ascertaining the shade of meaning intended in this case. I am not persuaded that the Major Outage Work is properly described as routine just because it is planned and regular. The Olympics are planned and regular but they would not be described as a routine sporting event. Similarly here, the Major Outage Work is of such a scale, involves such a degree of planning and appears to have such a standalone character that in my view it does not have the mundane character (is not unvarying, unimaginative or rote) which the compound phrase 'routine or minor' implies. Similar reasoning applies to the Integrity Outage Work.

83 EnergyAustralia accepted that its burden was to show that none of its employees were performing construction work in the construction industry. Even if EnergyAustralia is not substantially in the construction industry, I would hold that at least those employees engaged in Major Outage Work and Integrity Outage Work were not engaged in repair or maintenance work of a routine or minor nature.

Is the repair and maintenance work of a kind for which a rate of pay was fixed by a prescribed award?

84 EnergyAustralia says the repair and maintenance work is not construction work as defined by the Rules because it is not work of a kind for which a rate of pay was fixed by a prescribed award as at 6 May 2014.

85 The Rules no longer provide for prescribed awards or provide for work of a kind for which a rate of pay was fixed by a prescribed award. Relevantly, construction work means:

(a) Building Trades Work, the definition of which refers to work of a kind in one or more of the classifications in Appendix A;

(b) Electrical Trades Work, the definition of which refers to work of a kind in one or more of the classifications in Appendix B;

(c) Metal Trades Work, the definition of which refers to work of a kind in one or more of the classifications in Appendix C; and

(d) Other Trades Work which is not presently relevant.

86 EnergyAustralia does not say that its maintenance employees do not perform work of a kind in one or more of the classifications in Appendices A, B or C. Some, perhaps all, would appear to. For example, classifications for rigger, scaffolder, fitter, electrician, shift electrician and boilermaker all appear in those appendices.

87 Prior to 11 November 2014, the rules of the Fund ('the Former Rules') also defined construction work as (relevantly) meaning Building Trades Work, Electrical Trades Work, Metal Trades Work and Other Trades Work. However, in the Former Rules the definition of Building Trades Work referred to 'work of a kind for which a rate of pay is fixed by a Prescribed Building Award' with cognate references in the definitions of Electrical Trades Work and Metal Trades Work.

88 On 11 November 2014 the Former Rules were replaced by the Rules. This amendment, amongst other things, changed the definitional references from 'work of a kind for which a rate of pay was fixed by a [prescribed award]' to references to 'work of a kind which is within … one or more of the classifications, set out in' Appendices A, B or C.

89 It is common ground that:

(a) the replacement of the Former Rules with the Rules in 2014 was not the subject of approval by the Governor in Council; and

(b) therefore, the provisions of s 7 of the Act mean that the replacement could not have the effect of enlarging the class of persons capable of being paid benefits out of the fund.

90 EnergyAustralia says that:

(a) at no stage did any of the prescribed awards apply to work at the power station, rather other industrial instruments including the Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998 and the Victorian Electricity Industry (Mining & Energy Workers) Award 1998 applied to the exclusion of the prescribed awards;

(b) at no stage did any prescribed award fix a rate of pay for the maintenance workers;

(c) as at 6 May 2014 and immediately prior to the replacement of the former Rules, work performed by the maintenance workers was not work of a kind for which a rate of pay is fixed by a prescribed award; and

(d) as a result, either:

(i) Appendices A, B and C of the Rules should be read as not extending to the maintenance employees, or

(ii) if they do, they are invalid and so the maintenance employees would not be covered by the Rules.

91 LeavePlus says:

(a) EnergyAustralia's submissions do not pay any regard to the fact that the definition in May 2014 refers to *work of a kind* for which a rate of pay is fixed by a prescribed award;

(b) the critical question is not whether the prescribed awards in fact fixed a rate of pay for the maintenance workers;

(c) the question is whether the work performed by the maintenance workers was *work of a kind* for which a rate of pay was fixed by a prescribed award; and

(d) a comparative analysis shows that was the case for the maintenance workers.

