CITATION: *Cameron Owen Chaffey v Santos Limited* [2005] NTMC 032

PARTIES:	CAMERON OWEN CHAFFEY v SANTOS LIMITED
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Act
FILE NO(s):	20403000
DELIVERED ON:	10 June 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	9 December 2004
JUDGMENT OF:	Dr J. A. Lowndes SM

CATCHWORDS:

WORK HEALTH
VALUATION OF NON-CASH BENEFIT – EMPLOYER PROVIDED ACCOMMODATION – DIRECT COMPARISON METHOD – RECOURSE TO MISCELLANEOUS TAXATION RULING 2025 – MAINTENANCE OF INTERSTATE PREMISES

Work Health Act s 49
Normandy NFM v Turner 180 FLR 212 applied
BHP Australia Coal Ltd v FCOFT (Administrative Appeals Tribunal, 24 May 1993) considered
Miscellaneous Taxation Ruling 2025 considered

REPRESENTATION:

Counsel:

Plaintiff:	Mr Grant
Defendant:	Mr Barr QC

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 032
Number of paragraphs:	141

IN THE WORK HELATH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20403000

BETWEEN:

CAMERON OWEN CHAFFEY
Plaintiff

AND:

SANTOS LIMITED
Defendant

REASONS FOR JUDGMENT

(Delivered 10 June 2005)

Dr J. A. LOWNDES SM:

THE NATURE OF THE PROCEEDING AND THE ISSUES

1. The worker claims benefits pursuant to the *Work Health Act*, particulars of which are set out in the worker's Amended Statement of Claim. Matters in dispute were raised in the employer's Amended Notice of Defence and Counterclaim.

2. At trial only four issues remained in dispute which required adjudication by this Court, all other issues arising out of the proceedings having been resolved by the parties. The first issue, which concerns a challenge to the constitutional validity of the recent amendments to the *Work Health Act* dealing with the exclusion of superannuation contributions from the concept of "normal weekly earnings", is to be the subject of a case stated to the Supreme Court and does not require adjudication upon by this Court. I have advised the parties of my willingness to state a case in that regard, and I am in the process of settling the form of the case stated. The second relates to

the value of a non –cash benefit - namely accommodation provided by the employer to the worker during the course of his employment - for the purposes of calculating the worker's normal weekly earnings and ultimately his entitlement to weekly payments of compensation. The third issue relates to whether or not recreational facilities provided by the employer to the worker form part of "normal weekly earnings" and if so the value to be attributed to the provision of those facilities for the purpose of calculating weekly payments of compensation to which the worker is entitled. The fourth and final issue relates to whether or not at the date of injury the worker was required to pay any amount for interstate accommodation or for the maintenance of interstate premises. The parties have requested a determination on that issue as the employer has indicated a possible challenge to the validity of the decision in *Normandy NFM v Turner* which is referred to immediately below.[1]

THE VALUE OF THE ACCOMMODATION PROVIDED BY THE EMPLOYER

3. This Court is bound by the decision in *Normandy NFM v Turner* [2003] NRSC; 180 FLR 212 where it was held by Mildren J that whenever an employer provides free food, clothing or accommodation the value of those items are to be treated as part of the worker's remuneration. There, his Honour held that the provision of accommodation on a "two weeks on two weeks off" basis was not relevant to whether the provision of accommodation formed part of a worker's remuneration.[2] The facts in this case appear to be on all fours with facts in *Normandy NFM V Turner*.

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[1] The basis for the foreshadowed challenge is set out on pages 2 and 3 of Mr Barr's written submissions dated 22 February 2005. See also Mr Barr's oral submissions at pages 55 -56 of the transcript and Mr Grant's oral submissions at p 60-61 of the transcript. In short, the employer says that the accommodation and recreational facilities provided to the worker were facilities or amenities which were compensatory in nature and not intended to grant a net benefit; and did not result in any net benefit. Accordingly, the employer - provided accommodation should not be treated as part of the worker's gross weekly remuneration. It is in that context that this Court has been asked to make a finding as to whether the worker was paying for interstate accommodation or maintaining interstate premises. See n 2.

[2] See also the following observation made by Mildren J at 215:

> " …food and accommodation provided to the ship's master in *Skailes v Blue Anchor Line Ltd* was held to be part of his remuneration notwithstanding that he also had a residence in his home port."

Hence the need for this Court to make the ruling referred to n 1.

Therefore, this Court, being bound by that decision, must find that the accommodation provided to the worker formed part of his remuneration. However, what remains in dispute is the value to be attributed to the accommodation which was provided to the worker.

4. It is established law that when valuing a non cash benefit such as the employer-provided accommodation at the Mereenie gas Fields, the issue is what value was that accommodation to the worker – in other words, what would it have cost the worker to stay at those premises had the accommodation not been provided by the employer.

5. The worker and the employer have assumed opposing positions in relation to the value of the subject accommodation, in support of which they have obtained and called expert evidence. The worker has valued the accommodation at $40 per day - $280 per week - based on the opinion and evidence of Mr Peter Teagle. On the other hand, relying upon the opinion and evidence of Mr Gore, the employer has placed a value of $90 per week on the subject accommodation.

6. Before proceeding to consider the conflicting expert evidence in this case it is helpful to describe the accommodation which the employer provided to the worker during the course of his employment

The nature of the accommodation

7. As is evident from the valuations undertaken by Mr Teagle and Mr Gore the subject accommodation consisted of a single air-conditioned room with ensuite bathroom, adjoining a common lounge room shared by three other employees. The room was furnished with the following items: a single bed, desk, chair and colour television set and a lock up cupboard for clothing. The room was fully serviced, with bed linen changed once a week and clean towels supplied on a daily basis. When Mr Chaffey was absent from the work site the room was used by another employee. The common lounge area

provided basic kitchen facilities, colour television and a computer for internet and email access. A cleaner was provided on a regular basis for both the room and the common lounge area.

8. In addition the following recreational facilities were available: gymnasium (including gym towels), swimming pool, tennis court and beach volley court.

The expert evidence relating to the valuation of the subject accommodation

(a) Mr Teagle's evidence

9. In his report dated 26 May 2004 (Exhibit W2) Mr Teagle considered the subject accommodation to be remote "with limited, if any demand apart from the workers/contractors located on site".[3] Mr Teagle went on to say: "The closest comparison that can be made is rental comparisons of contractor accommodation providing a similar amenity".[4]

10. Mr Teagle adopted the following methodology in valuing the said property:

> "The most appropriate method of valuation in this case is considered to be the direct comparison approach whereby the amenity provided by Santos is compared to properties which provide a similar level of service and amenity.
>
> The valuation has been made on the basis of a willing well-informed lessee and a willing well-informed lessor both acting at arms length in a bon fide transaction.
>
> Whilst no money is exchanged between the employee and the employer there is an equivalent benefit accrued to both. This valuation assesses the open market of that benefit.
>
> There is limited market evidence of rental properties in this locality or other remote localities that I am aware of.

[3] See p 3 of the report.
[4] See p 3 of the report.

> I have considered serviced miner and rail contractor accommodation units in areas such as Katherine, Adelaide River, Pine Creek, Renner Springs and Tennant Creek and also bed-sit style accommodation within Alice Springs and Tennant Creek. More commercial styled hostel and hotel/motel styled accommodation has also been considered. Allowances for locational, functional and quality differentials have been made in the assessment of the appropriate rate. Consideration has been given to the fully serviced nature of the room and the inclusion of common room and outdoor recreational facilities." [5]

11. Under the heading "Other Considerations" on page 4 of his report, Mr Teagle stated as follows:

> "Supporting case law relates mainly to the issue of fringe benefits tax and includes BHP Australia Coal Limited v FC of T (Administrative Appeals tribunal, 24 May 1993), which provides the methodology to determine market values of remote area housing benefits.
>
> Miscellaneous Tax ruling – MT 2025 also sets out the guidelines for valuation of housing fringe benefits. It is these pieces of text that have been considered in the determination of what I consider an appropriate rental.
>
> Further to the above, the methodology utilised in Fox v Palumpa Station and Carroll v Murwangi Station was also considered."

12. In considering a fair monetary value for the employer-provided accommodation at Mereenie, Mr Teagle had regard to comparable rental properties which he particularised in a schedule forming part of his report.[6] It was Mr Teagle's conclusion that the rental value of the accommodation at Mereenie was $40 per day, that is, $280 per week, after making relevant adjustments.

13. In addition to his valuation report, Mr Teagle gave oral evidence at the hearing of this matter. His evidence is summarised below.

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[5] See p 3 of the report.

[6] See`pp 5 and 6 of the report. The schedule provided details of accommodation available at a variety of locations . A daily rental was attributed to each accommodation.

