CITATION: *Megan Elizabeth Woff and Territory Insurance Office v Adventure Tours Australia* [2013] NTMC 014

PARTIES:	MEGAN ELIZABETH WOFF and TERRITORY INSURANCE OFFICE v ADVENTURE TOURS AUSTRALIA GROUP PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	21101179
DELIVERED ON:	16 May 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	4, 5 and 6 March 2013
JUDGMENT OF:	Dr John Lowndes

CATCHWORDS:

WORK HEALTH- WHO IS A WORKER-WHO IS AN EMPLOYER

S3 Workers Rehabilitation and Compensation Act

S62 A Interpretation Act

Hendy V NTA [2010] NTMC 045 considered

Rem Johns Bros Pty Ltd v Francis [1956] VLR 404 considered

Thompson V Gemco (2003) 173 FLR 72 applied

Thompson V Groote Eylandt Mining [2003] NTCA 72 applied

Dave and Dietrich (1979) 37 FLR 175 distinguished

REPRESENTATION:

Counsel:

Applicant:	Mr Doyle
First Respondent:	Mr McConnel
Second Respondent:	Mr Walsh

Solicitors:

Applicant:	NT Law
First Respondent:	Minter Ellison
Second Respondent:	Cridlands

Judgment category classification:	A
Judgment ID number:	
Number of paragraphs:	90

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

No. 21101179

BETWEEN:

MEGAN ELIZABETH WOFF
Applicant

AND:

TERRITORY INSURANCE OFFICE
First Respondent

AND:

ADVENTURE TOURS AUSTRALIA GROUP PTY LTD
Second Respondent

REASONS FOR DECISION
(Delivered 16 May 2013)

Dr John Allan Lowndes SM:

THE ISSUES FOR DETERMINATION

1. Two issues fall to be determined by the Work Health Court:

    1. Was Ms Woff a "worker" within the meaning of the *Workers Rehabilitation and Compensation Act*? and

    2. Was Adventure Tours Australia Group Pty Ltd (Adventure Tours Australia) Ms Woff's employer within the meaning of the Act?

2. These are important questions as Ms Woff was injured in an accident on 5 May 2010.The accident occurred when the driver of an Adventure Tours Australia four-wheel drive tour bus was attempting to tow another vehicle which had become bogged in the sand. The shackle strap between the two vehicles (the snatch strap) came away from one of the vehicles and struck Ms Woff's leg. As a result of the accident Ms Woff sustained a fractured

tibia and fibula and had to be airlifted to Alice Springs hospital for medical treatment. As the accident and the resultant injury arose out of the use of a motor vehicle, the Territory Insurance Office is required to pay compensation under the Motor Accidents Compensation Act (MACA) scheme, unless it is determined by the Work Health Court that compensation is payable under the *Workers Rehabilitation and Compensation Act*.[1] Hence, the significance of the two issues to be decided by the Court.

THE WORKERS REHABILITATION AND COMPENSATION ACT: DEFINITIONS OF WORKER AND EMPLOYER

3. The question whether Ms Woff was a worker and Adventure Tours Australia was an employer for the purposes of the Act is foremost a matter of statutory interpretation – it falls to be determined upon a proper construction of the statutory definitions of "worker" and "employer". Ultimately, whether Ms Woff and Adventure Tours Australia were respectively a worker and employer depends upon the application of the proper construction of the statutory definitions to the established facts in this case.

4. "Worker" is defined in s3 of the *Workers Rehabilitation and Compensation Act* as a natural person who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under the law of the Territory or not), performs work or a service of any kind for another person.

5. A "worker" is also defined to mean a person, or a member of a class of persons, prescribed for the purposes of the definition of "worker". The relevant regulations define "prescribed workers" – namely, the crew of a fishing vessel, persons operating as direct selling agents, carers under the *Care and Protection of Children's Act*; and persons caring for another's child in their place of residence.

[1] Section 61 *Workers Rehabilitation and Compensation Act*.

6. However, a "worker" does not include a person who is employed in voluntary work and who receives in relation to that work, if anything, nothing more than reasonable travelling, accommodation or other out-of pocket expenses, unless that person is a "prescribed worker" or is engaged in emergency services, training and exercises or other prescribed activities, or voluntarily engaged in fighting a fire, training and exercises and the like.

7. "Employer" is simply defined to mean "a person by or for whom a worker is engaged or works".[2]

8. It is common ground between the parties that the issue of whether Ms Woff was a worker is to be determined solely in accordance with the statutory definition in s 3(b)(i), as she does not meet any of the descriptions referred to in the expanded meaning of "worker".

9. As pointed out in the submissions made on behalf of Ms Woff:

> In the circumstance of this case, it will be necessary to determine whether Ms Woff comes within the definition based upon all of the circumstances under which she came to be at the scene of the accident.[3]

10. In order to qualify as a "worker" for the purposes of the Act a person must, under a contract or agreement of any kind, perform work or a service of any kind for another person.

11. The breadth of the definition is immediately apparent. It covers a person who is performing work or a service not only under a contract, but also under an agreement. Any such contract or agreement may assume many different forms: it may be expressed or implied, oral or in writing or under the law of the Territory or not. Furthermore, in order to qualify as a "worker" it is not necessary for a person to be performing work – it is sufficient if the person is performing a service of any kind.

12. The key elements of the definition of "worker" are:

1. under a contract or agreement ; and

2. performs work or a service of any kind.

13. Dealing with the first element, the definition draws a distinction between contracts and agreements –a distinction that is already recognised by the general law. The difference between a contract and an agreement is that the former is an agreement between parties that is legally enforceable, whereas a simple agreement between parties may not contain the necessary elements to be legally enforceable as a contract – for example an intention to create legal relations. While a contract is enforceable at law an agreement may not.

