Chaffey v Santos Ltd [2006] NTSCFC 67

PARTIES:	CHAFFEY, CAMERON OWEN v SANTOS LIMITED (ACN 007 550 923) ATTORNEY–GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA INTERVENING
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	NO. 93 OF 2005 (20518847)
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HEARING DATES:	24 & 28 APRIL 2006
JUDGMENT OF:	ANGEL, MILDREN & SOUTHWOOD JJ

CATCHWORDS:

Constitutional law – powers of Legislative Assembly – power to acquire property – injured worker entitled to worker's compensation – retrospective amending Act reducing amount of compensation – whether an acquisition of property otherwise than on just terms – *Northern Territory (Self–Government) Act*, s 50 (Cth)

Legislation:

Interpretation Act (NT*)* s 59, s 62B
Supreme Court Act (NT) s 21(1)
Work Health Act (NT) s 49, s 49(1), s 49(1A), s 49 (1B), s 52, s 53, s 64, s 65, s 65(2), s 68, s 75B, s 80, s 81, s 82, s 83, s 85(2), s 88, s 89, s 91, s 91A, s 93, s 94, s 97, s 115(1), s 145(1), s 176(1), s 176(2), s 184, s 185, s 186, s 188, s 189
Work Health Amendment Act (NT) 2004 s 5, s 194, s 195
Workmen's Compensation Act (NT) 1949–1984 s 20

Northern Territory (Self–Government) Act 1978 (Cth) s 50, s 50(1)
Superannuation Guarantee (Administration) Act 1992 (Cth)
The Australian Constitution s 51 (xxxi)

Applied:
Australian Tape Manufacturers Association Ltd v Commonwealth (1993) 176 CLR 480
Clunies–Ross v The Commonwealth (1984) 155 CLR 193
Commonwealth v WMC Resources Ltd (1998) 194 CLR 1
Ha v New South Wales (1997) 189 CLR 465
Mutual Pools & Staff Pty Ltd v Commonwealth (1994) 179 CLR 155
Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 181 CLR 134
Re Director of Public Prosecutors; Ex parte Lawler (1994) 179 CLR 270
Smith v ANL Ltd (2000) 204 CLR 493
Theophanous v Commonwealth of Australia [2006] HCA 18

Followed:
Australian Capital Territory v Pinter (2002) 121 FCR 509
John Holland Constructions Pty Ltd v Hall (1987) 85 FLR 171

Referred to:
AAT King's Tours PtyLtd v Hughes (1994) 4 NTLR 185
Commonwealth v Tasmania (1983) 158 CLR 1
Georgiadis v Australian & Overseas Telecommunications Corporation (1994)179 CLR 297
Hastings Deering (Australia) Ltd v Smith [2004] NTCA 13
Laughton v Griffin (1895) AC 104
Maddalozzo v Maddick (1992) 108 FLR 159
Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513

Distinguished:
Health Insurance Commission v Peverill (1994) 179 CLR 226

REPRESENTATION:

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Respondent:	P Barr QC
Intervenor:	T Pauling QC with S Brownhill

Solicitors:

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Intervenor:	Solicitor for the Northern Territory

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

Chaffey v Santos Ltd [2006] NTSC 67
No. 93 of 2005 (20518847)

BETWEEN:

CAMERON OWEN CHAFFEY
Applicant

AND:

SANTOS LIMITED (ACN 007 550 923)
Respondent

AND:

ATTORNEY–GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA
Intervenor

CORAM: ANGEL, MILDREN & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 15 September 2006)

ANGEL J:

[1] The terms of the case stated for the opinion of the Supreme Court pursuant to s 115(1) Work Health Act (NT) are set out in the Reasons for Judgment of Mildren J.

[2] The question is whether the Work Health Amendment Act 2004 which amended the definition of "normal weekly earnings" in s 49 Work Health Act (NT) so as to exclude superannuation contributions from normal weekly earnings and therefore from the computation of statutory compensation payable to injured workers pursuant to s 53 Work Health Act (NT) is a law "with respect to the acquisition of property otherwise than on just terms" for the purposes of s 50(1) Northern Territory (Self–Government) Act 1978 (Cth).

[3] It may be accepted that the applicant's statutory right of compensation under the Work Health Act (NT) is "property". It may also be accepted that the extinguishment of a right which compromises "property" does not necessarily constitute an acquisition of property; *Commonwealth v Tasmania (the Franklin Dam case)* (1983) 158 CLR 1 at 145; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172–3. It may also be accepted that the extinguishment of a statutory right having no basis in the general law can, but need not necessarily, effect an acquisition of property. As Brennan CJ said in *The Commonwealth v W M C Resources Ltd* (1998) 194 CLR 1 at 17:

> "If statutory rights were conferred on A and a reciprocal liability were imposed on B and the rights were proprietary in nature, a law extinguishing A's rights *could* effect an acquisition of property by B." (my emphasis)

[4] Does the exclusion of superannuation from the computation of compensation payable by the respondent to the applicant effect an acquisition of property

by the respondent? I have come to the conclusion it does not because the applicant's right to compensation from the respondent is a right subject to alteration and its alteration does not therefore constitute an acquisition of property. True it is that the amending Act in excluding the superannuation component from "normal weekly earnings" works to the detriment of the applicant and reciprocally to the benefit of the respondent. As I understand the High Court authorities, whilst this may be indicative of an acquisition of property, it is not necessarily determinative: *W M C Resources Ltd*, ante, at [16], [17] per Brennan CJ, [78], [79], per Gaudron J.

[5] If, as I think is the present case, the accrued right of the applicant to be paid compensation is at a level inherently subject to change from time to time – up or down – its occasional modification does not effect an acquisition, notwithstanding any reciprocal benefit or detriment the applicant or respondent receives or suffers from time to time as a consequence. This is so because the applicant's accrued right to be compensated and the respondent's reciprocal obligation are both subject to change. Any diminution of the value of the applicant's right is simply a quality or characteristic of that right, not a loss of right. Were this not so, following the accrual of a worker's right to be compensated, *any* change in the level of compensation, up or down, would effect an acquisition of property, sometimes by the worker, sometimes by the employer.

[6] In *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 the majority held that a provision of the

Commonwealth Employees' Rehabilitation and Compensation Act which purported to extinguish the vested right of an employee to sue the Commonwealth for common law damages infringed the just terms requirement of the Commonwealth's acquisition power. The majority accepted that the acquisition power extends to a law relating to the compulsory acquisition by persons other than the Commonwealth. At p 308 Mason CJ, Deane and Gaudron JJ said :

> "It may well be that, if s 44 appeared in legislation establishing a compensation scheme applying to employers and employees generally … it would not fairly be characterised as a law for the acquisition of property for a purpose for which the parliament has power to make laws. But when s 44 is viewed in the context of a scheme which applies only to Commonwealth employees, it may be fairly characterised as a law for the acquisition of the causes of action which vested in those employees prior to the commencement of the new scheme."

[7] Likewise Brennan J, at 312, stressed that the constitutional guarantee protected common law choses in action which are vested in individuals. He, too, emphasised that the Commonwealth's liability in tort is not a creature of statute.

