SUPREME COURT OF QUEENSLAND

CITATION:	*Sullivan v Oil Co of Aust Ltd & Anor* [2003] QCA 570
PARTIES:	**KENNETH KEVIN SULLIVAN AND SYLVIA MARGARET SULLIVAN** (plaintiffs/respondents) **v** **OIL COMPANY OF AUSTRALIA LIMITED** ACN 001 646 331 (first defendant/first appellant) **SANTOS PETROLEUM OPERATIONS PTY LTD** ACN 010 829 017 (second defendant/second appellant)
FILE NO/S:	Appeal No 1334 of 2003 No PGC00017 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Land and Resources Tribunal at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2003
JUDGES:	Davies JA, Atkinson and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. The amount of compensation determined as payable by the Tribunal is reduced by removal of the amounts of $95,760 for injurious affection and $7,245 for legal expenses** **3. The judgment is varied to reflect the amended total of $67,677.78** **4. The respondents are to pay the appellants' costs of the appeal**
CATCHWORDS:	REAL PROPERTY – CROWN LAND – QUEENSLAND – ANCILLARY PROVISIONS – RESUMPTION AND COMPENSATION – ASSESSMENT – where appellants hold authority to prospect and petroleum leases over portion of the respondents' land – whether respondents are entitled to compensation for injurious affection to the balance of their property under s 99(1)(e) *Petroleum Act* 1923 (Qld) – whether respondents are entitled to legal expenses entailed in the preparation of their compensation claim under s 99(1)(e) *Petroleum Act* 1923 (Qld)

Mining on Private Land Act 1909 (Qld), s 17
Petroleum Act 1915 (Qld), s 7
Petroleum Act 1923 (Qld), s 18, s 88, s 99
Public Works Land Resumption Act 1906 (Qld), s 19

Coastal Estates Pty Ltd v Bass Shire Council [1993] 2 VR 566, considered
Duncan v Minister for Education [1969] VR 362, considered
Marshall v Director General Department of Transport (2001) 205 CLR 603, distinguished
Minister of State for the Army v Pacific Hotel Pty Ltd [1944] St R Qd 112, applied

COUNSEL: H B Fraser QC, with D W Williams, for the appellants
P J Lyons QC, with D A Skennar, for the respondents

SOLICITORS: Clayton Utz for the appellants
Rees R & Sydney Jones (Rockhampton) for the respondents

[1] **DAVIES JA:** I agree with the reasons for judgment of Holmes J and with the orders she proposes.

[2] **ATKINSON J:** I have had the advantage of reading the reasons for judgment of Holmes J. I agree with the proposed orders, for the reasons expressed by her Honour.

[3] **HOLMES J:** The appellants appeal against a decision of the Land and Resources Tribunal which determined compensation payable to the respondents under the *Petroleum Act* 1923. At issue is whether the respondents, over whose land the appellants hold an authority to prospect and petroleum leases granted under the Act, are entitled to compensation for injurious affection of the balance of their property, and legal expenses entailed in preparation of their compensation claim, as "consequential damages" pursuant to s 99(1)(e) of the Act.

[4] The respondents acquired a *Land Act* lease, later converted to freehold, over a central Queensland property, which they use for grazing and cropping. The lease was, in accordance with s 10 of the *Petroleum Act*, expressed to be subject to the reservation to the Crown of all petroleum in the land and all rights of access necessary to its exploitation. Each of the appellants holds a 50% interest in an authority to prospect and two petroleum leases issued under the *Petroleum Act* in respect of the land. The property is 3,225 hectares in size. About 20 hectares are currently the subject of the appellants' activities: gas wells have been drilled, pipelines laid and a pumping station set up.

The claim for compensation in the Land and Resources Tribunal

[5] The respondents based their claim for compensation in the Tribunal on ss 18, 88 and 99 of the *Petroleum Act*, the relevant sub-sections of which are as follows:

> **"18 Authority to prospect**
>
> **…**
>
> (5) Compensation under this Act shall be payable by the holder of an authority to prospect on any private land or improved land before the

holder enters thereon, and for the purpose of determining such compensation all of the provisions of this Act relating to the determination (whether by agreement or by the Wardens Court) of the compensation payable by a permittee or lessee shall, mutatis mutandis, apply and extend.