14. Accordingly, it is not necessary for a person to establish the existence of a legally enforceable contract in order to qualify as a worker.[4] It is sufficient for a person to show the existence of a simple agreement which may not contain all of the necessary elements of a contract.

15. Essentially, the definition removes the need for a person to prove a "contract of employment" in order to be a "worker" for the purposes of the Act.[5] In its place, the definition allows for the existence of less formal agreements for the performance of work or a service as a threshold for making a person a worker for the purposes of the Act.

16. It is noted that there is no requirement in the definition of "worker" for the payment of money, an aspect that was also recognised by the Court in *Hendy v NTA* [2010] NTMC 045.

17. The breath of the definition is also reflected in the second key element of the definition. As submitted by counsel for Ms Woff "the qualifying words

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[2] Section 3 of the Act.
[3] See [6] of the written submissions dated 6 March 2013.
[4] See *Hendy v Northern Territory of Australia* [2010] NTMC 045.
[5] In a similar vein, a strict proof of a "master and servant" relationship is not required: *Thompson v Groote Eylandt Mining* [2003] NTCA 72 at [21] per Mildren J referred to at [3.4] of the submissions made on behalf of Ms Woff dated 6 March 2013.

'of any kind' in the context of 'contract or agreement' and 'work or a service' mandate the widest possible construction".[6]

18. The scheme of the Act has been to use the widest and most comprehensive language in the definition of "worker" so as to bring within the scope of the Act all persons who have entered into contracts or agreements to perform work or a service of any kind: *R &M Johns Bros Pty Ltd v Francis* [1956] VLR 404 at 408. The definition of "worker" is expressed in the widest and most comprehensive language so as to capture consensual relationships between two or more parties that may not be conventionally regarded as establishing a worker/ employer relationship.

19. In construing the words of the *Workers Rehabilitation and Compensation Act* – more particularly the meaning of the phrase "an agreement of any kind"- the Court must have regard to the purpose of the Act.[7] Put another way, in interpreting a provision of an Act, the construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) will be preferred to a construction that would not promote that purpose or object: see s62A of the *Interpretation Act* (NT).

20. In that regard the definition of "worker" was intended to reflect the dynamic, fluid and constantly evolving relationship between workers and employers in contemporary society, with its ever changing social and economic circumstances.

21. Furthermore, as pointed out in the submissions made on behalf of the TIO, when interpreting the language used in the definition of "worker" regard should be had to the principles set out in *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 applied in *Thompson v Gemco* (2003) 173 FLR 72 at [30]:

[6] See [3.3] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[7] See [81] of the TIO's written submissions dated 6 March 2013.

> It is…a sound rule of statutory construction that the meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided. Unless the statutory language is intractable, an intention to produce by legislation an unjust and capricious result should not be attributed to the legislature.[8]

22. Finally, but not least, the statutory definition of "worker" is to be beneficially construed so as to provide the most complete remedy with which it is intended to deal, and which is consistent with the actual language employed and to which its words are fairly open: *Thompson v Groote Eylandt Mining* [2003] NTCA 72 at [21] per Mildren J; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622; *BAE Systems Australia Ltd v Rothwell* [2013] NTCA (delivered 1 March 2013; s62A *Interpretation Act* 1978(NT).[9]

23. The definition of "worker" is to be interpreted by appropriately applying each of these well established canons of statutory interpretation.

24. In seeking to impose a narrow construction on the definition of "worker" under the *Workers Rehabilitation and Compensation Act,* the employer sought to place substantial reliance upon the case of *Dare v Dietrich* (1979) 37 FLR 175, a decision of the Full Court of the Federal Court which dealt with the proper construction of the definition of "workmen" in circumstances where the alleged employer had offered to pay the worker $2 per hour for a trial to determine whether he was capable of painting a house. In that case the relevant legislation defined a "workmen" as:

> Any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise and whether the contract is express or implied, or is oral or in writing.

[8] See [82] of the TIO's written submissions dated 6 March 2013.
[9] See [3.1] of the written submissions on behalf of Ms Woff dated 6 March 2013.

25. The employer submitted that, for present purposes, it is significant that the Court in *Dare v Dietrich* concluded that the person was not a "workmen" under the definition in the *Workmens Compensation Ordinance* 1949:[10]

> Deane J (as he then was) observed that whilst there was common ground that there was a contract, the judicial determination of whether that contract was a contract of service will commonly resolve itself into the traditional choice between a contract of service and a contract for services.
>
> Thus, "if in the present case, the contractual relationship between the parties had extended beyond a period of trial to embrace the task of painting the appellant's home, the resolution of the question whether there was or was not a contract of service would have depended upon such a choice".
>
> His Honour went on to observe (paras 19, 20 and 21) that were it not for the undertaking to pay $2 per hour for the period of the trial it would have been clear that the arrangements for the trial were not intended to be and were not binding in contract upon either the appellant or respondent. The period of the trial could not properly be seen as a period in which the respondent would be doing painting work for the benefit of the appellant. The trial was to enable the parties to determine whether they would enter into contractual arrangements. Charitable motivation of the supposed employer was not the intention of a binding contract.
>
> His Honour considered that the offer of $2 per hour for the period of the test was an offer to enter into a unilateral contract, it was not executory. Contract of service is a contract which embodies the social relationship of employer and employee and cannot be identified by the presence of any one or more static characteristics. It is a dynamic relationship and needs to be accommodated to a variety of different and changing and social and economic circumstances. However, its essence is of bilateral contract involving executory obligations on behalf of both.
>
> "The trial was to enable the parties to determine whether they would enter into contractual arrangements for the painting by the respondent of the appellant's house. The charitable motivation of the appellant, and the fact that the content of any contract arrangements which might eventuate was left for further negotiation lend support for the conclusion that, in the absence of a promise as to payment, the arrangements for the trial would not have been intended to be, and would not have been, binding in contract"(para19)
>
> "The question which lies at the heart of the issue presently under consideration is whether the contract arising from the acceptance of the

[10] See [15] of the employer's written submissions.

