CITATION:	*Saitz v Northern Territory of Australia* [2008] NTMC 014
PARTIES:	SAITZ v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Darwin
FILE NO(s):	20514933
DELIVERED ON:	25 February 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	31 January 2008
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORK HEALTH – NORMAL WEEKLY EARNINGS – HIGHER DUTIES ALLOWANCE – INCLUSION OF HIGHER DUTIES ALLOWANCE IN NORMAL WEEKLY EARNINGS – THE MEANING OF "ALLOWANCE" AS CONTEMPLATED BY S 49(2) *WORK HEALTH ACT* - "BOTTOM UP" LEGAL REASONING – OBJECT OR PURPOSE OF THE *WORK HEALTH* ACT – STATUTORY INTERPRETATION AND THE RISK OF INJUSTICE – BENEFICIAL OR REMEDIAL LEGISLATION

SS 49(1) & (2) *WORK HEALTH ACT*
BY-LAW 23 PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT BY-LAWS

Murwangi Aboriginal Corporation v Carroll (2002) 12 NTLR 121 applied
AAT Kings Tours Pty Ltd v Hughes (1994) 4 NTLR 185 applied
Mutual Acceptance Co Ltd v Federal Commissioner of Taxation (1944) 169 CLR 389 applied
Fox v Palumpa Station Pty Ltd (1999) NTMC 024 applied
Newmont Australia Ltd v Kastelein [2007] NTSC 42 considered
Rofin Australia Pty Ltd v Newton (1997) 78 IR 78 applied
Mills v Meeking & Anor (1989-1990) 169 CLR 214 applied
Kingston v Keprese Pty Ltd (1987) 11 NSWLR 404 applied
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 applied
Rose v Secretary, Department of Social Security (1990) 92 ALR 521 considered

REPRESENTATION:

Counsel:

Worker:	Mr McDonald QC
Employer:	Mr Barr QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2008] NTMC 014
Number of paragraphs:	132

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

No. 20514933

[2008] NTMC 014

BETWEEN:

SAITZ

Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA

Defendant

REASONS FOR DECISION

(Delivered 25 February 2008)

Dr John Allan Lowndes SM:

THE SOLE ISSUE IN THE PROCEEDINGS

1. The only issue that falls for determination in this case is whether the higher duties allowance (HDA) which the worker was receiving at the time of her injury – 15 April 2002 - forms part of her normal weekly

earnings (NWE) for the purposes of determining her entitlement to compensation under the *Work Health Act*, or whether it is an "allowance" excluded by s 49(2) of the Act.

2. It is an agreed fact that the worker received HDA for 17 out of 26 fortnightly periods in the 12 months prior to her injury. It is also agreed between the parties that the worker's NWE are to be calculated over the period of 12 months prior to the date of her injury.

3. The worker and the employer have agreed that if the HDA forms part of NWE then the worker's NWE is $1,118.51; but if the HDA is excluded then her NWE is $1,081.16.

THE RELEVANT LEGISLATIVE PROVISIONS AND DELEGATED LEGISLATION

4. Section 49(1) of the *Work Health Act* provides that "normal weekly earnings", in relation to a worker, means:

> (a) subject to paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay…

5. "Normal weekly number of hours of work" is defined in s 49(1) as follows:

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

6. Section 49(1) defines "ordinary time rate of pay" as follows:

> (a) in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of his or her employment – the time rate of pay so fixed or
>
> (b) in the case of a worker –
>
> (i) who is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary

> time rate of pay so fixed and partly in relation to any other manner; or
>
> (ii) …….
>
> the average time rate of pay, exclusive of overtime other than where the overtime is worked in accordance with a regular and established pattern, earned by him or her during the period actually worked by him or her in the service of his or her employer during the period of 12 months immediately preceding the date of the relevant injury.

7. Section 49(2), which is the key provision for present purposes, states:

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

8. The HDA which was paid to the worker is governed by the *Public Sector Employment and Management By-Laws*, being delegated legislation made by the Commissioner pursuant to s 60 of the *Public Sector Employment and Management Act.* Under that provision the Commissioner is empowered to make by-laws relating to, inter alia, "entitlement to and payment of allowances" and "other terms and conditions of employment".

9. Pursuant to By-Law 23(2) of the *Public Sector Employment and Management By-Laws* the Chief Executive Officer of a Department or Agency is permitted to direct an employee to perform "higher duties", which are defined as "temporary performance of the duties of a designation which has a higher attainable maximum salary than the substantive designation occupied". "Substantive designation" is defined as "the designation to which an employee has been appointed, permanently transferred or permanently promoted".

10. HDA is defined by By-Law 23(1) to mean "the difference in salary between the incremental point of the salary range applicable to the substantive designation and the minimal incremental point of the salary applicable to the higher duty designation or the applicable incremental

point determined in accordance with clauses (2) to (5) …".

11. By–Law 23 (4), which deals with increments, provides as follows:

> The amount of allowance payable to an employee temporarily performing higher duties shall be adjusted to equal the difference between the appropriate increment point of the higher and lower ranges where higher duties have been performed –
>
> (a) for a continuous period of 12 months; or
>
> (b) non continuously for a period which aggregates in total a period of 12 months within 24 months, and a second or subsequent increment shall not be payable unless a previous increment as provided at paragraph (a) or (b) has been received for a period of 12 months.

12. By-Law 23(5) reads as follows:

> The period of employment at a higher duty designation shall count for incremental purposes at a substantive designation; and service towards increments applicable to a higher duty designation will be recognised if the employee is subsequently permanently promoted to the relevant higher designation or to a designation which is higher than the employee's substantive designation but equal to or lower than a higher duty designation to which the increment has been applied.

13. Other conditions relating to higher duties are covered by By-Law 23(6), which provides:

> An employee temporarily performing the duties of a designation, the conditions of service of which differ from those of the designation normally held by the employee, shall be subject to the conditions of service of that designation as though the permanent holder of that designation.

14. By-Law 23(8) states:

> An employee is not entitled to receive a higher duties allowance unless –
>
> (a) other than an employee referred to at paragraph (b), the employee performs the duties of a higher designation for a period in excess of 4 hours on one day;
>
> (b) in the case of an employee in a teaching capacity, the employee performs the duties of a higher designation for a period of 5 days or more.