14. Mr Teagle told the Court that he was familiar with the type of camp accommodation provided at Mereenie.

15. As to the comparable rental information provided in his report and his valuation of the subject accommodation, Mr Teagle stated:

> "…basically there's a range of values there, depending on the level of cost of accommodation provided to the person who is staying there. They range of anywhere to around $20 to the more expensive $80 being long term accommodation through to motel type accommodation. I basically placed the majority of my emphasis on accommodation that had been utilised by Ad-rail to accommodate their employees… I believe they were the most comparable in relation to the subject property in terms of the level of accommodation provided, the locality – the remoteness of the locality and facilities provided."[7]

16. Mr Teagle said that Ad-rail employees were working under contract to construct the Alice to Darwin railway.[8] He went on to say that the accommodation provided to them was the same sort of camp accommodation provided to Mr Chaffey.[9]

17. Mr Teagle told the Court that he had most regard to three types of accommodation: Adelaide River which consisted of demountable styled accommodation with ensuite facilities and pool; the PGA motel in Katherine, a simple motel styled accommodation with shared bathroom facilities and a common swimming pool ; and Renner Springs roadhouse, demountable styled accommodation which was fully furnished with ensuite facilities.[10] Mr Teagle said that the latter was the most comparable accommodation he looked at.[11] He went on to say that he looked at all three and a few others referred to in the schedule in his report and after comparing

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[7] See p 22 of the transcript of proceedings.
[8] See p 22 of the transcript.
[9] See p 22 of the transcript.
[10] See p 22 of the transcript.
[11] See p 22 of the transcript.

them with the accommodation at Mereenie he came up with a figure of $40 per day as being fair and reasonable for that accommodation.[12]

18. The witness said that the accommodation at Adelaide River was quite comparable to the accommodation at Mereenie, but because it was not as remote as the accommodation at Mereenie it attracted a daily rate of $55.[13] Mr Teagle considered the subject accommodation to be superior to the PGA accommodation at Katherine because the latter did not have ensuite bathroom facilities and had only shared bathroom facilities.[14] The witness considered the accommodation at Renner Springs to be similar to the subject accommodation: " It was a mixture of demountable and asbestos-type stunts buildings. It had a fully serviced ensuite room, however it didn't have a swimming pool and so realistically, probably not as good a quality as the subject."[15] As to the comparability of single room bed-sits in Alice Springs with the accommodation at Mereenie, Mr Teagle gave the following evidence:

> " ...they're not serviced at all. The quality of accommodation, particularly at Santa Theresa would be inferior. It is an older type building with only basic kitchen facilities. The Santa Theresa(?) one has a common bathroom area. There is no pool facilities in that particular one, so that I consider that's inferior. Six Stephens Road is probably better than Santaville based on the fact that it has got ensuite facility, it's got a common pool, but again it's a little bit older and the rooms are not serviced and still, I consider it inferior."[16]

19. The witness acknowledged that Mr Gore had arrived at a figure of $300 per week for the accommodation at Mereenie and discounted that figure by 70%.[17] He believed that that discounting was based on the guidelines set out in Tax Ruling MT 2025 and that Mr Gore had taken that approach because a

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[12] See p 22 of the transcript
[13] See p 23 of the transcript.
[14] See p 23 of the transcript.
[15] See p 23 of the transcript.
[16] See p 23 of the transcript.
[17] See p 23 of the transcript.

market rental value could not be directly attributed to the accommodation and the subject accommodation was remote.[18] As to the inability to attribute a market rental value to the Mereenie accommodation, Mr Teagle gave this evidence:

> " …just listing, in particular, the three properties that were utilised by Ad-Rail, they are in remote localities and I consider them to be quite comfortable in terms of the level of accommodation provided to those staying there. Realistically I would say that there is comparable evidence."[19]

20. Mr Teagle said that it appeared that Mr Gore had only considered accommodation located in Alice Springs and had not considered accommodation at other locations in the Northern Territory.[20]

21. Finally in evidence-in-chief, the witness said that he was uncertain as to the applicability of Tax ruling MT 2025 in the present case:

> "… it (referring to the ruling) says that it's relying on there being no market evidence at all, but I believe there is a market for this type of accommodation within some fair limits. It may not be in a specific locality that we're talking about but there's market evidence throughout … the Territory of this type of accommodation and what the market rate is for that type of accommodation."[21]

22. During cross examination it was put to Mr Teagle that in his report he was attempting to assess the fair market value of a hypothetical adjoining township to the Mereenie Gas Fields. His reply was: "What I am trying to do is assess the market value of the actual benefits that Mr Chaffey has incurred."[22]

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[18] See p 23 of the transcript.
[19] See p 24 of the transcript.
[20] See p 24 of the transcript.
[21] See p 24 of the transcript.
[22] See p 24 of the transcript.

23. By way of explaining his reference in his report to a “hypothetical adjoining township within the same locality” the witness stated: “It’s referring to what the market value would be for that accommodation…”.[23]

24. When asked to elaborate upon what he meant by “adjoining township” Mr Teagle said: “Basically saying that if that type of accommodation was provided at that locality, what it would be worth.”[24]

25. At page 25 of the transcript the witness gave evidence to the effect that he did not consider the “supporting case law” referred to his report as providing the correct methodology for valuing the subject accommodation because that case law was only applicable where there was no evidence of a relevant market and in the present case there was evidence of such a market. Accordingly he applied the “willing lessor/lessee” approach.

26. Mr Teagle said that he had considered the alternative methodologies supported by the case law, but ultimately rejected them as being inappropriate in the present case.[25]

27. At page 26 of the transcript the witness stated that he had considered Miscellaneous Tax Ruling 2025, but believed that the methodology applied therein was not appropriate in the present case. Mr Teagle was of that view because he believed that there was a limited market in the Northern Territory for the type of accommodation located at the Mereenie Gas Fields.[26] By “market” the witness meant “…accommodation that is provided to contractor and tenant employees to stay on site in remote localities in the Northern Territory”.[27]

28. Mr Teagle did not consider that he was hypothecating a market:

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[23] See p 24 of the transcript.
[24] See p 25 of the transcript.
[25] See p 25 of the transcript.
[26] See p 26 of the transcript.
[27] See p 26 of the transcript.

> "I'm giving factual evidence of what that employer has paid on behalf of their employees in three very similar camps in the Northern Territory and they all come out with a value that I consider is quite appropriate."[28]

29. When it was put to the witness that he had utilised the amount paid by the employer – " the cost to the employer of the accommodation" – Mr Teagle responded thus:

> "What the employer and the vendor have agreed on as a fair and reasonable fee."[29]

30. When it was put to Mr Teagle that it was the cost to the employer that he had looked at, he replied: " …it's not really the cost – part of the alternative they had was to set up their own camp."[30]

31. As to the Ad-Rail accommodation he looked at during the comparative exercise, Mr Teagle stated: "…. the cost that Ad-Rail has paid on behalf of their employees to accommodate that most specific location. If that's not market evidence, I don't know what is."[31]

32. At page 28 of the transcript Mr Teagle confirmed that the figures shown in the schedule to his report in relation to Ad-Rail were the amounts actually paid by Ad-Rail to the owner or provider of the designated accommodation.[32]

33. By way of explaining the principle of "willing lessor/lessee", Mr Teagle told the Court that a willing lessee is someone who is willing to lease premises.[33]

34. At page 29 of the transcript it was put to the witness that it was not appropriate to apply the "willing lessor/lessee" principle as a basis for valuing the accommodation at the Mereenie Gas Fields in circumstances

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[28] See p 27 of the transcript.
[29] See p 27 of the transcript.
[30] See p 27 of the transcript.
[31] See p 27 of the transcript.
[32] See p 28 of the transcript.
[33] See p 28 of the transcript.

where the employee (Mr Chaffey) was obliged to be at that location and was obliged to use the accommodation which was made available at that location.[34] Mr Teagle responded as follows:

> "There are benefits to both of them with him staying there. Just because he had to in terms of his employment stay there, does not mean that there is no value to him."[35]

35. At page 29 of the transcript Mr Teagle agreed that if one focused on the Mereenie Gas Fields and environs there was no market at all:

> "Not in the immediate locality, no. That comes back to my original methodology where I've used probable evidence not based on single geographic location but in general remote areas throughout the Northern Territory… Renner Springs, that's one example…Adelaide River, as well."

36. At page 30 of the transcript Mr Teagle agreed that the single accommodation described in paragraphs 27 and 28 of the Tax Ruling was similar in nature to the accommodation provided at Mereenie. The witness also agreed that the Tax Commissioner acknowledged that values within the market can be discounted on account of the remoteness or isolation of the accommodation provided.[36] However, Mr Teagle did not consider the Tax Ruling to provide a proper basis for valuing the subject accommodation because the ruling was "a tax ruling, it's talking about valuation of housing benefits provided when there is no evidence to say otherwise".[37]

37. At page 31 of the transcript the witness agreed that the tax ruling related to the valuation of all housing fringe benefits – it was for the purposes of income tax – and that the purpose of income tax was to assess the value of the benefit provided.

