AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.643 application for relief in respect of termination of employment

Ziday
(U2007/6416)

Clarke
(U2007/6421)

Tan
(U2007/6597)

Paskins
(U2007/6601)

Walker
(U2007/7513)

and

Aged Care Services Australia Group Pty Ltd

COMMISSIONER WHELAN MELBOURNE, 29 FEBRUARY 2008

Jurisdiction—qualifying period.

DECISION

[1] These are all applications for relief made by the applicants under section 643 of the Act. The respondent has moved that the applications be dismissed in so far as they rely on section 643(1)(a) on the basis that section 643(6) applies to each of the applications and the employees, at the time when they were given the notice of termination had not completed a qualifying period of six months employment.

[2] Prior to 1 June 2007, Ms Paskins and Ms Tan were employed by Professional Aged Case Enterprises Pty Ltd (PACE) at Rosanna Views. Ms Clarke and Ms Ziday were employed by PACE at Lower Plenty Gardens. Their employment was subject to the Nurses (Victorian Health Services) Award 2000. There may also have been a collective agreement relevant to the facility 1 but no evidence of this was before the Commission.

[3] Prior to 1 September 2007, Ms Walker was employed by Blue Cross at the Kirralee Aged Care facility. Her employment was subject to the Nurses (Victoria Health Services) Award 2000 and the Blue Cross Community Care Services (Ballarat) ANF and HSU Certified Agreement 2005-2008.

[4] In each case the facts are substantially the same. Prior to 1 June 2007 the applicants (except Ms Walker) were employed in residential aged care facilities owned and operated by Professional Aged Care Enterprises Pty Ltd (PACE). They had been so employed for varying periods of time but in each case for a period of at least twelve months.

[5] On 1 June 2007 the businesses operated by Professional Aged Care were purchased by Aged Care Services 15 (Rosanna Views) Pty Ltd and Aged Care Services 14 (Lower Plenty Garden Views) Pty Ltd. On the same date the respondent, Aged Care Services Australia Group Pty Ltd, "took over" the employment of the staff working at these facilities 2.

[6] Some time in May 2007 a meeting was held at the Rosanna Views facility which was attended by Ms Paskins. It was attended by representatives of PACE as well as representatives of the Respondent and staff of the facility. Mr Rouse assured staff that *"under the new ownership everything was going to remain the same, and service was to be recognised and that nothing, including our entitlements, would change"* 3. This was confirmed by representatives of PACE.

[7] Each employee was also sent a letter dated 23 May 2007, which confirmed the undertaking that:

> *"Aged Care Services Australia Group Pty Ltd will also recognise your prior service for the purposes of calculating your employment entitlements in the future, including long service and assume responsibility for your wages, salary or remuneration from the business transfer date.*
>
> *Aged Care Services Australia Group Pty Ltd will assume responsibility for all entitlements which may have accrued to you during your employment prior to the business transfer date but remain unpaid or untaken and we will continue to apply any entitlements or obligations contained in any applicable industrial instrument"* 4*,*

and also a letter headed *"Contract of Employment, Nursing and Associated Support Staff"* . Only Ms Paskins signed and returned the document headed *"Contract of Employment"* 5.

[8] Ms Walker was an employee of Blue Cross at the Kirralee Aged Care facility. She had been employed there for a period in excess of six months when Aged Care Services Group Pty Ltd purchased the business on 1 September 2007. On the same day the respondent "took over" the employment of the staff at Kirralee. Ms Walker was sent a letter dated 15 August 2007 and a "contract of employment" in similar terms to those sent to the other applicants. She signed the contract and returned it to the respondent. Her employment was terminated on 11 December 2007.

[9] It is not disputed that in each case, the applicant's employment was terminated within six months of the respondent "taking over" their employment.

Submissions

[10] Mr Rahilly, for the respondent, submitted that the provisions of section 643(6) applied to each of the applicants. He relied on the decision of Richards SDP in *Rogers v Reflections Group Pty Ltd* 6 and in particular to the Senior Deputy President's conclusions concerning the law in so far as it applied to novation of an employment contract. He concluded that:

> *"[32] Absent any statutory intervention, or on some other relevant terms, the law as it stands does not appear to provide for the retention of an unbroken contract of employment is circumstances in which there is a transmission of business and an arrangement is put in place for the transmittee to become the employer of the former employees.*
>
> *[33] Even where employment might be novated by appropriate assent by the employee, it would seem that the critical issue of law is that the employment contract is extinguished with or repudiated by the former employer and the contract of employment commences anew with the new employer (the transmittee in this case)."*

[11] As the employment was subject to a new contract the qualifying period in section 643(6) therefore applied.