15. Further restrictions are imposed on the payment of HDA by By-Law 23

(9):

> Without affecting clause 1, where the maximum salary payable in relation to a designation exceeds the maximum salary payable in relation to the designation of Administrative Officer 6 (AO6), an employee who performs in that designation is not entitled to be paid a higher duties allowance where the period is less than one week unless the Commissioner determines otherwise.

16. By–Law 23(10), which relates to payment on leave, provides:

> An employee who, immediately before proceeding on paid leave was receiving higher duties allowance, shall continue to be paid such a higher duties allowance at the same rate which would have applied if not on leave and to the extent that the Chief Executive Officer certifies that the higher duties allowance would have been payable but for the grant of leave.

17. Finally, but not least, By-Law 23(12) reads as follows:

> An allowance payable under this By-Law shall be regarded as salary for the purposes of calculating payment for overtime and excess travelling time.

18. Clause 26(1) of the *Prison Officers Arbitral Tribunal Determination No 11* is also relevant, given that the worker was at the time of her injury employed by Northern Territory Correctional Services as a prison officer. Clause 26(1) of the Determination reads as follows:

> An employee who is required to perform the duties of a designation higher than their own shall be paid the salary and allowances applicable to that designation for each shift so performed, provided that a minimum of four hours is worked on each shift…

THE WORKERS ARGUMENT

19. Mr McDonald QC, counsel for the worker, submitted that despite its designation as an "allowance", the HDA paid to Ms Saitz is properly characterised as "remuneration" in the context of the *Work Health Act* and having regard to the purpose of the Act. Counsel contended that HDA is "remuneration in the sense as used by the Court of Appeal in *Murwangi Community Aboriginal Corporation v Carroll* (2002) 12 NTLR 121 at [15] to [19]" in that "it is a higher rate of pay being paid to a worker who is working temporarily in a higher position and presumably carrying out

more responsible or demanding work in that higher position". Mr McDonald submitted that "the HDA is 'another manner' of payment than 'ordinary time rate of pay', which in the case of Ms Saitz is paid additionally to her ordinary time rate of pay, requiring consideration of the average weekly income over a period of 12 months prior to the date of injury: see s 49(1) definition of 'ordinary time rate of pay' at (b)(i)."

20. At [32] to [34] of his submissions Mr McDonald advanced the following argument:

> It is apparent from the contents of By-Law 23 that the HDA is money, which is paid to the worker by reference to the number of hours worked, calculated at her ordinary time rate of pay. Thus, Ms Saitz's case should be considered in the light of the definition in s 49(1)(a) of "normal weekly earnings". This part of the worker's remuneration does not trigger the definition in subsection 49(d)(ii) of the Act.
>
> Each time Ms Saitz received the HDA it was as a top up amount of money which actually increased the hourly rate she was paid. Although the pay is described in terms of a HDA, for all practical purposes Ms Saitz was in fact receiving a higher hourly rate of pay.
>
> Thus, the HDA is remuneration and comes within the definition of "normal weekly earnings" in sub paragraph 49(1)(a) of the Act.

21. In advancing the worker's argument, Mr McDonald relied upon the purposive approach to statutory interpretation, which now prevails at common law and under statute: *Mills v Meeking and Another* (1989-1990) 169 CLR 214, 222-224, 227, 233-235, 242-243; *Kingston v Keprese Pty Ltd* (1987) 11 NSWLR 404, 423-424; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 paragraph 69; *Interpretation Act* (NT) s 62A.

22. Mr McDonald relied upon the following observations made by the Court of Appeal in *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 193-194 with respect to the object or purpose of the *Work Health Act*:

> In our opinion, it is a legitimate approach to the construction of the definition to look to the object of the legislation. The intention appears to be to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings which he could have counted

> upon receiving if there had been no disability. To that extent it reflects an "income maintenance" approach.

23. Accordingly, Counsel submitted that "in the ordinary course, the HDA money was part of what Ms Saitz could have counted upon receiving if there had been no injury causing incapacity".

24. Mr McDonald submitted that "there is no magic in the use of the word 'allowance' in the HDA". By way of explication, Counsel relied upon the observation made by Dixon J in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 169 CLR 389 at 402 as to the context dependant meaning of the word "allowance":

> Allowance is one of the many words which take their meaning from a context rather than affecting or controlling the meaning of other words of the context in which they occur. For, considered alone and at rest rather than at work with other words, it means the allowing of a thing or a thing allowed. It is only by its application that you discover the kind of thing in mind.

25. Counsel also relied upon the following passage from the judgment of Latham CJ in *Mutual Acceptance Co Pty Ltd v Federal Commissioner of Taxation* (1944) 169 CLR 389 at 396-397 in relation to the term "allowance":

> When the word is used in connection with the relation of employer and employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of the service. Expense allowances, travelling allowances, and entertainment allowances are payments additional to ordinary wages made for the purpose of meeting certain requirements of a service. Tropical allowances, overtime allowances and extra pay by way of "dirt money" are allowances as compensation for unusual conditions of service.

26. Reliance was also placed upon the following conclusion of Mr Trigg SM in *Fox v Palumpa Station Pty Ltd* (1999) NTMC 024 at [80], which drew heavily upon the analysis of the term "allowance" by Latham CJ in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (supra at 396-397):

> Therefore, in my opinion, to be an allowance to be excluded under s 49(2) it must be a payment or portion allowed which of itself does not form part of

> the worker's remuneration in the ordinary sense. It must be something different.

27. At [46] of his written submissions Mr McDonald relied upon the following observations made by Riley J (with whom Martin CJ agreed) in *Newmont Australia Limited v Kastelein* [2007] NTSC 42 at [49]:

> Any uncertainty arising out of the use of the word "allowance" in s 49(2) of the Act should be resolved consistently with the beneficial nature of the legislation.

28. Mr McDonald submitted that "performing higher duties is not the same as performing unusual conditions of service". Counsel also submitted:

> Here, we are not dealing with "…a grant of something additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the services rendered by the worker or as compensation for unusual conditions of service": see paragraph 19 in *Murwangi Community Aboriginal Corporation v Carroll* (supra).

29. In anticipation of a counter argument from the employer, Counsel made the following submission:

> The employer may submit that the HDA was indeed compensation for unusual conditions of service. In answer to that, I offer the following illustration: if Ms Saitz was performing higher duties and suffered an injury, the employer would have us accept that the HDA part of her remuneration was compensation for unusual conditions of her service and therefore an "allowance" not to be included as part of NWE. However, if Ms Saitz were promoted so that the duties were now part of her substantive duties in her higher duties, and then she suffered an injury nobody could be heard to argue that the higher rate of pay in her higher substantive position was compensation for unusual conditions of that service.
>
> It is important to note Ms Saitz was paid HDA in 17 out of the 26 fortnightly pay periods (65.39%) which make up the 12 months prior to the injury. This being so, precisely how unusual a condition of her service was the higher duties allowance?