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[34] See p 29 of the transcript.
[35] See p 29 of the transcript.
[36] See p 31 of the transcript. At page 33 of the transcript the witness agreed that if a property is remote from a centre it is likely to attract a lower rental.
[37] See p 31 of the transcript.

38. It was put to the witness that he had "unofficially created a market in an area that is a long way distant from the subject company, based on what some other company has negotiated with private suppliers to provide for its own workplace or workmen".[38] Mr Teagle replied in these terms:

> "Well, that seems a fair market according to me. The accommodation provided was needed so they could get the workers to go there. So there have to be some benefits to both parties."[39]

39. However, the witness once again agreed that there was no market within the region of the Mereenie Gas Fields, but reiterated that there was a relevant market within other locations in the Northern Territory.[40]

40. At page 32 of the transcript Mr Teagle said that he had investigated accommodation at Alice Springs and Tennant Creek but neither the facilities nor amenities there matched those at the accommodation provided at the Mereenie Gas Fields.

(b) Mr Gore's evidence

41. Mr Gore, who was called on behalf of the employer, prepared and provided a valuation report (Exhibit E4).

42. As disclosed in the summary on page 3 of his report Mr Gore identified Mereenie as a remote field located approximately 240 km west of Alice Springs. According to Mr Gore no open market comparisons were available for the type of accommodation available at Mereenie. Mr Gore valued the subject accommodation by applying the FBT Tax ruling MT 2025 and relevant case law.

43. At page 7 of his report, Mr Gore stated:

> "In normal circumstances a fair market value is determined by comparison with what similar properties rent for in the market place.

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[38] See pp 31 -32 of the transcript.
[39] See p 32 of the transcript.
[40] See p 32 of the transcript.

In the subject case there is no local market to compare with and it is not comparable with other towns."

44. Mr Gore stated that what is in issue is the value of the accommodation to the worker and not the cost to the employer.[41] Proceeding on that basis, Mr Gore considered "the commercial cost of the benefits provided if received within a town/city and relate it to the subject location.[42]

45. Mr Gore stated that the value of the accommodation had been determined by taking into account paragraphs 25, 53 and 54 of the Miscellaneous Tax ruling 2025.[43]

46. At pages 7- 8 of his report Mr Gore considered and tabulated the cost of hostel accommodation within Alice Springs together with the cost of private rental accommodation.

47. At page 8 of his report Mr Gore stated:

> "Having considered the above rates we have adopted a rate for the subject accommodation if within Alice Springs of $300 per week.
>
> The discount rate applied has been determined from the Tax ruling and a discount rate of 70% has been adopted reflecting the remoteness of this location. Applying this rate gives a value of $90 per week for the subject accommodation and facilities."

48. Mr Gore, who was also called as a witness, gave evidence that in arriving at the discounted value of the accommodation at Mereenie he had applied the 70% discount referred to in paragraph 20 of the Tax Ruling. [44]

49. At page 37 of the transcript the following exchange occurred between the witness and the employer's counsel:

> "Q: Could you please explain …why it is that you have even done a discount, as you have at page 8 of your report from the Alice Springs

[41] See p 7 of the report.
[42] See p 7 of the report.
[43] See p 7 of the report.
[44] See p 37 of the transcript. The witness said that the reference to paragraph 25 in his report was an error and should have read paragraph 20.

> notional valuation fee in the dollars per week down to an amount that's only 30% of that?
>
> A: …we were charged with coming up with a fair market value rental for the property. In doing that part of that consideration is the location of the property being a major factor in what a fair market value for it would be. One of the things, normally in valuation we would do a direct comparison with comparable properties and try to compare like with like and say this is how the market has then treated that. In this situation the subject property is located approximately 240 kilometres from Alice Springs so we did not have directly comparable property with which to do a direct comparison. So the way that I approached it was to come up with what I believe to be a fair rental for the property in Alice Springs and say well, how much do we then discount that by. In looking at the ruling under the FBT tax ruling… when it's talking about market value, how to determine market value in a remote area the FBT ruling is dealing with market value. …that section is not talking about FBT itself, it's saying how do we come up with a market rental in a remote area. Now from previous experience – and in cases it's been argued under FBT ruling it was determined that 70% was considered a fair discount for what is considered to be a remote location. And it's my opinion that it is deemed a remote location."

50. Mr Gore went on to say that it is proper to discount the value of a particular property on account of its remote location because of lack of proximity to urban facilities, schools, shops and public transport and lack of amenities immediately external to the property in question.[45]

51. At page 38 of the transcript Mr Gore gave the following explanation for applying the full 70% discount as per the Tax Ruling:

> "….in reading what s20 says is actually referring to if the accommodation is more than 40 kilometres from the nearest rural town or city, it would be acceptable for the figures above to be discounted by 70%...having read that and considered what the subject property offers, I did not see any reason why it did not meet that criteria. And if it were considered appropriate to adopt a 70% reduction elsewhere, then I believe that that should apply in this case as well."

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[45] See page 38 of the transcript.

52. During cross-examination Mr Gore agreed that when valuing rural properties in the Northern Territory the market is "in a sense properties throughout the Northern Territory with similar amenities and values".[46] He also agreed that in the present context the valuing exercise was not subject to geographical limitations requiring the valuer to consider only neighbouring properties,[47] of which there were none.

53. At page 40 of the transcript the witness agreed that another way of determining the value of the accommodation to the worker was to determine how much the accommodation would have cost the worker had it not been provided by the employer.

54. It was put to Mr Gore that it was not appropriate to consider the commercial cost of the benefits provided if received in a town or city.[48] Mr Gore's reply was as follows:

> "We've come up with a rent in a nearby town because…in valuing properties we look at comparable properties. What we're saying is we didn't have comparable rental evidence of other accommodation in this remote location. So we've come up with what we believe to be a fair commercial rent for that property in – if it was located in Alice Springs and then discounted to reflect where it is located."[49]

55. Mr Gore said that he believed that such an approach enabled one to assess how much it would cost the worker to rent the accommodation at Mereenie had it not been provided by the employer.[50]

56. It was put to the witness that by looking at accommodation in Alice Springs he had removed the valuation exercise from an actual consideration of what the subject accommodation would have cost the worker, thereby introducing a notional element into the valuation.[51] Mr Gore's reply was as follows:

[46] See p 39 of the transcript.
[47] See p 39 of the transcript.
[48] See p 40 of the transcript.
[49] See p 40 of the transcript.
[50] See p 40 of the transcript.
[51] See p 40 of the transcript.

> "What we've had to do is look at …what is the most comparable accommodation that we could come up with."[52]

57. However, Mr Gore agreed that by considering accommodation at Alice Springs he was one step removed from addressing the central issue, that is to say, what it would have cost the worker to rent the subject accommodation.[53] Mr Gore did not agree with the proposition put to him under cross-examination that he had further removed himself from the central question by applying the 70% discount provided for by the tax ruling.[54] His evidence was to the effect that the application of the discount actually "brings the property back to the gas field",[55] and by inference addresses the central question.

58. Mr Gore acknowledged that the letter of instruction sent to him by the employer's solicitors (part of Exhibit E4) mentioned the fact that the employer had placed a value of $72 per day on the subject accommodation.[56] The witness was unable to say for what purpose the employer had attributed that value to the accommodation;[57] nor had he inquired as to how the employer had arrived at that value.[58] However, Mr Gore believed that the figure of $72 per day referred to the employer's cost in relation to the accommodation.[59]

59. The witness confirmed that the employer charged non-employees $150 per day for the subject accommodation.[60] Mr Gore did not know whether that tariff included meals.[61] He told the Court that he did not make any inquiry as to the basis upon which the daily rate of $150 was struck; nor did he

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[52] See p 40 of the transcript.
[53] See p 40 of the transcript.
[54] See p 41 of the transcript.
[55] See p 41 of the transcript.
[56] See p 41 of the transcript.
[57] See p 41 of the transcript.
[58] See p 41 of the transcript.
[59] See p 42 of the transcript.
[60] See p 42 of the transcript.
[61] See p 42 of the transcript.

inquire as to whether that rate included meals.[62] However, Mr Gore said that he had ignored the value placed on the accommodation by the employer when undertaking his valuation.[63]

60. At page 43 of the transcript it was put to the witness that if the subject accommodation had not been provided to the worker then it would have cost him $150 per day to stay there.[64] Mr Gore assumed so, but only if the stay was short term.[65] However, the witness said that he had not made any inquiries as to the range of non-employees that stayed at Mereenie, the length of their stay and whether or not the daily tariff was discounted for long term stays.[66] Mr Gore went on to agree that his assumption that the daily rate of $150 only applied to short term stays was speculative.[67]

