Grunt Labour Services Pty Ltd v Work Health Authority [2006] NTSC 6

PARTIES:	GRUNT LABOUR SERVICES PTY LTD (ACN 095 854 765) v WORK HEALTH AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	132 of 2005 (20524750)
DELIVERED:	9 March 2006
HEARING DATES:	16 and 20 December 2005 and 6, 7, 9, 15, 21 and 23 February 2006
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

ADMINISTRATIVE LAW – Judicial review – Work Health Act – Work Health Regulations – Work Health Authority – procedural fairness – unreasonableness – prescription by administrative action – labour hire agent – independent contractors – insurance – labour hire personnel – "worker" (definition) – approval and revocation – exemption – compensation and rehabilitation – legislative function

Ultra vires – regulations – sub-delegation – legislative power – legislative purpose

A New Tax System (Australian Business Number) Act 1999 (Cth): s 8
Income Tax Assessment Act (Cth)
Interpretation Act: s 43

Public Sector Employment and Management Act
Work Health Act, s 3(b)(vii), s 3(1), s 6, s 10, s 11, s 126(4) s 187
Work Health Regulations (2000), No 39: 3A(3), 3A(4)
Work Health (Amendment) Act

Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, applied
R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598, applied
Hookings v Director of Civil Aviation [1957] NZLR 929, applied
Kioa v West (1985) 159 CLR 550, applied
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, applied
R v Lampe; Ex parte Maddalozzo (1963) 5 FLR 160, applied
McKay v Adams [1926] NZLR 518, applied
Attorney-General (NSW) v Quin (1990) 170 CLR 1, applied
In Re Racal Communications Ltd [1981] AC 374, applied
Racecourse Co-operative Sugar Association Ltd v Attorney-General (QLD) (1979) 142 CLR 460, applied
Royal Botanic Gardens and Domain Trust v South Sydney Council (2002) 76 ALJR 436, applied

Dainford Ltd v Smith (1985) 155 CLR 342 referred to
Turner and Another v Owen (1990) 96 ALR 119; referred to

REPRESENTATION:

Counsel:

Plaintiff:	A. H. Sylvester
Defendant:	M. P. Grant

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Sou 0619
Number of pages:	42

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Grunt Labour Services Pty Ltd v Work Health Authority [2006] NTSC 6
No. 132 of 2005 (20524750)

BETWEEN:

GRUNT LABOUR SERVICES PTY LTD
Plaintiff

AND:

WORK HEALTH AUTHORITY
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 9 March 2006)

Introduction

[1] This is an application for judicial review commenced by originating motion. The plaintiff conducts a labour hire business. The plaintiff asks the court to quash a decision of the Work Health Authority revoking the plaintiff's approval as a labour hire agent for the purposes of reg 3A(3) of the Work Health Regulations. The Work Health Authority notified the plaintiff of its decision to revoke the plaintiff's approval as a labour hire agent by letter dated 30 September 2005. The revocation of the approval was expressed to take effect from 7 October 2005. The plaintiff claims relief in the nature of certiorari and mandamus and a declaration.

[2] The plaintiff was approved as a labour hire agent by the Work Health Authority on 2 May 2001. The effect of the approval was that labour hire personnel engaged by the plaintiff to work for the plaintiff's clients, under arrangements entered into between the plaintiff and its clients, were prescribed not to be workers for the purposes of the provisions of the Work Health Act relating to compensation and rehabilitation. Neither the plaintiff nor its clients were required to obtain an employer's indemnity policy of insurance ("workers compensation insurance") in accordance with s 126(4) of the Work Health Act and Schedule 2 Work Health Act that provided cover for the labour hire personnel who were engaged by the plaintiff. This meant that the costs of operating the plaintiff's business were reduced. It also meant that the labour hire personnel engaged by the plaintiff to work for its clients were not entitled to the benefits of compensation and rehabilitation provided by the Work Health Act if they were injured at work.

[3] An effect of the revocation of the plaintiff's approval as a labour hire agent, if the revocation is not set aside, is that the plaintiff will be required to obtain workers compensation insurance that provides cover for the labour hire personnel engaged by the plaintiff to work for its clients. The cost of purchasing workers compensation insurance will significantly increase the costs of operating the plaintiff's labour hire business. This cost will ultimately be passed onto the plaintiff's clients including a large number of mango growers in the Northern Territory.

[4] The decision to revoke the plaintiff's approval as a labour hire agent was made in somewhat unusual circumstances. The plaintiff has not ceased to conduct business as a labour hire agent nor has the plaintiff misconducted its business as a labour hire agent. Nor has the plaintiff breached the only condition of its approval as a labour hire agent which was that the plaintiff must ensure that all of its labour hire personnel hold an Injury and Sickness Insurance policy. The Work Health Authority has simply changed its mind about what should be the compensation and rehabilitation entitlements of labour hire personnel. The Work Health Authority has decided that all labour hire personnel in the Northern Territory should be included as workers under the Work Health Act and should be entitled to the benefits of compensation and rehabilitation provided by the Work Health Act, including the payment of medical, hospital and rehabilitation expenses, if they are injured at work. It is the opinion of the Work Health Authority that the plaintiff should carry workers compensation insurance that provides cover for the labour hire personnel engaged by the plaintiff.

The grounds of the plaintiff's claim

[5] The grounds of the plaintiff's claim are as follows. First, the plaintiff was denied procedural fairness. Second, the decision of the Work Health Authority revoking the plaintiff's approval as a labour hire agent for the purposes of reg 3A(3) of the Work Health Regulations was so unreasonable that no reasonable decision maker could have made the decision. Third, s 43 of the Interpretation Act was not a source of power by which the decision of

the Work Health Authority to revoke the plaintiff's approval as a labour hire agent could be effected. Fourth, in the alternative, a declaration that, "a natural person, who performs work or service for a person, whether before or after 7 October 2005, who before the close of business on 7 October had entered into an Agreement for Hire with the plaintiff, is and remains a prescribed person who is not a worker within the meaning set out in paragraph (b) of the definition of "worker" in s 3 of the Work Health Act, when performing the work or service."

[6] As to the denial of procedural fairness the plaintiff argues that the Work Health Authority failed to accord the plaintiff an adequate opportunity to be heard; failed to take into account relevant matters; took into account matters that it did not disclose to the plaintiff and thereby deprived the plaintiff of an opportunity to be heard in relation to those matters; and took into account an irrelevant matter.