[12] On the basis of that decision, Mr Rahilly submitted that in the circumstances of a transmission of business, the point at which the employment relationship came into effect was the point at which the transmission occurred and the employer changed. The qualifying period is predicated upon that date.

[13] That being the case, the employees were all dismissed within the qualifying period and the Commission has no jurisdiction to deal with the applications under section 643(a)(a).

[14] Ms Bornstein of counsel for the applicants, submitted that the onus was on the respondent to establish that the Commission lacked jurisdiction to hear the applications. There was a real question before the Commission concerning the legal effect of the exclusionary provisions and while there is no dispute that a transmission of business occurred, the respondent did not tender the contract relating to the sale of the business or call the transmittor in relation to any obligations arising under the transmission in relation to the employment of the applicants.

[15] There is no evidence that the transmittor terminated the employment of the applicants. There is no evidence that the employees' terms and condition of employment were altered as at 1 June 2007 (or 1 September 2007 in Ms Walker's case). There is no evidence apart from the letters of termination that the respondent did not treat the employment as continuous.

[16] The applicants relied on *Johnson v Express Envelopes* 7; *Mann v State Rail Authority*8; and *Modalla v Viewdaze Pty Limited t/as Malta Travel*9 in support of the argument that the onus lay with the respondent and it has failed to discharge this onus.

[17] The issue before the Commission is the construction of section 643. The provisions of section 643(6) are designed to exclude the operation of beneficial

legislation conferring rights on employees and should not be liberally construed [10]. The exclusionary provisions and the right to make an application seeking relief for harsh, unjust or unreasonable dismissal should be reconciled as far as possible[11]. In particular Ms Bornstein referred to paragraphs 69 and 70 of *Project Blue Sky v ABA*:

> *"69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In* Commissioner for Railways (NSW) v Agalianos*[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].*
>
> *70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[50]. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."*

[18] Ms Bornstein submitted that the right to seek relief is the leading provision and the exclusionary provision is the subordinate provision. As a matter of construction the exclusionary provision does not exclude an employee whose employment is continuous on transmission and who has fulfilled the qualifying period prior to the transmission of business.

[19] Ms Bornstein referred to a number of decisions of the Commission dealing with the issue of continuity of employment on transmission of business – *Daffy v Smart Investments Pty Ltd t/as Badger Creek Holidays* [12], *Bahoric v Renew Bumpers Pty Ltd*[13], *Miller v R & R Inspirations Pty Ltd*[14]; *Beagley v Australasian Tourist Park Management Holdings t/as Palms Village Resort*[15]; and *Rogers v Reflections Group Pty Ltd*[16].

[20] Ms Bornstein submitted that the Senior Deputy President appeared to take a different and somewhat more narrow view of the construction of the exclusionary provisions in *Rogers* than he had done in *Beagley*. She submitted that in the former case he had failed to take into account obligations arising under the employment relationship accepted by the transmittee on transmission of business including as to the continuous nature of the employment, and the effect of that on the exclusionary provision. The question is whether or not the employment is agreed to be continuous and the consequences of that. A narrow reliance on the proposition that there is always the creation of a new contract of employment, irrespective of the means by

which it is created or its terms is a very liberal construction of the exclusionary provisions.

[21] Ms Bornstein referred to the evidence of the applicants, their understanding from the letter of 23 May that their employment would be continuous, service would be recognised and nothing would change and the fact that after the date of transmission work continued without change. She submitted that under an assignment the respondent inherited all the rights and obligations of the previous operator of the business including recognition that the qualifying period had been satisfied.

[22] There was an assignment of employment by agreement between Aged Case Services and the applicants. There is no evidence that there was a novation and even if there were, that would not be fatal to the proposition that continuity of employment is the essential issue in construing the exclusionary provisions and their application.

[23] Under the assignment there has been no extinguishment of the obligations of the old contract. The obligations arise from the recognition that the continuity of the applicant's employment continues. The offer accepted by Ms Paskins does no more than put in writing the acceptance of the assignment of all the rights and obligations arising under that assignment.

[24] In the alternative Ms Bornstein submitted that the letter dated 23 May constitutes an agreement which was accepted by conduct on behalf of the applicants that no qualifying period of employment applied.