92 A consideration of the nature of industrial regulation when the Act was enacted and the former Rules commenced makes clear why it is unlikely that the phrase 'work of a kind for which a rate of pay is fixed by a [prescribed award]' should be construed as requiring that the prescribed award in fact applied at the employer's enterprise. Generally speaking, industrial awards made by the AIRC prior to 2003 bound the parties to the award but did not cover all employers in the industry or occupation covered by the award; that is the case for most of the prescribed awards. Further, various forms of agreement (both individual and enterprise) were permitted under the then *Workplace Relations Act 1996* (Cth). Typically, those agreements displaced the operation of the relevant award, either in whole or in part and usually as to rates of pay. Finally, there were also situations where enterprise specific awards applied to the exclusion of more general industry awards.

93 The evident purpose of the Act and the Former Rules was to create a system of portable long service leave for the construction industry. That purpose would have been undermined if an employee ceased to be covered by the scheme because:

(a) they moved from an employer in the construction industry who was respondent to the award to an employer in the construction industry who was not;

(b) their terms and conditions of employment came to be regulated by an enterprise agreement or an enterprise specific award; or

(c) because their employer ceased to be regulated by the award because their employer had only been bound by the award as a member of a respondent employer organisation and had since resigned that membership.

94 EnergyAustralia points to the decision in *Baytech Trades Pty Ltd v CoInvest Ltd* ('*Baytech*')[36] as demonstrating that award coverage is determinative of the question of whether work is of a kind for which a rate of pay is fixed in an award but that case

[36] [2015] VSCA 342.

does not stand for that proposition.

95 In *Baytech* the Court considered whether electrical fitters who built switchboards were employed performing construction work in the construction industry under the Former Rules. Baytech Trades Pty Ltd was a labour hire company. It supplied electrical fitters to a company, NHP Electrical Engineering Products Pty Ltd ('NHP'). The Court determined that the work of the electrical fitters did not fall within the scope of the relevant award because, properly construed, that award applied to on-site work installing a device or servicing it once installed and did not apply to assembling the device as part of a manufacturing process. Having made that finding, the Court might simply have found that Baytech was not in the construction industry because it was not in the industry of carrying out Electrical Services as that term was defined in the former Rules. Instead, however, the Court considered whether the work performed by the electrical fitters was construction work and whether it was work of a kind for which a rate of pay was fixed by the prescribed award. The Court concluded:

> [T]he NHP contract work was not 'work of a kind' to which the Electrical Contracting Industry Award applied. The relevant genus, as we have explained, is the provision of electrical services connected with, and for the purposes of, installation and maintenance of electrical appliances at the premises where they are used or to be used.[37]

96 *Baytech* makes clear that the scope of the relevant prescribed award was relevant in determining the 'genus' of work in order to determine whether work was 'of a kind' for which a rate of pay was fixed by that award, but what is equally clear is that respondency to the prescribed award was not the relevant discrimen of whether work fell within that description. *Baytech* did not establish that merely because Baytech was not respondent to the relevant prescribed award or that it might have been covered by another award the work was not 'of a kind for which a rate of pay was fixed' by the prescribed award.

97 Thus, the fact that EnergyAustralia was not respondent to any of the prescribed

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37 Ibid [78] (Maxwell P, Tate JA and John Dixon AJA).

awards does not provide an answer to the question of whether the work performed by its maintenance employees is work of a kind for which a rate of pay was fixed by a prescribed award. LeavePlus' contentions in 91(a) to (c) above should be accepted. It remains to be ascertained the relevant genus of work covered by the prescribed awards to determine whether work performed by the maintenance workers is work of that kind.

98 Again, it is worth emphasising that EnergyAustralia accepted that its burden in terms of obtaining the relief it seeks is to demonstrate that none of its maintenance employees performed construction work in the construction industry. It is enough for LeavePlus to succeed to show that some did.

