CITATION:	*Paul Clarke v Waylexson Pty Ltd t/a Peterson Earthmoving Repairs* [2007] NTMC 074
PARTIES:	PAUL CLARKE v WAYLEXSON PTY LTD t/a PETERSON EARTHMOVING REPAIRS
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20531308
DELIVERED ON:	30 October 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	25, 26, 27 & 28 June 2007
JUDGMENT OF:	Dr JA Lowndes SM

CATCHWORDS:

WORK HEALTH – CONNECTION BETWEEN INJURY AND EMPLOYMENT – INJURY ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT – INTERVAL OR INTERLUE OCCURRING WITHIN AN OVERALL PERIOD OR EPISODE OF WORK – EXPRESS OR IMPLIED INDUCEMENT OR ENCOURAGEMENT TO WORKER TO PARTICIPATE IN A PARTICULAR ACTIVITY – SECTION 4(4) WORK HEALTH ACT – FOR THE PURPOSES OF AND IN CONNECTION WITH TRADE OR BUSINESS

Work Health Act, s4(4)

Hatzimanolis v Ani Corporation (1992) 173 CLR 473 followed
Commonwealth v Oliver (1962) CLR 358 considered
Australian Frontier Holidays Ltd v Williams (1999) 153 FLR 348 considered
Roncevich v Repatriation Commission (2005) 79 ALJR 1366 considered
Work Cover Authority of NSW v Walling & Anor [1998] NSWSC 315 considered
Kennedy v Telstra Corporation (1995) 61 FCR 160 considered
Inverell Shire Council v Lewis (1992) 8 NSWCCR 562 considered
Comcare v Mather (1995) 56 FCR 456 considered
Smith v Australian Woollen Mills Ltd (1933) 50 CLR 504 applied
Goward v The Commonwealth (1957) 97 CLR 355 applied

REPRESENTATION:

Counsel:

Worker:	Mr Grant GC
Employer:	Mr Barr QC

Solicitors:

Worker:	Piper Barrister & Solicitors
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 074
Number of paragraphs:	143

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

No. 20531308

[2007] NTMC 074

BETWEEN:

PAUL JOHN CLARKE
Worker

AND:

WAYLESXON PTY LTD ta PETERSON EARTHMOVING REPAIRS
Employer

REASONS FOR DECISION

(Delivered 30 October 2007)

Dr JA Lowndes SM:

THE NATURE OF THE PROCEEDINGS AND THE PLEADINGS

1. The worker is claiming, pursuant to the provisions of the *Work Health Act*, payments of weekly compensation for loss of earning capacity together with payment of medical, rehabilitation, pharmaceutical and similar expenses, arising out of an alleged work related injury that occurred on 25 July 2005. The employer denies that it is liable to make those payments.

2. The worker alleges that he was employed by the employer as a diesel fitter and was subcontracted to Energy Resources Australia Ltd (ERA) to work at the Ranger Uranium Mine near Jabiru, in the Northern Territory. It is further alleged that the worker was directed by the employer to work to the supervision and under the direction and control of the supervisory staff of ERA, and in particular ERA supervisor Mark Todd, whilst being employed at the Ranger Mine.

3. It is alleged that on the night of 25 July 2005 the worker was injured in a car accident whilst travelling with Mark Todd to go fishing at the East Alligator River. The worker asserts that he sustained injuries comprising a fractured left tibia and a fractured left hip. It is alleged that as a result of those injuries the worker was and continues to be incapacitated for work.

4. The worker alleges the following:

    (i) his injuries were sustained in an interval or interlude occurring within an overall period or episode of work; and

    (ii) the injuries arose out of or in the course of his employment with the employer.

5. The following facts are alleged:

    (i) at the time of the accident the worker was employed to work a cycle of 7 day shifts consisting of 7 days on (comprising 3 consecutive day shifts from 6.00am to 6.00pm and 4 consecutive night shifts from 6.00pm to 6.00am); then 4 days off, then 7 days on (comprising 4 consecutive day shifts from 6.00am to 6.00pm, and 3 consecutive night shifts from 6.00pm to 6.00am), then 3 days off;

    (ii) whilst working a 7 day shift cycle the worker was accommodated by the employer with other workers from Ranger at the Lake View Caravan Park, Jabiru;

    (iii) the worker completed a day shift at 6.00pm on 25 July 2005 and was scheduled to begin a night shift at 6.00pm on 26 July 2005;

    (iv) at about 11.00pm on 25 July 2005 the worker was playing table tennis at the camp when he was expressly or impliedly induced or encouraged by the employer through Mark Todd to travel to the East Alligator River to fish;

    (v) it was a common practice, and a practice accepted by the employer, for workers at the Ranger Mine to engage in recreational activities, including fishing, when changing from day shift to night shift;

6. The employer admits that the worker was employed by the employer as a diesel fitter. However, it does not admit that he was subcontracted to ERA to work at the Ranger Mine.

7. Although the employer admits that it directed the worker to carry out work for ERA, it does not admit that it directed the worker to work to the supervision and under the direction and control of Mark Todd.

8. The employer admits the accident and consequent injuries; though it does not admit the worker's alleged incapacity for work.

9. The employer denies the following:

    (i) that the injuries were sustained in an interval or interlude occurring within an overall period of work; and

    (ii) that the injuries arose out of or in the course of the worker's employment with the employer.

10. The employer asserts that the accident and resultant injuries occurred while the worker was on a social outing to go fishing with friends and/or work colleagues.

11. The employer does not admit that the worker was employed at the relevant time to work the work cycle as alleged by the worker. It does not admit that the worker was accommodated at the Lake View Caravan Park. Nor does it admit that the worker completed a day shift on 25 July 2005 and that he was due to commence night shift at 6.00pm on 26 July 2005.

12. Furthermore, the employer does not admit that the worker was playing table tennis as alleged by the worker. In addition, the employer denies that the worker was expressly or impliedly induced or encouraged by the employer through Todd to go fishing at the East Alligator River. The employer also denies that it was a common practice, and a practice accepted by the employer, for workers at the Ranger Mine to go and engage in recreational activities, including fishing, when changing from day shift to night shift.

13. As disclosed by the pleadings, the two matters at issue are:

(i) whether the injury arose out of or in the course of employment; and

(ii) whether the worker was and continues to be incapacitated for work.

14. However, towards the close of the case it was indicated that the only real issue was whether the injury arose out of or in the course of employment.

THE FACTS IN ISSUE AND FINDINGS OF FACT

The largely uncontested facts

15. As submitted by Mr Grant QC, who appeared for the worker, the background facts are largely uncontested.[1]

16. The following facts are clearly established on the evidence:

(i) In or about mid - 2003 the worker commenced employment with the employer. The worker was originally employed on an operation in the Tanami Desert. In mid - 2004 he was transferred to work at the Ranger Uranium Mine. As at July 2005 the worker was a contract worker engaged on the servicing, maintenance and repair of heavy earthmoving equipment.

(ii) The employer had a contract for specialised repair and labour hire with ERA at Jabiru for a period of 12 months commencing in December 2004. It was pursuant to that contract that the worker was deployed to work at the Ranger Mine.

(iii) Although the worker was employed by the employer, he was supervised by Mark Todd, an ERA supervisor, who had commenced employment with ERA at Jabiru on 21 June 2005. For most of the time there was no employer representative at Ranger, or indeed in the Northern Territory. The worker was subject to very little supervision by his employer. Such supervision appears to have been limited to checking the worker's time sheets and paying his wages into his bank

[1] See [1] of Senior Counsel's written submissions dated 29 June 2007.

account. For all intents and purposes, the employer had ceded supervision of the worker to the ERA supervisor.

(iv) When first employed at the Ranger Mine, the worker worked from Monday to Friday. At some time prior to the accident, his roster changed to seven days on, four days off, seven days on, three days off. With respect to the first seven-day cycle, he worked three day shifts and then four night shifts. In relation to the second seven-day cycle, the worker worked four day shifts and then three night shifts. On days off, he returned to his home in Palmerston.

(v) Each shift was of 12 hours duration. The day shift commenced at 6 a.m. and terminated at 6 p.m. The night shift began at 6 p.m. and finished at 6 a.m.

(vi) Whilst at Ranger Mine, the worker was initially accommodated at the Jabiru Mining Camp. Subsequently, the worker was accommodated at the Lakeview Caravan Park, where he was staying at the time of the accident.

(vii) On 25 July 2005, the worker completed the day shift at 6 p.m. He returned to the Lakeview Caravan Park at about 6:30 p.m. He was on a shift turnaround and due to start night shift at 6 p.m. on 26 July 2005.

(viii) It was common practice at the Ranger Mine for workers on turnaround from day shift to night shift to stay up late into the night so that they awoke from sleep well into the following day to enable their bodies to adjust to the night shift, commencing at 6.00pm that day.

(ix) In the early morning of 26 July 2005, the worker was injured in a motor vehicle accident whilst travelling from Jabiru towards Oenpelli to go fishing with Mark Todd and another worker at Cahill's crossing on the East Alligator River.

Analysis of the evidence in relation to contentious issues

17. There were two contentious issues, which are very much related. The first concerned the immediate circumstances in which the worker went fishing in the early hours of 26 July 2005. The second related to whether or not the employer had induced or encouraged workers, including Mr Clarke, to engage in recreational activities – including fishing – when changing from

day shift to night shift, and more specifically had induced or encouraged the worker to engage in the fishing trip undertaken in the early hours of 26 July 2005.