[25] Mr Rahilly in reply submitted that there was a new contract of employment. It was known to everybody that a new contract was to come into effect between the respondent and the employees of the former employer who would cease the employment of those persons on the transmission date. A new employment relationship was to come into existence on and from that transmission date.

[26] The provisions of section 643(1)(a) have no effect unless the provisions of section 643(6) are met so the leading provision is section 643(6). Section 643(7) does not apply because there must be a positive statement that the qualifying period does not apply. It cannot be inferred from a letter which does not deal with the issue at all.

Conclusions

[27] It is not in dispute that in this case there has been a transmission of business between PACE and the respondent and Blue Cross and the respondent. Arising out of those transmissions the respondent "took over" the employment of the applicants. The actual terms of the transmissions were not before the Commission nor were the relevant industrial instruments.

[28] The letter of 23 May 2007 and the witness evidence of the applicants indicates that prior service with the transmittor was to be recognised by the transmittee for the purpose of calculating employment entitlements in the future, any entitlements which may have accrued would be recognised by the respondent and any entitlements or obligations contained in any applicable industrial instrument applied. A similar letter dated 15 August was sent to Ms Walker.

[29] There was no evidence that PACE or Blue Cross had given the applicants notice of termination or paid out any accrued entitlements to them. There was no evidence to suggest that the contracts offered by the respondent purported to vary their terms and conditions of employment. Indeed, it is notable that the contract makes no mention of any probationary period of employment and in the section dealing with termination of employment makes no reference to any right of the employer to terminate the employment solely because it is less than six months since the agreement was accepted.

[30] The 'contract' or 'agreement' does not purport to be an industrial instrument capable of being lodged with the Workplace Authority and nor does it appear to override the undertakings given in the letters of 23 May 17 and 15 August. Most of the applicants continued to work as usual without signing the contract, after 1 June 2007.

[31] Each of the cases referred to in the proceedings contained different factual situations. In *Daffy* there were no individual offers of employment made by the purchaser of the business although the 'old employer' instructed the 'new employer' to tell the employees that they would be employed by the new employer under their existing terms and conditions. The applicant's evidence was that he was told that after the sale he could 'continue on' working in the business. Lacy SDP found that there was a novation of the contract of employment and that the employment was continuous.

[32] In *Bahoric* the business was sold but the applicant's employment was not terminated by the 'old employer'. He was told to keep working as normal and the 'new employer' assumed responsibility for his accrued leave entitlements. There was no new contract offered. Smith C did not characterise the nature of the transaction but none the less found that the employment was continuous.

[33] In *Miller* there were two separate transactions involving the purchase of franchises from a family business. In both cases the applicant continued to hold the position of store manager after the sale of the franchise. Cargill C found that there was continuity of employment from the family business to the 'new employer'. Further she pointed to the different language used in that part of the Act dealing with the period of employment of a casual which refers to employment by 'a particular employer' and the section dealing with a qualifying period of employment which refers simply to employment with 'the employer'.

[34] In *Beagley* the 'new employer' purchased the management rights of the business from the 'old employer'. All employees were offered employment with the 'new employer'. There was no notice of termination but some evidence that employees were paid out their accrued entitlements. The respondent submitted that the applicant had agreed to his employment being transferred (by which Richards C (as he then was) took the respondent to mean 'novated'). After some discussion of 'assignment' and 'novation' the Commission found that, on the evidence, it was not possible to find that there had been a novation of the contract, *"let alone with the consequences for the applicant's continuity of employment"* 18 and that therefore the jurisdictional objection was not made out.

[35] In *Rogers* the Commission assumed that there was a transmission of business agreement. The terms of the agreement were not before the Commission although it was uncontested that various entitlements and credits accrued by the employees with the 'old employer' would be recognised by the 'new employer'. The SDP found that the law did not appear to provide for the retention of an unbroken contract of employment where there was a transmission of business and the 'new employer' became the employer of the former employees. Even if the employment was novated the old employment contract was extinguished and the contract of employment commenced anew with the 'new employer'.

Interpretation of the statute

[36] It is clear that in considering the meaning of section 643(6) and its application to these proceedings that the Commission should look to the purpose of the legislative provision in the context of the part of the Act in which it is placed and the Act as a whole. As the majority of the High Court in *CIC Insurance Limited* 19 stated:

> *"It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure[34]. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy[35]. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd[36], if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent [37]."*

[37] This approach is echoed by the decision of the majority in *Project Blue Sky* 20, a case cited by the applicants, at paragraph [78] of the decision:

> *"However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In Statutory Interpretation, Mr Francis Bennion points out[57]:*

"The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with"."