99 The *Australia Workers' Union Construction and Maintenance Award 1989* ('AWU Construction Award') is one of the prescribed awards. Clause 4 of that award provided:

> Subject to the provisions of clause 5 hereof, this award shall apply to the employment of **persons engaged in or in connection with** the industries or callings of:
>
> (a) The construction, **repair, maintenance** or demolition of:
>
> ….
>
> (iii) **power houses**, …[38]
>
> (emphasis added)

100 Clause 5 provided that the AWU Construction Award would not apply to the employment of building tradespersons or builder's or plumber's labourers employed on work not presently relevant.[39]

101 Clause 14 of the AWU Construction Award provided for wage rates for classifications for riggers and scaffolders.[40]

102 In my view, it is plain that the AWU Construction Award covered work of the same

38 CB 1944.
39 Ibid.
40 CB 1949-1950.

genus as the work performed by some of the maintenance employees. It covered persons engaged in repair or maintenance of powerhouses. The award fixes rates of pay for riggers and scaffolders which are notably alternative descriptors sometimes used by EnergyAustralia for its utility workers. In short, the work performed by those utility workers employed by EnergyAustralia on repair and maintenance work was 'of a kind for which a rate of pay [was] fixed' by the AWU Construction Award.

103 That conclusion is enough to dispose of the issues before me but another example further illustrates the point. *The Metal Trades Award 1952 Part III – The Victorian Employers Federation* ('Metal Trades Award') provides in clause 3(b):

> Subject to the exceptions and exemptions prescribed by this Part, the industries and callings covered by this Part are the engineering, metal working and fabricating industries in all their branches, and all industries allied thereto and include:
>
> …
>
> 4. Boilermaking and erection and repairing.
>
> …
>
> 61. Generation and distribution of electric energy.
>
> …
>
> 63. Making, manufacture, treatment, installation, maintenance, repair and reconditioning of any articles, part or component, whether of metal and/or any other material in any of the foregoing industries.[41]

104 The Metal Trades Award provides wage rates for boilermakers,[42] boiler (inside) chipper and cleaners,[43] welders,[44] electricians (including shift electricians),[45] and riggers.[46]

105 The Metal Trades Award covered work of the same genus as the work performed by the maintenance workers. It covered work involving maintenance and repair of articles, parts or components used in the industry of generating electricity. It specifically covered boilermaking. The Metal Trades Award fixes rates of pay for

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41 CB 4604, 4606.
42 CB 4626.
43 CB 4639.
44 CB 4627.
45 CB 4630.
46 CB 4640.

riggers, shift electricians and boilermakers (all classification descriptions used by EnergyAustralia for kinds of maintenance worker).

106 The work performed by those riggers, shift electricians and boilermakers employed by EnergyAustralia on repair and maintenance work was 'of a kind for which a rate of pay [was] fixed' by the Metal Trades Award.

The validity of the 2014 amendments

107 For completeness, I should note that LeavePlus submitted that it was necessary as a first step to determine the validity of the 2014 amendments. EnergyAustralia said this was unnecessary because it accepted that the answer to the first two questions posed in this case would have been no different under the provisions of the Former Rules and the answer to the third question posed is necessarily an answer to the situation which pertained under the Former Rules. It will be evident from the foregoing that I have accepted EnergyAustralia's submission. Even if the 2014 amendments were wholly invalid (and that is not a matter on which I offer any view in this proceeding) for the foregoing reasons some, at least, of EnergyAustralia's maintenance employees would have performed construction work in the construction industry within the meaning of the Former Rules.

Conclusion

108 For the above reasons, I find that:

(a) EnergyAustralia is in the construction industry as that term is defined in the Rules;

(b) The maintenance workers do not fall within the routine or minor maintenance carveout in the Rules; and

(c) At least some of the work performed by the maintenance workers is work of a kind for which a rate of pay was fixed by a prescribed award as at 6 May 2014.

109 EnergyAustralia's application for declarations should be dismissed.

110 It would seem likely that costs should follow the event. If EnergyAustralia wishes to make any application for a different costs order, it should do so within seven days. If it does not, I will order that EnergyAustralia pay LeavePlus' costs of the proceeding.