CITATION:	*Kastelein v Newmont Australia Limited* [2006] NTMC 081
PARTIES:	ROBERT KASTELEIN v NEWMONT AUSTRALIA LIMITED
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Act
FILE NO(s):	20517529
DELIVERED ON:	28 September 2006
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JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

WORK HEALTH CLAIM – Non Cash Benefit - Valuation

Work Health Act, ss49

Clark v Ryan (1960) 103 CLR 486
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 805
Murwangi Community Aboriginal Corporation v Carroll (2001) 166 FLR 247
William Payne v McArthur River Mining Pty Ltd [2004] BTMC 22
PQ v Red Cross Society [1992] 1 VR 19
English Exporters (London) Limited v Eldonwall Limited [1973] 1 CH 415, 420
Borowski v Quail [1966] VR 382
Millirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Damian Young v Henry Walker Eltin Contracting Pty Ltd (In Administration) [2006] NTMC 063
Fox v Pulumpa Station Pty Ltd (1999) NTMC 024
*Hasting Deering v Smit*h [2004] NTCA 13
Great Northern Railway v Dawson (1905) 1KB 331
Dophie & others v Robert McAndrew and Co. (1908) 1KB 803

Skailes v Blue Anchor Line Limited [1911] 1KB 360
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Normandy NFM Ltd v Turner (2003) 180 FLR 212
Ligertwood, "Australian Evidence" 4th Edition, Butterworths
Freckleton, "The Trial of the Expert", OUP
Hansard, Northern Territory Legislative Assembly, 14 October 2004

REPRESENTATION:

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Employer:	Ms Mangan

Solicitors:

Worker:	Ward Keller
Employer:	Lavan Legal

Judgment category classification:	B
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IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20517529

[2006] NTMC 081

BETWEEN:

ROBERT KASTELEIN
Worker

AND:

NEWMONT AUSTRALIA LIMITED
Employer

REASONS FOR DECISION

(Delivered 28 September 2006)

Ms BLOKLAND CM:

Introduction

1. This claim for benefits under the *Work Health Act (NT)* concerns primarily a claim for specified normal weekly earnings where the component of non-cash benefits is disputed between the worker and the employer. The dispute between the parties commenced in much wider terms but was narrowed significantly during the course of the hearing.

2. What was not in dispute at the conclusion of the hearing was that Mr Robert Kastelein, ("the worker") was employed by Newmont Australia ("the employer") as a supply officer at the Employer's Tanami Granites Mine in the Tanami Desert, Northern Territory from 2 September 2003 to 3 November 2004. Further, it is not in dispute the worker was employed on a *"fly in fly out"* basis at the Tanami Granites Mine during the period of employment. This form of employment involved a requirement to work 14 days, each day a 12 hour shift followed by seven days off. It is well known,

(as is evident in many cases in this jurisdiction), that this is a regular mode of employment in remote areas, particularly in the mining and related sectors. The employer also points out that it was a term of the worker's employment that after completion of every 12 months of continuous service with the employer, the worker was entitled to 28 rostered on-work days of annual leave. It is not in dispute the worker was employed at the Tanami Granites Mine for 224 days in each 12 month period.

3. During the course of the hearing I was advised it was no longer in dispute that the worker suffered an injury to his back in the course of his employment with the employer on or about 15 February 2004. As I understand the issues settled between the parties, the worker's incapacity arising from the injury is no longer disputed, neither is there an issue concerning the question of the most profitable employment. The dispute now revolves around the question of the calculation of the worker's *normal weekly earnings*. This in turn involves the calculation of the value of certain *non-cash benefits*.

4. The employer poses the question: "Whether the worker's *normal weekly earnings* should be calculated pursuant to s 49(1)(a) or s 49(1)(d)(ii) of the *Work Health Act"*. The worker argues the *non-cash benefits* are "*remuneration in part other that by the number of hours worked"* pursuant to s 49(1)(d)(ii) *Work Health Act (NT)*. The value of the *non-cash benefits* is in dispute. There is also dispute on the admissibility of proposed expert valuation testimony concerning that question. I admitted that testimony provisionally. It appeared to be more convenient to deal with that question at the conclusion of all of the evidence. In general terms, on the question of whether the accommodation provided at the Granites is a benefit to the worker, the employer argues it is a relevant factor that at all material times the worker: *had and bore the cost of private accommodation: (Statement of facts and issues 11 May 2006).* The employer also raises the issue of

whether the *non-cash benefits* are excluded as "other allowances" within the meaning of s 49(2) *Work Health Act (NT).*

Evidence Called on Behalf of the Worker

Robert Kastelein

5. Given the various concessions made throughout the course of the hearing, I will not summarise all of the worker's evidence, however it will be necessary to detail some parts of his evidence relevant and contextual to the question of the provision of and value of the *non-cash benefit.*

6. The worker gave evidence that he was born on 3 June 1962; he completed the school certificate in Bowral in 1978; he commenced as an apprentice chef on or about 1980. He worked for many years in the hospitality field cooking, managing, waiting, supervising, (including the role of *maitre de),* in guest houses, restaurants and similar establishments. He also had employment periods as a tour guide. As might be expected, many of those roles inherently required the capacity to bend, lift and carry, both repetitively and for significant periods of time. Early in the worker's evidence he mentioned that since the injury giving rise to these proceedings he was unable to function at the level required for employment in those types of positions. The worker occupied many remote positions prior to his employment with the employer including positions at Cooinda, Ulladulla and Jabiru. Much of his employment history is now not relevant but in my view he makes a fair assessment to the effect that he has not experienced difficulty finding employment.

7. The worker said he started working at "the Granites" for another employer in March 2002 as a Bar Manager and that this employment involved 12 hour shifts "two weeks on, one week off". During this period of employment he was accommodated in the single mans quarters at "the Granites". As a manager, his air conditioned room had an en suite, he was supplied linen and

toiletries, and the room was serviced three times per week. He was supplied uniforms, hard hat and steel capped boots; laundry was supplied as was breakfast, lunch and dinner. He explained the amenities included a large mess that seated 500 people, situated 200 metres from the accommodation, open 24 hours per day. The evening meal was generally a choice of steak or chicken with three varieties of fresh vegetables; two wet dishes, dessert and fruit. Breakfast comprised eggs, bacon and sausages, baked beans, spaghetti and cereal. Lunch was a range of cold meats and salad, or one wet dish with rice. He said a healthy lifestyle was also reflected in the facilities including the gym equipped with weights. His usual routine was to finish work at 6.00pm, run 10 kilometres, go to the gym and/or swim. He said he always kept fit and this was encouraged by the employer. He said he used the gym provided every day.

8. In September 2003 the worker changed employment. Although still working at the Granites site he commenced with Newmont Australia Ltd, (the employer in this action). He was employed in the position of a Supply Officer. This involved multiple and varied duties involving unloading two road trains per week, checking the goods and food, shelving and generally running all of the supplies. The physical side of the work involved lifting weights from one to 30 or 40 kilos; it was explained that this concerned lifting tools and other items of varying weights; this aspect of the work could be repetitive; the shifts were for 12 hours; other duties involved record keeping of stock including use of a computer system. The worker was clear he would be not able to perform the duties involving lifting, post injury.

9. The terms of the employment between the Worker and the Employer are set out in Exhibit W3. Relevantly to the question now before the court is that the terms include (at page 2) “Amenities: The Company provides accommodation and messing free of charge to employees while on site”. Various salary increases are noted in Exhibit W4 and W6.

10. The worker gave evidence of how the injury to his back occurred on 15 February 2004, namely that he injured his back when he was climbing from a forklift involved in unloading a truck. He jumped off and hit the ground; he was in pain, reported it to his superior, was treated by nurses on site, rested but the next day was unable to return to work. He said he was flown from the Granites to Alice Springs. He had to lie over three seats at the back of the plane during that flight. He was ultimately assessed by a General Practitioner and a doctor chosen by the Employer. The Worker's Compensation claim and certificate note the description of the injury (Exhibit W7) as "low back pain" and "back strain". During the course of the hearing the Court was advised that the injury was no longer in dispute. It is agreed the Worker suffered an injury to his lower back at the L4/5 and L5/S1 level and suffered a whole of person impairment of 5%. In evidence the worker gave a history of various attempts at returns to work on light or modified duties, treatments and exercises. He described pain levels in the region of 7/8 out of 10 being reduced to 4/5 out of 10 but that the pain never goes away.

11. Ultimately the worker felt he was unable to continue in employment with the Employer due to episodes of aggravating the injury or being unable to rehabilitate. He resigned from employment with the Employer on 3 November 2004. The worker obtained employment at the Palmerston Hub operating the change box, initially working four hours per day for a four day week increasing to six hours. That employment lasted for one month. He then took employment as a cook or chef at the Humpty Doo Hotel Bistro; he said other staff were able to deal with the duties that he was unable to perform due to limitations from his injury. The worker told the Court he took on more hours, aggravated his injury and left the employment in May 2005. The worker spent some time in employment with "Practical Plastics" from November 2005 onwards was working for "International All Sports", in a position he says he is able to moderate his hours and duties sufficiently

to accommodate his injury. He said the employer is aware of the problems he has and he works six hours per day and no more than five shifts per week. He does not work more than 30 hours per shift. The worker gave evidence of his continued limitations, sitting tolerance and continued gym programme.

