SUPREME COURT OF QUEENSLAND

CITATION:	*Rio Tinto Coal Aus P/L & Ors v Qld Coal & Oil Shale Mining Industry (Superannuation) P/L* [2005] QSC 340
PARTIES:	**RIO TINTO COAL AUSTRALIA PTY LTD** (formerly Pacific Coal Pty Ltd) (first applicant) **HAIL CREEK COAL PTY LTD** (second applicant) **KESTREL COAL PTY LTD** (third applicant) **RIO TINTO SERVICES PTY LTD** (fourth applicant) **v** **QUEENSLAND COAL AND OIL SHALE MINING INDUSTRY (SUPERANNUATION) PTY LTD** (first respondent) **AUSCOAL SUPERANNUATION PTY LTD** (formerly COALSUPER Pty Ltd) (second respondent)
FILE NO/S:	BS3282 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2005
JUDGE:	Muir J
CATCHWORDS:	STATUTES – REPEAL – INTERPRETATION – RULES OF CONSTRUCTION – PRESUMPTIONS AS TO LEGISLATIVE INTENTION – applicants contributing employers pursuant to the *Queensland Coal and Oil Shale Mine Workers Superannuation Act* 1989 (Qld) ("QCOS Act") – respondents original and current trustees of relevant fund – as originally enacted QCOS Act allowed contributions to be paid to the QCOS fund or any such fund as approved by the trustee – amendments made to QCOS Act deleting provision for payment to a fund other than QCOS fund – did the amendment affect an 'accrued right' under s 20 of the *Acts Interpretation Act* 1954 (Qld) – was the intention of the

legislature to terminate approval

STATUTES – INCONSISTENT STATUTES – INTERPRETATION – INCONSISTENCY – applicants entered into Australian Workplace Agreements ("AWAs") and certified agreements providing for agreement between employer and employee regarding superannuation –whether amendment creates inconsistency with existing contractual rights – whether amendment is inconsistent with provisions of *Workplace Relations Act* 1996 (Cth)

Acts Interpretation Act 1954 (Qld), s 20
Coal and Oil Shale Mine Workers' Superannuation Act 1989 (Qld), s 4, s 13
Coal Legislation Amendment Act 1997 (Qld), s 4
Commonwealth of Australia Constitution Act 1900 (Cth), s 109
Industrial Relations Act 1988 (Cth)
Mining and Other Legislation Amendment Act 2000 (Qld), s 3, s 4
Workplace Relations Act 1996 (Cth), s 170LZ, s 170VR

Abbott v Minister for Lands [1895] AC 425
CIC Insurance Ltd v Bankstown Football Club Ltd (1996-1997) 187 CLR 384
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297
Hamilton Gell v White [1922] 2 KB 422
Jones v Wrotham Park Settled Estates [1980] AC 74
Kingston v Keprose Pty Ltd (No 3) (1987) 11 NSWLR 404
Mathieson v Burton (1971) 124 CLR 1
R (Passenger Transport UK) v Humber Bridge Board (CA) [2004] QB 310
R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd [2001] 2 AC 349
Re Finance Sector Union of Australia, Ex parte Financial Clinic (Vic) Pty Ltd (1993) 114 ALR 321
Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures (1986) 160 CLR 341
Resort Management Services Limited v Noosa Shire Council [1997] 2 Qd R 291
Sofi v Wollondilly Shire Council (1975) 2 NSWLR 614
WACB v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 79 ALJR 94

COUNSEL: J N West QC, with A W Duffy, for the applicants
S E Brown, with M Luchich, for the respondents

SOLICITORS: Freehills for the applicants
Minter Ellison for the respondents

[1] Section 13 of the *Coal and Oil Shale Mine Workers' Superannuation Act* 1989 (Qld) ("the Act"), before its repeal by section 4 of the *Mining and Other Legislation Amendment Act* 2000 (Qld) ("the Amendment Act"), contained a requirement for mine workers and mine owners to contribute to the Queensland Coal and Oil Shale Workers' Superannuation Fund ("the Statutory Fund") "or to such other superannuation funds as the trustee may from time to time approve". The first respondent is, and was at all relevant times, the trustee of the Statutory Fund.

[2] On about 9 June 1992, the first respondent approved a fund known as the Rio Tinto Staff Superannuation Fund ("the Rio Tinto Fund") as a fund into which contributions may be made for the purposes of section 13 of the Act. That approval was subsequently extended on or about 29 September 1993.