30. At [44] of his written submissions Mr McDonald made the following submission concerning the inconsistency of the employer's contention with the purposive approach to statutory interpretation and the uncertainty and unfairness occasioned by its characterisation of the HDA:

> The construction or assertion that the HDA is not part of the NWE does not promote the objects of the Act: see *AAT Kings Tours Pty Ltd v Hughes*

> (supra). It also leads to potential inconsistencies, uncertainties and certain unfairness. The legislature cannot have intended a situation whereby a permanent employee in a substantive position gets full compensation and the additional amount included in NWE and a permanent employee temporarily performing higher duties and doing the same work does not get the top up amount as part of his or her NWE. Equal pay for equal work is achieved when the person acting in higher duties and the person substantively performing these higher duties get the same; can it be right these people are compensated differently if injured whilst performing the same duties. This would give rise to a clear injustice.

31. Relying upon what was said in *Mills v Meeking* (1989-1990) 169 CLR 214 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, Mr McDonald submitted:

> The risk of injustice must bear upon the construction: *Mills v Meeking* (1989-1990) 169 CLR 214 at 223, 242. As the High Court said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 3555 at 381:
>
> > The primary object of statutory interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (45). The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" (46). In *Commissioner for Railways (NSW) v Agalianos* (47), Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed (48).

THE EMPLOYER'S ARGUMENT

32. After referring to By–Law 23 of the *Pubic Sector Employment and Management By*-Laws, Mr Barr QC, counsel for the employer, submitted that "the payment of 'higher duties allowance' is readily seen as a payment to compensate and remunerate an employee for what is presumed to be a greater degree of responsibility, or perhaps difficulty, than that in the person's substantive designation".

33. Although Mr Barr accepted that the *Work Health Act* is remedial or beneficial legislation and that the underlying policy of the Act is that of "income maintenance" (as explained by the Court of Appeal in *AAT Kings Tours Pty Ltd v Hughes* (supra)), he submitted that it was important to note that "s 49(2) of the *Work Health Act* is both inclusionary and exclusionary as

to those components of the worker's remuneration to be taken into account". Counsel submitted that in this context, the following statement of the Full Court of the Federal Court in *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521 at 524 is significant, as it was made in the context of an entitlement to an age pension measured by "income":

> Parliament from time to time has added to or removed from the various categories of payments or benefits (…in the definition of "income") which are not to be taken into account as part of a person's "income" for the purpose of reducing his or her entitlement to the age pension.
>
> We were referred in argument to various principles of construction of statutes including the principle that remedial legislation should be construed beneficially. The Act is a remedial provision in that it gives benefits to persons and thereby remedies Parliament's perceptions of injustice. It calls for no narrow or pedantic construction; but, as mentioned earlier, it contains both enabling and excepting provisions which do not therefore necessarily require beneficial interpretation. It depends on the particular statutory provision and an analysis of its language and purpose…

34. Mr Barr relied upon what was said by Heydon J (with whom all of the other Justices of the Court agreed) in *Victims Compensation Fund Corporation v Scott Brown and Ors* [2203] HCA 54 at [32]-[33] in relation to the judicial task of determining the meaning of relevant words in a legislative provision:

> The principal argument in favour of the disjunctive construction which attracted the majority of the Court of Appeal was that the legislation had remedial and beneficial objectives, one of which was, as stated in s 3(a) of the Act, "to give effect to a statutory scheme of compensation for victims of crimes of violence". It may be accepted at once that the legislation did have remedial and beneficial objectives…
>
> <u>The "remedial and beneficial objectives" argument</u>
>
> To begin consideration of issues of construction by positing that a "liberal", "broad" or "narrow" construction will be given tends to obscure the essential question, that of determining the meaning of the relevant words used require. Although the purpose of the Act is beneficial, it does not follow that recovery is contemplated for every act of violence or every consequence that could be described as an injury…

35. In light of those statements or observations Mr Barr submitted:

> …there is no warrant to apply a liberal or beneficial construction to the term "allowance" in the phrase "…but does not include any other allowance". On

> the contrary, the phrase is exclusionary and it is therefore not appropriate to give it a beneficial construction.

36. Turning to the specific meaning of the term "allowance" as used in s 49 (2) of the Act, Mr Barr submitted that the starting point, in the present context, was the decision of Dixon J (as he then was) in *Mutual Acceptance Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 402 and his Honour's observations therein as to the context dependant meaning of "allowance" (which was referred to in Mr McDonald's submissions).

37. After referring to the decision of the Court of Appeal in *Murwangi Community Aboriginal Corporation v Carroll* (supra), where it was held that benefits of free rent, board and electricity received by the worker were not "other allowances' as contemplated by s 49(2) of the Act, Mr Barr made this submission:

> In so deciding, the Court of Appeal relied on the decision of Latham CJ in *Mutual Acceptance Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 396-7. In that case the employer had made weekly cash payments to employed travelling debt collectors in respect of the use of their private vehicles in connection with the employer's business. The issue before the High Court was whether such cash payments came within the definition of "wages" in s 3 *Payroll Tax Assessment Act* 1941(Cth). The relevant statutory definition of "wages" was …any wages, salary, commission, bonuses or allowances paid or payable (whether at piece work rates or otherwise and whether paid or payable in cash or kind) to any employee… and without limiting the generality of the foregoing, includes (d) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employer's services.

38. At [19] of his written submissions Counsel submitted:

> The benefits provided in *Carroll* were found not to be allowances because: -
>
> they were not paid in cash;
>
> none of the benefits was a grant of something additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the service rendered by the worker or as compensation for unusual conditions of that service.

39. In conclusion Mr Barr submitted the following:

> In the present case, the higher duties allowance received by the worker is an "allowance" because:-
>
> it is described and defined as an "allowance" in the relevant by-laws;
>
> when payable, it is paid as an allowance, that is, it is paid in cash as an additional separate component of the worker's earnings;
>
> it is referable to and compensation for the worker taking on a greater degree of responsibility or difficulty whilst acting in a higher position than the worker's substantive designation, and is therefore comparable with the notion of "dirt money" referred to in *Mutual Acceptance*.