[7] The plaintiff says that the Work Health Authority failed to take into account the following relevant matters: upon the revocation of the plaintiff's approval as a labour hire agent the plaintiff's clients would become employers, within the meaning of the Work Health Act, of the plaintiff's labour hire personnel; the plaintiff's clients would be required to obtain workers compensation insurance cover for the plaintiff's labour hire personnel; unless the plaintiff's clients purchased workers compensation insurance that provided cover for the plaintiff's labour hire personnel they would become liable to the imposition of civil penalties under the Work

Health Act; the rights and interests of the plaintiff, its clients and its labour hire personnel under existing contractual arrangements; that the rights and interests of the plaintiff, its clients and its labour hire personnel under existing contractual arrangements may be frustrated and that additional costs may be incurred by the plaintiff or its clients as a result of any such frustration of contract; that the plaintiff would have no reasonable opportunity to make the necessary contractual and insurance adjustments prior to the revocation taking effect; without sufficient notice of the date that the revocation would become effective, the plaintiff could be in breach of the Work Health Act; the range of benefits that the plaintiff's labour hire personnel had under the Injury and Sickness policy of insurance that had been purchased by the plaintiff's labour hire personnel; the pending national review of the definition of worker and the implication that a change in the meaning of worker may have for independent contractors; the need for a formal review of the consequences of any revocation; the labour hire personnel engaged by the plaintiff were genuine independent contractors and their insurance cover should only be compared to other independent contractors not to workers in general; in reliance upon the approval granted to it the plaintiff had established a sizeable business based on established labour hire costs; the time that the plaintiff had conduct of its business as an approved labour hire agent and its complete compliance with the only condition that had been imposed on it in order to obtain approval; the opportunity to merely make a written submission was not an adequate

opportunity to be heard; and, the plaintiff had been given to expect that there would be a full review of the position of labour hire companies.

[8] The plaintiff says that the Work Health Authority wrongly, and without informing the plaintiff, took into account the following matters: its opinion that the plaintiff had - entered into contrived contractual arrangements, engaged in tax avoidance, caused increased costs to its clients and had an unfair competitive advantage; inequities that the plaintiff's labour hire personnel suffered relative to the position of other workers; the decision to revoke the plaintiff's approval was necessary to forestall Commonwealth moves to expand labour hire contracting in the workforce; consultations with the Northern Territory Confederation of Industry and Commerce, the Territory Construction Association and Unions NT; and, the conclusions of an internal inquiry within the Work Health Authority into injuries suffered by workers in the mango industry.

[9] It was pleaded that the irrelevant consideration that the Work Health Authority took into account was that since 22 March 2005 the officers of the plaintiff had known that the government was considering the removal of the approvals from 1 July 2005 and the plaintiff had sufficient time to make alternative arrangements.

[10] As to unreasonableness, the plaintiff argues that the revocation of the approval was perverse because when granting the approval, the Work Health Authority was aware of the limited insurance cover provided by the Injury

and Sickness Insurance policy that was held by labour hire personnel engaged by the plaintiff; when granting the approval to the plaintiff, the only condition imposed by the Work Health Authority was that labour hire personnel continue to hold the level of insurance cover provided by the Injury and Sickness Insurance policy; at all material times the lack of medical and rehabilitation cover was known to the Work Health Authority; yet, the approval was revoked because the labour hire personnel engaged by the plaintiff only held the level of insurance cover that the Work Health Authority required them to have when it granted the approval on 2 May 2001. The effect of the prescription that the labour hire personnel engaged by the plaintiff were not workers for the purposes of the provisions of the Work Health Act relating to compensation and rehabilitation was that the labour hire personnel were not entitled to the benefits of compensation and rehabilitation provided by the Work Health Act.

The issues

[11] The principal question in this case is whether the Work Health Authority had authority or jurisdiction to revoke the plaintiff's approval as a labour hire agent for the purposes of reg 3A(3) Work Health Regulations? The resolution of the principal question is dependent upon the resolution of three subsidiary questions. First, was the making of reg 3A(4) of the Work Health Regulations a sub-delegation of a legislative power or was it the grant of a power to administer a validly made regulation? Secondly, if the making of reg 3A(4) was a sub-delegation of a legislative power, was the making of the

regulation beyond the power of the Administrator? Thirdly, if reg 3A(4) was the grant of a power to administer a validly made regulation, was the decision of the Work Health Authority to revoke the approval of the plaintiff as a labour hire agent a decision that was made for an administrative purpose or a legislative purpose?

[12] There is an ancillary question that only arises if the revocation of the plaintiff's approval as a labour hire agent was valid namely, what was the effect of the revocation?

[13] In my opinion, for the reasons set out below, reg 3A(3) and reg 3A(4) of the Work Health Regulations are valid regulations. Regulation 3A(4) was the grant of a power to administer a validly made regulation. However, the Work Health Authority acted without authority or jurisdiction because the Work Health Authority exercised its discretion to revoke the plaintiff's approval as a labour hire agent for a legislative purpose. It did not have the authority to do so.

[14] The reason the Work Health Authority exercised its discretion to revoke the plaintiff's approval as a labour hire agent was that it was in the best interests of labour hire personnel to be workers for the purposes of the Work Health Act, so that in the event of workplace injury, labour hire personnel have access to benefits of the workers' compensation scheme provided by the Work Health Act. The determination of who should be a worker for the

purposes of the provisions of the Work Health Act relating to compensation and rehabilitation involves the exercise of legislative power.

The Work Health Authority

[15] The Work Health Authority is a body corporate with perpetual succession that is established by s 6 of the Work Health Act. The Work Health Authority is constituted by the Chief Executive Officer within the meaning of the Public Sector Employment and Management Act, of the Agency administering the Work Health Act. The Agency is currently the Department of Employment, Education and Training. The functions of the Work Health Authority are to administer and enforce the Work Health Act and such other functions as are imposed on it by the Work Health Act or any other Act. The Work Health Authority has such powers as are necessary to enable it to perform its functions or as are conferred on it by or under the Work Health Act or any other Act. The Work Health Authority, in the exercise of its powers and the performance of its functions, is subject to the directions of the Minister responsible for the Work Health Authority. NT WorkSafe is the body that provides administrative and policy support to the Work Health Authority. Under the Administrative Arrangements Order, NT WorkSafe is a division of the Department of Employment, Education and Training.

The facts

[16] Having considered all of the affidavits and other exhibits that have been tendered in evidence and the testimony of Mr Hird, Mr Coventry and Mr Simpson I find the following facts.

[17] On 1 July 2000 the Work Health Amendment Act No 27 of 2000 commenced operation. The act amended the definition of worker in the Work Health Act. Following the commencement of the amending Act the definition of worker was no longer confined to a person in respect of whom the employer deducted P.A.Y.E. tax. Instead a worker, so far as is relevant, was defined as a natural person who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person unless and until the person notifies the other person, in writing, of a number that is, or purports to be, the ABN of that person for the purposes of the work or service. A consequence of the amendments to the definition of worker was that labour hire companies, who had previously deducted tax under the Prescribed Payments Scheme (PPS) of the Income Tax Assessment Act (Cth) from the wages they paid to their personnel and had therefore not been required to take out workers compensation insurance, were now required to obtain such insurance unless otherwise exempted. The personnel engaged by labour hire companies are not eligible to obtain an Australian Business Number (ABN) under s 8 of the A New Tax System (Australian Business Number) Act 1999 (Cth) as they are not carrying on an enterprise.

