HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No D2/2007

ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY — APPELLANT

AND

CAMERON OWEN CHAFFEY & ANOR — RESPONDENTS

Matter No D3/2007

SANTOS LIMITED — APPELLANT

AND

CAMERON OWEN CHAFFEY & ANOR — RESPONDENTS

Attorney-General for the Northern Territory v Chaffey
Santos Limited v Chaffey
[2007] HCA 34
2 August 2007
D2/2007 & D3/2007

ORDER

1. Appeals allowed.

2. Set aside the order of the Full Court of the Supreme Court of the Northern Territory made on 15 September 2006 and, in its place, order that the questions asked in the special case be answered as follows:

(1)

Q. 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?

A. No.

(2)

Q. Whether for the period after 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?

A. No.

3. The appellants to pay the respondents' costs of the appeals to this Court.

On appeal from the Supreme Court of the Northern Territory

Representation

T I Pauling QC Solicitor-General for the Northern Territory with S L Brownhill for the appellant in D2/2007 and the second respondent in D3/2007 (instructed by Solicitor for the Northern Territory)

S J Gageler SC with P M Barr QC for the second respondent in D2/2007 and the appellant in D3/2007 (instructed by Hunt & Hunt)

B W Walker SC with M P Grant QC and N Christrup for the first respondent in both matters (instructed by Ward Keller Lawyers)

D M J Bennett QC Solicitor-General of the Commonwealth of Australia with M A Perry QC and G M Aitken intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

CATCHWORDS

Attorney-General for the Northern Territory of Australia v Chaffey
Santos Ltd v Chaffey

Constitutional law (NT) – Acquisition of property – The respondent was a worker entitled to compensation under the *Work Health Act* (NT) ("the WHA") – The *Work Health Amendment Act* 2004 (NT) amended s 49 of the WHA so as to exclude employers' superannuation contributions from the definition of a worker's "remuneration" – Whether the amendment to s 49 was an acquisition of property otherwise than on just terms.

Constitutional law (NT) – The legislative power of the Northern Territory does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms – Statutory right to compensation – Whether amendment to the WHA amounted to an acquisition of property – Relevance of statutory right being "subject to" and "in accordance with" the statute as in force from time to time – Relevance of statutory obligation to provide "such compensation as is prescribed" – Inherent variability of statutory entitlements to workers' compensation.

Words and Phrases – "acquisition of property", "just terms", "remuneration".

Northern Territory (Self-Government) Act 1978 (Cth), ss 5, 6, 50.

Work Health Act (NT), Pt 5, ss 49, 52, 53.

Work Health Amendment Act 2004 (NT).

1 GLEESON CJ, GUMMOW, HAYNE AND CRENNAN JJ. These appeals, which were heard together, are brought by the Attorney-General for the Territory and by Santos Limited ("Santos"). They were the unsuccessful parties to a special case stated for the opinion of the Supreme Court of the Northern Territory pursuant to s 115 of the *Work Health Act* (NT) (the "Work Health Act") and referred by a Judge thereof (Mildren J) for determination by the Full Court.

The Self-Government Act

2 The starting point for consideration of these appeals is presented by s 5 of the *Northern Territory (Self-Government) Act* 1978 (Cth) (the "Self-Government Act"). This established the Northern Territory of Australia as "a body politic under the Crown" and s 6 conferred upon the Legislative Assembly power to make laws for the peace, order and good government of the Territory. However, the conferral of legislative power by s 6 is expressed therein as being subject to other provisions of the Self-Government Act. In that regard, s 50 states:

> "(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."

Section 70 is a special provision dealing with acquisition of interests in land and does not bear upon the present dispute[1].

3 As a general proposition, subject to any applicable constitutional qualification, the power of an Australian legislature to make laws, here conferred upon the Assembly by s 6 of the Self-Government Act, "includes the power to unmake them". Statements to that effect were made in *Kartinyeri v Commonwealth*[2]. In the case of the Assembly that power is expressly subjected to the restraint imposed by s 50 of the Self-Government Act. This in turn calls

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1 cf *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

2 (1998) 195 CLR 337 at 355 [13], 368-369 [47], 372 [57]. See also *R v Public Vehicles Licensing Appeal Tribunal (Tas): Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 226.

for the application of the decisions which have construed s 51(xxxi) of the Constitution.

4 Counsel for the Attorney-General for the Territory stressed that in contrast to the position of the Parliament under s 51 of the Constitution, the power of the Assembly is not conferred by reference to enumerated heads of power. This was said to render inapposite in the Territory those authorities[3] which found in other heads of legislative power enumerated in s 51 a contrary indicator to the provision of just terms. However, these appeals may be considered without pursuit of any such distinction between s 51(xxxi) and s 50 of the Self-Government Act.