WHETHER THE HIGHER DUTIES ALLOWANCE IS TO BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF CALCULATING NORMAL WEEKLY EARNINGS

40. There are no authorities directly on point in relation to how the worker's HDA should be treated for the purposes of calculating NWE. However, both the worker and the employer sought to rely upon a number of authorities that they argued should be applied, followed, approved, or at least considered, by the Court in arriving at its decision. Both parties also sought to rely upon various established canons of statutory interpretation which they argued ought to be applied by the Court in coming to its decision.

41. The starting point is s 49(2) of the *Work Health Act* and the analysis of that provision by the Court of Appeal in *Murwangi Community Aboriginal Corporation v Carroll* (supra at [18]):

> The purpose of s 49(2) of the *Work Health Act* is to identify some payments made to a worker that are to be taken into account in assessing his or her normal weekly earnings and to exclude all "other allowances" from that assessment. It is to make clear in relation to those payments what is and is not to be included in normal weekly earnings for the purpose of assessing compensation. The amounts identified for inclusion are not limited to allowances. For example an over award payment is not necessarily an allowance. Although it is not clear what is meant by the expression, a service grant would seem unlikely to be an allowance. By operation of the section there are included within normal weekly earnings some payments that would qualify as an allowance and some that may not. However, it is clear that payments excluded are limited to "any other allowances", that is, allowances other than those that have been specifically included. The section does not expand the meaning of "normal weekly earnings" but, rather, it identifies some payments that fall within the ambit of the expression and clarifies how

> those payments are to be treated for the purpose of calculating the entitlement of a worker to compensation.

42. As pointed out by Mr Barr, s 49(2) contains an inclusionary as well as an exclusionary definition of "a worker's remuneration". On the one hand, the section provides that a "worker's remuneration" includes the various payments or allowances enumerated therein, with the effect that those components are to be included in NWE for the purpose of assessing compensation. On the other hand, the subsection excludes from the concept of "worker's remuneration" "any other allowance", with the effect that such allowances are not to be included in the calculation of NWE.

43. In my view, it is clear that the word "includes", as used in s 49(2), was not intended to have an exhaustive meaning – that is, it was not meant to be read as "means and includes". Furthermore, I do not consider that the adversative phrase – "but does not include any other allowances" – should be viewed as evincing a legislative intent to provide an exhaustive definition of "remuneration" in s 49(2).

44. In my opinion, the legislative draftsman used the word "includes" in s 49 (2) for the simple reason that he or she was unclear as to precisely what benefits might be regarded as falling within the scope of "remuneration"; and the draftsman exercised caution by providing a list of those benefits that constituted "remuneration". In my respectful opinion, this provides the answer to the inquiry made by the Court in *Palumpa v Fox* (1999) 132 NTR 1 at [19] as to the rationale behind the specification of certain benefits in s 49(2) of the Act.

45. It is patently clear from the decision of the Court of Appeal in *Murwangi Community Corporation v Carroll* (supra) that the Court did not regard the definition of "a worker's remuneration" in s 49(2) as an exhaustive one, for it found that rent, board and electricity were not allowances, and "therefore not 'other allowances' as contemplated by s 49(2) of the *Work*

Health Act". But most significantly, the Court concluded that those items were "part of the remuneration of the worker simpliciter" and "they, along with the amount [the worker] is paid in cash, make up his remuneration".

46. Further observations made by the Court of Appeal confirm that interpretation of the definition of "a worker's remuneration" in s 49(2).

47. The Court of Appeal observed as follows:

> In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise "remuneration … earned by the worker. Similar cases are gathered in the decision of Mr Trigg SM at first instance in *Fox Palumpa Station Pty Ltd* [1999] NTMC 24.

48. After referring to the cases of *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360 and *Dawson v Bankers & Traders Insurance Co Ltd* [1957] VR 491, both of which held that "remuneration" is not synonymous with salary or cash paid by an employer to an employee and can also include non-monetary benefits such as board and lodging, the Court of Appeal cited with approval the following passage from the decision of the Australian Industrial Relations Commission in *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 at 81:

> The term now used is "remuneration", a term which denotes a broader concept than salary or wages. "Remuneration", in our view, is properly defined as the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer. It is a term that is confined neither to cash payments nor, necessarily, to payments actually made to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of moneys otherwise due to that employee as salary or wages.

49. Given that the definition of "worker's remuneration" in s 49(2) of the Act is not exhaustive, and the concept embraces salary or wages as well as some non-monetary benefits, the question that needs to be answered is whether the worker's HDA constitutes salary or wages or falls within the

purview of "any allowance" as contemplated by s 49(2).

50. The discussion of the term "allowance" by the Court of Appeal in *Murwangi Community Aboriginal Corporation v Carroll* (supra) serves as a springboard for that inquiry.

51. The Court of Appeal began by referring to the following observation made by Dixon J in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 402:

> "Allowance" is one of the many words which take their meaning from a context rather than affecting or controlling the meaning of other words of the context in which they occur. For, considered alone and at rest rather than at work with other words, it means the allowing of a thing or a thing allowed. It is only by its application that you discover the kind of thing in mind.

52. The Court then went on to refer to the more expansive discussion of the concept of "allowance" by Latham CJ in the same case at [396-397]:

> When the word is used in connection with the relation of employer and employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service. Expense allowances, travelling allowances and entertainment allowances are payments additional to ordinary wages made for the purpose of meeting certain requirements of a service. Tropical allowances, overtime allowances and extra pay by way of "dirt money" are allowances as compensation for unusual conditions of service.

53. In holding that rent, board and electricity were not allowances excluded by s 49(2) of the Act, the Court of Appeal found as follows:

> There was no additional cash payment made to the worker in respect of those items. None of the benefits was a grant of something additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the service rendered by the worker or as compensation for unusual conditions of that service. The provision of the benefits was part of his remuneration. That being so none of the benefits was an "allowance" to be excluded by the application of s 49(2) of the *Work Health Act.*

54. The question that arises is whether, in light of the Court of Appeal's discussion of the terms "remuneration" and "allowance", the worker's HDA should be treated as a component of remuneration rather than an

excluded allowance. Into which class does it fall?

55. In order to begin to answer that question it is necessary to further consider the concept of "remuneration" at a more theoretical level.