61. Mr Gore told the Court that he had not relied upon the daily rate of $150 charged by the employer as a matter relevant to his valuation.[68]

62. The witness agreed that on the face of the letter sent to him by his instructing solicitors it would have cost the worker $150 per day had it not been provided by the employer.[69]

63. At page 44 of the transcript the witness agreed that a monopoly is a market: a particular type of market where there is one supplier of a particular good or service.[70] Mr Gore also agreed that the existence of a market constituted by a monopoly does not mean that the goods or services provided in that market cannot be accorded a value.[71] The witness further agreed that in determining the market value of a particular commodity or service it is irrelevant that there is only one supplier because that is an inherent feature

[62] See p 42 of the transcript.
[63] See p 42 of the transcript.
[64] See p 43 of the transcript.
[65] See p 43 of the transcript.
[66] See p 43 of the transcript.
[67] See p 43 of the transcript.
[68] See p 43 of the transcript.
[69] See p 43 of the transcript.
[70] See p 44 of the transcript.
[71] See p 44 of the transcript.

of that particular market.[72] Finally, the witness concurred with the proposition put to him that the "value of goods or service …in a monopolistic market is simply the value that the supplier charges for it… because that's what the market wears".[73]

64. At page 44 of the transcript Mr Gore said that he did not accept that he had departed from the guiding principle – the cost to the worker if the accommodation at Mereenie had not been provided by his employer – by failing to investigating and considering accommodation at Alice Springs and by failing to take into account the notional value attributed to the accommodation by the employer and the amount actually charged to non-employees for the accommodation.[74] By way of further response, Mr Gore stated:

> "We've been asked to determine a fair market value , being definition of willing lessee willing lessor and that's the principle in which we've determined the valuation."[75]

65. At page 45 of the transcript the witness said that he was attempting to determine how much the accommodation would have cost the worker had it not been provided by the employer. Also at page 45 of the transcript Mr Gore stated that a fair market rent is what someone is prepared to pay for accommodation.

66. The witness went on to agree that some people were paying $150 per day and Santos was the only accommodation provider in the immediate area.[76] Mr Gore also agreed that Santos was running a monopoly in that sense, charging $150 per day in what amounted to a monopolistic market.[77] However, Mr Gore was not prepared to therefore accept that the value of the

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[72] See p 44 of the transcript.
[73] See p 44 of the transcript.
[74] See p 44 of the transcript.
[75] See p 44 of the transcript.
[76] See p 45 of the transcript.
[77] See p 45 of the transcript.

subject accommodation was $150 per day.[78] He went to speculate that if contractors were being charged that daily rate they would be recovering that disbursement as part of their overall charge to the gas field.[79]

67. At page 46 of the transcript Mr Gore concurred with cross-examining counsel that there is a market in the Northern Territory for rural properties; and similarly that there is "a market for remote accommodation used for the purpose of working camps". The witness also agreed that that market was Territory wide.[80]

68. At pages 47 - 48 of the transcript the witness was taken to the valuation report he prepared for remote accommodation at Murwangi Station in about 2000. It was put to Mr Gore that in relation to that accommodation he had not applied a discount.[81] The witness said that he would like to have the benefit of seeing his report, but it was his recollection that a substantially reduced rate had been applied to the subject accommodation.[82] He went on to say that he had looked at rental accommodation at Katherine and Pine Creek and used a lesser rate on the subject premises than what was applicable to the accommodation available in Katherine and Pine Creek.[83] Mr Gore could not say whether or not he had referred to Miscellaneous Tax ruling 2025 because he could not recall the actual report.[84] Mr Gore believed that he had valued the accommodation at Murwangi Station at $60 per week while another valuer valued it at $80 per week.[85]

69. During re-examination Mr Gore told the Court that the fact that the employer charges out the accommodation at $150 per day in relation to non-employees did not affect his valuation.[86] He also said that the notional value

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[78] See p 46 of the transcript.
[79] See p 46 of the transcript.
[80] See p 46 of the transcript.
[81] See p 47 of the transcript.
[82] See p 47 of the transcript.
[83] See p 47 of the transcript.
[84] See p 48 of the transcript.
[85] See p 48 of the transcript.
[86] See p 50 of the transcript.

placed by the employer on the subject accommodation did not affect his valuation.[87]

THE PROVISION OF RECREATIONAL FACILITIES

70. During the course of the hearing the parties reached agreement as to the value of this non-cash benefit, namely, $14 per week. The only remaining issue is whether this benefit formed part of the worker's remuneration. That issue is dealt with below at page 31 of this decision.

THE ISSUE OF INTERSTATE ACCOMMODATION OR MAINTENANCE OF INTERSTATE PREMISES

71. The worker gave evidence that during the course of his employment he worked 14 days on, 14 days off.[88] However, he did say that there were times when he worked during his 14 day off period.[89]

72. The worker told the Court that when he started employment with Santos he stayed in an apartment in Brisbane for six weeks. That apartment was provided by his employer.[90] For about ten weeks thereafter he rented a house in Brisbane.[91] The worker told the Court that he had been required by his employer to move to Brisbane.[92] After that 10 week period he moved back to Sale in Victoria.[93]

73. The worker was asked whether during his lay off periods he leased, rented or otherwise maintained residential property in Sale, to which he replied:

> "No, I stayed sometimes with my parents and sometimes with my partner's parents."[94]

[87] See p 50 of the transcript.
[88] See p 14 of the transcript.
[89] See p 14 of the transcript.
[90] See p 15 of the transcript.
[91] See p 15 of the transcript.
[92] See p 15 of the transcript.
[93] See p 16 of the transcript.
[94] See p 16 of the transcript.

74. The worker reiterated that after the 16 week period when he moved back to Sale he did not maintain a residence in Sale.[95]

75. During cross-examination the worker stated that after the 16 week period he did have a residence with either his parents or his partner's parents.[96]

COUNSELS' SUBMISSIONS

The worker's submissions

76. Mr Grant, counsel for the worker, made the submission that the Court could find, in light of the evidence of both expert witnesses, that there is a market for the type of residential accommodation that was provided to the worker by the employer at Mereenie.[97] In relation to the issue of the relevant market, Counsel stated:

> "Either the market is one in the nature of a monopoly which centres around the provision of this style of accommodation in fact this particular accommodation in Mereenie. The second manner in which your Worship can approach the issue of the relevant market is that there is a Territory –wide market for rental accommodation in work-camp style infrastructure for people engaged in construction and mining work in remote localities."[98]

77. Mr Grant relied upon Mr Gore's evidence that for the purposes of valuing rural or remote properties there was a Territory-wide market for residential accommodation for persons working in the construction and mining industry.[99] Mr Grant submits that if the Court accepts the existence of such a market, "moving to a consideration of what is or is not available in terms of rental accommodation in Alice Springs becomes either unnecessary or erroneous because you are moving yourself so far out of the realms of the relevant market in this case which I say is either the monopolistic market

[95] See p 16 of the transcript.
[96] See p 17 of the transcript.
[97] See p 62 of the transcript.
[98] See p 62 of the transcript.
[99] See p 62 of the transcript. Mr Grant submitted that Mr Gore gave this evidence without necessarily accepting that his method of valuation was incorrect: see p 62 of the transcript.

out there or the broader Northern Territory market for this sort of accommodation."[100]

78. Mr Grant urged the Court to accept the approach taken by Mr Teagle which was to look at the market for residential accommodation in remote areas of the Northern Territory and "using that comparable market evidence, or valuation evidence, come to an appropriate figure having regard to the comparative amenities".[101] In that regard he referred to Mr Teagle's evidence concerning accommodation provided to AD-rail employees working in remote localities at Renner Springs and Adelaide River which were respectively rented out at $35 and $55 per week. [102] Mr Grant also referred the Court to Mr Teagle's evidence that he had compared the standard of accommodation and amenities in the three localities – Renner Springs, Adelaide River and Mereenie – and arrived at a figure of $40 per day for the accommodation provided at Mereenie.[103]

79. Mr Grant submitted that another way of approaching the issue was to inquire how much the accommodation would have cost the worker if it had not been provided by the employer:

> "That's what the value to the worker is. The value to the worker is not what accommodation of that sort would be worth in Alice Springs, discounted to take account of remoteness because that ignores the worker's situation.
>
> The worker's situation is that he's in a position where he is required to be in a particular place. To rent accommodation in that particular place would cost an amount and the job of the valuer in these circumstances is to ascertain how much it would cost the worker to

[100] See p 62 of the transcript of proceedings. See also Mr Grant's submission at p 63 of the transcript:
"The moment you use Alice Springs as your springboard for assessing market value you are going down the wrong path. You've identified the wrong market and you're moving well away from what Mr Gore identified both in his report and during the course of cross-examination, as the guiding principle."
[101] See p 63 of the transcript.
[102] See p 63 of the transcript.
[103] See p 63 of the transcript.