> appellant's undertaking to make the payment transformed the arrangement in the present case from a trial to determine whether the parties would enter into a contract in relation to the painting of the house into an executory contract under which the respondent was bound to perform work for the appellant as an employee or an independent contractor. In my view it did not (para 20)".[11]

26. The difficulty with the employer's reliance on *Dare v Dietrich* is that, in that case, the Court was considering a definition of "worker" couched in quite different language to the definition of "worker" under the *Workers Rehabilitation and Compensation Act*. Significantly, the definition of "workmen" under the *Workmens Compensation Ordinance* 1949 was predicated upon the common law concept of a "contract of service" and the requirement for there to be a binding and enforceable contract. The decision in *Dare v Dietrich* turned upon whether the arrangement between the parties resulted in a bilateral contract involving executory obligations on behalf of both parties. However, the definition of "worker" under the *Workers Rehabilitation and Compensation Act* is expressed in far wider terms than the definition of "workmen" under the 1949 Ordinance, and its operation is not confined to the traditional concept of a "contract of service", nor to a requirement that there be in existence a legally enforceable contract.

27. In my opinion, the decision in *Dare v Dietrich* does little, if nothing, to illuminate the boundaries of the very broad definition of "worker" under the *Workers Rehabilitation and Compensation Act* , which is transparently free of the strictures of the traditional master/servant relationship and the legalistic concept of a "contract of service".

28. Turning to the definition of "employer" under the Act: an employer means a person by or for whom a worker is engaged or works.

29. The element of "engagement" in the definition of "employer" broadens the class of persons who are an employer – an employer is not simply a person for whom a person (who satisfies the definition of "worker") works. The

[11] See [15] of the employer's written submissions.

ordinary meaning of the word “engage” is to obtain, secure or gain the use or services of another. This implies that the definition of “employer” is satisfied if the person in question has obtained, secured or gained the use or services of another person (who satisfies the definition of “worker”).

30. The definition is purposefully wide in order to accord the status of “employer” to a variety of persons who have a wide ranging relationship with any person who satisfies the definition of a “worker”. An employer is not only a person who has a “working” relationship with another person – namely that other person performs work for the first mentioned person – but also a person who “engages” the other person.

31. In my opinion, the word “engaged” was included in the definition to specifically cover the situation where one person is not strictly “working” for another person, but is performing a service for the other person under a contract or agreement. The word “engaged” is intended to dovetail with the requirement in the definition of “worker” that a person “perform… a service of any kind for another person”.

32. It is imperative to read the definition of “worker” alongside the definition of “employer”. They are intended to be complementary, and read as a whole as reflecting the intended scope of the worker/employer relationship for the purposes of the Act.

33. The present case calls for a meticulous examination of the dealings between Ms Woff and Adventure Tours Australia and the nature of the arrangements made between them prior to Ms Woff embarking on the tour, during which she sustained her injury. Once a concluded view has been reached in that regard, the task of the Court is to determine whether Ms Woff and Adventure Tours Australia were respectively a “worker” and an “employer” for the purposes of the Act, duly applying the relevant principles of statutory interpretation.

ANALYSIS OF THE EVIDENCE AND FINDINGS AS TO THE ARRANGEMENTS BETWEEN THE PARTIES

34. In order to determine whether Ms Woff was a worker and Adventure Tours Australia were respectively a worker and employer at the time of the accident, it is necessary to examine all of the circumstances under which Ms Woff came to be at the scene of the accident during a tour operated by Adventure Tours Australia, including her application for a position with the company, the usual recruitment process and the application of that process to Ms Woff.

35. The ordinary recruitment process began when an applicant, such as Ms Woff, answered an advertisement for tour guides placed by Adventure Tours Australia. Someone in the organisation would then contact the applicant, acknowledging receipt of the application and informing him or her that they would be contacted for an interview once the recruitment process had commenced.[12]

36. In some, but not all cases, the interview would be conducted in conjunction with a recruitment evening at which a number of applicants would attend. The applicants were required to make a presentation. Adventure Tours Australia provided a presentation to all the applicants present before proceeding to interviews.[13]

37. Consistent with that process, Ms Woff applied to Adventure Tours Australia by email on 25 January 2010.[14] Mr Wright (Recruitment and Training Manager of Adventure Tours Australia) responded initially on 27 January

[12] See Exhibit 1, p 20.
[13] See Mr Wright's evidence and Exhibit 1 pp 22-24.
[14] See Exhibit 1 p 18.