[18] Following the amendments to the definition of worker in the Work Health Act, the owners of one of the labour hire companies lobbied the Northern Territory Government for labour hire companies to be exempt from the requirement to take out workers compensation insurance. The company was successful and reg 3A(3) and reg 3A(4) of the Work Health Regulations (Regulations 2000, No.39) were made by the Administrator on 30 June 2000. They were notified on 1 July 2000. The regulations provided as follows:

> (3) For the purposes of paragraph (b)(vii) of the definition of "worker" in section 3 of the Act, a natural person who performs work or a service for another person under an arrangement entered into by that other person with an approved labour hire agent is a prescribed person who is not a worker within the meaning of that definition when performing the work or service.
>
> (4) In subregulation (3), "approved" means approved by the Authority for the purposes of that subregulation.

[19] Soon after reg 3A(3) and reg 3A(4) were notified two labour hire companies, SP & C Hatton Pty Ltd trading as Best Practice Skills and Astute Workplace Relations Pty Ltd, were approved by the Work Health Authority as labour hire companies for the purposes of reg 3A(3) of the Work Health Regulations.

[20] Since the first approvals of labour hire companies as labour hire agents under reg 3A(4) of the Work Health Regulations, some of the staff working in NT WorkSafe have held the opinion that reg 3A(3) and reg 3A(4) of the Work Health Regulations are inconsistent with Government policy to

provide fair and equitable workers compensation coverage for Northern Territory workers.

[21] The plaintiff was incorporated on 9 February 2001 in the Northern Territory. On 23 March 2001, Mr Mike Hird, a manager of the plaintiff wrote to the Work Health Authority asking for an exemption from the Work Health Act for all contractors engaged to perform work through the plaintiff. Mr Hird's letter stated that, "Every contractor that we place carries their own Sickness and Accident and Public Liability Insurance which we [the plaintiff] administer on their behalf". Copies of the policies of insurance were attached to the letter. The Injury and Sickness Insurance policy held by the plaintiffs labour hire personnel only provided income protection. The policy of insurance provided no cover for the medical and rehabilitation expenses of workers injured at work. At all material times the Work Health Authority knew the limits of the cover provided by the Injury and Sickness Insurance policy held by the plaintiff's labour hire personnel and also knew that the insurance policy did not cover the medical and rehabilitation expenses of injured workers.

[22] On 2 May 2001 the Work Health Authority wrote to the plaintiff approving, "the exemption of your organisation… for the purpose of Work Health Regulation 3A(3), effective from the date of this letter." The letter of the Work Health Authority also stated, "This approval is conditional upon the continued coverage of your labour hire personnel by sickness and accident insurance with a minimum benefit level as detailed in your application."

[23] Since 2 May 2001 the plaintiff has built up a large labour hire business. Prior to 7 October 2005 the plaintiff had 669 clients in the Northern Territory and had engaged 3,372 labour hire personnel.

[24] The plaintiff sources and supplies labour to its clients. The plaintiff takes orders from its clients for the provision of personnel to the client for its needs. The business is focussed primarily on the provision of personnel for casual and seasonal work in the Northern Territory. The business is particularly strong in the horticultural and seafood industries. A large number of the plaintiff's labour hire personnel are supplied to mango growers during the mango harvesting season. The client records the hours worked for the client for each person provided by the plaintiff and reports these to the plaintiff. The plaintiff pays the wages of the personnel supplied by it and bills the client for the agreed cost of the labour provided, plus a mark up to cover administration costs, insurance costs, operational costs and profit. The advantage of the plaintiff's labour hire system is that the plaintiff recruits and trains the required personnel and does all contract administration including the payment of PAYG tax. The plaintiff's clients are relieved from doing such tasks which would otherwise consume their time. The labour hire personnel are subject to the direction of the plaintiff's clients as to what work they do. The plaintiff deducts 2.6 percent of the wages paid to its labour hire personnel to pay the premiums for the Injury and Sickness Insurance policy that they each hold.

[25] In recent years an increasing number of complaints have been made to NT WorkSafe by labour hire personnel about the injuries that they have sustained at work and the fact that they are not covered by insurance for medical and hospital expenses for the injuries they sustain at work. Labour hire personnel that have worked in the mango industry have been the most vocal about such complaints. In October 2003, NT WorkSafe embarked on a project to examine the levels of safety in the mango industry. The project was precipitated by the death of a worker following a fall from a cherry picker on a mango property in the Darwin region during the 2003 harvest.

[26] As a result of the increasing number of complaints made by labour hire personnel about the lack of workers compensation cover and some specific use of labour hire arrangements to avoid workers compensation arrangements, NT WorkSafe recommended the removal of reg 3A(3) and reg 3A(4) of the Work Health Regulations to the Work Health Authority. The recommendation was made prior to 1 June 2004.

[27] On 1 June 2004 the Work Health Authority constituted by Mr Peter Plummer as the Chief Executive Officer of the Department of Employment Education and Training sent a memorandum to the Minister for Employment, Education and Training recommending that the Minister approve Parliamentary Counsel drafting legislation to revoke or repeal "the offending" Work Health Regulation 3A(3) thereby ensuring that persons employed to provide services on behalf of labour hire companies are entitled

to workers compensation coverage under the Work Health Act. The Minster approved the recommendation.

[28] During 2004 and 2005 the Northern Territory of Australia in cooperation with other Australian workers compensation jurisdictions was participating in the development of a nationally consistent definition of a worker for workers compensation purposes. The definition being considered was consistent with the tests applied by the Australian Taxation Office when consideration is given to issuing a personal services certificate. The Australian Taxation Offices tests are results based, rather than the traditional common law control test, and are designed to ensure that so far as practicable only those individuals who are genuinely in business for themselves can be eligible for a personal services certificate. At the same time the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation was conducting an inquiry into independent contracting and labour hire arrangements including ways independent contracting could be pursued consistently across state and federal jurisdictions.

[29] In February 2005 Kenneth Donald Simpson became the Acting Chief Executive Officer of the Department of Employment, Education and Training. He remained in that position until 31 October 2005 when he became the Deputy Chief Executive Officer of the Department of the Chief Minister. In his capacity as Acting Chief Executive Officer of the

Department of Employment, Education and Training he constituted the Work Health Authority.

[30] In March 2005 Mr Crossin, the Director of NT WorkSafe, telephoned Jeffrey Ross Coventry, the Northern Territory Regional Manager of the plaintiff. Mr Crossin told Mr Coventry that the plaintiff's exemption pursuant to reg 3A(4) of the Work Health Regulations was currently under review and that the reason for the review was because NT WorkSafe was of the view that the plaintiff's labour hire personnel would be better off under the workers compensation scheme because they would be able to access medical benefits. After Mr Crossin's conversation with Mr Coventry, Mr Hird, a regional manger with the plaintiff, telephoned Mr Crossin. During the telephone conversation Mr Crossin told Mr Hird that the plaintiff's approval and exemption were under review.