> rent the accommodation but for the provision of it by the employer".[104]

80. Counsel submitted that although Mr Gore accepted that guiding principle he disregarded it during the process of valuing the accommodation provided to the worker at Mereenie.[105]

81. Mr Grant made the following submission as to the best method or methods of determining what the accommodation at Mereenie would have cost the worker had it not been provided by the employer:

> " …the best way of determining what it would have cost or the best manner of determining what it would have cost the worker to procure that accommodation if it hadn't been provided is either to look at that Territory market for remote area accommodation and how much it cost in actuality to procure that sort of accommodation in similar locations, accommodation with similar amenities or if you're fortunate enough to have the information to hand, look at what it actually costs people to reside in that accommodation at the Mereenie Gas Fields."[106]

82. In relation to the first approach – the "Territory market" – Mr Grant submitted that the Court had Mr Teagle's assessment, looking at accommodation available at Renner Springs and Adelaide River and arriving at a figure of $40 a week for the accommodation at Mereenie.[107] With respect to the second approach – the "local market" – Mr Grant submitted as follows:

> " …look at what it is that the employer assesses the value at and what the employer rents the accommodation out at to people who aren't lucky to fall within the category of employee and receive it gratis."[108]

83. In the latter regard Mr Grant said that the Court had evidence that the employer rented the premises out at $150 a night to non-employees and the

[104] See p 63 of the transcript.
[105] See p 63 of the transcript.
[106] See p 63 of the transcript.
[107] See p 63 of the transcript.
[108] See p 64 of the transcript.

employer had attributed to the accommodation a notional value of $72 per day for employees.[109]

84. At page 66 of the transcript Counsel conceded that the Territory wide analysis was probably the best approach to the matter, but stressed that the evidence that the employer charged non-employees $150 per night and in relation to employees had placed a notional value of $72 a day on the accommodation operated as a useful cross check against the accuracy and reliability of Mr Treagle's valuation of $40 per day which was derived from a Territory wide analysis.[110]

85. At page 67 of the transcript Mr Grant made the submission that accommodation, like petrol, is not necessarily less expensive in remote localities because of the cost of providing it.[111] It was further submitted that the cost of such accommodation depends on all the circumstances and remoteness does not automatically depress the cost of such accommodation, for example despite its remoteness accommodation at resorts, like Uluru, can be very expensive.[112] These submissions invited the Court to draw and rely upon its acquired knowledge, derived from ordinary experience, of the varying cost of accommodation in the Northern Territory and the various factors relating thereto.

86. Mr Grant made the following submissions as to the weight that should be attached to the Taxation Ruling:

> " …the tax ruling necessarily has a limited utility. That is because as we know from the law that generally surrounds taxation issues, it's an area that is more than any other, subject to the encroachment of political considerations into the development of legal policy and interpretation.

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[109] See p 64 of the transcript. Mr Grant's submissions as to the weight to be attached to this evidence appear at p 65 of the transcript.
[110] See pp 63-64; 66 of the transcript.
[111] See p 67 of the transcript.
[112] See p 67 of the transcript.

What tax ruling MT 20/25 is designed to do is to provide employers with some sort of indication as to how, immediately following the introduction of a fringe benefits tax in 1985 they are to, or they're permissibly able to assess their fringe benefits tax liability in respect to accommodation expenses…

It is not surprising that the Tax Office issued a ruling after the FBT had been in for a short time, that sought to apply the fringe benefits tax in a different or more benign or less penalising way on employers who operated in remote localities because of – and provided accommodation to their employees to their work force generally, because of the significant impost on those sorts of employers and of course… there is the double impost in terms of them providing the accommodation and then paying the fringe benefits tax as well on top of it.

So that's really the political, social and legal context in which this document was produced. It is not a document we say that can be applied without proper recognition being given to those factors to the mainstream valuation process because it does…work on the assumption that if it's in a remote locality it's necessarily much, much cheaper, that is a wrong assumption. And the reason it's made the assumption particularly in relation to mining companies is so that mining companies don't go bankrupt because of the double impost of providing accommodation to their employees as they must necessarily do, and then paying a 50% loading in the nature of fringe benefits tax."[113]

87. Addressing paragraph 53 of the ruling Mr Grant submitted as follows:

"If I could just…go to paragraph 53 and it's interesting the language that's used there it has been put that some accommodation is so isolated that it has no relevant market value, that is obviously that's been put by a mining company or some peak industry body seeking to reduce , minimise or otherwise defray the impost that would be placed on their members. There's no suggestion that a careful assessment of the valuation evidence has indicated this to be so or anything else, it has been put. That's clearly a submission by an interest group, in my submission, rather than any sort of scientific attempt in the terms of the ruling to analyse the particular issue."[114]

[113] See p 68 of the transcript.
[114] See p 68 of the transcript.

88. Mr Grant submitted that the tax ruling has very limited utility because of the contextual factors to which he referred. He also submitted that its utility was limited because:

> "…it gives no consideration to the Territory wide market for this sort of accommodation and takes no account of the variances in the cost and value of accommodations in remote localities depending on the nature of the amenities the extent to which the service provider has a monopoly and those other factors that this court must necessarily take into account in arriving at the appropriate value."[115]

89. Mr Grant pointed out that the criticisms levelled at Mr Teagle's approach to valuing the subject accommodation were two-fold: the first related to his statement on page 8 of his report that "the above reflects the value that would be required to replicate the benefits incurred by Mr Chaffey in an adjoining township…", while the second related to his reference to existing case law and Taxation Ruling MT 2025. [116]

90. By way of addressing those criticisms, Mr Grant submitted:

> "When you look at what he said…..he said, first of all, supporting case law relates mainly to the issue of fringe benefits, and includes BHP Australia Coal v FCT, which provided the methodology to determine market values of remote area housing benefits, and so it does. If your Worship is minded to have a look at that particular case which is…about the valuation of premises in Central Queensland provided to mine employees, and the methodology that is adopted is almost precisely the same as the methodology that Mr Teagle adopts at pages 5 and 6 and then in his conclusion.
>
> The valuer there looks at the cost of comparable accommodation in other centres such as Emerald and various other centres in Western Queensland, he considers the relative amenities of those houses in those various centres and then he considers whether they're purely in the nature of work towns or work camps or whether they're mixed localities. So Emerald, for example he considered was a mixed locality and he considered whether or not you know the market was tight or upbeat at the relevant time – the valuer that was accepted at least. And the court accepted Mr Turner, I think his name was, his

[115] See p 68 of the transcript.
[116] See p 69 of the transcript.

valuation because he was the most experienced in that particular region.

So what Mr Turner did and what the court found to be the case, in terms of the appropriate methodology in BHP Australia Coal v FCT was very similar or a facsimile of the process that Mr Teagle went through in this particular case, so he can't be criticised for saying that that was a particular case to which he had regard in approaching the valuation exercise.

Insofar as the tax ruling is concerned, he says it sets out guidelines for the valuation of housing fringe benefits and he had regard to it. What he also said in his oral evidence was this, he looked primarily in relation to remoteness at 53 and 54. And what 53 and 54 says is, if you don't have a market then it is appropriate to discount. In his view he had found the market, and it's a market that Mr Gore agrees exists on the theoretical plane at least but declined or refused or overlooked applying in the practical process of arriving at value for these particular accommodations."[117]

91. In further defence of Mr Teagle, Mr Grant submitted that "the worst that can be said of Mr Teagle is that he's a man unused to giving evidence obviously, nervous in the courtroom context and not possessed of the same facility with words as people who work in our particular field might be."[118]

92. Finally, Mr Grant submitted that the Court should be drawn to the fundamental correctness of Mr Teagle's approach while at the same time recognising the artificiality of the methodology applied by Mr Gore.[119]

93. In relation to the recreational facilities provided by the employer to the worker Mr Grant submitted that the Court should have no difficulty in finding that that non-cash benefit formed part of the worker's remuneration.[120] Mr Grant referred the Court to the line of authority in the Supreme Court of the Northern Territory dealing with benefits such as food, accommodation and electricity.[121]The Court was also referred to the decision

[117] See pp 69-70 of the transcript.
[118] See p 70 of the transcript.
[119] See`p 70 of the transcript.
[120] See p 62 of the transcript.
[121] See p 62 of the transcript.

of Riley J in *NT Drilling Pty Ltd v McFarland* [2004] NTSC 23 at [14]- [18} where his Honour held that a motor vehicle will only form part of a worker's remuneration if it is part of the terms of employment expressly or by necessary implication. Mr Grant submitted that it was very much to the point that in the present case the provision of recreational facilities was incorporated in the worker's contract of employment (Exhibit W1, p 4).[122]