56. As elucidated by Freedland, the concept of "remuneration" invokes:

> … the notion of not merely of payment of one person by another or others but more specifically of payment in the context of work or of employment. In other words, it is part of the meaning of remuneration that it has a connection with work or employment… there is a direct or tight exchange –based kind of connectedness whereby remuneration is seen as being for or in return for work.

57. Freedland also refers to another theory of remuneration – the relational theory – according to which "there is a looser and more indirect kind of connection whereby remuneration is seen as being given in respect of a period of employment".

58. The author goes on to say:

> There is a strong tendency to use the term "wages" to refer to the former kind of remuneration, and to use the term "salary" to refer to the latter kind but…we cannot regard this as a firm and clear distinction.

59. In dealing with the issue at hand, it is important to keep firmly in mind the "exchange – based" - the quid pro quo – approach to remuneration as well as the relational theory of remuneration.

60. According to the "exchange- based" theory the core element of "remuneration" is the payment of a salary or wages to an employee by an employer as a reward – as something earned - for work done or services rendered by him or her in the course of their employment.

61. It is now necessary to consider the intrinsic nature of the HDA, which was being paid to the worker, in order to determine whether it falls within the purview of "a worker's remuneration", thereby forming part of the worker's NWE.

62. As the HDA paid to the worker fell under the *Public Sector Employment and*

Management By-Laws, it necessarily follows that the relevant parts of those By-Laws form part of the worker's terms of employment.

63. By-Law 23 throws considerable light on the nature of the HDA and points to it being remuneration simpliciter, notwithstanding that it is labelled as an "allowance". The Court is guided by the observation made by Dixon J in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (supra at 402) as to the context – dependant meaning of the word "allowance".

64. By-Law 23(1) makes it clear at the outset that HDA is a salary item. It represents an increase in the salary paid to an employee on account of him or her being assigned to a higher duty designation, and being directed to perform higher duties. It is clearly a payment "in the context of work or employment" and it is properly seen as "being for or in return for work". The HDA has a direct and tight connection with work or employment, and bears all the hallmarks of remuneration according to the exchange-based theory of remuneration.

65. By-Laws 23(4), (5), (8) and (9) reflect the characteristics of the relational theory of remuneration. Each of those By-Laws lean heavily towards the treatment of HDA as remuneration "given in respect of a period of employment".

66. By-Laws 23(5), (6) and (10) acknowledge a continuum of employment - a direct connection between an employee's substantive designation and his or her higher duty designation. Those By-Laws tacitly, if not expressly, recognise that HDA is, in fact, remuneration paid for and in return for the performance of work related duties, that is, work.

67. The most significant By-Law, for present purposes, is 23(12) which states that HDA is to be regarded as "salary for the purposes of calculating

payment for overtime and excess travelling time".

68. "Salary" is generally taken to mean a fixed regular payment by an employer to an employee for work done or services provided during the course of employment. The term "salary" refers to payments made to a worker for work performed over a set period of time and the term is interchangeable with the term "wages". The notion of "salary" invokes the exchange-based theory of remuneration. By-Law 23(12) makes it patently clear that HDA is remuneration simpliciter.

69. Furthermore, the treatment of HDA as salary for the purposes of calculating overtime speaks loudly as to its essential character as remuneration.

70. Overtime payments refer to payments, usually at a higher rate of pay, to employees who work in excess of the ordinary number of hours at their place of employment. In the context of the *Work Health Act* overtime payments are calculated on an employee's "ordinary time rate of pay" referable to the "normal weekly number of hours of work" performed by him or her in the workplace. The effect of By–Law 23(12) is to include HDA as part of a worker's "ordinary time rate of pay". That is reinforced by the definition of "ordinary time rate of pay" in s 49(2)(b)(i) of the Act. As submitted by Mr McDonald, "HDA is 'another manner' of payment than 'ordinary time rate of pay'".

71. The overall effect, as submitted by Mr McDonald, is that "for all practical purposes, Ms Saitz was in fact receiving a higher hourly rate of pay".

72. It is very much to the point that the worker was paid HDA in compliance with the requirements of By-Law 23, and in accordance with the regular pattern established under that By–Law 23 (8).

73. In order for a worker's earnings of overtime to be taken into account in calculating his or her pre-injury "normal weekly earnings", it is necessary

for the employee to show that the overtime is sufficiently established and worked with sufficient regularity to form part of his or her regular income: see *AAT Kings Tours Pty Ltd v Hughes* [1994] 4 NTLR 185. The worker must demonstrate a regular and established pattern within the statutory framework of s 49 of the *Work Health Act*.

74. Similarly, s 49(2) of the Act provides for the inclusion of "shift allowance" in the calculation of "normal weekly earnings", provided that "shift work is worked in accordance with a regular and established pattern.

75. Overtime, shift allowance and the worker's HDA all share a common characteristic, which unites them under the rubric of "remuneration". In order to qualify for inclusion in the calculation of a worker's "normal weekly earnings" all three require proof of an established and regular pattern of payment in a relevant sense.

76. It is also important not to overlook Clause 26(1) of the *Prison Arbitral Tribunal Determination No 11*. That clause reinforces the By-Laws' treatment of HDA as salary, and therefore remuneration, by providing that an employee, who is required to perform higher duties in a higher designation, is to be paid the salary and allowances applicable to that designation. Clause 26 draws the critical distinction between salary and allowances, thereby bringing the worker's HDA squarely within the compass of "salary". Moreover, by linking the payment of HDA to shifts of not less than 4 hours – a period of employment - Clause 26(1) points to the HDA being remuneration simpliciter, according to the relational theory of remuneration.

77. In my opinion, when the HDA paid to the worker is put in proper context – when it is viewed within the construct of By-Law 23 of the *Public Sector Employment and Management By-Laws* and Clause 26(1) of the *Prison Arbitral Tribunal Determination* - then it can only be construed as

"an established incident of the [worker's] employment" so as to form an integral part of her regular income for the purpose of calculating her "NWE".

78. The labelling of the HDA as an "allowance" is a misnomer. The label belies its true character: it cloaks or misrepresents its status as remuneration simpliciter.

79. The conclusion that the worker's HDA is not what it professes to be – and in fact unconditionally represents remuneration - is reinforced by its failure to conform to the generally accepted defining characteristics of an "allowance", as identified by Latham CJ in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (supra at 396-397).