…

88 Conduct of operations on land

…

(3) The holder of an authority to prospect, permittee, or lessee shall make compensation in accordance with this Act to the owner of any private land or holder under the Crown of any unallocated State land or, in the case of either private land or unallocated State land, to any person in lawful occupation thereof in respect of all damage caused by the holder, permittee or lessee to crops and improvements on such land, including any permanent artificial water supply.

(4) Such compensation shall include reimbursement for the occupation of that portion of the land occupied by the holder, permittee, or lessee for mining and construction works during the period of such occupation.

…….

99 Measure of compensation

(1) Save as is by this Act otherwise provided, the compensation to be made under this Act shall be compensation for –

(a) deprivation of the possession of the surface or of any part of the surface; and

(b) damage to the surface or any part thereof, and to any improvements thereon, which may arise from the carrying on of operations by the Minister or the permittee or lessee thereon or thereunder; and

(c) severance of the land from other land of the owner or occupier; and

(d) surface rights of way; and

(e) all consequential damages.

…"

[6] The Tribunal awarded compensation which included amounts for what it regarded as "consequential damages" under s 99(1)(e): an amount of $95,760 by way of injurious affection, being the diminution in the market value of that part of the respondents' land which was not the subject of any operations under the leases or the authority to prospect, and another amount of $7,245 representing the legal fees paid to the respondents' solicitor in connection with the preparation of their claim for compensation. The appellants argued that a proper construction of the statute did not permit either claim to be upheld.

[7] The Tribunal, in reaching its conclusion that damages for injurious affection and legal expenses were available under s 99(1)(e), rejected the appellants' argument that the consequential damages the sub-section provided for were referable to the forms of loss identified in the preceding sub-sections. Instead, it took the view that each of the sub-sections in s 99(1) conferred an independent entitlement to compensation; and they were to be read cumulatively, each sub-section adding another head of damage. Thus, s 99(1)(e) was not governed by the preceding sub-sections, but provided an additional head of compensation sufficiently broad to enable recovery of all losses flowing as the result of entry and activity on a property under an authority to prospect or a petroleum lease. That extended beyond the impact on the landholder's primary production activities to encompass, in this case, compensation for the diminution in the market value of those parts of the property not being used for the purposes of the appellants' mining operations, and the legal expenses involved in preparation of a compensation claim.

The legislative history

Compensation under the 1915 Act

[8] The Tribunal relied heavily, in reaching its decision, on the history of the Queensland legislation governing petroleum and its exploitation. The *Petroleum Act* 1915 was the predecessor to the legislation in issue here. In relation to the Crown's powers, and compensation for their exercise, s 7 provided:

> (1) The Minister is hereby empowered, by his officers, agents, and workmen, to carry on the business of searching for petroleum, and of conducting all operations deemed necessary for obtaining, refining, and disposing of petroleum, in or upon any land in Queensland.
>
> (2) For this purpose the Minister may enter upon and occupy, either temporarily or permanently –
>
> (a) Any vacant Crown land; or
>
> (b) Without making any compensation, except for permanent deprivation of the possession of so much of the surface, including any improvements thereon, as is required for any purpose other than the actual working of the mine and other than surface rights of way thereto or therefrom, any land in the grant or subsisting lease or license of which from the Crown, whether issued before or after the passing of this Act, petroleum has been reserved; or
>
> (c) Subject to paying compensation, any other land alienated from the Crown for an estate in fee-simple before the passing of this Act, or any other land held under subsisting lease or license from the Crown issued before the passing of this Act.
>
> (3) For the purpose of determining the compensation to be paid under this section, the provisions of *The Public Works Land Resumption Act of* 1906 shall be applicable.

> (4) The compensation, if any, to be made under paragraph (c) of subsection two of this section shall be compensation for –
>
> (i) Deprivation of the possession of the surface or of any part of the surface; and
>
> (ii) Damage to the surface or any part thereof and to any improvement thereon which may arise from the carrying on of operations thereon or thereunder; and
>
> (iii) Severance of the land from other land of the owner or occupier; and
>
> (iv) Surface rights of way; and
>
> (v) All consequential damages:
>
> Provided that –
>
> (a) In determining the amount of compensation no allowance shall be made for any petroleum known or supposed to be in or under the land;
>
> (b) Compensation under this section shall not be payable in any case where the operations of the Minister do not comprise any portion of the surface of the land.