The employer's submissions

94. Mr Barr QC, for the employer, submitted that Mr Teagle purported to assess the "fair market value" required to "replicate the benefits incurred (*by the worker*) in an adjoining township within the same locality as at the relevant dates".[123] Counsel submitted that in arguing that there was a relevant market in which the remote area accommodation at Mereenie could be valued, the approach taken by Mr Teagle was to ascertain the cost to Ad-Rail of comparative accommodation for its rail construction workers at Adelade River and Katherine.[124] According to Mr Barr the relationship between this comparative approach and the notional "adjoining township within the same locality" referred to at page 8 of Mr Teagle's report (Exhibit W2) was never explained by him and remained unclear.[125] Mr Barr was also critical of Mr Teagle's approach in these terms:

> "Although Mr Teagle agreed that a general principle of valuation was, in effect, 'the more remote the less valuable', he did not make any allowance or deduction in his valuation of the worker's accommodation on account of its remoteness, nor did he apply a discount of the kind acknowldeged as applicable to the valuation of remote or isolated housing in Tax Ruling MT 2025, paragraph 20, 27-28 (Exh E5)."[126]

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[122] See p 62 of the transcript.
[123] See p 3 of Counsel's written submissions dated 22 February 2005.
[124] See p 3 of Counsel's written submissions dated 22 February 2005.
[125] See p 3 of Counsels' written submissions dated 22 February 2005.
[126] See p 3 of Counsel's written submissions dated 22 February 2005.

95. Having identified these perceived shortcomings with the opinion and evidence given by Teagle, Mr Barr submitted that the approach taken by the employer's valuer, Mr Gore, was to be preferred and should be accepted and acted upon by the Court.

96. Mr Barr relied upon the following statement made by Mr Gore at page 7 of his report: "In normal circumstances a fair market value is determined by comparison with what similar properties rent for in the market place. In the subject case there is no local market to compare with and it is comparable with other towns."[127]

97. Mr Barr made the following submissions as to the approach taken by Mr Gore:

> "Mr Gore approached the valuation exercise by assessing a value of $300 per week for the worker's residential accommodation, as if it were accommodation in Alice Springs. He then applied a discount of 70% to reflect the remoteness of the accommodation at Mereenie. As he explained in evidence, the reason for discounting for remoteness is on account of market supply/demand" 'remote location – low demand'. The further one is situated from townships, the further one is from sought-after urban amenities, such as schools, hospitals etc. This accords with the general principle of valuation agreed to by Mr Teagle as stated above, ie 'the more remote the less valuable'.
>
> The specific discount of 70% was based on Taxation Ruling MT 2025, paragraph 20, the accommodation being more than 40 km from the nearest rural town or city. In fact, Mr Gore made a full 70% discount because of the extreme remoteness of Merceenie, ie, it was a lot more than 40 km from the nearest town or city.
>
> Taxation Ruling MT 2025 has no binding effect as a matter of law or otherwise, but its use is justified because it shows the extent to which even the Commissioner of Taxation accepts a discount for remoteness in determining the market value of employer-provided accommodation (see para 11, Exh E5)."[128]

98. Mr Barr made supplementary oral submissions along the following lines.

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[127] See p 4 of Counsel's written submissions dated 22 February 2005.
[128] See p 4 of Counsels' written submissions dated 22 February 2005.

99. As to the commonsense associated with attributing a discounted value to remote residential accommodation Mr Barr submitted:

> " …if a unit is provided in a very remote place, that if your task is to determine the market value of what is provided, it makes sense to discount on account of isolation. It's a matter of commonsense and perhaps it doesn't really need to be stated by a valuer as an expert matter, but nonetheless it has been.
>
> It's a matter of commonsense that the more isolated a property or premise is, the less valuable it is, in ordinary terms. That's a principle of valuation that Mr Teagle accepted, it's a principle that Mr Gore accepted and chose to discount for that reason. Your Worship simply has to determine whether that's reasonable or not."[129]

100. Mr Barr made the following submission as to the relevance and utility of Taxation Ruling MT 2025 in determining the issue:

> "…. the tax ruling was set out to value – to enable parties to put a value on accommodation – permanent accommodation provided by employers, whether it be in remote localities or whether in town."[130]

101. After stating that the Taxation Ruling has no binding effect under the *Work Health Act*, and is neither binding on the Work Health Court or the expert witnesses who gave evidence in this case,[131] Mr Barr submitted that "the most compelling aspect to this case is that the Commissioner of Tax is prepared to accept that a remote area site is less valuable than one in town".[132] By way of elaboration, Counsel submitted:

> "Normally you would expect the Commissioner to be the point of greatest resistance to any diminution of valuation where it involves his receiving less tax on that account. And it was a point that Mr Gore made… but even if the Taxation Commissioner is prepared to accept that remote localities are less valuable, premises or properties in remote localities are less valuable and is prepared to agree so that there's no ongoing disputes or it doesn't have to be agitated on every

[129] See p 58 of the transcript.
[130] See p 58 of the transcript.
[131] See p 58 of the transcript.
[132] See p 58 of the transcript.

> taxation appeal or objection, that 70% is appropriate, then it's a matter that your Worship can certainly take into account.
>
> It may not persuade you absolutely, but it's a matter that is of some persuasive value in the way that you approach the subject."[133]

102. Mr Barr pointed out the significance of both valuers referring to the Taxation Ruling, though he noted that Mr Teagle chose not to rely upon it as a factor influencing his valuation.[134] Counsel submitted that Mr Teagle had failed to satisfactorily explain why he had rejected the miscellaneous tax ruling as a basis for valuing the accommodation at Mereenie.[135]

103. At page 59 of the transcript Mr Barr submitted that there are other factors that may be persuasive, but again stressed that both valuers appear to have accepted the notion of discounting for remoteness, and that is a factor that should be given effect to in the determination of the Court.

104. Mr Barr submitted that Mr Gore's approach to valuing the employer-provided accommodation was both logical and consistent:

> "….Mr Gore's approach of finding the nearest major town where there is a market, determining what the value of the accommodation and facilities would be in that market and then transposing it to the camp, is a perfectly logical and consistent way to approach what would otherwise be an impossible task, the valuation of a facility is in effect a monopolistic sole provider situation in the middle of nowhere."[136]

105. As to the worker's interstate accommodation after the first 16 weeks of his employer, Mr Barr made the following submission:

> "I understood the worker to say he wasn't actually renting or himself maintaining a household… and if that's the case I invite you to make the finding as to whatever the worker said, that wasn't challenged. My understanding though is that there was no evidence from either side, as to whether he incurred any cost, board or rental contribution

[133] See p 58 of the transcript.
[134] See p 59 of the transcript.
[135] See p 60 of the transcript.
[136] See p 59 of the transcript.

towards rental, so it may be that your Worship is not able to make a specific finding as Mr Grant said."[137]

Submissions in reply

106. By way of reply to Mr Grant's oral submissions Mr Barr invited the Court to read very carefully the decision in *BHP Australia Coal v FCT,* with a view to divining the relevance of that decision to the present case.[138]

107. Mr Barr also invited the Court to examine very carefully the transcript of Mr Grant's cross-examination of Mr Gore as to the existence of a Territory wide market for remote accommodation comparable to that at the Mereenie Gas Fields.[139] Mr Barr submitted that the Court should be cautious in accepting the interpretation Mr Grant urged the Court to place on Mr Gore's apparent acceptance of a Territory wide market.[140]

108. In relation to that latter aspect Mr Grant submitted that the context of the cross-examination of Mr Gore made it clear that Mr Gore was accepting the proposition that there is a Territory wide market in relation to remote rental accommodation.[141]

109. With respect to the other issue – where the worker resided during his off periods – Mr Grant made the following submission at page 61 of the transcript:

> "As a matter of fact… an important finding of fact, as at the date of injury the worker was not required to pay any amount for accommodation or the maintenance of premises in Sale. So this is not a situation where the worker was required to pay monies for the maintenance of accommodation in his usual rest cycle residence and thereafter – and simply received in the accommodation at the remote location on top of that particular impost.

[137] See p 71 of the transcript.
[138] See p 71 of the transcript.
[139] See pp 71 -72 of the transcript.
[140] See p 72 of the transcript where Mr Barr submitted that it was unclear what Mr Gore was agreeing to, for example his evidence may be construed as an acceptance of a Territory wide market in relation to the sale of accommodation of the type available at Mereenie.
[141] See p 72 of the transcript.

> This was a situation where on the unchallenged evidence he stayed part of the time at his wife's place – partner's mother's place, part of the time at his parent's place and wasn't required to rent anything or pay anything in terms of rent for that purpose".

FINDINGS

110. I make the following findings in advance of the disposition of the case stated in relation to the superannuation component of the worker's claim for compensation.