[8] In *The Commonwealth v W M C Resources Ltd* (1998) 194 CLR 1 at 53 [140], [141] McHugh J noted that the Court's decision in *Health Insurance Commission v Peverill* (1994) 179 CLR 226 and the judgment of Mason CJ, Deane and Gaudron JJ in *Georgiadis* recognise that the Parliament could modify or revoke a property interest that was created by a Federal statute even though the modification or revocation was not made on just terms. A

statutory right comprising "property" is in a different category from a property right arising under the general law. Whether revocation or modification of a statutory right effects an acquisition of property depends on the nature of the right.

[9] In contrast to *Georgiadis*, the right of the present applicant is to compensation pursuant to the Work Health Act (NT), ie. a purely statutory right.

[10] The property right said to have been acquired in the present case is the superannuation component in the computation of compensation payable under s 53 Work Health Act (NT) which provides:

> "Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her –
>
> (a) death;
>
> (b) impairment; or
>
> (c) incapacity,
>
> there is payable by his or her employer to the worker or the worker's dependents, in accordance with this Part, such compensation as is prescribed."

[11] In my view the words "such compensation as is prescribed" connote and mean as is prescribed from time to time and indicate that compensation is payable at a level, which, inherently, is subject to change from time to time.

[12] This conclusion is supported by a consideration of the objects and purposes of the Work Health Act (NT) and of its provisions generally. The Act abolishes common law rights of workers. It substitutes therefor a statutory "no fault" scheme which manifestly balances the rights of the worker to proper compensation for work injury irrespective of fault against the employer's ability to pay that compensation. It is a compromise between payer and payee, on the one hand providing an adequate level of compensation to injured workers, on the other containing that level to one which is affordable by employers, and, ultimately, by society at large.

[13] The Act contains a mechanism whereby the responsible Minister can be informed about levels of compensation. The adequacy or otherwise of benefits payable to injured workers under the Act and the consequences, including costs, of any change to benefits may be the subject of an inquiry and report to the Minister by the Work Health Advisory Council established under Part III of the Act. In 1991 s 65 of the Act was amended to increase the compensation for long term incapacity from 70% to 75% of loss of earning capacity as a consequence of one such review; see Work Health Amendment Act No. 2 1992 (NT).

[14] The compensation for loss of earning capacity to which an injured worker is entitled under the Act comprises weekly payments to ensure the worker's earnings from employment total the worker's "normal weekly earnings" for a period of 26 weeks, s 64(1) Work Health Act (NT), and either 75% of the worker's "loss of earning capacity" or 150% of "average weekly earnings",

whichever is the lesser amount, until retirement age, s 65(1) Work Health Act (NT). Compensation for permanent impairment under s 71 Work Health Act (NT) is a fixed sum expressed in terms of various percentages of compensation payable with respect to varying degrees of permanent impairment.

[15] In my opinion the compensation payable under the Act in respect of both loss of earning capacity and permanent impairment is, in the words of Gummow J in *W M C Resources Ltd*, ante, at 70 [181], in a "form expressed in terms indicative of subsequent amendment".

[16] Compensation payable under the Act in respect of loss of earning capacity involves on–going payments which may continue until an injured worker's retirement. In the context of continuing payments over lengthy periods maintaining the scheme could involve modifying compensation to a level affordable according to the economy from time to time. The percentage level of compensation, like interest rates and one–time goldmining "booms" in Natal, may well have its "ups and downs", cf. *Laughton v Griffin* [1895] AC 104 at 106, 107, per Lord Macnaghten. This factor, in my opinion, also supports the conclusion that the applicant's statutory right to compensation is amoeba–like and that there is no acquisition of property involved in its modification, or "partial extinguishment" as counsel for the applicant called it, effected by the Work Health Amendment Act (NT) 2004.

[17] Compensation is defined as meaning a benefit or an amount paid or payable under the Work Health Act (NT). In my view, as a matter of substance, all that has happened here is the quantum of compensation payable under the Act has been changed. The amendment is in substance a law varying the quantum of payable compensation, albeit that the method adopted to vary the amount payable is specifically by reference to the superannuation component in its calculation. It is not, in my opinion, a law "with respect to the acquisition of property" for the purposes of s 50(1) Northern Territory (Self–Government) Act 1978 (Cth) because it does not effect an acquisition of property.

[18] Alternatively, if I am wrong in this and the statutory amendment does constitute an acquisition of property, in my view the legislative provision which effects that acquisition of property is not a law *with respect to* the acquisition of property. In my opinion it could not fairly be characterised as a law for the acquisition of property but rather a law substituting one mode of computing compensation for another in an overall statutory compensation scheme applicable to employers and employees generally: cf *Georgiadis*, ante, at 306–307, 308, per Mason CJ, Deane & Gaudron JJ; *Mutual Pools & Staff Pty Ltd,* ante, at 171–172, per Mason CJ; 184–186, per Deane and Gaudron JJ; *Peverill,* ante, at 236–237, per Mason CJ, Dean and Gaudron JJ.

[19] To the question when is a law which effects an acquisition of property a law with respect to the acquisition of property, I would answer not when it is a

law with respect to the level of compensation payable to injured workers which is subject to regulation in the general interest.

[20] I would answer each question in the stated case as follows: No.

MILDREN J:

[21] This is a special case stated for the opinion of the Supreme Court pursuant to s 115(1) of the Work Health Act which has been referred to the Full Court pursuant to s 21(1) of the Supreme Court Act.

[22] The facts as stated in the special case stated are as follows:

> "1. On or about 24 March 2003 the Worker commenced employment with the Employer as a maintenance operator working at the Mereenie gasfield approximately 200 kilometres west of Alice Springs in the Northern Territory of Australia ("the workplace").
>
> 2. At all material times the Worker's employment with the Employer was pursuant to a written contract of employment dated 19 February 2003 ("the contract").
>
> 3. At all material times the Worker in his employment with the Employer was a "worker" within the meaning of the Work Health Act ("the Act").
>
> 4. At all material times the Employer made superannuation contributions on behalf of the Worker pursuant to the contract at the rate of 10 per cent of the Worker's salary ("the superannuation contributions").
>
> 5. On or about 10 September 2003 the Worker sustained an injury within the meaning of the Act for which the Employer accepted liability.

6. By passage of the Work Health Amendment Act 2004 the s 49 definition of "normal weekly earnings" in the Work Health Act was amended to exclude the superannuation contributions from the calculation of normal weekly earnings ("the amendment").

7. The amendment commenced operation on 26 January 2005.

8. The employer paid compensation to the Worker for incapacity caused by the injury from the date of the injury to 26 January 2005 and continuing in accordance with medical certificates provided by the Worker.

9. The calculation of the compensation paid to the Worker during the period up to and including 26 January 2005 did not involve the calculation of "normal weekly earnings" by reference to remuneration that included the superannuation contributions.

10. There was no order made by the Work Health Court or the Supreme Court before 26 January 2005 for the worker's compensation to be calculated and paid by reference to remuneration that included the superannuation contributions."

[23] The questions for determination are as follows:

(a) Whether for the period up to 26 January 2005 the amendment constitutes an acquisition of the Worker's property inconsistent with s 50 of the Northern Territory (Self-Government) Act and as such is invalid to the extent of such inconsistency.

(b) Whether for the period after 26 January 2005 the amendment constitutes an acquisition of the worker's property inconsistent with s 50 of Northern Territory (Self-Government) Act and as such is invalid to the extent of such inconsistency.