[31] On 4 April 2005 Mr Crossin wrote a letter to Mr Hird in which he stated:

> I refer to the approval that your organisation has under Regulation 3A(4) of the Work Health Act Regulations that exempts your labour hire personnel from workers compensation coverage under the Work Health Act.
>
> Currently there are three labour hire organisations, inclusive of yours, that have such exemption. As explained to you in our recent telephone conversation, the government intends to have those approvals removed and is considering 1 July 2005 as the operative date.
>
> I have taken note of your concerns over this time and of your preference for the exemption to remain in place until the commencement of the proposed nationally consistent definition of a worker for workers compensation purposes.

> I will ensure that the government is aware of your concerns and preference in this regard. In addition, I will keep you apprised of any new developments.

[32] In May 2005 Mr Simpson gave consideration to the means by which the exemptions granted to the three labour hire companies may be removed. On 26 May 2005 a memorandum was sent on behalf of Mr Simpson to the Minister for Employment Education and Training. In it the author stated, inter alia:

> At the time the approvals were given the three labour hire companies … were mainly involved in building and construction, transport and cleaning industries. Prior to 30 June 2000, these industries were largely subject to PPS taxation arrangements thereby enabling those companies to avoid workers compensation coverage for their labour hire personnel.
>
> However, since that time these companies have moved into other industries such as health, community services, agriculture, retail and wholesale trades, mining and tourism and hospitality. These are industries that have traditionally had fairly universal workers compensation coverage in the Northern Territory.
>
> The approvals to exempt these labour hire companies from having to cover their labour hire personnel for workers compensation only serves to allow those companies an advantage over their competitors but at the expense of their labour hire personnel. The approvals result in a potential unfairness to persons employed by those labour hire companies, as the insurance required to be held by the employees does not provide coverage with respect to medical, hospital and rehabilitation costs.
>
> …
>
> In consultation with labour hire organisations it was suggested to them that the government proposal was to remove the exemptions as at 1 July 2005. However, in consideration of the companies' contractual obligations, but also having regard to the impending

> mango season, it is now proposed that the exemption be removed as at 1 September 2005.
>
> Repealing the particular regulations would resolve this matter, however it can be achieved simply by the Work Health Authority (constituted by the Chief Executive of DEET) revoking its approval for the exemptions given under Work Health Regulation 3A(4).
>
> …
>
> It is recommended that you: Approve the Work Health Authority, constituted by the Chief Executive of the Department of Employment Education and Training revoking the approval given to the three labour hire firms under Work Health Regulation 3A(4) to be exempt from worker's compensation coverage of workers, with effect on and from 1 September 2005.

[33] On 27 May 2005 the recommendation was approved by the Minister for Employment, Education and Training.

[34] On 15 August 2005 Mr Crossin sent a memorandum to Mr Simpson. The memorandum to Mr Simpson was in similar terms to the memorandum to the Minister dated 26 May 2005. The memorandum also contained a recommendation that Mr Simpson, "Sign the attached letters to Grunt Labour Hire [the plaintiff], Best Practice Skills, and Astute Workplace Relations, advising them of the proposal to revoke their approvals under Work Health Regulations 3A(3) and (4) and providing the opportunity for them to provide a written submission before you make a final decision on the matter."

[35] On 16 August 2005 Mr Simpson signed the letters attached to the memorandum of Mr Crossin and he caused them to be sent to each of the

three approved labour hire agents. The letter to the plaintiff was addressed to Mr Hird, it stated:

> I refer to the matter of the approval under regulation 3A(4) of the Work Health Regulations that was granted to the labour hire firms, including your company, in 2000.
>
> As you know, this approval means that persons hired under your company's labour hire arrangements are not considered workers for the purposes of the Northern Territory workers' compensation scheme established by the Work Health Act (the Act). As a consequence such persons are precluded from workers' compensation coverage under the Act.
>
> While such persons are covered by income protection insurance policy, they are unable to access the medical benefits such as are available to injured persons under workers' compensation. It may therefore be arguable that such persons are disadvantaged by comparison with other Northern Territory workers who have the benefit of the workers compensation scheme established by the Act.
>
> I am accordingly considering whether it is appropriate for such persons to remain outside of the workers compensation scheme established by the Act and whether all approvals granted under regulation 3A(4) of the Work Health Regulations, including that granted to your company, should be revoked.
>
> I understand that you have been involved in talks with the Director NT WorkSafe, Mr Mark Crossin, and the Manager Workers' Compensation and Rehabilitation, Mr Geoff Anstess, in March 2005, during which you were invited to make submissions on both the revoking of your approval and on the issue of the appropriate timing of such a step if taken.
>
> Further, Mr Crossin wrote to you on 4 April 2005, indicating that a likely date for the revocation of the exemption would be 1 July 2005. This did not occur, however a likely date being considered is 1 September 2005.
>
> However, before I make any final decision in relation to whether or not your approval under regulation 3A(4) of the Work Health

> Regulations should be revoked I invite your written submissions on the matters as outlined above to assist me in coming to a final decision on this matter. Your submissions, if any, should reach me by close of business on Friday 26 August 2005.

[36] On 24 August 2005 the solicitor for the plaintiff, Mr De Silva, had a telephone conversation with Mr Crossin. During the conversation Mr Crossin stated that the Northern Territory Government had decided to revoke the exemption given to the labour hire companies under reg 3A(4) of the Work Health Regulations. The only real issue for consideration was the timing of the revocation. Extensive complaints had been made about the plaintiff's induction processes and the non-provision of medical expenses to labour hire personnel and these complaints had prompted the Northern Territory Government to remove the exemption under the regulations.

[37] The plaintiff's solicitor, Mr De Silva, responded to Mr Simpson's letter by letter dated 2 September 2005. In his letter Mr De Silva acknowledged that it was highly probable that the exemption may be revoked. He raised the following matters. First, before a final decision is made to revoke the approval of the plaintiff as a labour hire agent, a formal review should be conducted into the consequences of the exemption being revoked. The review should involve consultation with all stakeholders. Secondly, at the time the approval was granted to the plaintiff the Work Health Authority was satisfied with the insurance arrangements that the plaintiff had put in place. Thirdly, after noting that medical benefits were not payable under the Sickness and Accident policy of insurance held by labour hire personnel,

Mr De Silva stated that there were other benefits payable under the existing polices of insurance that were not available under workers compensation. Both forms of insurance had positives and negatives. Fourthly, the labour hire personal engaged by the plaintiff were bona fide independent contractors not workers engaged in a master servant relationship. Fairness dictates that the insurance cover for labour hire personnel should only be compared to the insurance cover carried by other independent contractors or subcontractors and should not be compared with workers compensation insurance. Fifthly, resolution of the insurance needs of labour hire personnel should await resolution of the broader question of who is a worker for the purposes of workers compensation. The decision should not be made on an ad hoc basis. Finally, a considerable amount of time should be allowed before the revocation takes effect as the plaintiff had expended a considerable amount of money and effort in recruiting personnel and in determining hire rates that had been factored into its clients' budgets and renegotiation of existing arrangements would take time.