[3] Section 13 of the Act was renumbered as section 3 and section 16, which made provision for the recovery of unpaid contributions required to be made under section 13, was renumbered as section 4 by the *Coal Legislation Amendment Act* 1997 (Qld). Sections 3 and 4 were repealed by the Amendment Act. A new section 4, inserted by the Amendment Act, provides for mine workers and employers of mine workers to make contributions to the Statutory Fund. It has no provision for the trustee of the Statutory Fund or anyone else to approve the payment of contributions into an alternative fund. For convenience, section 4 of the Act as amended will be referred to as section 4 of the Act.

[4] The applicants are all part of the Rio Tinto Limited group of companies. The first, second and third applicants are contributing employers under a superannuation deed to a superannuation fund in respect of which the first respondent was the original trustee and the second respondent is the current trustee.

[5] The applicants seek a declaration that on the proper construction of section 13 of the Act and section 4 of the Act, the approval of the Rio Tinto Superannuation Fund under section 13 was not terminated by the Amendment Act.

[6] Alternatively a declaration is sought that, in the alternative, section 4 is inconsistent with the *Industrial Relations Act* 1988 (Cth) and the *Work Place Relations Act* 1996 (Cth), and certain agreements made pursuant to that legislation, and is invalid to the extent of the inconsistency.

The relevant legislation

[7] Section 13 of the Act and section 4 of the Act (as amended) relevantly provide:

> "**Contributions to Superannuation Fund**
>
> **13.** Contributions shall be made to the superannuation fund or to such other superannuation funds as the trustee may from time to time approve –
>
> (a) by each mine worker, in accordance with the obligation to contribute to the fund under the previous Act at the rate per week (with fractions of a cent disregarded) of 2.5% of the weekly award rate specified in section 18(1)(b) of the previous Act;

(b) by each owner, in accordance with the obligation to contribute to the fund under the previous Act except that the amount shall be at the rate per week (with weekly award rate specified in section 18(1)(c) of the previous Act."

"**Contributions to superannuation fund**

4.(1) For each pay period for each mine worker, the following persons must make contributions to the superannuation fund at the rates stated—

(a) the mine worker, at the rate of 2.5% of the award wage for a coalcutting machineman under the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (the '**award wage**');

(b) the mine worker's employer, at the rate of 7.5% of the award wage.

Maximum penalty for subsection (1)(b)—20 penalty units.

(2) The following persons are employers for the class of mine worker stated in the section mentioned—

(a) section 3(1)(a), (b), (d), (e) and (f)—the owner of the mine;

(b) section 3(1)(c)—the employee organisation;

(c) section 3(1)(g)—the mines rescue brigade;

(d) section 3(2)—the partnership;

(e) section 3(3)—the contractor;

(f) section 3(4)—the subcontractor.

(3) Contributions to be made under subsection (1) must be made within 14 days after the end of the mine worker's pay period to which the contributions relate.

(4) Contributions to be paid under subsection (1) that are not paid within the period specified in subsection (3) are a debt payable to the trustee.

(5) Subsection (1) does not apply when a mine worker is on unpaid leave.

(6) In subsection (5)—

"**unpaid leave**", for a mine worker, means leave during which the mine worker is, with the consent of the mine worker's employer, absent without remuneration from employment and includes parental leave, compassionate leave and special leave but does not include –

(a) sick leave during which the mine worker receives salary, wages or other remuneration from the employer; or

(b) leave during which the mine worker receives compensation under the *WorkCover Queensland Act 1996*."

[8] The applicant advances two construction arguments. The first relies on section 20 of the *Acts Interpretation Act* 1954 (Qld). It relevantly provides:

> "**20. Saving of operation of repealed Act etc.**
> …
> **(2)** The repeal or amendment of an Act does not –
> …
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or
> …"

[9] The "right" identified is the existence of the approval and/or the entitlement to pay contributions into the approved fund. In reliance on *Mathieson v Burton*,[1] it is submitted "rights" for the purposes of section 20 need not be necessarily strictly legal rights. In that case the right of a child of the lessee of prescribed premises, upon the death of the lessee, to remain in possession of the premises until a grant of probate or letters of administration, was accepted as a "right" within the meaning of section 8(b) of the *Interpretation Act* 1897 (NSW), a New South Welsh analogue of section 20.