- **The Fishing Excursion**

18. Three witnesses – Paul Clarke (the worker), Geoffrey Verzeletti and Mark Todd – gave evidence concerning the immediate circumstances surrounding the fishing excursion embarked upon in the early hours of 26 July 2005. Other evidence before the Court touching upon the issue assumed the form of two interviews between the worker and insurance investigators.

19. Mr Barr QC, counsel for the employer, submitted that the Court should reject the worker's account that, in accordance with a common practice at Ranger Mine, he accompanied Mr Todd on the fishing trip in order to stay awake between the shift change and to delay sleep in preparation for the shift starting the next day. Counsel sought to impugn the worker's credibility on a number of grounds:[2]

    - The worker's oral testimony was inconsistent with what he had told the insurance investigator, Steve Kelk, on 14 September 2005 –see Exhibit E 8;

    - In that interview the worker had told Mr Kelk that he had been approached by Mr Todd who wanted to borrow his fishing rod so he could go fishing. He also told Mr Kelk that he decided to accompany Mr Todd and act as "croc spotter";

    - In that interview he had also told Mr Kelk that he accompanied Mr Todd to keep an eye on his rod, and that he was never actually going fishing himself;

    - In that interview the worker suggested that he had gone on the fishing trip to curry favour with Mr Todd, with a view to obtaining direct employment with ERA;

[2] See [28] – [40] of Senior Counsel's written submissions dated 29 June 2007.

- The statements made by the worker during the interview are to be preferred to the worker's oral evidence because those statements "were not contaminated by discussions with any other person about his legal rights and entitlements, arising from the accident in which he was injured", and some of the worker's replies were spontaneous;

- The worker's oral testimony was also inconsistent with what he had told Steve Horsnell, insurance investigator, on 16 November 2007 – see Exhibit W11;

- In that interview, the worker had told Mr Horsnell that Mr Todd had approached him and asked if he could borrow his rod. The worker agreed and said that he went along for the drive and act as croc-spotter. He also told Mr Horsnell that he went along to keep an eye on his rod;

- In that interview the worker mentioned for the first time the element of using the fishing activity to stay awake – a new explanation for the excursion, representing " a shift in emphasis";

- The suggestion that the worker went on the fishing excursion to curry favour with Mr Todd was supported by Exhibit E 7.

20. Mr Grant QC, counsel for the worker, submitted that the worker's oral testimony should be accepted by the Court because "underlying all of the worker's activity and decision making on the night was the fact of the shift change and the practice of staying awake, in the worker's particular case, until 4.00am or so".[3] Mr Grant also submitted that there was no "material inconsistency in the various accounts given by the worker".[4]

21. The Court's task is to determine the reason or reasons why the worker went on the fishing excursion. I consider it more likely than not that he went on the fishing trip for a combination of reasons.

22. In his oral evidence the worker stated that he was approached by Mr Todd who asked him about going fishing. He said that Mr Todd also asked him if he could borrow his rod. The worker agreed to lend his rod to Mr Todd, and

[3] See [47] of Senior Counsel's written submissions dated 29 June 2007.
[4] See [49] of Senior Counsel's written submissions dated 29 June 2007.

said that he would accompany him on the fishing trip and act as "croc-spotter".

23. The worker said that he was interested in accompanying Mr Todd on the trip because it was still early in the night, and he wanted to get his body into rhythm for the next shift.

24. When he was taken to what he had told the investigator, Steve Kelk, about the circumstances leading up to the accident, the worker said that he was in hospital at the time and was "under a lot of drugs and all the rest". He said that he could not recall how exactly the conversation with Mr Todd about fishing began. He could only generalise, saying that Mr Todd wanted to go fishing and he was prepared to lend him his rod.

25. The worker denied the suggestion that he went on the fishing trip to curry favour with Mr Todd, with a view to obtaining direct employment, and that he had lent Mr Todd his rod with that objective in mind. He agreed that the prospects of getting a job with ERA might have been in the back of his mind, but did not agree that that was a factor in him lending his rod to Mr Todd.

26. During cross –examination the worker told the Court that he had previously approached Mr Todd for a job and he had indicated that he would recommend him for a position with ERA. The worker conceded that lending his rod to Mr Todd would assist him in getting a position with ERA.

27. The worker was referred to his solicitor's letter to the insurer dated 5 January 2007 (Exhibit E7). That letter provided the following particulars:

> "In relation to paragraph 9.4 of the Statement of Claim, the facts relied on by the worker in relation to the assertion that the worker was "either expressly or impliedly induced or encouraged" by the employer through Todd to travel to the East Alligator River to fish are as follows:
>
> 9.4.1 Todd asked the worker if he could borrow his fishing rod and gear to go fishing.

9.4.2 By reason of his relationship with Todd through his employment the worker agreed.

9.4.3 The fact of his fishing gear being used by Todd encouraged the worker to go with Todd on the fishing trip, as to do so would mean that he could keep an eye on his gear.

9.4.4 The circumstances of the inducement or encouragement included that it was the practice of the worker, consistent with industry practice, to look for things to do to stay awake on the night of a shift change.

9.4.5 By reason of the above matters the worker considered himself invited to go on the fishing trip with Todd, who was his immediate day to day supervisor, and also a person who may influence his employment prospects in the future as regards being offered direct employment with ERA; and this factor operated as a further inducement for the worker to go fishing."

28. The worker was referred to the second page, paragraph 9.4.5 of that letter which stated that Mr Todd was a person who may influence his employment prospects with ERA. The worker agreed that he had told his solicitors that. He also agreed that that was a factor which operated as a further inducement for him to go fishing.

29. Therefore, the worker's own evidence lays the foundation for there being more than one factor influencing him to accompany Mr Todd on the fishing excursion.

30. When one examines the worker's interview with Mr Kelk on 14 September 2005 (Exhibit E 8), the worker says nothing about Mr Todd asking him to go fishing. He simply has Mr Todd asking him if he could borrow his rod. The worker told Mr Kelk that he agreed to lend his rod to Mr Todd, and went along on the fishing trip to act as "croc – spotter".

31. When it was put to the worker by the investigator that one of the reasons for going fishing that night was to stay up late to try to get a sleep the next day, the worker replied:

> "Basically he (Mr Todd) wanted to go fishing. I think the tides were good at the time and he wanted to go and asked if he could borrow me rod. He's me boss, it's like "Yeah well whatever, no worries".

32. The worker went on to agree that the main reason he went on the fishing trip was for "something to do and just to keep an eye on [his] equipment".

33. During that interview the worker had suggested that he wanted to keep on Mr Todd's good side to improve his prospects of getting a job with ERA.

34. However, it is important not to overlook the fact that during the interview the worker acknowledged the practice of staying awake and the fact that fishing was one means of facilitating that practice: see Question and Answer 42, Question and Answer 55, Question and Answer 74 in Exhibit E8.[5]

35. Once again a mix of reasons for going on the fishing trip are disclosed by Exhibit E 8.

36. The record of interview between the worker and Steve Horsnell on 18 November 2005 (Exhibit W 11) reveals a similar mix of explanations for going on the fishing excursion. However, as submitted by Mr Barr, the answer to Question 143, which proffered an explanation for going fishing with Mr Todd, represented "a shift in emphasis":

> "…keep an eye on my gear and if he wants to borrow my rod and that, yes I'd be like a croc spotter and what you normally do is try and stay awake fairly late so you can sleep during the day so then you're right and you can get up and go to work."

37. The employer submitted that the contents of Exhibit E 8 was the most telling evidence against the worker because it belies his explanation, in the witness box, that he went fishing to stay awake to attune his body to the shift change. However, it is important to note that some of the responses from the worker were elicited by leading questions, and that those responses should

[5] See [49] of Mr Grant's written submissions dated 29 June 2007. The answer to Question 74 is ambiguous. However, the worker's statement "you can sleep during the day when you get home" could be seen as a reference to the practice of "staying up" in preparation for the next shift.

be weighted in the context in which the interview was conducted. That was to some degree conceded by Mr Barr in his written submissions.[6]

38. Although the explanation provided in the interview of 14 September 2005 is the first account available to the Court describing the circumstances in which the worker accompanied Mr Todd on the fishing trip - uncontaminated "by discussions with any other person about his legal rights and entitlements arising from the accident"[7] – and some of the responses therein may have been considered to be spontaneous, the accuracy and reliability of certain statements made by the worker may have been affected by the fact that he was interviewed under less than ideal circumstances. He was in hospital recovering from the accident, and may well have been under the influence of medication. Indeed the worker says that he was "under a lot of drugs and all the rest", and was unclear about what had happened. He said that he could only generalise about the surrounding circumstances.

39. That the responses in the interview conducted on 14 September 2005 (Exhibit E 8) may be inaccurate and unreliable is revealed by evidence from witnesses other than the worker that the worker had been invited to go fishing by Mr Todd. Mr Verzeletti said that both himself and the worker were asked by Mr Todd whether they wanted to go fishing, although he was not sure who was invited first. Mr Todd also gave evidence that he had suggested to both the worker and Mr Verzeletti that they might go fishing, although he was also unsure to whom he spoke first. The evidence of these two witnesses is at odds with the inference drawn from the interview that Mr Todd had not invited the worker to go fishing.