12. Tendered through the worker (Exhibit W13) are a series of photos showing the mess area, accommodation, amenities and general environment at "The Granites".

13. In cross-examination the worker explained the position at "the Granites", although of similar remuneration to his position at Jabiru represented an opportunity for him because it was a bigger mine site. He was not primarily motivated by money when he accepted the position. Due to the concessions made in the course of the hearing much of the cross-examination is no longer particularly relevant, however in relation to the issues of the value of benefits the worker explained that when he lived and worked in Jabiru the house he resided in was provided by ERA (the employer); that the house and the mining operation was on Aboriginal land and therefore it was not possible to buy or sell a house in Jabiru. He said when he commenced work at the Granites he was initially renting a unit in Darwin and then bought a house and property at Humpty Doo. He agreed "the Granites" was 650 kilometres northwest of Alice Springs in the Tanami Desert and was "very isolated". He said Rabbit Flat had the nearest remote facility but it was generally "offbound" to workers under the rules. It was possible to purchase fuel and limited supplies at Rabbit Flat. He agreed there was no alternative accommodation available and no alternative amenities available.

14. The worker's usual work schedule was to leave his residence at Humpty Doo on a "fly-in" day at 4.30am and drive to Darwin Airport. At 6.00am he would catch the plane going to the Granites and would be collected by the Employer at Granites Airport. It was a two hour flight. He said he would

usually arrive at about 8.30am. At the beginning of "the swing" he would change into clothes provided by the employer and have breakfast and commence work at 9.30am. He agreed he would finish at 6.00pm and that two and a half hours of the first day of work comprised travel. On other mornings at the Granites he would get up at 5.00am, commence work at 6.00am and finish work at 6.00pm. He would have half an hour for lunch that comprised of a packet lunch. He agreed the dining room was a large room that could seat about 500 people – in the dry mess that was the food area, alcohol was prohibited. He said people would move to the wet mess after eating. He agreed his next 12 days followed the same routine and he would fly out on the Tuesday. He agreed this was essentially the same routine for all workers. He said he had to stay at the accommodation provided; there was no alternative if he didn't like it; he said the position was the same with the food. He agreed there was not much time to use the accommodation as he was working. He agreed the gym was open 24 hours per day and the pool open until 10.00pm. He said the tennis court was a concrete court and a "bit rough" although he said people still used it; he said the tennis court also served as a basketball court and there was a separate volleyball court.

15. He agreed he was not receiving much more money with the employer than at his previous employment; (he said it may have amounted to a couple of thousand dollars more). He said he was interested in mine work. He was referred to Exhibit W3 (the contract of employment). He agreed the "remuneration" was $45,000 plus superannuation making a total of $50,000. He said money was not the reason he took the job. He agreed all his other needs were provided with the job. He was referred to Exhibit W4, a memorandum advising of an NT Residential Allowance of $14,000 per annum. He said he was "chuffed" to receive it. He said he saw this as an incentive to keep workers in Darwin or Alice Springs rather than interstate. He agreed that by letter (Exhibit W6) his remuneration was reviewed and

increased to $66,000. He agreed it was the *best money* he had ever earned. He was asked whether he would have taken a position in Darwin for that remuneration and he said "not after the injury".

16. He was asked about the rule of the Granites that stopped workers going to Rabbit Flat. He said he could stop to buy a t-shirt or stop to say hello to the "old fellow". He said Rabbit Flat was 50 kilometres away and he could use a company car to go there; he said apart from Rabbit Flat the closest towns were the community of Yuendumu and Halls Creek. He said he didn't have time to drive anywhere and the only reason that people would go to Rabbit Flat would be to utilise the extra airport that the company owned.

17. He was asked about the restrictions on alcohol at the Granites and said that workers could drink as much as they like but they could be breathalysed and they could not work if under the influence of alcohol as that would lead to dismissal. He agreed that under the Granites Goldmine village rules any breach of the rules could lead to summary dismissal. The rules were tendered (Exhibit 15). It was pointed out to him that the rules stated "any breach of the rules may lead to summary dismissal for the Granites Goldmine personnel or in the case of the contractors employees, the principal reserves the right to withdraw accommodation and messing facilities for any person for non-observance of the village rules". The worker agreed that while working at the mine site workers were under the control of the employer for 24 hours a day. He said he was not aware of other rules save for the rule not to go to Rabbit Flat and he was also told not to go to Aboriginal sacred sites.

18. In relation to the reference to "amenities" in Exhibit W3 , the worker said that the employer provided amenities to everyone who was at the site, including contractors and he recalled a psychologist who was visiting the site; he said he was not aware whether a visiting doctor was charged or not for the accommodation. He agreed the weather at the mine site was at times

very hot and at times very cold and wet; he agreed there were snakes everywhere, flies, insects and dingoes. He said in relation to his own room, no-one stayed in it when he was away and he could leave his possessions in his room. He was asked why he didn't stay at the mine site when he was not working and he replied that he was "pretty sure" that he couldn't stay there when not working. He agreed that the gym was funded by the social club and he was a member of the social club; he said the profits of the social club went to helping to set up the gym; he said the mine helped with funding the gym; he said the wet mess was run by ESS; he said the social club had a role with running the wet mess and ran raffles and some of the proceeds went to the gym. He agreed there were set meal times and that the workers took their lunch with them to work during the day. He said that he would run 10 kilometres as soon as he had finished work. He was asked about enforcement of the rules and he replied that a lot of people were involved in enforcement including occupational health and safety officers, ESS, mine employees and security personnel.

19. He was asked further about the rules concerning the Granites; he agreed that from the moment he was on the plane the employer supervised everything and provided clothing for use on the mine site; he said the employer provided equipment and other amenities used to actually perform his duties; a computer and office were provided; steel capped work boots and hardhat were provided; transport from the accommodation to his office was also provided. He agreed the employer was safety conscious and he was provided with everything he needed to perform his duties.

20. He was asked about his accommodation in Darwin and he said that throughout the period of employment he first had a flat rented in Darwin and then he bought the premises in Humpty Doo because he wanted his own place. He said it was a five acre block and he financed the purchase by borrowing $108,000 and he had loan repayments of about $900 per month. He said he refinanced his loan again this year and recently his payments

were about $950 per month. He said his expenses for his own property concerned generally maintaining the property; that his power bills were about $250 per quarter; he paid for bore water; his rates and taxes were about $800 per year and in maintaining the premises he bought a ride on lawn mower; he said there were mango trees also on the property when he first bought it; he was unsure what his telephone bill was. He said his average food bill was about $120 per week and he would "eat out" sometimes but not often.

21. In re-examination he confirmed that he used the gym and other amenities regularly as he felt better when he was feeling fit and that the occupational health and safely values of the employer re-enforced use of the equipment and other physical activities. He said in relation to Rabbit Flat his understanding was that there was another mine site there about 100 kilometres away and that vehicles went to that mine site most days. He said the roadhouse at Rabbit Flat mainly serviced tourists passing in that remote area and also trade from Aboriginal communities. He said there was no accommodation there and he was unsure of whether fuel was sold. He said he had been there in circumstances of going from one mine site to another. He said the difference between the dry mess and the wet mess was that in the dry mess people would sit down and have their meals. In the wet mess there were dart boards, table tennis tables, pool tables, a band once a month, alcohol was discounted. He said the difference between accommodation between different workers was that some people were in what were referred to as "dog boxes" as they didn't have an en suite. The next standard up was an en suite with air conditioning and the next standard up added a double bed. He said in relation to the purchase of his Humpty Doo premises, he was able to save money because it was good employment and provided an opportunity to save all of his money because food and accommodation were provided and he could go for 14 days and not spend "five cents".

Mr Bill Linkson

22. Mr Bill Linkson was called by the worker. His evidence was objected to by the employer, however as it formed a significant part of the worker's case I agreed to accept the evidence provisionally and rule on it when dealing with the substantive issues. My ruling appears below. Mr Linkson was called to provide evidence on the valuation of the non-cash benefits. His curriculum vittae was marked in these proceedings as MFI16. He gave evidence that his formal qualifications were in *valuation*. I note he has a Bachelor of Applied Science (Property Resource Management) Valuation, University of South Australia, 1988; Associate Australian Property Institute, AAPI, Certified Practicing Valuer, 1991; Master of Business Administration Degree (MBA), Public Sector Management, University of New England, 1997, Licensed Valuer WA (License number 44041). He said he had experience in valuation of mining camps. He said he had worked as a valuer in the Northern Territory since 1990 and across a number of remote areas including Nhulunbuy, Boorooloola, Tennant Creek and Ayers Rock. He said he resided in Nhulunbuy in 1994 and his work involved amongst other things, the valuation of contractors accommodation in remote areas. He said he also worked in the Kimberley area in Western Australia involved in capital values in particular in Kunnanara. He said he had worked in the Valuer Generals Office (NT) from 1990 – 1996; he said part of his role was to value assets in remote locations. He said his expertise related to capital valuation, however he said that questions of capital value also included the income derived from premises such as roadhouses or motels and that in turn was partly calculated on the basis of nightly tariffs including road gangs who would stay for long periods and receive discounts by virtue of the amount of time that they stayed. He said he had been involved in valuation of residential properties for the Northern Territory Housing Commission concerning the tenant purchasing scheme and had generally done a lot of work in valuing properties in regional centres and remote regions.