[9] The *Public Works Land Resumption Act* 1906, referred to in s 7(3), provided in s 19 for compensation:

> "In estimating the compensation to be paid, regard shall in every case be had not only to the value of land taken but also to the damage, if any, caused –
>
> (a) By the severing of the land taken from other land of the claimant; or
>
> (b) By the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land…."

[10] Those provisions demonstrated, the Tribunal said, that injurious affection was always a concept relevant to the assessment of compensation in petroleum matters. The debate on the Bill which became the 1915 Act contained reference to the inclusion of injurious affection as a form of compensation. The words "all consequential damages" used in the 1915 Act would, by virtue of the incorporation of damages under s 19 of the *Public Works Land Resumption Act,* extend to injurious affection; and it followed that in the subsequent Act the same words would similarly embrace such compensation. Sub-section 7(4) of the 1915 Act contained identical heads of compensation to those appearing in what is now s 99(1) of the 1923 Act as amended. In the second reading speech to the Petroleum Bill in 1923 there was reference to adequate compensation for loss of property rights. That manifested a clear intent, the Tribunal considered, that all damages consequential on exploitation of petroleum would be compensated for; and that must include damages for injurious affection.

[11] A closer examination of the *Petroleum Act* 1915, does not however, support the view that it provides any precedent for payment of compensation for injurious affection to applicants in the position of the present respondents; quite the contrary. Under the 1915 legislation, only the relevant Minister was empowered to enter and occupy land in order to engage in the activities of searching for and dealing with petroleum. That Act, in its original form, contained no provision for the grant of authorities, leases or permits to others. For the purposes of compensation, a distinction was drawn between land subject to the reservation of petroleum to the Crown, on the one hand, and other alienated land on the other. In the case of the former, compensation was limited to "permanent deprivation of … the surface, including any improvements" [1], and then was available only in respect of the part of the land occupied which was being used for something other than the mine workings and access to them; for example, where a refinery had been established. In contrast, where no reservation existed, compensation was to be paid by reference to s 19 of the *Public Works Land Resumption Act,* which did require regard to be had to injurious affection of the balance of the applicant's land[2].

Other pre-1923 Act legislation

[12] Prior to the 1915 Act, the *Mining for Coal and Mineral Oil Act* 1912 had enabled the grant of licences to prospect and mineral leases[3] under the *Mining Act* 1898 for mining for "mineral oil" (including petroleum) on Crown land. "Crown Land" was defined for those purposes, in s 3 of the *Mining Act*, as including unalienated Crown land and pastoral leases. No compensation was prescribed, except in respect of very limited areas, the subject of special licences to reside or carry on business, or special purpose leases of areas not exceeding 25 acres under s 188 of the *Land Act* 1897; in those cases a claim could be made within three months, by persons entitled to or in charge of the surface, for injury to the surface or disturbance of its enjoyment[4]. The *Mining for Coal and Mineral Oil Act* was amended by the *Petroleum Act* 1915 so as to end its application to petroleum. However, in 1920, the *Mining Act Amendment Act* [5] amended the *Petroleum Act*, reinstating licences to prospect and mineral leases for mining for petroleum on Crown land, in terms very similar to those in the *Mining for Coal and Mineral Oil Act.* The provisions of the *Mining Act* with respect to mineral leases were expressed to apply to leases for mining for petroleum, and the compensation available remained the same.

Compensation under the 1923 Act as enacted

[13] A major change effected by the 1923 Act was to allow, for the first time, the issue of prospecting permits and petroleum leases for exercise on "private land" or "improved land"; the former[6] being freehold land or land held from the Crown with an entitlement to acquire an estate in fee simple[7], and the latter, land with improvements on it, or subject to specific uses: inter alia, cultivation or mining storage[8].

---

1 s 7(2)(b).
2 s 7(2)(c), s 7(3).
3 s 5,s 7.
4 s 46 *Mining Act* 1898.
5 s 23.
6 s 3.
7 Under the *Land Act* 1897, selectors who met certain conditions had such an entitlement.
8 s 3, s 4 *Mining on Private Land Act* 1909.