40. There are some consistent threads in the various accounts given by the worker. During the interview on 18 November 2005 and in the witness box the worker said that he went fishing to stay up to attune his body to the shift

[6] See [32] – [33] of Senior Counsel's written submissions dated 29 June 2007.
[7] See [30] of Mr Barr's written submissions dated 29 June 2007.

change. This explanation was also adverted to in the answer to Question 74 in Exhibit E8. That the worker was to act as "croc spotter" was mentioned in both interviews and by the worker in the witness box. The fact of Mr Todd having asked to borrow the worker's rod consistently appeared in the two interviews and the worker's oral testimony. Mr Todd also said that he asked the worker if he could borrow his rod.

41. The conclusion I have reached is that the following factors contributed to the worker's participation in the fishing activity during the early hours of 26 July 2005:

- The worker was invited by Mr Todd to go fishing. The worker accepted that invitation either expressly or by implication;
- Mr Todd asked the worker whether he could borrow his rod. The worker agreed to the lend his rod to Mr Todd;
- The worker went on the fishing trip in order to stay up late to attune his body to the shift change;
- The worker was conscious of keeping on the good side of Mr Todd in order to enhance his prospects of obtaining direct employment with ERA;

42. It seems to me it was a case of killing several "birds with the one stone".

43. Mr Grant appears to have foreseen the possibility that the Court might on the evidence before it conclude that there were multiple reasons why the worker decided to go on the fishing trip.[8]

44. The worker's explanation that he went fishing to stay awake in order to prepare himself for the shift change has a very strong evidential basis. It is established on the evidence that it was common practice in the mining industry, and at Ranger Mine, to stay awake as long as possible during the course of a shift change in order to allow the body to adjust from day shift

[8] See [47] of Senior Counsel's written submissions dated 29 June 2007.

to night shift. Furthermore, the worker had actually been instructed by ERA supervisors to try and stay awake as along as possible during the course of a shift change. One means of doing so, which was adopted by the worker and other workers at the Ranger Mine, was to go fishing. The evidence showed that workers frequently went fishing during the shift change for that purpose. That body of evidence lends credence to the worker's explanation as to why he went fishing with Mr Todd on 26 July 2005.

- **The Attitude of ERA and the Employer to the Activity of Fishing during Shift Change**

45. The following facts are established to the reasonable satisfaction of the Court, on the balance of probabilities:

    1. it was common practice within the mining industry, and in particular at the Ranger Mine, to stay awake for as long as possible during the course of a shift change in order to allow the body to adjust from day shift to night shift;[9]

    2. it was a term of the worker's employment with the employer that the worker would submit to the supervision of the organisation running the operation in which he was posted for the present time, which in this case was ERA. Mr Todd was in a supervisory position vis-a-vis the worker;[10]

    3. the worker had actually been instructed by ERA supervisors, to whom the employer had ceded supervision of its employees, to try and stay awake for as long as possible during the course of a shift change for the purpose referred to in (1) above;[11]

    4. one means of doing so, adopted by the worker and other employees at the Ranger Mine, was to go fishing out of Jabiru and within the boundaries of Kakadu National Park;[12]

    5. the worker was expressly precluded from returning to his home during the seven-day cycle;[13]

[9] See the submission made by Mr Grant at [45] of his written submission dated 29 June 2007.
[10] See the submission made by Mr Grant at [45] of his written submissions dated 29 June 2007.
[11] See the submission made by Mr Grant at [45] of his written submissions dated 29 June 2007.
[12] See the submission made by Mr Grant at [45] of his written submissions dated 29 June 2007.
[13] See the submission made by Mr Grant at [45] of his written submissions dated 29 June 2007.

6. there were limited suitable activities available to fill in time and to assist workers in remaining awake whilst making the advisable adjustment to sleeping during the day;[14]

7. on the night in question, the worker was undertaking a shift change from day shift to night shift.[15]

46. What is in contention is whether, against the backdrop of those established facts, the employer encouraged or induced – either expressly or impliedly – the activity of fishing during shift change and in particular the fishing excursion on 26 July 2005.

47. Mr Dawe, a former Human Resources Manager employed by ERA during 2004/2005, was asked about the attitude of the Ranger Mine management to the participation by Ranger workers in fishing activities in the general sense. He was asked whether there was any specific policy in relation to people going fishing at Jabiru. He replied as follows:

> "None whatsoever. It would have been neither been (sic) supported or discouraged it, so it was just part of the suite of activities that people generally undertook."

48. The witness went on to state that there was no specific policy in relation to whether or not fishing should take place on shift changes.

49. During cross – examination, the following exchange occurred at page 108 of the transcript:

> "Q: …in terms of fishing on shift changes; I take it that you had no direct knowledge whether shift supervisors employed by ERA were aware of that practice or whether they condoned the practice?
>
> A: That's a fairly open ended question as much that it would be naive to say that people when they were not working on site were not going fishing. As I said, fishing was an absolute passion for some of our employees and their reason for actually continuing to work at Jabiru. To say we were unaware that people were going fishing, as I said, that's certainly not the case. We knew that a lot of people fished and fished often.

[14] See the submission made by Mr Grant at [45] of his written submissions dated 29 June 2007.
[15] See the submission made by Mr Grant at [45] of his written submissions dated 29 June 2007.

> Q: …you are not personally aware whether the shift supervisors at the ERA site knew of the practice or condoned the practice of fishing during shift change?
>
> A: I would believe that supervisors were very much aware that some of their crew members went fishing. I'm not too sure again whether it was an issue of condoning or not. It was just something that people did.

50. One can glean from the above evidence that although ERA in general knew that workers engaged in fishing as a recreational activity,[16] the corporation did not encourage or induce the activity as an activity to be engaged in during shift changes.

51. Neither Mr Todd nor any other ERA supervisor should be viewed as being synonymous with the corporation, ERA. Mr Todd and other supervisors were employed by ERA – they were its employees. Mr Dawe gave the following evidence as to the managerial structure of ERA:

> "…Reporting to the managing director were a number of general managers, one of whom was the site general manager and reporting to the site general manager were the operations managers. That included the Health, Safety and Environment Manager, Manager of Mining, Manager of Processing and Manager of Maintenance. I actually reported to the Chief Financial Officer who is also a general manager, he was based in Darwin but I was actually based at the mine site."

52. It is important to keep this corporate structure – and the chain of command - in mind when considering the issue at hand.

53. As Mr Barr points out, "there is no direct evidence, and no other evidence from which an inference can be drawn, that Mr Todd was acting on behalf of ERA" in encouraging Mr Clarke and Mr Verzeletti to go fishing during the early hours of 26 July 2005.[17] There is no evidence that Mr Todd had authority from ERA, either express or implied, to encourage or induce workers, including Mr Clarke, to take part in night fishing activities in Kakadu National Park, as part of ERA's general encouragement to workers

[16] See the evidence of Mr Dawe to the effect that fishing was used as a "hook" to recruit workers by ERA. However, as noted by Mr Barr, this evidence has no relevance to the worker as he was not recruited by ERA.
[17] See [45.2] of Senior Counsel's written submissions dated 29 June 2007.

to defer sleep as long as possible during shift changes. The authority of ERA supervisors was confined to encouraging workers to try and stay awake as long as possible during a shift change – indeed that was the instruction given by ERA supervisors to workers at Ranger Mine.[18]

54. In my opinion, one cannot reasonably infer from that actual or express authority an implied authority, conferred upon Mr Todd or any other ERA supervisor, to encourage or induce workers to achieve the object of staying up as late as possible by going fishing at night in Kakadu National Park and using a company vehicle as a means of transport to and from a particular fishing spot. The bulk of the evidence denies or undermines the existence of such implied authority.

55. The activity, on its face, was not without danger. First it entailed driving at night on Territory roads, an inherently dangerous exercise. Secondly, it involved fishing in waters which are known to be frequented by crocodiles. Indeed the danger was adverted to by the worker who said that he was to act as "croc spotter", on arriving at the fishing destination. The activity is not one which a sensible employer would be minded to encourage or induce.

56. The acceptance agreement signed by Mr Todd (Exhibit E9) at the time of his engagement made it clear that, in relation to his need for transport, he would be given access to a bus providing transport between ERA and Jabiru to coincide with rostered shift start and finish times. There was nothing in the terms of his engagement which permitted company vehicles, in particular the bus, to be used for purposes other than as transport to and from the mine site.

57. Furthermore, Mr Dawe gave the following evidence during an exchange at pages 104 and 105 of the transcript:

[18] See above, p 13.

"Q: Could you tell the Court what the policy, if any there was, in relation to the use of crew transport buses by the employees or contractors at Ranger?

A : Buses were provided to transport people from the accommodation area to and from the mine.

Q: Now from your observation what were the crew buses actually used for at the time prior to Mr Clarke's accident?

A: Well primarily for that they were used for was as I said to transport between the camp and the mine sites and the mine site back to the camp. Occasionally buses may have been used to go to the local shopping centre and places within Jabiru and I think that was an acceptable use at that time.

Q: So were the buses actually allocated to a particular person within a crew? What was the position?

A: No, they were allocated to a crew and essentially it was up to the crew to nominate a driver. So we weren't saying it had to be the same driver at any given time.