(a) The value of the accommodation provided by the employer

111. After considering the whole of the evidence, in light of the submissions made by Mr Barr QC and Mr Grant, I am of the view that the valuation report and the accompanying oral evidence of Mr Teagle is to be preferred over Mr Gore's report and oral evidence.

112. Although Mr Teagle's evidence was at times difficult to follow[142] (as commented upon by Mr Barr), it was clear that in valuing the subject accommodation he had used one of the three basic methods used by valuers to estimate the value of a property – that is the "Direct Comparison" method.[143] According to that method the valuer "analyses recent market transactions and applies this information to the property to be valued".[144]

113. Of course, the "direct comparison" method of valuation presupposes the existence of a relevant market and evidence of relevant and recent market transactions. This approach requires the valuer to "discuss, in general terms, the property market and particularly the market for the type of property being valued, indicating recent trends in values up or down".[145] As a preclude to formulating an opinion of value the valuer must examine all

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[142] The difficulties inherent in Mr Teagle's evidence are discussed below at p 36.
[143] See Frecklton & Selby *Expert Evidence* Vol 5 par 121.130. The other two recognised methodologies are the "Summation" method and "Investments Analysis" methods, neither of which have any application whatsoever to the subject exercise.
[144] Freckleton & Selby, n 143, par 121.130.
[145] Freckleton & Selby, n 143, par 121.350.

relevant transactions – which in the present context relates to rentals – and to analyse those transactions.[146] The "direct comparison" method of valuing a property also requires the valuer to comment on the strength of evidence of value which those comparable transactions provide and to undertake a reconciliation of those rentals with the property being valued.[147] As pointed out by Freckleton & Selby:

> "The examination of comparable sales[148] and their application to the property being valued is amongst the most important functions of the valuer."[149]

114. Although Mr Teagle conceded that there was limited market evidence of rental properties in the general locality of the Mereenie Gas Fields and other remote areas in the Northern Territory, in my opinion the evidence he gave was sufficient, according to the civil standard of proof, to establish the existence of a relevant market - a Territory wide market - for the type of accommodation being valued. The market in question relates to "accommodation which is provided to contractor and tenant employees to stay on site in remote localities in the Northern Territory".[150] In my view it is not essential that there be evidence of a market existing as a conglomerate – a cohering mass – which is confined to a single geographical area. As demonstrated by Mr Teagle a market can exist in the form of a number of pockets which are dispersed over a vast geographical area such as the Northern Territory; and this is exactly what one would expect in the context of camp style accommodation provided by an employer to an employee.

115. Although the accommodation examined by Mr Teagle at locations such as Katherine, Adelaide River, Pine Creek and Renner Springs may not have been as remote as the camp style accommodation provided at Mereenie Gas Fields, the relative remoteness of those locations and the camp style

[146] Freckleton & Selby, n 143, par 121.360.
[147] Freckleton & Selby, n 143, par 121.360.
[148] "Rentals" can be substituted for "sales" without undermining the integrity of the author's observation.
[149] Freckleton & Selby, n 143, par 121.360.
[150] See Mr Teagle's evidence referred to above at pp 6-7.

characteristics of the accommodation available at those locations is sufficient to establish a relevant market which invites direct comparison with the accommodation provided at the Mereenie Gas Fields.

116. It is worth noting that even Mr Gore, who adopted a different methodology for valuing the subject accommodation, agreed that for the purposes of valuing rural or remote properties there was a Territory-wide market for residential accommodation for persons working in the construction and mining industry.[151]

117. I consider Mr Teagle's opinion as to the existence of a relevant Territory market to have a reasonable factual basis. At no time did he attempt to exaggerate the strength of the evidence supporting that opinion. Throughout his evidence he expressed himself in terms of relativities: (1) "the closest comparison that can be made is rental comparisons of contractor accommodation providing a similar amenity";[152] (2) "the most appropriate method of valuation in this case is considered to be the direct comparison approach whereby the amenity provided by Santos is compared to properties which provide a similar amenity";[153] (3) "I basically placed the majority of my emphasis on accommodation that had been used by Ad-Rail to accommodate their employees…I believe that they were the most comparable in relation to the subject property in terms of the level of accommodation provided, the locality – the remoteness of the locality and facilities provided";[154] (4) "the three properties that were utilised by Ad – Rail, they are in remote localities and I consider them to be quite comfortable in terms of the level of accommodation provided to those staying there";[155] and (5) "I believe that there is a market for this type of accommodation within some fair limits".[156] Mr Teagle appropriately

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[151] See above at p 15.
[152] See above at p 4.
[153] See above at p 4.
[154] See above at p 6.
[155] See above at p 8.
[156] See above at p 8.

recognised the limitations of the available evidence and made appropriate concessions where necessary. Despite those shortcomings, I found Mr Teagle's evidence to be "fundamentally correct" (to borrow Mr Grant's turn of phrase) and, in the final analysis, to be far more persuasive than the somewhat artificial – overtly contrived - evidence given by Mr Gore, which is discussed below.[157]

118. It should also be noted that Mr Teagle approached the exercise in a considered and balanced manner. He considered the alternative methodogies, but ultimately rejected them in favour of the "direct comparison" method. In my opinion the comparisons undertaken by Mr Teagle produced a realistic reflection of the market value of the accommodation at the Mereemie Gas Fields.

119. Turning to the practical aspects of Mr Teagle's approach, I consider that he appropriately examined and analysed comparable rentals and undertook a reconciliation of those rentals with the accommodation being valued.

120. I feel it is necessary to deal with the semantic difficulties occasioned by Mr Teagle's evidence. I have chosen to describe those difficulties as being semantic because to my mind they were nothing more than that, and upon close scrutiny did not detract from the fundamental soundness of the methodology he applied in valuing the accommodation at the Mereenie Gas Fields. In that regard I accept and adopt the submissions made by Mr Grant: see pages 26-27 of this decision.

121. I am also attracted to the approach taken by Mr Teagle because in my view the "direct comparison" method enables the Court to more accurately and reliably assess what it would have cost the worker to stay at the Mereenie Gas Fields had the accommodation not been provided by the employer – a guiding principle in this case - than the approach taken by Mr Gore. I agree with the submission made by Mr Grant that "the best way of determining

[157] See below at p 37.

what it would have cost or the best way of determining what it would have cost the worker to procure that accommodation if it hadn't been provide is to look at that Territory wide market for remote area accommodation and how much it costs in actuality to procure that sort of accommodation in similar locations".[158] In my opinion, it is entirely artificial – and therefore unreliable and inaccurate - to assess the cost to the worker of procuring such accommodation by looking at the cost of accommodation at Alice Springs and discounting that cost, according to a statutory formula set out in a tax ruling, to take account of the remoteness of the accommodation at Mereenie. The difficulty with that approach is that it creates too large a margin for error in determining the actual cost to the worker. The merit of the direct comparison approach adopted by Mr Teagle is that the element of remoteness is factored into the comparative analysis and more truly refects what it would have cost the worker had he not been provided with accommodation at the work site.

122. There is a further basis for preferring Mr Teagle's approach and resultant valuation. There is a body of evidence, which is independent of and external to Mr Teagle's evidence, which lends support to the reliability and accuracy of his valuation.

123. There was uncontradicted evidence before the Court that the employer charged non-employees $150 per night for the subject accommodation. Although the evidence did not reveal whether this tariff included meals or whether the tariff would be reduced for long term stays, the rental of $150 per day suggests that Mr Teagle's valuation of $70 per day is far closer to the mark than Mr Gore's valuation of $90 per week (ie about $13 per day), and more truly reflects market forces and the likely cost to the worker of procuring the accommodation at the work site had it not been provided by the employer. Assuming that the tariff of $150 per day included meals and was liable to be discounted for long term stays, it seems totally unrealistic

[158] These submissions were referred to above at p 23.

to suggest that after making such adjustments the commercial tariff would be brought back to $13 per day for employees.

124. It is noteworthy that Mr Gore did not have regard to the commercial rate charged out to non-employees during the course of valuing the subject accommodation. In my view, Mr Teagle disregarded a relevant factor which had the potential to exert an influence on his valuation.

125. There was also uncontradicted evidence before the Court that the employer had placed a value of $72 per day on the subject accommodation. Although the basis for this attribution of value was never made known to the Court, it is significant that this value was placed on the subject accommodation by the employer who was also charging out the accommodation to non-employees at the rate of $150 per day – more than twice the notional value of $72 per day. This suggests that the usual commercial rate was discounted, inter alia, to take account of the employer-employee relationship. What is even more significant is that the notional value of $70 per day, when viewed in the context of the evidence of both valuers – particularly Mr Gore – amounts to a clear statement against interest, and can therefore be assumed not to have been lightly made by the employer. It should be borne in mind that "a party's out-of court statements about events in issue is often the best evidence, in the sense that a party is unlikely to disclose adverse information at trial if it can be avoided": see Ligertwood *Australian Evidence* (Lexis Nexis Butterwoths, Australia 2004), par 8.54, p 621. Again, Mr Gore ignored this important piece of evidence which lends credence to the valuation undertaken by Mr Teagle.