23. Before the Court as part of MFI17 is the letter of referral from the worker's solicitor to Integrated Valuation Service, the firm Mr Linkson worked for. The relevant part reads as follows:

> "Mr Kastelein was provided with accommodation with was classed single man's quarters at the mine site. The room was furnished with a bed, table and chairs and refrigerator. The room had its own shower and toilet facilities.
>
> Three times a week the room was cleaned, the bed linen and towels changed and the bed made and clothes laundered.
>
> Our client was provided with a very well equipped gym which consisted of weights, walking machines plus a physiotherapist on site to help with exercise programs and injuries. Additionally, there was a 20 metre heated swimming pool, tennis court, basket ball court, volleyball court and indoor cricket pitch.
>
> Our client used the gym and pool facilities 5 days a week.
>
> As part of his employment Mr Kastelein was provided with 3 meals a day on an average week the meals were as follows:
>
> 1. Breakfast consisted of bacon and eggs, hash browns, beans, spaghetti, cereal and toast with jam and tea and coffee.
>
> 2. Lunch consisted of salad and cold meat.
>
> 3. Dinner consisted of a hot meal, salad, 4 vegetables and dessert.
>
> We seek a valuation of these entitlements in relation to the accommodation on the mine site".

He also gave evidence that he had seen the photos tendered in Exhibit W13 and understood the premises photographed to be the mine accommodation site.

24. In Mr Linkson's report under the heading "*Accommodation Description*" he states as follows:

“Accommodation Description”:

In accordance with the instruction provided, we have assumed that the accommodation includes a single ensuite styled room classed as “single mans quarters”. Further amenities include a bed, refrigerator, table and chairs.

Three times a week the room was cleaned, the bed linen and towels changed and the bed made and clothes laundered.

We understand that the room is air-conditioned and common facilities including a swimming pool, gymnasium, tennis court, basketball court, volleyball court and indoor cricket pitch were provided.

Meals were provided and included a choice of hot of cold breakfasts, sandwich/cold meat lunches with hot meal, salad, vegetables and desserts.

This level of provision and accommodation is typical of contractor employment.

General Comments:

The subject property is considered remote with limited, if any, demand apart from workers/contractors located on site. The closest comparison that can be made is rental comparisons of contractor accommodation providing a similar amenity”.

Under “**Valuation Methodology**” he states as follows:

“The most appropriate method of valuation in this case is considered to be the Direct Comparison approach whereby the residential and meals benefit provided to your client is compared to those of a similar nature provided in other situations in the open market and allowances for variations are made. This amount is reflective of the cost to provide a similar level of amenity outside the mine. We consider that the provision of such benefits is considered by the employee in their decision to take accept or otherwise the position.

We have also considered the value of gymnasium facilities provided, as these are not usually included with most accommodation facilities. We have had regard to gym membership costs within Katherine and Alice Springs.

> Further we consider that in order to attract employees to the position the employer must provide such benefits in order to attract staff, alternatively allowances must be paid, commensurate with the provision of such benefits.
>
> We consider that an employee takes account of the whole package to be provided, whether it all be by way of salary, or allowance/benefit or a combination of both.
>
> In order to attribute a monetary value to the benefit (non cash) provided by the employer to the employee, it is necessary to assume that a market exists and assess the amount that a willing but not anxious person would be prepared to pay for the provision of such benefits in light of the condition and the amenity of such an accommodation unit and provision of such meals.
>
> Whilst no money is exchanged between the employee and employer there is an equivalent benefit accrued to both. This valuation assesses the open market value of that benefit.
>
> Supporting case law relates mainly to cases including "*Palumpa Station v Fox"* (1999) *[NTSC] 144: Murwangi Community Aboriginal Corporation v Carroll" [2002] NTCA(9)"*.

There is a table set out in the report at p 4. The conclusion of the valuation was as follows:

"Accommodation (1 weekly service, A/C room with ensuite)	$40 per day ($280 per week)
Breakfast	$10 per day ($70 per week)
Lunch (sandwich/salad/meats)	$10 per day ($70 per week)
Dinner (hot)	$15 per day ($105 per week)
Access to gymnasium	($10 per week)
Total Value per day	**$535 per week"**

25. Mr Linkson agreed in cross-examination that he was a property valuer and that he valued residential and commercial properties for banks or other financial institutions. He agreed that some 60 per cent of his work would have been valuation for mortgage security in the area of commercial

valuations. He said in relation to industrial properties he conducted valuations for mortgage security purposes on behalf of owners or prospective owners and that this would make up about 25 per cent of his work. He agreed that remote locality valuations concerning the property valuations were generally different to commercial rental determinations. In relation to his report (MFI17) he was asked about use of the word "we" throughout the report. Mr Linkson said that that essentially meant to refer to himself, although he also acknowledged use of a pro-forma report. He was asked about his acquired knowledge and asked about the remote sites he had visited. He said that he had visited McArther River. He said he hadn't stayed at any of the roadhouses he had used in his evaluation. He said he was familiar with mine site accommodation at Nhulunbuy in relation to the bauxite mine at Nhulunbuy. He said when he referred to "demand" that he meant demand for accommodation. He was asked about a report from a Mr Gore that he had perused and Mr Linkson said that his recollection was that Mr Gore had used the direct comparison method. Mr Linkson said that in his own report he made adjustments for certain particular characteristics and conditions but Mr Gore had made a percentage discount concerning remoteness.

26. He said the direct comparison approach was analagous to other situations in the open market. He said in relation to the appropriate comparison the "open market" was defined by a group of "prudent purchasers" and "not over anxious" vendors. Mr Linkson endorsed the definitions of:

> "106.1 Property Valuers. Asset Valuers and Appraisers – are those who deal with the special discipline of economics associated with preparing and reporting valuations. As professionals, Valuers must meet rigorous tests of education, training, competence and demonstrated skills.
>
> 106.2 Market – to be the environment in which goods and services trade between buyers and sellers through a price mechanism. The concept of market implies goods and services may be

traced among buyers and sellers without undue restriction on their activities.

106.3 Market Value – is defined as: The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion".

that were put to him in cross-examination from the Australian Property Institute Professional Practice Manual 2004.

27. He was questioned on whether the relevant definitions could really apply to the situation concerning remote and regional accommodation such as in this case. He said it was appropriate to look at the prudent lessee or contractor or some other person during a period of employment. It was suggested to him that these circumstances could not really be considered a "market" where goods and services are bought and sold. Mr Linkson said that a market could be regional although he was unable to say precisely what the goods and services were. He said in considering the accommodation and services, (being the meals and amenities), the market in that situation was the actual rental that could be charged. He said the prudent lessees might be contractors and the prudent lessors might be owners of the mine. It was suggested to him that there was no evidence of leasing and essentially it was put to him that the comparison method was not appropriate as it was not an open market and there was no effective market in that situation.

28. It was suggested to him that he had not taken a number of variations into account such as the railway going through the comparable region and there possibly being more willing lessees. It was suggested to him that the period of the lease was not taken into account but he said that he did take into account variations in the comparable accommodation. It was put to him that there was no open market at the Granites site itself. He agreed that he had not telephoned the gym in Katherine himself to obtain the price of gym membership. He agreed that someone in his firm had already obtained it a

couple of weeks after the request. He agreed that it was necessary to assume that a market existed to make the valuation. It was suggested to him that much of his report was simply from a format from previous reports and that he did not in fact write it. He agreed the format was used previously by his firm. He agreed that most regional towns in the Northern Territory are not comparable to the Granites. He said his view was that Renner Springs was the most comparable in terms of quality of accommodation. He said he had seen the demountables from Renner Springs in situ in Alice Springs but most of the accommodation he had spoken of he had not visited himself. He agreed he did not look inside the demountables. He agreed they were new when he saw them. He agreed he hadn't spoken to persons who utilise the Renner Springs demountables. He couldn't say who owned the Renner Springs accommodation. He said he did not know how long Adrail were in Renner Springs building the railway. He said that the Safari Lodge also was comparable in that it provided a double room and a television. He said he relied on records and figures that his office had in Alice Springs concerning some of the prices. He agreed he discounted accommodation at Adelaide River as he thought it was too close to Darwin. He said he thought the Safari Lodge had inferior accommodation but a superior location. He thought Renner Springs was more remote than other locations and the combination of services made it quite comparable. It was suggested to him that the "Ivy Camp" at the Granites would have no market and therefore no value when mining ceased and it was likely to be abandoned. He said it was possible an abandoned site could be revived.