Q: Now we've heard some evidence in the proceeding to date… that people would see Ranger vehicles at the Jabiru service station with boats in tow, filling up on fuel or out on the roads towing vehicles. Is there any explanation – I don't think that was evidence directed at the crew vehicles, but at Ranger alleged vehicles – is there any explanation for that consistent with the policies that were in place at the time?

A: It could very well be and by that I mean that without knowing which vehicles were being referred to, but there are vehicles which are allocated to for instance superintendents for their private use which is part of their remuneration package, as actually part of their contract that they do have private use of vehicles. So it's quite probable that vehicles with the Ranger emblem on the side being seen at the service station with boats it was one of those vehicles."

58. At page 108 of the transcript the following exchange occurred:

"Q: I'll also suggest to you that prior to this accident on 26 July 2005, employees and contractors routinely used those minivans for private purposes including the purpose of fishing on shift change. What do you say to that proposition? Are you able to agree with it or not?

A: The fairly honest I can give is I was unaware."

59. The effect of Mr Dawe's evidence is that the company buses were to be used for limited purposes, and although some latitude may have been given to the use of such vehicles, the use of such vehicles to transport workers to and from fishing spots at night was clearly not a permissible use. [19]

60. As submitted by Mr Barr: [20]

> "Corroboration for the absence of authorisation… is the fact that neither the worker nor Mr Verzeletti had previously been out on fishing trips in the ERA crew vehicle.[21] Moreover, as a practical matter, any breakdown in a remote area would have put the use of the vehicle at risk for the next shift change in ERA's operations."

61. Mr Todd was dismissed for the unauthorised use of the company vehicle during the early hours of the morning of 26 July 2007.[22] This is circumstantial evidence -in the nature of retrospectant evidence - that justifies an inference that at the time Mr Todd used the company vehicle the specific use to which he put the vehicle was unauthorised.[23]

62. Mr Dawe's evidence that he interviewed Mr Todd prior to his termination is also illuminating. According to Mr Dawe Mr Todd offered no justification for his use of the vehicle on the night in question.[24] That is somewhat surprising. One would have expected that if ERA had encouraged the use of company vehicles on late night fishing activities Mr Todd would have thrown that back at ERA management.

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[19] See the following submission made by Mr Barr at [45.3] of his written submissions dated 29 June 2007, with which the Court agrees:
" Non –specific evidence of ERA vehicles (non –crew buses) being seen with fishing boats in tow, whether at the boat ramps or filling up with fuel at the Jabiru Service Station, is vague and probably irrelevant, given that crew buses were not involved and the fact that Ranger personnel were permitted to use their employer – supplied vehicles for private purposes – see the evidence of Mr Dawe."

[20] See [45.3] of Mr Barr's written submissions dated 29 June.

[21] In footnote (7) to his submissions, Mr Barr relied upon the following evidence given by Mr Hughes:
" Mr Hughes said in evidence that, as a contractor, he had used the crew bus to go fishing on a shift change, accompanied by a contractor from Skilled and another from Hastings. As a practical issue, any breakdown in a remote area would have put the use of the vehicle at risk for the next shift change. Neither Hughes nor the others were ERA employees at the time of the alleged use. There was no evidence that the use of the vehicle by Hughes was notified to ERA, or that ERA was aware of it. The inference, on all the evidence, is that such use was unauthorised, just as it was in the case of Todd".

[22] See [45.3] of Mr Barr's written submissions dated 29 June 2007.

[23] See Cross On Evidence (Australian Ed, Butterworths 1996) Vol 1 at [1170].

[24] See [45.3] of Mr Barr's written submissions dated 29 June 2007.

63. Exhibit E2 – the light vehicle procedure – points to Mr Todd's use of the vehicle as having been unauthorised. Clause 7.6 of the procedure stated that when undertaking extended company business trips travel is to occur between dawn and dusk; and travel outside of those times must be authorised by the Departmental Manager responsible for the employee or for the vehicle. The provision also stated that "the following should be considered: restrict use of private hire cars used for company business".

64. The prohibition on workers returning home during the seven day cycle does not sit comfortably with the claim that workers were encouraged or induced to head off late at night into Kakadu National Park with all of the risks that attach to long distance driving at night.

65. The circumstance that since the accident the management of ERA had not banned or discouraged workers fishing during shift changes[25] has a neutral effect and bearing on the issue at hand. One cannot properly infer from the subsequent position assumed by ERA in relation to fishing activities during shift changes that ERA had previously encouraged or induced the practice.

66. Having regard to all the evidence, including properly drawn inferences, I cannot be reasonably satisfied on the balance of probabilities that Mr Todd was acting on behalf of ERA when he encouraged or induced the worker and other employees to participate in night fishing activities (including the excursion on 26 July 2007) in order to adjust their bodies for the next shift. The worker carries the onus of proving that set of circumstances. In my opinion the worker has failed to discharge that burden.

67. If Mr Todd was not acting on behalf of ERA, then that largely puts paid to the worker's assertion that he was encouraged or induced by the employer to go on the fishing excursion on 26 July 2005. However, it is still necessary to examine and evaluate Mr Peterson's evidence to determine whether his

[25] See the evidence of Mr Dawe.

evidence in any way supports the worker's contention that the employer induced or encouraged the practice of going fishing at night to defer sleep, notwithstanding that the weight of the evidence is against Mr Todd having had authority from ERA to act as he did. It is also necessary to consider Mr Peterson's evidence just in case I have erred in concluding that Mr Todd was not acting on behalf of ERA.

68. Mr Peterson gave evidence that he went to the Ranger Mine or Jabiru two to three times a month and would stay there maybe three days each time. He did not think that he worked a shift roster on those occasions, nor did he think that he worked at night. He told the Court that his labour hire employees were on site sometimes when he was at the Mine, and he had contact with his employees. Mr Peterson said that he socialized with and talked to his employees during working hours, and maybe met at the mess after work.

69. Mr Peterson told the Court that his labour hire employees were supervised by ERA employees and supervisors. He said that was so because he was not there to supervise them and it was not his role to supervise them – "they were there for labour hire". He stated that because it was a labour hire service the employees were subject to the direction and supervision of ERA, to which they were hired. He went on to agree that they were subject to the practices that were in place in the ERA workplace and the ERA camp.

70. Mr Peterson told the Court that he had been fishing once or twice during the day. He said that he had received lots of invitations from other people to go fishing, including at night. He said that he had never gone fishing at night.

71. The following exchange occurred at page 98 of the transcript:

> "Q: Did you have any knowledge of the suggested practice of people commonly going out fishing at night time?
>
> A: No, I've never heard of it before.

Q: When did you first come to learn about the suggested practice?

A: The night that Paul had his or the morning after Paul had his accident."

72. Mr Peterson said that he was not aware of men fishing at night, but had heard of "blokes fishing during the day on their days off, but not at night".

73. The following exchange also occurred at page 98 of the transcript:

"Q: Mr Peterson, I wanted to ask you about fishing activities at amongst the people working out at the Ranger mine. Was as far as you were concerned what was the significance of fishing among the people who worked either with you or for you at Ranger?

A: Well I suppose some of the guys went fishing after work on their days off or whatever because they were out there."

The following exchange occurred at pages 98 -99 of the transcript:

"Q: had anything been said to you at anytime about staying up late at night on the shift change in order to if you like to adjust going to work the next day?

A: I think that's just some people's stories, but it's not the way I've heard things.

Q: did any of your men talk to you about the fact that they stayed up late at night on shift change in order to be if you like to adjust their bodies to be able to start a night shift 24 hours later?

A: I think the only reason they were staying up late is because they were obviously partying.

Q: Did anybody suggest to you that their staying up late was because of their desire to have their bodies adjust to starting a night shift the following day?

A: I think that was an excuse.

Q: Did anybody actually say to you that's what they were doing?

A: No.

Q: And in terms of the late night fishing activities did any of your men ever say to you that they were heading off on late night fishing activities

in order to stay up late in order to have their bodies adjust to a night shift 12 or 24 hours later?

A: No, I don't think so. It sounds like rubbish to me.

Q: Did Mr Clarke ever mention to you that he had a practice of staying up late at night and going fishing to adjust his body for the night shift occurring 24 hours later?

A: No, the only thing I ever heard was people staying up partying, not to adjust to night shift.

Q: but as far as you were concerned did you do anything to encourage Mr Clarke or the other men who worked for you to stay up late at night and /or go fishing late at night in order to prepare themselves for starting night shift the next day?

A: No, I didn't.

74. Turning to the evaluation of Mr Peterson's evidence, Mr Grant submitted that the Court could properly disregard Mr Peterson's evidence to the effect that he had never heard of the practice of staying up late during a shift change in order to adjust the body for the impending night shift, as his evidence was inconsistent with the evidence of the other witnesses who collectively have had extensive experience in the mining industry, as well as being inconsistent with the evidence regarding the promotion of that practice by ERA supervisors since early 2005.[26] Senior Counsel further submitted that Mr Peterson's evidence to the effect that workers went on late night fishing excursions in order to stay up to enable their bodies to adjust to night shift sounded like "rubbish" was (1) uninformed, having regard to the plain evidence to the contrary, (2) self-serving and (3) not based on any direct or other evidence disclosed during the course of his testimony.[27]

75. The mere fact of the inconsistency of Mr Peterson's evidence with the evidence of other witnesses and other evidence is not a sufficient basis for

[26] See [58] of Senior Counsel's written submissions dated 29 June 2007. Mr Grant also submitted that Mr Peterson's evidence was inconsistent with Exhibit W 12, which recognised and recommended the practice.
[27] See [59] of Senior Counsel's written submissions dated 29 June 2007.

rejecting Mr Peterson's evidence and finding that he did, in fact, know of the subject practice. Such inconsistency may be no more than a reflection of the state of knowledge of the various witnesses, including Mr Peterson.