2010[15]and later on 2 February 2010[16], inviting Ms Woff to a guide recruiting evening. A letter with details was attached.[17]

38. However, Ms Woff was unable to attend the proposed interview/recruitment evening due to work commitments.[18] Instead, she was interviewed over the telephone.[19]

39. That telephone interview subsequently took place, and a matter of days after the interview, Ms Woff was told that she had been successful in applying for tour guide training and was given a letter of confirmation.[20] She was provided with an Information Pack.[21]

40. As submitted by the employer, it is clear from both that email and the attached letter that the application for tour guide was for "training leading to a guide position".[22] Again as pointed out by the employer, the attached letter emphasised the following aspects:[23]

- The position was one of "candidate";
- Ms Woff was invited to attend a training programme to be held in Alice Springs on 14 April 2010;
- The initial task would be a familiarisation tour;[24]
- As to the training course it was to be for a period of two weeks commencing on 14 April. The letter noted "as a candidate you are a potential new employee and you will be assessed as a potential employee throughout the duration of the training course. At the end of this period there is an assessment day where final interviews will be conducted. If successful you will progress to "trainee guide" and will begin survey tours";

[15] See Exhibit 1 p 20.
[16] See Exhibit 1 p 22.
[17] See Exhibit 1 p 23.
[18] See Ms Woff's evidence and Exhibit 1 pp 25 -26, including email sent on 22 February 2010.
[19] See Ms Woff's evidence and Exhibit 1 pp 27-28, including email sent on 24 February 2010.
[20] See Exhibit 1 pp 34-37.
[21] See Exhibit 1 pp 38-47.
[22] See [18.3] of the employer's written submissions.
[23] See [18.4] of the submissions.
[24] The letter explained that the familiarisation tour would allow her time to enjoy a tour prior to the commencement of training and that the tour would be free of charge.

- It was not until achieving survey status that a daily payment would be made.[25]

41. As pointed out by the employer, even at survey stage, whilst a daily payment was made, there was no obligation to offer employment until such time as there was an offer of employment in writing.[26]

42. As with all applicants, Ms Woff was sent an Information Pack.[27] In that document the process was again clearly articulated under the topic "Company Objectives" and thereafter.[28]

43. The Information Pack dealt with a number of subjects, including the purpose of a familiarisation tour as well as aspects of training.

44. The familiarisation tour is described as follows:

> Guiding in the Red Centre is very exciting, interesting and rewarding, but it does require a commitment from both you and the company. This is why we insist that you participate in one of our tours, prior to starting the course. Participating in a three day tour will give you an insight into how we operate as a company, a chance to view a tour guide's role in its entirety and an opportunity to determine whether the position is right for you before committing to our training program. The company will not charge the candidate any money to participate in the tour. Meals, accommodation and national parks fees are included.[29]

45. The Information Pack draws a distinction between candidates, trainees and probationary tour guides.[30] It points out that trainees are potential new employees that have successfully completed "all set competencies on the training course and are involved in survey tours". A trainee is to be contrasted with a probationary tour guide, who is described as "a new

[25] See Exhibit 1 p 35: "Employment isn't guaranteed until you successfully complete the Training Programme including the period as Trainee Guide, and receive a letter of Offer of Employment. If yourself or Adventure Tours Australia terminate your involvement in training, Adventure Tours Australia are not responsible for any relocation or travel expenses. It is crucial that you understand this, so, if you have any queries please call us".
[26] See [5] of the employer's written submissions.
[27] See Exhibit 1 p 38.
[28] See [5] of the employer's written submissions.
[29] See Exhibit 1 p 41.
[30] See Exhibit 1 p 42.

employee who has successfully completed survey tours, and is out on the road guiding solo".

46. In relation to training the Information Pack states:

> Employment is however not guaranteed and is subject to successfully passing the training course, all associated competencies and authorisations from Alice Springs. Employment is not guaranteed until you have received a written letter of employment. You will also be subject to a three month probationary period.[31]

47. The status of "survey guide" is also dealt with in the Information Pack: at this point a person is classed as "a trainee tour guide [who] will be placed on survey tours with passengers, supervised by an experienced tour guide".[32]

48. The survey process is normally reserved for candidates who had completed an initial familiarisation tour, followed by a 2 week structured "live in" training course, and then passed an assessment process.[33]

49. A survey guide was to be paid $124.60 per day.

50. Returning to the chronology, the training course was scheduled to commence on 14 April 2010, and Ms Woff was advised to be in Alice Springs a few days prior to 14 April, so she could participate in a "familiarisation tour". However, Ms Woff subsequently found that the date of the training course would clash with university commitments that she had. After considering alternatives, Ms Woff informed Mr Wright that she would be unable to do the training course and consequently withdrew her application.[34]

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[31] See Exhibit 1 p 43.
[32] See Exhibit 1 p 43. See [25] of the TIO's written submissions dated 6 March 2013:
"The survey process was where trainees had completed the training course and were classed as trainee tour guides. They were placed on survey tours with passengers, supervised by an experienced tour guide. With each survey trip, they were to be given more responsibility in conducting the tour until they were assessed and passed. Once they passed, they would go on to the roster as a guide. Their performance in each survey tour would be assessed by the driver and operations staff, who would talk to them in relation to strengths, areas that need attention and responsibilities for the next survey": see Exhibit 1 p 38.
[33] See [7.1] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[34] See Exhibit 1 p 51.

51. The very same day (15 March 2010) Mr Wright telephoned Ms Woff and advised her that although she was unable to undertake the training course, she could, instead, undergo training "via the survey process". This was confirmed by a subsequent email.[35]

52. Ms Woff, acting on the telephone conversation, as confirmed by email, booked her airfare to Alice Springs and advised Mr Wright of her travel details on 13 April 2010.[36]

53. On 20 April 2010 Mr Wright emailed Ms Woff advising her that on arrival in Alice Springs she should telephone the Alice Springs operations number to facilitate a company representative picking "you up from the airport and taking you to your accommodation. Troy our Alice assistant manager will be your liaison. He will book your training tours and following your progress on the ground".

54. The preceding chronology and recruitment process is essentially uncontested, the critical issue being whether at the time Ms Woff suffered her injury she was participating in a familiarisation tour or a survey tour.[37] This is an issue that the parties contend goes to the very heart of the nature of the relationship between the parties.