The Facts

5 Mr Chaffey, the first respondent to each appeal in this Court, was employed by Santos as a maintenance operator working at the Mereenie Gasfield, approximately 200 km west of Alice Springs. His employment commenced on or about 24 March 2003 and at all material times he was a "worker" within the meaning of the Work Health Act. Mr Chaffey's employment with Santos was pursuant to a written contract of employment dated 19 February 2003. At all material times pursuant to the contract Santos made superannuation contributions on his behalf at the rate of 10 percent of salary.

6 On or about 10 September 2003 Mr Chaffey sustained an injury within the meaning of the Work Health Act for which Santos accepted liability. It appears to have been common ground that for the purposes of these appeals the compensation rights of Mr Chaffey under the Work Health Act accrued when he sustained his injury. Reference to the statute in these reasons, save where otherwise indicated, are to the statute as it stood when Mr Chaffey was injured. The facts do not disclose whether, had the relevant common law still been in force in the Territory, Mr Chaffey would have had an action for damages against Santos.

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3 See *Theophanous v Commonwealth* (2006) 80 ALJR 886 at 889-890 [9]-[14], 896 [55]-[58]; 226 ALR 602 at 606-607, 614-615; Dixon, "Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution", (2005) 27 *Sydney Law Review* 639 at 650-651.

The Work Health Act

7 The Work Health Act repealed the *Workmen's Compensation Act* 1949 (NT) and commenced on 1 January 1987. Part II thereof (ss 6-15) constitutes the Work Health Authority ("the Authority") as the body to administer and enforce the statute. Part V (ss 49-91A) establishes a scheme of workers' compensation. Part VII (ss 117-177) provides for the funding of the scheme, with compulsory insurance to be taken out by employers with an insurer approved by the Authority (s 126), and with provision also for approved self-insurers (s 120) and for the establishment of a Nominal Insurer (s 150) to administer the Nominal Insurer's Fund (s 162). The stated purpose of ss 75-78 is to ensure rehabilitation of injured workers. An assignment of compensation payable under the statute is void and against an employer or an insurer (s 186). A Scheme Monitoring Committee, with a representative of the Authority and the other members appointed by the responsible Minister, is to monitor the viability and performance of the scheme (ss 141, 145).

8 Two provisions of Pt V are of immediate importance. First, s 52 states that the statutory regime operates with effect from 1 January 1987 to the exclusion of certain common law actions for damages which otherwise would have arisen thereafter.

9 Secondly, s 53 provides that "*[s]ubject to this Part*", where a worker suffers an injury which results in or materially contributes to the death, impairment or incapacity of that worker, "there is payable by [the] employer to the worker or the worker's dependants, *in accordance with this Part, such compensation as is prescribed*." (emphasis added). The term "prescribed" means prescribed by the Work Health Act or by an instrument of a legislative or administrative character made under that statute. This follows from the *Interpretation Act* (NT), s 18 ("the Interpretation Act"). Section 187(g) of the Work Health Act confers upon the Administrator of the Territory the power to make regulations "prescribing the amount of compensation payable or by reference to which compensation is to be calculated".

10 Section 65 of the Work Health Act provides that, in certain cases of long term incapacity, compensation is to be paid until attainment of the normal retirement age or the age of 65, whichever is the longer period. A component of the prescribed compensation is calculated by reference to the "normal weekly earnings" of the worker and that expression is defined in s 49(1) by reference to the "remuneration" of the worker.

The 2004 Act

11 In *Hastings Deering (Australia) Ltd v Smith (No 2)*[4] the term "remuneration" in s 49(1) was construed by the Northern Territory Court of Appeal as including superannuation contributions made by an employer for the benefit of a worker. The sequel was the enactment of s 49(1A) which was inserted in the Work Health Act by the *Work Health Amendment Act* 2004 (NT) ("the 2004 Act"). The 2004 Act commenced on 26 January 2005 but it also inserted s 195, the effect of which was to give s 49(1A) a measure of retrospective operation which applied to the circumstances of Mr Chaffey. In introducing the Bill for the 2004 Act, the responsible Minister made clear to the Assembly that its purpose was to "restore the status quo by confirming what was considered to be the intention of [the Work Health Act]".

12 Section 5 of the 2004 Act amended s 49 of the Work Health Act by inserting the following after sub-s 49(1):

> "(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."

13 Section 58 of the Interpretation Act provides that every Act amending another Act shall be construed with the earlier statute and as part thereof. That section is declaratory of the common law principles of statutory construction and interpretation[5].

The Special Case

14 The special case posed for determination by the Full Court two questions respecting the validity of the amendment made to s 49 by the 2004 Act. By majority (Mildren and Southwood JJ, Angel J dissenting)[6] the Full Court ordered that the questions be answered as follows:

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4 (2004) 18 NTLR 1.

5 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463.