80. Although the discussion of the term "allowance" by Latham CJ in *Mutual Acceptance* (supra) was directed at the construction of a statutory definition somewhat removed from the definition in s 49(2) of the *Work Health Act*, the Chief Justice's analysis is nonetheless valuable, and greatly assists in the interpretation of the phrase "any other allowance", as used in s 49(2) of the Act.

81. According to his Honour's analysis, in order for a particular benefit to qualify as an "allowance" it must amount to "a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of service".

82. In order to fully comprehend the nature of the requirement imposed by the Chief Justice it is necessary to refer to the examples his Honour gave in explication of the requirement.

83. As noted earlier, his Honour began with these three examples: expense allowances, travelling allowances and entertainment allowances. All three readily fall within the parameters of Latham CJ's analysis. Significantly

all three are not directly referable to the performance of work duties and, strictly speaking, are not paid as a reward for work done or services provided during the course of one's employment. They are payments made to an employee on account of work related expenses that are liable to be incurred by an employee during the course of employment. They are indeed something additional to "ordinary wages" which is paid to an employee for the purpose of meeting some particular requirement of his or her employment, for example, travelling to and from the place of employment, entertaining the employer's customers or undertaking some other work related activity that causes an employee to incur expense. In my view, the Chief Justice's analysis of the term "allowance" should be construed in light of those examples and confined to examples of that ilk.

84. In my opinion, it is clear that the HDA paid to the worker cannot be equated with the three types of allowances mentioned by Latham CJ. The HDA was clearly referable to the performance of work duties, and without question represented a reward for the work done by the worker. The HDA in no way represented a payment on account of work related expenses incurred, or liable to be incurred, by the worker during the course of her employment. The HDA was not something additional to "ordinary wages" because it itself represented "ordinary wages". Furthermore, it was not paid to the worker for the purpose of meeting some particular requirement of her employment in

the sense discussed by the Chief Justice in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (supra at 396-397).

85. It is also my view that the HDA cannot be properly regarded as "compensation for unusual conditions of service" – the second aspect of Latham CJ's analysis of the term "allowance". The worker's HDA does not conform to the examples that the Chief Justice gave by way of explication of that secondary aspect of the term "allowance".

86. “Tropical allowances”, can be readily seen as representing compensation for unusual conditions of service, that is, compensation for working in adverse climatic conditions. A “tropical allowance” is intended to recompense a worker for having to suffer a particular hardship or disadvantage at work. Such an allowance is not referable to work done or services provided. Nor does it represent a reward for such work or services.

87. The worker’s HDA bears no resemblance to a “tropical allowance”, and clearly falls outside the ambit of the Chief Justice’s analysis of the constituent elements of an “allowance”.

88. Similarly, “dirt money”, which is an amount of money paid for work performed in a dirty or unpleasant environment (for example boiler scraping, handling toxic chemicals) and which is sometimes called “danger money”, also readily qualifies as compensation for unusual conditions of service. Again the distinctive feature of this benefit is that it is intended to compensate an employee for the environment in which the duties assigned to him or her are carried out. Like a “tropical allowance”, it cannot properly be viewed as a reward for work done or services provided, according to the “exchange-based” theory of “remuneration”.

89. Clearly, Mr Barr’s submission that the HDA paid to the worker is comparable to the notion of “dirt money” must be rejected. The HDA is clearly remunerative, as distinct from being merely compensatory.

90. Although the Chief Justice did not explain what he meant by “overtime allowances”, such allowances usually relate to an amount paid which the worker may retain whether or not “overtime” is worked. The allowance may be in lieu of any contingency to work outside normal working hours. As with the other two allowances mentioned by his Honour, “overtime allowances” are not directly linked to the performance of work or the provision of services by a worker. “Overtime allowances” do not fit neatly

within the "exchange – based" theory of "remuneration". "Overtime allowances" are best characterised as an additional benefit or payment which is intended to recompense a worker for his or her conditions of employment, and which is payable regardless of whether overtime is worked.

91. Again, it is clear that the worker's HDA cannot be equated with "overtime allowances", in light of the direct and tight connection that the former has with the worker's work or employment.

92. The worker relied upon Mr Trigg's discussion of the term "allowance" in *Fox v Palumpa Station Pty Ltd* (1999) NTMC 024 in order to further demonstrate that the HDA received by the worker did not constitute an "allowance" as contemplated by s 49(2) of the *Work Health Act*.

93. In that case Mr Trigg said that "to be an allowance to be excluded under s 49(2) it must be a payment or portion allowed which of itself does not form part of the worker's remuneration in the ordinary sense. It must be something different". Although Mr Trigg was dealing with the characterisation of housing, meat, electricity and gas benefits within the framework of s 49(2), I consider that his Honour's observations as to the nature of an "allowance" are equally relevant to the way in which the worker's HDA is to be characterised in the present case. In my opinion, his Honour's observations were not overruled in *Palumpa v Fox* (1999) 132 NTR 1; nor were they disapproved of by the Court of Appeal in *Murwangi Community Aboriginal Corporation v Carroll* (supra).

94. In my opinion, the HDA paid to Ms Saitz cannot properly be viewed as being "a payment or portion allowed which of itself does not form part of the worker's remuneration in the ordinary sense". It is not "something different". It is clearly part of the worker's remuneration.

95. As stated by Thomas J in *Hastings Deering (Aust) Ltd v Smith* 14 NTLR

155 at [20] remuneration is "a broad concept which includes the total sum for which the worker is entitled as a reward for services rendered". The HDA paid to the worker in the present case formed part of that total sum.

96. One of the prongs of the employer's argument was that the HDA was paid to the worker in the form of cash "as an additional separate component of the worker's earnings". Accordingly, it must be regarded as an "allowance".

97. This argument does not carry much weight. The fact that the HDA paid to the worker was in the form of cash does not necessarily indicate that the payment is an "allowance". In order to qualify as an "allowance" it needs to possess the other characteristics identified by Latham CJ in *Mutual Acceptance* (supra at 396-397). As stated by Riley J (with whom Martin (BR) CJ) in *Newmont Australia Limited v Kastelein* [2007] NTSC 42 at [45]:

> Reference to the reasons for decision in *Murwangi* makes it clear that the Court regarded the payment of cash as but one of a number of indicators of whether a benefit was an allowance for the purposes of the legislation.

98. For the sake of completeness, it is necessary to consider the argument put forward by Mr McDonald at [42] - [43] of his written submissions.