76. Mr Peterson may well have been uninformed – the corollary of his lack of knowledge of the practice.

77. To say that Mr Peterson's evidence was self serving is to suggest that he has given evidence with a view to serving or promoting some particular interest or purpose or interest in the outcome of the present proceedings. It was never put to the witness that he had such a purpose or interest.

78. Mr Peterson's evidence that the subject practice was "rubbish" struck me as merely being a demonstrative way of conveying to the Court that he had no knowledge of the practice.

79. Mr Peterson appeared to give inconsistent evidence in relation to one issue, which might be thought to discredit his evidence. He said that he had received invitations to go fishing at night as well as during the day. At the same time he said that he had no knowledge of men going fishing at night. I consider that the evidence is capable of being reconciled on this basis - although he had received invitations to go fishing at night he knew of no actual instances of men engaging in night fishing.

80. In my opinion, Mr Peterson's limited engagement at the Ranger Mine and his limited interaction with labour hire employees, and by reasonable inference limited contact with ERA supervisors, lends support to his assertion that he was not aware of the practice of Ranger employees (including labour hire employees) staying up as long as possible during shift changes and the practice of going fishing at night in order to stay up as long as possible in order to adjust their bodies for the impending night shift.

81. It is important to note that no witness called in these proceedings said that Mr Peterson was aware of the subject practice. Mr Peterson's evidence was

therefore not contradicted by the oral testimony of any other witness. That reinforces my view that Mr Peterson was by and large insulated from the camp environment and its practices, which goes to explain his asserted lack of knowledge of the subject practice.

82. An important issue arises as to the extent to which labour hire employees were subject to the direction and supervision of ERA supervisors, such as Mr Todd. The evidence of Mr Peterson and Mr Dawe differed in relation to that issue.

83. Mr Dawe gave evidence that the labour hire employees were not subject to supervision by ERA supervisors whilst they were in camp. Mr Dawe gave the following evidence:

> "There were expectations of behaviour as everybody who was in ERA accommodation was expected to adhere to and those were around norms of consideration, but certainly not under the supervision of anybody once they were in the camp."

84. He said that whilst they were on the site working they were in the discharge of their employment duties subject to supervision by ERA supervisors.

85. Mr Peterson's evidence suggested that his labour hire employees were subject to supervision by ERA supervisors at both the mine site and the ERA camp.[28]

86. There is, therefore, some uncertainty as to the degree to which the worker was subject to the direction and control of Mr Todd. The evidence indicates that the alleged encouragement given by Mr Todd occurred off site – at the camp - and at a time when the worker may not have been subject to supervision by Mr Todd. This has real implications for the worker's case. The worker's case is that the employer had ceded supervision of its labour hire workers to ERA and its supervisors, and any encouragement or inducement offered by a ERA supervisor could be sheeted back to the

[28] See above, p 20

employer. However, if the worker was encouraged to go fishing at a time when he was not subject to supervision by Mr Todd, then it is difficult to see how that encouragement could properly be attributed to the employer.[29]

87. It follows from the foregoing analysis that, even if I have erred in concluding that Mr Todd was not acting on behalf of ERA, the worker's claim must still fail for the following reasons.

88. Again having regard to all the evidence, including properly drawn inferences, I am not reasonably satisfied on the balance of probabilities that any encouragement given by Mr Todd to the worker, and other labour hire employees, to engage in the fishing excursion on 26 July 2005, occurred during a period when the worker was subject to the direction and control of ERA supervisors. Nor am I reasonably satisfied that Mr Peterson, representing the employer, had knowledge of the worker's (or any of his worker's) engagement in fishing activities on shift changes, and in particular had knowledge of the particular outing on 26 July 2005. [30] Finally, I am not reasonably satisfied that the employer otherwise induced or encouraged the worker to take part in the fishing excursion on 26 July 2005.

89. The worker bears the onus of proof in relation to the above matters. In my opinion, the worker has failed to discharge that onus.

90. I would add that even if Mr Todd had been acting on behalf of ERA and the employer had ceded supervision of the worker to the ERA supervisor both on and off site, then that delegation of the supervisory function would not by itself be sufficient to attribute any encouragement given by Mr Todd to the employer. Given the unusual nature of the activity said to have been encouraged - an activity which would not ordinarily be regarded as being incidental to employment – the employer would have to have had specific

[29] That circumstance would also support the hypothesis that at the time of the encouragement Mr Todd was not acting with the authority of ERA.
[30] See [45.1] of Mr Barr's written submissions dated 29 June 2007.

knowledge of the encouragement or inducement in order for it to be properly attributed to it.

DISCUSSION OF THE APPLICABLE LAW

91. The phrase "in of the course of employment" points to the time, place and circumstance in which an alleged injury was suffered: it refers to a temporal relationship between the employment and the injury.[31]

92. A liberal and flexible interpretation has been given by courts to the expression *Commonwealth v Oliver* (1962) 107 CLR 358 such as to make compensable any injury which arises when what was being done was an "incident" of the employment.[32] The focus of the inquiry is on whether something is incidental to a worker's employment .

93. As pointed out by Mr Grant, the effect of the decision in *Hatzimanolis v ANI Corporation* (1992) 173 CLR 473 has been to significantly liberalise the interpretative approach to the expression "in the course of employment". [33]

94. The relevant aspects of the ratio of *Hatzimanolis v ANI Corporation* (supra at 483) are set out below:

> "For the purposes of worker's compensation law, an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring within an overall period or episode of work than when it has been sustained in the interval between two discrete periods of work.
>
> ….Indeed, the modern law cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of the employment. Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred

[31] See *Kavanagh v Commonwealth* (1960) 103 CLR 547.
[32] See *Australian Frontier Holidays Ltd v Williams* (1999) 153 FLR 348.
[33] See [41] of Senior Counsel's written submissions dted 29 June 2007.

> at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment and not merely to the circumstances to the particular occasion out of which the injury to the employee has arisen."

95. In his written submissions dated 29 June 2007 at [38] Mr Grant argued that there need only be a "slight connection" between the relevant activities in which a worker is injured and the employment. Senior Counsel relied upon the observation made by Martin CJ in *Australian Frontier Holidays Ltd v Williams* (1999) 153 FLR 348. Mr Grant submitted as follows:

> "As Martin CJ observed in *Australian Frontier Holidays Ltd v Williams* (supra), the courts accord the phrase a liberal and flexible interpretation so as to compensate injury which arises when the activity was an "incident" of employment, and a slight connection will suffice.[34]

96. Mr Barr argued that the worker's reliance upon "slight connection" was based upon a misunderstanding of the discussion of "slight connection" in *Commonwealth v Oliver* (1962) 107 CLR 358:

> "…the reference to "slight connection will suffice" must be understood in its context, which Martin CJ did not make clear in *Williams*, and which the worker's submissions appear to have overlooked. The relevant passage from the decision of Menzies J in *Commonwealth v Oliver* 107 CLR 353 at 362 is extracted below:
>
> > in Kavanagh v the Commonwealth … it was held that personal injury by accident which occurs to an employee while performing his duties or whilst doing something incidental thereto arises in the course of his employment and although the judgment of the majority in *Davidson v Mould* does not go to the extent of establishing the proposition which the learned Chief Justice said had not been finally established, it does show that where an employee is upon his employer's premises with his employer's sanction during a break in his employment and is injured, what seems to be a very slight connection between what he was doing at the time of his injury and his employment is sufficient to bring the injury within the course of his employment.
>
> The notion that a "slight connection will suffice" is not a principle of general application, but in its proper context is referable to and dependant on presence at the workplace. The "throwaway line" in the decision of

[34] See [64] of Senior Counsel's written submissions dated 29 June 2007.

> Martin CJ in Australian Frontier Holidays v Williams relied on by the worker is not relevant here."[35]

97. I consider that the submission made by Mr Barr accurately reflects the law.

98. Mr Grant submitted that in the interpretation of the phrase "in the course of employment" the connection with employment does not have to be the sole reason for which the worker was undertaking the activity.[36] In support of that proposition Counsel relied on the following observations made by the High Court in *Roncevich v Repatriation Commission* (2005) 79 ALJR 1366 at [27]:

> "A casual link alone or a causal connection is capable of satisfying the test of attributability without any qualification conveyed by such terms as sole, dominant, direct or proximate.