[24] Pursuant to the provisions of the Work Health Act the Worker's entitlement to weekly benefits is calculated by reference to his or her "normal weekly earnings". That term is relevantly defined by s 49(1) of the Act to mean "remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay".

[25] In *Hastings Deering (Australia) Ltd v Smith* [2004] NTCA 13 (unreported), the Court of Appeal held that remuneration for those purposes included superannuation contributions made by an employer for the benefit of a worker. An application for leave to appeal to the High Court is still pending.

[26] The Work Health Amendment Act 2004 commenced with effect on 26 January 2005. By s 5 of that Act it inserted s 49(1A) and s 49(1B) into the Act. Those provisions provide:

> (1A) For the purposes of the definition of "normal weekly earnings" in subsection (1), a worker's remuneration does not include superannuation contributions made by the employer.
>
> (1B) Subsection (1A) is taken to have come into operation on 1 January 1987.

[27] The Work Health Amendment Act 2004 also provided certain transitional provisions relating to s 49(1A) as follows:

> **194. Definition**
>
> In this Part –
>
> > "commencement date" means the commencement date of the *Work Health Amendment Act 2004*.

195. Calculation of normal weekly earnings

(1) Section 49(1A) does not affect the following compensation, the calculation of which involved the calculation of normal weekly earnings by reference to remuneration that included a superannuation contribution referred to in section 49(1A):

(a) compensation paid under section 64 or 65 before the commencement date;

(b) compensation payable under section 64 or 65 in respect of a period before the commencement date in accordance with an order of the Court or Supreme Court made before the commencement date.

(2) Despite anything to the contrary in section 12 of the *Interpretation Act* or in any other law in force in the Territory, and subject to subsection (1), section 49(1A) and (1B) applies in relation to the calculation of compensation –

(a) paid before the commencement date; or

(b) payable on or after the commencement date, even if the right to claim compensation arose before the commencement date.

(3) To avoid doubt, section 49(1A) applies in relation to compensation under section 64 or 65 that is, on the commencement date, the subject of any of the following:

(a) a dispute to which Part VIA, Division 1 applies;

(b) proceedings under Part VIA, Division 2;

(c) an appeal, review or special case being considered under Part VIA, Division 3, 4 or 5;

(d) a commutation under section 74 not yet authorised by the Court.

[28] It is common ground that the amendments were made to overcome the decision of the Court of Appeal in the *Hastings Deering* case. It is also common ground that without accepting the correctness of the decision of the Court in the *Hastings Deering* case, this Court must proceed in determining the special case on the basis that the decision in *Hastings Deering* is correct.

[29] The right of the applicant which has been affected by these amendments was the applicant's right to compensation for weekly payments under s 64 and s 65 of the Act to include a component calculable by reference to the superannuation contributions made on his behalf by the respondent.

[30] The Northern Territory Legislature has no power to make laws with respect to the acquisition of property otherwise than on just terms. Section 50 of the Northern Territory (Self-Government) Act 1978 (Cth) provides:

> **Acquisition of property to be on just terms**
>
> **50.** (1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.
>
> (2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.

[31] There is no saving provision in the Work Health Amendment Act 2004 authorising the Court to determine such compensation as is necessary to ensure that the acquisition is on just terms. Therefore, if that law is found to

be one which operates to acquire property otherwise than on just terms, the provision is, subject to s 59 of the Interpretation Act (NT), invalid. Section 59 of the Interpretation Act provides:

> **59. Act to be construed subject to power**
>
> Every Act shall be read and construed subject to the *Northern Territory (Self-Government) Act 1978* of the Commonwealth and any other Act of the Commonwealth relating to the power of the Legislative Assembly to make laws in respect of particular matters, and so as not to exceed the legislative power of the Legislative Assembly, to the intent that where any Act would, but for this section, have been construed as being in excess of that power it shall nevertheless be a valid Act to the extent to which it is not in excess of that power.

[32] The restriction on the legislative power of the Territory Legislature is in terms similar to the acquisitions power contained in s 51(xxxi) of the Constitution. It is common ground that authorities relating to the interpretation to be given to s 51(xxxi) of the Constitution apply equally to the interpretation to be given to s 50 of the Northern Territory (Self-Government) Act.

[33] In *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202, the Court in a joint judgment said that the grant of legislative power contained in s 51(xxxi) “has assumed the status of a constitutional guarantee of just terms (*Minister of State for the Army v Dalziel*) and is to be given the liberal construction appropriate to such a constitutional provision: see *Attorney-General (Cth) v Schmidt*” (footnotes omitted).

[34] It is conceded by the respondent and by the intervener, properly in my view, that the applicant's relevant entitlement was "property" within the meaning of s 50(1) of the Northern Territory (Self-Government) Act.

[35] The next question then is whether the applicant's property has been acquired within the meaning of s 50(1) of the Act. A second question is whether, notwithstanding that the amendments effect an acquisition of property, the amendments are or amount to "a law *with respect to* the acquisition of property". It is the contention of the respondent and of the intervener that the amending legislation does not effect an acquisition within the meaning of s 50(1) of the Northern Territory (Self-Government) Act and even if it does, it is not "a law with respect to the acquisition of property".

Statutory background

[36] The Work Health Act 1986, for the most part, came into force on 1 January 1987. The Act repealed the previous Workmen's Compensation Act 1949-1984 ("the former Act"): see s 188. However that repeal did not affect causes of action in respect of an injury to or death of a worker arising out of or in the course of his or her employment before the commencement date including an action or claim at common law and those claims were able to be continued under the provisions of the former Act: see s 189.

[37] The purposes of the Work Health Act 1986, as set out in the preamble to the Act, were:

> "… to promote occupational health and safety in the Territory to prevent workplace injuries and diseases, to protect the health and safety of the public in relation to work activities, to promote the rehabilitation and maximum recovery from incapacity of injured workers, to provide financial compensation to workers incapacitated from workplace injuries or diseases and to the dependents of workers who die as the results of such injuries or diseases, to establish certain bodies and a fund for the proper administration of the Act, and for related purposes."

[38] In *Maddalozzo v Maddick* (1992) 108 FLR 159 at 167, I referred to the shift of emphasis of the Work Health Act, when compared with the former Act in that the former Act provided solely for compensation for injured workers and for a compulsory insurance scheme to make sure that compensation would be paid, whereas the focus of the Work Health Act 1986 covered a wide range in that the Act dealt not only with compensation but with occupational health and safety, the rehabilitation of injured workers and the obligations of an employer to provide suitable employment to an injured worker or to find suitable work with another employer for him and to participate in efforts to retrain an injured employee.

[39] There are quite a number of differences between the two Acts to which reference was not made in *Maddalozzo v Maddick*. Under the former Act a worker could recover both compensation and common law damages although there were provisions preventing double recovery in that the former Act required the successful worker in a common law action to repay the compensation paid to the worker's employer: see s 22(1). Under the Work Health Act 1986 actions at common law brought by a worker or a dependent of a worker against an employer or co-worker have been abolished (see

s 52). However, common law actions against strangers other than the employer or co-workers are still possible even in cases where compensation is payable, although the worker is liable to repay the compensation from any damages recovered: see s 176(1) and s 176(2).