[10] Another decision on which reliance is placed by the applicants is *Hamilton Gell v White*.[2] The *Agricultural Holdings Act* 1908 gave tenants the right to compensation where they had given notice of intention to claim compensation within two months of receipt of a notice to quit provided the claim was made within three months of the quitting of the subject holding. The court was required to consider the tenants' rights where the relevant provisions of the Act were repealed between the giving of notice of intention to claim compensation and the making of the claim.

[11] It was held, in reliance on a provision substantially the same as section 20, that the tenants' claims were not affected. Lord Atkin said:[3]

> "It is obvious that the provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here, the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances, the tenant has 'acquired a right', which would 'accrue' when he has quitted his holding to receive compensation. A case was listed in support of the landlord's contention: *Abbott v Minister for Lands* [1895] AC 425 …"

[12] The concept of "accrued right" was explained in *Sofi v Wollondilly Shire Council*[4] in these terms:

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1 (1971) 124 CLR 1 at 12, 13.
2 [1922] 2 KB 422.
3 At 431.
4 (1975) 2 NSWLR 614 at 618.

> "Generally speaking, these cases indicate that a right may be regarded as accrued only if it is a specific right which is vested in an individual by reason of the happening of an event, or events, specified by the repealed enactment, or by virtue of some act done by the individual before the repeal."

[13] That analysis is consistent with the approach taken in *Abbott v Minister for Lands,*[5] in which in respect of a provision analogous to section 20, it was observed:

> "They [their Lordships] think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."

[14] In *Resort Management Services Limited v Noosa Shire Council,*[6] McPherson JA explained:

> "The primary purpose of s 20(1)(c) is to prevent rights which have been created or conferred by statutes from being casually, or it may be unintentionally, destroyed by repeal of the statute and without any further or other specific indication of a legislative intention to do so going beyond the fact of the repeal itself. Apart from that, s 20(1)(c) has no recognisable function."

[15] Section 20(1)(c) must be read together with section 4 of the *Acts Interpretation Act* 1954 (Qld) which provides:

> "The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any Act."

[16] That intention is an objective concept to be gleaned from the language of the legislation.[7] There is no contrary intention disclosed in the Amendment Act. Indeed, the absence of any transitional provisions and of any reference at all to the status of approved funds, and the impact on those funds on the removal of the right to pay into them, is suggestive of a parliamentary oversight rather than an intention to remove the ability to pay into the approved funds. The application of the foregoing principles require the conclusion that the subject approval under section 13 as extended and the consequent entitlement to pay contributions into the approved fund is a right under the Act which was not affected by its amendment.

[17] Having regard to the conclusion I have reached it is unnecessary for me to consider in detail the alternative argument that words should be read into section 4 of the Act

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5 [1895] AC 425, particularly at 431.

6 [1997] 2 Qd R 291 at 298.

7 *R (Passenger Transport UK) v Humber Bridge Board (CA)* [2004] QB 310; *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 396, 397.

to remedy the consequences of an obvious unintentional omission. In support of this limb of their argument, the applicants rely on the following statement of principle of Lord Diplock in *Jones v Wrotham Park Settled Estates*:[8]

> "First the court must know the mischief with which the statute is dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its intention had been dawn to the defect."

[18] That passage was referred to with approval by McHugh JA in *Kingston v Keprose Pty Ltd (No 3)* (1987) 11 NSWLR 404 at 422, 423.

[19] *CIC Insurance Ltd v Bankstown Football Club Ltd*[9] is another relatively recent decision which cautions against undue literalism in statutory construction. In their joint judgment, Brennan CJ, Dawson, Toohey and Gummow JJ observed:

> "Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent"

[20] In the joint judgment in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs,*[10] it was pointed out that Gibbs CJ, in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[11] said that "the canons of construction should not be treated so rigidly as to prevent the implementation of a realistic solution in the case of a drafting mistake". But, it was noted also that Gibbs CJ went on to say that "where the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning". In this case, I doubt that it can be said that the deficiency if there be one, must be rectified "if the purpose of the legislation is to be achieved". The language of section 4 is clear and

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8 [1980] AC 74 at 105.

9 (1996-1997) 187 CLR 384 at 408. See also, *Vacheral Sons Ltd v London Society of Compositors* [1913] AC 107

10 (2004) 79 ALJR 94 at 101.

11 (1981) 147 CLR 297.

unambiguous and no inconsistency or lack of harmony with other provisions of the amended Act has been identified.