99. As pointed out by Mr Barr, the proposition advanced by Mr Grant is contentious and it is by no means clear that the observations in *Roncevich* (supra) have application to the interpretation of the phrase "in the course of employment". Mr Barr's submissions are extracted below:

> "At paragraph 48 of the worker's submissions, in answering the employer's argument (employer's submissions paragraphs 41-43) that the worker's reason for undertaking the fishing trip was to obtain direct employment with ERA (and hence as a matter of law remove the trip from the "course of employment" with the within employer) senior counsel for the worker argues that the connection with employment "does not have to be the sole reason for which the worker was undertaking the activity" and then referred to *Roncevich v Repatriation Commission*.
>
> In that case, the relevant legislation provided a pension entitlement in the event of incapacity from a "defence –caused injury". A "defence –caused injury" was one which "arose out of, or was attributable to, any defence service."
>
> However, the decision of the High Court was concerned with a causative connection with defence service ("arising out of"), not a temporal connection. The relevant common law legal principle is that an injury need not have one cause only and may have several: some negligence related, some not. Even if only one of several causes of injury were

[35] See[14]- [15] of Mr Barr's written submissions in reply dated 10 July 2007.
[36] Senior Counsel made this submission in case the Court found that the worker had more than one reason for engaging in the fishing activity.

negligence, and even then not the principal cause, the plaintiff was still entitled to recover. Paragraph 27 must be read in this context:

> [27] The use disjunctively in s 70(5) of the expressions "arose out of" and "attributable" manifest a legislative intention to give "defence – caused" a broad meaning, and certainly one not necessary to be circumscribed by considerations such as whether the relevant act of the appellant was one that he was obliged to do as a soldier. A causal link alone or a causal connexion is capable of satisfying a test of attributability without any qualifications conveyed by such terms as sole, dominant, direct or proximate.

It can be seen, therefore, that the High Court's decision says nothing about the concept of "course of employment", but rather speaks of causation under the particular provisions of the relevant Act. It does not provide an answer to the employer's case that the worker's purpose or motive for undertaking the trip took it outside the course of the worker's employment with the employer [As to why the worker's injury did not arise "out of his employment", see the employer's written submissions paragraphs 53-56]."[37]

100. In my view, the decision in *Roncevich* (supra) is based on a particular statutory provision referable to a causal connection with employment – and not a temporal connection with employment - and therefore can not be relied upon in support of the worker's claim.

101. Mr Grant submitted that *Work Cover Authority of New South Wales v Walling & Anor* [1998] NSWSC 315 is authority for the proposition that the requirement of inducement or encouragement is not essential to a finding that injury arose in the course of employment.

102. Mr Grant dealt with the facts and legal conclusions in that case:

> "That case involved a worker who was employed in a remote area as a driller's offsider. The drilling rigs were kept on a property, and on that property a cottage was leased to the employer in which the worker and other employees were accommodated. On the morning of the accident, the worker performed work on the rig, and finished work at midday to entertain a female friend who had arranged to visit. The worker was showing off his trail bike during the course of the visit when he fell from the bike and suffered injury.

[37] See [16] – [19] of Senior Counsel's written submissions dated 10 July 2007.

> Although there was no suggestion that the activity of entertaining the female friend or riding his trail bike was induced or encouraged by the employer, the Court of Appeal held that the requirement of inducement or encouragement was not necessary given that, amongst other factors: (1) the worker was living and working away from his usual residence; (2) the injury occurred during an interval or interlude in the worker's employment at his place of employment during an overall period of work (commencing upon his arrival from his usual residence); (3) the isolated location; (4) the nature of the employment and (5) the extended working hours."[38]

103. In the Employer's submissions in reply dated 10 July 2007, Mr Barr addressed Mr Grant's argument that the requirement of inducement or encouragement is not essential to a finding that the injury arose in the course of employment.

104. After observing that Mr Grant's propostion was, on its face, contrary to the High Court's decision in *Hatzimanolis*, Mr Barr made the following submission:

> "The decision of the Compensation Court of New South Wales which gave rise to the Court of Appeal's decision referred to by counsel for the worker was *Walling v Mitchell Drilling Contractors Pty Ltd and Another* … In that decision, Truss J made the following statement: -
>
> > Having considered the authorities I have come to the conclusion that, where a worker who is working at a particular locality away from his normal residence is injured during an interval or interlude at his place of employment, temporary residence or travelling between the two, the majority decision in *Hatzimanolis* does not require that the activity in which he is engaged at that time be incidental to his employment or temporary residence or that the worker be induced or encouraged by the employer to spend such interval or interlude in a particular way. In my view this latter requirement only applies to a situation where the interval or interlude is spent away from the place of employment or temporary residence." [39]

105. Mr Barr went on to point out that the Court of Appeal in *Walling* (supra) upheld the decision of Truss CCJ, saying:

> "In our view, Truss CCJ was entitled to conclude that it was no impediment to an award that the activity of trail bike riding was neither induced or encouraged by the employer. The injury occurred during an interval or interlude in his employment at a place which was contiguous to

[38] See [62] – [63] of Senior Counsel's written submissions dated 29 June 2007.
[39] See [4] of Senior Counsel's written submissions dated 10 July 2007.

his place of employment such that there was no real issue that he was at his place of employment. In our opinion, in this case, that is probably sufficient to find that the injury occurred in the course of employment."[40]

106. Mr Barr went on to make the following submission:

"It is therefore not correct to say that *Walling* is authority for the proposition that the requirement of inducement or encouragement is not essential to a finding that injury arose in the course of employment (paragraph 64 of the worker's submissions). However, consistent with the employer's arguments, *Walling* is authority for the proposition that the requirement of inducement or encouragement is not essential to a finding that injury arose in the course of employment if the worker sustains his injury during an interval or interlude within an overall period of work and if the worker is injured at his place of employment (or, I suggest at his place of temporary residence).

At paragraph 61 of the worker's submissions, senior counsel for the worker referred to the decision of the Federal Court (Tamberlin J) in *Kennedy v Telstra Corporation* (1995) 61 FCR 160. In that case, the worker was injured at his place of "temporary residence" when he was assaulted in the carpark of his motel when returning after dinner and drinks at a hotel in the same country town. I set out the relevant passages from the decision (at 169) below:

> In my view, it is important that the injury occurred within the boundaries and the curtilage of the Adelong Motel, at a time when the employee was in the course of returning to his room.
>
> This is not a case where the employee was injured at a cinema or club or on other premises away form the place of accommodation which he selected. He stayed at the motel for the purpose of carrying out the duties of his employment. It is true that it was not necessary for him at stay at Narrabri, but it was not unreasonable for him to do so…
>
> …I consider that the injury occurred during an interval or interlude within an overall period or episode of work. The evidence indicates that the employer had impliedly encouraged the employee to spend that interval or interlude at a place of accommodation within a reasonable travelling distance of his place of work …
>
> …I do not think the excursion to the Clubhouse Hotel took the applicant outside the interval or interlude of employment. The injury occurred at the premises where the employee was staying for the purpose of attending and carrying out his work and at a time he was simply returning to his room…

[40] See [5] of Senior Counsel's written submissions dated 10 July 2007.

As can be clearly seen, the place of injury was a determining factor in the Kennedy decision. This is emphasized by the first and second paragraphs extracted above. The Kennedy decision is consistent with the employer's arguments. The equivalent situation in the Clarke case would be if the worker were injured at his employer – provided accommodation – something which the employer would probably have to concede as being in the course of employment.

At paragraph 71 of the worker's submissions, senior counsel for the worker referred to the decision of Handley JA of the NSW Court of Appeal in Inverell Shire Council v Lewis (1992) 8 NSWCCR 562. The majority in that case comprised Handley JA, who wrote the lead judgment, and Clark JA. It was acknowledged that the worker's injuries were sustained during an interval between periods of training while he was in the caravan park where he was temporarily housed by the employer. However, the essential reasoning of Handley JA, like that of Tamberlin J, in Kennedy, was "place-based":

> The findings of the trial Judge demonstrate that there is no question of "gross misconduct" in this case. The employer had induced or encouraged the worker to reside in the caravan park during his course and the injury occurred in that place. Although the employer did not induce or encourage the worker to visit Mr Davis' caravan that evening to have a cup of coffee in the company of others, I can see no basis for limiting the principle in this way. Social visits to other caravans in the park such as that occupied by Mr Davis were a reasonable and foreseeable incident of his residence in the park…
>
> In this case the worker was injured while he was at "the particular place" where his employer had encouraged him to stay, and while he was doing something that was reasonably incidental to his temporary residence there. Accordingly in my opinion Manser CCJ did not err in finding that the worker's injuries arose in the course of his employment.

At paragraph 80 of the worker's submissions, senior counsel for the worker referred to the decision of the NSW Court of Appeal in McCurry v Lamb (1992) 8 NSWCCR 556, in the context of his argument that improper conduct by Mr Todd does not bear on the worker's eligibility for compensation.[41] However, this is yet another "place-based" decision. The worker was shot and seriously injured while asleep in the jackeroos' cottage on a sheep station 70 miles north of Deniliquin. The trial Judge found that the worker was permitted or authorized to reside on the station and was encouraged to do so by the provision of free accommodation and meals. He was not confined to any particular place for sleeping purposes. The employer did not object to him sleeping in the jackeroos' cottage. The

[41] In a footnote to his submission Mr Barr added:
" In any event, this misstates the employer's case. The employer argues that Todd's unauthorised use of the crew vehicle is evidence that no –one on behalf of the employer or ERA encouraged or induced the excursion – see paragraphs 44-46 of the employer's submissions".

essential reasoning of Handley JA, again the lead judgment, was stated in these terms:

> …for the reasons given in Inverell Shire Council v Lewis, the worker sustained his injuries "at a particular place", namely the camp, where the employer had induced or encouraged him to stay, and while he was doing something that was reasonably incidental to his temporary residence there, namely sleeping. No question of gross misconduct arises…Accordingly, the worker received his injuries in the course of his employment."[42]

107. Once again I find myself in agreement with Mr Barr. Although the requirement of inducement or encouragement is not essential to a finding that an injury arose in the course of employment, that requirement can only be dispensed with under the circumstances set in the various authorities considered and discussed by Mr Barr.