126. Mr Grant submitted that another way of approaching the issue was to treat the relevant market (for the purposes of valuing the subject accommodation according to the "direct comparison" method) as a local market in the nature of a monopoly. A market can, of course, be constituted by a monopoly which involves the exclusive possession or control of a trade or commodity.

According to that approach the relevant market would be the provision by Santos of the style of accommodation in situ at Mereenie. The evidence discloses that it costs non-employees $150 per day to stay at the work site, while the employer places a notional value on the accommodation of $72 per day. According to the evidence the local market would between $72 and $150 per day depending on the type of tenant. Although this approach is sound at a theoretical level, I believe it is preferable to adopt the approach taken by Mr Teagle which was to make a direct comparison with a Territory-wide market for accommodation of the type provided at the Mereenie Gas Fields. That approach permits competitive market forces at a Territory level to exert an influence on the valuation of the subject accommodation. It is preferable to treat the evidence of the actual tariff charged to non-employees and the employer's own assessment of the notional value of the accommodation as a check against the accuracy and reliability of the valuation arrived at by Mr Teagle by using the "direct comparison" method.[159]

127. In my view the method that Mr Gore used to value the subject accommodation is inappropriate on a number of grounds.

128. Mr Gore arrived at his valuation by applying the method prescribed in Tax Ruling MT 2025. That ruling relates to the calculation of fringe benefits tax in relation to the provision of housing benefits to employees. Insofar as it relates to remote housing, the statutory formula, which prescribes a discounting of 70% on account of remoteness, only comes into play in the absence of a local market (and presumably some other relevant market) with which the property being valued can be compared for the purposes of assessing the market value of that property. In the present case, the evidence established the existence of a relevant market, thereby removing the foundation for the application of the tax ruling to the accommodation at the

[159] Conversely, the results yielded by Mr Teagle's use of the "direct comparison" method tend to validate the employer's own assessment of the value of the accommodation.

Mereenie Gas Fields. It is for this very reason that Mr Teagle considered the tax ruling irrelevant to the valuation exercise.

129. Mr Barr submitted that "the most compelling aspect to this case is that the Commissioner of Taxation is prepared to accept that a remote area site is less valuable than one in town" and Miscellaneous Tax ruling 2025 reflects the commonsense associated with attributing a discounted value to remote employer- provided accommodation.[160] That might be so, but the existence of a relevant market for the purposes of applying the "direct comparison" method of valuation means that it is not necessary nor appropriate to have recourse to the Tax Ruling for purposes of valuing the subject accommodation. As noted earlier,[161] the "direct comparison" method, which is predicated upon the existence of a relevant market, takes due cognizance of the remoteness aspect, recognises the inherent commonsense in attributing a discounted value to remote accommodation and allows the element of remoteness to be factored into the valuation of such accommodation.

130. However, apart from the fundamental bar to applying the Tax ruling to the subject accommodation, there are other problems with resorting to the Tax ruling as an aid in valuing the accommodation at the Mereenie Gas Fields.

131. Tax rulings are one of a number of interpretative tools available to assist in the interpretation of income tax law.[162] They are an expression of the Australian Taxation Office's views on the interpretation and application of tax law.[163] Although the rulings are binding on the Australian Taxation Office,[164] they are not binding on this Court.[165] At best, Miscellaneous Tax Ruling 2025 can only have persuasive effect in relation to the issue before

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[160] See above, p 30.
[161] See above, pp 33-34.
[162] See *The Laws of Australia, Law Book Company Vol 31.12.14*
[163] See *The Laws of Australia, Law Book Company Vol 31.12.14*
[164] See *The Laws of Australia, Law Book Company Vol 31.32.14*
[165] See Mr Barr's submission referred to above at p 30.

this Court, namely, the valuation of the remote accommodation at the Mereenie Gas Fields.

132. However, in my opinion, the persuasive effect of the ruling is greatly diminished by the very fact that is merely an interpretative tool to assist in the interpretation of income tax law which is invariably underpinned by political and fiscal considerations which may have little, or no, application in the context of work health legislation.[166] The *Work Health Act* is beneficial legislation and one of its purposes is to provide financial compensation to workers incapacitated from workplace injuries or diseases while the dominant purpose of the *Income Tax Assessment Act* is the imposition, assessment and collection of tax upon incomes – indeed Miscellaneous Tax ruling relates to the assessment of fringe benefits tax.

133. The persuasive effect of Miscellaneous Tax Ruling 2025 is further diminished by the fact that the 70% discount prescribed in paragraph 20 of the ruling appears to have been arbitrarily set. By applying a pre-determined statutory formula, the ruling adopts a standardised non-individuated approach to the valuation of remote accommodation, proceeding on the assumption that remoteness automatically and very significantly depresses the market value of such accommodation.[167] The market value of remote accommodation, that is to say, the cost of staying at such accommodation depends on all the circumstances.[168] The statutory discount imposed by the tax ruling overlooks the fact that some remote accommodation can be expensive notwithstanding its remoteness. As stated earlier, [169] the guiding principle in the present case is the cost to the worker staying at the work site accommodation had that accommodation not been provided to him by his

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[166] See Mr Grant's submissions which are referred to above at pp 24-25..
[167] This point is made by Mr Grant: see above at p 24.
[168] This point is also made by Mr Grant: see above at p 24.
[169] See above, pp 3, 22.

employer. In my opinion reliance on the statutory formula in Tax Ruling 2025 would be prone to produce an unreliable and inaccurate estimate of the accommodation to the worker.

134. Finally, my limited research in this matter suggests that remote housing is now an exempt benefit (see s 58ZC *Income Tax Assessment Act*) from which it must follow that Tax Ruling 2025 – at least insofar as it relates to the assessment of fringe benefit tax on remote housing – ceases to have any effect. If it has no current application in income tax law, then its persuasive weight in the present context must be even further diminished.

135. If I have erred in preferring Mr Teagle's approach on the basis that there is a Territory wide market which permits the use of the "direct comparison" method of the subject accommodation, and that therefore recourse to the approach set out in Tax Ruling 2025 is open to be applied in this case, I would still reject the approach taken by Mr Gore. I would do so on the basis of the various observations I made above about the problems with the application of the tax ruling as a valuation aid in this case. In rejecting that approach, I would act upon the evidence relating to the daily rate charged out by Santos to non-employees and the employer's own assessment of the value of the accommodation. In other words, I would prefer a monopolistic view of the value of the accommodation as against a valuation based on the application of Tax Ruling 2025. Having taken that approach I would have placed a value of $72 per day on the subject accommodation.

136. However, as is evident from the tenor of this judgment, my preference is to value the subject accommodation at the rate of $40 per day according to the "direct comparison" method of valuation applied by Mr Teagle.

(b) The recreational facilities provided by the employer

137. I am of the view that the recreational facilities provided by the employer to the worker formed part of the worker's remuneration. I have reached that

view after considering and applying the relevant case law, making particular note of the fact that the provision of recreational facilities was an express condition of Mr Chaffey's contract of employment.

138. As indicated above the parties have by agreement placed a value of $14 per week on the subject facilities. Accordingly, I value the recreational facilities at $14 per week for the purposes of calculating the worker's "normal weekly earnings".

(c) The worker's interstate accommodation

139. It is my tentative view that it can be inferred from the examination of the worker that the worker did not pay any amount for accommodation or the maintenance of premises in Sale during the course of his employment. When asked whether he leased, rented or otherwise maintained premises he said that he either stayed with his parents or partner's parents. The inquiry as to whether he otherwise maintained premises was broad enough – and clear enough – to cover arrangements such as boarding or lodging. The worker gave the simple and unqualified response that he stayed with either his parents or his partner's parents – no mention was made of paying board. Any suggestion that he was boarding with those persons should have been the subject of cross-examination; but no such cross-examination was undertaken. In all the circumstances, I consider that it can be reasonably inferred from the worker's response (which was not pursued by cross-examination) that he stayed with those persons free of charge.

140. I invite further submissions from the parties before proceeding to make a final finding in relation to the circumstances concerning the worker's interstate accommodation. It occurred to me that the parties might wish to have the worker recalled so that he can be directly questioned as to he whether he paid board at the relevant residences.

(4) Consequential formal orders

141. I also intend to hear the parties as to what formal orders, if any, should be made pending the disposition of the case stated.

Dated this 10th day of June 2005.

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Dr. J. A. Lowndes
MANAGING MAGISTRATE OF
THE WORK HEALTH COURT