Inconsistency

[21] The applicants have entered into nine certified agreements and three Australian Workplace Agreements in which, in different forms of words, there is agreement between employer and employee that superannuation be provided to the employee either through the Rio Tinto Fund or the Statutory Fund. It is contented that on the proper construction of such provisions employees were to be given a choice of funds and not limited to the Statutory Fund. Consequently, it is said that if section 4 of the Act removes the ability of employers and employees to use the Rio Tinto Fund, there will be inconsistency between section 4 and those contractual rights. Three of the certified agreements provide in respect of superannuation contributions:

> "The company will pay the employer contribution into the Queensland Coal and Oil Shale Superannuation Fund or other complying superannuation fund agreed between the company and an employee.
>
> Salary sacrifice will be available to employees subject to the rules of the relevant fund and the requirements of the Australian Taxation Office."

Another two contain practically identical provisions with the addition:

> "The parties will review superannuation arrangements in the event that the contributions to the Queensland Coal and Oil, - Shale Superannuation Fund fall below the Superannuation Guarantee requirements."

[22] Each of the above provisions contemplate that the employer and employee may, by agreement, decide that the employer's contributions be paid into a fund other than the Statutory Fund. The salary sacrifice provisions contemplate also that employee's contributions may be made to another fund. As the applicants' submissions point out, it is unlikely that the agreement contemplated that employer and employee contributions might be made to different funds.

[23] Two other Certified Agreements described in the material as Certified Agreements 3(b) and 9 provide:

> "The Company, and if required by the relevant fund each Employee, will make superannuation contribution into either:
>
> - The Defined Contributions (DC) Section of the Rio Tinto Superannuation Fund; or
> - The Queensland Coal and Oil Shale and Superannuation Fund (QCOS) or its successor fund; or
> - If agreed by the Employee and the Company, another complying Superannuation fund, in accordance with the rules of that fund.
>
> …".

[24] Certified Agreement 8 is practically identical to 3(b) and 9.

[25] Plainly, those provisions contemplate that superannuation contributions may be made to a fund other than the Statutory Fund.

[26] Certified Agreement 5 is different. It provides:

> "Superannuation shall be paid at Coal Industry Rates into the Coal Industry Fund and/or a recognised Industry Superannuation Fund."

[27] I accept the submission that the provision contemplates that an election may be made by an employee as to the fund into which contributions must be paid.

[28] I do not propose to set out the relevant terms of the AWAs. Each of them provides for a right of one party or the other to choose the fund into which contributions must be paid.

[29] In normal circumstances, contractual rights would give way to statutory requirements but here there is express statutory provision for the consequence of inconsistency. Sections 170LZ and 170VR of the *Workplace Relations Act* 1996 (Cth) respectively, address the precedence of certified agreements and Australian Workplace Agreements ("AWAs") over state laws. They relevantly provide as follows:

> **"170 LZ Effect of a certified agreement on Commonwealth laws or State laws, awards or agreements**
>
> (1) Subject to this section, a certified agreement prevails over terms and conditions of employment specified in a State law, State award or State employment agreement, to the extent of any inconsistency.
>
> …"

> **"170 VR Effect of AWA on other laws**
>
> (1) Subject to this section, an AWA prevails over conditions of employment specified in a State law, to the extent of any inconsistency."
>
> …"

[30] It is apparent from the language of both of these provisions that the expressions "terms and conditions of employment" and "conditions of employment" are not confined to the terms of a contractual document entered into between employer and employee. The establishment of superannuation, the identity of the fund and provision for contributions to it are very much part of an employee's remuneration entitlement. Those matters are, as has been held in various cases, "an aspect of the terms and conditions of employment".[12]

[31] Section 4 is incompatible with the provisions made in the certified agreements and AWAs in relation to superannuation. It requires superannuation contributions to be

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[12] *Re Finance Sector Union of Australia, Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 114 ALR 321 at 336 and *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341.

made to the Statutory Fund, whereas the latter, in substance, offer a choice of fund either to the employee or to the employer, or contemplate its use of another fund, by agreement. The effect of sections 170LZ and 170VR is to create an inconsistency between the provisions of section 4 and sections 170LZ and 170VR. By operation of section 109 of the Constitution, section 4 is void to the extent of the inconsistency.

[32] I will hear submissions on the form of orders, if any, which ought be made.