6 (2006) 18 NTLR 22.

Question 1.

Whether for the period up to 26 January 2005 the amendment constitutes an acquisition of [Mr Chaffey's] property inconsistent with s 50 of the [Self-Government Act] and as such is invalid to the extent of such inconsistency?

Answer 1. Yes.

Question 2.

Whether for the period after 26 January 2005 the amendment constitutes an acquisition of [Mr Chaffey's] property inconsistent with s 50 of the [Self-Government Act] and as such is invalid to the extent of such inconsistency?

Answer 2. Yes."

15 In the period before 26 January 2005, Mr Chaffey had received compensation but in sums not allowing for the holding in *Hastings Deering*. Thereafter further payments were computed in the same way but now with the additional support given by the 2004 Act in reversing the effect of the holding in *Hastings Deering*. Questions 1 and 2 were so framed as to allow for the particular circumstances of Mr Chaffey, but the same answer was given to both Questions.

The Appeals to this Court

16 The Attorney-General for the Territory intervened in the proceeding in the Full Court and instituted the first of the two appeals now before this Court. Santos has instituted its own appeal. The Attorney-General of the Commonwealth intervened in support of each appellant.

17 For the reasons that follow, the appeals should be allowed. It was a term of each grant of special leave that the appellant not seek to disturb any costs in favour of Mr Chaffey in the Full Court and that the appellant bear its costs of the appeal to this Court.

The Submissions

18 The appellants submit that the critical provisions in the Work Health Act are the stipulations in s 53 that the obligation imposed upon the employer to make payments to the worker or the dependants of the worker is imposed "subject to" and "in accordance with" Pt V and is an obligation to provide "such

compensation as is prescribed". These references to Pt V are naturally to be construed as identifying Pt V as amended from time to time[7]. Further, the reference to "such compensation as is prescribed" is naturally construed as a reference to such compensation as is prescribed from time to time. It follows that on the proper construction of Pt V of the Work Health Act the method prescribed for quantification of the amount of compensation payable to a worker by an employer had not been fixed in permanent form at the date of the injury to Mr Chaffey and was always subject to variation.

19 It was that construction of Pt V which Mr Chaffey disputed. Counsel pointed to other provisions of Pt V which were said to show that the temporal elasticity apparent from the terms of s 53 is limited, so that in respect of each injured worker the obligation of the employer thereafter is fixed by reference to the terms of the statute as it stood at the time of injury. Hence, in the case of Mr Chaffey, the changes made by the 2004 Act so diminished his accrued rights under the Work Health Act, his "property", as to amount to proscribed "acquisition".

20 For the reasons that follow the construction of s 53 advanced by Mr Chaffey should be rejected, and that advanced by the appellants accepted. The result is that on the proper construction of the Work Health Act, s 50 of the Self-Government Act had no application to the change made by the 2004 Act.

Acquisition of Property

21 In the *Industrial Relations Act Case*[8] Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ observed:

> "It is well established that the guarantee effected by s 51(xxxi) of the Constitution extends to protect against the acquisition, other than on just terms, of 'every species of valuable right and interest including ... choses in action'[9]. It has been held to prohibit the extinguishment of

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7 *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd* (1963) 109 CLR 276 at 280, 282-284; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 74 [200].

8 (1996) 187 CLR 416 at 559.

9 *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 299, 349; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509;

(Footnote continues on next page)

> vested causes of action[10]. At least that is so if the extinguishment results 'in a direct benefit or financial gain ... and the cause of action is one that arises under the general law'[11]."

Further, contraction in what otherwise would be the measure of liability in respect of a cause of action or other "right", may constitute an "acquisition" of property for the purposes of s 51(xxxi)[12]. Hence the change brought about by the 2004 Act in the content of the "remuneration" by reference to which the right of Mr Chaffey to compensation had been measured since 2003 could, all else being equal, constitute an "acquisition" of property in the necessary sense. But these appeals do not turn upon the notion of "acquisition". They depend upon the identification of the "property" to which s 50 of the Self-Government Act is said to apply.

22 Counsel for Santos properly emphasised that the first task is to identify that bundle of rights which is said to constitute the "property" to which s 50 of the Self-Government Act applies. Counsel for Mr Chaffey did not dispute this.

23 The term "property" is used in various settings to describe a range of legal and equitable estates and interests, corporeal and incorporeal[13]. In its use in s 51(xxxi) the term readily accommodates concepts of the general law. Where the asserted "property" has no existence apart from statute further analysis is imperative.

24 It is too broad a proposition, and one which neither party contended for in these appeals, that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of

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Mutual Pools & Staff Pty Ltd v The Commonwealth (1994) 179 CLR 155 at 172, 176, 184, 194, 201, 222.

10 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

11 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305.