108. In his submissions Mr Grant relied upon the decision in *Comcare v Mather* (1995) 56 FCR 456 for the two purposes.[43]

109. First, he relied upon the decision as authority for the proposition that in the present case it is not necessary for the worker to establish that the employer provided any specific authorisation in relation to the East Alligator on the particular night. He referred to the following observation made by Keifel J in *Comcare v Mather* (supra):

> "If, as the applicant contends, *Hatzimanolis* requires that the employee must be directed to an identified place or that authority be given for an identified activity, then there would not be a case for compensation under the Act. But nothing in the review of the cases from which the statement of principles is extracted, nor in the expression of the principles, leads me to that conclusion."[44]

110. Mr Grant then went on to observe:

> "In that case, the Court found that an injury sustained by a soldier on local leave while on a three month camp was compensable despite the fact that the activity in question and the place at which it was undertaken were not the subject of any express discussion with the employer, and the injury

[42] See [6] –[10] of Senior Counsel's written dated 10 July 2007.
[43] See [69] – [70] and [74] –[75] of Senior Counsel's written submissions dated 29 June 2007.
[44] See [69] of Senior Counsel's written submissions dated 29 June 2007.

> was not sustained in the place at which the worker was accommodated. This is consistent with Toohey J's formulation in *Hatzimanolis* (at 490) to the effect that the course of employment in such circumstances also extends to acts which the worker may be "allowed" to do.[45]

111. Secondly, Mr Grant relied upon the decision as authority for the proposition that the requirement of inducement or encouragement – either express or implied – does not require the worker "to establish positive conduct on the part of the employer bearing a direct nexus to the activities being undertaken at the time of the injury".[46] In that regard Mr Grant relied upon the following conclusion reached by Keifel J in *Comcare v Mather* (supra):

> "In my view "encouragement" is not to be taken as of narrow meaning and limited to some positive action and in specific terms which might lead the employee to undertake a particular activity or attend at a particular place. The two particular cases which their Honours in Hatzimanolis were concerned with in this context, The Commonwealth v Oliver (1962) 107 CLR 353 and Danvers v Commissioner for Railways (NSW) (1969) 122 CLR 529 involved, respectively, an expectation of presence coupled with a recognized practice and making available facilities for an employee's use. The facts in Hatzimanolis did not require the Court to discuss in greater detail what was encompassed by the phrase "induced or encouraged". To be said to have, expressly or impliedly, induced or encouraged an undertaking or presence at some location could refer to, by way of example only, requirements, suggestions, recognition of practices, fostering of participation, or providing assistance and may include the exercise of discretion or choice on the part of the employee. Further attempt at definition would be fruitless. In each case, the question will be whether the attendance at the place at which or the undertaking in which the employee is involved when injured in an interval falls within the ambit of statements, acts or conduct made by the employer and what may be said to logically arise from them. And in each case, importantly, they must be viewed in the background of the particular employment and the circumstances in which the employer is then placed."[47]

112. Mr Grant then made this submission:

> "The Court in that case observed further (at 463B) that "the terms of the inducement or encouragement here were such as to leave the soldiers with some choice as to location and activity to be undertaken during the

[45] See [69] of Senior Counsel's written submissions dated 29 June 2007. Counsel stated that that principle was also reflected in *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562.
[46] See [74} of Senior Counsel's written submissions dated 29 June 2007.
[47] See [74] of Senior Counsel's written submissions dated 29 June 2007.

interval in question". All that was required was that the employer "might expect or foresee" participation in the relevant activity".[48]

113. Mr Barr made the following submissions in relation to the worker's reliance on the decision in *Comcare v Mather* (supra):

> "The facts in that case matter (sic) were quite different in (sic) those in the present:- there the context was military; the men affected were on "authorized local leave" (but subject to recall to duty). The specific purpose of such leave was to give the soldiers time away from their camp, in connection with which the army provided transport to take soldiers on leave to Darwin casino and another hotel. There was no specific excursion organized by the employer (as in *Hatzimanolis* or as alleged in the present case); apart from the transport drop –off, the soldiers had a choice of activities as varied as the distractions of the local area in which they found themselves. In such circumstances, it would be hard not to characterize any lawful activity in which the soldiers engaged as being in the course of their employment because, on the facts found by the Tribunal below, there was "an express or implied encouragement or inducement by the Army to take local leave outside of the confines of the camp pursuing recreational activities". This would include in that case the activity of drinking, since all transport provided was to licensed establishments.
>
> In simple summary, (1) the Army encouraged its soldiers to leave camp for recreation, and, by reasonable inference, (2) it positively induced soldiers on leave to drink, by driving them to licensed establishments. Neither of those essential conditions precedent to the outcome in Comcare v Mather are present in this case. Recreational facilities provided by ERA were in Jabiru itself, and there was no encouragement to go anywhere else for recreation; nor was transport on the occasion or otherwise provided by the employer or ERA.
>
> The interpretation, re-interpretation or extension of the principles stated in Hatzimanolis by Keifel J in Comcare v Mather at 462F-G must be seen in the context of the facts of that case. The reference to the "exercise of discretion or choice" (relied on by the worker in this case) was a reference to the soldiers being able to decide what they did after being transported out of and away from their camp."[49]

114. The Court accepts that in certain circumstances – such as prevailed in *Comcare v Mather* – it is not necessary for a worker to establish that the employer provided any specific authorisation in relation to a particular

[48] See [75] of Senior Counsel's written submissions dated 29 June 2007.
[49] See [50] – [52] of Senior Counsel's written submissions dated 29 June 2007.

activity. The Court also accepts that in the circumstances that existed in *Comcare v Mather* the requirement of inducement or encouragement does not require a worker to "establish positive conduct on the part of the employer bearing a nexus to the activities being undertaken at the time of the injury". The application of those principles depends upon the particular facts of the case, including the general nature, terms and conditions of the employment.

THE APPLICATION OF THE LAW TO THE FACTS

The fishing excursion

115. In my opinion, the principle enunciated in *Roncevich v Repatriation Commission* (supra), which was concerned with the causal connection with employment cannot be extrapolated to the present context, which is concerned with the temporal connection with employment. Although the two concepts involve the application of similar methodologies, they are not subject to the same set of principles. Accordingly, I reject the submission made by Mr Grant.[50]

116. At the same time, I do not agree with the following submission made by Mr Barr:

> "It would be contrary to basic principle for the Court to find that the worker was in the course of his employment with Peterson when he accompanied Todd on the fishing excursion. Given the stated reason, the excursion could not be incidental to the workers' work, or something the worker was 'reasonably required, expected or authorized to do in order to carry out his duties".

117. That argument must be rejected. In my opinion, it matters not that the worker might have had multiple reasons for going on the fishing trip. What counts is that the practice of staying up late by going fishing was encouraged or induced by the employer. If there were such encouragement

[50] See above, p 28

or inducement, then the worker's participation in the fishing activity occurred in the course of his employment, regardless of the number of the motives he had for engaging in the activity. Whether he went on the fishing excursion to curry favour with Mr Todd or to keep an eye on his rod is not to the point. All that matters is that one of his reasons for engaging in the activity was that he wanted to stay up late to adjust his body for the impending shift change. It need not be the sole or main reason for engaging in the encouraged or induced activity. I would even go so far as to suggest that it would have been sufficient satisfaction of the relevant test if the worker went on the fishing excursion in the knowledge that the subject activity had been encouraged or induced by the employer.

118. Therefore, the worker's claim should not fail on the basis advanced by Mr Barr or any other basis.

The encouragement or inducement of the fishing excursion

119. The facts as found in the present case do not support the worker's contention that his injuries arose in the course of his employment. The worker's claim is not supported by the applicable law. The relevant case law indicates that the injury suffered by the worker was sustained outside the course of his employment.

120. Although the period of the worker's shift change amounted to an interval or interlude occurring within an overall period or episode or work – rather than an interval between two discrete periods of work – the fishing excursion on 26 July 2005 was not in the course of the worker's employment.[51]

121. The present case is very much unlike the situation in *Hatzimanolis* (supra).[52] The distinguishing features were identified by Mr Barr.[53] The supervisor in *Hatzimanolis* was "the principal supervisor at the remote site and the

[51] See [41] of Mr Barr's written submissions dated 29 June 2007.
[52] See [45.2] of Mr Barr's written submissions dated 29 June 2007.
[53] See [45.2] of Senior Counsel's written submissions dated 29 June 2007.

spokesman for the employer in terms of explaining and interpreting to the workers the general nature terms and conditions of the employment in the remote locality".[54] The supervisor had "organized and provided company vehicle and food for the 800 km expedition, and was therefore found to have been acting on behalf of the employer".[55] In the present case there was no "organization" to speak of – neither ERA nor the employer were involved. The particular fishing excursion undertaken on 26 July 2007 was spontaneous – on "the spur of the moment".[56] Unlike the supervisor in *Hatzimanolis* Mr Todd, in acting as he did, had neither actual or implied authority to act on behalf of ERA.