99. In my opinion the fact that the worker was paid 17 out of the 26 fortnightly pay periods, which make up the 12 months prior to the injury, is immaterial. Equally, the rhetorical question – "this being so, precisely how unusual a condition of service was the higher duties allowance" – is an irrelevant question. The fact that Public Sector employees are routinely directed by the Chief Executive Officer to perform higher duties is equally irrelevant. Those facts or circumstances or accompanying questions, rhetorical or otherwise, have no bearing on the issue.

100. A distinctive feature of the worker's employment was that it entailed the possibility that at any time during the course of her employment she might

be directed to perform higher duties in a higher designation. There was no certainty that the worker would be called on to perform such duties. However, if and when directed to carry out such duties, the performance of those duties would represent a departure from the usual conditions of service of the worker. That the worker might have been assigned higher duties and performed those duties over a period of time does not alter the salient fact that ab initio the assumption of higher duties was an unusual condition of the worker's employment.

101. However, the concept of "remuneration" accommodates unusual conditions of service as much as the term "allowance". The classic example is "overtime".

102. While it is true that the performance of "higher duties" constituted an unusual condition of service in the context of the worker's general employment, the purpose of the HDA, which was paid to Ms Saitz, was not to compensate her for the unusualness of those duties relative to her normal duties – for the additional burden of performing those duties – but to remunerate her for performing those higher duties per se and for the concomitant level of responsibility.

103. The strongest argument for treating the HDA as an "allowance" as contemplated by s 49(2) of the Act is that it is referred to as an "allowance" in By–Law 23 of the *Public Sector Employment and Management By-Laws*. However, the only difference between the HDA and remuneration simpliciter is that the former is called an "allowance". Apart from that purely formal distinction there is no material difference between the two economic benefits. Accordingly, there is no warrant for excluding the worker's HDA from the calculation of NWE on the basis of that highly artificial distinction.

104. It is very telling that if the HDA paid to the worker had not been labelled as an "allowance" in the By-Laws, but instead described, for example, as

a "higher duties payment", nobody could be heard to argue that it was anything other than remuneration simpliciter.

105. The conclusion that I have reached is that the HDA received by the worker formed part of her remuneration for the purposes of s 49 of the Act, and should therefore be included in the calculation of NWE for the purposes of assessing her entitlement to compensation under the Act.

106. That conclusion has been arrived at by a process of "bottom –up" legal reasoning, involving the techniques of "plain meaning" and reasoning by analogy based on existing case –law. However, that conclusion can also be arrived at by a process of statutory interpretation based on the purposive approach to construing a statute.

107. As stated by Thomas J in *Murwangi Community Aboriginal Corporation v Carroll* (2001) 166 FLR 247 at [18]:

> In construing provisions of the Act, in this case s 49 of the Act, the Court must adopt a purposive approach. The most recent High Court decision in support of this principle being *Commissioner of Taxation (Cth) v Ryan* (2000) 210 CLR 109 at 143-146: see also *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 320 -321, *Kingston v Keprose Pty Ltd* (198&) 11 NSWLR 404 at 421-423; *Mills v Meeking* (1990) 169 CLR 214 at 235, 242-243 and s 62A of the *Interpretation Act 1978* which states:
>
> > In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

108. The object or purpose of the *Work Health Act* was discussed by the Court of Appeal in *AAT King's Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 194, during the course of considering an aspect of the definition of "normal weekly number of hours worked" in s 49:

> In our opinion, it is a legitimate approach to the construction of the definition to look to the object of the legislation. The intention appears to be to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings which he could have counted upon receiving if there had been no disability. To that extent it reflects an "income maintenance" approach.

109. The *Work Health Act* contemplates ongoing weekly benefits in the context of an income maintenance scheme. The intention of the Act is provide for the maintenance of a worker on an ongoing basis, during a period or periods of incapacity, with the income that he or she might otherwise have expected, but for the injury, to have at their disposal.

110. It should be noted that the employer does not take issue with the fact that the policy of the *Work Health Act* is "income maintenance".

111. I agree with the submission made by Mr McDonald that "in the ordinary course, the HDA money was part of what Ms Saitz could have counted upon receiving if there had been no injury causing incapacity".

112. As stated by Thomas J in *Murwangi Community Aboriginal Corporation v Carroll* (supra at [68]), "the purposive approach to statutory construction recognises that it is when there is an actual economic loss that payment of compensation is needed and becomes payable". As a result of her injury causing incapacity Ms Saitz suffered an actual economic loss – not only in terms of the salary applicable to her substantive designation, but also the additional salary referable to her higher designation – in respect of which she was entitled to be compensated under the Act.

113. In light of the "income maintenance" policy of the *Work Health Act*, it is most unlikely that the legislature intended to exclude an item such as the HDA that was being paid to Ms Saitz from the calculation of NWE, while including in that calculation the benefits or payments specified in s 49(2) of the Act. Most of those specified benefits do not possess the same proximate relationship that the HDA in the present case bears to the concept of remuneration as discussed earlier; nor do they flaunt themselves as "income" in the same conspicuous manner as the HDA that was being paid to the worker. Those benefits are not as closely connected with the maintenance of income as is the worker's HDA. If the HDA were

to be excluded from the calculation of NWE than that would be inconsistent with the specific inclusions in s 49(2), and would frustrate or defeat the fundamental object of the Act.

114. In my opinion, the HDA paid to the worker formed part of her "income" – as much as her base salary – and it would be contrary to the compensatory objects of the *Work Health Act,* as articulated in the "income maintenance" approach, to exclude the HDA from the calculation of her NWE. I agree with the worker's submission that the exclusion of the HDA from the calculation of the worker's NWE would not promote the objects of the Act.

115. Therefore, the conclusion that the HDA forms part of the remuneration of the worker simpliciter, which was arrived at by way of a process of "bottom–up" legal reasoning, is consistent with the compensatory object of the *Work Health Act.*

116. In aid of her argument, the worker sought to rely upon the fact that the *Work Health Act* is remedial or beneficial legislation that should be construed liberally in favour of the worker.

117. As also stated by Thomas J in *Murwangi Community Aboriginal Corporation v Carroll* (supra at [21]) the *Work Health Act*:

> "is beneficial in character and should be construed liberally in favour of the worker: *Foresight Pty Ltd v Maddick* (1991) 1 NTLR 209 at 215; *Rozycki v Work Social Club – Katherine Inc* (1997) 137 FLR 1 at 13; *Loizos v Carlton & United Breweries Ltd* (1994) 117 FLR 135 at 136; *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335".