[40] Under the former Act the Minister may determine the maximum premium rates for employer's liability insurance: see s 20. The present Act does not provide for the regulation of premium rates although it does provide for a Scheme Monitoring Committee whose functions include the monitoring of premium rates offered for workers compensation in the Territory and the monitoring and publishing of data on overall underwriting results as well as the monitoring of "the viability and performance of the workers compensation scheme": see s 145(1).

[41] The essential argument of the respondent and of the intervener is that the applicant's rights to compensation have no existence apart from statute and that those rights were by their very nature susceptible of modification or extinguishment such that there was no acquisition of property involved in the modification or extinguishment of the right: see *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236.

Extrinsic materials

[42] In support counsel for the Attorney-General for the Northern Territory relied upon the second reading speech of the responsible Minister when the Work Health Bill was first introduced into the Legislative Assembly, who said:

> "The government is acutely aware that there is a balancing act to be performed with every workers' compensation scheme. We need to balance the rights of the worker to proper compensation for industrial injury against the employer's ability to pay for that compensation." (Hansard, Legislative Assembly, 19 June 1986, p 208)

[43] Further the Minister said (ibid, p 212):

> "Cost containment is a prerequisite to the continuation of a proper system of workers' compensation benefits. This bill sets in place the mechanisms for cost containment. I believe we all share the common aim of remedying the problems with the current system. I believe we all share the fundamental philosophy of this bill: safety is the first priority in preventing injury and disease as far as possible; where injury and disease occur, the rehabilitation of the injured worker must be the major aim; and there must be a system to compensate injured workers with justice and support them with dignity during their period of incapacity."

[44] Further reliance was placed upon a statement by the Minister at the time when the substituted Work Health Bill was introduced into and debated in the Legislative Assembly, that the philosophy of the proposed legislation was reflected in the words of Professor Ronald Sackville, then Chairman of the NSW Law Reform Commission, as follows (Hansard, Legislative Assembly Debates, 26 November 1986, p 1433):

> "In the final analysis, everybody pays for benefits provided to anyone for anything. Whether the benefits are wages and salaries, supporting benefits, old age pensions or the dole, the community pays for them through prices or taxes. Workers' compensation

> benefits are no exception. Consequently, the community as a whole has the right and the responsibility to determine how much it can afford to pay and the decision is one for employees, employers and governments according to the economy of the day."

[45] Thus it was put that it was clear from the objects, purposes and intention of the Act that the statutory scheme which replaced non-vested common law rights with statutory entitlements to compensation sought, at the time of the enactment, a compromise between the rights of workers, employers and insurers with the ultimate aim of a fair, workable and sustainable compensation scheme. This submission, so it was submitted, was confirmed by the second reading speech to the Work Health Act Amendment Act 2004 by the responsible Minister (Hansard, Legislative Assembly, 14 October 2004):

> "Workers' compensation benefits represent a balance between what is fair for the injured worker and what is affordable to the community. It follows that benefit structures under statutory workers' compensation schemes are not intended to provide full indemnity for an injured worker's financial loss but, rather, are intended to meet what is considered by the community to be fair but affordable compensation."

[46] Thus it was put that it was not unreasonable to expect that the Assembly reserved to itself the ability to modify the level of compensation payable under the scheme in order to ensure its continuing fairness, workability and sustainability.

[47] We were also referred by counsel to the second reading speech of the responsible Minister on the introduction of the Work Health Amendment

Bill (Hansard, Legislative Assembly Debates, 14 October 2004) where the responsible Minister said:

> "Recent court decisions threaten the balance of the Northern Territory's Workers' Compensation Scheme and consequently its financial viability. In this regard, the courts have interpreted the definition of "normal weekly earnings" under the Work Health Act to include employer-funded superannuation contributions made on behalf of workers, and the value to the worker of free board and lodgings and any other non-cash remuneration that could be seen as a benefit to the worker. It is, therefore, now open to interpretation that employer-funded allowances such as annual leave loading, airfares and private use of motor vehicles could also be included in normal weekly earnings. While the court decisions can be seen to have a positive effect for injured workers, because benefits payable will, in many cases, more closely match a worker's total remuneration, they will have an adverse effect on the costs of the Workers' Compensation Scheme.
>
> In this regard, if the definition of "normal weekly earnings" under the Work Health Act as determined by the court is not addressed, then superannuation alone would increase future private sector scheme costs by around 4% per annum. In percentage terms, the government sector costs are likely to be higher at around 7% per annum because superannuation contributions made by government are generally higher than in the private sector. Actual costs will be considerably higher when taking into account other employer funded remuneration, such as rental assistance, electricity subsidies, vehicles, leave loading, airfares, etc.
>
> Further, these court decisions are retrospective in their effect, and benefits owing for past periods for superannuation alone are conservatively estimated at $15m for the private sector and $8m for the government sector. These will be unfunded liabilities. These figures do not take into account interest on late payments that, if claimed, could apply to payments owing for up to 17 years. Once again, non-cash benefits are very difficult to estimate, but would add considerably to the retrospective unfunded liability. …The remedy lies in legislative amendment with retrospective effect from the commencement of the Work Health Act in 1987. In this regard, the bill provides that the definition of "normal weekly earnings" under the Work Health Act does not include employer-funded superannuation contributions and non-cash forms of remuneration.

> This provision will restore the status quo by confirming what was considered to be the intention of workers' compensation legislation prior to the recent court decisions. It is not proposed that this retrospective amendment should apply to payments that may have been made before the commencement of the amendment; that is, the retrospective amendment will not enable recovery by the employer of superannuation or non-cash benefit that may have already been paid as part of the worker's incapacity benefit. Further, the retrospective amendment will not affect compensation payable by order of the court made prior to commencement of the amendment."

[48] I note that the Work Health Amendment Act 2004 did not affect non-cash benefits other than employer contributions of superannuation. During the course of argument, I expressed considerable doubt as to whether this Court is able to have regard to second reading speeches in deciding whether or not there has been an acquisition of property otherwise than on just terms. Section 62B of the Interpretation Act enables this Court to use extrinsic material in the interpretation of a provision of an Act, but the question which we have to determine does not fall within that provision.

[49] Reference was made to the fact that in *Health Insurance Commission v Peverill* the High Court did consider the Minister's second reading speech as well as the explanatory memorandum when considering the amending Act which was the subject of that decision: see *Health Insurance Commission v Peverill* (supra) at 233-235. I note also that regard was also had to the second reading speech by the High Court in *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1993-1994) 181 CLR 134 at 142. It was submitted that regard could be had of this material to establish the purpose of the legislation and the context in which the amendment came about. I accept

that submission. However, the Minister’s second reading speech or other extrinsic materials cannot be determinative of the question of whether or not the provision is invalid as otherwise the question would become a political one dependent upon the Minister’s speech rather than a legal one. It is the text of the legislation itself as well as its legislative history which primarily needs to be considered in order to arrive at the proper answer to this question. I note that that was the approach of Black CJ in *Australian Capital Territory v Pinter and Ors* (2002) 121 FCR 509, where his Honour said (at518-519 [38]-[39]:

> “[38] Kirby J observed (at 91-92 [237], point 5) that *Newcrest*, and other cases where it was accepted that the statutory rights were "property" (his Honour referred to *Commonwealth v Mewett* (1997) 191 CLR 471 at 551-552), illustrate that "it is necessary, in every case, to examine the legislation in question so as to determine whether the nature of the interests involved are 'inherently defeasible' or, however 'innominate or anomalous' so partake of the quality of 'property' that the guarantee in s51(xxxi) is attracted." Later in his reasons, his Honour repeated the observation that the mere fact that a property right is created by legislation cannot put it beyond the protection of s 51(xxxi): at 99 [253].
>
> [39] While the question may still be regarded as an open one (see *Smith v ANL* at 514 [53] per Gaudron and Gummow JJ), I take the reasons in *WMC Resources* to suggest that a critical question where statutory rights and interests are concerned is whether those rights are inherently defeasible. The question is not merely whether the right is defeasible, because in a real sense all statutory rights are inherently susceptible of variation since, s51(xxxxi) aside, the Parliament is able to uncreate what it has created. But the mere circumstance that a right or interest is created by statute does not mean the right or interest is inherently defeasible; one must look for something more. This will involve a careful analysis of the objects and terms of the legislation in question: compare *Smith v ANL* at 520-521 [76] per Kirby J.”