29. In re-examination Mr Linkson explained his firm has a relevant data base of comparable values for property in a number of parts of the Northern Territory and it had been collated over time. He said he accepted some values and rejected others. He said he would differentiate tourist towns and mining towns; he said he would look at the fair market from the point of view of the benefit to parties.

Evidence called on behalf of the Employer

Neil Holland

30. Mr Holland gave evidence that he was the Human Resource Manager with Newmont Australia Limited; he said he was familiar with Mr Kastelein's matter; he said he had no formal qualifications but had worked as a surveyor progressing through the various companies and major projects. From about the late 1980's he was involved in human resource positions and industrial relations positions for large mining companies. He gave evidence (although objected to, I allowed it provisionally) that he had knowledge of and experience of accommodation concerning mining workers. He derived this knowledge from residential sites and places such as Kalgoorlie and "drive in drive out" circumstances as well as "fly in fly out" circumstances. He was also aware of "fly in fly out" mine sites which were effectively "closed towns".

31. He said that mine sites had evolved to the "fly in/fly out" employment mode over time as governments were increasingly reluctant to provide services in remote towns for the purpose of the mining industries. He said as a consequence employees were less likely to bring wives and children with them to the employment site if that site was remote. He said that he was aware that at the Granites mine site where Mr Kastelein was working, workers were provided with "messing and accommodation". He said this amounted to food and dwelling as well as access to the wet mess. He said he was aware of the swimming pool and other facilities.

32. He said workers were also provided with office facilities on site. There were also warehouses, there was an airstrip and there was a mill treatment process. He said the supply shed was essentially a warehouse 40 metres long and 30 metres wide and was a wide open building; he said there was airconditioning over the work station with computer desks and an area generally for paperwork. He said the accommodation at the Granites

consisted largely of transportable *dongas* of about 40 feet long and an individual unit was about 10 feet by 10 feet with one small bathroom; he said there were three or four rooms to a 40 foot donga. He said the Granites mine site provided a dry mess for food preparation and serving every day of the year. He said that as well as the employees who stayed there, contractors stayed there and sometimes people travelling along the Tanami highway would be allowed to stay with no charge. He said the "fly out day" was a popular day but the "fly in day" was not popular. He said people were generally working to a date to fly out and although there might be a case for an employee not to fly out due to personal reasons, this was not encouraged during the days off. He said that due to the isolation it was in the best interests of employees to fly out. He said in relation to Exhibit W3 (the contract of employment), that this was a standard Newmont contract and that the paragraph concerning "amenities" included the messing and accommodation on site at no cost to the worker.

33. Mr Holland said that in relation to attracting and maintaining workers Newmont had a 22 per cent turnover but in some areas it was as high as 60 per cent. He said there were difficulties attracting and keeping people at remote sites and they tended to be paid more reflecting this issue. He said he had seen the Ivy Exploration Camp but not stayed there. He said if any of these camps were demobilised in a changed exploration environment, so that staff were no longer needed, they would be dismantled. He said as the Granites was on Aboriginal freehold land the company had an obligation to rehabilitate the land and it would revert to the traditional owners.

34. In cross-examination he agreed that the provision of amenities was to try and make the circumstances as nice as possible for the mental and physical well being of employees but it also related to the retention issue. He agreed that a factor in the provision of remote services by the company concerned how difficult it was to recruit and retain employees in those areas.

James Turner

35. Mr Turner gave evidence that he was the contract administrator for the employer and he was familiar with the Granites mine site and had stayed there himself. He said it was owned by the employer for between fifteen and twenty years. He said the cost of providing these services to employees including the servicing of rooms, the provision of food, cleaning, and dining was about $30 per person per day but that depended on the number of persons in the accommodation at any one time. He said the rules of the Granites camp were enforced by camp management and there was some security. He agreed that if rules were breached the consequences were severe and may result in a warning or dismissal depending on the nature of the breach. He said if accommodation was withdrawn it would effectively amount to dismissal because without accommodation it was impossible to have a job at the Granites. He said that Mr Kastelein had his own room for the entire period of his employment; he could leave his belongings there when he flew back to Darwin. He said the "fly out" days were always very busy at the mine site as everybody looks forward to flying out. He said there were functions provided from time to time in the wet mess and the swimming pool was paid for by the social club; he said the source of those funds were derived from the bar. He said that when contractors are working at the site and stranded tourists stay there, they are not charged.

36. He was referred to clause SS7 "wet mess and retail shop" (services agreement Exhibit 19) that states as follows:

> "SS7 WET MESS AND RETAIL SHOP
>
> The Principal's Social Club is the Licensee of the Village Wet Mess, all profit and losses from the operation of the Wet Mess are to the account of the Social Club.
>
> The Principal requires the Contractor to provide a Bar manager and other personnel as required to assist the Principal in the operation of the Wet Mess.

The Bar Manager will re-order and stock all alcohol and all other items for the operation of the Wet Mess and Retail Shop.

SS7.1 Wet Mess Operation

(a) The Contractor shall appoint a suitably qualified and experienced person as Bar Manager. A suitably qualified employee will be appointed as relief Bar Manager with the Bar Manager is off site.

(b) The Bar Manager will be responsible for:

(i) complying with all relevant liquor licensing legislation:

(ii) the restocking and, in consultation with the Social Club's Representative, for the re-ordering of all goods and videos;

(iii) general bar duties;

(iv) cleanliness of the bar area and immediate environs during trading hours. Empty cans and other rubbish are to be removed from these areas before commencement of next trading session.

(c) The Wet Mess is open for bar trading during the following hours:

(i) Monday – Sunday

0500 to 0900 hours

1700 to 2130 hours

(d) The Contractor will be solely liable for any theft, fraud, or other misdemeanour committed in the bar/wet mess by appointed person.

(e) The Contractor must operate an EFTPOS facility for use by al personnel on site during hours of Wet Mess operation.

Admissibility of Mr Linkson's Evidence

37. Primarily relying on *Clark v Ryan* (1960) 103 CLR 486, and *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 805 and various extracts

from *Cross on Evidence* (Australian Edition 1991), counsel for the employer advanced a number of propositions that I agree are non-controversial in so much as they represent the principles adopted by courts in determining whether proposed expert opinions ought to be admitted. The difficulty is usually in the application of those principles as is evident in the current proceedings. I thank counsel for setting out these matters in written submissions. It is convenient to set out the general propositions from counsel for the employer's written submissions:

> "5.1 There must be a field of specialised knowledge.
>
> 5.2 There must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert.
>
> 5.3 The opinion proffered must be wholly or substantially based on the witness's expert knowledge.
>
> 5.4 So far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert.
>
> 5.5 So far as the opinion is based assumed facts they must be identified and proved in some other way.
>
> 5.6 It must be established that the facts on which the opinion is based form a proper foundation for it.
>
> 5.7 The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached. That is the expert's evidence must explain how the field of specialised knowledge in which the expert by reason of training, study or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded".

38. Paragraph 6 of those submissions turns to the application of those general principles in this case, namely it is submitted "The field of specialised knowledge sought to be established is the value to a worker of the benefit of

accommodation, food and gym facilities at an employer's remote mine site. There is no such field of specialised knowledge".

39. Counsel for the worker, (I thank her also for her written submissions), submits (at 12.3) "…the subject matter of the opinion is the rental value of specified single accommodation and food in the surround of the identified amenity". And at 12.4 "That is what the worker does not have to pay for to engage in his employment. That is the benefit provided to the worker to encourage him to engage in the employment". (Evidence of Mr Holland, human resource manager of the employer).

40. That the value of accommodation, food and amenities or other remuneration means the value to the worker is clear. From the cases referred to me and from my own researches, how the courts ascertain that value is drawn from sources that are not limited to expertise specifically on a field as narrow as that asserted by the employer. I note Her Honour Thomas J's decision in *Murwangi Community Aboriginal Corporation v Carroll* (2001) 166 FLR 247 rejecting the cost-to-employer approach to value of remuneration. That part of the appeal dealing with the question of evidence of the existence of a "market" was abandoned, however throughout the decision Her Honour has referred to the evidence of valuers, (in that case a Mr Gore and a Mr Copland), who gave evidence in the proceedings before the Magistrate on the value of accommodation and associated benefits. In the context of dismissing the ground of appeal concerning the assessment of the value of the benefit, Her Honour stated (at 256): "with respect to the amounts awarded by the learned stipendiary magistrate for rent, food and electricity, I am satisfied there was evidence to support the amount awarded <u>including valuation evidence</u> and that no error on the part of the learned stipendiary magistrate in calculating these amounts has been demonstrated".

41. In *William Payne v McArthur River Mining Pty Ltd* [2004] BTMC 22, His Honour Mr Bradley CM thoroughly and critically reviewed the development

of the case law on this point and concluded that the question of value of benefits is the (para 59) "value to the workman reasonably ascertained". His Honour said how the Court makes the valuation as follows:- (at para 65)

> "…"that the court should find the value to the workman "reasonably ascertained" and regard therefore would be had to the nature of the benefit itself, its quality, cost, commercial value and its value to the worker".