12 See *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 16 [15], 29-30 [56], 37 [81]-[83], 49 [128]; *Smith v ANL Ltd* (2000) 204 CLR 493 at 499-500 [7], 504-506 [20]-[23], 525-526 [89]-[91].

13 *Yanner v Eaton* (1999) 201 CLR 351 at 388-389 [85].

s 51(xxxi). *Newcrest Mining (WA) Ltd v The Commonwealth*[14] is an example to the contrary. That case concerned the use of statute to carve out mining interests from the radical title enjoyed by the Commonwealth upon the acceptance of the Territory pursuant to s 111 of the Constitution. Again, a law reducing the content of subsisting statutory exclusive rights, such as those of copyright and patent owners, would attract the operation of s 51(xxxi)[15].

25 On the other hand, the statutory licensing scheme for off-shore petroleum exploration the validity of which was upheld in the *Commonwealth v WMC Resources*[16] was constructed so as to subject the scope and incidents of licences to the form of the legislation from time to time. In *WMC*, as with Pt V of the Work Health Act, by express legislative stipulation in existence at the time of the creation of the statutory "right", its continued and fixed content depended upon the will from time to time of the legislature which created that "right".

Abolition of Common Law Rights

26 The written submissions for Mr Chaffey stressed the importance of the abolition of certain common law rights by s 52 of the Work Health Act; the section is to be read with the transitional provision in s 189 which preserved accrued common law rights. Section 189 thus is a provision itself consistent with s 50 of the Self-Government Act. Subsections (1) and (2) of s 52 state:

> "52 Abolition of certain rights to bring action
>
> (1) Subject to section 189, no action for damages in favour of a worker or a dependant of a worker shall lie against –
>
> (a) the employer of the worker;
>
> (b) any person who, at the relevant time, was a worker employed by the same employer as the deceased or injured worker; or

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14 (1997) 190 CLR 513.

15 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 70-71 [182]-[187].

16 (1998) 194 CLR 1. See also *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 163-165; *Bienke v Minister for Primary Industry and Energy* (1996) 63 FCR 567 at 585-587.

(c) the Nominal Insurer,

in respect of –

(d) an injury to the worker; or

(e) the death of the worker –

(i) as a result of; or

(ii) materially contributed to by,

an injury.

...

(2) The purpose of subsection (1) is to ensure that, so far as the legislative power of the Legislative Assembly permits, no action for damages at common law shall lie in the Territory or otherwise in the circumstances described in that subsection and nothing in this Act shall be construed as derogating from that purpose."

Mr Chaffey submitted that rights arising under the Work Health Act "represent a statutory expression of previously existing general law rights subsisting as between worker and employer in relation to work-related injuries". In oral submissions counsel put the point in rather different terms. These were that the abolition of common law rights by s 52 aided a construction of s 53 which gave to the statutory right a fixed rather than unstable character.

27 This was far from saying that what "replaces" common law rights by a statutory regime such as that here, should be taken as having its characteristics. The common law was not concerned with the creation and funding of rights to compensation which might continue for many years, with compulsory insurance, a purpose of rehabilitation, and monitoring by a Scheme Monitoring Committee.

Other Provisions

28 Counsel for Mr Chaffey also relied upon s 65. This is the central provision dealing with long term incapacity and the making of payments of a stipulated percentage of average weekly earnings until the worker attains 65 years or, if it be a later date, normal retirement age. But the regime is, by the opening words of s 65(1) subjected to the rest of Pt V, including s 53.

29 Reliance also was placed upon s 69. This was misplaced. This provides for the settlement by mediation, with a right of appeal given the worker if mediation should fail, of disputes arising from proposed cancellation or reduction of payments.

Conclusions

30 The appellants' construction of s 53 of the Work Health Act as it stood at the time of the injury suffered by Mr Chaffey is correct. The consequence is that his rights to compensation under that statute were of a nature which rendered them liable to variation by a provision such as that made by the 2004 Act. Once this nature of the "property" involved is understood it is apparent that there was no "acquisition" spoken of in s 50 of the Self-Government Act.

31 The Attorney-General for the Territory accepted that subsequent legislation might so remove the content of rights to compensation, as to go beyond what was contemplated by s 53 and amount to abolition. But that is not this case, and the prospect need not here be further considered.

32 Nor is it necessary to consider the alternative ground advanced by the appellants, that what was involved here was not an "acquisition" of property, but an adjustment and regulation by the 2004 Act of competing claims, rights and liabilities of "stakeholders" in the system established by the Work Health Act[17].

Orders

33 The appeals should be allowed. The order of the Full Court should be set aside and in place thereof, each question answered "No".

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17 Cf *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161.