[14] The structure of the 1923 Act as regards compensation was much closer to the *Mining on Private Land Act* 1909, which regulated mining for minerals and gold on "private land" (defined in identical terms to those later used in the 1923 Act), than anything in the 1915 Act. Section 17 of the *Mining on Private Land Act* made compensation payable to landholders affected by operations under mining tenements, and s 19(1) prescribed the "measure of compensation" to be made under the Act. The heads of that compensation were formulated in terms identical to those used in s 7(4) of the 1915 Act (in respect of operations by the Minister), and later in s 61, now re-numbered as s 99(1), of the 1923 Act. Like the 1923 Act, and unlike the 1915 Act, the *Mining on Private Land Act* restricted application of the compensation provisions of the *Public Works Land Resumption Act*, which included compensation for injurious affection, to cases where land was resumed[9].

[15] The *Petroleum Act* 1923 as enacted continued to distinguish[10], for the purposes of compensation for entry and occupation by the Minister, between land the subject of a reservation of petroleum, and other land. In the case of the former, compensation was limited to permanent deprivation of the possession of so much of the surface as was required for purposes other than the actual working of the mine and rights of way. Otherwise, compensation was to be made as provided in the Act. Reference to the *Public Works Land Resumption Act* in this context was omitted in the 1923 Act; it remained relevant only as prescribing compensation for the purposes of s 8, to be paid to the owner or occupier of land resumed by the Governor in Council.

Compensation under the 1923 Act as amended

Entry or occupation by the Minister

[16] The same limitation on compensation payable on entry or occupation by the Minister (now a corporation sole) of land subject to a reservation is maintained, in very similar terms, in s 14(4) of the current *Petroleum Act*. In 1988, specific reference to compensation for entry on land not the subject of any reservation was omitted[11], possibly because the circumstance was so rare as not to require mention. By inference, if there remains any land where no reservation exists, compensation remains payable for the Minister's activities on the broader basis provided by s 99(1); but there is no specific mention of injurious affection in relation to entry or occupation by the Minister.

Resumption

[17] As the *Petroleum Act* currently stands, s 11(2)(c) confers on the Minister a general power to take land. More specifically, s 76 of the *Petroleum Act* contemplates resumption of land for the purpose of pipelines, by the Minister[12] or by the Governor in Council[13], where leasehold is involved. Any resumption of leasehold is to proceed under the *Land Act* 1994, which, in turn, applies, for the purposes of compensation, the *Acquisition of Land Act* 1967. Section 76 is not so clear as to procedure where the land is freehold, but again, since the land is taken for the purposes of an Act, and hence falls within the schedule to, and s 5 of, the *Acquisition of Land Act*, it seems that the latter Act would apply in determining the

---

9 s 8.

10 In s 7(2).

11 Section 6 of the *Petroleum Act Amendment Act* 1988 repealed and replaced s 7 with a new series of sections concerning the Minister's powers, including s 7C, since re-numbered as s 14(4).

12 Subs. (5).

13 Subs. (2).

compensation payable. The *Acquisition of Land Act* makes express provision in resumption cases for compensation[14] for both severance and injurious affection of other land of the claimant[15]. Other than by application of the *Acquisition of Land Act* in the case of resumption, through the process just described, the *Petroleum Act* contains no reference to compensation for injurious affection.

Measure of compensation

[18] Notwithstanding the respondents' submissions to the contrary, it is clear, I think, that s 99(1) is not an independent source of entitlement to compensation, as opposed to identifying heads of compensation which may be payable pursuant to other provisions of the Act. The heading, "Measure of compensation" is the first indication of that. The sub-section speaks of "the compensation to be made under this Act" and proceeds to identify it; it does not stipulate that compensation *is* to be made under the Act. And it is difficult to see how it could operate in the abstract, somehow conferring compensation at large irrespective of a particular tenement or right under the Act. Plainly enough, the section does no more than specify the extent of the rights of compensation conferred elsewhere in the Act, subject to provision to different effect.