His Honour clearly made a final assessment (see para 74) on the basis of the Worker's Valuation, the cost to the company and the court assessment of the value. My colleague Dr Lowndes SM took a similar approach when assessing the non-cash benefit in *Chaffey v Santos Limited* [2005] NTMC 032 and relied also on evidence of a similar flavour to that given by Mr Linkson in this matter. Finally, my colleague Mr Trigg SM who has had a long interest in this jurisdiction (having written the foundation judgment in the matter of *Fox v Palumpa Station Pty Ltd* [1999] NTMC 024), has recently (in *Young v Henry Walker Eltin Contracting Pty Ltd* (*In Administration*) [2006] NTMC 063), reaffirmed that the principle is "value to the worker, not the cost to the employer that is to be assessed". His Honour there objectively assessed the value of accommodation and related facilities, taking a "broad brush" approach. I appreciate that His Honour's view was to reject the proposed valuation evidence as expert evidence although he took the view the witnesses had; "gathered together some information that may be of assistance to the court". Further, they have expressed views which (although not expert opinion) may be of some assistance if treated more as submissions by persons who have expertise in the general area of valuing" (para 180).

42. The purported area of expertise is not simply "the value to a worker of the benefit of accommodation, etc" it is the general expertise of commercial valuation of remote accommodation and amenities. To be of assistance to the Court, the expertise need not be as specific as the "value to the employee" as asserted by counsel for the employer, the field of expertise

may be wider (to assist the court to come to a conclusion on the value to the employee *objectively and reasonably assessed*). The quote relied on by counsel from *Clark v Ryan* (1960) 103 CLR 486 at 491 to argue that there is not a legitimate area of expertise is as follows:

> "…the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to obtain knowledge of it".

Suffice to say, valuation evidence is not a "science" as such (bearing in mind that *Clark v Ryan* concerned the rejection of an engineer's evidence when he was found to possess no higher knowledge of the tendency of a trailer to slew than the trier of fact). The quote in *Clark v Ryan* needs also to be seen accommodating the later High Court decision of *Weal v Bottom* (1966) 40 ALJR 463 that also concerned the question of establishing the tendency of a trailer to slew outwards to the centre of the road during cornering. In *Weal v Bottom* the plaintiff called testimony from experienced drivers of similar vehicles to explain the slewing tendency and the conditions under which it might occur. The testimony, being knowledge outside of the general experience of the jurors was admitted as of assistance to it in inferring whether, given the conditions established by the admissible evidence it was likely that the accident was caused through the slewing of the trailer towards the centre of the road: (As discussed in Ligertwood, Australian Evidence 4th Edition Butterworths at 485-488). The context of *Weal v Bottom* involved the acceptance of experience of the witness as providing particular expertise concerning the particular problem in that case. In my view Mr Linkson, through his experience and qualifications and his study of the particular area and associated areas under enquiry by the Court should be allowed to give that testimony as an expert. Mr Linkson is clearly experienced in an area of knowledge beyond that possessed by the Court and it is of apparent assistance as it will assist the Court to make an objective

assessment of the value of the benefits. This is similar to the approach taken in *Weal v Bottom* and does not detract from the dictum in *Clark v Ryan*.

43. This does not mean that the testimony should not be scrutinised. In my view it is not akin to a new or novel area of science that requires the Court to go through a process of questioning whether there is general acceptance within the relevant scientific community. I note that even in the scientific or the medical area the expert knowledge of a Medical Practitioner can be relied on even though their views are not accepted generally by other experts within the medical profession: *Commissioner for Public Transport v Adamicik* (1961) 106 CLR 292. Not all fields of expert evidence are science based. Some of the submissions made on behalf of the employer rely on the principles that are more relevant to whether or not the Court accepts a new form of scientific evidence (such as is seen around issues of general acceptance of evidence in the relevant scientific community as laid down in *Frye v United Sta*tes 293 F 1013 (DC CIR 1923), as applied by King CJ in the South Australian Supreme Court in *Runjanjic v Kontinnen* (1991) 56 SASR 114). (See discussion in Ligertwood). There is no reason to be concerned that this area of valuation is not acceptable to the particular intellectual community (being expert valuers). No evidence has been called to suggest that other expert valuers do not accept the method used or expertise claimed by Mr Linkson. As noted above, there are a number of cases in the Northern Territory (*Chaffy v Santos, Payne v McArthur River Mining)* where this form of evidence has been permitted and been found to be useful in the objective assessment of the value to the worker of the benefits. In my view clearly there is a field of expertise concerning valuation of properties and services. Valuers with experience who are aware through their training of the correct material and procedures to rely on often give evidence before the Courts in a wide range of subjects. I see the offered evidence as closely related to general property valuation. It is clear

from Mr Linkson's curriculum vitae that he has expertise in valuing regional and remote properties. In my view this is not diminished by the fact that much of his work concerned valuations for mortgagees. Part of valuing properties, as he mentioned in his evidence, concerned ascertaining the potential of those properties to generate income.

44. Paragraph 7 of the employer's submission states that this is not a field on which expert evidence can be called because an ordinary person is as capable of forming the correct view (the common knowledge "rule"). I acknowledge this has been a principle that has been important to regulate opinion evidence and indicates that if an "expert" has no knowledge additional to the trier of fact and cannot contribute to the case, then the opinion is inadmissible. There are many reported cases on situations where this has been a useful guide, however since *Murphy v R* (1989) 167 CLR 94, by majority, the High Court held that the common knowledge rule of itself is not a legal test of admissibility. In any event even if it were a strict test of admissibility, in my view it would be difficult for the Court to come to a considered view without the evidence of Mr Linkson. Expert evidence on the issue contributes to a more accurate decision.

45. The evidence of Mr Linkson is also challenged on the grounds that it is not properly based on proved facts. Firstly, it must be said that a great deal of the material concerning the accommodation at the Granites is in evidence from other witnesses and is not in dispute. Mr Linkson told the Court he had seen photos of the accommodation and it is similar to accommodation he has observed elsewhere in remote parts of the Northern Territory. He has given evidence that he has familiarised himself with different types of accommodation as detailed in his report, although he has not visited most of the sites himself. He has obtained the particular values for accommodation from data bases or records held at his firm and through research from colleagues. I accept the factual basis of an opinion offered as expert evidence must be proven. In my view the primary facts have been proven

although I accept there are background facts that may not be. In my view Mr Linkson has identified the assumptions or facts upon which his opinion has been based. Most areas of expertise involve a general area of facts which form the background knowledge for the witness. Those background facts may not be compiled by the witness themselves. It is however accepted that when an expert witness gives evidence of facts peculiar to the case at hand those facts must be proved by evidence admissible under the ordinary rules of evidence: *PQ v Red Cross Society* [1992] 1 VR 19 per McGarvie J at 36 and generally *Makita (Australia Pty Limited) v Sprous* (supra). In *PQ's* case, the plaintiff claimed that he had contracted the HIV virus as a result of the defendant's negligence. There was scientific evidence from expert witnesses concerning the state of scientific knowledge about the transmission of the HIV virus at the time the plaintiff received the contaminated blood transfusions. McGarvie J held that is was proper for such experts to testify about the state of that scientific knowledge which they had read about in journals, books and other sources. It was also proper to adopt or acknowledge the correctness of those facts as part of their evidence. Such facts were facts of general application. However, the facts peculiar to the particular case of *PQ* – the primary facts – were matters such as PQ's age, his condition, his degree of haemophilia, the results of his blood test and so forth. Those primary facts had to be proven by admissible evidence, but not the "background facts".

46. Generally speaking, the cumulative experience and reading and reference to relevant reports and surveys are part of the general basis of an expert's opinion. It is completely impracticable for the Court to demand that these general matters of acquired knowledge be specifically proven (from Freckelton, The Trial of the Expert, OUP at 92). Justice Megary in *English Exporters (London) Limited v Eldonwall Limited* [1973] 1 CH 415, 420 referred to this in relation to expert valuers opinion stating (as quoted in Freckelton):

> "In building up his opinions about values, he will no doubt have learned much from transactions in which he has himself been engaged, and of which he could give first hand evidence. But he will also have learned much from many other sources, including much of which he could give no first hand evidence. Text books, journals, reports or options and other dealings, and information obtained from his professional brethren and others, some related to particular transactions and some more general and more definite, will all have contributed their share. Doubtless much or most of this will be accurate, though some will not; and even what is accurate so far as it goes maybe incomplete, in that nothing may have been said of some special element that affects values. Nevertheless, the opinion that the expert expresses is none the worse because it is in part derived from the matters from which he could give no direct evidence".

47. Despite the basis rule, the law accepts that no one professional can know from personal observation all of the data on which they base their opinions. A reliance on reported data and the work of colleagues is accepted. In *Borowski v Quail* [1966] VR 382, 386 *Wigmore on Evidence* was cited with approval (as reproduced in Freckelton supra):

> "On the one hand, a mere layman who comes to court and alleges as fact which he has learned only by reading a medical or mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards. Yet it is not easy to express in useable form that element of professional competency which distinguishes the later case from the former. In general the considerations which define the later are
>
> (a) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information,
>
> (b) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed,
>
> (c) the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely.
>
> The true solution must be to trust the discretion of the trial Judge exercised in the light of the nature of the subject and of the witnesses

> equipment. The decisions show in general a liberal attitude in receiving technical testimony based on professional reading".