[38] Significantly, Mr De Silva's letter did not suggest that the plaintiff was prepared to arrange insurance that covered the medical and rehabilitation expenses of injured workers nor did the letter deal with many of the matters that the plaintiff now contends that the Work Health Authority should have taken into account when deciding whether to revoke the plaintiff's approval as a labour hire agent.

[39] On 29 September 2005 Mr Simpson in his capacity of constituting the Work Health Authority received a memorandum from Mr Crossin. In the memorandum Mr Crossin stated so far as is relevant the following:

> … since that time [the granting of approval] these companies [the approved labour hire agents] have expanded their labour hire businesses into other industries such as health, community services, agriculture, retail and wholesale trades, mining and tourism and hospitality. These are industries that have traditionally had universal workers' compensation coverage in the Northern Territory.
>
> The approvals to exempt these labour hire companies from having to cover their labour hire personnel for workers' compensation only served to allow those companies an advantage over their competitors but at the expense of their labour hire personnel. The approvals resulted in a potential unfairness to persons employed by those labour hire companies, as the insurance required to be held by the employees only provides limited loss of earnings cover and does not provide coverage with respect to medical, hospital and rehabilitation costs.
>
> NT WorkSafe has consistently received complaints from mango pickers, their families and treating doctors regarding the lack of workers' compensation cover for mango industry workers. The mango industry generally source their labour from young, transient, unemployed and/or semi skilled workers.
>
> The most recent and vocal complaints about lack of workers' compensation coverage and related benefits have come from this group of workers. NT WorkSafe considered that it would be in the best interests of those workers if the approval of exemption was removed prior to the next mango picking season due to commence in October 2005.
>
> NT WorkSafe contacted each of the three labour hire companies as well as stakeholder groups including the Northern Territory Chamber of Commerce and Industry, the Territory Construction Association, Unions NT and their affiliates during March 2004 on a proposal to remove the approvals effective from 1 July 2005. The consultations were followed up by a formal letter to each of the labour hire companies on 4 April 2005...

In response to the timing of the proposal to revoke the approvals, Grunt Labour Hire [the plaintiff] preferred that any revocation coincide with the adoption of a new broader workers' compensation definition of worker. In this regard the Northern Territory is currently looking at an agreed definition of worker for workers' compensation purposes. However, it is unlikely that a new definition of worker for worker's compensation purposes would be in place before the second half of 2006.

In relation to the adoption of a new definition of worker, the other two labour hire companies also thought that this would be an appropriate time to revoke the approvals. However, they conceded that the removal of the approvals earlier than that time was inevitable.

In consideration of verbal representations from the three companies, NT WorkSafe recommended that if there was a decision to revoke the approvals that any such revocation would not take place before 1 September 2005.

This proposed action was suggested by NT WorkSafe to allow the companies more time to consult with their clients with regard to the impact of workers' compensation cover for labour hire personnel.

1 September 2005 was also important as NT WorkSafe was conscious that if any revocation of approval was to occur it would be appropriate timing to do so prior to the commencement of the mango season.

The two companies, S P & C Hatton and Astute Workplace Relations, advised NT WorkSafe that they had consulted their clients and put in place workers' compensation arrangements from 1 July 2005.

As you are aware these two companies had their approvals revoked by you as of 31 August 2005.

CURRENT SITUATION

Grunt Labour Hire has replied through De Silva Hebron, Barristers and Solicitors, to your letter of 16 August 2005…

A number of premises, detailed in the De Silva Hebron letter on behalf of Grunt Labour Hire, are incorrect and are clarified below.

These matters include:

That Grunt [the plaintiff] did not receive its approval for exemption in 2000 as stated by De Silva Hebron. The approval was given in May 2001.

The basis upon which the approval was granted was not as stated by De Silva Hebron but resulted from a Cabinet decision in 2000 leaving the Work Health Authority little choice but to extend the approvals of exemption granted to two other labour hire companies in 2000 to Grunt in 2001.

The Work Health Authority was not satisfied that the full protection of employees by access to workers' compensation insurance was to be met by personal accident insurance. However, the Work Health Authority insisted on arrangements by Grunt to have personal accident cover in place for their labour hire personnel as a condition of the approval.

De Silva Hebron makes an issue of their assertion that Grunt's labour hire personnel are independent contractors. NT WorkSafe does not agree that this is the case in relation to the majority of their mango picking employees for the reasons described earlier… the issue of independent contractor status is not particularly relevant to current workers' compensation coverage under the Work Health Act.

NT WorkSafe is considering a proposal to recommend to government to change the definition of worker for workers' compensation purposes to include a broader spectrum of the workforce than is currently the case. However, it is the view of NT WorkSafe that this broader matter should not impact on the provision of workers' compensation coverage to the labour hire personnel of Grunt and in particular up to 4000 mango pickers that may be hired by Grunt during this mango season.

De Silva Hebron argues that Grunt Labour Hire requires more time before any revocation should be implemented and have sought an extension of any such decision, asking that it be implemented from 1 July 2006. NT WorkSafe has given Grunt Labour Hire more than

> sufficient notice, in fact since 22 March 2005, to address this matter and suggested at the time that a likely date was 1 July 2005. It is clear that they have had sufficient time to liaise with their clients and address the proposed new arrangements but have chosen not to until receipt of your letter of 16 August 2005.
>
> You will note that you have already revoked the approvals of the other two labour hire companies involved, from 31 August 2005. It is imperative that if you decide to revoke Grunt's approval that it should be affected in a timely fashion, as any inconsistency of timing of revocations could arguably lead to an unfair advantage to Grunt over their competitors.
>
> …
>
> The decision to revoke the approval in relation to Grunt Labour Hire's labour hire personnel has yet to be made by you. Subject to your decision if you decide to revoke the approval you will need to advise Grunt Labour Hire of that decision in writing before it can be effective.

[40] On 29 September 2005 Mr Simpson accepted Mr Crossin's recommendation and he decided to revoke "the approval of exemption of the plaintiff from workers compensation coverage of its labour hire personnel pursuant to Work Health Regulation 3A(3)". When making his decision to revoke the approval of the plaintiff as a labour hire agent for the purposes of reg 3A(3) of the Work Health Act, Mr Simpson did not consider the following matters: any matter in relation to the plaintiff's taxation status or arrangements; any belief that the approval granted to the plaintiff by the Work Health Authority under reg 3A(4) of the Work Health Regulations resulted in the plaintiff entering into contrived contractor arrangements; any belief that the approval resulted in the plaintiff engaging in tax avoidance; the fact that the approval gave the plaintiff an unfair competitive advantage in the market

place; the proposition that the approval was causing increased costs to the plaintiff's clients including mango growers; any belief that the decision was necessary to forestall Commonwealth moves to expand labour hire contracting in the work force; any consultations that had previously taken place between NT WorkSafe and the Confederation of Industry and Commerce and/or the Territory Construction Association and Unions NT; and, any inquiry that was conducted by NT WorkSafe into injuries to workers in the mango industry.