[38] This approach is also referred to in paragraph [69] of the decision:

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In Commissioner for Railways (NSW) v Agalianos[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48]."

[39] Section 643 appears in Division 4 of Part 12 of the Act. The object of that Division is set out in section 635:

"635 Object

(1) The principal object of this Division is:

(a) to establish procedures for conciliation in relation to certain matters relating to the termination or proposed termination of an employee's employment in certain circumstances; and

(b) to provide, if the conciliation process is unsuccessful, for recourse to arbitration or to a court depending on the grounds on which the conciliation was sought; and

(c) to provide for remedies appropriate to a case where, on arbitration, a termination is found to be harsh, unjust or unreasonable; and

(d) to provide for sanctions where, on recourse to a court, a termination or proposed termination is found to be unlawful; and

(e) by those procedures, remedies and sanctions, and by orders made in the circumstances set out in Subdivision D, to assist in giving effect to the Termination of Employment Convention.

(2) The procedures and remedies referred to in paragraphs (1)(a) and (b), and the manner of deciding on and working out such remedies, are intended to ensure that, in the consideration of an application in respect of a termination of employment, a "fair go all round" is accorded to both the employer and employee concerned."

[40] The right to bring an application before the Commission is a statutory one. Section 643(1) sets out that right noting that it is subject to certain subsections including section 643(6). The provisions of Division 4 of Part 12 and its predecessors have frequently been described as beneficial legislation 21. Section 643(1)(a) confers that benefit and section 643(6) is designed to exclude access to that benefit in certain circumstances. As such it should not be given a liberal interpretation.

[41] The provision should also be considered in the context of the wider legislative provisions of the Act. Part 11 of the Act deals extensively with the transmission of business. The object of that parties set out in section 577:

"577 Object

The object of this Part is to provide for the transfer of employer obligations under certain instruments when the whole, or a part, of a person's business is transmitted to another person."

[42] Part 11 deals with a range of industrial instruments. It serves to bind the transmittee (the new employer) by the industrial instruments (AWAs, collective agreements, award or APCs) which applied to the transmittor and the transferring employees. The transmittor remains bound by that industrial instrument in relation to any transferring employees until one of a number of events specified by the statute bring that to an end. The transmittor cannot unilaterally alter the terms and conditions of employment contained in the industrial instrument and to which the transferring employee is entitled.

[43] It is clear that these provisions are intended to provide a benefit to the transferring employee and ensure, so far as is possible, a "business as usual" situation during the transmission period (defined by section 580(4) as the first 12 months after the time of transmission).

[44] It appears that all of the employees involved in these proceedings were 'transferring employees' within the meaning of section 581 of the Act. While there is no direct evidence that their employment was terminated by the 'old employer' (as defined by section 580(1)), it is clear that they were all employed after the relevant dates (1 June 2007 with respect to Ms Paskins, Ms Tan, Ms Clarke and Ms Ziday and

1 September 2007 with respect to Ms Walker) in the business transferred from the ‘old employer’ to the ‘new employer’ (as defined by section 580(1)).

[45] As ‘transferring employees’ the ‘new employer’ remained bound by the award with respect to their employment by virtue of section 595 of the Act. Those provisions only give such protection to ‘transferring employees’ and not to new employees engaged by the employer after the transmission. Further, at least in the case of Ms Walker, and possibly in the case of the other employees, the respondent remained bound by the collective agreement in relation to the transferring employees (section 585) but not in relation to any new employees who might be engaged.

[46] It is clear from the provisions of Part 11 of Division 4 of the Act that the legislation affords certain protections and benefits to employees where a business is transmitted which arise independently of the contractual relations which might be entered into by the parties to the succession, assignment or transmission.

[47] Further, the Act takes into account situations where as part of a transmission the ‘new employer’ is required to recognise the transferring employee’s entire period of service with the ‘old employer’ as continuous service with the ‘new employer’. In such cases the statutory obligation to provide a period of notice, or payment in lieu thereof, is removed from the ‘old employer’ (section 661 (8) and Regulations 12.13 of Part 12, Division 4 of Chapter 2).