48. The basis rule in expert evidence cases does admit of a pragmatic application depending on the nature of the discipline or intellectual community from which the witness is a member. A classic example of this in the Northern Territory was *Millirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 where Justice Blackburn held that expert evidence of anthropologists was admissible concerning the nature of the plaintiff's society even though they were only capable of proof to a large degree by hearsay. Evidence given by valuers is somewhat has some analogies to this. The only part of the opinion that in my view does breach the basis rule is the "gym access" part. He has simply relied on someone else's phone call and is unclear about the basis. I have come to the conclusion that Mr Linkson's evaluation of remote accommodation is a legitimate area of expertise and he is appropriately qualified. It is of significant assistance to the Court. Even if I am wrong in this conclusion I would with respect suggest that it can be admitted via the approach of my colleague Mr Trigg SM in *Young v Henry Walker Eltin Contracting Pty (In Administration*), bearing in mind that the *Work Health Act* requires the Court to be "conducted with as little formality and technicality and with as much expedition, as this requirements of this Act and a proper consideration of the matter permits": Section 110A *Work Health Act* and further "subject to this Act, the Court in proceedings under this provision is not bound by any rules of evidence but may inform itself on any matter in such manner as it sees fit". Having ruled the evidence admissible, that does not mean that it is beyond criticism and although is useful to the Court, ultimately the Court must conduct its own assessment. I should add that I would also admit the evidence of Mr Holland that was objected to. In my view it was evidence of matters he had direct knowledge and experience of.

49. As indicated, Mr Linkson was referred to a report that was said to have been compiled by a Mr Gore. It became evident during the course of the hearing that Mr Gore prepared a valuation for the employer. Mr Linkson prepared a response to questions on that report and was asked questions about it in evidence. His written response to Mr Gore's report and to questions from the worker's solicitor appear in MFI 18. A question arose at the end of the proceedings on whether Mr Gore's report itself was tendered. Further, counsel for the employer wrote to the Court on 19 May 2006 noting that she filed Mr Gore's report under a misapprehension of the requirements, did not rely on Mr Gore's report, disputed that it had been tendered and sought that it be uplifted. During the course of preparing these reasons, I have listened to the recording of what I thought were the relevant parts of the proceedings. It is unclear on whether Mr Gore's report was formally tendered. It appears from the tape that on 9 May Mr Gore's report was before Mr Linkson when he was in the witness box as he was being questioned on it. Mr Linkson's curriculum vitae became MFI 16, his report became MFI 17 and his commentary on Mr Gore's report became MFI 18. There is a comment about tendering 'the report' (May 9) that is inaudible and it is difficult to now know what report it is referring to. Further, the Court Officer's exhibit list does not include Mr Gore's report, curiously however, it has been stapled to MFI 16 (Mr Linkson's curriculum vitae). In these circumstances it is unclear whether it was formally tendered. I formally admit MFI 17 and MFI 18 into evidence. In my view the fairest way to deal with this is to admit MFI 16 as it relates to Mr Linkson's curriculum vitae and to admit only those parts of Mr Gore's report that have been referred to Mr Linkson in evidence. I will not make an order for uplifting the report in those circumstances, neither will I have regard to it save for those parts referred to in Exhibit W18 or in the evidence of Mr Linkson.

Consideration of the Issues

50. On behalf of the employer, lengthy submissions have been made in an attempt to demonstrate that the *non-cash benefits* are not part of "remuneration" and are "other allowance[s]" within the meaning of s 42(2) of *Work Health Act.* The submission is that the items claimed, being accommodation, food and amenities do not form part of the worker's *normal weekly earnings*. Ms Mangan has referred in detail to the relevant legislation and Supreme Court cases as well as decisions of this Court and argues that this Court should distinguish those cases that tend to support the worker's case. I note with respect that a similar approach was taken by the employer in *Damian Young v Henry Walker Eltin Contracting Pty Ltd (In Administration*) [2006] NTMC 063. My colleague Mr Trigg SM rejected a similar argument in that case and with respect I substantially agree, however I will answer the employer's arguments as they relate to this particular case. The relevant part of the *Work Health Act* is s49 that reads as follows:

> **"49. Interpretation for Part V**
>
> "normal weekly earnings", in relation to a worker, means –
>
> (a) subject to paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay;
>
> (b) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked full-time at one time for one employer and part-time at another time for one or more other employers – the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of his or her full-time employment;
>
> (c) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked part-time at one time for one employer and part-time at another time for one or more other employers –

(i) the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of both or all of his or her part-time employments; or

(ii) the gross remuneration that would have been payable to the worker if he or she had been engaged full-time in the part-time employment in which he or she usually was engaged for the more or most hours of employment per week at the date of the relevant injury,

whichever is the lesser; or

(d) where –

(i) by reason of the shortness of time during which the worker has been in the employment of his or her employer, it is impracticable at the date of the relevant injury to calculate the rate of relevant remuneration in accordance with paragraph (a), (b) or (c); or

(ii) subject to paragraph (b) or (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked,

the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment;

"normal weekly number of hours of work" means –

(a) in the case of a worker who is required by the terms of his or her employment to work a fixed number of hours, not being hours of overtime other than where the overtime is worked in accordance with a regular and established pattern, in each week – the number of hours so fixed and worked; or

(b) in the case of a worker who is not required by the terms of his or her employment to work a fixed number of hours in each week – the average weekly number of hours, not being hours of overtime other than where the overtime is worked in accordance with a regular and established pattern, worked by him or her during the period actually worked by him or her in the service of his or her employer

during the 12 months immediately preceding the date of the relevant injury;

"nursing service" means a nursing service provided by a registered nurse who has a right of practice under the *Health Practitioners Act* otherwise than at a hospital or as a member of the nursing staff of a hospital;

"ordinary time rate of pay" means –

(a) in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of his or her employment – the time rate of pay so fixed; or

(b) in the case of a worker –

(i) who is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner; or

(ii) where no ordinary time rate of pay is so fixed for a worker's work under the terms of his or her employment,

the average time rate of pay, exclusive of overtime other than where the overtime is worked in accordance with a regular and established pattern, earned by him or her during the period actually worked by him or her in the service of his or her employer during the period of 12 months immediately preceding the date of the relevant injury;

"proceeding" means a claim before the Court for compensation or a matter or question incidental to such a claim;

"spouse", in relation to a person, includes a de facto partner of the person;

"worker", in relation to an employer, includes a person formerly employed as a worker by the employer where the worker became eligible for compensation in respect of an injury arising out of or in the course of employment with that employer.

(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.

Note for section 49(1B) –

Section 195 contains transitional matters specifying when subsection (1A) does not affect the calculation of compensation by reference to remuneration otherwise excluded by that subsection.

(2) For the purposes of the definition of "normal weekly earnings" and "ordinary time rate of pay" in subsection (1), a worker's remuneration includes an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance.

(3) In determining whether overtime is worked in accordance with a regular and established pattern for the purposes of the definitions of "normal weekly number of hours of work" and "ordinary time rate of pay" in subsection (1), or shift work is worked in accordance with a regular and established pattern for the purpose of the definitions of "normal weekly earnings" and "ordinary time rate of pay" as referred to in subsection (2) –

(a) regard shall be had to the overtime or shift work, as the case may be, worked by a worker in his or her employment with his or her employer at the time of the relevant injury during the period of 6 months immediately preceding the date of the injury; or

(b) where the worker has been employed by his or her employer at the time of the relevant injury for less than 6 months, regard shall be had to the overtime or shift work, as the case may be, worked by the worker during the period of that employment and whether, in the normal course of that employment, he or she would have worked overtime or shift work had he or she not been injured."

51. The employer's written submissions (para 42) refer to the introduction of the *Work Health Bill* (No. 2) 1986 when the then Chief Minister in response to a question in relation to accommodation, airfares and electricity stated:

> "Those *non-cash benefits* are not included in the calculation of ordinary weekly payments….they have never been taken into account in the calculation of workmen's compensation payment".

I note it is not suggested this statement was made during the second reading speech. Answers to questions during debate are not in my view generally indicative of the interpretation of the statute. It is clear that for some substantial period of time since its introduction the *Work Health Act* has been interpreted to include certain *non-cash benefits* as remuneration. It is now almost twenty years since the introduction of the Act and *non-cash*

benefits have been included for some time. The first well known case was decided by Mr Trigg SM in *Fox v Pulumpa Station Pty Ltd* (1999) NTMC 024. Aside from recent amendments concerning superannuation the *Work Health Act* has not been amended in that twenty years to exclude *non-cash benefits*. The answer given by the then Chief Minister is not indicative in this instance of an expression of legislative intent.