The nature of the right acquired

[50] So far as the right to compensation is concerned the right which the applicant had was a right, if necessary by taking action in the Work Health Court to enforce an entitlement to weekly compensation calculated in accordance with the Act. By reducing that right, retrospectively, the legislature has reduced the applicant's right and conferred a benefit on employers, insurers, self-insurers and, to the extent that the Northern Territory is a self-insurer, the Northern Territory. Moreover, I do not think that workers' entitlements can be characterised as social security benefits. They are not paid out of consolidated revenue, but are in the first instance required to be met by employers. A worker's right to receive workers compensation may be seen as an incident of the relationship of master and servant. In return for giving up his rights to sue at common law an employee, when he enters into a contract of employment, obtains the benefit of a no fault scheme of workers compensation benefits. I observe also that in *Hastings Deering (Australia) Ltd v Smith* (supra) Martin CJ said in relation to the Superannuation Guarantee (Administration) Act 1992 (Cth) at [22]:

> "The intention of the guarantee legislation is that employees will be rewarded for their efforts as employees by payments emanating from the employer being credited to a fund established for the future benefit of the employee. In the ordinary sense of the word, and as a matter of fact, those payments are "earned" by an employee as a reward for the services rendered by the employee to the employer."

Was the result of the Court of Appeal's decision relevantly unexpected?

[51] It may be that insurers have set premiums for workers compensation cover in the past without having regard to the potential for employer funded superannuation benefits to be treated as part of employees' remuneration. If that was a mistake by some or even all of the insurers, it is a mistake I think which we cannot take any cognisance of. The insurance industry was perfectly capable of getting legal advice on what is and what is not remuneration. It is to be noted that the learned Magistrate and four Judges of this Court have unanimously held that employer funded superannuation benefits are part of remuneration so that at the very least insurers ought to have been aware of the possibility that such might be the true meaning of that term. It is not uncommon for courts to interpret statutory provisions which may give to those provisions a broader meaning than the insurance industry might hope to expect. But in my opinion that does not alter the character of the payments to which the employee is entitled and nor does it follow that the statutory benefits are by their nature susceptible of modification or extinguishment.

Are the applicant's statutory rights inherently susceptible to change?

[52] An assignment of a worker's rights to compensation payable under the Act is void as against the employer or insurer: see s 186 of the Act. However, s 186 does not provide that such an assignment is void for all purposes and it may be that as between the worker and the assignee the assignment is still valid. There is no specific provision in the Act preventing compensation

payments from being attached. Section 184 of the Act provides that claims to compensation survive after a claimant's death and may be brought by the claimant's personal representative. Section 185 of the Act provides that unpaid compensation forms part of a deceased worker's estate. Section 186 contains provisions designed to prevent the contracting out of the provisions of the Act. These provisions are consistent with the concession that the applicant's rights are property rights. Moreover, they tell against the argument that the rights are *inherently* susceptible to change. Rights which are inherently susceptible to change are presumably also susceptible to being not merely altered, but revoked altogether. In my opinion, s 184 and s 185 in particular indicate that it was not contemplated that such rights could be revoked. Further, in my opinion, given that the rights to compensation under the Act replaced entirely a worker's rights to common law damages for personal injuries against his employer and co-workers for negligence or breach of contract, a statutory right of this nature is far removed from mere "statutory entitlements to receive payments from consolidated revenue not based on antecedent propriety rights recognised by the general law": *c.f.* Mason CJ, Deane and Gaudron JJ in *Peverill* at 237. It was submitted that statutory rights which replaced common law rights were inherently defeasible but I am unable to follow the logic of this argument. It was submitted that in *Pinter* (supra) each of the Justices in the majority thought that the fact that the statutory rights did not replace common law rights was important to this question. Although in that case the statutory

scheme did not replace common law rights and was seen as reforming the law to provide a more effective remedy so that the statutory rights and common law rights "walked hand in hand" (to adopt Black CJ's expression at 524), I do not see why a scheme which replaces common law rights cannot similarly be characterised as one which is not inherently susceptible to change, particularly when the rights under the Act are based upon the relationship between master and servant.

[53] It is to be noted also, that the right to receive payments under the Act is not discretionary but a right capable of enforcement if necessary by bringing a claim in the Work Health Court. A judgment of the Work Health Court is capable of being enforced as a judgment of the Local Court: see s 97. It is difficult to see how such a right is inherently defeasible.

[54] Counsel for the Northern Territory acknowledges that the applicant had his property taken and acknowledged that there was "some identifiable and measurable countervailing benefit or advantage accruing" to the employer (or its insurer) and that it was not necessary that the benefit or advantage accrue to the acquiring Crown: see *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993-1994) 179 CLR 155 at 185 per Deane and Gaudron JJ; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145 per Mason J; cited with approval in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ. It is difficult to see how in those circumstances there has not been an acquisition of the applicant's property.

Is it a law with respect to the acquisition of property?

[55] It was submitted by counsel for the Northern Territory that there are two bases upon which a law which effects an acquisition of property may escape characterisation as a law with respect to the acquisition of property. First there are those cases which, under the Constitution, fell within a head of power to which the condition in s 51(xxxi) does not attach. In *Re Director of Public Prosecutors; Ex parte Lawler* (1994) 179 CLR 270 at 285, in a passage cited with approval by Gummow, Kirby, Hayne, Heydon and Crennan JJ in *Theophanous v Commonwealth of Australia* [2006] HCA 18 at [56], Deane and Gaudron JJ said:

> "[T]he power conferred by s 51(xxxi) is one with respect to 'acquisition of property on just terms'. That phrase must be read in its entirety and, when so read, it indicates that s 51(xxxi) applies only to acquisitions of a kind that permit of just terms. It is not concerned with laws in connexion with which 'just terms' is an inconsistent or incongruous notion. Thus, it is not concerned with a law imposing a fine or penalty, including by way of forfeiture, or a law effecting or authorizing seizure of the property of enemy aliens or the condemnation of prize. Laws of that kind do not involve acquisitions that permit of just terms and, thus, they are not laws with respect to 'acquisition of property', as that expression is used in s 51(xxxi)."

[56] The categories of matter which falls within the first exception is not closed and includes taxes, civil penalties, confiscation of property connected with crime, forfeiture, enforcement of statutory liens, loss of superannuation benefits following convictions for corruption and abuse of power and property acquired as the result of insolvency laws. It is, in my opinion, clear that the amendments to the Work Health Act do not fall within this category.