55. There is a conflict between the evidence given by Ms Woff and Mr Wright as to whether there was any mention of Ms Woff doing the familiarisation tour during her telephone conversation with Mr Wright. Although Ms Woff agreed that after arriving in Alice Springs she had been told she would be going on a familiarisation tour the following day, as she was being shown the tour guides house by Mr Troy Lum,[38] she could not recall whether Mr Wright had mentioned that she would be required to go on a familiarisation

[35] See Exhibit 1 p 52.
[36] See Exhibit 1 p 61.
[37] See [13] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[38] This is corroborated by the evidence given by Mr Lum. While showing Ms Woff the tour guides house he advised her that she would be going on a familiarisation tour the next morning. He told her to go to the depot in the morning with two trainee guides who were staying at the house at the time.

tour, as well as her on-the- job training as a survey guide, during the conversation on 15 March 2010. Mr Wright, in both his affidavit sworn 9 June 2011 and his oral testimony, stated otherwise, claiming that the familiarisation tour was mentioned.

56. Extensive submissions were made by all three parties as to the likelihood of any mention being made by Mr Wright of Ms Woff doing the familiarisation tour during the telephone conversation on 15 March 2010.

57. In my opinion, it is more probable than not that such a conversation did not take place due to the existence of a very significant body of circumstantial evidence (and concomitant reasonable inferences) that outweighs Mr Wright's assertion that he informed Ms Woff that she would be participating in a familiarisation tour. I have reached that conclusion on the basis of the following:

    1. If participation in the familiarisation tour had been mentioned during the telephone conversation, then it is most likely that it would have been referred to in the email immediately following.[39] The email said nothing about taking part in a familiarisation tour: it stated that "you will join a guide and a tour group and talk (sic) notes and progressively build you (sic) skills via each survey". Not only is that statement consistent with the prior arrangements between the parties, but it does not sit comfortably with a requirement that Ms Woff go on a familiarisation tour, in the absence of any specific mention of one. Given that a requirement to take part in a familiarisation tour represented a departure from the prior understanding between the parties – namely that a familiarisation tour was to be dispensed with – then one would expect, in the ordinary course of events, that the follow-up email would make reference to that very significant variation to the arrangements; and, indeed, Mr Wright would have been at pains to draw that variation to Ms Woff's attention, so as to avoid any misunderstanding. If Mr Wright had mentioned the familiarisation tour during his telephone conversation with Ms Woff then it is extremely difficult to understand why participation in a familiarisation tour was not confirmed in the immediately following email.

    2. The evidence clearly discloses that Adventure Tours Australia was keen to recruit Ms Woff. That is made abundantly clear by the fact that she

[39] See [30] (a) of the TIO's written submissions dated 6 March 2013.

would be bypassing the usual training course and not be subject to the usual requirement of completing a satisfactory assessment before commencement of the survey process, and in lieu being allowed to undergo training via the survey process (a process normally reserved for candidates who had completed an initial familiarisation tour, followed by a training course and an assessment process). Given those circumstances it is difficult to understand why Mr Wright would then have required Ms Woff to undertake a familiarisation tour.[40] Such a requirement is contradictory and inexplicable, in the absence of any reasonable explanation.[41]

3. In the email sent to Ms Woff about ten days prior to her arrival in Alice Springs, Mr Wright again made no mention of her taking part in a familiarisation tour.[42] The email referred only to the fact that the Alice Springs manager would liaise with Ms Woff and book her training tours and monitor her progress – all of which was consistent with her training being undertaken via the survey process. Again, if Mr Wright had mentioned taking part in a familiarisation tour during the telephone on 15 March 2010 then it most likely that he would have referred to it in his email sent 10 days before Ms Woff went to Alice Springs.

4. If reference had been made to the familiarisation tour during the telephone conversation, then it is most likely that Mr Wright would have mentioned it in at least one of his two subsequent emails. It would be extraordinary if during the conversation he had told Mr Woff that she would be going on a familiarisation, and yet failed to confirm that in either of the two follow –up emails.

5. Mr Wright was a less than impressive witness. I agree with the submission that the statement made by Mr Wright in his affidavit sworn 9 June 2011 to the effect that he had communicated to Ms Woff the requirement for her to undergo a familiarisation tour was demonstrated to be based solely on the usual practice of recruiting candidates rather than on evidence of what actually transpired in conversation with Ms Woff.[43] Furthermore, it was not only evident from the evidence given by Mr Wright under cross examination, but also in evidence in chief, that he had no independent recollection of his conversation with Ms Woff outside the scope of his correspondence via email.[44]

6. Mr Wright's attempted explanation or justification for requiring Ms Woff to go on a familiarisation tour was implausible, illogical and

[40] See [30] (b) of the TIO's written submissions dated 6 March 2013.
[41] See n 45, below.
[42] See [30] (c) of the TIO's written submissions dated 6 March 2013.
[43] See [15.3] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[44] See [15.4] of the written submissions made on behalf of Ms Woff dated 6 March 2013.

lacked credibility.[45] This affects the likelihood of Mr Wright ever having mentioned the familiarisation tour during the telephone conversation on 15 March 2010.