[41] Mr Simpson did take into account the fact that the approval of the plaintiff as a labour hire agent caused or potentially caused inequities to labour hire personnel relative to other workers because they did not have equivalent insurance cover. Mr Simpson was prepared to take into account and took into account the representations made on behalf of the plaintiff before making his final decision to revoke the plaintiff's approval as a labour hire agent for the purposes of reg 3A(3) of the Work Health Regulations.

[42] On 30 September 2005 Mr Simpson sent a letter to the solicitors for the plaintiff in the following terms:

> I refer to your letter of 2 September 2005 concerning the labour hire approval of exemption issued to Grunt Labour Hire under Regulation 3A(4) of the Work Health Act.
>
> An approval pursuant to Work Health Regulation 3A(4) was granted to Grunt Labour Hire Pty Ltd by virtue of correspondence from Mr Doug Philips of 2 May 2001. This resulted in the exclusion of labour hire personnel from the definition of worker for the purposes of the Work Health Act (1986) NT ("the Act").

> On 16 August 2005 I wrote to your client advising that I was considering whether to make a decision to revoke that approval and I sought your client's submissions. You provided a submission on behalf of your client in your letter of 2 September 2005 which I have considered carefully.
>
> Notwithstanding your submissions on behalf of your client I am of the view that it is in the best interests of labour hire personnel to be workers for the purposes of the Act, so that in the event of workplace injury, labour hire personnel have access to benefits of the workers' compensation scheme provided by the Act.
>
> Consequently I have decided to revoke the approval granted to Grunt Labour Hire effective from the close of business on 7 October 2005. Such revocation is pursuant to s 43 of the Interpretation Act (1979) NT.

[43] Mr Simpson's letter was received by Mr De Silva's office and by the plaintiff's Darwin office at 3.19pm on 3 October 2005. On 7 October 2005 the solicitors for the plaintiff facsimiled a further letter to the Work Health Authority. The letter formally requested that the Work Health Authority not proceed with the revocation of the plaintiff's approval as a labour hire agent. The request was based on the following grounds. First, the plaintiff has had insufficient time to make alternative arrangements for workers compensation insurance for the casual workers that it contracts on a seasonal basis. Secondly, the Work Health Authority failed to accord the plaintiff procedural fairness. The Work Health Authority appeared to have received some kind of direction from the "Government" to revoke the approvals and the plaintiff has not been informed of the considerations that the person purporting to revoke the approval took into account. Thirdly, substantive

legal rights of the plaintiff, the plaintiff's clients and its labour hire personnel were affected by the decision to revoke the approval.

[44] Mr Simpson read the letter facsimiled to the Work Health Authority on 7 October 2005. It was his opinion that the letter did not address the issue on which he made his decision.

[45] On 7 October 2005 or immediately thereafter the plaintiff obtained workers compensation insurance to cover all of its labour hire personnel. The insurance was obtained at a cost equivalent to 4.75 percent of the total wages the plaintiff pays to its labour hire personnel. During the 2005 mango harvesting season none of the cost of the workers compensation insurance premium that was paid by the plaintiff was passed onto the plaintiff's clients. The whole cost of workers compensation insurance was born by the plaintiff. However, the cost will be passed onto the plaintiff's clients in the future. This means that there will be a significant increase in the price of the plaintiff's services in the future. No evidence was led that the plaintiff sustained a significant loss of profit as a result of bearing the cost of the workers compensation insurance that it obtained. Nor was there any evidence led that the plaintiff had to reduce the number of labour hire personnel that it retained because of the plaintiff incurring the cost of the workers compensation insurance policy that it purchased. Nor was there any evidence led that the plaintiff expected a contraction in the demand for its services in the future as a result of passing on the cost of workers compensation insurance to its clients.

[46] The 2005 mango harvesting season finished in the Northern Territory at the beginning of December 2005. It went as effectively as any other season in which the plaintiff had been involved. There were no difficulties with the harvesting of the mangos as a result of the revocation of the plaintiff's approval as a labour hire agent. There was no deleterious impact on the mango industry as a result of the revocation of the plaintiff's approval as a labour hire agent. There was no alteration in the relationship or the arrangements between the plaintiff and its clients.

[47] The revocation did not have any immediate and serious repercussions on the plaintiff's labour hire personnel. There has been no difficulty in the plaintiff's contractual arrangements with its labour hire personnel. The plaintiff was able to make all necessary arrangements in the time allowed in Mr Simpson's letter of 30 September 2005.

[48] The decision of the Work Health Authority to revoke the plaintiff's approval as a labour hire agent for the purposes of reg 3A(3) of the Work Health Regulations was based on the fact that workers associated with labour hire companies were disadvantaged because they did not have appropriate workers compensation insurance cover. The underlying policy was that workers in the Northern Territory should be appropriately covered.

[49] Mr Simpson's decision was not a decision made for an administrative purpose it was a decision made for a legislative purpose. He made a decision that labour hire personnel should be included in the definition of

worker for the purposes of the provisions of the Work Health Act relating to compensation and rehabilitation. A decision about who should be a worker for the provisions of the Work Health Act relating to compensation and rehabilitation is a legislative decision.

[50] The legislative nature of Mr Simpson's act of revoking the approval of the plaintiff as a labour hire agent is established by the following. The act of revocation of the approvals of the three labour hire companies as labour hire agents was seen both by NT WorkSafe and Mr Simpson as equivalent to revoking reg 3A(3) and reg 3A(4) of the Work Health Regulations. A decision was made to revoke the approvals of all three labour hire companies that were approved as labour hire agents for the purposes of reg 3A(3) of the Work Health Regulations. None of the three labour hire companies have misconducted their affairs or breached the conditions of their approval as labour hire agents. In his letter of 16 August 2005 Mr Simpson stated, "I am accordingly considering whether it is appropriate for such persons [labour hire personnel engaged by the three approved labour hire agents] to remain outside the workers compensation scheme established by the Act and whether all approvals granted under reg 3A(4) of the Work Health Regulations, including that granted to your company, should be revoked". In his letter dated 30 September 2005 notifying the plaintiff's solicitors of the decision and the reasons of the Work Health Authority to revoke the plaintiff's

approval as a labour hire agent, Mr Simpson stated that the approval granted to the plaintiff "resulted in the exclusion of labour hire personnel from the definition of worker for the purposes of the Work Health Act." He then stated, "Notwithstanding your submissions on behalf of your client I am of the view that it is in the best interests of labour hire personnel *to be workers for the purposes of the Act* [emphasis added], so that in the event of workplace injury, labour hire personnel have access to benefits of the workers compensation scheme provided by the Act." The decision of the Work Health Authority was not part of the administration of the prescription established by reg 3A(3) of the Work Health Regulations. The revocation of the approval served a legislative function.