Rights of compensation

[19] There are some specific rights of compensation created elsewhere in the Act, some of which require recourse to s 99(1), others of which "otherwise provide". Section 14(4), which concerns compensation where the Minister enters or occupies land the subject of a reservation, has already been mentioned; it expressly limits compensation, where available, to deprivation of the possession of the surface. Section 68 requires the holder of an entry permission (for the purpose of investigation and survey) to pay compensation where someone acting under that permission damages improvements, while s 77 similarly requires the holder of a pipeline licence who damages improvements on land not resumed for the pipeline, to pay compensation. In those cases, s 99(1), which itself refers to damage to improvements in the specific context of damage arising from the carrying on of operations, would not seem to add much, except perhaps in the reference in sub-section 99(1)(e) to consequential damages.

[20] The respondents relied, in seeking compensation, on s 18, which applies to authorities to prospect, and s 88 of the Act which is concerned with authorities, permits and leases. (Other than in respect of the injurious affection claim, which did not distinguish between tenements, about two thirds of the damage claimed was attributed to work under the petroleum leases, the balance to the authority to prospect.) Section 18(5) makes compensation payable by the holder of an authority to prospect before he enters on the land. All of the Act's provisions in relation to determination of compensation, by agreement or by the Wardens Court[16], are expressed to apply. Section 36, a provision not relied on here, bears some similarity to s 18 in the way it operates: it requires the holder of a prospecting petroleum permit (including an authority to prospect) to apply to a Wardens Court to determine the compensation payable before any drilling on private or improved land is commenced. No parameters for the determination of compensation are set by

---

14 ss 12,18.

15 s 20.

16 A role now assumed, by virtue of s 86 of the *Land and Resources Tribunal Act*, by the Land and Resources Tribunal.

either s 18 or s 36; but s 99 would operate in each case to provide the bases of compensation.

The relationship between ss 88 and 99

[21] It is harder to discern the relationship between the heads of damage articulated in s 99 and the rights to compensation conferred by s 88, the only source of compensation in respect of damage done by operations under a petroleum lease. The language of s 88 presents considerable difficulty in arriving at any coherent construction of the section itself or its operation in relation to s 99. On one view the rights conferred by sub-sections (3) and (4) of s 88 are quite limited – to provide compensation for damage to crops and improvements on the one hand, and, on the other, reimbursement for occupation, which might reasonably be characterised as in the nature of rent or mesne profits – and have no obvious relationship to each other or to any of the forms of damage specified in s 99(1).

[22] Section 88(3) requires compensation in accordance with the Act in respect of damage to all crops and improvements on the property as a whole. Section 88(4) appears to be a non sequitur: it says that "such compensation" is to include reimbursement for the occupation of the part of the land occupied for mining and construction works; a head of compensation which bears no obvious relationship to damage to crops and improvements on the land as a whole. Neither form of damage has any apparent connection to those identified in s 99(1)(a)-(d), which are concerned with the effects of mining on the surface of the property and severance of the land used from the balance of the landholder's property. The requirement of compensation "in accordance with the Act" is not illuminating; it might refer to the application of s 99, but equally might simply be a reference to s 97, which limits the circumstances in which compensation may be paid to those where operations comprise part of the surface of the land, and provides what must happen if the persons entitled to compensation cannot be found.

[23] It is possible, on a narrow view, to regard s 88 as identifying only three forms of compensation payable in respect of petroleum lease operations - damage to crops, damage to improvements, and occupation rent - and thus "otherwise providing" so as to exclude any role for s 99(1). Such a construction is unattractive: it would place a landholder whose property was subject to a lease where no authority to prospect or permit had been granted (as may be the case under s 42) in a worse position than a landholder in respect of whose land no more than a permit to drill had been given. In the latter case, the landholder would be entitled to compensation under s 36 assessed in accordance with s 99; but where a lease existed in the absence of such a permit, although drilling could certainly be expected to take place within the terms of the lease, there would be no capacity to recover in respect of surface damage or severance.