34 KIRBY J. These two appeals, from a divided decision of the Full Court of the Supreme Court of the Northern Territory[18], have taken this Court once again to the constitutional principles governing the obligation to provide "just terms" for the acquisition of property from a person, pursuant to an enacted law. As explained in the reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ ("the joint reasons")[19], the law challenged in the appeals is one enacted not by the Federal Parliament but by the legislature of the Northern Territory of Australia, acting pursuant to the *Northern Territory (Self-Government) Act* 1978 (Cth), s 50(1)[20].

35 These appeals have required this Court, once again, to consider the large number of decisions, many delivered in recent years, concerning the "just terms" requirement and the meaning of each of the individual words in its composite expression. Those words include whether the law in question was one "with respect to" the subject of the "just terms" guarantee; whether it was one involving an "acquisition"; whether, if so, what was acquired was "property"; and whether, in that case, the law provided for "just terms". Over the years, in the circumstances of individual cases, each and every word in the formulation has been closely scrutinised.

The suggested imprecision of "just terms" discourse

36 In recent times, members of this Court[21] and academic commentators[22] have noted what they have perceived to be inconsistencies or overly-fine distinctions that present difficulties for later courts and for other decision-makers seeking to apply the Court's doctrine on this subject in the circumstances of a new case. Thus, Professors Blackshield and Williams, by reference to several recent decisions, have suggested that outcomes in such cases appear to depend on "difficult questions of judgment" and "subtle distinctions … exacerbated by the

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18 *Chaffey v Santos Ltd* (2006) 18 NTLR 22.

19 Joint reasons at [1]-[4].

20 cf Constitution, s 51(xxxi).

21 See, for example, *Smith v ANL Ltd* (2000) 204 CLR 493 referred to in the reasons of Callinan J at [56].

22 Blackshield and Williams, *Australian Constitutional Law and Theory*, 4th ed (2006) at 1285; Dixon, "Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution", (2005) 27 *Sydney Law Review* 639 at 639-640; Allen, "The Acquisition of Property on Just Terms", (2000) 22 *Sydney Law Review* 351.

judicial differences in emphasis and approach."[23] Similar suggestions have been made in other areas of judicial decision-making[24]. A measure of imprecision is probably inherent in all constitutional decisions and therefore deserving of no particular apology[25].

37 The way to bring clarity to this area of discourse would seem to be by attempting to identify more explicitly the purposes of the "just terms" guarantee[26]. However, the present appeals were argued within the four walls of recent decisional authority. No party made an attempt to propound a new or different approach so as to bring a brighter and more consistent light to bear on the task in hand. These appeals would not, therefore, afford a suitable occasion to attempt a new analysis, aided by contradictory submissions.

Two disqualifications from "just terms" entitlements

38 *Adjustment of rights*: Within the present approach two disqualifications appear to stand out, each of them relevant to the decision in these appeals. Unsurprisingly, they are interrelated.

39 In *Nintendo Co Ltd v Centronics Systems Pty Ltd*[27], six Justices of this Court said:

> "[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 characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution." (footnote omitted)

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23 *Australian Constitutional Law and Theory*, 4th ed (2006) at 1285.

24 See eg *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2006) 81 ALJR 1155 at 1168 [69]; 234 ALR 618 at 633 concerning the constitutional doctrine of the separation of the judicial power.

25 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60].

26 Evans, "When Is an Acquisition of Property Not an Acquisition of Property? – The Search for a Principled Approach to Section 51(xxxi)", (2000) 11 *Public Law Review* 183 at 184.

27 (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 166, 198.

40 In *Commonwealth v WMC Resources Ltd*[28], I cited this passage but acknowledged that it was not always easy to ensure its consistent application:

> "In *Nintendo*, the character of the Act in question was determined to be beyond the reach of the constitutional guarantee of just terms. There have been other, similar cases. The difficulty has been to draw a satisfactory line between such cases and others where valuable rights are affected by legislation in a way adverse to the interests of the property owner. No formula of universal application can be expressed. This is because the task of characterisation which is invoked obliges the Court to evaluate all of the features of the law in question in order to classify it as falling within, or outside, the operation of the guarantee in s 51(xxxi)." (footnote omitted)

These words remain true today. They are applicable to the decisions in these appeals.

41 *Inherent variability*: The second relevant disqualification acknowledges, as a touchstone for the task of characterisation, that particular types of legislation will be outside the ambit of the guarantee to provide "just terms" for an "acquisition" because the statutory rights acquired may be seen as inherently susceptible to variation[29]. This category of non-application of the guarantee is usually traced to this Court's decision in *Health Insurance Commission v Peverill*[30].

42 *Peverill* was a case involving a claim based on a federal law of retrospective operation. That law was designed to reduce the amount which patients (and, by assignment of the benefits, medical practitioners) were entitled to claim by way of reimbursement for pathology services. The whole Court dismissed the attack on the challenged law, albeit for varied reasons, holding either that the benefit entitlement did not constitute "property", or that the retrospective reduction in the amount of benefits payable was not an "acquisition of property" within the meaning of s 51(xxxi)[31]. Relevantly, Mason CJ, Deane and Gaudron JJ held that the statutory right to reimbursement in the case was of a

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28 (1998) 194 CLR 1 at 98-99 [251]-[252].