118. As the *Work Health Act* is remedial or beneficial legislation, where there is ambiguity, "the construction most favourable to the worker is to be preferred": *Foresight Pty Ltd v Maddick* (1991) 79 NTR 17 at 24; *Wilson*

v Wilson's Tile Works Pty Ltd (1960) 104 CLR 328 at 335; *Dodd v Executive Air Services Pty Ltd* [1975] VR 668 at 679, 682.

119. The worker placed particular reliance upon the observations made by Riley J (with whom Martin CJ agreed) in *Newmont Australia Limited v Kasterlein* [2007] NTSC 42 at [49]:

> Any uncertainty arising out of the use of the word "allowance" in s 49(2) of the Act should be resolved consistently with the beneficial nature of the legislation.

120. The employer does not take issue with the fact that the *Work Health Act* is remedial or beneficial legislation. However, as noted earlier, Mr Barr, on behalf of the employer, argues, on the basis of observations made in *Rose v Secretary, Department of Social Security* (1990) 92 ALR 521 at 524 and

Kennedy and Ors v Anti-Discrimination Commission of the Northern Territory (2006) NTCA 9 at [43], as well as in *Victims Compensation Fund Corporation v Scott Brown and Ors* [2003] HCA 54 at [32]–[33], that there is no warrant to give a liberal or beneficial construction to the term 'allowance' in the phrase '…but does not include any other allowance'. Mr Barr argues that as the phrase is exclusionary, it is inappropriate to place a beneficial construction upon it.

121. The effect of excepting provisions in a remedial Act is discussed by Pearce and Geddes *Statutory Interpretation in Australia* 6th edition pp 282 – 283 at [9.5]:

> In *Rose v Secretary, Department of Social Security* (1990) 21 FCR 241 at 244…a Full Federal Court noted that enabling and excepting provisions in a remedial Act did not thereby have to be given a liberal interpretation. It depended upon the purpose of the provision. Exceptions may be included in the legislation to provide the practical balance between competing public interests. As such they should be interpreted carefully in order not to destroy that balance. … Simply to treat all provisions of the legislation as requiring a liberal interpretation is too simplistic an approach: *Commonwealth v Human Rights and Equal Opportunity Commn* (1998) 76 FCR 513 at 20-1…

122. However, the authors point out that there may be cases where exceptions

to what is regarded as beneficial legislation may be read down "so as to limit the exception in order to preserve the scope of the beneficial effect of the legislation".

123. Even if Mr Barr's submission is correct, it is not necessary to place a liberal construction upon the provisions of s 49(2) – in the particular the word "allowance - in order to arrive at the conclusion that the HDA should be included in the calculation of NWE. It is clear that the words "any other allowance" were intended to cover benefits possessing the characteristics described by Latham CJ in *Mutual Acceptance* (supra), and were not intended to extend to monetary or non-monetary benefits that clearly form part of remuneration simpliciter, such as the HDA paid to the worker in the present case. Furthermore, such a construction is consistent with the compensatory object of the *Work Health Act* and its underlying policy which is directed at "income maintenance".

124. There is another reason why it is not necessary to invoke the remedial or beneficial character of the *Work Health Act* in order to bring the worker's HDA within the ambit of NWE.

125. As submitted by Mr McDonald, "the risk of injustice must bear upon the construction" of a statutory provision. In my opinion, the strict construction of s 49(2) put forward by the employer, if accepted, would lead to manifest injustice whereas the interpretation argued by the worker, which has been accepted by this Court –avoids such injustice. That is clearly demonstrated by the scenario set out in Mr McDonald's written submissions. If the employer's argument is accepted, a worker who is temporarily performing higher duties in a higher designation is not entitled to have his or her additional salary included as part of their NWE, while a worker who is permanently performing higher duties in a higher designation is entitled to have the whole of his or her salary included in NWE. The differential treatment of the two workers purely on the basis

that one worker is a temporary employee and the other a permanent employee cannot be justified, and is clearly unjust, particularly in light of the compensatory objects of the *Work Health Act* and its policy of "income maintenance". The personal predicament of each worker is not a material difference to justify their differential treatment. To treat the two workers differently is to infringe the fundamental principle of substantive justice - treat like cases alike and treat different cases differently.

126. The fact that the temporary employee acting in the higher designation may not be receiving exactly the same salary as the permanent incumbent does not detract from the force of the argument. All that matters is that the temporary incumbent is being paid the lowest increment applicable to the higher designation.

127. Another scenario referred to by Mr McDonald in a slightly different context further highlights the injustice occasioned by an acceptance of the employer's strict construction of s 49(2) of the Act. If a worker was temporarily directed to perform higher duties in a higher designation, but prior to injury was promoted to that higher designation there could be no argument that the whole of the worker's salary should form part of NWE (at least from the date of promotion). However, if the worker remained as a temporary employee in that higher designation up until the time of injury, then, according to the employer's argument, the increase in the salary due to higher duties would be excluded from the calculation of NWE. In my view, it is most unlikely that the legislature intended such a situation, whereby the level of compensation paid to a worker is dictated by mere fortuity. If the employer's argument were accepted, then the extent to which the income of a worker is maintained is left to pure chance.

128. It is important to keep in mind that the *Work Health Act* is remedial legislation. As such "it gives benefits to persons and thereby remedies

Parliament's perceptions of injustice". Given that the Act is remedial legislation it is imperative that any statutory provision contained therein not be construed in a way that gives rise to injustice.

129. Finally, in the event that I have erred in the conclusion that I have reached, and it is necessary for the worker to invoke the remedial or beneficial nature of the *Work Health Act* in order to succeed in having the HDA included in her NWE, then I am not satisfied that the exclusionary phrase in s 49(2), expressed as it is in general terms, is sufficient to preclude a liberal or beneficial construction being placed upon the term "allowance" in that phrase. Consequently, in the circumstances I have outlined, the provision should be read liberally in favour of the worker so as to permit the inclusion of the HDA in the worker's NWE.

DECISION

130. I find that the HDA paid to the worker forms part of NWE for the purposes of assessing her entitlement to compensation pursuant to the *Work Health Act*.

131. On that basis the worker's NWE is $1,118.51, being the agreed figure.

132. I will hear the parties in relation to any ancillary or consequential orders.

Dated this 25th day of February 2008.

___

_____

Dr

John Allan Lowndes SM

STIPENDIARY
MAGISTRATE