7. The characteristics and features of the tour actually undertaken by Ms Woff were more consistent with her participating in a survey tour rather than a familiarisation tour: [46]

   (a) the familiarisation tour is usually undertaken by a candidate before the candidate begins the usual two week training course;

   (b) the principal purpose of the familiarisation tour is for the candidate to assess their own suitability as a (prospective) tour guide;

   (c) share accommodation is provided by Adventure Tours Australia only from the commencement of the training period proper;

   (d) a candidate going on a familiarisation tour is "collected from their accommodation as with any other passenger, and while on the tour they have the same duties as passengers such as cooking and cleaning..";

   (e) Ms Woff was accommodated at the company's Bloomfield St property, use of which was reserved for candidates engaged in the formal two-week training course or for trainee tour guides (ie training guides involved in the survey process);

   (f) In contrast, candidates who had arrived in Alice Springs but not commenced the formal training course had to make their own arrangements for hostel or hotel accommodation, and when participating in a familiarisation tour would be collected from such accommodation in the same way as regular full fee paying guests;

   (g) On 2 May 2010 (the first morning of the tour) Ms Woff travelled from the Bloomfield St property to the company's depot by taxi at her own expense in the company of two other tour guides;

   (h) Upon arrival at the depot and prior to the departure of the tour, Ms Woff was provided with an Adventure Tour Australia polo

[45] See [73]-74] of the TIO's written submissions dated 6 March 2013.
[46] See [16] of the written submissions on behalf of Ms Woff dated 6 March 2013. See also [49] –[58] of the TIO's written submissions dated 6 March 2013

shirt and fleece jumper (bearing the company's logo or insignia) to be worn on the tour;

(i) Ms Woff was directed by the tour guide to stow her backpack and personal effects in the front cabin of the tour vehicle along with the baggage and personal effects of the tour guide Mr De Soyres and the cook Mr Wera. The baggage of the tour guests was stowed separately in a separate baggage compartment under the rear section of the vehicle, which comprised a separate section of the vehicle in which the tour guests were seated during the journey;

(j) Whilst on tour, Ms Woff travelled with Mr De Soyres and Mr Wera in the front section of the vehicle separate from the tour guests;

(k) Whilst on tour Ms Woff assisted with the distribution of baggage when unloading at camp, which the tour guests did not do.

8. All these characteristics and features rendered the so called "familiarisation tour" not a familiarisation tour at all. The fact that the tour undertaken bore most, if not all, of the hallmarks of a survey tour renders it more probable than not that Mr Wright never told Ms Woff during the telephone conversation on 15 March 2010 that she would be going on a familiarisation tour.

9. The countervailing evidence given by Mr Wright as to the reference made to the familiarisation tour during the telephone conversation, as already adverted to, lacks credibility and reliability.

10. The fact that Ms Woff appears to have conceded that she was on a familiarisation tour at the time of the accident neither assists in establishing that Mr Wright had told her that she would be required to undertake such a tour nor in establishing that she was in fact on a familiarisation tour at the material time. Ms Woff's concession has little probative value.[47]

[47] I agree with the following submissions made on behalf of Ms Woff:
" The applicant's acknowledgement in cross examination that she had made a statement to the effect that she would be required to go on a familiarisation tour was in the context of simply repeating what she had been told by the employee of the respondent, Troy Lum, who collected her from the airport after her arrival in Alice Springs on 1 May 2010; and evidence was not led as to the context or circumstances in which the applicant made that acknowledgement.
Lum did not give evidence.
There was no evidence led as to any communication between Wright and Lum on the question of the applicant going on a familiarisation tour.
It is reasonable to infer that Lum simply made the statement on the basis that the usual practice would be for a "candidate" or prospective trainee tour guide just arriving to go on a familiarisation tour soon after their arrival.

11. Although the Court may not be satisfied that Ms Woff was wearing the uniform of an employee whilst on the tour she was, importantly, wearing trainee articles of clothing that clearly identified a connection with Adventure Tours Australia.

58. The preponderance of the evidence establishes that Mr Wright did not mention to Ms Woff that she would be participating in a familiarisation tour when she left Alice Springs on 2 May 2010 on an Adventure Tours Australia tour. Although Mr Lum had told Ms Woff she would be going on a familiarisation tour, the tour that she undertook was for all intents and purposes a survey tour as previously contemplated between Mr Wright (on behalf of Adventure Tours Australia) and Ms Woff.[48]

59. Although the arrangement made between Mr Wright (on behalf of Adventure Tours Australia) and Ms Woff, as reflected in the chronology previously set out and evidenced by the exchange of emails between the parties, may not have resulted in a "contract" – namely a legally enforceable agreement – the arrangement, nonetheless, constituted an agreement, either express or implied, by which it was agreed that:

(a) Ms Woff was to be engaged by Adventure Tours Australia to undergo training as a "trainee tour guide" via the survey process;

(b) Ms Woff would not be required to undertake either the usual familiarisation tour or the usual training course;

(c) Ms Woff would not be subject to the usual company requirement of completing a satisfactory assessment before commencement of the survey process;

In any event, while evidence of subsequent conduct may be admissible to determine the existence of a contract, it is not admissible to determine the terms of the contract.
Wright had no first-hand knowledge of what actually transpired following the applicant's arrival in Alice Springs up to the time of her injury."

[48] See [59] of the TIO's written submissions dated 6 March 2013:
"The fact that Ms Woff was told she would be going on a Famil tour by Mr Lum the day she arrived in Alice Springs should not have any bearing on an assessment of the nature of the relationship between Ms Woff and Adventure Tours Australia by the time of her injury".

(d) Ms Woff would receive remuneration for her participation in the survey process at the rate prescribed in the Information Pack.

60. Significantly, Ms Woff acted upon that agreement by arranging her travel to Alice Springs at her own expense for the purpose of undergoing tour guide training via the survey process. Furthermore, no further relevant terms of agreement were stipulated or agreed prior to Ms Woff's arrival in Alice Springs on 1 May 2010.[49]

61. The fact that Mr Lum informed Ms Woff that the tour she would be undertaking would be a familiarisation tour is not sufficient to satisfy the Court that the terms of the previous agreement were altered or modified in that regard.