52. In my view paras 43 – 46 of the employer's written submissions are non controversial to the effect that the intention of the *Work Health Act* is to provide financial compensation for workers incapacitated from work place injuries; that the amount of compensation during a long term incapacity shall be less than the amount of pre-injury earning capacity; that the Act does not attempt to place the worker in a better position than if he or she had not been injured. The submissions draw the Court's attention to the Second Reading speech of 14 October 2004 *Work Health Amendment Bill* of the then Minister for Employment, Education and Training stating:

> "The final, but far from least, matter that the Bill will give effect to, concerns the definition of "*normal weekly earnings*" under the *Work Health Act* ..
>
> The benefit structures under statutory compensation schemes are not intended to provide full indemnity for an injured worker's financial loss but, rather are intended to meet what is considered by the community to be fair but affordable compensation".

I do not think this takes the matter any further. That concerned a Bill excluding superannuation contributions from *normal weekly earnings*. No other benefits were sought to be excluded by that legislation although they had been acknowledged by the courts for some considerable period.

53. The employer raises the issue of whether the worker's normal weekly earnings should be calculated pursuant to s 49(1)(a) or s 49(1)(d)(ii) of the *Work Health Act*. It is clear from the now many authorities of the Supreme Court that the types of benefits offered to this worker are considered

"remuneration". Although on one interpretation that may well mean it is open for a court to find that the claimed *non-cash benefits* are within the purview of s 49(1)(a), customarily the type of arrangement the worker in this case was engaged in was treated as coming within the definition of s 49(1)(d)(ii). As that is the state of the current precedent, it is my view that this case comes within s 49(1)(d)(ii). (See eg. *Hasting Deering v Smit*h [2004] NTCA 13).

54. As indicated previously in these reasons, the terms of employment included provision of accommodation and messing "free of charge". In detailed submissions the employer's counsel seeks to persuade the Court that this Court and the Supreme Court in coming to the conclusion that remuneration includes *non-cash benefits*, have relied too strongly on the older cases and have failed to appreciate the modern context or context of this case. Various factual and contextual matters are drawn from *Dawson v Bankers and Traders Insurance Company Limited* [1957] VR 491, *Great Northern Railway v Dawson* (1905) 1KB 331, *Dophie & others v Robert McAndrew and Co*. (1908) 1KB 803, *Skailes v Blue Anchor Line Limited* [1911] 1KB 360 and *Sharpe v The Midland Railway Co*. (1903) 2KB 26. It was submitted that reliance on these cases by courts in this jurisdiction as the foundation of the jurisprudence of the *Work Health Act* is misplaced. The employer's submissions also emphasise His Honour Mr Bradley's view in *William Payne v McArthur River Mining Pty Ltd* [2004] NTMC 22 where His Honour said:

> "It is meaningful at this stage to note that in these cases like the subsequent early Victorian cases, were decided in the context of determining whether or not a person was to be included or excluded from the category of a worker entitled to benefits based on the amount of income received…….although these decisions are helpful some caution needs to be adopted given this background and the era and social circumstances in which they were made".

55. The earlier cases in other statutory contexts clearly involve various allowances or "board and lodging". Although there may be a case for

caution, they are hardly irrelevant to the considerations in the more modern cases. These considerations commonly arise in employment situations or industries where the employees work remotely such as in the pastoral industry, or as in this case the mining industry or with the earlier cases, at sea. The employer submits that this Court is not bound by *Murwangi Community Aboriginal Corporation v Carroll* (2002) 171 FLR 116 as there was a specific finding that the workers wages would have been considerably higher had food, accommodation and power not been provided as part of the remuneration. It is submitted that there is no evidence of *salary sacrifice* in the case before me. It is also submitted that in *Carroll's* case the accommodation became his home and he lived freely and independently in it. It is suggested that these are all points of distinction as the evidence, (as suggested in this case) concerns the provision of accommodation that was really a temporary shelter and that at all times the worker was subject to the rules, control and supervision of the employer. The evidence was that he always looked forward to leaving the site at the end of each "swing". It was submitted that staying at the mine was not perceived by the worker to be a benefit or a home. I am not persuaded that the perceived factual distinctions are enough to distinguish this case from *Carroll's* case. There is still a benefit to the worker as he is provided with accommodation (albeit of a basic kind) and food (that in my view is of a high quality). Clearly the provision of accommodation and other amenities was a benefit. If not provided by the employer, the employee would have to provide them himself. It is not the law that a *salary sacrifice* has to be proven to prove a benefit to the employee. If the *Fox v Pulumpa Station Pty Ltd* [1999] NTMC 24 and *Murwangi v Carroll* line of cases did not put the matter beyond doubt, then His Honour Mildren J in *Normandy NFM Ltd v Turner* (2003) 180 FLR 212 did. It would seem to me that *Normandy NFM*, being such a factually similar matter dealing with similar legal issues clearly binds this Court. For whatever critiquing might be done about the basis of decisions in this jurisdiction be they in this court or the superior courts, this

court is very clearly bound by the decisions of the Supreme Court. In my view the points of factual difference are not substantial enough to justify distinction. A number of witnesses were asked about the value of an abandoned site, the Ivy Exploration Camp, but I do not agree this is a relevant comparison using abandoned sites and the cases do not support making such a comparison. This factor of possible future abandonment does lessen the claim. Accommodation and food are not in the same category as desks, computers and other provisions incidental to the employment as suggested by the employer.

56. The employer has also raised the argument that the claimed *non-cash benefits*, rather than being remuneration are allowances that are excluded by virtue of s 49(2) "…but does not include any other allowance". This argument has also been rejected by the Northern Territory Court of Appeal in *Murwangi* and also in relation to employer superannuation contributions, *Hastings Deering (Australia) Ltd v Smith* [2004] NTCA 13. As was apparently argued by the employer in *Young v Henry Walker Eltin Contracting Pty Ltd (In Administration)* (supra), it was suggested to this Court that *Murwangi v Carroll* was limited in its application to the matter before this Court as the employer had argued the case differently and strictly speaking the ratio does not concern the same issue. In my view with respect any Court of Appeal decision including matters that are technically obiter are significantly persuasive to this court's deliberations. In my view His Honour Justice Mildren puts that matter beyond doubt in *Normandy NFM Ltd v Turner* (2003) 180 FLR 212. As my colleague Mr Trigg SM did in *Young v Henry Walker Eltin Contracting Pty Ltd (In Administration)*, I will also set out His Honour's remarks that indicate to me that this is the current state of the law. His Honour said:

> "[1] This is an appeal pursuant to s 116 of the Work Health Act from a decision of the Work Health Court.
> [2] The facts are in a small compass. The respondent worker was employed by the appellant at its mine known as The Granites Gold Mine

in a remote part of the Northern Territory.
[3] The terms and conditions of the employment were covered by an enterprise bargaining agreement referred to as "The Granites Gold Mine Enterprise Agreement 1994."
[4] Outside the terms of that agreement, the employer also provided the respondent worker with free meals three times a day and free accommodation at the mine site. The respondent was supposed to work two weeks on and two weeks off. He normally lived in Alice Springs. However, the learned Magistrate found that in fact the respondent worked for 35 weeks of each year.
[5] The question which arose was whether or not the value of the food and accommodation should be taken into account in the proper calculation of "normal weekly earnings" pursuant to s 49(1) of the Work Health Act.
[6] The learned Magistrate held that the respondent was entitled to have an amount representing food and accommodation included in this calculation.
[7] The grounds of the appeal to this Court are as follows:
1. The learned Magistrate erred in failing to distinguish the decision in Caroll (sic) v Murwangi Community Aboriginal Corporation [2002] NTCA 9 in respect of the provision of meals.
2. The learned Magistrate erred in failing to provide any or any adequate reasons for his finding that the present case was indistinguishable from Caroll's (sic) case in respect of meals.
3. The learned Magistrate erred in finding that the present case was indistinguishable from Caroll's (sic) case in respect of accommodation.
4. The learned Magistrate erred in failing to provide any or any adequate reasons for his finding that the present case was indistinguishable for Caroll's (sic) case in respect of accommodation.
5. The learned Magistrate erred in finding that the provision of accommodation constituted a benefit to the worker."
[8] In my opinion none of these ground are entitled to succeed.
[9] In Murwangi Community Aboriginal Corporation v Carroll (2002) 171 FLR 116 the Court of Appeal held that an abattoir supervisor employed at a remote location in the Northern Territory who under the terms of his employment was paid a monetary wage and also was provided with free food, accommodation and electricity was entitled to have relevantly the food and the accommodation included within the expression "normal weekly earnings" for the purposes of determining the amount of compensation payable to him. In that case their Honours said at par 9:
"In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise "remuneration … earned by the worker …".
[10] Their Honours then referred to a number of cases gathered in a decision by Mr Trigg SM at first instance in Fox v Palumpa Station Pty Ltd (1999) NTMC 024 and make reference to three such cases, namely Skailes v Blue Anchor Line Ltd [1911] 1 KB 360, Dawson v Bankers and

Traders Insurance Co Ltd [1957] VR 491 at 497 and Rofin Australia Pty Ltd v Newton (1997) 78 IR 78 at 81. On the hearing of the appeal the employer in Carroll's case did not argue that the benefits received by the worker by way of free rent, board and electricity ought not to be regarded as items of remuneration but rather contended that such benefits were to be excluded from "normal weekly earnings" by operation of s 49(2) of the Work Health Act. The Court held that such benefits were not "allowances" and therefore not "other allowances" as contemplated by s 49(2) but rather they were part of the remuneration of the worker simpliciter and that the non-monetary benefits were correctly included in the assessment of his normal weekly earnings.