[24] The better view, I think, is that while s 88(3) sets a clear limit - damage to crops and improvements - on compensation in respect of damage done beyond the boundaries of the land subject to permit or lease, so as to "otherwise provide" for the purposes of s 99(1), a broad construction should be given to "reimbursement for the occupation of that portion of the land occupied … for mining and construction works", as meaning compensation for the effects on the land of its occupation: those matters set out in s 99(1). Apart from the concern I have already expressed as to the inequitable result of a more narrow view, there are other reasons for construing "reimbursement for … occupation" not as having the more obvious meaning of a

form of rent, but as embracing compensation for damage to the land occupied. Rent under an authority to prospect, permit, or lease is payable to the Crown under other provisions of the Act, in the case of an authority at a rate to be fixed by the Minister, and for a permit or lease at rates specified in the Act. There seems little justification for imposing another requirement of recompense for occupation. And it is to be noted that, unless it is provided by s 99(1), the Act does not prescribe any measure of reimbursement for occupation under s 88(4).

[25] The heading to s 88, "Conduct of operations on land" also provides some slight support for a construction of the provision generally as concerned with the effects of the work done on the land in the course of occupation, rather than occupation per se. The subsections, other than (4), consistently with that heading, prohibit interference, beyond what is necessary, with the existing use of the land demised, provide for compensation for damage to crops and improvements, require precautions to prevent injury to the land occupied and require repair of damage done. It would similarly be consistent with the section's heading if subsection (4) were directed to compensation for what was done in the course of occupation of the land occupied, rather than rent for the occupation.

[26] Some further support for a construction of "reimbursement" in s 88(4) as a reference to compensation is to be found in an examination of the sub-section as it originally appeared, in s 52 of the Act. The part of the section that dealt with compensation read as follows:

> "Without derogating from any other provisions of this Act, the permittee or lessee shall reimburse the owner or occupier (as the case may be) of such land for all damage sustained by such owner or occupier to crops and improvements, including permanent artificial water supply, by reason of drilling, prospecting operations, and construction works: such damage shall include reimbursement for occupation of that portion of such land occupied by the permittee or lessee for mining and construction works during the period of such occupation."

It can be seen that, instead of referring to an obligation 'to make compensation' in the first instance, the expression used is 'shall reimburse the owner or occupier ... for all damage ... to crops and improvements'. That suggests the use of "reimburse" and "compensate" interchangeably; and there is a clear link, in that earlier form of the provision, between damage and reimbursement for occupation, again suggesting that what is contemplated is compensation for damage resulting from occupation. It may be that a distinction was perceived between compensation payable in advance, under ss 18 and 36, and compensation for damage already sustained, the latter described as "reimbursement". Section 52 was replaced in 1962[17] by a provision which, apart from numbering, was in the form of s 88 as it is now. Nothing was said on the introduction of the amending Act to suggest that the change to this section was intended to give it any different effect.

[27] I would read, then, the expression "reimbursement for occupation" in s 88(4) as requiring compensation for the occupation of that part of the land used for mining and construction while the land was occupied. That compensation is available for those matters referred to in s 99(1); that is to say deprivation of the possession of the surface, damage to it and to improvements, severance of the land involved, service

[17] *Petroleum Act Amendments Act* 1962, s 21.

rights of way (all of which seem apt in respect of the land used for mining and construction works); and consequential damages.

Does "all consequential damages" encompass injurious affection?

[28] Clearly enough, taking s 88(4) with s 99, compensation is available for the adverse physical effects of operations on the land actually occupied and also for damages consequential upon those effects. There remains, of course, the question as to what is encompassed in "all consequential damages"; or more particularly, in this case, whether adverse effects to land other than that used and occupied, apart from actual damage to crops and improvements, are compensable.

[29] The respondents argued for an expansive approach to the construction of s 99(1)(e), sufficiently wide to include injurious affection. Such an approach would, it was submitted, accord with what was said by McHugh J in *Marshall v Director General Department of Transport*[18] :

> "legislation dealing with the compensation ... in respect of the compulsory acquisition of land ... should be construed with the presumption that the legislature intended the claimant to be liberally compensated".

[30] The statutory provisions in this case are rather different from those under consideration in *Marshall*. There the question was as to the extent of the circumstances in which an expressly conferred right of compensation for injurious affection arose. Here the Act contains no mention of injurious affection. What is sought is the implication of a very significant right of compensation, embraced, in effect as an afterthought, in the expression "all consequential damages". Although one starts with a presumption of liberal construction, still there must be something in the statute to support that construction.