62. Furthermore, even if the tour that Ms Woff went on was, in fact, a "familiarisation tour" (which the court does not find to be supported by the evidence), then the conduct of that tour was contrary to the terms of the agreement between the parties –as it was never a term of the agreement that Ms Woff would undertake a familiarisation tour prior to commencing survey tours[50]. What matters is the nature of the agreement between the parties that subsisted at the time of the accident and Ms Woff's injury. The fact that the tour she went on was, or was treated as, a "familiarisation tour" is beside the point and irrelevant.

63. In my opinion, the evidence unequivocally supports a finding that Ms Woff was, under an agreement between her and Adventure Tours Australia, participating in a survey tour as a trainee tour guide at the time of the accident and her injury.

[49] See [9] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[50] See [15] of the written submissions made on behalf of Ms Woff dated 6 March 2013.

WAS MS WOFF A WORKER AND ADVENTURE TOURS AUSTRALIA AN EMPLOYER

64. In my opinion, the agreement made between the parties in this case falls squarely within the parameters of the type of agreement (even if it may not constitute a "contract") contemplated in the definition of "worker", with the result that Ms Woff and Adventure Tours Australia should be treated respectively as worker and employer for the purposes of the Act.

65. If pursuant to an agreement a person agrees to undergo training – as in the present case where Ms Woff agreed to undergo training as a trainee tour guide via the survey process – then I can see no reason why such an agreement should not be considered to be an agreement under which a person (such as Ms Woff) performs work or a service (of any kind) for another person (such as Adventure Tours Australia). Clearly it should be considered to be such. The reasons for that are self –evident.

66. Having been engaged as a trainee tour guide via the survey process, Ms Woff was required to perform all the work and to provide all the services expected of a trainee tour guide, in accordance with the expectations and requirements of Adventure Tours Australia.

67. During that process Ms Woff was under the control and direction of Adventure Tours Australia – a traditional indicia of a worker/employer situation. Ms Woff was also to receive remuneration at the rate of $124.60 per day – a further indicia of such a relationship.

68. The fact that the Information Pack portrayed the position of "trainee tour guide" as a "potential new employee" has no bearing on the assessment of the nature of the relationship between Ms Woff and Adventure Tours Australia and, in no way, detracts from that relationship being characterised as one of worker and employer. Irrespective of being designated a "potential new employee", the reality is that Ms Woff, as a trainee tour guide undertaking the survey process, would be performing work or service for

Adventure Tours Australia. The reality of the situation was recognised by Mr Wright in cross examination when he stated that Adventure Tours Australia did, in fact, regard a "trainee tour guide" as an employee of the company entitled to remuneration at the rate of $124.60 per day.[51]

69. It is clear on the evidence that Adventure Tours Australia had offered to engage Ms Woff as a trainee tour guide and Ms Woff had accepted that offer of engagement.[52] Her engagement as a trainee tour guide commenced from the time of her arrival in Alice Springs on 1 May 2010;[53] and continued up to and including the time of the accident, and when she sustained her injury. As pointed out in submissions, it is immaterial that Ms Woff could have no expectation of remuneration until she had commenced (if not completed) her first survey tour.[54]

70. Whilst on the survey tour, and as part of the training process, Ms Woff performed work or a service within the meaning of the definition of "worker" in the Act – including interacting with tour guests as a representative of Adventure Tours Australia, assisting with the loading and unloading of guests' luggage and preparation of meals for guests.[55]

71. By participating in the survey process Ms Woff was performing a service for and to the benefit of the company in a broader abstract sense. Nowadays, traineeships are an integral component of an employer's recruitment strategy, and are viewed by employers as an effective way to attract and recruit staff. The benefits to an employer in engaging trainees, in the manner done by Adventure Tours Australia, are real. Traineeships enable a company such as Adventure Tours Australia to offer employment to trainees who have demonstrated that they have the requisite skills to become a valuable employee, contributing to the performance and productivity of the

[51] See [12] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[52] See [14.1] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[53] See [14.2] of the written submissions made on behalf of Ms Woff dated 6 March 2013.
[54] See [14.3] of the written submissions made on behalf of Ms Woff dated 6 March 2013.

company's business enterprise. That is the ultimate benefit to a company, such as Adventure Tours Australia, who offers persons the opportunity to undergo training as a tour guide. By engaging in the training program – such as the survey process – persons such as Ms Woff, whilst subject to the direction and control of the company, perform a service that is of ultimate value to Adventure Tours Australia. However, the potential benefit is mutual. By undertaking training a person such as Ms Woff has prospects of being offered employment with the company.

72. It is immaterial that Ms Woff would not be employed by the company until she had completed her training, and received a satisfactory assessment and a letter of employment. The agreement reached between the parties was sufficient to bring that agreement within the parameters of the definitions of "worker" and "employer" – and hence create a worker/employer relationship for the purposes of the Act.

73. There can be no doubt that at the time of the accident Ms Woff was, pursuant to an agreement made with Adventure Tours Australia, on a survey tour as a trainee tour guide, and under the direction and control of the company, performing work or a service for or to the benefit of the company. Ms Woff was in the performance of such work or service when she sustained her injury.[56] Furthermore, Adventure Tours Australia was, at the relevant time, a person by or for whom Ms Woff was engaged or working. Accordingly, I find that at the time of the accident and subsequent injury Ms Woff was a "worker" and Adventure Tours Australia was an employer within the meaning, and for the purposes, of the Act.

74. Such a finding is consistent with the purpose or object of the Act – and in particular its definitions of "worker" and "employer".

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[55] See [14.4] of the written submissions made on behalf of Ms Woff dated 6 March 2013. See also [57] of the TIO's written submissions dated 6 March 2013.