[48] It is clear that in a transmission of business situation the Act does not treat the transferring employees in the same way as new employees who might be engaged by the transmittee. Further it also allows the transmittor to avoid some of its obligations to the transferring employee where the service is treated by the transmittee as continuous.

[49] These statutory provisions exist whether or not there has been an assignment or novation of the employment contract.

[50] In a situation where transferring employees have their ongoing rights and entitlements protected by the statute, the employer expressly recognises and assumes responsibility for *“all entitlements which may have accrued during your employment prior to the business transfer date”* 22 and also recognises prior service for the purpose of calculating employment entitlements into the future, it would be incongruous to treat the employees as ‘new employees’ for the purpose of section 643(6) only.

[51] I am fortified in this view by the fact pointed out by Cargill C that section 643(6) refers to a qualifying period of employment with ‘the employer’. Section 638(4) which likewise requires the employee to serve a period of employment before being eligible to bring proceedings under this Act refers to the employee being engaged by *“a particular employer”*. Accepting that as a rule in a statute different language is used for a particular reason and is intended to have a different meaning 23, it can be assumed that the legislative intention is that a period of casual employment will not be continuous where the business is transmitted because it must be employment with a particular employer. Where the employee is a ‘transferring employee’ however that

period of employment is not confined to a ‘particular’ employer but can be regarded as continuous for the purposes of section 643(6).

[52] Having reached that view I do not consider it necessary to determine if what occurred in each of these cases was an assignment of the employment contract by consent of the employee or a novation of the contract. With regard to the proposition that there was a novation, and therefore a new contract and therefore a new qualifying period, an essential piece of the evidence to establish the first of these propositions is missing.

[53] ‘Novation’ requires the consent of all parties to an agreement that a new contract will be substituted for an existing contract and the latter discharged. There was in this case no evidence of the contract entered into between PACE and Aged Care Services Group, or between Blue Cross and the latter. Further, there was no evidence of the terms, if any, under which the employees agreed to discharge their contracts with PACE and Blue Cross.

[54] It is, in my view, immaterial in any event, to the construction of section 643(6) to delve into the precise nature of the contractual relations between PACE/Blue Cross and the applicants, PACE/Blue Cross and Aged Care Services Group, and Aged Care Services Group and the applicants.

[55] Having concluded that section 643(6) does not apply to any of the applicants it is not necessary to consider if section 643(7)(b) applies.

[56] The parties are to indicate to the Commission within seven days if further conciliation is required otherwise certificates will be issued in accordance with section 650(2) of the Act.

BY THE COMMISSION:

COMMISSIONER

Appearances:

J. Bornstein of counsel for the applicants.

M. Rahilly for the Aged Care Services Australia Group Pty Ltd

Hearing details:

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1 See clause 16.1.1 of the Contract - Exhibits A1-A4, Attachment A.

2 Exhibit R1.

3 Exhibit A3.

4 *Exhibits A1-A4, Attachment A.*

5 Exhibit A3, Attachment B.

6 *Rogers v Reflections Group Pty Ltd* [2007] AIRC 2.

7 *Johnson v Express Envelopes* [PR922460].

8 *Mann v State Rail Authority* (1999) FCA 273.

9 *Modalla v Viewdaze Pty Limited t/as Malta Travel* [PR927971].

10 (1999) FCA 273.

11 *Project Blue Sky v ABA* 194 CLR 355.

12 *Daffy v Smart Investments Pty Ltd t/as Badger Creek Holidays* [PR92270].

13 *Bahoric v Renew Bumpers Pty Ltd* [PR967182].

14 *Miller v R & R Inspirations Pty Ltd* [PR951253].

15 *Beagley v Australasian Tourist Park Management Holdings t/as Palms Village Resort* [PR951364].

16 *Rogers v Reflections Group Pty Ltd* [2007] AIRC 2.

17 Exhibit A2, Attachment A.

18 [PR951364] at [56].

19 *CIC Insurance Limited v Bankstown Football Club* (1997) 187 CLR 384 per Brenann CJ, Dawson, Toohey and Gummow JJ.

20 *Project Blue Sky v ABA* (1998) HCA 28 (per McHugh, Gummow, Kirby and Hayne JJ).

21 See *Mann v State Rail Authority* [1999] FCA 273.

22 Exhibits A1-A4, Attachment A.

23 *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VLR 75; *O'Sullivan v Barton* [1947] SASR 4.