[11] The learned Magistrate's reasons were very brief. He considered that the case was indistinguishable from Murwangi Community Aboriginal Corporation v Carroll, and said that he was unable to follow how the accommodation was a benefit for the employer, as surely it was a benefit for the worker. I do not consider his Worship's reasons to be inadequate. It is difficult to see on what possible basis Murwangi Community Aboriginal Corporation v Carroll is distinguishable from the facts of this case. First it was put that an inference should be drawn that in the circumstances of this case these benefits were not part of his remuneration because they were not included in The Granites Gold Mine Enterprise Agreement 1994. It was put that his remuneration was payment in cash on hourly rates. I do not think that that argument can be sustained. That may have been his wages but it was not his only remuneration. Nor do I think it matters whether or not the terms of the engagement expressly provide that the employer will pay for the accommodation and food. The fact is that these items are met by the employer and it must therefore be implied that this is part and parcel of the conditions of the contract of employment: see Skailes v Blue Anchor Line Ltd [1911] 1 KB 360 at 364 where Cozens-Hardy MR made the distinction between voluntary gratuities and the drawing of an inference that certain sums were paid as extra wages, notwithstanding that the extra amounts were not contained within the written agreement between the employer and the employee.

[12] It has long been the case that whenever the employer provides free food, clothing or accommodation that the value of these items are treated as part of the employee's remuneration: see for example Great Northern Railway v Dawson (1905) 1 KB 33; Dothie & Ors v Robert MacAndrew & Co (1908) 1 KB 803; Skailes v Blue Anchor Line Ltd [1911] 1 KB 360 and Sharpe v The Midland Railway Co (1903) 2 KB 26. This is the same line of authority as was approved by the Court of Appeal in Murwangi Community Aboriginal Corporation v Carroll. I think the learned Magistrate was right when he held that the question had been decided by that case.

[13] Likewise the argument that the provision of food and lodging is for the benefit of the employer and not for the benefit of the employee simply cannot be sustained. Reliance was placed upon an observation by Sholl J in Dawson v Bankers and Traders Insurance Co Ltd [1957] VR 491 at 497: "Board and lodging are properly including in remuneration, - at any rate where they are not provided solely for the benefit of the employer."

[14] It is difficult to imagine a circumstance under which the employer

provides food and lodging for the benefit of the employer and not for the benefit also of the employee. Perhaps Sholl J was referring to cases where the food and lodging was paid, not as part of the terms of the employment, but merely because of some other arrangement or relationship which existed between the employer and the employee. It may be, for example, that the employee was the employer's son. In such a case it may be a question as to whether or not the father was meeting his son's food and accommodation expenses because of that relationship, or whether it was being provided as part of the consideration for the contract of employment. Where, however, as in this case, there is no evidence of any such relationship or other arrangement between the worker and the employer which might suggest that the employer is providing the food and accommodation gratuitously or for some reason other than that which arises out of the contract of employment, the only available inference according to the authorities is that it is part of the worker's remuneration.
[15] Another possible point of distinction that was raised is the fact that the accommodation was provided only on a two weeks on, two weeks off basis. I do not see how that has anything to do with it. The railway guard in Sharpe v Midland Railway Co was paid an allowance for lodgings whenever he was away from home (an entitlement which under the circumstances he got irrespectively of whether he incurred any out-of-pocket expense or not), but it was nevertheless held to be part of his remuneration. Similarly, the 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.
[16] Even if strictly speaking the decision in Murwangi Community Aboriginal Corporation v Carroll supra is distinguishable on its facts as the real ratio concerned whether or not the benefits were not allowances excluded by s 49(2) of the Work Health Act, I nevertheless consider that the conclusion which the learned Magistrate reached is perfectly correct and indeed was the only decision which he could have reached in the circumstances for the reasons I have already given.
[17] The appeal is therefore dismissed. (emphasis added)".

57. In my view it is clear that the *non-cash benefits* form part of the remuneration and they are not "other allowances".

Assessment of the Non-Cash Benefits

58. Although I have admitted Mr Linkson's evidence, and the commercial rates he provides by direct comparison are of significant assistance, in my view the utilising of Renner Springs rates and the Safari Lodge is too generous a comparison. Renner Springs, situated on the Stuart Highway is not as remote as the Granites. It is a road house and therefore it is reasonable to

assume it services an area beyond a mere work site. It is of greater value as a facility generally in my view than "the Granites". Similarly, the Safari Lodge is in Tennant Creek and has the relative advantage of general amenities of the town area. Although the provision of accommodation is to be valued significantly, there is, in my view, a distinction between the village at "the Granites" and better situated accommodation. It is reasonable in my view to value Granites accommodation to the worker at $25 per day or $175 per week. Relying on the authorities I reject the proposition that this must be discounted as the worker pays his mortgage in any event. Towards the end of proceedings before me it was all but conceded that food could be included in the *non-cash benefits*. In my view there is provision of high quality meals at the village. The worker spends on average $120 per week on food when in Darwin. The value placed on meals by Mr Linkson is $35 per day. In my view the values for lunch and breakfast are higher than for those meals if prepared by a person for their own consumption from goods purchased themselves. I think this approach better reflects the value to the worker and would be more in the order of $25 per day, or $175 per week and that is how I assess it. The access to the gym and pool is less clear. There are a range of gym membership prices given in the valuation. It is suggested it be valued at $10 per week. On the whole the evidence is not clear that this is an additional benefit beyond the accommodation provided by the employer. There is evidence of arrangements with the Social Club to fund the gym and it is the weakest part of the valuation evidence. I do not propose to allow for gym membership. The worker has claimed the *non-cash benefits* as $535/3 x 2. I would value the *non-cash benefits* as $350/3 x 2. I have noted also that the cost to the employer (on the evidence) of providing food and accommodation to a single employee averages at $210 per week ($30 per day).

Findings

59. As most of the matters are no longer in dispute between the parties I readily find that the worker Mr Robert Kastelein suffered an injury while working for the employer on or about 15 February 2004. The injury during the course of his employment satisfies the pre-conditions for being eligible for compensation under the *Work Health Act.* The worker suffered an injury to his lower back at the L4/5 and L5/S1 level. The worker has been assessed as having suffered a whole of person impairment of five percent and the employer has accepted that assessment. The worker has received the cash component of his remuneration with his previous employer in the relevant period as set out in MFI 12 in these proceedings. The worker commenced employment with the employer as a supply officer at Tanami Granites Mine in the Tanami Desert from 2 September 2003 to 3 November 2004. At all material times during the course of the employment with the employer the worker worked 14 days straight for 12 shifts and 7 days off. The worker's normal weekly earnings at the time of the accident consisted of:

(a) Average gross weekly remuneration during the 12 months immediately proceeding the accident in accordance with s 49(d) of the *Work Health Act* as follows:

(i) Remuneration received from Compass Group (Australia) Pty Ltd for period 18 February 2003 to 1 September 2004 of $38,411.58 and

(ii) Remuneration received from the employer for the period 2 September 2003 to 17 February 2004 of $21,032.88.

Total $59,444.46. **Note**: The "agreed figures" changed a number of times throughout the hearing and I will receive any further submissions or amendments on those figures if required. I have taken the latest agreed figures as I understood it.

(b) Employers compulsory superannuation payments of 9% of annual gross of remuneration $5,350. **Note**: I was advised during the hearing that the parties would await the decision in *Chaffey v*

Santos Ltd concerning the legislative competency of amendments to the *Work Health Act* concerning whether or not the abolition of superannuation was an acquisition. That decision has recently been delivered (15 September 2006); see *Chaffey v Santos Ltd* [2006] NSCA 67 ruling that the amendment was an acquisition.

(c) Non-Cash Benefits.

Once again, I will request submissions on whether an order is sought to include superannuation contributions in the final calculations or whether the parties wish to seek advice concerning whether or not *Chaffey v Santos Ltd* will go further. As I indicated, I find the weekly *non-cash benefits* to be $350/3 x 2. I note the original claim was for $535 which when properly adjusted was $356.77. The Court values the *non-cash benefits* at $233 (after the same adjustment). As indicated was appropriate in submissions, I request that the parties confer and finalise the calculations in the light of these reasons. I have forwarded the decision to the parties today and will list the matter for 10 October at 9.30am, for final orders and any issues concerning costs and/or interest. If this date is not suitable to the parties, I request an approach be made to the Listing Registrar.

Dated this 28th day of September 2006.

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JENNY BLOKLAND
CHIEF MAGISTRATE