75. It was intended that the two key definitions in the Act are to be construed to give effect to modern notions of the employment relationship, which have moved far beyond the confines of the traditional master/servant relationship and the "contract of service" model. As previously mentioned, the scheme of the Act is to capture consensual relationships between two or more parties that may not be conventionally regarded as establishing a worker/employer relationship, such as the agreement made between Ms Woff and Adventure Tours Australia. The purpose of the Act was to cover what might conveniently be described as "pre-employment" agreements, whether legally enforceable or not. Such agreements fall mid-way between conventional employment contracts or agreements (which are covered by the Act) and the performance of work or a service as a volunteer (ie voluntary work, which is not covered by the Act unless it falls within one of the statutory exceptions).

76. The key difference between "pre-employment" agreements – such as the agreement made between Ms Woff and Adventure Tours Australia – and agreements or arrangements to perform voluntary work is that the former most importantly contemplates prospective employment whereas the latter contemplates no such thing. A volunteer does work or performs service usually for altruistic reasons, without any desire or expectation to be remunerated for their work or services, or otherwise gainfully employed. It is this material difference that has largely resulted in the performance of voluntary work being excluded from the operation of the Act (subject to a few exceptions based on sound public policy).

77. As mentioned above, agreements that involve the training of prospective employees – such as the one made between Ms Woff and Adventure Tours Australia - are to the mutual advantage of the parties. In my opinion, an agreement whereby a person is engaged to undergo training with a view to obtaining prospective employment clearly falls within the purview of the type of agreement contemplated in the definition of "worker"; and such an

agreement is sufficient to create a worker/employer relationship for the purposes of the *Workers Rehabilitation and Compensation Act*. It is noteworthy that even Adventure Tours Australia regarded a "trainee tour guide" as an employee of the company.

78. The conclusion that I have reached in the present case also accords with the principles of statutory interpretation set out in *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, as applied in *Thompson v Gemco* (2003) 173 FLR 72 at [30]. If the type of agreement entered into by Ms Woff and Adventure Tours Australia were not caught by the definition of "worker" under the *Workers Rehabilitation and Compensation Act*, then that would produce an unjust and capricious result. To avoid such an unsatisfactory outcome the definition should be construed in a way that captures agreements of the kind made between Ms Woff and Adventure Tours Australia.

79. Finally, the construction I have placed upon the kind of agreements covered by the definition of "worker" accords with the beneficial approach to statutory interpretation. As the *Workers Rehabilitation and Compensation Act* is beneficial legislation, the definition of "worker" should be construed liberally so as to give "the fullest relief which the fair meaning of its language will allow".[i] The definition of "worker" should be construed liberally to capture "pre-employment" agreements of the type made between Ms Woff and Adventure Tours Australia.

80. One question that remains to be answered is what other "pre-employment" contracts or agreements are covered by the definition of "worker". What about a contract or agreement to participate in a "familiarisation tour" of the type conducted by Adventure Tours Australia, and as explained in the company's Information Pack?

81. Adventure Tours Australia had maintained throughout the proceedings that Ms Woff was not, at the material time, a "worker", nor was Adventure Tours

Australia an "employer" because the agreement made between the parties was that Ms Woff would participate in a "familiarisation tour".

82. Although it is not necessary for the Court to determine whether an agreement to take part in a "familiarisation tour" would fall within the ambit of the definition of "worker", my tentative view is that such an agreement would be caught by the definition.

83. Adventure Tours Australia accepted that the principal purpose of a "familiarisation tour" was to enable a candidate to assess their own suitability as a prospective tour guide, and to provide an opportunity for the parties to decide whether they wished to enter into a contract or arrangement for work or service – including a traineeship contract or agreement.

84. As mentioned earlier, in today's society employers are continuously trying to find more effective ways to attract and recruit staff. In addition to offering traineeships, employers may utilise other recruitment strategies such as encouraging prospective employees to participate in "familiarisation" programs, which are designed to identify the best candidates to undergo training in anticipation of future employment with the employer. By participating in a "familiarisation" program a prospective employee is, in real terms, performing a service for the prospective employer because such a program gives both parties an opportunity to have a close look at each other, and to decide whether they have a future in terms of entering into an employment relationship.

85. Furthermore, as acknowledged in the Adventure Tours Australia Information Pack, an important objective of the "familiarisation tour" is to secure commitment from both the prospective employee and the company prior to embarking upon – and committing to - the training process.

86. “Familiarisation” programs of the type conducted by Adventure Tours Australia are of true benefit to both the prospective employee and prospective employer.

87. Although a person may not perform work (as usually understood) under an agreement to participate in a “familiarisation” program, the prospective employee clearly performs a service for or to the benefit of the prospective employer. It is equally clear under such an arrangement that the prospective employee is engaged by the prospective employer to perform such a service.

88. Although there is clearly a voluntary element to participation in “familiarisation” programs, what distinguishes agreements or arrangements to take part in such initiatives from the performance of work or service by a person as a “volunteer” is that the focus of the former is on prospective employment – and that is the critical point – while the latter has no such focus.

89. In my opinion, agreements to participate in “familiarisation” programs (such as the “familiarisation tours” conducted by Adventure Tours Australia) fall within the scope of the type of contracts or agreements contemplated in the definition of “worker” under the *Workers Rehabilitation and Compensation Act*.

DECISION

90. I find that at the time of the accident and her injury Ms Woff was a worker and Adventure Tours Australia was an employer for the purposes of the *Workers Rehabilitation and Compensation Act*. I will hear the parties in due course as to any substantive and ancillary orders.

Dated this 16 day of May 2013

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE