CITATION: *McIntyre v Tumminello Holdings* [2004] NTMC 097

PARTIES: JOHNATHON MCINTYRE

v

TUMMINELLO HOLDINGS

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Act

FILE NO(s): 20312425

DELIVERED ON: 15 September 2004

DELIVERED AT: Darwin

HEARING DATE(s): 5, 6, 7 & 8 April 2004

JUDGMENT OF: Mr Lowndes SM

CATCHWORDS:

WORK HEALTH – SS 75B(2) & (3) - WORK HEALTH ACT - CANCELLATION OF PAYMENT PURSUANT TO S 69 – WORK HEALTH ACT - MEANING OF THE REHABILITATION PROCESS – MUTUAL OBLIGATIONS – CONCEPT OF MORE PROFITABLE EMPLOYMENT – DEEMING PROVISION IN s 75B WORK HEALTH ACT

Interpretation Act
Work Health Act ss 69, 75B(2) & 75B(3)

Morrissey v Conaust Ltd (1991) 1 NTLR 183 - applied
AAT Kings Tours Pty Ltd v Hughs (1994) 4 NTLR 185 - applied
Disability Services of Central Australia v Regan (1998) 8 NTLR 73 - applied
Ju Ju Nominees Pty Ltd v Carmichael (1999) 9 NTLR - applied
Kypreos v Nabalco Pty Ltd 1999 - applied
Horne v Sedco Forex Australia Pty Ltd (1992) 106 FLR 373 - applied
Hunt v Collins Radio Constructions Inc (unreported NTSC 1996) - applied
Dicken v NT Tab Pty Ltd (unreported NTSC 2003) - applied
Normandy NFM Ltd v Turner [2002] NTSC 29 - applied
Schell v Northern Territory Football League (1995) 5 NTLR 1 - applied
Alexander v Gorey & Cole Holdings Pty Ltd (2002) 171 FLR 31 - applied
NT Tab Pty Ltd v Gail Dicken [2004] NTCA 8 - considered
Wacando v Commonwealth (1981) 148 CLR 1 - applied
Knight v Normandy Mining Ltd [2000] NTMC 002 - considered
Tanner v Anthappi Pty Ltd (2000) NTMC 4 - followed
Van dongen v Master Dairy SCWA - applied

REPRESENTATION:

Counsel:

Worker:	Mr McDonald QC
Employer:	Mr Southwood QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2004] NTMC 097
Number of paragraphs:	281

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

No. 20312425

BETWEEN:

JOHNATHON MCINTYRE
Plaintiff

AND:

TUMMINELLO HOLDINGS
Defendant

REASONS FOR DECISION

(Delivered 15 September 2004)

Mr LOWNDES SM:

THE NATURE OF THE PROCEEDINGS AND THE ONUS OF PROOF

1. The pleadings are as set out in the consolidated pleadings provided to the Court by the worker on 26 March 2004 as an aide memoire in relation to a preliminary legal argument as to the issue of which party was to be dux litus. This Court determined that issue on 1 April 2004. The Court made the following orders on that date:

1. That the employer bear both the evidentiary and legal onus in respect of its cancellation of payment of weekly benefits to the worker.

2. That the employer bear both the evidentiary and legal onus of establishing the value of any "more profitable employment" within the meaning of section 75B(2) of the *Work Health Act*.

3. That the employer bear both the evidentiary and legal onus of establishing the value of "the most profitable employment" within the meaning of section 75B(3) of the *Work Health Act*.

4. That the employer be dux litus for the purposes of the hearing of those proceedings to commence before the Work Health Court on Monday 5 April 2004.

5. That the costs of and incidental to determining the issue of which party is to be dux litus in these proceedings, and associated costs, be costs in the cause certified fit for counsel and to be taxed in default of agreement at 100% of the Supreme Court scale.

2. At the time of determining the issue of dux litus I indicated that I would provide written reasons in due course. Those reasons are as follows.

3. It is important to bear in mind that the worker's Statement of Claim is in the nature of an appeal from the decision of the employer to cancel payment of weekly benefits to the worker by reason of its Notice of Decision and Rights of Appeal dated 13 March 2003. The worker has confined his case to an appeal against cancellation of benefits pursuant to s 69 of the Work Health Act. The nature of the present proceedings is pivotal to the determination of the issue of dux litus.

4. It is well established law that where an employer has commenced payment of the weekly benefits under the *Work Health Act* and subsequently cancels payment of such benefits pursuant to s 69 of the Act, the employer carries the burden of establishing the matters or circumstances relied on in support of the cancellation: see *Morrissey v Conaust Ltd* (1991) 1NTLR 183; *AAT Kings Tours Pty Ltd v Hughs* (1994) 4 NTLR 185; *Disability Services* of *Central Australia v Regan* (1998) 8 NTLR 73. The employer is also dux litus in such circumstances: see *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR.

5. The fact that in the present case the employer seeks to rely upon a failure of refusal on the part of the worker to discharge his statutory obligations pursuant to subsections 75B(2) and (3) of the *Work Health Act* does not alter the position: the employer is still dux litus. That is consistent with the current state of the law. Any argument that the worker should be dux litus because he has peculiar or superior knowledge of the matters in issue – that is, the failure or refusal to discharge his statutory obligations – cannot be sustained. In my view, the employer has as great, or even greater, knowledge of the disputed matters. It is the employer who is asserting that the worker has not met his statutory obligations. The employer is in a better position to begin in relation to that matter. The employer is better positioned to lead evidence in relation to the rehabilitative processes and other relevant circumstances surrounding the alleged breaches of statutory duties by the worker. Finally, subsections 75B(2) and (3) require proof of unreasonable conduct on the part of the worker. It is the employer who asserts that the worker has acted unreasonably. Once again, the employer is in the better position to begin in relation to that issue.

6. In my view, making the employer dux litus in relation to the worker's appeal is the most effective way of resolving the issues in question: see *Kypreos v Nabalco Pty Ltd* (NTSC, 10 June 1999 per Kearney J). In my opinion, that is also the fairest method of resolving the issues: see *Kypreos v Nablaco Pty Ltd* (supra). If the worker were made to begin that would be unfair to the worker as he would be compelled to anticipate the employer's case, and the evidence it proposed to lead in support of its case. The worker should be forced to anticipate the employer's evidence in relation to the alleged failure or refusal: in effect, he would be required to make assumptions – worse still guesses. The worker would also be compelled to anticipate the employer's sane in relation to the "unreasonableness" aspect. Again this would, in my opinion, disadvantage the worker.

7. The employer's counterclaim gives rise to a similar set of issues, and the same considerations apply to it. In my opinion, the employer should be dux litus in relation to its counterclaim.

THE ISSUES AS DEFINED BY THE PLEADINGS AND THE RELIEF SOUGHT

8. The pleadings disclose the following admissions:

1. The worker was employed by the employer.

2. On June 1 1992 the worker was a victim in an armed hold up in the course of his employment and as a result suffered an injury, namely post-traumatic stress disorder.

3. As a consequence of the injury the worker was initially totally incapacitated for work and subsequently partially incapacitated for work to date and continuing.

4. The worker made a claim under the *Work Health Act* which was accepted.

5. Following acceptance of the worker's claim the worker received payments of compensation pursuant to the Act from the date of the injury to 28 March 2003.

6. By notice of decision and rights of appeal dated 13 March 2003 together with a letter from TIO to the worker also dated 13 March 2003 the employer cancelled payment of the worker's weekly benefits 14 days after service of the notice upon the worker.

7. The worker sought a mediation of that decision which provided an outcome of "no change".

8. The worker appealed from the decision.

9. After cancellation of weekly benefits the employer again sought to have the worker engaged in rehabilitation which the worker declined to do by letter dated 14 May 2003.

9. The areas of dispute in this case are of fairly narrow compass.

10. The employer alleges that the worker unreasonably failed or refused to comply with his obligations under subsections 75B(2) and/or (3) of the *Work Health Act*. The employer seeks the following rulings from the *Work Health Court:*

    1. That the worker's payments of compensation be cancelled or reduced in accordance with s 75B(2) of the Act.

    2. That the worker's payments of compensation be cancelled or reduced in accordance with s 75B(3) of the Act.

    3. In the alternative, a ruling as to the extend of the worker's incapacity for work from 13 March 2003 ongoing and continuing and consequential orders as to the cancellation or reduction of payments of compensation to the worker.

11. The employer seeks the following orders:

    1. In accordance with subsection 75B(2) the worker is deemed to be able to undertake more profitable employment than his employment at the time of the injury.

    2. The worker's payments of compensation are cancelled pursuant to Subsection 75B(2) of the Act from 27 March 2003.

    3. In accordance with subsection 75B(3) the worker is deemed to be able to undertake the most profitable employment that would be reasonably possible for a willing worker with his or her experience and skill and who has sustained a similar injury and who is in similar

circumstances and such employment is more profitable than the worker's employment at the time of the injury.

4. The worker's payments of compensation are cancelled in accordance with subsection 75B(3) of the Act from 27 March 2003.

5. On 27 March 2003 the worker ceased to have a loss of earning capacity.

12. Further, the employer seeks consequential orders, including an order as to costs.

13. The worker denies the alleged breaches of s 75B (2) and/or (3), and in lieu of the rulings sought by the employer seeks the following findings and orders:

1. That the notice of Decision and Rights of Appeal dated 13 March 2003 cancelling payment of benefits to the worker was invalid.

2. That the employer pay arrears of weekly benefits to the worker from and including 29 March 2003 to and including (date of judgement) and thereafter in accordance with the *Work Health Act*.

3. That the employer pay interest on arrears of weekly benefits in accordance with s 89 of the Act at the rate of 20% per anum from and including 3 April 2003 (one week after cessation of weekly benefits) to and including the date of payment on arrears at the rate of 20% per anum.

4. That the employer's decision to cancel payments of benefits to the worker in the circumstances as found by this Court was unreasonable and/or the failure to pay compensation to the worker after 28 March 2003 was unreasonable.

5. That the employer pay interest on arrears of weekly benefits pursuant to s 109(1) of the *Work Health Act* at the rate of 20% per anum or such other rate as this Court sees fit.

6. That the employer pay any medical and like expenses pursuant to s 73 of the Act in such amount as this Court deems fit in the absence of agreement between the parties.

14. In addition, the worker seeks consequential orders in relation to costs.

THE HEARING AND THE WRITTEN SUBMISSIONS

15. These proceedings were heard in the Work Health Court over four days, 5 April to 8 April 2004.

16. At the conclusion of the hearing the Court received written submissions from the parties in accordance with a timetable which was subsequently revised with the consent of the parties and the Court. The Court received the worker's dated 17 May 2004. Those submissions were followed by the employer's submissions dated 23 June 2004. Subsequently the Court received submissions on behalf of the employer in reply dated 26 July 2004 and worker's submissions in response dated 29 July 2004.

THE WORKER'S SUBMISSION THAT THE SECTION 69 NOTICE WAS INVALID DUE TO NON-COMPLIANCE WITH SECTION 69(4) OF THE WORK HEALTH ACT

17. It was submitted on behalf of the worker that the Notice of Decision and Rights of Appeal was invalid because it did not comply with s69(4), that is to say, the notice did not provide sufficient information to enable the worker to fully understand why the amount of compensation was being cancelled. The Court received very extensive submissions from the worker in relation to that aspect.[1] The employer made submissions in reply which,

[1] See pp 2, 12-19 of Mr McDonald QC's (counsel for the worker) written submissions dated 17 May 2004. See also pp 1-3 of Mr Neil's (the worker's solicitor) written submissions dated 29 July 2004.

inter alia, asserted that as the worker had not pleaded that the employer's notice cancelling payments did not comply with subsection 69(4) of the *Work Health Act* the point cannot be taken on his behalf.

18. In my opinion, the worker is precluded from arguing that the employer's notice was invalid on the ground of non-compliance with the provisions of subsection 69(4) of the Act. That conclusion flows from an established line of authority in the Northern Territory to the effect that the Work Health Court is a court of pleading and from the operation of the Work Health Court Rules.

19. It was held in *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 that the Work Health Court is a court of pleading and that the primary purpose of pleadings in that jurisdiction is to define the issues between the parties. The second function of pleadings is to control the admission of evidence during the course of a trial.

20. With reference to the first function of pleadings, Williams, *Supreme Court Practice in Victoria,* 1987 observes (at p 85):

> "Recording the issues which the court decides is a function of pleadings. It would seem to follow, therefore, that the court should decide only the issues that the pleadings disclose and further, that if an issue arises for the first time at trial, the court ought not to decide the issue unless it is incorporated in the pleadings".

21. The importance of pleadings in the Work Health Court was elaborated upon by Mildren J in *Hunt v Collins Radio Constructions Inc* (unreported NTSC, 3 December 1996, at 15):

> "The pleadings are not just scraps of paper which the parties and the court are free to ignore. Their purpose is to define the issues between the parties and to control the admission of evidence at the hearing. If it is desired to raise new issues, the pleadings must be amended, and the court ought not to decide new issues unless they are incorporated into the pleadings: see *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 379-80. Magistrates would be well advised to insist upon any necessary amendments to the

> pleadings, if new issues are to be raised, and if necessary, to refuse to entertain new issues without the appropriate amendments".

22. The governing and controlling function of pleadings in the Work Health Court was further discussed in *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1 where the Court of Appeal observed that for the benefit of the trial court and appellate courts, pleadings need to be in proper form such that they define the limits of the contest.

23. The Work Health Rules specify what constitutes adequate pleadings: the pleadings must be in accordance with the relevant rules.

24. The present proceedings are in the nature of an appeal – an appeal against an employer's decision to cancel or reduce weekly compensation pursuant to s69 of the Act. Such an appeal is brought pursuant to s104(1) of the *Work Health Act* which provides:

    > "For the purposes of the Court exercising its powers under section 94(1)(a), a person may, subject to this Act, commence proceedings before the Court for the recovery of compensation under Part V or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under this Part".

    Subsection 104(2) provides:

    > "Proceedings under this Division may be commenced before the Court by application in the prescribed manner and form or, where there is no manner or form prescribed, in such manner or form as the Court approves".

25. Rule 5.02 of the *Work Health Court Rules* prescribes the form and contend of applications commencing a proceeding, which includes appeals like the present.

26. Rule 8.01(1), inter alia, provides that a pleading is to contain, in summary form, a statement of all the material facts on which the party relies but not the evidence by which those facts are to be proved and if (the) claim of

defence of a party arises by or under an Act the pleading is to identify the specific provision relied on.

27. An examination of the worker's Statement of Claim reveals that although service of the employer's Notice of Decision and Rights of Appeal is pleaded there is no allegation whatsoever in the Statement of Claim that the notice was invalid due to non-compliance with the provisions of subsection 69(4) of the *Work Health Act*. It is accepted that the worker, in his Statement of Claim, seeks a ruling that the cancellation of benefits was invalid, but the remedy sought is not supported by any allegation, either general of specific, as to the invalidity of the employer's notice. The material facts supporting the invalidity of the notice are not pleaded. Furthermore, the Statement of Claim fails to identify the specific provision of the *Work Health Act*, that is to say, s69(4) which the worker submits was not complied with, and therefore renders the notice invalid.

28. It was submitted on behalf of the worker that it was not necessary for the worker to plead that the employer's notice did not comply with subsection 69(4) of the Act:

> "In paragraph 7 of the Worker's Statement of Claim dated 17 September 2003, the worker pleaded the cancellation of benefits to the worker 14 days after service of a Notice of Decision and Rights of Appeal dated 13 March 2003. The employer admitted that in paragraph 7 of its Defence dated 13 October 2003. The worker went on in paragraph 10 of his said Statement of Claim to appeal from the employer's said decision. Subsequently, this Honourable Court ordered that the employer bore the onus of justifying the Notice of Decision to cancel payments of benefits.
>
> The worker's pleading by way of appeal from the employer's Notice of Decision was sufficient to challenge all legal requirements of that decision. The onus is then on the employer to justify the validity of that decision – see Martin CJ in NT Court of Appeal in *Ju Ju Nominees Pty Ltd v Carmichael (1999) 9 NTLR 1*".[2]

---

[2] See Mr Neil's written submissions dated 29 July 2004, p3.

29. In my opinion, that submission cannot be sustained and must be rejected.

30. An appeal against an employer's notice issued pursuant to s69 of the Act may proceed on two bases. First, the appeal may concern compliance with the procedural requirements of s69: the worker may challenge the validity of the decision reducing or cancelling payments on the basis that the notice of decision fails to comply with the requirements of subsections 69(1), (3) and (4). Many cases coming before the Work Health Court have involved an appeal of that species. Secondly, the appeal may relate to the actual grounds or reasons given in the notice for reducing or cancelling the benefits: the worker may challenge the validity of the notice of decision on the basis that the grounds said to justify the reduction or cancellation did not exist. Many cases coming before the Work Health Court have also involved an appeal of this type. In some cases the appeal has proceeded on both bases.

31. The present appeal challenged the existence of the grounds for cancelling the worker's payments, that is, the unreasonable failure of the worker to participate in the rehabilitation process and his unreasonable refusal to present for assessment of employment prospects. It is clear from the Statement of Claim that the appeal was not being prosecuted on the basis that the notice was invalid due to non-compliance with the requirements of subsection 69(4). There was no indication during the preliminary argument as to dux litus that issue would be taken with the notice being invalid on the grounds of non-compliance with subsection 69(4). The argument was confined to the circumstances relied upon as justifying the cancellation of the worker's benefits. Most telling was the absence of any reference whatsoever to non-compliance with subsection 69(4) during this hearing.

32. The Court approached and heard this appeal on the basis that there had been compliance with the procedural requirements of s69: the appeal was

confined to a consideration of the grounds for cancelling the worker's benefits.

33. I do not consider that *Ju Ju Nominees Pty Ltd v Carmichael* (supra) stands as authority for the proposition that a pleading by way of appeal from an employer's Notice of Decision is sufficient to challenge all legal requirements – including procedural requirements – of that decision and consequently imposes a burden on the employer to justify the validity of the decision, both in procedural and substantive terms.

34. *Ju Ju Nominees Pty Ltd v Carmichael* (supra) involved an appeal from a s69 notice of decision on substantive grounds. As disclosed by the Statement of Claim filed in that case, the worker disputed the employer's decision to cancel his payments for the reason that any incapacity from which he presently suffered is due to his underlying degenerative condition and further denied that he had ceased to suffer from the effects of his injury. The worker did not seek to attack the notice on procedural grounds.

35. Although the case under consideration makes it clear that the worker's case may be confined to an appeal against the cancellation or reduction of benefits, that the onus of proof is on the employer to justify the reasons for the reduction of cancellation of payments and that the employer is dux litus in an appeal against an employer's decision to cancel benefits under s69 of the Act, there is nothing in the decision of the Court of Appeal that obviates the need for a worker to specifically pleas the relevant parts of s69 – for example s69(4) – where the validity of a s69 notice is being challenged on procedural or formal grounds. It remains incumbent upon a worker to define the internal parameters of the appeal against the reduction or cancellation. In that regard the observations made by Bailey J in *Ju Ju Nominees Pty Ltd v Carmichael* (supra at 28) are very much to the point:

> "I would only add that I particularly endorse the remarks of the Chief Justice as to the need for both counsel and the Work Health Court to

> pay close attention to the nature of any appeal against an employer's decision to cancel or reduce weekly compensation pursuant to s699 of the *Work Health Act* and the need for the pleadings to be in proper form before the proceeding with the hearing".

36. The workings of the *Work Health Act* are, as was observed by Martin CJ in *Ju Ju Nominees Pty Ltd v Carmichael* (supra at 2), complex. Although the present proceedings are in the nature of an appeal, they are required to be commenced by the filing of an application followed by the lodgment of a Statement of Claim. As a consequence, the process initiating the appeal – the originating process – must comply with the rules of pleading prescribed by the Work Health Court Rules. The fact that the proceedings are characterised as an appeal, does not mean that all conceivable issues arising out of an appeal against reduction or cancellation of benefits fall for consideration by the Court: all material issues must be pleaded as they must be pleaded in relation to any originating process that assumes the form of a Statement of Claim.

37. I note that counsel for the employer did not complain of being taken by surprise or prejudiced by the worker stepping outside the bounds of his pleadings; but, to my mind, that is immaterial, for it is the Court which has a vested interest in the pleadings being precise. The Work Health Court is not only a court of pleading: it is a court of principle. The Court is only required to decide those issues which are disclosed by the pleadings: it need not concern itself with matters that fall beyond the pale of the pleadings – not matter how interesting and no matter how helpful the resolution of those issues may be in acquiring a better understanding of the workings of the *Work Health Act*.

38. As the worker is, in my opinion, precluded from challenging the employer's notice on procedural grounds, it is not necessary for the Court to deal with the worker's and employer's submissions as to the formal validity of the employer's notice of decision. However, my tentative view is that the notice does not comply with the requirements of s69(4) due to

lack of particularity, due to imprecision and on account of occasioning ambiguity and confusion.

39. Having said that, I consider that there is one aspect of the formal matters raised by the worker in relation to the s69 notice that is deserving of judicial consideration and should be the subject of obiter remarks. That aspect relates to the need for an employer, in a case like the present, to include in its notice an arithmetical comparison for the purposes of justifying the proposed cancellation on the basis of the worker unreasonably failing or refusing to comply with the statutory obligations referred to in subsections 75B(2) and (3).

40. It is useful to reproduce those submission in full:

> "The notice of cancellation also fails to identify any arithmetical or comparative basis pursuant to which a reduction let alone a cancellation of benefits, could take place. A failure or refusal to comply under subsections 75B(2) or (3) of the Act does not result in a penalty of cancellation of benefits, - rather any such failure or refusal sets in train a process of comparison and calculation involving:
>
> (i) the worker's indexed normal weekly earnings; and
>
> (ii) a 'more profitable employment' which the rehabilitation treatment or rehabilitation training or workplace based return to work program could have enabled the worker to undertake, specifying the weekly dollar value of that; or
>
> (iii) the 'most profitable employment' in terms of subsection 75B(3) also specifying a weekly dollar value.
>
> The mere cancellation of weekly benefits without any explanation to the worker of these points of comparison and calculations, clearly fails to explain to the worker, fully or at all how the employer has got from the payment of weekly benefits to payment of nothing per week".

41. In support of this argument the worker relies upon the observations of Angel J in *Dicken v NT Tab Pty Ltd* (unreported decision of the Supreme

Court of the Northern Territory delivered 5 December 2003, par 17, pp 8 and 0 of the decision):

> "As in *Normandy NFM Ltd v Turner* [2002] NTSC 29, this notice is its terms purports to assert a state of affairs. It asserts nothing 'to enable the worker to whom the statement is given to understand fully why she was paid compensation in full before the notice and is to be paid no compensation 14 days after the notice. If I may be pardoned for saying so, section 69(4) *Work Health Act* means what it says. A notice must unambiguously spell out why a current payment regime should change in clear terms that a lay reader can fully and readily understand".[3]

42. Counsel for the worker expanded the submissions thus:

> "The letter accompanying the Notice of Decision dated 13 March 2003 makes it clear no comparison of dollar values was undertaken by the employer in arriving at the decision to cancel benefits.
>
> The reference to 'deeming' in the letter dated 13 March 2003 (Exhibit E9, p 233) indicates that what the writer of the letter is deeming is not what might be deemed pursuant to section 75B(2) and/or (3) of the Act. There is serious ambiguity here, and it is impossible for a reader fully to understand 'why the amount of compensation is being cancelled or reduced': see *Ansett Australia v Van Nieuwmans* NT Court of Appeal decision delivered 9 December 1999 per Mildren J at paragraphs 12 and 14; *Dickin* (supre)".[4]

43. Although the two cases mentioned above – *Dickin v NT Tab Pty Ltd* (supre) and *Normandy NFM Ltd v Turner* (supra) – dealt with the need for sufficient particularity in s 69 notices, neither case dealt with an alleged breach by the worker of his or her obligations under s 75B of the *Work Health Act*. Therefore, neither case gives direct support to the worker's argument in present case that the s 69 notice was deficient on the grounds that the notice lacked arithmetical comparison. The question is whether

---

[3] See p 17 of the written submission of counsel for the worker. It is noted that in his written submissions dated 26 July 2004 at p 4, Mr Southwood submitted that the decision of Justice Angel in *Dickin v NT TAB* is not binding on the Work Health Court, as the decision was overruled by the Court of Appeal in *NT TAB v Dickin* [2004] NTCA 8. However, a close and careful analysis shows that that part of the decision relied upon by the worker in this case was not overruled; and therefore, the observations made by Justice Angel in *Dickin* (supra) remain pertinent to the present case.

[4] See p 18 of the written submissions of counsel for the worker.

the cancellation of benefits without any explanation to the worker of points of comparison and

calculations rendered the employer's notice invalid for want of sufficient particularity.

44. The starting point is the wording of s 69(4). As noted earlier, the reasons set out in the notice must provide a worker with sufficient detail to enable the worker to understand fully why the amount of compensation of being cancelled or reduced. The subsection only requires that a worker by provided with "sufficient detail" to achieve the required level of understanding. In my opinion, it is not necessary for the reasons provided in a s 69 notice to embark upon and undertake the type of arithmetic comparison that the worker says is required to ensure compliance with the requirements of the s 69(4) of the Act. Section 69(4) requires only that the notice state the reasons thereof the worker is deemed to undertake "more profitable employment' (in terms of s 75B(2)) of the most profitable employment" (in terms of s 75B(3)). Those assertions lay the foundation for reducing or cancelling the amount of compensation, and constitute the "reasons for the proposed cancellation or reduction" contemplated by s 69(1)(b)(i). On this construction, it is not necessary for an employer to include in its notice the calculations or points of comparison leading to the cancellation or reduction of benefits. Such an exercise in arithmetical comparison goes beyond the "reasons" – the substantive requirements – which are mandated by s 69(1)(b)(i). Computations of that kind, which are ultimately a matter for evidence at the hearing of an appeal against cancellation or reduction, flow from the fact of cancellation or reduction which must, in accordance with s 69(1)(b)(l) and (4), be supported by sufficiently particularised reasons. The requirements of s 69(4) in relation to a proposed cancellation or reduction pursuant to s 75B are best understood by drawing and relying upon the time-honoured "why/how" distinction. Section 69(4) merely requires that a worker be provided with

sufficient detail to understand fully *why* the amount of compensation has been cancelled or reduced. The subsection does not require sufficient detail – or indeed any detail at all – as to the actual process by which the amount of compensation has been cancelled or reduced, that is to say, *how* the amount of compensation was cancelled or reduced. In my opinion, the submission made by the worker's counsel overlooks the subtleties of the "why/how" dichotomy.

45. It is clear from the provisions of s 69(1)(a) of the Act that an amount of compensation shall not be cancelled or reduced unless the worker has been given 14 days notice of the intention to cancel or reduce the compensation, and, where the compensation is to be reduced, the amount to which is to be reduced (emphasis added). This takes up the earlier point, that is to say, the reasons or grounds for reduction or cancellation – the "why" aspect – need not address the process by which the compensation is to be reduced. Section 69(1)(a) looks after the arithmetical aspect of a reduction in payments.

46. Significantly, there is no requirement in s 69(1)(a) that in the case of a cancellation of benefits the notice specify in arithmetic terms, the consequence of the cancellation. That is perfectly understandable, as it is self evident that where payments are to be cancelled the amount of compensation payable to the worker will be nil.

47. Given that the worker failed to raise the s 69(4) point on the pleadings, the Court must proceed to determine the worker's appeal on the basis that the notice was valid in all formal respects.

THE EMPLOYER'S BURDEN OF ESTABLISHING THE GROUNDS FOR CANCELLATION OF BENEFITS AND ITS COUNTERCLAIM

48. As the present proceedings involve an appeal by the worker against the cancellation of benefits the employer carries the onus of establishing or justifying the reasons for cancelling the worker's payments. The first

reason given by the employer for cancelling payments was that the worker had unreasonably failed to comply with s 75B of the *Work Health Act* by failing to undertake reasonable rehabilitation treatment or to participate in rehabilitation or job search requirements that would enable him to undertake paid employment. The second reason was that the worker had failed to comply with section 75(B) of the Act by being unnecessarily self limiting by failing to undertake duties that were requested by IRS, such as providing a resume, authority form and medical certificate, so approval for a functional capacity evaluation could be obtained. The third reason provided in the notice was that the worker had failed to comply with section 75B of the Act by not returning phone calls and correspondence, nor sending required information to his rehabilitation provider and TIO within the required time frame. The fourth and final reason was that as a result of his behaviour and attitude towards IRS and the rehabilitation progress, IRS had not been able to request any information from treating parties, nor had it been able to undertake any assessments such as a functional evaluation, which would provide them with the information that was needed to begin the job search part of the worker's program.

49. The reasons boil down to assertions that the worker had failed to discharge his statutory obligations as referred to in subsections 75B(2) and (3) of the *Work Health Act*. The employer purported to rely upon those circumstances as justifying the cancellation of the worker's payments.

50. Subsection 75B(2) provides:

> "Where a worker unreasonably fails to undertake medical, surgical and rehabilitation treatment or to participate in rehabilitation training or a workplace based return to work program which could enable him or her to undertake such employment and his or her compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly".

51. Subsection 75B(3) goes on to provide:

> "Where a worker so required under subsection (1) unreasonably refuses to present himself or herself for assessment of his or her employment prospects, he or she shall be deemed to be able to undertake the most profitable employment that would be reasonably possible for a willing worker with his or her experience and skill and who has sustained a similar injury and is in similar circumstances, having regard to the matters referred to in section 68, and his or her compensation under Subdivision B of Division 3 May, subject to section 69, be reduced or cancelled accordingly".

52. The employer filed a counterclaim which enables it to independently argue the cancellation of benefits arising out of the worker's failure to discharge his obligations pursuant to subsections (2) and (3) of s75B of the Act: see *Schell v Northern Territory Football League* (1995) 5 NTLR 1 at 6.3; *Disability Services v Regan* (1998) 8 NTLR 73 at 78-79*; Alexander v Gorey & Cole Holdings Pty Ltd* (2002) 171 FLR 31 at para 30*, NT TAB Pty Ltd v Gail Dickin* [2004] NTCA 8 para 24. Had the worker been able to successfully challenge the s 69 notice on procedural grounds, rendering the notice invalid, the employer would have still been able to seek orders cancelling the worker's benefits: see *NT TAB Pty Ltd v Gail Dickin* (supra).

53. Therefore, the worker's appeal and the employer's counterclaim give rise to the same substantive issues – alleged breaches of subsections 75B(2) and (3) of the Act – in respect of which the employer was dux litus and in relation to which it carries the burden of proof. The common issue is whether the worker unreasonably failed to present himself for assessment of his employment prospects.

The nature and scope of the rehabilitative process contemplated by subsection 75B(2) of the *Work Health Act*

54. The employer asserts that there was an unreasonable failure on the part of the worker to comply with his obligations under subsection 75B(2) in the following respects:

(a) The worker did not complete the IRS authority to obtain and release information which is now Exhibit 2 in these proceedings;

(b) The worker did not provide IRS with an appropriate medical certificate, showing that he had the capacity to go through vocational and functional assessments;

(c) The worker did not complete the activities statement which is in the Book exhibit E8, p 83;

(d) The worker did not provide IRS with a skills audit; and

(e) The worker did not provide IRS with realistic employment goals.[5]

55. Mr Southwood submitted that as a result of those failures on the part of the worker the accredited vocational rehabilitation provider was unable to:

(a) complete a functional assessment;

(b) complete a vocational assessment;

(c) complete an assessment of the worker's employment prospects;

(d) formulate what rehabilitation training the worker required and

(e) establish a work based return to work program.[6]

56. Mr Southwood submitted that the worker must thereby be taken to have failed to undertake rehabilitation training and failed to participate in a work place return to work program.[7]

---

[5] See Mr Southwood QC's opening. See also p 5 of Mr Southwood's written submissions dated 23 June 2004.

[6] See p 6 of counsel's written submissions dated 23 June 2004. There, counsel also submitted that as a result of the said failures on the part of the worker and consequences thereof the worker must be taken to have refused to present himself for assessment of his employment prospects pursuant to subsection 75B(3). That aspect is dealt with below at p 38

[7] See again p 6 of counsel's written submissions dated 23 June 2004.

57. As correctly identified by Mr Southwood,[8] the following issues arise for consideration pursuant to s75B(2) of the Act:

(a) Can there be a failure on the part of a worker to participate in rehabilitation training when no specific training has been determined or put in place? and

(b) Can there be a failure on the part of a worker to participate in a workplace based return to work program when none as yet has been established?

58. Addressing those issues, Mr Southwood made the following submissions:

> "The employer argues there can be a failure to participate in rehabilitation training pursuant to subsection 75B(2) of the Act where there is medical advice that a worker is capable of undergoing such training and should be assessed in order to determine what would be suitable rehabilitation training with the object of returning a worker to employment and the worker unreasonably fails to co-operate in the process that will enable appropriate rehabilitation training to be identified and undertaken.
>
> Likewise the employer argues that there can be a failure to participate in a workplace based return to work program where there is medical advice that a worker is capable of participating in a workplace based return to work program and should be assessed in order to determine what would be a suitable workplace based return to work program with the object of returning the worker to work and the worker unreasonably fails to cooperate in the process that will enable an appropriate workplace based return to work program to be formulated, established and undertaken.
>
> Subsection 75B(2) has to be read in the context of the Act as a whole. A fundamental purpose of the Act is to promote the rehabilitation and recovery from incapacity of injured workers. Further sections 75A and 75B create reciprocal obligations for the worker and the employer. The purpose of the Act would be defeated if a worker could avoid his obligations by unreasonably refusing to engage in the very process which enables the identification and establishment of appropriate rehabilitation training and a workplace

[8] See p 13 of counsel's written submissions dated 23 June 2004.

> return to work program. Such conduct must amount to a failure to participate in rehabilitation training and a failure to undertake a workplace based return to work program. The worker in this case has adopted a position which is clearly to the effect that he is not prepared to be retrained nor is he prepared to go back to work. There is no other explanation of his conduct".[9]

59. In reply to those submissions, Mr McDonald QC, submitted that as there was no rehabilitation within the meaning of Division 4 of Part V of the Act taking place at any material time, "any refusal or failure by the worker, even if proved, would be merely a refusal or failure to cooperate with the employer in a frolic of its own and would not attract the consequences set out in section 75B(2) and/or (3) on the Act".[10]

60. In support of that argument, Mr McDonald made detailed submissions that went to the statutory construction of s75B of the Act. It is helpful to set those submissions out in full:

> "A purposive approach to statutory interpretation now prevails both at common law and pursuant to section 62A of the *Interpretation Act,* which provides:
>
> > '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.'
>
> The preamble of the *Work Health Act* sets out the general objects of the Act. The preamble provides:
>
> > 'An act to promote occupational health and safety in the Territory to prevent workplace injuries and diseases, to protect the health and safety of the public in relation to work activities, to promote the rehabilitation and maximum recovery from incapacity of injured workers, to provide financial compensation to workers incapacitated from workplace injuries or diseases and to the dependants of workers who die as the result of such injuries or diseases, to establish certain bodies

---

[9] See pp 13-14 counsel's written submissions dated 23 June 2004.
[10] See p 2 of counsel's written submissions dated 17 May 2004

and a find for the proper administration of the Act, and for related purposes".

The preamble is part of the Act for the purposes of construction. Recourse to the preamble helps throw light on the statutory purpose and object: see *Wacando v Commonwealth* (1981) 148 CLR 1 at 23 per Mason J. So an interpretation of Part V of the Act especially section 75B thereof is assisted by reference to the Preamble. The reference to the object in the Act to 'to promote rehabilitation and maximum recovery form incapacity' helps in the constriction of the specific subsections here in question, namely, subsections 75B(2) and (3) of the Act.

In this appeal the employer purports to rely upon subsections 75B(2) and/or 75B(3) of the Act to justify cancellation. It is necessary to look at these subsections in their context both in the Act when read as a whole, and any more specific context the subsections may have.

The relevant subsections appear in section 75B of the Act. The section in its entirety is in Division 4 of Part V of the Act. Division 4 of the Act comprises sections 75 to 78 inclusive.

A construction of subsections 75B(2) and (3) of the Act must be one read in context and with a purposive approach to statutory interpretation: s62A *Interpretation Act* in paragraph 19 above.

The specific context of subsections 75B(2) and (3) of the Act is provided by an important purpose and object section, namely section 75 of the Act which provides the express purpose of Division 4 of the Act.

Section 75 of the Act provides:

"(1) The purpose of this Division is to **ensure** (my emphasis) the rehabilitation of an injured worker following an injury.

(2) For the purposes of subsection (1), 'rehabilitation' means the process necessary to **ensure**, as far as is practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, **economic and social** (my emphasis) condition in which the worker was before suffering the relevant injury".

Division 4 of the Act is headed 'Rehabilitation and other Compensation'. By operation of section 55 of the *Interpretation Act* this is part of the Act for interpretation and construction purposes.

Section 75(1) of the Act specifies the purpose of Division 4 as being to 'ensure' the rehabilitation of an injured worker following an injury. Subsection 75(2) of the Act provides a definition of 'rehabilitation'. The importance of section 75(1) of the Act is highlighted by the obligations of the employer set out in section 75A of the Act.

The immediate sectional context of both subsections 75B(2) and 75B(3) of the Act is subsection 75B(1) and (1A) of the Act.

Subsections 75B(2) and (3) must, of course, be read in accordance with the express object set out in section 75 of the Act which is to 'ensure' the rehabilitation of an injured worker following an injury. Therefore, the determination of what amounts to an unreasonable failure to undertake medical, surgical and rehabilitation treatment in subsection 75B(2) or unreasonably refusing to present for assessment of the worker's employment prospects in s75B(3) of the Act must take into account and be construed in accordance with this object. The express object of Division 4 necessarily raised the bar for

determining what is unreasonable in subsections 75B(2) and 75B(3) of the Act.

Given the purpose and intent of the Act and specifically Division 4 thereof, any alleged failures or refusals must be so serious as to prevent rehabilitation. Only this would warrant depriving the worker of weekly benefits and rehabilitation benefits under the Act. Any refusal or failure must be such that rehabilitation efforts become impracticable. For a useful example of this approach we refer the *Knight v Normandy Mining Ltd* [2000] NTMC 002 at paragraphs 28 and 29".[11]

61. At pp 19 to 20 of his written submissions, Mr McDonald expanded upon the argument that the worker could not be found to have been in breach of his statutory obligations because the dealings between the TIO and the worker and IRS and the worker did not involve any form of "rehabilitation" within the meaning of the *Work Health Act*:

> "The worker's obligations in respect of rehabilitation are set out in section 75B(1) of the Act. This provides as follows:
>
> '75B(1) Where compensation is payable under Subdivision B of Division 3 to a worker, the worker shall undertake, at the expense of the worker's employer, reasonable medical, surgical and rehabilitation training or, as appropriate, in workplace-based return to work programs, or as required by his or her employer, present himself or herself at reasonable intervals to a person for assessment of his or her employment prospects.'
>
> In the present case, there have been no allegations in respect of any refusal or failure by the worker other that in respect of rehabilitation treatment or, possibly, rehabilitation training. It is submitted on behalf of the worker that in either case, what must be involved is

[11] See pp 8-11 of counsel's written submissions dated 17 May 2004. In support of the argument the worker relies upon the provisions of s 75B(1A) which places an obligation upon the employer to ensure that rehabilitation and return to work programs are provided by an accredited vocational rehabilitation provider and s 50 of the Act which makes it an offence to provide vocational rehabilitation other than through an accredited vocational rehabilitation provider.

some sort of rehabilitation process within the meaning of the Work Health Act generally and Division 4 of Part V specifically".

62. That submission was made on two separate bases.

63. The first was that the employer had failed to adduce evidence that IRS to whom the worker was referred in Brisbane in January 2003 was an accredited vocational rehabilitation provider, or that the personnel with IRS with whom the worker dealt were accredited vocational rehabilitation providers.[12] Accordingly, it was submitted that "any action or failure to act, any failure or refusal on the part of the worker, was not in the context of any rehabilitation process recognised by the Work Health Act, in the absence of involvement by an accredited vocational rehabilitation provider, and therefore there can be no breach of the provisions of subsections 75B(2) and/or (3)".[13]

64. The second basis for the submission that there was no "rehabilitation process" in train at any material time was put in these terms:

> "At all times material to these proceedings, the employer company was no longer operating. Further, the evidence of Professor Yellowlees was that the worker was barred by the symptoms of his condition of post-traumatic stress disorder from returning to work in the hotel industry. This meant that the employer could not comply with the provisions of section 75A(1)(a) of the *Work Health Act*, which provides as follows:
>
> '75A **Employer to assist the injured worker to find suitable employment**
>
> (1) An employer liable under this Part to compensate an injured worker shall –

[12] See p21 of counsel's written submissions dated 17 May 2004.
[13] See pp 21-22 of counsel's written submissions dated 17 May 2004.

> (a) take all reasonable steps to provide the injured worker with suitable employment; and
>
> (b) so far as is practicable, participate in efforts to retrain the worker.
>
> Penalties provided.'

Section 75A(2) goes on to deal with the situation where an employer cannot comply with these obligations, as follows:

> '(2) Where an employer liable under this Part to compensate an injured worker is unable to provide the worker with suitable employment in accordance with subsection (1)(a), the employer **must** (my emphasis) refer the worker to an alternative employer incentive scheme developed by the Authority.
>
> Penalties provided.'

Given the circumstances of this case that the employer could not comply with its obligations under section 75A(1)(a), the employer was then obliged to refer the worker to an alternative employer incentive scheme developed by the Work Health Authority (now known as NT WorkSafe).

There is no evidence before the Court that there was any liaison between the TIO and the Work Health Authority concerning any employer incentive scheme, nor that there was any referral by the employer/TIO of the worker to any such scheme developed by the Authority.

The terms of section 75A(2) are mandatory, and in the absence of compliance in this case, it is submitted that what the TIO and IRS arranged for the worker, Mr McIntyre, was once again not rehabilitation within the meaning of Division 4 of part V of the *Work Health Act*.

It is once again submitted that accordingly, even if there was any failure or refusal on the part of Mr McIntyre to cooperated with the TIO or IRS as alleged, this would not trigger the provisions of subsections 75B(2) and/or (3) of the Act, which are subject to the limitations in Division 4 of Part V of the Act".[14]

65. It is important not to overlook the following additional submissions made by Mr McDonald as to the absence of any rehabilitative process, program or treatment during the course of dealings between the worker and TIO/IRS.

66. Mr McDonald submitted that there was no evidence of the institution of any rehabilitation training or the establishment of workplace return to work program.[15]

67. As to "rehabilitation treatment", which is referred to in subsection 75B(2), counsel made the following submissions:

> "What we are left with is the possibility of ….' medical, surgical and rehabilitation treatment….which could enable him to undertake more *profitable* employment.'
>
> 'Medical, surgical and rehabilitation treatment' is defined in section 49(1) of the Act. The definition includes:
>
> "Medical, surgical and rehabilitation treatment', in relation to a worker, includes –
>
> (a) an attendance, examination or treatment on or of the worker by a person entitled under the *Medical Act*, the *Dental Act* or the *Health and Allied Professionals Registration Act*, or a corresponding law of a State or another Territory of the Commonwealth, to provide such attendance, examination or treatment or, where there is no such corresponding law, an attendance, examination or treatment by a person which, if

[14] See pp 22-24 of the written submissions of the worker's counsel dated 17 May 2004.
[15] See p 24 of counsel's written submissions dated 17 May 2004.

provided or carried out at the place where the person normally provides his or her service, would be recognised for compensation purposes under a law providing for compensation to injured workers in that place;

(b) the provision of a certificate by a person referred to in paragraph (a) required by the worker, a dependant of the worker or the worker's legal personal representative for a purpose relating to the operation of this Part;

(c) the provision for the worker of – not relevant;

(d) to (f) inclusive – not relevant.'

The evidence shows that there was no failure by the worker in respect of 'an attendance, examination on or of the worker' by any relevant person. Mr McIntyre attended all examinations and appointments except on three occasions, when he telephoned first and rescheduled the appointment: see the attached chronology. It is also clear from Professor Yellowlees' reports and the IRS progress notes and the IRS Initial Assessment report that Mr McIntyre participated in all such appointments/examinations.

It is apparent in this case that the subparagraphs (b) to (f) in the section 49(1) definition of 'medical surgical and rehabilitation treatment' are not applicable in this case.

Accordingly, it is plain that there has been no 'failure' by the worker within the meaning of subsection 75B(2) of the Act, or at all, to undertake rehabilitation treatment as defined".[16]

68. The very exhaustive submissions made on behalf of the worker and employer are directed at the import and scope of s75B(2) – and its underlying philosophy and, indeed, that of Division 4 of Part V of the Act.

69. As the submission made by both counsel in this matter indicate, the scope of the rehabilitative process referred to in s 75B(2)[17] is of critical importance to the determination of this case because unless a process of rehabilitation had been set in train the worker cannot be found to have

[16] See pp 25-26 of counsel's written submissions dated 17 May 2004. See also Mr McDonald's further submissions relating to the possible broader interpretation of "medical, surgical and rehabilitation treatment": pp 27-28.

failed to discharge the rehabilitation obligation imposed upon him by the Act. The critical question is whether the course of dealings between the worker and the TIO and/or IRS involved the undertaking of medical, surgical and rehabilitation treatment and/or participation in rehabilitation training or a workplace based return to work program. If it did not, then any conduct on the part of the worker cannot be found to constitute a failure on his part to fulfil his statutory obligations.

70. Both counsel are in general agreement as to how the statutory construction of subsection 75B(2) ought to be approached: the subsection has to be read in the context of the *Work Health Act* as a whole, and a purposive approach to statutory interpretation needs to be adopted. The Court totally agrees with that approach. The meaning and effect of subsection 75B(2) can only be divined through an appreciation of the overall structure of the Act and its purposes or objects.

71. The purpose of Division 4 of Part V of the *Work Health Act* and the function of s75B within the statutory scheme was discussed by Martin CJ in *Ansett Australia v Van Nieuwmans* (unreported decision of the Supreme Court NT delivered 15 December 1998 par 10):

> "Section 75B falls within Division 4 of the Act "Rehabilitation and other Compensation". The purpose of the Division as set out in s75 is to ensure the rehabilitation of an injured worker following an injury, and under s75A an employer liable for workers compensation and rehabilitation is to take all reasonable steps to provide the injured worker with suitable employment or, as the Act was at that time, if unable to do so, to find suitable employment with another employer. There is a further obligation, so far as is practicable, to participate in efforts to retrain the worker. Subdivision B of Division 3 (s75B(i)) is that dealing with weekly compensation for incapacity for work and the obligation on the worker under s75B who is receiving such compensation is to undertake, at the expense of the worker's employer, the various forms of treatment, or to participate

[17] The term "rehabilitative process" is used as a generic term to cover "medical, surgical and rehabilitation treatment…rehabilitation training or a workplace based return to work program".

in rehabilitation training and return to work programs as referred to in that subsection".

72. In my view, these observations can be applied mutatis mutandis to the current provisions of the Act.

73. The word "rehabilitation", which appears twice in subsection 75B(2), provides an important textual clue as to whether the course of dealings between the parties formed part of the rehabilitative scheme contemplated by the Act. The word "rehabilitation" first appears in relation to the treatment aspect, and secondly, with respect to the aspect of training or reintroduction into the work force. As is made clear by the definition in s75(2), "rehabilitation" involves *the process* (emphasis added) that is "necessary to ensure, as far as practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, economic and social condition in which the worker was before suffering the relevant injury".

74. In abstract terms, a "process" entails a course of action, involving a series of stages, steps or operations, each of which is designed to achieve an end product or result. By its very nature, any process must have a beginning and an end. Consistent with that analysis, a process of rehabilitation such as that contemplated by the *Work Health Act* has all of those structural characteristics. In the present case, had a process of rehabilitation, within the meaning of the *Work Health Act*, begun and been embarked upon?

75. In order to answer that question, it is necessary to examine the chronology of events.

76. On 30 December 2002, two crucial events occurred. First, the TIO sent a fax to Professor Yellowlees advising that it had appointed a rehabilitation provider to assist in the worker's return to work. It was indicated that the TIO was prepared to support the worker's return to work in another industry. Secondly, the TIO wrote to the worker advising him that it had

appointed a rehabilitation provider. The worker was at the same time informed that the provider would be contacting him. The TIO further advised that "a different approach leading to a more successful outcome (was) being adopted". In my opinion, those events initiated the process of rehabilitation contemplated by the *Work Health Act* and marked that commencement of that process, but it had also communicated its decision to the worker.

77. In my view, an acknowledgment on the part of an employer of its "rehabilitation" obligations under the Act by the appointment of a rehabilitation provider is a foundational step in the process of rehabilitation envisaged by the *Work Health Act*. Communication to a worker that a rehabilitation provider has been appointed signals the commencement of the rehabilitation process, in respect of which the worker has a mutual "rehabilitation" obligation. Once the process of rehabilitation has been set in train, each subsequent step taken by the employer or rehabilitation provider or by them jointly forms part of the process of rehabilitation. That process is ongoing, and continues until such time as the objective of that process – the restoration of the worker to the same physical, economic and social condition in which he or she was prior to suffering the relevant injury – is achieved or the process is prematurely brought to end, as in the present case.

78. As averted to by Mr Southwood in his submissions,[18] the process of rehabilitation under the *Work Health Act* necessarily involves the identification and establishment of appropriate rehabilitation training and workplace based return to work programs.[19] Although these preliminary processes are preparatory to the actual process of restoring a worker to his pre-injury physical, economic and social condition, they are clearly in

[18] See p 14 of counsel's written submissions dated 23 June 2004.
[19] And as submitted by Mr Southwood at p6 of his written submissions dated 26 July 2004, "the rehabilitation contemplated by section 75B of the *Work Health Act* includes vocational rehabilitation and training".

furtherance of and for the purpose of rehabilitation such that they form an integral part of the rehabilitative process.

79. In my view, there is considerable strength in Mr Southwood's submission

that the rehabilitative purposes of the Act would be defeated if a worker could avoid his "rehabilitation" obligations by failing to cooperate and engage in the preliminary processes that are necessarily and inextricably linked to the rehabilitative process.[20] In my opinion, it would lead to a absurdity if those preliminary processes were construed not to form part of the process of rehabilitation envisaged by the *Work Health Act.*[21] It would be an equally absurd outcome if a failure to participate in those essential early processes were not considered to be a failure to participate in the process of rehabilitation contemplated by subsection 75B(2) of the Act. A failure by the worker to participate in those early stages of the rehabilitative process must amount to a failure to participate in the process of rehabilitation.[22]

80. In my opinion, the employer had embarked upon a rehabilitative process involving the worker. That process involved the identification and establishment of appropriate rehabilitation training and workplace based return to work programs.[23] Those preliminary processes formed an integral part of the rehabilitative process contemplated by subsection 75B (2), that is to say, the worker's participation in "rehabilitation training or a workplace based return to work program which could enable (the worker) to undertake more profitable employment".

---

[20] See again p 14 of counsel's written submissions.
[21] See Pearce and Geddes *Statutory Interpretation in Australia* (5th ed, Butterworths, Australia, 2001), par 2.4, pp 21-22 where the authors discuss "absurdity of outcomes" as an extrinsic tool in statutory interpretation.
[22] See the submission made by Mr Southwood at p 14 of his written submissions dated 23 June 2004.
[23] In my view, what is necessary is that be a program of some kind devised by the employer: see *Ansett Australia v Van Nieuwans*[1999] NTCA 138, delivered 9 December 1999, at par 16, p 13. What was put in place was part of a workplace based return to work program.

81. The process which was set in train by the employer did not involve the undertaking of "medical, surgical and rehabilitation treatment".[24] The employer did not urge the Court to find otherwise.

82. As to the submission made by the worker that there cannot be a rehabilitative process within the meaning of the *Work Health Act* unless the rehabilitation provider, which has been appointed, is an accredited vocational rehabilitation provider, I am unable to accept the employer's submission that there was no evidence, or insufficient evidence, that IRS – the appointed rehabilitation provider – was an accredited rehabilitation provider.

83. In my view, there was sufficient evidence adduced at the hearing to establish that at all material times IRS was an accredited rehabilitation provider.

84. Penelope Behan gave evidence to the effect that throughout 2002-2003 and continuing from 1 December 2003 to 20 November 2004 IRS Total Injury Management was an accredited vocational rehabilitation provider with NT WorkSafe. Exhibit 1 comprised a letter from Geoff Anstess, Manager Rehabilitation and Compensation Division NT WorkSafe, to IRS dated 26 November 2003, to which was attached a certificate of accreditation for the period 1 December 2003 to 30 November 2004. Relevantly, the accompanying letter stated:

> "I am pleased to advise you that approval to operate as an Accredited Vocational Rehabilitation Provider under Section 50(1) of the *Work Health Act* has been renewed for the period 1 December 2003 to 30 November 2004".

85. The use of the word "renewed" in the accompanying letter implies that IRS was previously an accredited rehabilitation provider; and that is entirely

[24] To that extent I agree with the submissions made by Mr McDonald at pp 24-26 of his written submissions dated 17 May 2004.

consistent with Ms Behan's evidence that throughout 2003-2004 IRS was an accredited vocational rehabilitation provider.

86. In his written submissions, the worker's counsel has either overlooked Ms Behan's oral evidence or treated her evidence as not being sufficiently cogent to establish accreditation at the material times. As Mr Southwood points out,[25] no objection was taken as to the witness' evidence nor was she cross examined in relation to her evidence. In my view, the evidence given by Ms Behan, coupled with the inference which can be drawn from Mr Anstess' letter, established accreditation during the material periods to a prima facie level. That body of evidence was not contradicted by the worker by either evidence elicited in cross-examination or led as part of the worker's case. That course was at all times open to the worker, but not pursued. In my view, the worker's submission that the employer has failed to establish that IRS was an accredited rehabilitation provider at all material times must fail.

87. I must say that even if there were insufficient evidence that IRS was an accredited vocational rehabilitation provider, I could not be satisfied – without the benefit of further legal argument – that lack of accreditation would necessarily invalidate any rehabilitation process implemented under the *Work Health Act*; though I can see how a worker, who became aware of such lace of accreditation and failed to take part in the rehabilitative process on account of that lack of accreditation, might be able, under such circumstances, to successfully meet a case that he or she had failed unreasonably to discharge his or her obligations under s75B(2) of the Act.

88. In relation to the worker's submission that what the TIO and IRS arranged for the worker was not rehabilitation within the meaning of Division 4 of Part V of the *Work Health Act* because of non-compliance with s75A(2) of the Act, counsel for the employer made the following submission:

> "Section 75A(2) of the *Work Health Act* (NT) has no application to the current proceeding. It had not been pleaded as a basis of any relief.
>
> No evidence was led on behalf of the worker that there was an alternative employer incentive scheme developed by the Authority which was available to him. Nor did the worker lead any evidence that he would be prepared to participate in such a scheme.
>
> If a corporate employer breaches subsection 75A(2) the Act merely provides a penalty by way of fine. There are no other ramifications".[26]

89. The worker replied to that submission thus:

> "Section 75A(2) establishes an obligation on an employer in mandatory terms, and prescribes a penalty where the obligation is breached. The Court is required to take such obligations and breaches of them into account irrespective of whether they have been pleaded. The worker is not required to plead a conclusion of law.
>
> There was no requirement for the worker to lead any evidence that there was an alternative employer incentive scheme developed by the authority which was available to him. The wording of section 75A(2) of the Act is mandatory in nature, requiring that the employer *must* (my emphasis) refer a worker in circumstances where the employer could not provide a return to work for that worker, to an alternative employer incentive scheme developed by the Work Health Authority(now NT WorkSafe).
>
> The onus lies on the employer to show that it complied with this mandatory obligation. It did not discharge this onus.
>
> The worker maintains his submission that if section 75A(2) applies, then in the absence of compliance by the employer with its mandatory obligation thereunder, no other rehabilitation process is available to the employer and any processes implemented or sough to be implemented by the employer involving a worker by way of "rehabilitation" in those circumstances would be a frolic of the employer's own, and not "rehabilitation" within the meaning of the *Work Health Act*".[27]

---

[25] See p 4 of counsel's written submissions in reply dated 26 July 2004

[26] See p 5 of Mr Southwood's submissions dated 26 July 2004.

[27] See pp 4-5 of Mr Neil's submissions dated 29 July 2004.

90. In my opinion, the worker is precluded from arguing the employer's non-compliance with s75A(2) for the simple reason that such a non-compliance was not pleaded in the Statement of Claim; and for one reason or another the matter ought to have been raised on the pleadings.

91. I am unable to accept the submission made by the worker that it was not necessary to plead s75A(2) as to do so would amount to pleading a matter of law of conclusion of law. Although it is arguable that it is a question of law whether an employer's compliance with s75A(2) is necessary to legitimise any rehabilitative process embarked upon under the *Work Health Act*, whether or not an employer has breached the statutory enactment is a matter of legal inference from proved facts. An employer cannot be found guilty of a breach of s75A(2) unless and until the material facts supporting the breach have been established. In my view, if the worker wished to rely upon a breach of s75A(2), in support of a point of law, it was incumbent upon him to plead the material facts that went to establishing that breach. The matter should have been either pleaded in the worker's Statement of Claim or in the worker's answer to the Counterclaim.

92. However, there is a more compelling reason why the worker must be precluded from raising the s75A(2) argument. Rule 8.01(1)(d) of the *Work Health Court* Rules envisage that it may be necessary for a party to plead even a conclusion of law if such a pleading is required to enable the Court to determine all issues in dispute[28], to support an allegation that the claim of the opposite party is not maintainable[29] or in order to avoid the opposite party from being taken by surprise.[30]

93. Although the worker is prevented from raising the s75A(2) argument, I must say that it is by no means clear that a breach of s75A(2) has any other

[28] See Rules 8.01(2) and 8.02(2) of the Rules.
[29] See Rule 8.03(a) of the Rules.
[30] See Rule 8.03(b) of the Rules. As to the matter of a party being taken by surprise by the failure of the other party to plead a statutory provision see *Banque Commercial v Akhit Holdings Ltd* (1990) 169 CLR 96.

ramifications apart from incurring a monetary penalty. I accept that s75A(2) creates a statutory obligation that must be discharged by an employer under certain circumstances. I also accept that s75A(2) is an important thread in the fabric of the rehabilitative scheme contemplated by the *Work Health Act*, and plays a significant role in the mutual obligations owed by worker and employer in relation to the rehabilitative scheme under the Act.

94. However, I am not convinced – without the benefit of further legal argument – that the compliance with the provisions of s75A(2) is necessary to legitimise or validate any rehabilitative process implemented under the Act. However, I can see how a worker might be able to justify a failure to comply with his or her statutory rehabilitation obligations in circumstances where he was aware of the employer's non-compliance with s75A(2) and was insisting on the employer's compliance. In other words a worker's failure to comply with s75B(2) under those circumstances might well be considered reasonable. Significantly, in the present case there was no evidence that Mr McIntyre was aware of a breach of s75A(2), and that he was resisting the rehabilitative process because of the employer's non-compliance with the statutory provision.

The nature of the worker's obligations pursuant to subsection 75B(3) of the *Work Health Act*

95. As stated earlier,[31]subsection 75B(3) obliges a worker to present himself or herself for assessment of his or her employment prospects. The deeming provisions of that subsection are triggered by an unreasonable refusal on the part of a worker to present himself or herself for assessment of their employment prospects.

96. The word "present" is a key word in the subsection. Mr McDonald made the following submissions as to its meaning:

---

[31] See above pp 18-19.

"There is no definition in the Act of the word 'present'. The Macquarie Dictionary relevantly defines 'present' as:

'8. To come, to show (oneself) before a person in or at a place etc.'

In this case Mr McIntyre has always presented himself, with the exception of the three occasions identified in the chronology when he telephoned to change the appointments in advance and to reschedule them. He did more than just present himself. He also participated in the consultations and sessions arranged or rescheduled".[32]

97. As with subsection 75B(2), it is necessary to examine subsection 75B(3) in its 'context both in the Act when read as a whole, and any more specific context (it) may have"[33]. In other words, a purposive approach needs to be taken to the statutory construction of the provision.[34]

98. In my opinion, when read in context and with a purposive approach to statutory interpretation, the word 'present' in subsection 75B(3) must be attributed a wide meaning than ordinarily attributed to it – or the meaning attributed to it by Mr McDonald – and one which promotes the rehabilitative purposes or objects of the *Work Health Act*.

99. The purpose behind the process of assessment referred to in subsection 75B(3) is to assist and facilitate the re-introduction of a worker into the work force.[35]As part of its rehabilitation obligation, an employer is

---

[32] See pp 26-27 of counsel's written submissions dated 17 May 2004.
[33] See pp 26-27 of counsel's written submissions dated 17 May 2004.
[34] Both Mr McDonald and Mr Southwood agree that subsection 75B(3) must be read with a purposive approach to statutory interpretation.
[35] This clear from the terms of subsection 75B(1) which provides:
"Where compensation is payable under Subdivision B of Division 3 to a worker, the worker shall undertake, at the expense of the worker's employer, reasonable medical. Surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, or as required by his or her employer, present himself or herself at reasonable intervals to a person for assessment of his or her employment prospects".
There are no temporal restrictions on when a worker may be required to present for assessment of employment prospects. The request may be made at any time, including before the actual commencement of any rehabilitation treatment, rehabilitation training or a workplace based return to work program.
It is also clear from the terms of subsection 75B(1) that the requirement to present for assessment is referable to the rehabilitative regime.

required to undertake that process of assessment. Similarly, it is part of a worker's rehabilitation obligation to subject himself or herself to that process. It is against that background that the phrase "present himself or herself for assessment of his or her employment prospects", as appears in subsection 75B(3), is to be construed. The phrase must be construed according to the context in which it appears and as the circumstances require.

100. Adopting such an approach, it is my view that the subject phrase must be construed as obliging a worker to do far more than merely attend before a person at a specified place for the purpose of an interview or examination which is designed to assess the worker's employment prospects. The phrase must be more broadly construed as requiring a worker to make himself or herself generally available to assist and accommodate the employer in carrying out the assessment process and to facilitate that process. In my view, subsection 75B(3) requires a worker to meet all reasonable requirements of an employer that have a clear nexus with the assessment process. Those requirements may, for example, require a worker to provide the employer with certain information or documentation as a precursor to the actual assessment process. This is the very point made by Mr Southwood who submits that due to the failure of the worker to provide IRS with a medical certificate, a signed authority to obtain and release information, a skills audit, a signed activities plan and realistic employment goals the accredited vocational rehabilitation provider was unable to complete a functional assessment, vocational assessment and an assessment of the worker's employment prospects; and further was unable to formulate what rehabilitation training Mr McIntyre required and to establish a workplace based return to work program.[36] Mr Southwood

[36] See pp 5-6 of counsel's written submissions dated 23 June 2004.

submitted that “the worker thereby must be taken to have failed to present himself for an assessment of his employment prospects”.[37]

101. There is also a factual basis (as disclosed by the evidence) for the broad construction placed upon the word “present” in subsection 75B(3). A vocational assessment – clearly part of the assessment process contemplated by the subsection – was arranged for 3 March 2003, but as the worker had not provided the requisite documentation the assessment did not, and could not, proceed.

102. The difficulty with imposing a narrow construction (of the type suggested by Mr McDonald) on the word “present” is that such a construction would defeat the rehabilitative purposes of the Act and of subsection 75B(3) itself. Those purposes would be defeated if a worker could avoid his rehabilitation obligations under subsection 75B(3) by unreasonably refusing to provide relevant information and documentation without which the process of assessment could not be carried forward.[38]

103. Therefore, when considering whether the worker was in breach of his obligations under subsection 75B(3) the subsection must be broadly construed in the manner stated above.

The meaning of the word “fails” in subsection 75B(2) of the *Work Health Act*.

104. The word “fails” as appears in subsection 75B(2) is a critical element of the deeming provision; and yet it is not defined.

105. In my opinion, in the absence of a statutory definition, the word “fails”, simply means “does not do, or omits to do, the thing required to be done”.[39]

---

[37] See again pp5-6 of counsel’s written submissions

[38] Mr Southwood made a similar submission in relation to the construction of subsection 75B(2): See above, p 23.

[39] See form example *Victoria v Commonwealth* (1975) 50LAJR 7; see also *Adair v Gough* (1990) 10 MVR 558

The word "fails" does not connote fault on the part of a worker: an element of wilfulness is not implied in the word.

106. I have reached the conclusion that the word "fails" denotes mere non-fulfilment of the worker's obligation because the word is qualified by the adverb "unreasonably". It is not the case that every non-fulfilment of the statutory obligations will trigger the deeming provisions of subsection 75B(2) and provide a ground for cancellation or reduction of benefits: only unreasonable failures will lead to that outcome. The wording of the subsection implies that a person may reasonably fail to fulfil their statutory obligations. Accordingly, there may be evidence before the Work Court that provides an explanation for the non-fulfilment of the obligations, which is reasonable in all the circumstances. The provisions of subsection 75B(2) implicitly allow scope for any proven failure to comply to be explained away to the satisfaction of the Court. I am fortified in the conclusion that I have reached as to the meaning of "fails" in subsection 75B(20 by the qualifications that the subsection puts on the element of "failure" and the degree of latitude it extends to a worker who has not met his or her statutory obligations. Any perceived harshness in construing the word "fails", in terms of mere non-fulfilment, is overcome by requiring the non-fulfilment of obligations to be unreasonable.

107. Of course, the failure must be a relevant failure, that is, a failure to undertake rehabilitation treatment or to participate in rehabilitation training or a workplace return to work program, and if there was never any process of rehabilitation in train – in terms of rehabilitation treatment or training or a return to work program – then it is plain that there has been no "failure" by the worker within the meaning of subsection 75B(2) of the Act.

The meaning of the word "refuses" in section 75B(3) of the *Work Health Act*

108. The legislature has drawn a distinction between the conduct that triggers the deeming provisions of subsection 75B(2) and the triggering conduct in subsection 75B(3), though, in both instances, the foundational conduct must be found to have been unreasonable.

109. Although "refusal" will usually qualify as "failure",[40] a refusal is not synonymous: to refuse do something is not equivalent to failing to do something, as the former implies a conscious act of violation.[41] As such, the notion of "refusal" involves a state of mind.

110. On most occasions, when a person's state of mind is in question, that mental state can only be proved by circumstantial evidence – only rarely will t here be direct evidence of the person's mental state. A person's mental state may be established circumstantially "by reference to his or her conduct at the time (including what is said), or to the surrounding circumstances".[42] Consistent with that approach, it may be permissible, in the absence of evidence to the contrary, to infer a refusal from the fact of failure. The drawing of such an inference in no way interferes with the integrity of the distinction between a "failure" and a "refusal".

111. Of course, the refusal must be a relevant one in the sense that it relates to an assessment of a worker's employment prospects (as explicated above) and the refusal is unreasonable.

The test of "unreasonableness" in subsections 75B(2) and (3)

---

[40] See *Adair v Gough* (1990) 10 MVR 558 at 559

[41] See Stroud's *Judicial Dictionary of Words and Phrases* (6th ed, Sweet & Maxwell, London, 2000) Vol 3 Q-Z, p 2235. See also *Boon v Maher* (1986) 7 NSWLR 232 where it was held, in the context of the *Pure Food Act* 1908 (NSW), s38(b) the word "refuse" conveys more than a mere failure or inability to do something; it involves some exercises of discretion or will.

[42] See Gilles *Law of Evidence in Australia* (2nd ed, Legal Books, Sydney), p 113. There, the author goes on to say :

> "As well, it's clearly permissible to seek to prove an individual's state of mind by reference to his or her conduct, before or after this time in question, as well as to relevant surrounding circumstances existing before or after this time. This may be justified by reference to the considerations underpinning the recurrent conduct principle … viz, in circumstances where the facts are such that a recurrence of state of mind may properly be argued".

112. As it is only an unreasonable failure or refusal to discharge a worker's statutory obligations that trigger the deeming provisions in subsections 75B(2) and (3), the meaning of the word "unreasonably", as appears in both subsections, assumes critical importance.

113. At first glance, one might think that the issue of whether any failure or refusal was unreasonable is merely determined by inquiring as to what a reasonable person would have done in the circumstances. There is a considerable body of law, in many different areas of the law – both criminal and civil – that encourages that type of approach. However, such an approach is over-simplistic, and without more is uninformative, uninstructive and ultimately unhelpful. The test of "unreasonableness", in the context of s75B(2) and (3) is considerably more complex, and involves value judgments based not only on the conduct of the worker but on his or her subjective state of mind, viewed in the context of the rehabilitative objects of the *Work Health Act* and the mutual "rehabilitation" obligations created by that legislation.

114. It is useful to begin with the following discussion of the refusal of a worker to accept medical treatment, in the context of worker's compensation legislation, which appears in Mill's "Worker's Compensation: New South Wales" (Butterworths, Sydney, 1969, p300):

> "Whether the worker's refusal is unreasonable is question fact, to be determined in light of the medical evidence and of the attitudes, capacity and motives of the parties. That the worker is acting in accordance with advice of his own doctor does not compel the conclusion that his refusal is reasonable, but the onus on the employer to show unreasonableness will be much higher in such cases.
>
> Other factors relevant to the unreasonableness of the refusal are medical opinions on the chance of the operation being a success, and a genuine fear by the worker of surgical treatment: *Vincent Chemical Co Pty Ltd v Sheather* (1956) WCR 96.

> A person is mentally incapable of making the decision whether to submit to treatment or not cannot be said to have unreasonably refused treatment, and consent given by another on his behalf is irrelevant for these purposes: *Dalla-Costa v Edwards* [1953] WCR 134.
>
> The worker is entitled to a reasonable time in which to make up his mind on the acceptance of medical treatment: *Lynch v McIlwraith, Mc Eachern* [1937] 153 (SC)".

115. In my opinion, the observations made by Mill can be adopted and applied in the context of unreasonable failures and refusal in subsection

75B(2) and (3). Accordingly, when considering whether a worker has unreasonable failed to participate in the rehabilitative process or unreasonable refused to present for assessment of employment prospects, it is necessary to have regard to (1) any evidence relating to the likely success of the proposed rehabilitative process, (2) the fruits (or benefits to the worker) likely to result from an assessment of the worker's employment prosects (viewed in the overall rehabilitative context) and (3) the respective attitudes, capacity and motives of the employer and the worker.

116. The meaning of "unreasonably" was discussed at considerable length by Mr Trigg SM in *Tanner v Anthappi Pty Ltd* (2000) NTMC delivered 21 January 2000.

117. Mr Trigg began by noting the observations made by the High Court (Stephen, Mason, Murphy, Aickin and Wilson JJ) in its joint judgment in *Fazlic v Millingimbi Community Inc* (1982) 38 ALR 424 at 427. There the Court considered whether under the *NT Worker's Compensation Act* a refusal to have an operation should result in the loss of entitlement to compensation :

> "No doubt it will be but rarely that an employer does not succeed in establishing that a worker's refusal is unreasonable when the worker has allowed baseless fear to decide his choice, outweighing his

> knowledge of cogent factors favouring his undergoing an operation …
>
> Any assessment of the reasonableness or otherwise of a worker's refusal of treatment must depend upon the worker's state of knowledge at the relevant time. This accords both with good sense and with authority. A worker's choice cannot be said to be unreasonable because he has failed to give effect to factors unknown to him. And in the case of complex medical or surgical procedures he will know little except what he is told. In the present case he was told very little indeed".

118. Their Honours made the following additional observations (at 428 – 429):

> "It's (ie the Court's) concern is, rather, with whether, judged in the light of the medical advice given to the worker at the time and all the circumstances known to him and affecting him, his refusal is unreasonable.
>
> It follows that in the present case the extensive expert medical testimony showing that the operation might reasonably have been performed was irrelevant to the point in issue, the reasonableness of the appellant's refusal, since the facts deposed to were never known to the appellant, who was aware only of the treating surgeon's reticent and, if anything, rather discouraging statement about the operation that was recommended. Moreover, the appellant had candidly confessed to his treating surgeon his fears regarding the operation and this despite the fact that the alternative facing the appellant was, as he had been told, that there would be no improvement in his condition".

119. In *Tanner v Anthappi Pty Ltd* (supra at par 110) Mr Trigg adopted those observations as being applicable to the case under consideration:

> "In deciding whether the worker's failure to undertake the program was unreasonable or not only the facts and knowledge of the worker at the time the decision was made is relevant. In my view, subsequent facts or opinions which were unknown to the worker at the relevant time are of no assistance".

120. These observations make it clear that in applying the objective test of "reasonableness" the contemporaneous subjective knowledge and state of mind of the worker is relevant to the reasonableness or otherwise of a

worker's failure to discharge his statutory duties pursuant to subsections 75B(2) and (3).

121. Mr Trigg went on to make the following pertinent observations (at par 111) during the course of a holistic analysis of the *Work Health Act*:

> "… the question of what is reasonable must be looked at in the context of the Act as a whole. As noted above there are mutual obligations created in the Act (both on the employer and the worker) with the aim of rehabilitating workers back into the workforce. This is in accordance with what appears to be the general policy of the Act, which is that it is a weekly compensation scheme with ongoing mutual obligations. … In my view, a worker must actively and fully participate in the rehabilitation".

122. These observations emphasise the importance of a worker fully cooperating in the process of rehabilitation.

123. As Mr Trigg goes on to observe (at par 114), the reasonableness or otherwise of a failure to take part in the rehabilitative process is determined by undertaking a balancing exercise:

> "In my view, whether a decision is unreasonable is one of balance on the facts of each case. Therefore the stronger the prognosis of a return to work program being of real benefit the more likely a failure to participate in it will be unreasonable even if there are personal reasons for the failure. 'Unreasonableness' falls to be considered in the context of the Act as a whole, and personal reasons may in a particular case be secondary to the mutual obligations created in the Act. However, if matters personal to the worker were intended to have no relevance then Parliament could have left the word 'unreasonably' out of Section 75B(2) altogether.

124. Counsel for the worker appears to have adopted Mr Trigg's analysis in *Tanner v Anthappi Pty Ltd* as capturing the essence of the "reasonableness test in s75B(2) and (3):

> "What is 'unreasonable' for the purpose of Section 75B(2) and/or (3) is a matter of context, bearing in mind the general and specific objects of the Act concerning rehabilitation, and must include factors

subjective to the worker – see Trigg SM in *Tanner v Anthappi Pty Ltd* (2000) NTMC 4 delivered 21 January 2000 at paragraph 114.[43]

125. Finally, it is useful to refer to the case of *Van Dongen v Master Dairy* (Supreme Court of Western Australia, The Full Court, Kennedy ACJ, Wallwork and Anderson J, 19 January 2001).

126. That case was concerned with S64 of the *Workers Compensation* and *Rehabilitation Act* 1982 (WA), pursuant to which an employer may require a worker to submit himself or herself for examination by a medical practitioner provided and paid for by the employer. Following a request that he submit to such an examination, the worker, acting on the advice of a friend (a law student), asked that he be accompanied by another person with the purpose of taking notes during the examination. The medical practitioner refused the request on the grounds that the medical examination should not be open to public review, and the note taker would prove too much of a distraction.

127. Section 64(1) of the Western Australian Act provided that the worker shall be suspended from a right to compensation "without reasonable excuse", if the worker "refuses to submit to such examination, or in any way obstructs it". Section 65 of the Act provided that "where a person agrees to submit to a medical examination subject to a reasonable condition, that cannot constitute a refusal".

128. After two decisions by a Review Officer, concluding that the conditions imposed by the worker were unreasonable, subsequently affirmed by two decisions delivered in the Compensation Magistrates' Court, the worker appealed to the Supreme Court.

129. In determining whether the conditions imposed by the worker were reasonable, Kennedy ACJ described (at 774) the type of inquiry that was required to be undertaken:

---

[43] See P30 of Mr McDonald's written submissions dated 17 May 2004

> "The question to be answered is whether the request for note taking by the appellant was reasonable. It is not a matter of whether a reasonable man would have made such a request, but whether it was reasonable for the appellant himself to impose a condition of note taking, having regard to any characteristics which might distinguish him from other people, for example, his short-term memory…
>
> Naturally the reasons for Dr Mustac's refusing to permit note taking and his terminating the examination will require consideration in determining whether a condition imposed by the appellant was reasonable".

130. This case highlights the relevance of personal factors to the inquiry whether a person has unreasonably failed or refused to do what is required of them.

The meaning of the phrase "could enable him or her to undertake more profitable employment": subsection 75B(2)

131. In order for the deeming provisions in subsection 75B(2) to be activated, and to thereby lay a statutory foundation for the reduction or cancellation of compensation payments, it is necessary for the employer to establish that the rehabilitative process could have enabled the work to undertake more profitable employment.

132. The meaning of the phrase "could enable him or her to undertake more profitable employment" was considered by Mr Trigg SM in *Tanner v Anthappi Pty Ltd* (2000) NTMC 4 delivered 21 January 2000. As stated by Mr Trigg (at par 4) the employer must satisfy the Court that the rehabilitation treatment, training or workplace return to work program could enable the worker to undertake some employment. In that respect, it is necessary for the employer to "identify a particular employment, or type of employment", although it would not generally be necessary for a particular job to be identified.[44] However, in addition to those matters, the employer must establish that the identified employment could enable the

[44] See par 110.

worker to undertake *more profitable employment*. In order to prove that element, it is necessary for the employer to establish that the worker, without participating in the rehabilitative process envisaged by subsection 75B(2), had the capacity to "earn $x per week" and the rehabilitative process could enable the worker to "earn $y per week"; and that "$y is more than $x".[45] Finally, it is important to note that it is only necessary that the rehabilitative process "could" – not "would" – enable the worker to undertake the particular employment, or type of employment, identified by the employer.[46]

133. I agree with the observations made by Mr Trigg SM in *Tanner v Anthappi Pty Ltd* (Supra), and adopt them as accurately stating the law in relation to the potentiality to undertake more profitable employment, as referred in subsection 75B(2) of the *Work Health Act*.

The meaning of the deeming provision in subsection 75B(3) of the *Work Health Act*

134. Subsection 75B(3) provides that where a worker unreasonably refuses to present himself or herself for assessment of their employment prospects, he or she shall be deemed to be able to undertake the most profitable employment that would be reasonably possible for a willing worker with his or her experience and skill and who has sustained a similar injury and is in similar circumstances, having regard to the matters referred to in Section 68.

135. The employer bears the onus of showing the matters contained in the deeming provision, which for ease of reference have been italicised. All of those matters "must be addressed and shown by the employer before the

[45] See par 110.

[46] See par 110 where the learned magistrate states: "The word 'can' (the present tense of the word 'could') is defined in the Concise Oxford Dictionary (8th ed) to mean 'be able to, be potentially capable of".

worker can be deemed to be able to undertake any such most profitable employment".[47]

136. Although the deeming provision in subsection 75B(3), on its face, indicates that all of the matters referred to in s68 of the Act[48] are to be taken into account when considering a worker's ability to undertake the most profitable employment etc; Mr Southwood sought to argue that the reference to S68 be read down:

> "The employer argues that the reference to 'matters referred to in Section 68' which is contained within Section 75B(3) is a reference to matter other than Section 68(f).[49] The specific provisions of section 75B(3) govern the general provisions of Section 68. The deeming provisions of section 75B(3) are concerned with creating an objectively comparable worker of similar age, experience, training, skills and potential for rehabilitation training as the claimant worker. They are not concerned with the availability of work. Such a consideration is irrelevant to the objective comparison required by the section. To have reference to the availability of work as is required by section 68(f)[50] would make the deeming provisions of section 75B(3) redundant. The process would simply become an

---

[47] See p33 of Mr McDonald's written submission dated 17 May 2004.

[48] Section 68 provides:

"In assessing what is the most profitable employment available to a worker for the purposes of Section 65 or reasonably possible for a worker for the purposes of Section 75B(3), regard shall be Had to –

(a) his or her age;
(b) his or her experience, training and other existing skills;
(c) his or her potential for rehabilitation training;
(d) his or her language skills;
(e) in respect of the period referred to in Section 65(2)(b)(i) – the potential availability of such employment;
(f) the impairments suffered by the worker; and
(g) any other relevant factor

[49] I think Mr Southwood must mean "Section 68(e) which deals with the potential availability of such employment.

[50] Again, I think Mr Southwood means "Section 68(e)".

assessment of what was the worker's current loss of earning capacity if any".[51]

137. The fundamental difficulty that confronts the employer is that subsection 75B(3) says that when considering "most profitable employment" regard must be had to the matters referred to in s68 of the Act: the clear indication is that all of the matters in s68 need to be considered. Furthermore, s68 itself states that in assessing what is the most profitable employment

reasonably possible for a worker for the purposes of section75B(3), regard shall be had to the considerations thereafter mentioned. Subsection 75B(3) and s68 mirror one another and appear to make it clear that for the purposes of assessing most profitable employment, in the context of subsection 75B(3), all of the factors set out in s68 – including the potentially availability of such employment – need to be considered.

138. Furthermore, I am not at this stage persuaded by Mr Southwood's submission that the potential availability of the most profitable employment is an irrelevant consideration for the purposes of subsection 75B(3), and that the inclusion of that criteria would render the deeming provisions of s75B(3) redundant.

139. I consider that in some circumstances the construction favoured by Mr Southwood might wreak an injustice on a worker. Say for example the most profitable employment that would be reasonably possible for a willing worker etc might be a form of employment that is generally available elsewhere in Australia but is not, or no longer, potentially available in the Northern Territory because of its relatively small population and lack of demand for the services provided by that particular type of employment. To visit the consequences of a breach of s75B(3) on a worker in those circumstances would, to my mind, be unfair

[51] See pp 14-15 of Mr Southwood's written submissions dated 23 June 2004.

140. However, given the importance of the point raised by Mr Southwood and the absence of any detailed submissions in reply from the worker, I would prefer to have the benefit of further submissions from the parties before finally determining the subsection 75B(3) issue.

The determination of the Appeal and Counterclaim

141. In the context of both the worker's appeal and the counterclaim, the employer bears the onus of proving the following matters in relation to subsection 75B(2):

1. That at all material times there was in train a rehabilitative process within the contemplation of the subsection;
2. That the said process was one which could enable the worker to undertake more profitable employment;
3. That the worker failed to participate in the said rehabilitative process and
4. That the worker did so unreasonably.

142. Again in the context of the appeal and counterclaim, the employer bears the onus of proving the following matters in relation to subsection 75B(3):

1. That all material times there was in train a process of assessment of the worker's employment prospects;
2. That the worker refused to present himself for such assessment and
3. That the worker did so unreasonably

143. In addition, the employer must show the most profitable employment that would be reasonably possible for a willing worker with his experience and skill who has sustained a similar injury who is in similar circumstances, having regard to the matters referred to in s68 of the Act.

144. The relevant standard proof is, of course, the civil standard, namely, the balance of probabilities. The employer must reasonably satisfy the Court on the balance of the probabilities that is more likely than not that the facts or circumstances required to be established in relation to subsection 75B(2) and (3) either existed or exist. The existence of those facts or circumstances can be proved either by direct evidence or circumstantial evidence; or even a combination of the two. The proof of some of those facts or circumstances involve questions of law.

(a) Subsections 75B(2) and (3)

145. For the reasons given earlier, I am reasonably satisfied that the worker and the employer (by and through the TIO/IRS) were at all material times engaged in a rehabilitative process within the meaning of the *Work Health Act* and subsection 75B(2).[52]

146. On the state of the evidence, I am reasonably satisfied that the rehabilitative process instigated by the employer could have enabled the worker to undertake more profitable employment. This conclusion is predicated upon the premise that it is not necessary for the Court to have in evidence comparative data of "more profitable employment" as at the date of cancellation. I intend to hear the parties further in relation to that issue, and therefore my finding as to "more profitable employment" is provisional pending further legal argument.[53]

147. In my opinion, had Mr McIntyre cooperated with IRS, the rehabilitation provider was capable of organising rehabilitation training and a workplace

[52] See above, pp 30-38
[53] See below, p 64

based return to work program which could have enabled the worker to undertake more profitable employment.[54]

148. The evidence adduced by the employer shows that the process of rehabilitation commenced by the employer could have enabled the worker to undertake particular employment or a type of employment, without necessary identifying a particular job.

149. Professor Yellowlees told the Court that Mr McIntyre was able to work within his range of work experience.[55] More specifically, the Professor was of the opinion that the worker was and is able to work as a truck driver or a courier driver,[56] that he was capable of undertaking employment in relation to the sale and marketing of fruit juices[57] and that he was able to be employed as a sales and marketing manager with a hospitality agency.[58]

150. In his report dated 23 September 2002 September 2002 the Professor stated:

> "I believe that Mr McIntyre could be refit to re-train in other areas, we discussed possible work with animals for instance, but he will obviously need to have some career counselling, as well as vocational support and training".

151. In his report dated 30 January 2003 Professor Yellowlees spoke of the existence of future work options in the sporting field, where the worker's main interests, skills and expertise lie. The Professor said that there appeared to be "quite a few possibilities in training, coaching, talent spotting and stewarding in particular…"

152. In his report dated 24 April 2003, Professor Yellowlees expressed the opinion that the worker's enrolment in the Diploma of Business in Marketing offered by the Gold Coast TAFE represented a "very reasonable

---

[54] See the submission made by Mr Southwood at p 11 of his written submissions dated 23 June 2004.
[55] See p 49 of the transcript.
[56] See again p 49 of the transcript.
[57] See p 61 of the transcript.

option for him to do as it would get him back into some sort of business career which is in line with his hotel management position that he had prior to his injury.

153. The Professor went on to say:

> "…there are many opportunities in marketing, especially in the tourism industry in Queensland, and it does seem to me that this would be the sort of course that Jon could manage quite reasonably well".

154. In the same report Professor Yellowlees expressed the view that Mr McIntyre was fit to undertake such courses.

155. The evidence given by Ms Nearhos also established that the worker's participation in the rehabilitative process could have enabled the worker to undertake not only some employment but a particular type of employment.

156. Ms Nearhos told the Court that she had prepared a report in conjunction with Lisa Phillips dated 28 August 2003 (part of Exhibit U10). In that report it was recommended that a number of occupations could be explored as part of a return to work or rehabilitation plan, animal trainer, sports official, sales and marketing manager, sales representative, club manager, stock clerk/stock controller and garden labourer. As to those types of options, Ms Nearhos stated: "They would have been possible options that could have arisen from – after consulting with him and his treating practitioner".[59] She added that they were all possible areas of employment.

157. Under cross-examination, Ms Nearhos said that in relation to the option of animal trainer she employed the following methodology:

> "I used the Australian Job Search Internet site to find job titles, job descriptions. I used a program called 'Arc Angle', issued in 2003/2004, which identifies jobs and described them and their labour market options. And I contacted employers and licensing authorities,

---

[58] See again p 61 of the transcript.
[59] See p 101 of the transcript.

and there's also an Internet site called 'Wage Line' that can identify wages".[60]

158. However, the witness acknowledged that she had not ascertained whether any of the identified employment options were available for a person who had post-traumatic stress disorder and had not worked for 10 or 11 years. She also acknowledged that she had not ascertained whether those positions were available for a person (such as the worker) who lacked experience with computers.[61]

159. Ms Nearhos told the Court that none of the suggested occupations were offered through her to the worker. She also said that she did not give details of Mr McIntyre's personal and work experience to any of her sources of information during the course of arriving at the suggested areas of future employment. [62] In relation to the suggested categories of employment, Ms Nearhos was not able to say that any of those positions were then and there on offer to the worker.[63]

160. Ms Nearhos conceded that there would be difficulties in Mr McIntyre identifying employment goals and returning him to the workforce; however, she said that she would "expect it would take a process of vocational counselling as well as the benefits of the assessment to assist him to open up his options and look more broadly, and therefore develop a realistic job goal".[64]

161. The evidence given by Belinda Marwick, a recruitment consultant, was also probative in relation to the potential ability of the worker to undertake a particular type of employment as a result of the rehabilitative process.

[60] See p 102 of the transcript.
[61] See again p 102 of the transcript.
[62] See p 103 of the transcript.
[63] See again p 103 of the transcript
[64] See p 105 of the transcript.

162. Ms Marwick told the Court that she had been instructed to conduct certain job searches in relation to the worker.[65] As a prelude to that process, she was provided with the labour market research report of 28 August 2003 prepared by Jane Nearhos and Lisa Phillips.[66] She said that she was also provided with the initial assessment report from IRS dated 20 February 2003 and a rehabilitation closure report dated 17 March 2003.[67] Consequently, Ms Marwick made what are called in the industry "contact lists",[68] There are two such lists.[69]

163. The first list consisted of seven contacts, each referring to a particular position, its availability, its duties, requirements and salary range. Ms Marwick said that unless otherwise indicated opposite the contact, the specified jobs were available as at 5th April 2004. Attached to that list were a number of advertisements which corresponded with each of the positions referred to in the contact list.

164. Exhibit ED6 also included a second contact list comprising eight contacts.[70] That list was accompanied by a number of advertisements or draft advertisements.[71] This second list followed the same format as the first: it referred to the position, its availability, duties, requirements and salary range.

165. During cross-examination, Ms Marwick acknowledged that when she spoke to each of the contacts she did not inquire as to whether those positions were available to a person, such as the worker, who had post-traumatic disorder for ten years and who had not worked for that period of time [72] She also confirmed that none of the positions had been specifically offered

---

[65] See p 68 of the transcript.
[66] See again p 68 of the transcript.
[67] See again p 68 of the transcript.
[68] See again p 68 of the transcript. See Exhibit E6.
[69] See again p 68 of the transcript.
[70] See p 69 of the transcript.
[71] See p 70 of the transcript.
[72] See p 71 of the transcript.

to the worker.[73] When speaking to the various contacts, Ms Marwick did not disclose Mr McIntyre's personal details and experience.[74]

166. In relation to the first two contacts in the first list, Ms Marwick said that both positions required the candidate to be computer literate.[75] The second mentioned position also required current leadership experience within a small to medium warehouse environment.[76] Ms Marwick said that contact 5 also required computer skills; it also required engineering trade background with experience in a similar environment.[77] The witness agreed that contact 6 obviously required computer skills.[78] With respect to contact 7, Ms Marwick agreed that Ms Nearhos' skills assessment did not meet the job description.[79]

167. In relation to the second list, Ms Marwick said that the first and second contacts also involved some computer skills.[80] The witness said that contact 8 also required some basic computer skills.[81]

168. The evidence given by Pamela Kay Tragear, legal practitioner, is also probative in relation to the issue. Ms Tregear had collected off the internet various advertisements as to the availability of jobs in Queensland; see Exhibit E7. Prior to undertaking the searches, Ms Tregear said that she had been provided with the labour market research report dated 28 August 2003, the IRS report dated 20 February 2003 and the closure report dated 17 March 2003.[82]

169. Under cross-examination, Ms Treagear said that she did not inquire of any of the prospective employers whether the positions in question were

[73] See again p 71 of the transcript.
[74] See again p 71 of the transcript.
[75] See again p 71 of the transcript.
[76] See p 72 of the transcript.
[77] See p 73 of the transcript.
[78] See again p 73 of the transcript.
[79] See p 74 of the transcript.
[80] See pp 74 and 75 of the transcript.
[81] See p 76 of the transcript.
[82] See p 77 of the transcript.

available to a person who had post-traumatic disorder and who had not worked for ten or eleven years.[83] Nor did she inform the prospective employers of the worker's personal details and experience.[84] To the best of her knowledge, none of the positions referred to had specifically been offered to the worker.[85]

170. Mr McDonald, counsel for the worker, submitted that the rehabilitative process[86] embarked upon by the employer could not have enabled the worker to undertake more profitable employment:

> "(i) the 'rehabilitation treatment' (if it was such within the meaning of the definition) was at such an early stage that there is no evidence of any sort concerning what work Mr McIntyre could have done if had given IRS everything requested as at March 2003.
>
> (ii) Professor Yellowlees gave evidence that the worker needed to undergo a period of assisted work hardening and training before he could be fit for any work.
>
> (iii) No comparative data of 'more profitable employment' as at March 2003 is in evidence before this Court. The cancellation was premature".[87]

171. Mr McDonald went on to submit:

> "No wonder Professor Yellowlees was surprised that rehabilitation was ceased in the absence of a dollar figure for more profitable employment in March 2003.[88] It is impossible to find a figure to

---

[83] See p 78 of the transcript.
[84] See again p 78 of the transcript.
[85] See again p 78 of the transcript.
[86] Of course, the worker argues that no rehabilitative process within the meaning of s75B(2) had commenced: see above, pp 22-30.
[87] See p 32 of counsel's written submissions dated 17 May 2004. See also p 3 of those submissions where Mr McDonald submitted that "the employer has failed to provide the Court with evidence which would permit the Court to calculate any cancellation or even reduction of weekly benefits. There is no evidence of specific 'more profitable employment' (s75B(2)) or 'most profitable employment' (s75B(3)) on which the employer would have had to rely at the time of reducing or cancelling weekly benefits".
[88] Professor Yellowlees' surprise at the cessation of rehabilitation is to be found in his oral evidence, p 57 of the transcript:
"Whilst … it was clearly the TIO's right to cut him off, in that he…wasn't providing them with what they wanted, it seemed to me that – I was trying to take a long term view and … he obviously was a difficult guy, very difficult for many years and … I thought it was actually important for him to try

compare with indexed normal weekly earnings. Therefore, it is impossible to calculate a reduction let alone a cancellation of weekly benefits".[89]

172. In my opinion the totality of the evidence – the evidence of Professor Yellowlees, Jane Nearhos, Belinda Marwick, Pamela Tregear, Exhibits E10, E6, E7 and E9 – establishes that had the worker cooperated with IRS, the rehabilitation provider was more than capable of organising rehabilitation training and a workplace based return to work program which could have enabled the worker to undertake more profitable employment including employment training greyhounds, club manager and sales and marketing manager within the hospitality industry.[90] Furthermore, as Mr Southwood pointed out,[91] the worker is able to work as a truck driver, courier driver, sales representative, stock clerk, nursery assistant, garden labourer and in the area of sales and marketing of fruit juices.

173. Whilst I agree that the rehabilitative process was in its nascent stage, the prognosis for the worker being able to take up employment in one of the identified areas, had he cooperated, with IRS was reasonably good. It must be borne in mind the relevant test is "could" – not "would". The test is concerned with an assessment of the ability, or potential capability, or the worker to obtain more profitable employment. I consider that the employer has satisfied that test.

174. It is necessary to deal with the following submission made by Mr Southwood:

> "The evidence obtained by Senior Counsel for the worker during the cross-examination of Jane Nearhos and Belinda Marwick about whether the various employment positions about which they gave evidence were available to:

---

and have some contact with his rehab people and to receive the sort of … work-hardening approach that I'd been taking to him about".

[89] See pp 32-33 of counsel's written submissions dated 17 May 2004.

[90] See the submission made by Mr Southwood at pp 10-11 of his written submissions dated 23 June 2004.

[91] See p 11 of counsel's written submissions dated 23 June 2004.

- a person who had a lack of experience with computers or who lacked other skills,

- or a person who had difficulty job searching because they had been out of employment for a long time,

- or a person who may not be able to tolerate certain work or workplace interactions if they were suddenly employed full time without a graduated return to work,

cannot be relied on by the workers as a basis for arguing that there was no employment reasonably available to the worker. Nor can the evidence be relied on by the worker as a basis for arguing that the worker did not have a capacity for work. As the worker did not give evidence about his lack of skills or lack of capacity no foundation of evidence has been laid by the worker to enable the court to draw any such conclusions. The answers given by the witnesses in cross-examination remain hypothetical. For example there was no evidence led from the worker that he did not have the computer skills for the job positions identified during the course of the evidence led on behalf of the employer. Nor was there evidence led from the worker that he was incapable of working full time because he would have difficulty coping with the normal interactions with work. The fact the worker chose not to give evidence about such matters means that the Court can be bold in drawing conclusions or fact referred to above. As Rich J said in *Insurance v Joyce*(1948) 77 CLR 39 at 49:

'When circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold.'

Further it has never really been doubted that when a part to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may readily accept that evidence: *Weissensteiner v R* (1993) 178 CLR 217 see also *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125".[92]

175. There is considerable strength to the submissions made by the employer's counsel[93] with which I agree. However, that aside, what is critical, for the

[92] See pp 12-13 of counsel's written submissions dated 23 June 2004.
[93] Though it should be noted that Ms Nearhos said that the worker informed her of his need for computer skills on 11 February 2003. It should also be noted that Professor Yellowlees stated in his

purposes of s75B(2), is the ability, or potential capability, of the worker to take up employment in the specified types of employment as a result of participating in an appropriate rehabilitative scheme of the type contemplated by subsection 75B(2) of the *Work Health Act*. The rehabilitation provider was, on the evidence provided to the Court, more than capable of instituting and implementing a program of rehabilitation training and a workplace based return to work program, which again was more than capable of accommodating and addressing the worker's lack of experience with computer, lack of other requisite skills, the worker's lengthy absence from the workforce and his present lack of tolerance to certain workplace interactions. Furthermore, there is no indication from the evidence presented by the employer that it was intended to return the worker in full time employment without the benefit of a graduated return to work program.

176. Mr McDonald's submission that the worker needed to undergo a program of assisted work hardening and training is very much to the point. It is plain from the evidence of Professor Yellowlees that the worker could not have returned to work without further reviewing and professional rehabilitation processes. However, had Mr McIntyre been willing to cooperate with IRS – that is complied with their requirements at the relevant time – the objective probabilities are that the rehabilitation provider would have assisted the worker in that respect; and it is most likely that as a result of such a program the worker would have been able to obtain employment in one of the identified areas of employment.

177. I consider that there is a sufficiently cogent and uncontradicted body of evidence, of both a direct and inferential nature, before the court. The worker's normal weekly earnings were agreed at $583.00 and the evidence adduced by the employer shows that many of the types of employment that

---

report dated 26 November 2003 that "at the moment (the worker) has no knowledge of computers at all …". However, in my view, none of that evidence detracts from the force of Mr Southwood's

the worker could undertake as a result of participating in the rehabilitative process pay more than his normal weekly earnings. Accordingly, the worker's participation in the rehabilitative process could have enabled the worker to undertake more profitable employment.

178. I note the submission made by Mr McDonald that the employer has failed to make out its case because no comparative data of "more profitable employment" as at March 2003 was in evidence before the Court. While that appears to be the case, my provisional view is that the Court does not need such contemporaneous evidence in order to make an order for cancellation of payments. It is sufficient that there is comparative data at some date following cancellation of payments. The Court, in my view, has such evidence. Of course, there might be an argument that in order for the employer to obtain the full benefit of the 75B(2) deeming provision, that is to say, cancellation of payments as from the date that payments were stopped, the comparative data must relate back to that date.[94] If the evidence is only referable to a date after payments were stopped, then the employer may only get the benefit of cancellation, pursuant to the deeming provision, as from that date.

179. However, as indicated earlier,[95] I intend to hear the parties further in relation to this aspect of "most profitable employment'. Further legal argument may or may not lead me to alter my provisional finding on the issue.

180. The only remaining issue is whether the worker unreasonably failed to participate in the rehabilitative process and/or unreasonably refused to present himself for assessment of employment prospects. In order to determine those two issues, it is necessary to carefully examine the course of dealing between the worker and the TIO and/or IRS, and to adopt the

---

submission.

[94] This would apply whether the employer was relying upon the s69 notice ceasing payments or relying upon its counterclaim relating back to the time that payments were stopped.

evaluative approach taken by Mr Trigg in *Tanner v Anthappi* (supra) and by courts in various other authorities.

181. The evidence shows that on 30 December 2002, Jodie Woodward wrote to the worker informing him that a rehabilitation provider had been provided. At the same time she requested him to cooperate in their assessments. Shortly thereafter, on 7 January 2003, Jane Nearhos, a psychologist in the employ of IRS, telephoned the worker and advised him that IRS had been appointed rehabilitation provider as a consequence of Dr Yellowlees report. Ms Nearhos arranged an appointment to see the worker on 17 January 2003. The evidence shows that part of Ms Nearhos' role as a rehabilitation provider was to undertake an assessment of the worker's employment prospects.[96]

182. The evidence also shows that IRS Total Injury Management is and was at all material times an accredited rehabilitation provider that employed suitably qualified personnel.[97] IRS, being an entity separate from and independent of the TIO,[98] had adopted appropriate procedures for carrying out assessments of injured workers' employment prospects, for determining what rehabilitation training injured workers required and for establishing appropriate workplace based return to work programs for injured workers.[99]

183. As noted earlier,[100] the appointment of IRS as rehabilitation provider marked the commencement of the rehabilitation process and workplace based return program, referred to in subsection 75B(2) of the Act. The evidence also clearly establishes that IRS, as the rehabilitation provider, was charged, inter alia, with the task of assessing the worker's employment prospects. For all intents and purposes, that aspect of IRS' role commenced upon its appointment as rehabilitation provider.

---

[95] See above, p 54
[96] See p 84 of the transcript.
[97] See pp 5 and 81 of the transcript: see also Exhibit E1.
[98] See p 85 of the transcript.

184. It is necessary to examine the conduct of the worker following the appointment of IRS, in the context of what was required of him by that entity, in order to determine whether he was guilty of unreasonably failing in terms of subsection 75B(2) and/or unreasonably refusing in terms of subsection 75B(3). Of course, the reasonableness or otherwise of any defaulting conduct on the part of the worker has to be assessed through the lens of what is "unreasonable".

185. Ms Nearhos told the Court that during her first interview with the worker on 17 January 2003 she told him about IRS's requirement that he provide to

IRS, as the rehabilitation provider, a signed authority to obtain and release information.[101] Ms Nearhos said that she explained the authority to Mr McIntyre and gave him a copy of the IRS Privacy document entitled "How We Handle Your Personal Information". [102] Ms Nearhos went on to say that she informed the worker of IRS's obligations to report to the insurer and explained to him that the purpose of the interview was to determine his rehabilitation needs and return to work goals, and to formulate a return to work plan.[103]

186. At page 85 of the transcript, Ms Nearhos told the Court that it was "a standard policy of IRS to obtain (the) authority before initiating rehabilitation of the worker so that we knew who we could contact about matters relating to their rehabilitation, particularly their treating practitioner".

187. As to the necessity to contact the worker's employer, Ms Nearhos stated:

[99] See pp 6, 11, 84 and 85 of the transcript.
[100] See above, pp 31-32.
[101] See p 83 of the transcript
[102] See again p83 of the transcript.
[103] See p 84 of the transcript.

> "It may be possible, if the person was currently in contact with an employer, as the general procedure, in specific cases where there was no employer involved, that particular section is not completed. So on the authority form, you gave a space with the worker to determine who were the appropriate people to contact, and if it was appropriate, then an employer would be – a name would be written on that form".[104]

188. Ms Nearhos gave evidence to the effect that during that initial interview, Mr McIntyre gave her some information. He said that he did not want his "personal information going to people who didn't want it". He also said that he did not have a current general practitioner and was not on medication or receiving treatment. He advised that he was due to see Dr Yellowlees again, and indicated that he wanted to consult his solicitor before signing the authority.[105]

189. The witness went on to give the following evidence as to what occurred during that first interview:

> "He told me he believed he'd been through that rehabilitation process before with no outcomes and he was not willing to do it again unless it would have results. He indicated he wanted to return to work doing something that he will enjoy, and the capacity to increase his wages up to something like his pre-injury income. And he told me he has considered options such as greyhound trainer and promotions work. On that occasion we agreed, from my notes, from my recollection, to pursue some activities. Firstly, that Mr McIntyre would find out where he could do a course that would accredit him to check and treat greyhounds for other trainers. Secondly, for Mr McIntyre to explore with experienced trainers their expectations of what qualifications they would require if they were to employ him. For Mr McIntyre to investigate promotions work for companies that operate in his local area, to find out what would be the nature of the work and employment options…investigate his local TAFE, relevant courses in promotions work, and to advise IRS in two weeks – to contact us in two weeks to make another appointment to review his progress".[106]

[104] See p 85 of the transcript.
[105] See again p 85 of the transcript.
[106] See pp84-85 of the transcript.

190. Ms Nearhos testified on 30 January 2003 she received a message from the worker to make another appointment for 11 February 2003.[107] The witness said that on that day she had a further interview with Mr McIntyre.[108] Ms Nearhos gave the following evidence as to the course of that interview:

> "We discussed his recent review with Doctor Yellowlees. I gave him the information on employment ideas in sport and outdoor occupations, including that of dog trainer. We discussed his long-term interest and experience in the hotel and hospitality areas, regarding the transferable skills he could take to another occupation. I advised him of the process of a vocational assessment which would include aptitude testing and liaison with his doctor and I advised him of the need to have his signed authority to obtain and release information, and on that occasion Mr McIntyre also commented on his need for computer skills".[109]

191. The witness said that the following plan was discussed with the worker on 11 February:

> " …I put forward a plan that Mr McIntyre would contact IRS to arrange an appointment next week, to complete a vocational assessment, for Mr McIntyre to consider the job information I'd given him and to consider all options we could pursue. I gave him a skills audit checklist to take with him and complete and return at his next appointment. …I asked him also to complete the authority to obtain and release information form, and to bring it back signed at the next appointment".[110]

192. As to what a vocational assessment entails, Ms Nearhos gave this evidence:

> "A vocational assessment is undertaken as a fairly standardised process involving an assessment of the person's aptitudes, their transferable skills and their interests, with the aim of developing possible job goals or job matches, and identifying what additional training the person may require to achieve these jobs".[111]

193. Ms Nearhos said that such an assessment involved a structured interview with the person, during which the person's employment and educational

---

[107] See p86 of the transcript.
[108] See p 87 of the transcript.
[109] See p 88 of the transcript.
[110] See again p 88 of the transcript.

history was obtained, their literacy and numeracy skills were tested and their career interests were identified.[112]

194. The witness gave the following evidence as to the need for the worker's signed authority to obtain information:

> "Two reasons. One is the IRS procedure that requires me to obtain that, and the other reason is to complete a vocational assessment it is essential that I be able to contact the person's treating practitioner regarding the job matches we identify in vocational assessment to ensure they are appropriate for the person's restrictions and limitations, and also to obtain information from the treating practitioner about how they could work in them, like how many hours they could start at, and whether any of the training that would be required would also be appropriate given their medical condition".[113]

195. Ms Nearhos went on to tell the Court that the skills audit was "a standard document that IRS uses as part of the vocational assessment".[114] As to its contents, she said that it "includes a list of possible skills in a number of areas such as administration, cleaning, labouring tasks… it lists a lot of skills that people may have obtained in their working life or in other areas of their life, and as a checklist it allows the person to tick off skills that they believe they can use".[115] The witness said that the skills audit provided a means by which information on a person's transferable skills could be obtained; though such information could be elicited from the person concerned.[116] Ms Nearhos stated that the information as to a person's transferable skills was essential to a vocational assessment.[117] As to the purpose of vocational assessment, the witness stated:

> "A vocational assessment is intended to identify realistic potential job options for an individual based on their skills, aptitudes and

---

[111] See again p 88 of the transcript.
[112] See pp 88-89 of the transcript.
[113] See p 89 of the transcript.
[114] See again p89 of the transcript.
[115] See again p 89 of the transcript.
[116] See again p 89 of the transcript.
[117] See again p 89 of the transcript.

> interests, and with reference to how realistic those jobs are within the current labour market".[118]

196. Ms Nearhos told the Court that on 18 February 2003 she telephoned the worker. During that conversation Ms Nearhos arranged for the worker to attend at IRS to undergo a vocational assessment on 21 February. She also reminded him to take to the assessment "the consent form, his medical certificate and the skills audit".[119]

197. The witness gave the following evidence as to the medical certificate:

> "I was seeking the statutory form that's required by the Worker's Compensation Insurers from the person's treating medical practitioner to certify whether they are fit or not fit to return to work, and everyone under a compensation scheme needs to provide that medical certificate as a requirement".[120]

198. Ms Nearhos gave this evidence as to the need for that certificate:

> "Firstly it's a requirement for IRS to obtain that from people who – injured workers who are undergoing rehabilitation, and secondly because it would give me information on whether the persons was fit to return to work and at what pace he could return to work. Whether he could return to work for a certain number of hours or was there – and also any restrictions in his ability to return to work".[121]

199. The witness told the Court that Mr McIntyre had agreed during the telephone conversation on 18 February to produce all the requested documentation on 21 February.[122]

200. Ms Nearhos then gave evidence on 20 February she received a telephone call from the worker requesting a change in the appointment that had been arranged. She stated that the worker said that he needed to pick up his child from school on 21 February, and accordingly, the appointment was

[118] See again p 89 of the transcript.
[119] See p 91 of the transcript.
[120] See again p 91 of the transcript.
[121] See again p 91 of the transcript.
[122] See again p 91 of the transcript.

re-scheduled to 24 February.[123] The witness went on to say that on 24 February she received a message from Mr McIntyre to the effect that he was unable to attend the appointment as he was ill.[124] At that time the worker did not organise another time for the vocational assessment. The witness gave the following evidence as to what occurred on 26 February:

> "I attempted to contact Mr McIntyre at home and on his mobile but he was not available… and then I received a telephone call from Mr McIntyre on the same day to make another appointment, and we agreed on an appointment on Monday, 3 March at 11:30am".[125]

201. Ms Nearhos said that she could not recall asking the worker on 26 February to post or e-mail to her the signed authority.[126]

202. The witness next gave evidence of her interview with the worker at the IRS office in Brisbane on 3 March 2003. As to what transpired during that interview, Ms Nearhos stated:

> "Mr McIntyre did not provide the authority to obtain and release information, he did not provide a medical certificate, so I advised him of TIO's stand on non-compliance. I drafted him an activities plan, which is a statement of tasks that …. needed to be undertaken. I reviewed – we reviewed his progress in identifying job options and we included tasks about researching job options in the activities plan. On that occasion Mr McIntyre refused to sign the activities plan, on that occasion. He reported that he would have it checked by his solicitor the next day, and he also said that he would pick up the authority form from his solicitor the next day. And I told him that I would be advising TIO about our interview today and the outcome and provide them with a copy of the activities plan that I drafted. I requested that he provide the signed authority, medical certificate and the signed activities plan by the end of the week".[127]

203. Ms Nearhos said that she did not believe that the worker provided her with the skills audit either on or before 3 March 2003. [128] The witness said that

---

[123] See p 93 of the transcript.
[124] See again p 93 of the transcript.
[125] See again p 93 of the transcript.
[126] See again p 93 of the transcript.
[127] See p 94 of the transcript.
[128] See again p 94 of the transcript.

she did not consider undertaking a skills audit on 3 March because at the time she needed the signed authority to continue the rehabilitation process, and also needed the medical certificate to continue that process. In her own words, "it was essential to have these documents".[129] Ms Nearhos said that it was necessary for the worker to sign the activities plan: "signing such a plan would ensure that both he and I were committed to those activities".[130] She went on to say that the purpose of the activities plan was "to state clearly what tasks both IRS and Mr McIntyre needed to complete in order to continue the rehabilitation process and to state the time frames in which they would be required".[131]

204. The witness told the Court that she requested Mr McIntyre to provide both the signed authority to release information and the medical certificate by 7 March 2003.[132] Mr McIntyre was also requested to investigate training courses for checking greyhounds.[133] Ms Nearhos said that the worker was to complete the skills audit and send it to IRS by 31 March.[134] She said that IRS was to conduct research into the greyhound industry and related jobs, and that task was due to be completed by 7 March.[135]. The witness said that on 3 March she reminded Mr McIntyre of the consequences of non-compliance.[136]

205. Ms Nearhos gave evidence of having received a telephone message from the worker on 4 March. She said that she returned his call, and on speaking to him, Mr McIntyre informed her that he had spoken to his solicitor, and he was able to sign the documents that he had been given, though he stated that he was unable to locate the authority form.[137] Ms Nearhos said that she agreed to post him another authority form and

---

[129] See again p 94 of the transcript.
[130] See again p 94 of the transcript.
[131] See again p 94 of the transcript.
[132] See p 95 of the transcript.
[133] See again p 95 of the transcript.
[134] See again p 95 of the transcript.
[135] See again p 95 of the transcript.
[136] See again p 95 of the transcript.

requested Mr McIntyre to send all the signed forms back to her. [138] During that conversation the worker agreed to a functional assessment to be arranged by IRS. It was also agreed that information regarding that assessment would be sent to the worker.[139] Ms Nearhos said that Mr McIntyre was still keen on pursuing greyhound work, and she asked him to continue searching relevant courses and perhaps preparing a business plan.[140] The witness believed that the worker had agreed to undertake those activities.[141] Following the conversation with the worker, Ms Nearhos posted another authority form to the worker.[142]

206. As Ms Nearhos had not received any of the required documents from the worker by 10 March 2003, she attempted to telephone Mr McIntyre on 10 March to find out what had happened.[143] The witness was unable to contact the worker on that occasion, and left a message with the person who answered the phone, the message being to the effect that she had not received the signed authority from Mr McIntyre and that she would have to advise the insurer of that fact.[144]

207. Ms Nearhos told the Court that on 11 March the worker telephoned her, complaining about the fact that she had left a message with his flatmate, thereby breaching his privacy.[145] During that conversation, Mr McIntyre stated that he had signed the authority and would be sending it by mail.[146] Also during that conversation, the worker advised Ms Nearhos that he had made inquiries about the greyhound course, but as “it didn’t have any qualifications he would obtain through doing it”, he was “not willing to do

---

[137] See p 96 of the transcript.
[138] See again p 96 of the transcript.
[139] See again p 96 of the transcript.
[140] See again p 96 of the transcript.
[141] See again p 96 of the transcript.
[142] See again p 96 of the transcript.
[143] See again p 96 of the transcript.
[144] See again p 96 of the transcript.
[145] See p 97 of the transcript.
[146] See again p 97 of the transcript.

a course without qualifications".[147] The worker also indicated that he did not believe that he could get work without qualifications.[148]

208. The witness gave the following evidence as to further discussions that took place during the conversation;

> "I told him that I'd informed TIO that I hadn't received the forms as of yesterday, that in terms of the training course the important issue was about leading to job outcomes, and that he needed to identify a realistic goal for return to work, and that TIO would top up his pay if it was not at the level of his pre-injury income. That the functional assessment and vocational assessment could assist in determining that goal, and I suggested that he review his work ideas with Dr Yellowlees. He told me he was going to see Dr Yellowlees again on 18 March,"[149]

209. At page 97 of the transcript, Ms Nearhos told the Court that following her conversation with the worker on 11 March 2003 she never received the signed authority, the medical certificate, the completed skills audit form nor the activities plan.

210. Ms Nearhos stated that on 12 March 2003 she received an e-mail from the insurer directing her to discontinue any involvement with the worker and to cease any action on the claim until further advice.[150] The witness went on to say that she was advised by the insurer that a Form 5 had been served on the worker on 14 march and requested by the insurer to complete a closure report,[151] A closure report was prepared on 17 March 2003.

211. At page 98 of the transcript Ms Nearhos, in referring to her closure report, said that Mr McIntyre appeared anxious about his privacy throughout their dealings: he "indicated a preference for keeping personal information about his life very personal and private and not wanting to disclose or share that

[147] See again p 97 of the transcript.
[148] See again p 97 of the transcript.
[149] See again p 97 of the transcript.
[150] See again p 97 of the transcript.
[151] See p 98 of the transcript.

information where it was not needed".[152] The witness believed that it was possible that the worker's concern with the privacy affected his willingness to sign the authority to release information.[153]

212. Ms Nearhos told the Court that on 9 May 2003 IRS received instructions to recommence the worker's rehabilitation.[154] The witness said that in accordance with those instructions she prepared a letter addressed to the

worker, advising of an appointment – 19 May at 9:30 at IRS, Brisbane – with herself and her branch manager "for an interview to outline the referral instructions, to prepare a rehabilitation plan and to determine acceptable time frames".[155]

213. The witness gave the following evidence in relation to a telephone conversation that she had with the worker on 12 May 2003:

> "…I contacted Mr McIntyre and I advised that I was returning a call that he'd made before and that I said that he would be receiving a letter offering an appointment on 19 May with myself and my branch manager and that letter included a consent form for him to complete… I asked him if he had any queries – he said: 'No'. He said he would get back to me as he was seeking legal advice and I said that I would leave that appointment unless I had an instruction from the insurer".[156]

214. Mr Nearhos told the Court that the worker did not attend the appointment.[157] The witness said that as a result of that non-attendance she attempted to telephone Mr McIntyre on three occasions – on two of those occasions, his phone was busy while on the third there was no answer.[158] Subsequently, on 19 May, Ms Nearhos sent a letter to the worker advising of him of a further appointment on 30 May 2003. The worker did not

---

[152] See again p 98 of the transcript.
[153] See again p 98 of the transcript.
[154] See p 99 of the transcript.
[155] See again p 99 of the transcript.
[156] See again p 99 of the transcript.
[157] See again p 99 of the transcript.
[158] See again p 99 of the transcript.

attend that appointment.[159] As a consequence of that non-attendance, Ms Nearhos said that was again instructed by TIO to close the file.[160]

215. At page 101 of the transcript Ms Nearhos gave evidence as to the contents of a labour market research report dated 28 August 2003 which had been prepared in conjunction with Lisa Phillips, a rehabilitation consultant.

216. Ms Nearhos was referred to the job options identified on page 1 of the report. In relation to that aspect, she stated:

> "They would have been possible options that could have arisen from – after consulting with him and his treating doctor. I was only going on the information I had to date".[161]

217. Upon being referred to page 2 of the report, dealing with various occupations which could be explored as part of a return to work rehabilitation plan, Ms Nearhos stated:

> 'They were possible options that were suggested, both by his comments and by the other reports. I didn't discuss of those options with Mr McIntyre myself".[162]

218. By "possible options", Ms Nearhos said that she meant "possible areas of employment".[163]

219. The witness confirmed that under the heading "Results" in the report seven different options were listed.[164]

220. During cross-examination, Ms Nearhos was asked what specific further information she required from Professor Yellowlees to proceed with the functional assessment after 17 January 2003. She replied as follows :

---

[159] See again p 99 of the transcript.
[160] See again p 99 of the transcript.
[161] See page 101 of the transcript.
[162] See again p 101 of the transcript.
[163] See again p 101 of the transcript.
[164] See again p 101 of the transcript.

> "When we had started to undertake the vocational assessment that would have meant developing some job options and at that point, after developing some job options, after completing some assessment tasks with Mr McIntyre, I would have been in contact with the treating practitioner, Dr Yellowlees, and consulted with him about those job options. The functional assessment was another issue which (inaudible) vocational assessment. I couldn't complete that without consulting with the treating practitioner. I couldn't commence the assessment tasks and I couldn't complete the report and recommendations without consulting the treating practitioner".[165]

221. By way of clarification, the witness said that she could not proceed with the functional assessment without the treating doctor's permission.[166]

222. On page 125 of the transcript, in response to further cross-examination, Ms Nearhos stated:

> "…without a doctor's permission, a relevant practitioner's permission to proceed with that functional assessment, I didn't get to a point to find out who would be the right person for that. Doctor Yellowlees would have been a starting point…it is practice to contact the treating practitioner for permission to conduct a functional assessment and to seek their recommendation on that…it was the procedure from IRS and strongly suspect it's an ethical requirement or if not a legal requirement as well, but I couldn't be certain of that. It was certainly a procedure…I had no other information except Doctor Yellowlees, so he would have been my first contact".[167]

223. At page 126 of the transcript Ms Nearhos was asked why she could not go ahead with the vocational assessment after the initial assessment had been completed on 11 January, given that she had all the reports of each of the meetings with Professor Yellowlees. She replied as follows:

> "I would still – as I said – I could have initiated vocational assessment tasks, but I couldn't complete a report and recommendations without consulting with Doctor Yellowlees or whoever the relevant treating practitioner would be, and the specific

---

[165] See p 124 of the transcript

[166] See again p 124 of the transcript.

[167] See p 125 of the transcript.

job options identified out of that report, so that's why I wanted that consent to contact Doctor Yellowlees".[168]

224. The witness repeated that although she could have started a vocational assessment, she could not have completed it.[169]

225. Ms Nearhos went on to explain the relevant procedure at page 127 of the transcript:

> It was IRS procedure to initially obtain consent to contact the treating practitioner before starting the vocational assessment, and it was essential that before completing a vocational assessment, that the consultant completing that should contact the treating practitioner about the specific job options that were identified out of the assessment to ensure that they were appropriate according to the worker's medical situation or restrictions or any contra-indication. So I would have needed to have spoken to Doctor Yellowlees or communicated with him about specific options that I identified with Mr McIntyre".[170]

226. Under cross-examination, the witness said that on 13 March 2003 – the date payments were cancelled – she had not commenced "the formal element" of the vocational assessment: "I had given him a skills audit, which was part of the vocational assessment report, and I was prepared to start a vocational assessment formal tasks with him when I next saw him".[171]

227. At page 129 of the transcript, Ms Nearhos said that the activities plan included matters that would have been included in the vocational assessment: "so it was a way of getting those things started".

228. Ms Nearhos told the Court that at the time she was directed to cease any further rehabilitation work with the worker on 12 March 2003, she had not

[168] See p 126 of the transcript.
[169] See p 127 of the transcript.
[170] See again p 127 of the transcript.
[171] See pp 127 – 128 of the transcript.

completed a vocational assessment, nor had she commenced a functional assessment.[172]

229. As to what further information she needed from Professor Yellowlees for the purposes of undertaking a functional assessment, the witness stated:

> "For a functional assessment, the occupational therapist requires permission from the treating practitioner to commence the functional assessment, so that would have been required".[173]

230. At page 132 of the transcript the following exchange took place between cross-examining counsel and the witness:

> "Q: Without the signing of the authority or the activities plan, what was stopping you going ahead with the vocational assessment?"
>
> "A: …I had also asked Mr McIntyre for a medical certificate, which I also needed to complete a vocational assessment, and he hadn't provided that…"
>
> "Q: What could this medical certificate have added in this case?"
>
> "A: The medical certificate, I understand, is a legal requirement for a rehabilitation provider to obtain in order to ensure that they had a clear indication of the worker's fitness to return to work or fitness for suitable duties and restrictions. It is essential we had a current medical certificate to proceed with rehabilitation."

231. Ms Nearhos told the Court that the skills audit, as a written document, was not essential to a vocational assessment: "…the information it contained could be gained by another means…"[174]

232. In my opinion, a very careful and thorough analysis of the course of dealings between the worker and the insurer/IRS leads to two conclusions: (a) the worker unreasonably failed to take part in the rehabilitative process envisaged by subsection 75B(2) and (b) the worker unreasonably failed to present for medical assessment as required by subsection 75B(3).

---

[172] See p 129 of the transcript.
[173] See again p 129 of the transcript.
[174] See p 133 of the transcript.

233. In terms of subsection 75B(2), the worker failed to provide the vocational rehabilitation provider with:

1. A medical certificate;
2. A signed authority to obtain and release information;
3. A skills audit;
4. A signed activities plan; and
5. Realistic unemployment goals.[175]

234. The evidence adduced by the employer clearly establishes each of those failures. The evidence lead by the employer was neither contradicted nor rebutted by the worker and is accepted by the Court.

It is not without significance that the worker denied any failure to discharge his statutory obligations under subsection 75B(2) predominantly on the ground that the course of dealings between the worker and the insurer/IRS did not fall within the ambit of the rehabilitative process envisaged by subsection 75B(2); but that argument was rejected by the Court.[176]

235. The submission made by Mr McDonald to the effect that there was no failure on the part of the worker to comply with his statutory obligations because he "attended all examinations and appointments except on three occasions, when he telephoned first and rescheduled the appointment"[177] cannot be sustained, in the overall context of the worker's conduct during the course of his interaction with the insurer/IRS. The further submission that "it is clear from Professor Yellowlees' report and the IRS progress notes and the IRS Initial Assessment Report that Mr McIntyre participated in all such appointments/examinations"[178] suffers from the very same

[175] See p 5 of Mr Southwood's written submissions dated 23 June 2004.
[176] See above, p 33.
[177] See p 26 of the Counsel's written submission dated 17 May 2004.
[178] See again p 26 of Counsel's written submissions dated 17 May 2004.

affliction – superficiality and selectivity – and ignores the worker's conduct during the material period.

236. In my opinion, the said failures resulted in the vocational rehabilitation provider being unable to:

1. Complete a functional assessment;
2. complete a vocational assessment;
3. complete an assessment of the worker's employment prospects;
4. formulate what rehabilitation training the worker required and
5. establish a work based return to work program.[179]

237. In my opinion, the said failures collectively amounted to a failure for the purposes of s75B(2) of the *Work Health Act*. It is also my opinion that those failures were so fundamental that they rendered rehabilitation efforts impracticable, if not impossible.

238. It is also my view that the said failures collectively amounted to a refusal on the part of the worker to present himself for assessment of his employment prospects, as required by subsection 75B(3) of the Act.

239. As also observed earlier, a distinction is to be drawn between "failure" and "refusal", though the latter can be properly inferred from the former, in the absence of any evidence to the contrary.[180] In the present case, one can properly infer from the series of failures on the part of the worker that the worker was refusing to present himself for assessment for employment prospects. The worker did not attempt to rebut that inference. Indeed, the worker did not give evidence in these proceedings, nor did he call any evidence on his behalf. On account of the worker's failure to testify and to

[179] See p 6 of Mr Southwood's written submissions dated 23 June 2004.
[180] See above pp 42-43.

call evidence by way of explaining or contradicting the evidence adduced in the employer's case, the Court may more readily accept the evidence (including the inferences therefrom) led by the employer.[181] In my opinion, the inference (a powerful at that) that can be drawn from the evidence adduced by the employer is sufficient to reasonably satisfy the Court on the balance of probabilities that the worker had refused to discharge his obligations under subsection 75B(3)[182].

240. In my opinion, the said failure and refusal were unreasonable in the sense contemplated by subsection 75B(2) and (3). There are a number of reasons for coming to that conclusion.

241. I start with the worker's capacity to make decisions, because subsection 75B(2) and (3) requires a worker to make various decisions in the course of meeting his or her statutory obligations; and a factor which is relevant to whether or not the worker unreasonably failed or refused in the context of that subsection is the worker's capacity to make appropriate decisions.

242. Mr McDonald made the following submission:

> "When considering 'unreasonable' in this case, it is important to remember that Mr McIntyre had been out of work due to PTSD at the time of cancellation of benefits on 13 March 2003, since 1 June 1992, some 10.75 years. This long period out of the workforce had its effect on the worker in relation to his readiness for an adaptability to rehabilitation."[183]

243. This submission appears to be referable to the worker's mental capacity and mental disposition to participate in the rehabilitative process instigated by the employer.

---

[181] See *Insurance Commissioner v Joyce* (1948) 77 CLR 39; *Transport Industries Insurance Co Ltd v Longmuir* [1977] 1 VR 125 applying *Jones v Dunkel* (1959) 101 CLR 298, *O'Donnell v Reichard* [1975] VR 916 and *Weissensteiner v R* (1993) 178 CLR 217.
[182] See *Transport Industries Insurance Co Ltd v Longmuir* [1977] 1 VR 125; *Bradshaw v McEwans Pty Ltd* (unreported, High Court, 27 April 1951) for the proposition that in civil cases, evidence is required only of circumstances raising a reasonable, definite and more probable inference of what is alleged. In the present case, the evidence raised a reasonable, definite and more probable inference that the worker was refusing to present himself for assessment of his employment prospects.
[183] See p 31 of the Counsel's written submissions dated 17 May 2004

244. Although I accept that a worker's mental capacity is a relevant factor in the assessment of the worker's conduct in the context of subsection 75B(2) and (3), I do not find that the worker's capacity to make decisions was so impaired by his mental condition and lengthy absence from the workforce as to provide a satisfactory explanation for his said failure to take part in the rehabilitative process and/or refusal to present for assessment of employment prospects, and thereby render any such failure and/or refusal reasonable. In my view, there are a number of contradictions, and the preponderance of the evidence points the other way.

245. The evidence given by Mr Yellowlees is important in that regard. Professor Yellowlees considered the worker to be an intelligent person who had occupied a responsible management position prior to his injury.[184] The Professor was of the opinion that the worker remained competent in many areas and retained significant physical and intellectual assets.[185] It is the case that the worker has no physical disabilities and has largely overcome the problems caused by his post-traumatic disorder. Significantly, he neither takes nor requires medication for his condition.[186] Particularly telling was Exhibit E5-the video which showed the worker sitting in the bar of a hotel having a drink and placing bets with the use of the hotel's gambling facilities.[187] The video, to my mind, demonstrates the extent to which the worker has overcome the difficulties generated by his post-traumatic stress disorder. Having said that, I accept the worker's psychiatric condition prevents the worker from obtaining employment in the hotel industry because he remains determined to evade anything that would bring back the robbery to his mind.[188] Against that background, and in light of the evidence given by Ms Nearhos as to her dealings with Mr McIntyre, I believe that the worker understood his obligations pursuant to

---

[184] See p 1 of Professor Yellowlees' medical report dated 23 September 2002 (Exhibit E4).
[185] See pp 2 and 3 of Professor Yellowlees' report dated 23 September 2002 (Exhibit E4).
[186] See p 49 of the transcript.
[187] See the submission made by Mr Southwood at p 10 of his written submissions dated 23 June 2004.
[188] See p 50 of the transcript.

the *Work Health Act* and was prudent enough whenever he deemed it appropriate – and I would add, convenient – to seek legal advise. In my opinion, in the absence of evidence to the contrary, the worker had a capacity to make appropriate decisions during the course of his dealings with the insurer/IRS. That is the clear inference can be drawn from the evidence adduced by the employer. It was always open to the worker to adduce or call evidence to the contrary – Mr McIntyre chose not to avail himself of that option.

246. As to Mr McIntyre's readiness for his adaptability to rehabilitation – to the extent that that is a matter quite distinct from his mental capacity to engage in a rehabilitative process – I consider that the expert evidence as to his physical and intellectual strengths established, to a prima facie level, that Mr McIntyre was sufficiently equipped to engage in the rehabilitative process embarked upon by the insurer/IRS. Again, it was always open to the worker to rebut that prima facie case. In the absence of contradictory evidence, I find myself unable to accept the worker's submission that the worker's readiness for adaptability to rehabilitation can be relied upon as a reasonable explanation for the worker's proven failures and refusals.

247. Whilst on the present topic, I consider that Ms Nearhos' evidence that Mr McIntyre had told her he had been through the rehabilitative process before and he was not willing to participate once again unless it was going to produce results[189] is particularly telling, and reveals a great deal about Mr McIntyre's attitude to the rehabilitative process set in train by the insurer/IRS. One can infer from that uncontradicted piece of evidence given by Ms Nearhos, taken in conjunction with the objective facts relating to the worker's failure to provide or sign material documentation, a negative attitude on the part of the worker in relation to the rehabilitative process and the process of assessment of employment prospects. The worker's attitude is directly relevant to the reasonableness or otherwise of

his conduct throughout his dealings with the insurer/IRS. In my opinion, the evidence adduced by the employer gives rise to an overwhelming inference that Mr McIntyre was unwilling to cooperate in the process. That inference was neither contradicted not rebutted by the worker.

248. The various circumstances relating to and surrounding the worker's contact and interaction with the insurer/IRS disclosed a lack of cooperation on the part of the worker.

249. It is clear from the evidence of Ms Nearhos and Professor Yellowlees that the procedures of IRS were carefully explained to the worker, and that the worker appeared to understand what was required of him; but despite that Mr McIntyre failed to provide IRS with the documentation and material that was necessary to undertake an assessment of his employment prospects and to advance and complete the rehabilitative process. As Mr Southwood pointed out:[190]

> "There was no rational or sensible reason for the worker's refusal to cooperate with the requirements of IRS. The worker sought advice both from his solicitor[191] and Professor Yellowlees[192] and he was told that he should cooperate with the requirements of IRS. Indeed the worker undertook to Professor Yellowlees that he would comply with the requirements of IRS".[193]

250. In my opinion, the attendant and surrounding circumstances give rise to the overwhelming inference that the worker was simply not prepared to cooperate[194] with IRS to enable it to undertake an assessment of his employment prospects and to further the rehabilitative process. No attempt was made by or on behalf of the worker to disturb that very powerful

---

[189] See above, p67.
[190] See p 7 of counsel's written submissions dated 23 June 2004.
[191] See Ms Nearhos' uncontradicted evidence.
[192] See Professor Yellowlees' reported dated 20 March 2003.
[193] See Professor Yellowlees' report dated 20 march 2003.
[194] See the observation made by Professor Yellowlees in his report dated 20 March 2003: "I am well aware there have been difficulties in terms of Jon's interaction with Jane, and with Jon seemingly being 'uncooperative with his potential rehabilitation program'". In my view this is a very astute observation, though somewhat conservatively expressed.

inference. On the evidence before me, I do not consider that the worker's lack of cooperation can be attributed to his psychiatric condition. Accordingly, I find no reasonable explanation for the worker's lack of cooperation either in relation to rehabilitative process or the process of assessment of employment prospects.

251. It is apparent from the evidence led by the employer that Mr McIntyre made inconsistent statements to Ms Nearhos and Professor Yellowlees during the period of interaction with the TIO and IRS. In the absence of any explanation, or reasonable explanation, those discrepancies point to his participation in the rehabilitative process being less than genuine.

252. During the interview on 19 November 2002 the worker told Professor Yellowlees that he had thought long and hard about what he wanted to do in the future, and the two of them spent most of the time talking about his future career possibilities as a greyhound trainer.[195] During the same interview, the worker had told the Professor that he and his wife had planned to purchase a property in the Gold Coast Hinterland, large enough to set up some greyhound training stables, and to take out a loan for that purchase.[196] Also during that interview he told Professor Yellowlees that he had made inquiries about certification, and had come across a course in greyhound welfare in Melbourne that would provide him with the necessary certification.[197] Subsequently, on 30 December 2002 Ms Woodward wrote to the worker informing him that the TIO had appointed a rehabilitation provider.[198] In that correspondence the writer stated that the TIO understood that the worker was interested in pursuing a career in the greyhound industry and that this area would be investigated by the TIO and IRS.[199] During a telephone conversation on 7 January 2003 with Ms

[195] See Professor Yellowlees' report dated 26 November 2002.
[196] See again Professor Yellowlees report dated 26 November 2002.
[197] See the Professor's report dated 26 November 2002,
[198] See Exhibit E10.
[199] See again Exhibit E10.

Nearhos the worker told her that he had given up pursuing that option.[200] However, subsequently on 17 January 2003, the worker told Ms Nearhos that he had considered options such as greyhound training and promotions and agreed with Ms Nearhos that he would make appropriate inquiries in relation to courses that would accredit him to check and treat greyhounds for other trainers.[201] On 28 January 2003 Mr McIntyre told Professor Yellowlees that he had abandoned the notion on greyhound training in the short term, and wanted to look for jobs in the sporting area which was where his main interests, skills and expertise lie.[202] About two months later on 11 March 2003 Mr McIntyre told Ms Nearhos that he had inquired about the greyhound course but stated that the course offered no qualifications and he was unwilling to undertake a course which provided no qualifications.[203] This was a variance with what the worker had told Professor Yellowlees. The inconsistencies in relation to the worker's stated intentions regarding pursuit of a career in the greyhound industry cast a long shadow over the bona fides of the worker and strongly indicate that he never had any actual intention of obtaining employment in that area.

253. There are other indicators in the evidence adduced by the employer that the worker was not a bona fide participator in the rehabilitative process set in train by the employer; nor a genuine participant in the process of assessment of employment prospects.

254. The various statements made by the worker in relation to the signing of the consent/authority form appear inconsistent, and cast considerable doubt over the veracity of those statements. On 4 March 2003 the worker told Ms Nearhos that he could not find the authority form.[204] However, the evidence shows that on 3 March – 24 hours earlier – Mr McIntyre had told

[200] See p 82 of the transcript.
[201] See p 85 of the transcript.
[202] See Professor Yellowlees' report dated 30 January 2003.
[203] See p 97 of the transcript.

Ms Nearhos that he would collect the authority from his solicitor the next day, that is 4 March. The evidence also shows that Mr McIntyre told Ms Nearhos on 4 March that he had been informed by his solicitor that it was in order for him to sign the documents that he had been provided by IRS.[205] A far more glaring discrepancy is to be found in the evidence given by Ms Nearhos to the effect that the worker told her on 11 March 2003 that he had signed the authority and was sending it back by mail.[206] This is plainly inconsistent with the objective evidence: the authority to obtain and release information (Exhibit E8) had not been signed by the worker, nor had it appeared to have been mailed to Ms Nearhos.

255. These inconsistencies were never explained, or adequately explained, by the worker: the worker did not give evidence to clarify the discrepancies nor did he call any explanatory evidence. In my view, those inconsistencies cannot be attributed to, or explained away, by the worker's psychiatric condition, for the evidence is not sufficiently cogent in that respect.

256. There is yet further evidence that shows that the worker approached and participated in the rehabilitative process and process of assessment of employment prospects with less than due diligence and was less than a bon fide participant.

257. The evidence discloses that the worker failed to adhere to the undertaking he gave to Professor Yellowlees to comply with the requirements and requests of the rehabilitation provider.[207] The worker's failure to live up to the assurances given to Professor Yellowlees impacts negatively upon his overall attitude and commitment to the rehabilitative process and process of assessment of employment prospects.

---

[204] See p 96 of the transcript.
[205] See p 96 of the transcript.
[206] See p 97 of the transcript.
[207] See Professor Yellowlees' report dated 20 March 2003.

258. A careful examination of the course of dealings between the worker and the insurer/IRS shows that the latter two entities acted reasonably and were extremely patient[208] - one might add tolerant and forgiving – during the rehabilitative process. The extreme latitude afforded by the insurer/IRS to the worker is in stark contrast to the procrastinative behaviour of the worker. In this case one needs to determine where the balance of

reasonableness lies between the need for the employer to pursue and implement the rehabilitative process and assessment process[209] - and the latitude given to the worker during that process – and the worker's conduct in delaying the process. After weighing the conduct of the insurer/IRS against the conduct of the worker, the conduct of the latter clearly emerges as being unreasonable.[210]

259. It is necessary to deal with the detailed submission made by Mr McDonald at pp 28 – 30 of his written submissions dated 23 June 2004 that any

---

[208] See the following submission made by Mr Southwood at p 6 of his written submissions dated 23 June 2004, which is adopted by the Court:

> "They (ie TIO and IRS) ensured that workers were dealt with professionally, fairly and safely and that their rights were respected. The procedures also ensured that a worker had opportunity for proper input and ownership into his or her return to work provided his or her participation in the process was genuine".

[209] There was nothing unreasonable about either the rehabilitative process and assessment process set in train by the employer. As Mr Southwood points out "Both the employer through the TIO and IRS attempted to organise an employment assessment and a return to work for the worker which was in accordance with Professor Yellowlees' report 23 September 2002 and his subsequent reports (Exhibit E4)":see p 5 of counsel's written submissions dated 23 June 2004.
See also the following submission made by Mr Southwood at p 6 of his written submissions dated 23 June 2004, which is also adopted by the Court:

> "IRS has established procedures for the purposes of carrying out assessments of workers employments prospects, for determining what rehabilitation training a worker requires and for establishing workplace based return to work programs for workers (Exhibit E3). Its procedures were the sort of procedures that you would ordinarily expect an accredited rehabilitation provider to have in place".

[210] See *Van Dongen v Masters Daly* (Supreme Court of Western Australia, The Full Court, 19 January 2001). I reject the following submission made by Mr McDonald at p 4 of his written submissions:

> "In respect of a worker who had been out of work for 10 years and had continuing 'quite severe symptoms of PTSD', the attempt by the TIO at rehabilitation showed a notable lack of patience or appreciation of the rehabilitation task, both in terms of the facts of Mr McIntyre's situation and of the legal requirements of rehabilitation under the Act. The decision to cease weekly and rehabilitation benefits was bureaucratic, premature, unreasonable and achieved the antithesis of rehabilitation under the Act".

proven failure or refusal on the part of the worker (in terms of either subsection 75B(2) or (3) was not unreasonable for the reasons stated therein. I reject those submissions for the following reasons.

260. In my opinion, the IRS requirement for a signed authority to release or obtain relevant information was both reasonable and prudent, despite the absence of a treating doctor. The fact that Professor Yellowlees was content to provide all information to IRS without authority, that he was not asked to provide such information and that the various reports of the Professor were furnished to IRS are not sufficient to change my mind about the matter. In that regard I am persuaded by the reasons given by Ms Nearhos for requiring a signed authority. In my view IRS acted reasonably in requiring the authority to be provided so as to avoid any future objection made by the worker – an apparently difficult, or at least potentially difficult, client – as to the circumstances under which IRS came to be in possession of the reports and use that might be made of the reports. Looking at the matter from the reverse angle, it is difficult to understand why the worker would have any difficulty signing the authority and see the need for seeking legal advice as to the provision of that authority. Surely, those circumstances vindicate the cautious approach taken by IRS. In my opinion, it was totally unnecessary for the worker to seek advice on such a straightforward matter. What operates against the worker is that he failed to follow the legal advice that he apparently received, and that is yet a further factor that vindicates the conservative – yet entirely proper – approach taken by the rehabilitation provider.

261. The same or similar considerations apply in relation to the medical certificate. I am unable to find any real impedient to the worker obtaining a medical certificate as requested.

262. I also find the submission made by counsel as to the worker’s failure to provide an activities statement unconvincing.

263. The submission made by Mr McDonald conspicuously – even conveniently – overlooks the worker's failure to provide a skills audit or a set of realistic employment goals.

264. A final, but critical factor which renders the workers failure and refusal unreasonable were the prospects of the rehabilitative process embarked upon by the insurer/IRS succeeding. In my opinion, the prognosis for the return of the worker to the workforce as a result of the rehabilitative process and the process of employment prospects set in train by the employer was reasonably good. That can be gleaned from a number of evidentiary sources.

265. The medical expert evidence led by the employer, namely, the evidence of Professor Yellowlees, indicates there were reasonable prospects of success in relation to the insurer/IRS sponsored rehabilitative process.

266. Professor Yellowlees was of the opinion that Mr McIntyre was able to do other work within his range of work experience.[211] According to the Professor, the worker was and is able to work as a truck driver and a courier driver.[212] Professor Yellowlees also expressed the opinion that the worker could undertake employment in relation to the sale and marketing of fruit juices[213] and was unable to work as a sales and marketing manager with a hospitality agency.[214] However, Professor Yellowlees expressed the view that it was important for the worker to take responsibility for his own future and he should endeavour to obtain whatever employment he could, even if that meant taking on employment not quite at the level he had expected of obtaining.[215]

[211] See pp 54-55 above.
[212] See again pp 54-55.
[213] See again pp 54-55.
[214] See again pp 54-55.
[215] See p 50 of the transcript. See also Professor Yellowlees' report dated 28 October 2003 (Exhibit E4)

267. The various reports prepared by Professor Yellowlees' also disclosed a reasonably good prognosis in relation to the worker's return to paid employment.

268. In his report dated 23 September 2002[216] Professor Yellowlees said of Mr McIntyre:

> "He knows that he is still very competent in many areas and it would seem much more sensible for him to commence re-training in an unrelated work area from past experiences…"
>
> "I believe that Mr McIntyre could be fit to retrain in other areas, we discussed possible work with animals for instance, but he will obviously need to have some career counselling, as well as vocational support and training…" "Obviously it is to be hoped that he will retrain in another area, and within not too long would be likely to be earning more than $30,000 per annum at which stage he would be financially ahead of his present situation, and of course will be psychologically and socially feeling very much better through a new career option…"
>
> "All of this is a very major change for Mr McIntyre, but one that I am confident that he will take to very positively…"
>
> "I must say incidentally, that I was overall very impressed by him and by the end of the interview he was presenting a warm, pleasant, friendly and much more optimistic manner".

269. In his subsequent report dated 26 November 2002[217] Professor Yellowlees reported on his discussions with the worker regarding the employment option of greyhound trainer. In relation to that option the Professor stated:

> "…must say it looked extremely sensible to me. He took the view that it would be an aim that within two or three years time he would be completely independent of the TIO and earning more than his present payments from TIO and was very positive about his prospects in that regard".

270. In his third report dated 30 January 2003[218] Professor Yellowlees reported thus:

> "I had a good and interesting session with Jon today…where I was essentially talking to him in the role of a 'coach' with respect to his future work options. As you know Jon has gone off the idea of greyhound training in the short-term, mainly because he has moved into a unit at the Gold Coast and it is relatively impractical right now. He does seem to be interested still in a new career and is pleased that the TIO is prepared to help him with this. He told me that he had seen the rehabilitation people last week and we spent most of the session today talking about the type of jobs that he might look for in a sporting environment, as that is where his main interests, skills and expertise lie. There seemed to be quite a few possibilities in training, coaching, talent spotting and stewarding in particular and we had a good discussion about these".

271. In his fourth report dated 20 March 2003[219] Professor Yellowlees reported on the worker having thought about other career options, for example, placement in public relations, marketing ad promotions. The Professor stressed the need for Mr McIntyre to take "quite a bit of initiative in looking for work". He had suggested that the worker acquire computer skills and expertise with the use of the internet.

272. In that report the Professor also referred to the worker's apparent lack of cooperation with his potential rehabilitation provider, although he noted the worker's assurance that he was prepared to give Ms Nearhos access to his relevant medical files and provide her with a resume.

273. In his subsequent report dated 24 April 2003[220] Professor Yellowlees reported that the Diploma of Business in Marketing offered at the Gold Coast TAFE represented a reasonable option for Mr McIntyre as "it would get him back into some sort of business career which is in line with his hotel management position that he had prior to his injury". More significantly, the Professor stated:

---

[216] Part of Exhibit E4.
[217] Again part of Exhibit E4.
[218] Part of Exhibit E4.
[219] Also part of Exhibit E4.
[220] Again part of Exhibit E4.

> "From the psychiatric point of view Jon presents well today and I certainly think he is fit to undertake these types of courses and hope that he will do so…"

274. In his final report dated 28 October 2003[221] Professor Yellowlees reported that the worker had not been "advancing his cause from a medical point of view", and stressed the need for Mr McIntyre to move forward and to assume responsibility for his own future.

275. Viewed as a whole, the seven medical reports prepared by Professor Yellowlees disclosed a reasonably good prognosis for the reintegration of the worker into the workforce through an appropriate rehabilitative process and assessment process, provided the worker was prepared to take responsibility for his future. However, the evidence before the Court did not show that Mr McIntyre was willing to assume such responsibility.

276. This is a case where the aggregate of a number of different factors – the capacity and attitude of the worker, the inconsistent behaviour of the worker, the doubtful honesty of the worker, the worker's procrastination, the conduct of the employer through the TIO/IRS and the reasonably good prognosis in relation to the worker's return to the workforce – rendered the worker's failure or refusal to comply with his statutory obligations under s75B(2) and (3) unreasonable.

277. One final matter that needs to be addressed is the attempt by the TIO/IRS to reactivate the rehabilitative process and assessment process after cancellation of payments and the worker's subsequent conduct. I mention this matter just to make it patently clear that I do not consider that they are factors which bear upon the failure or refusal of the worker to engage in the statutory processes nor upon the reasonableness of the worker's conduct.

---

[221] Also part of Exhibit E4.

278. I agree with the submission by Mr McDonald that the worker was at that point under no statutory obligation to engage in rehabilitation or a process of assessment of unemployment prospects.[222] But even if I am wrong in reaching that conclusion, it is difficult to see how the employer can reasonably satisfy the Court that the worker was unreasonable in declining to attend the proposed appointment. He apparently acted after seeking legal advice, and the legal advice appears prima facie reasonable.

(b) The remaining subsection 75B(3) issue : the deeming provision

279. Although I have reached the conclusion that the worker unreasonably refused to present himself for assessment of his employment prospects, as indicated earlier, I propose to defer giving my decision in relation to the deeming provisions of subsection 75B(3) and finally determining the 75B(3) issue until I have had the benefit of receiving and duly considering further legal argument.[223]

(c) The final disposition of the matter

280. Given that there are two main issues remaining to be finally determined – the "most profitable employment" issue in relation to subsection 75B(2) and the issue relating to the deeming provision in subsection 75B(3) – the matter cannot, at this stage, be finally determined and made the subject of final orders.

281. I will hear the parties in relation to the residual issues at a time that meets the convenience of both the Court and the parties.

Dated this 15th day of September 2004

[222] See p 34 of counsel's written submissions dated 17 May 2004.
[223] See above, p 52

Mr J A Lowndes

STIPENDIARY MAGISTRATE