[51] Obviously to the extent that the above conclusions differ from Mr Simpson's testimony I do not accept his testimony and I rely on the documentary exhibits that I have set out in my reasons. In particular I do not accept the gloss put on the reason for revoking the plaintiff's approval as a labour hire agent namely the decision was made for the sole reason that labour hire personnel did not have insurance cover for medical and rehabilitation expenses.

[52] The revocation of the plaintiff's approval as a labour hire agent was said to be pursuant to s 43 of the Interpretation Act.

Judicial Review

[53] Broadly speaking, the grounds of judicial review are threefold: illegality, irrationality and procedural impropriety: *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410 per Lord Diplock. Executive or administrative power must be exercised lawfully, reasonably and rationally: *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 76 ALJR 436 at par [81] per Kirby J.

[54] It is the duty of courts to enforce "the law which determines the limits and governs the exercise" of administrative action: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J. It is the province and duty of the courts, to determine whether administrative action falls within the limits imposed by law, whether those limits are to be found in legislation or in delegated legislation. The executive works within the law as interpreted and applied by the courts. The resolution of the limits of administrative power often lies ultimately in the construction of the statute or the regulation pursuant to which the particular power is conferred. In the absence of a contrary intent in the statute or other instrument an administrative authority lacks authority to make a decision otherwise than in accordance with the law*: In Re Racal Communications* Ltd [1981] AC 374 at 383. The basic principle is that the limits of administrative discretion are to be found in the statute or instrument by which the discretion is conferred. Parliament will be presumed to have intended that the discretion be confined by the requirement that it be exercised according to law. The use of the adjective

unfettered "can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon" an administrative authority: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1060 per Lord Upjohn. The executive is not free to go beyond the legal limits of the power conferred by legislation: *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

[55] A ground of judicial review is that a person cannot delegate legislative power that has been delegated to that person. While the rule, which is expressed by the Latin maxim *delegates non potest delegare,* is a rule of statutory construction that may be rebutted by a contrary legislative intention, it reflects important administrative law values. "According to Willis:

> This prima facie rule of construction dealing with delegation is derived in part from the 'literal rule' of construction, in part from the political theory known as 'the rule of law', and in part from the presumption that the naming of a person to exercise some discretion indicates that he was deliberately selected because of some aptitude peculiar to himself … The 'rule of law' says that, since the common law recognises no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision which expressly or impliedly permits him to do so; to point to a provision justifying interference by A does not, of course justify interference by B."
>
> Aronson, Dyer and Groves, Judicial Review of Administrative Action (Thomson 3rd ed) at p 305; J Willis, "Delegatus non Potest Delegare" (1943) 21 Can Bar Rev 257 at 259-260.

[56] Support for the above proposition is found in the reasons of Gibbs J in *Racecourse Co-operative Sugar Association Ltd v Attorney-General (QLD)* (1979) 142 CLR 460 at 481 where his Honour stated:

> When a discretionary power is conferred by statute upon the Executive Government, or indeed upon any public authority, the power can only be validly exercised by the authority upon whom it was conferred. Its exercise cannot be delegated to someone else, unless the statute, upon its proper construction, permits such delegation. Some cases which illustrate this proposition, such as Allingham v. Minister of Agriculture (1948) 1 All ER 780; 64 TLR290; may perhaps be regarded as applying the maxim delegates non potest delegare, whereas others, such as Ratnagopal v. Attorney-General (Ceylon) (1970) AC 974, may simply provide authority for the obvious proposition that a statute which on its proper construction confers a power on A does not permit the power to be exercised by B. There are cases in which powers conferred on a Minister have been held to be exercisable by a responsible official of his department (see Carltona Ltd. v. Commissioners of Works (1943) 2 All ER 560, at p 563; Reg. v. Skinner (1968) 2 QB 700; it is unnecessary to discuss those authorities, for this of course is not such a case. A power given to one person to determine a value or fix a price will not be validly exercised by allowing another to exercise a wide and unreviewable discretion in determining that price, although the person upon whom the power is conferred may, instead of actually fixing a money sum himself, "lay down a method of finding it which will produce the same result whoever applies it, so long as he uses it correctly.": Cann's Pty. Ltd. v The Commonwealth (1946) 71 CLR, at p 228 (at p481)

[57] See also *Turner and Another v Owen* (1990) 96 ALR 119 at 127 and 142.

[58] Another important administrative law value contained in the rule of statutory construction is accountability. There is a strong presumption against the delegation of legislative powers. “This may be explained by a concern that the representative, public, and procedurally more formal characteristics typical of the legislative process should not be bypassed

without good reason": *Aronson et al* (supra) at 307. See also *Dainford Ltd v Smith* (1985) 155 CLR 342; *R v Lampe; ex parte Maddalozzo* (1963) 5 FLR 160. However, while a delegate may not have the power to sub-delegate legislative power, a delegate may have the power to delegate administrative power for the purpose of the administration of a validly made regulation: *R v Lampe; ex parte Maddalozzo* (supra); *Hookings v Director of Civil Aviation* [1957] NZLR 929; *McKay v Adams* [1926] NZLR 518.

[59] A delegate who exceeds the terms of the formal delegation or formal sub-delegation acts ultra vires. I use the expression, ultra vires, in its narrow sense. That is, the decision is unlawful because the decision maker has acted without authority or jurisdiction. A sub-delegate who has been granted discretion to act administratively cannot exercise the discretion for a legislative purpose.

Definition of worker

[60] Section 3 of the Work Health Act ("the Act") provides relevantly:

> "worker" means –
>
> for the purposes of the provisions of this Act relating to compensation and rehabilitation – a natural person –
>
> (i) who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person unless and until the person notifies the other person, in writing, of a number that is, or purports to be, the ABN of that person for the purposes of the work or service; or

(ii) who is a person, or a member of a class of persons, prescribed for the purposes of this definition;

but does not include a person –

(vii) who is a person, or a member of a class of persons prescribed for the purposes of this definition;

[61] Section 187 of the Work Health Act provides relevantly:

(1) The Administrator may make regulations, not inconsistent with this Act, prescribing matters –

required or permitted by this Act to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to this Act,

and in particular – “

[62] Regulations 3A(3) and 3A(4) of the Work Health Regulations provide as follows:

(3) For the purposes of paragraph (b)(vii) of the definition of "worker" in section 3 of the Act, a natural person who performs work or a service for another person under an arrangement entered into by that other person with an approved labour hire agent is a prescribed person who is not a worker within the meaning of that definition when performing the work or service.

(4) In subregulation (3), "approved" means approved by the Authority for the purposes of that subregulation.

