



**KJK**  
**LEGAL**

# Closing the Loop 2012

‘Suitable employment’ in the context  
of the *Workers Rehabilitation and  
Compensation Act 1986*:

What exactly are we talking about?

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# Suitable employment

## Introduction

- Raising more questions than answers today?
- The objectives of the Act.
- Some relevant definitions.

# Suitable employment

## “Suitable employment”:

*suitable employment*, in relation to a worker, means employment in work for which the worker is currently suited, whether or not the work is available, having regard to the following:

- (a) the nature of the worker's incapacity and previous employment;
- (b) the worker's age, education, skills and work experience;
- (c) the worker's place of residence;
- (d) medical information relating to the worker that is reasonably available, including in any medical certificate or report;
- (e) if any rehabilitation programs are being provided to or for the worker;
- (f) the worker's rehabilitation and return to work plan, if any[.]

# Suitable employment

**“Current work capacity”:**

*current work capacity*, in relation to a worker, means a present inability arising from a compensable injury such that the worker is not able to return to his or her employment at the time of the occurrence of the injury but is able to return to work in suitable employment[.]

# Suitable employment

**“No current work capacity”:**

*no current work capacity*, in relation to a worker, means a present inability arising from a compensable injury such that a worker is not able to return to work, either in his or her employment at the time of the occurrence of the injury or in suitable employment[.]

# Suitable employment

## Rehabilitation programs:

### Rehabilitation and Return to Work Plans

- Reference the accompanying regulations.
- Is there a disconnect?
- A subconscious impact on stakeholders?
- Building towards confusion?

# Suitable employment

## Sections 35, 35A, 35B and 35C

- Suitable employment as a dual obligation says section 35.
- Either make it available or perform it when offered suggests section 35.
- It only has to be notionally available says section 35B.
- Do I only have to be in “employment” in section 35C and not suitable employment?
- Is the door open to the nullifying of the intended effect of a section 35B assessment?

# Suitable employment

## Section 36

- Now we're dealing with “work” and suitable employment.
- Changing concepts again?

### 36—Discontinuance of weekly payments

(1a) A worker breaches the ***obligation of mutuality*** if - [...]

(f) the worker refuses or fails—

- (i) to undertake work that the worker has been offered and is capable of performing; or
- (ii) to take reasonable steps to find or obtain suitable employment,

or having obtained suitable employment,  
unreasonably discontinues the employment[.]

# Suitable employment

## Section 58B

### 58B—Employer's duty to provide work or pay wages

(1) If a worker who has been incapacitated for work in consequence of a compensable injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer from whose employment the injury arose must provide suitable employment for the worker (the employment being employment for which the worker is fit and, subject to that qualification, so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was employed immediately before the incapacity). Maximum penalty: \$25 000.

# Suitable employment

## Section 58B

- The definition is “extended” and availability of work is again an element.
- Has the obligation to provide work gone beyond what the drafter of the legislation intended?
- *Longyear’s* case: Is it a question of overextending the legislation? Or just open-ended application?
- What to pay that worker for that suitable employment?

# Suitable employment

## Longyear's case

*Longyear Australia Pty Ltd v WorkCover* [1995] SASC 4951:

“The primary obligation is to provide suitable employment. If unqualified, that obligation would undoubtedly require the creation of a position if no suitable vacancy existed. It seems to me that whether the qualification of reasonable practicability relieves the employer of the obligation to create a position must depend upon the circumstances. The concept of reasonable practicability cannot be confined as proposed by the plaintiff. In a small business with a small staff and limited financial resources, the creation of a position may not be reasonably practicable. In a larger organisation, there may be little or no difficulty in finding appropriate tasks for the disabled employee.”

# Suitable employment

## Practical application of the reasonably practicable expectation

- Making up a job: Isn't this against everything we've worked towards?
- Redundancies and the effect on industrial harmony when making up a job.
- Is it removed from the financial reality of our times if we make up a job?

# Suitable employment

## The interstate experience

- Getting 'real', not artificial.
- Meaningful.
- Realistic and not theoretical.
- *Sodexho's* case [2009] VSC 298

And the conclusion?