29 The inherent susceptibility to modification or extinguishment was the essential argument of the appellants below. See *Chaffey v Santos Ltd* (2006) 18 NTLR 22 at 37 [41].

30 (1994) 179 CLR 226.

31 See (1994) 179 CLR 226 at 243 per Brennan J, 250-251 per Dawson J, 254-256 per Toohey J, 265-266 per McHugh J.

kind inherently susceptible to variation[32]. When such variation occurred, with results disadvantageous to a person, this did not amount to "acquisition" of the property of that person, nor was the law to be characterised with respect to such acquisition. The guarantee was therefore not attracted.

43 In *Commonwealth v WMC Resources Ltd*[33], I endeavoured to explain how this category applied:

> "Some interests, of their nature, are much more likely to be catalogued as protected by the guarantee than others. If the interests are ephemeral, prone to ready variation or dependent upon benefits paid out of the consolidated revenue, they will much more readily be classified as falling outside the constitutional protection than where they are exclusive, transferable, require substantial investment, impose significant obligations and partake, by analogy, of the familiar features of stable and valuable property interests long recognised by the common law. The creation of new property interests by federal legislation can scarcely be a consideration which, of itself, puts such interests beyond the protection of s 51(xxxi). After all, the Commonwealth can ordinarily create property interests only by legislation. Several interests created by federal legislation have been held to attract the protection of s 51(xxxi). *Newcrest*[34] is but the latest case to deny the proposition that all legislative rights are inherently provisional and of their nature liable to repeal without the provision of just terms."

44 I realise that expressions such as "inherently susceptible to variation" or "inherently provisional", like the equivalent phrase of disqualification "inherently incongruous"[35], are not wholly satisfactory. They postulate as self-evident a disqualifying feature that needs to be established convincingly when it is challenged. Moreover, the feature is assumed to act as a disqualification from the "just terms" entitlement without necessarily explaining why it has that effect. However, this may be another illustration of the fact that, in legal reasoning and

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32 (1994) 179 CLR 226 at 237.

33 (1998) 194 CLR 1 at 99 [253].

34 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513.

35 *Burton v Honan* (1952) 86 CLR 169 at 180-181; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 219-220; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307; *Newcrest* (1997) 190 CLR 513 at 595; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60].

in constitutional elaboration especially, a point may ultimately be reached where the decision is sustained by considerations of impression and judgment. Verbal explanations, in such instances, can only go so far. Expressions such as "inherently variable" or "inherently incongruous" may still be useful for reaching the judgment necessary to decision-making.

Application of the disqualifications in this case

45 *Approach to the problem*: Whilst I accept the criticisms that have been levelled at the current doctrine and the occasional difficulty of reconciling the outcomes of particular cases[36], the foregoing two considerations lead me, in the present case, to the conclusion that the appeals must be allowed. My reasoning is essentially the same as that of Heydon J[37].

46 *Adjustment of entitlements*: The scheme of the *Work Health Act* (NT) ("the Act") is designed to adjust the competing rights, claims and obligations of persons in the particular relationship of employment[38]. One can have views concerning the justice of particular adjustments made from time to time, and specifically of the adjustment in the present case which abolished (with retrospective operation) the inclusion of employer-paid superannuation payments as part of the "remuneration" of the "worker"[39], Mr Chaffey, upon which his entitlement to compensation would otherwise be calculated[40]. However, indisputably, the legislation in question here, which was justified as an attempt to restore the previous understandings of the operation of the Act[41], involved an adjustment in a statute containing a range of provisions burdening employers and favouring workers in specified ways.

47 Most importantly, the history of workers' compensation law in Australia, since its first introduction in the early years of the twentieth century, has been one of frequent and repeated legislative change and adjustment both in the types of available benefits and in their quantification. Commonly, the adjustment has

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36 See eg *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 76-77 [211].

37 Reasons of Heydon J at [59]-[67].

38 See reasons of Heydon J at [64]-[66].

39 The Act, s 3(1).

40 See joint reasons at [11]-[13]; cf *Hastings Deering (Australia) Ltd v Smith (No 2)* (2004) 18 NTLR 1.

41 See Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 October 2004, cited in *Chaffey v Santos Ltd* (2006) 18 NTLR 22 at 39 [47].

seen the gradual increase in worker benefits. However, sometimes (as is said to be the case here), particular benefits have been reduced or abolished within a legislative "package" including a different mix of new entitlements and burdens. It was not too much to say, as Angel J did in the Full Court, with some hyperbole, that "[t]he percentage level of compensation, like interest rates and one-time goldmining 'booms' in Natal, may well have its 'ups and downs'"[42].

48 *Inherent variability*: Moreover, the particular provision of the Act, concerning the property right allegedly acquired by the removal of the superannuation component in the computation of the respondent's compensation benefits (s 53), contains a triple indication of the impermanency of the benefits accorded by the Act.

49 The three indications of this susceptibility are shown in the critical section, reproduced as it was in force at the time, with appropriate emphasis:

> "*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 dependants, *in accordance with this Part*, such compensation *as is prescribed*".

Each of the emphasised phrases indicates, from the text of the statute, the impermanency and variability of the entitlement in question, and the necessity to read the statutory compensation "right", as it was provided by law from time to time. The right was, and is, therefore, a "right" inherently susceptible to variation. It follows that a law fulfilling the predicted variation was not a law with respect to the "acquisition" of property, nor was the "right" that was varied "property" that was susceptible to acquisition for "just terms" purposes.

Conclusion: "just terms" inapplicable

50 These two features of the Act are therefore sufficient, within the present principles endorsed by this Court, to deny an entitlement to compensation for

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42 *Chaffey v Santos Ltd* (2006) 18 NTLR 22 at 30 [16], invoking *Laughton v Griffin* [1895] AC 104 at 106-107 per Lord Macnaghten.

what is, after all, simply the latest "adjustment" and "variation of benefits" by the Act. In this case, there was not an uncompensated acquisition by abolition of a pre-existing right to bring an action for damages at common law such as led to the outcome in *Smith v ANL Ltd*[43]. Instead, there was an adjustment and variation in entitlements wholly of a statutory kind. Although the origin of the entitlements in statute was not necessarily fatal to the entitlement to "just terms" for their abolition or variation, their inherent impermanency and variability was. The impugned provision of the Act therefore did no offence to the "just terms" requirement in the *Northern Territory (Self-Government) Act*. It was valid.

Orders

51 I therefore agree in the orders proposed in the joint reasons.

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43 (2000) 204 CLR 493. See also *Georgiadis* (1994) 179 CLR 297 at 310-311.

52 CALLINAN J. Subject to the matters which I later discuss, I agree with the construction of the relevant legislation adopted in the joint judgment, and the orders proposed by its authors.

53 The fact that a right or interest is the entire creature of an enactment does not, on that account, immunize its extinguishment, alteration, reduction or acquisition against an obligation on the part of the responsible polity to pay compensation. Many rights and interests, as well as obligations, are the creature of statute, but people coming to possess the former outlay money, time and effort by and on the faith of that possession. Others dealing with the possessor similarly do so. Everything that the Commonwealth lawfully does and creates, it does pursuant to statute and the Constitution. That certainly does not have the consequence that the Commonwealth may escape the operation of s 51(xxxi). It is subject to these basic propositions that various statements made by the Court, in a quite different setting, respecting repeals and amendments in *Kartinyeri v Commonwealth*[44] must be read.

54 Sometimes reference has been made to the "fragility" of a particular right, title or interest[45]. That description, although it may be relevant to value, has nothing to say about the existence of the right, title or interest.

55 All legislation is amendable or repealable. Amendments and repeals may however come at a price. It is not merely the inherent quality of legislative change that will defeat a right to compensation, but also the nature and quality of the object of the legislation, here the provision of benefits of specially adapted kinds to workers. Those benefits may not be confined to monetary benefits: for example, they might include access to rehabilitation or changed working conditions. So too, the benefits may fluctuate as the economy itself fluctuates. Workers compensation is a unique form of benefit, closely associated with working conditions generally. These are notorious matters. Sometimes the employer and its insurer may appear to be advantaged, at others the employees. Arrangements and transactions, for example, sales of going concerns employing many people are made with an awareness of these possibilities. These are considerations which distinguish workers compensation from conventional choses in action and other interests.

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44 (1998) 195 CLR 337.

45 See, for example, *Western Australia v Ward* (2002) 213 CLR 1 at 93 [91], 240-241 [561], 262-263 [616], 303-304 [702]; *Wilson v Anderson* (2002) 213 CLR 401 at 457 [138], 458-459 [142]; *Fejo v Northern Territory* (1998) 195 CLR 96 at 150-154 [105]-[112].

56 I do not doubt that s 50 of the *Northern Territory (Self-Government) Act* 1978 (Cth) should be construed in the same way as the Constitutional guarantee. It is not necessary however, for the purposes of this case to attempt to resolve the unsatisfactory state of the conflicting authorities and pronouncements in regard to it to which I referred in *Smith v ANL Limited*[46], and in respect of which my views remain unchanged.

57 The appeals should be allowed.

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46 (2000) 204 CLR 493. See the judgment of Callinan J.