122. In my opinion, the worker in the present case is not able to rely upon the strand of authority which maintains the proposition that the requirement of encouragement or inducement is not essential to a finding that injury arose in the course of employment. That proposition represents the law only in relation to the "place- based cases", like *Walling* (supra). The present case is not one of those cases. The worker was not injured at his <u>place of employment or temporary residence</u> during an interval or interlude within an overall period of employment.

123. Nor, in my opinion, can the worker invoke the assistance of authorities, such as *Comcare v Mather* (supra) and *Inverell Shire Council v Lewis* (supra), which hold that it is not necessary for an employer to induce or encourage the particular activity with specificity.

124. It is essential to bear in mind that the principle enunciated in those two cases was based on the particular facts of the case.

[54] See [45.2] of Mr Barr's written submissions dated 29 June 2007.
[55] See [45.2] of Mr Barr's written submissions dated 29 June 2007.
[56] See [45.2] of Mr Barr's written submissions dated 29 June 2007.

125. In the former case, there was an express or implied authority by the Army to soldiers to take local leave outside the confines of the camp and to pursue recreational activities. Although no specific recreational activity was encouraged or induced within the parameters of the general encouragement given to soldiers to take leave outside the camp, the activity of drinking was by implication encouraged or induced. Any other lawful recreational activity was similarly encouraged or induced. In the circumstances of that case, it is understandable why the Court did not require there to be an encouragement of the specific activity being undertaken by the worker at the time of injury.

126. In the second case, the employer had induced or encouraged the worker to reside in the caravan park during his course and the injury occurred in that place. The worker was injured while he was at "the particular place" where his employer had encouraged him to stay, and while he was undertaking an activity that was reasonably incidental to his temporary residence there. Again, it is entirely understandable why the Court did not require there to be an encouragement of the specific activity.

127. The present case is immediately distinguishable from those two cases. Although ERA induced or encouraged workers to defer sleep during the course of a shift change, it did not encourage or induce workers to leave the confines of the camp or the immediate environs of Jabiru township and to be at a particular place – for example one of the fishing spots frequented by workers - or to take up temporary residence at a particular location. That is the lacuna in the worker's argument.

128. In my opinion, the worker has failed to establish on the balance of probabilities that the alleged injury arose in the course of his employment.

THE WORKERS ALTERNATIVE CASE

129. In the alternative the worker sought to rely on two further arguments. The first postulated that the injury suffered by the worker arose of the worker's

employment. The second was predicated upon the provisions of s 4.4 of the *Work Health Act*.

The injury arose out of the employment

130. As stated in *Smith v Australian Woollen Mills Ltd* (1933) 50 CLR 504 at 517 – 518 the concept of "arising out of employment" imports a causal connection with the employment, but it does not necessitate direct or physical causation:

> "Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? It must arise out of the work which the worker is employed to do – out of his service…
>
> An injury which arises directly out of circumstances encountered because to encounter them falls within the scope of employment is an injury arising out of the employment."[57]

131. Further as stated by Dixon CJ in *Goward v The Commonwealth* (1957) 97 CLR 355 at 364:

> "The question is one of cause, but it is not enough to point to antecedent situations in the absence of which there could not have been an accident of the description involved. It is correct no doubt that if the camp had not been near a railway and if the deceased had not been living in the camp the accident would not have happened. But these are no more than antecedent conditions which are preliminary to, but hardly operative causes of, the accident." [58]

132. Mr Barr made the following submission:

> "The road accident which caused the worker's injury occurred during the 24 hour rest and recreation period on a shift change; it may be accepted (for present purposes) that the road accident would not have happened unless the worker and his shift crew were out on the road, they having decided not to go to bed at approximately midnight or at 1.00am, whenever it was they finished drinking, playing pool and table tennis, and socialising on a shift change. However, although these matters satisfy the "but for" test of causation, ie are "antecedent situations in the absence of which there could not have been an accident of the description involved",

[57] See [54] of Mr Barr's written submissions dated 29 June 2007.
[58] See [55] of Mr Barr's written submissions dated 29 June 2007.

> they are not operative causes of the injury, as spoken of by Dixon CJ in *Goward*."[59]

133. It is incumbent upon the worker to establish that his injury arose out of his employment by establishing a causal connection between his injury and his employment. In my opinion, on the evidence before the Court the worker has failed to discharge that onus.

The extension provisions of s 4(4) of the Work Health Act

134. At paragraph 83 of his written submissions, Mr Grant argued that s 4(4) of the *Work Health Act* provided "an independent statutory basis for the worker's claim".

135. Section 4(4) of the Act provides as follows:

> "An injury shall be deemed to arise out of or in the course of employment even though at the time that the injury occurred, the worker was acting –
>
> (a) in contravention of a regulation (whether by or under an Act or otherwise) applicable to the work in which he or she is employed; or
>
> (b) without instructions from his or her employer,
>
> if the act was done by the worker for the purposes of and in connection with his or her employer's trade or business."

136. Mr Grant submitted that "the activity in question was undertaken for the purpose of the shift change and in connection with the employer's business as a labour hire operation".[60]

137. Senior Counsel also made the following submission:

> "This provision (referring to s 4(4)) also undermines the employer's proposition that some express instruction or encouragement was required in order for the activity to be in the course of employment. As Heery J observed in Roncevich v Repatriation Commission (2003) 75 ALD 345 at para [37]:

[59] See [56] of Mr Barr's written submissions dated 29 June 2007.
[60] See [83] of Senior Counsel's written submissions dated 29 June 2007.

> It might also be said that if injury can only arise out of or be attributable to defence service if it occurs when the claimant is doing something which he or she is ordered to do, it is strange that the Act contemplates injury being compensable even when it arises out of disobedience of an order, as long as there has not been a serious default or wilful act or a serious breach of discipline." [61]

138. Mr Grant went on to submit as follows:

> "... on the *Hatzimanolis* formulation, if the Court finds that the injury took place in an interval in an overall period of work…the injury will be in the course of employment if it occurred whilst engaged in a recognized practice "unless the employee was guilty of gross misconduct taking him or her outside the course of employment". There can be no suggestion on the evidence that the worker was guilty of gross misconduct on the night in question."[62]

139. Finally, Senior Counsel submitted that the provisions of subsections 4(1), (2) and (2A) are not relevant to the circumstances of the present case.[63]

140. Mr Barr made the following submissions in reply:

> "Sub- section 4(4) of the *Work Health Act* is in almost identical terms to s 8(1) *Workers Compensation Act 1958* (Vic). The original purpose of that provision was to prevent the somewhat arbitrary exclusion of accidents from being categorized as "arising out of and in the course of employment" where the worker had done some prohibited act – see the discussion in Hill and Bingeman *Principles of the Law of Workers Compensation* Law Book Company, 1981 at pp 60-63.
>
> A similar provision in the New South Wales *Workers Compensation Act 1987*, s4(1), was considered and discussed by Priestley JA in *Higgins v Galibal Pty Ltd Trading as Hotel NIkko Darling Harbour* (1998) 45 NSWLR 45 at 57 in these terms: -
>
> > It seems to me that provisions in workers compensation legislation in terms such as s 14 were enacted on the footing that the authorities that had denied compensation to workers in the three types of cases described, operated too harshly when the injury which would have been in the course of employment but for those authorities was one resulting in the death or serious and permanent disablement of the worker. Accordingly, the view was taken that in the two types of cases now provided for in New South Wales by s 14(1), so long as the act had been done for the purposes of or in connection with the employer's trade or business, the injury should still be regarded as one in the course of the

[61] This observation was cited with approval by the High Court in *Roncevich v Repatriation Commission*.
[62] See [86] of Senior Counsel's written submissions dated 29 June 2007.
[63] See [88] –[89] of Mr Grant's written submissions dated 29 June 2007.

> worker's employment, and compensation should be payable notwithstanding that the case law would otherwise have brought about the contrary result.
>
> This is not a case where the injury would have been in the course of employment but for the old authorities. More significantly, however, no relevant act or activity causing injury was "done by the worker for the purposes of and in connection with his or her employer's trade or business (cf para 84 of the worker's submissions).[64]

141. I respectfully agree with and adopt the submission made by Mr Barr regarding the worker's reliance upon s 4(4) of the *Work Health Act* .The extension provision in s 4(4) of the Act "does not apply to assist the worker in this circumstance".[65] The precondition for the operation of the deeming provision is not present. The evidence does not establish that the fishing excursion undertaken on 26 July 2005 had a temporal connection with the worker's employment, that is to say, that it was undertaken "for the purposes of and in connection with the worker's employment". The weight of the evidence points to the fishing excursion being a social outing or recreational activity which was neither for the purposes of, nor connected, with his employment.

THE COURT'S DETERMINATION

142. The worker's claim is dismissed.

143. I will hear the parties in due course in relation to costs.

Dated this 30th day of October 2007

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE

[64] See [22] – [24] of Senior Counsel's written submissions dated 10 July 2007.
[65] See [43] of Mr Barr's written submissions dated 29 June 2007.