It was not suggested by the Northern Territory or by the respondent otherwise.

[57] The second basis upon which a law might escape characterisation as a law with respect to the acquisition of property occurs where the law can be characterised as one for "the adjustment of competing rights and interests as part of the general regulation of some subject matter or area of law": per Deane and Gaudron JJ in *Mutual Pools* (supra) at 189-190; and see *Pinter* (supra) per Black CJ at 530 [94] and cases there cited. It was upon this basis that the Northern Territory and the respondent submitted that the amending Act did not amount to a law with respect to an acquisition of property. In essence, the argument which was put was that the amending Act was a law "which operates retrospectively to adjust competing claims or to overcome distortion, anomaly or unintended consequences in the working of the… scheme… In such a case, what is involved is a variation of a right which is inherently susceptible of variation and the mere fact that a particular variation involves a reduction in entitlement and is retrospective does not convert it into an acquisition of property. More importantly, any incidental diminution in an individual's entitlement to property in such a case does not suffice to invest the law adjusting entitlements under the relevant statutory scheme with the distinct character of a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the Constitution…" (*Peverill* (supra) per Mason CJ, Deane and Gaudron JJ at 237).

[58] Thus it was put that the amending Act was in direct response to an unforeseen development in the law and was passed with the express intention of restoring the status quo because the decisions 'threatened the financial viability of the Territory's workers' compensation scheme'. Reference was made by analogy to the following passage in *Peverill* (supra) at 236, that the amendment was passed to bring about:

> "… a genuine legislative adjustment of the competing claims made by patients, pathologists including Dr Peverill, the Commission and taxpayers. Clearly enough, the underlying perception was that it was in the common interest that these competing interests be adjusted so as to preserve the integrity of the health care system and ensure that the funds allocated to it are deployed to maximum advantage and not wasted in 'windfall' payments."

[59] I have already pointed out that there are a number of features which distinguish this case from *Peverill*: (1) the fact that in *Peverill* the scheme was for the provision of welfare payments from public funds; (2) in *Peverill*, the Court characterised the adjustment as one intended to preserve the integrity of the scheme, whereas there is nothing in the present amending legislation (besides the Minister's statements reported in Hansard) which would lead to that conclusion; and (3) the fact that in my opinion there was nothing really unexpected in the Court of Appeal's decision which was based upon a line of reasoning stemming from decisions which go back to the early twentieth century and which, at the very least, must have been anticipated as a distinct possibility by the insurance industry. In addition, it would be wrong to describe the additional payments as "windfall payments".

I doubt if injured workers who lose their employers' superannuation contributions as the result of an injury at work would see it that way.

[60] Further assistance is to be gained by a consideration of *Nintendo Co Ltd v Centronics Systems Pty Ltd* (supra). In that case Nintendo instituted proceedings against Centronics and others claiming infringement of a variety of intellectual property rights, including its rights under the Circuit Layouts Act 1989 (Cth) (the Circuits Act). The Nintendo layout was a plan showing the location of components of a complex electronic circuit, which, when incorporated in a Read Only Memory Chip, was used in video game machines manufactured by Nintendo. The Circuits Act came into force in 1990 and replaced the protection, apparently seen as uncertain and inappropriate, previously available in respect of circuit layouts under the general provisions of the Copyright Act 1968 (Cth) and the Designs Act 1906 (Cth). The Circuits Act protected "original circuit layouts" (called "eligible layouts"). It was not disputed that Nintendo had been the owner of the original circuit layout. Under s 17(c) of the Circuits Act, Nintendo had the exclusive right to exploit the layout commercially in Australia. After the commencement of the Circuits Act, Centronics sold in Australia video game machines known as Spica Entertainment Units which employed a circuit which was made in accordance with the whole or a substantial part of the Nintendo layout. The Spica Entertainment Units had been imported into Australia from Taiwan 10 months before the commencement of the relevant part of the Circuits Act and were owned by Centronics. Presumably,

Nintendo's layout was not then protected by the existing intellectual property legislation. It was submitted that, to the extent that the Circuits Act operated to confer on Nintendo the exclusive right of commercial exploitation of the Spica Entertainment Units already owned by Centronics as at the commencement of the Act, the Act purported to effect an acquisition of property otherwise than on just terms. In response to that submission the Court said, in the joint judgment of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, at 161:

> "The cases also establish that a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution. The Act is a law of that nature. It cannot properly, either in whole or in part, be characterized as a law with respect to the acquisition of property for the purposes of that section. Its relevant character is that of a law for the adjustment and regulation of the competing claims, rights and liabilities of the designers or first makers of original circuit layouts and those who take advantage of, or benefit from, their work. Consequently, it is beyond the reach of s 51(xxxi)'s guarantee of just terms."

[61] In my opinion, the relevant provisions of the Work Health Amendment Act are directed towards the acquisition of property as such. So much is evident from the precise terms of the amendments inserting s 49(1B) and the transitional provisions and also, with respect, from the Minister's second reading speech. In *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, Gaudron J said at 38-39:

> "The argument that the Consequential Provisions Act is, in essence, a law for the adjustment of competing rights and interests overlooks the fact that a law may have more than one character. In my view, a law which effects an acquisition of property will only escape characterisation as a law with respect to the acquisition of property if it adjusts competing claims or interests as part of the general regulation of some subject-matter or area of the law or if it is "an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest." The Consequential Provisions Act is highly specific in its operation and is in no sense a law effecting the general regulation of a subject-matter or area of the law or incidental to the general regulation of conduct, rights or obligations."

[62] In my opinion this is not a law of the character so described by her Honour. It is plainly specifically directed towards reversing, retrospectively, the result of the decision of the Court of Appeal in the *Hastings Deering* case, in so far as it purported to affect rights not yet enforced by Court order.

[63] I would therefore answer the first question "Yes".

[64] In *John Holland Constructions Pty Ltd v Hall* (1987) 85 FLR 171, Kearney J considered whether or not an amendment made to a provision of the former Act relating to the amount of weekly compensation payable applied to a case where incapacity was caused by injuries which occurred before the amendment came into force. At 179-180, his Honour referred to the judgment of Fullagar J in *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194, i.e. that in general an amending enactment is prima facie to be construed as having a prospective operation only, in the sense that "… it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement". At 184 after considering a

number of other authorities, his Honour concluded that the appellant's liability to pay weekly compensation crystallised when the respondent was incapacitated by injury, an "event" which occurred in 1981 before the amend Act was passed in 1985. Importantly, for the purposes of this case, his Honour said:

> "The incapacitating injury of 1981 and not the passage of each week of incapacity was the "fact" or "event" to which legal consequences under the Act attached, and they attached at the time of that injury."

[65] It may be open to argument as to whether or not the fact or event is the incapacitating injury, or the date upon which notice of injury is given or the date upon which incapacity arises as a result of the injury giving rise to a claim for compensation. In this case, the date is the same and we do not have to determine that question. What is important is his Honour's conclusion that it is not the passage of each week of incapacity that is the relevant "fact" or "event". In my opinion his Honour was correct on this issue and it follows from this that the applicant's property right was fixed before the passage of the amending Act and extended beyond the date it came into force. No argument was put to the contrary. In those circumstances I would answer the second question "Yes".