58 HEYDON J. The background is set out fully in the joint judgment, and the abbreviations in it are adopted below.

59 Mr Chaffey's rights to compensation under the Work Health Act were of a nature that rendered them inherently liable to variation by provisions such as those in the 2004 Act, and hence the 2004 Act did not effect an acquisition. This is so not because of the specific terms of s 53 of the Work Health Act read in isolation, but for the following reasons.

60 First, legislation relating to workers compensation has historically been peculiarly subject to frequent and often extensive amendment in the light of changes in economic conditions, the solvency of insurers, and the fluctuating positions of executive governments in relation to indemnifying under-funded workers compensation schemes. It is thus unlikely that persons affected by workers compensation legislation will commonly have any expectation that it will remain immune from amendment in a way which can alter existing rights.

61 Secondly, the Work Health Act reflects a particular balance between the interests of those affected by it.

62 From the point of view of workers, apart from the provisions for the payment of benefits in Pt V, the Work Health Act has the following purposes appearing in its long title:

> "[T]o 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 [and] to promote the rehabilitation and maximum recovery from incapacity of injured workers ..."

These purposes are carried out by the creation in Pt IV of numerous statutory duties on employers, occupiers, self-employed persons, manufacturers, owners and workers (ss 29-31). Provision is made for work health officers to be appointed (s 35) and to carry out investigations (ss 36-39). Provision is made for the Authority to issue improvement (s 40) and prohibition (s 41) notices, and for the creation of health and safety committees in workplaces (ss 44A-44G). Specific provision is made to ensure the rehabilitation of injured workers following an injury (ss 75-78). The Scheme Monitoring Committee also has the functions of advising the Minister (s 145(1)(d)) and reporting on the effectiveness of premiums in encouraging employers who do, and penalising employers who do not, develop and maintain safe working practices (s 145(1A)).

63 How are these advantages for workers to be secured? The Act creates a system of insurers approved by the Work Health Authority, where approval depends in part on the ability to provide the necessary insurance services and on financial viability (ss 119(3)(a) and (c) and 120(3)(a) and (b)). Unless an employer is a self-insurer (s 120), it is compulsory to take out insurance with an

approved insurer (s 126). There is a statutory duty on approved insurers to indemnify the employers they have insured (s 126(A)). There is provision for a Nominal Insurer (s 150) and a Nominal Insurer's Fund (s 162) to protect injured workers whose employers lack workers compensation insurance (s 150(1A)(a)) and to protect employers and injured workers where insurers default in payment of compensation (s 150(1A)(b); and see ss 137 and 167). The "viability and performance of the workers compensation scheme" is to be monitored by the Scheme Monitoring Committee (s 145(1)(a)), as are premium rates (s 145(1)(aa)) and overall underwriting results (s 145(1)(c)). The Committee has on it a representative of the Authority and other members appointed by the Minister (s 141), and the Authority is obliged to supply it with information (s 146). It is crucial to the operation of the Committee that insurers and self-insured employers be able to provide relevant statistical and other information, which is a matter material to their approval (ss 119(3)(d) and 120(3)(c)). Section 25(1) provides that the Work Health Advisory Council has the functions of inquiring into and reporting to the Minister on matters referred to it by the Minister, and of investigating and making recommendations to the Minister about any matter under the Act or relating to the administration of the Act (s 25(1)(a) and (b)). Thus the Council can inquire into and report on the adequacy of benefits payable to injured workers and the consequences, including the costs consequences of changing those benefits. The existence of these mechanisms for giving information and advice to the Minister about how the scheme is operating suggests that an implication of the legislation is that the scheme will remain workable, and that it will be amended if it is not.

64 The scheme involves reciprocity in the sense that the rights of workers to compensation depend on the duty of employers to pay it. Many employers will be unable to fulfil their duty to pay compensation unless they can obtain insurance in order to enable them to pay it. The availability of insurance depends on the willingness of insurers to enter the particular market, their ability to offer affordable premiums, and their capacity to pay on the policies entered by employers. It is possible that injured workers could receive payments until the attainment of the age of 65 (or normal retirement age if that is longer) (s 65(1)). The liability of insurers under particular policies could continue for very long periods.

65 Thus, as Angel J said in dissent in the Full Court, the scheme created by the Work Health Act[47]:

> "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

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47 *Chaffey v Santos Ltd* (2006) 18 NTLR 22 at 29 [12].

> 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."

66 In these circumstances it is clear that the legislation contemplates the possibility of frequent amendment in order to adjust, and ensure the continuing operation of, the scheme in the interests of workers, employers and insurers over long periods of time during which economic and commercial conditions are likely to fluctuate, perhaps radically.

67 For these reasons the reference in s 53 to "such compensation as is prescribed" means "prescribed by or under the Act from time to time".

68 The orders proposed in the joint judgment should be made.