[63] The Administrator’s power under s 187 Work Health Act to make regulations is legislative in character: *R v Lampe; ex parte Maddalozzo* (supra) at 172. This is apparent from the inclusion in the subjects made available for regulations under the section of penalties for regulation

infringement. The regulations when made are intended to bind the public and be enforced. The power granted to the administrator is unaccompanied by any further power to sub-delegate. Section 187 of the Work Health Act does not give any sub-delegation power expressly. Nor does it do so impliedly. I am of the opinion that the Administrator has no authority to delegate any legislative power delegated to him under s 187 of the Work Heath Act to the Work Health Authority or any other entity.

[64] However, s 10 of the Work Health Act provides "the functions of the [Work Health] Authority are to administer and enforce the Work Health Act" and "such other functions as are imposed on it by or under this or any other Act". Section 11 of the Act provides that "the [Work Health] Authority has such powers as are necessary to enable it to perform its functions or as are conferred on it by or under this or any other Act." The effect of these provisions is that the Administrator may confer administrative functions on the Work Health Authority. Significantly the only express mention of the Work Health Authority in s 187 of the Work Health Act is about the Administrator prescribing the powers of the Work Health Authority or officers in relation to investigations at workplaces which is a power of prescription in relation to an administrative function.

[65] The discretion granted to the Work Health Authority under reg 3A(4) of the Work Health Regulations is expressed to be for "the purposes of" reg 3A(3) of the Work Health Regulations. What is intended thereby is that the power

of approval be exercised for the purpose of administering the prescription contained in reg 3A(3) not for the purpose of determining who is to be included in the definition of worker in the Work Health Act for the purposes of the provisions of this Act relating to compensation and rehabilitation. This is made clear by the fact that as soon as an approval is granted the prescription is made. A revocation of the approval does not revoke the prescription which is effected by reg 3A(3).

[66] The kinds of matters that may be considered for the purposes of administering the prescription include whether the applicant is a bona fide labour hire company; the induction process provided to workers about safe work practices in the workplace; the performance of health and safety obligations by the labour hire company; the company's practices and systems in relation to occupational health and safety - a prescription that a person is not a worker for the purposes of the provisions of the Work Health Act relating to compensation and rehabilitation does not mean that a person is not a worker for the purposes of the provisions of this Act relating to occupational health and safety; and, the systems that the labour hire company has in place for recording, investigating and reporting accidents.

Want of authority to revoke the approval

[67] Section 43 of the Interpretation Act provides as follows:

> "Where an Act confers a power to take an action or to make grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like

> manner and subject to the like conditions to repeal, rescind, revoke, amend or vary any such action or instrument."

[68] The power of approval that is granted to the Work Health Authority by reg 3A(4) of the Work Health Regulations would also include a power to revoke an approval by virtue of s 43 of the Interpretation Act. However, s 43 of the Interpretation Act stipulates that the power of revocation is exercisable in the like manner and subject to the like conditions as the power to take an action. This means that as the power of approval granted in reg 3A(4) of the Work Health Regulations is for the purpose of administering the prescription created by reg 3A(3) of the Work Health Regulations the power of revocation must be exercised in a like manner and subject to the scope of the power provided by reg 3A(4) of the Work Health Regulations. The effect of the findings of fact that are made pars [49] and [50] above is that the Work Health Authority impermissibly exercised its power of revocation for a legislative purpose. Such an exercise of the power of revocation is not authorised by either reg 3A(4) of the Work Health Regulations or by s 43 of the Interpretation Act. Consequently the decision of the Work Health Authority to revoke the plaintiff's approval as a labour hire agent was without authority and ultra vires.

[69] This is a case in which the Work Health Authority misconstrued the regulatory framework of the Work Health Act.

The other grounds of judicial review

[70] The other grounds of judicial review relied on by the plaintiff are not made out. As to procedural fairness I make the following findings. The opportunity provided to the plaintiff to make written submissions to the Work Health Authority constituted a fair opportunity to be heard. Procedural fairness conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case: *Kioa v West* (1985) 159 CLR 550 at 585. There was no need for a detailed review in the terms recommended by the plaintiff. The relevant considerations that the plaintiff said should be taken into account were either self evident or of no account. All that happened as a result of the revocation of the plaintiff's approval as labour hire agent was that it was necessary for the plaintiff to purchase workers compensation insurance to cover its labour hire personnel. This resulted in the operational costs of the plaintiff being increased by approximately 4.75 per cent. Otherwise the relationship between the plaintiff and its clients and the plaintiff and its labour hire personnel remained intact. There was no disruption caused to the harvesting of mangoes in the Northern Territory in the 2005 season. The plaintiff had sufficient time to make the necessary amendments to its various contracts and to obtain the necessary workers compensation insurance. Frank concessions were made about all of these matters by both Mr Coventry and Mr Hird during their cross examination.

[71] As I have stated in par [40] above Mr Simpson did not take into account the matters referred to in that paragraph when making his decision to revoke the approval. Consequently they are not matters which he was required to communicate to the plaintiff and seek a response from the plaintiff about.

[72] In any event the effect of the revocation having been made effective from the close of business on 7 October 2005 is that it would have no impact on the status of labour hire personnel who performed work in 2005, or who continue to perform work for the plaintiff's clients, under arrangements already entered into by the plaintiff with its clients as at 7 October 2005. The revocation of the approval has no retrospective effect. The revocation of the approval only impacts upon the status of labour hire personnel who work for the plaintiff's clients pursuant to arrangements entered into between the plaintiff and those clients after 7 October 2005. I make no finding as to who falls within this category. There is simply insufficient evidence before the court to make such a determination. My finding is based upon an ordinary reading of reg 3A(3) of the Work Health Regulations. The prescription takes effect upon labour hire personnel performing work pursuant to arrangements entered into by the plaintiff and its clients. The revocation of the approval does not revoke the prescription effected by reg 3A(3) of the Work Health Regulations.

[73] As I have found that the revocation of the plaintiff's approval as a labour hire agent by the Work Health Authority was without jurisdiction or authority, the issue as to whether the decision was so unreasonable that no

reasonable decision maker would have made the decision becomes irrelevant. However, had the revocation been authorised, I would not have found that it was so unreasonable that no reasonable repository of the power could have taken the impugned decision. The unreasonableness ground of judicial review is extremely confined: *Attorney-General (NSW) v Quin* (supra) at 36

Declaration

[74] It is not appropriate to make the declaration sought by the plaintiff in the absence of labour hire personnel as parties to the proceeding.

Orders

[75] I make the following order:

> The decision of the Work Health Authority to revoke and the revocation of the plaintiff's approval as a labour hire agent for the purposes of reg 3A(3) of the Work Health Regulations notified to the plaintiff by letter dated 30 September 2005 and effective from 7 October 2005 are set aside.

[76] I will hear the parties further as to any ancillary orders and costs.