SOUTHWOOD J:

[66] This is a special case stated for the opinion of the Supreme Court pursuant to s 115(1) of the Work Health Act. The questions for determination are as follows:

1. For the period up to 26 January 2005, did the amendment to the Work Health Act constitute an acquisition of the worker's property inconsistent with s 50 of the Northern Territory (Self Government) Act and as such is the amendment invalid to the extent of such inconsistency?

2. For the period after 26 January 2005, did the amendment to the Work Health Act constitute an acquisition of the worker's property inconsistent with s 50 of the Northern Territory (Self Government) Act and as such is the amendment invalid to the extent of such inconsistency?

[67] The relevant amendments to the Work Health Act are those made by s 5, s 194 and s 195 of the Work Health Amendment Act 2004. The amending legislation amended s 49 of the Work Health Act by excluding superannuation contributions paid by an employer on behalf of a worker as a component in the calculation of a worker's normal weekly earnings. The applicant is an injured worker whose claim for workers compensation was accepted by the respondent before the amending legislation came into force. The amendment has the effect of retrospectively decreasing the amount of weekly payments of compensation that the applicant was entitled to receive under the Work Health Act.

[68] In my opinion both questions should be answered yes. The amendment constitutes an acquisition of the worker's property inconsistent with s 50 of

the Northern Territory (Self Government) Act and is invalid to the extent of such inconsistency. I have had the advantage of reading Mildren J's Reasons for Decision. I agree with his Honour's reasons for decision. I would add the following comments in relation to the two principle issues in the proceeding namely, whether the amending legislation effects an acquisition of property and, if so, whether the amending legislation is properly characterised as a law with respect to the acquisition of property. In so doing I adopt Mildren J's exposition of the case stated and of the amending legislation.

The nature of the right to claim workers compensation

[69] It is now well established that property rights may be created by statute: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Australian Capital Territory v Pinter* (2002) 121 FCR 509. Further, not all statutory rights are inherently defeasible: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1

[70] Workers in Australia have had the right to claim workers compensation under various statutes for over 100 years. In the Northern Territory workers have had a statutory right to claim workers compensation since 1920. Prior to that time the South Australian Employers' Liability Act 1884 applied in the Northern Territory. The historical position of the scheme of workers compensation provided by the Work Health Act suggests permanence on the

legal landscape: *Australian Capital Territory v Pinter* (supra) per Black CJ at [62]. The right to claim workers compensation pursuant to the Work Health Act was granted in substitution for workers' common law rights to sue their employers for damages for personal injury in negligence or for breach of contract. The legislation was intended to be in the nature of a permanent reform of the law and thus the rights given under it are not inherently defeasible: *Australian Capital Territory v Pinter* (supra) per Black CJ at [62]. The statutory right to claim and be paid workers compensation is granted in the context of an established legal relationship of employer and worker. It is not a gratuitous right but is an incident of the relationship of employer and worker. Nor are the payments of weekly compensation voluntary. The predominant concern arising from the provisions of Part V of the Work Health Act is entitlement not need. Compensation is to be paid by the employer who is required to be either insured or a self insurer. An employer has a right to dispute liability under the Act. The right to claim workers compensation under Part V of the Work Health Act is not ephemeral or inherently subject to modification. It is stable and established in character. The right is of real value to the applicant.

[71] The rights granted to workers under the Work Health Act need to be considered in light of its terms and objectives at the time of its enactment not retrospectively in light of what later may be seen to be a better or more affordable policy: *Australian Capital Territory v Pinter* (supra) per Black CJ

at [63]. Under Part V of the Work Health Act a worker is granted an exclusive right to claim and be paid prescribed amounts of compensation if the worker suffers an injury arising out of or during the course of his or her employment that results in the worker's impairment or incapacity for work: s 3 (definition of injury), s 53, s 80, s 81, s 82 and s 83 Work Health Act. If an employer accepts a worker's claim for compensation the employer must start making the prescribed weekly payments of compensation within three days of the acceptance of the claim: s 85(2) Work Health Act. If a claim for workers compensation is not accepted by the employer the worker has a right to enforce his or her claim for compensation in the Work Health Court: s 104 Work Health Act. The Work Health Court is a court of record which has the power to hear and determine claims for compensation and all matters incidental to or arising out of such claims: s 93 and s 94 Work Health Act.

[72] Subject to an employer and a worker making an agreement as to when weekly payments of compensation should be made, the Work Health Act provides a maximum monetary penalty of $15,000 in the case of a corporation and $3000 in the case of an individual if a weekly payment of compensation is not made before the expiration of seven days after the end of the week in respect of which it is payable or before the expiry of seven days after the end of the period in respect of which the worker is normally paid: s 88 Work Health Act. Further, a worker is entitled to an additional payment in the nature of interest if an employer fails to make a weekly payment of compensation on or before the due date: s 89 Work Health Act.

[73] The stable and established nature of the right to claim and be paid workers compensation is not altered by the fact that the Work Health Act has multiple objectives which include occupational health and safety and the rehabilitation of an injured worker. The other objectives of the Work Health Act are consistent with the stable and established nature of a worker's right to claim compensation as I have described it above.

[74] During the second reading speech Mr Hatton, who was the Minister responsible for the Work Health Act, stated relevantly to the compensation provisions of the Work Health Bill that:

> "[T]he basic philosophy of the [Work Health Bill] was 'To promote occupational health and safety in the Territory to prevent workplace injuries and diseases, to protect the health and safety of the public in relation to work activities, to promote the rehabilitation and maximum recovery from incapacity of injured workers, **to provide financial compensation to workers incapacitated from workplace injuries or diseases and to the dependants of workers who die as the results of such injuries or diseases'** (*emphasis added*).
>
> Fundamental to the benefit structure set out in the bill are the following three considerations: **the seriously and long-term incapacitated must have benefits which last for the duration of the incapacity** *(emphasis added)*; there must be every incentive and no disincentive to rehabilitation; employers must not be faced with ever-increasing costs. These are among the reasons why the government has not altered its commitment to abolishing common law actions between employers and workers. Our reasons were set out in detail in March, when the draft bill was tabled, and I do not propose to repeat them at this time. The 3 fundamental considerations listed above are reasons why the benefit structure in this bill, as in the March draft bill, makes less use of lump sums than does the current one, provides a somewhat wider range of benefits for rehabilitation purposes, sets out clearly the obligation of the worker to participate in reasonable rehabilitation programs, and enables reviews of periodic benefits if this cooperation is not forthcoming.

> Compensation for injured workers financial losses will be primarily in the form of weekly benefits. Benefits for the first 26 weeks of total incapacity will be equivalent to the worker's normal weekly earnings;
>
> **It is vital to the success of this scheme that long term benefits be administered firmly, consistently and in a humane fashion** (*emphasis added*)."

[75] Consistent with the second reading speech the balancing of the rights of employers and workers under the Work Health Act is achieved by requiring workers to provide medical certificates in relation to their incapacity for work as a result of an injury: s 91A Work Health Act; to be periodically medically assessed: s 91 Work Health Act; to undergo rehabilitation: s 75B Work Health Act; and, to seek out employment once they have regained a capacity for work: s 65(2) and s 68 of the Work Health Act. It is not achieved by varying the amounts of compensation to be paid under the Act.