[31] The respondents' primary position was that sub-section 99 (1)(e) conferred of itself a right to compensation for injurious affection, ungoverned by any preceding provision. That was demonstrated by the fact that s 18 did not identify any particular matters by reference to which compensation in respect of the exercise of rights under an authority to prospect could be determined; yet it was clear that compensation was to be paid under the section. Consequently, s 99(1) must provide for that compensation; but it was conceivable that activities under an authority to prospect would not give rise to any of the heads of damage set out at subsections (1)(a) – (d). Since an available category of compensation must be found somewhere, the phrase "all consequential damages" in sub-section (1)(e) must be read as referring to any damage consequential on the exercise of the rights conferred by an authority to prospect.

[32] I do not find the argument compelling. It is quite conceivable that exercise of rights under an authority to prospect might do no damage; and I doubt that in such a case the legislation intends compensation. Section 18 does not, in my view, mandate compensation wherever land is entered under such an authority; what it does do, is to make whatever compensation is payable under the Act, payable before entry.

[33] The respondents' second argument was premised on an acceptance that the compensation available under s 99(1) was compensation in respect of the matters in s 88(4). That sub-section provided for compensation including "reimbursement for

[18] (2001) 205 CLR 603 at 627.

the occupation ... of the land". Taking that in conjunction with s 99(1)(a), there was to be compensation for the deprivation of the possession of the surface. If the respondents had not been deprived of possession of the land they could have prevented activities which gave rise to the injurious affection. The resulting loss, in the form of a diminution in value, came within the expression "all consequential damages".

[34] But on my reading of s 88(4), the basis of compensation is the occupation of the land used for mining and construction works. The compensation is for the effect of that occupation on the land occupied. Putting aside resumption cases, the only allusion in the Act to compensation for adverse effects on land not the subject of activities under the relevant tenement is the specific reference in s 88(3) to damage to crops and improvements. That does not encourage a view that injurious affection was intended to be the subject of compensation.

[35] The language of the statute does not, in my view, permit a conclusion that injurious affection is embraced in s 99(1)(e). Nor, as discussed earlier, does the legislative history of compensation for petroleum extraction offer any support for the notion. Damages should not have been awarded for this aspect of the claim.

Legal expenses

[36] As to the question of legal expenses, the appellants' submission was that the costs were not capable of characterisation as consequential damages; if they were recoverable at all, they were recoverable as costs. Counsel for the respondents argued that there was a distinction to be drawn between the legal costs of the preparation of the claim and legal costs of the proceedings. The former were capable of being recovered as consequential damages, and it had been the practice of tribunals to permit their recovery. (In the decision of the Tribunal reference was made to other decisions of the Tribunal and of the Land Court allowing the cost of preparation in the context of claims under the *Mining Act* 1968 and the *Mineral Resources Act* 1989.)

[37] I do not consider that legal fees paid in connection with the preparation of the claim for compensation are properly characterized as damage consequential upon the occupation of the land by the appellants under the permit and leases. If authority be needed for that proposition it is to be found in *Minister for the Army v Pacific Hotel Pty Ltd*[19] in which valuation fees advanced by the claimant as part of his damage were held to be part of the costs of preparing the claim and not part of the damage suffered by the claimant when its hotel was impressed for war purposes. Nor, as was observed in both *Duncan v Minister for Education*[20] and *Coastal Estates Pty Ltd v Bass Shire Council*[21], is there any basis for treating costs incurred in the preparation of a claim any differently from costs in any other form of litigation.

[38] Section 50 of the *Land and Resources Tribunal Act* 1999 requires each party to bear its own costs, in the absence of special circumstances. It was not contended by the respondents that if the legal expenses were not properly awarded as part of compensation they should be ordered as costs.

---

[19] [1944] St RQd 112, at 122, 123, 129.
[20] [1969] VR 362 at 365.
[21] [1993] 2 VR 566 at 594.

Conclusion

[39] For the reasons I have given, the amount of compensation determined as payable by the Tribunal should be reduced by removal of the amounts for injurious affection ($95,760) and legal expenses ($7,245). The judgment should be varied to reflect the amended total of $67,677.78. The order for interest made in a subsequent judgment of the Tribunal does not require adjustment. The respondents should pay the appellants' costs of the appeal.