[76] Nor is the stable and established nature of the right to claim and be paid workers compensation changed by the principle of income maintenance which is an aspect of the Work Health Act. The principle of income maintenance is simply intended to overcome the problems created by the once and for all approach to the assessment of common law damages. An employer is prohibited from ceasing weekly payments of compensation unless a notice under s 69(1) of the Work Health Act is provided to the worker or one of the criteria in s 69(2) of the Work Health Act are satisfied. A worker may appeal to the Work Health Court against a notice cancelling payments and the employer bears the onus of proving that the employer was

entitled to stop making payments of weekly compensation: *AAT King's Tours Pty Ltd v Hughes* (1994) 4 NTLR 185. The formulas for determining weekly payments of compensation that are established by s 49, s 64 and s 65 of the Work Health Act are permanent in character. That is, of course, not to say that Parliament cannot amend or repeal Part V of the Work Health Act.

The effect of the amending legislation and its characterisation

[77] Upon the respondent accepting the applicant's claim for compensation the applicant had an entitlement to be paid weekly payments of compensation in accordance with s 64 and s 65 of the Work Health Act based on a calculation of his normal weekly earnings inclusive of a component equivalent to the applicant's superannuation contributions that were paid by the respondent: *Hastings Deering (Australia) Ltd v Smith* [2004] NTCA 13 (unreported). Immediately prior to the amending legislation coming into force the applicant had an entitlement to receive the shortfall in his payments of weekly compensation that were the result of the respondent's failure to include a component for the applicant's superannuation contributions paid by the respondent in the calculation of the applicant's normal weekly earnings. If the shortfall in his payments of weekly compensation was not paid by the respondent the applicant had a right to commence a proceeding in the Work Health Court for the recovery of such payments. The applicant also had the right to receive ongoing payments of weekly compensation during his incapacity for work based on a proper calculation of his normal

weekly earnings and to obtain a ruling from the Work Health Court as to the proper calculation of his normal weekly earnings. The effect of the amending legislation is to extinguish the applicant's entitlement to be paid the shortfall in his weekly payments of compensation and his entitlement to be paid ongoing weekly payments of compensation based on a calculation of his normal weekly earnings inclusive of superannuation contributions and the respondent employer's reciprocal liability to make such payments. By so doing the amending legislation effected an acquisition of the applicant's property: *Smith v ANL Ltd* (2000) 204 CLR 493; *Commonwealth v WMC Resources Ltd* (supra) per Brennan CJ at [16] – [17]; Toohey J [53]; Gaudron J [78] – [79].

[78] It was contended by the respondent and the intervener that even if the amending legislation did effect an acquisition of property it was nevertheless not a law with respect to the acquisition of property within the meaning of s 50 Northern Territory (Self Government) Act. There are commonly two bases on which a law that effects the acquisition of property might escape characterisation as a law with respect to that acquisition: *Australian Capital Territory v Pinter* (supra) per Black CJ at [93]. First, the law is of a nature or kind to which the provisions of s 50 of the Northern Territory (Self Government) Act cannot attach. For example, a taxation law or a law about the forfeiture of the proceeds of crime are laws to which s 50 of the Northern Territory (Self Government) Act cannot attach. The

amending legislation in question in the present case presents no such special features.

[79] Secondly, if the law is a law for the adjustment of competing rights and interests as part of a general regulation of some subject matter or area of law it may escape characterisation as a law with respect to the acquisition of property. In order to characterise the amending legislation it is necessary to look at the substance and effect of the legislation: *Ha v New South Wales* (1997) 189 CLR 465 per Brennan CJ, McHugh, Gummow and Kirby JJ at 498. As their Honours stated, "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices".

[80] The amending legislation is highly specific in its operation. The substance and effect of s 5, s 194 and s 195 of the Work Health Amendment Act 2004 is to retrospectively reduce the applicant's vested entitlement to payments of weekly compensation by reducing his normal weekly earnings by excluding superannuation contributions made by the respondent on behalf of the applicant as a component of the applicant's remuneration and to extinguish the respondent's reciprocal liability to make such payments of weekly compensation. There is a direct financial gain to the respondent measured by the reduction in the amount of payments of weekly compensation. It is in no sense a law affecting the general regulation of a subject matter or area.

The acquisition of property, which the amending legislation effects, is not merely incidental to some other object.

[81] I do not accept the submissions made on behalf of the respondent and the intervener that because it is said that the purpose of the amendments was to save the scheme of workers compensation established by the Work Health Act the amendments cannot be characterised as a law with respect to the acquisition of property. There are no facts or evidence before the court that establish that the viability of the scheme of workers compensation provided by the Work Health Act was threatened by assessing normal weekly earnings in the manner provided by the Work Health Act and including a component for superannuation payments paid by an employer on behalf of a worker in the calculation of a worker's normal weekly earnings. There are no facts or evidence before the court, for example, that establish that the Northern Territory of Australia could not meet its liability to pay compensation under the Work Health Act prior to the Work Health Amendment Act 2004 coming into force or that the Territory Insurance Office would have difficulty indemnifying employers that it had insured to pay workers compensation under the Work Health Act if the amendments were not made to the Work Health Act.

[82] This case is different to the case of *Health Insurance Commission v Peverill* (1993-1994) 179 CLR 226. The provisions of the Health Insurance Act 1973 (Cth) are radically different to the Work Health Act. The Health Insurance Act 1973 established a statutory scheme for the gratuitous

payment of medical benefits from the consolidated revenue of the Commonwealth for a variety of medical services including pathology services. The benefits were set out in schedules to the Health Insurance Act 1973 (Cth). Section 4A of the Health Insurance Act 1973 (Cth) expressly provided that the pathology services table may be varied by varying or inserting an item in the table or by omitting an item from the table or by substituting another amount for an amount set out in an item in the table. The Minister was authorised to refer to the Pathology Services Advisory Committee, for its consideration and recommendation, the question whether the pathology services table should be varied: s 4A(1); and, in addition, the functions of the Medicare Benefits Advisory Committee included recommending, in pursuance of a reference by the Minister, the extent to which a particular treatment or combination of treatments should be specified in an item or items and the appropriate fee or fees that should be specified for that item. The Health Insurance (Pathology Services) Amendment Act 1991 (Cth) was introduced to overcome a problem that had been created by the fact that the Minister had not taken the necessary steps to give effect to the recommendations of the Medicare Benefits Advisory Committee that the classification and thereby the fee for various pathology items should be varied: *Health Insurance Commission v Peverill* (supra) per Mason CJ, Deane and Gaudron JJ at 234.

[83] The amending legislation reducing the applicant's entitlements to payments of weekly compensation was not an element in a regulatory scheme for the

provision of welfare benefits from public funds. Even if a purpose of the amendments to the Work Health Act was to save the scheme of workers compensation in the Northern Territory it would not change the substance and effect of the legislation. The terms of s 145 of the Work Health Act do not amount to an express or implied reservation that payments of weekly compensation may be altered or extinguished at any time prior to payment without compensation for the rights and interests arising under Part V of the Work Health Act. The amendments are properly characterised as a law with respect to the acquisition of property. Section 50 of the Northern Territory (Self Government) Act prevents the expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest: *Smith v ANL Ltd* (supra) per Gleeson CJ at [9].