



Jurisdictional Policy Advice No. 2007/04

Safety, Rehabilitation and Compensation Act 1988

Meaning of ‘contributed to in a material degree’ in the definition of ‘disease’ in the *Safety, Rehabilitation and Compensation Act 1988* following the ‘*Sahu-Khan*’ Federal Court decision.

Introduction

This advice is about the meaning of ‘contributed to in a material degree’ contained in the definition of ‘disease’ and the processes that can be applied against claims to establish whether a sufficient employment contribution to a claimed illness exists. It replaces Jurisdictional Policy Advice 2006/9.

The *Safety, Rehabilitation and Compensation Act 1988* (the 1988 Act) requires that for compensation to be payable a disease must have been contributed to in a material degree¹ by an employee’s employment. The definition of ‘disease’ can be found in section 4 of the 1988 Act.

The Full Federal Court (FFC) in [Comcare v Canute](#) [2005] FCAFC 262 (15 December 2005) (*Canute*) has previously observed that the inclusion of the term ‘material’ in the definition of disease by the 1988 Act ‘imposes an evaluative threshold below which a causal connection may be disregarded’.

This was followed in the Federal Court (FC) by Finn J’s decision in [Comcare v Sahu-Khan](#) (2007) FCA 15 (19 January 2007) (*Sahu-Khan*).

The outcomes of *Sahu-Khan* mean that:

- the word ‘material’ in the definition of ‘disease’ in the 1988 Act requires something more than ‘a mere contributing factor’; and
- the test in *Treloar’s* case does not apply to the definition of ‘disease’ under the 1988 Act; and
- the 1988 Act ‘requires a stronger causal relationship between the employment and the ailment, etc suffered than that exacted by the 1971 Act’.

¹ The definition of disease in the 1988 Act was amended by the Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007 (SRCOLA Act) for injuries sustained from 13 April 2007 – see Application section below.

Following on from the *Canute* observation, these are significant outcomes. Consequently, **the ‘Treloar’ material contribution test should no longer be applied for 1988 Act claims.**

Decision makers should now make determinations on disease claims which weigh the available evidence and **consider whether the contribution from an employee’s employment to an employee’s disease meets the ‘material’ threshold test** as required by the 1988 Act. In this regard, the *Sahu-Khan* case provides valuable guidance on the 1988 Act’s meaning of ‘material’.

Background

The requirement for an employment contribution to a disease is contained in the definition subsection [ss4(1)] of the 1988 Act as follows:

disease means:

- (a) any ailment suffered by an employee; or
- (b) the aggravation of such an ailment;

being an ailment or an aggravation that was **contributed to in a material degree by the employee’s employment** by the Commonwealth or a licensed corporation. **(emphasis added)**

Discussion

In *Sahu-Khan*, Justice Finn considered that the meaning of the word ‘materially’ in the Shorter Oxford English Dictionary, as ‘substantially, considerably’, probably captured ‘the essence of what the legislature was conveying’, in the phrase “material degree” in s 4(1) of the SRC Act. He also agreed that the word ‘material’ imposes an evaluative threshold below which a causal connection may be disregarded.

Justice Finn concluded that the definition of ‘disease’ in s4 of the SRC Act:

- (i) “requires a stronger causal relationship between the employment and the ailment, etc suffered than that exacted by the 1971 Act;
- (ii) ‘in a material degree’ requires an evaluation of all relevant contributing factors for the purpose of asking whether the employee’s employment did or did not contribute materially to the suffering of the ailment, etc, in question (‘the threshold evaluation’); and
- (iii) whether this will be so in a given case will be a matter of fact and degree.”

Process Guidelines

Decision makers must make decisions based on the factual information available (objective decision making) and be satisfied on the balance of probabilities.

In considering whether the employment contributed in a material degree, decision makers should weigh the available evidence and make a determination as to whether the contribution by the employee's employment to the disease would constitute a 'material' one on the balance of probabilities. The following terms provide guidance.

Disease

Is defined in subsection 4(1) of the 1988 Act (see relevant legislation below) but some guidance on what has been determined as a disease is given below.

A disease may be:

- initiated by some external cause (environmental stressors or pathogens)
- be idiopathic (unknown cause)
- autogenous (self generated).

Examples of disease types include:

- abnormal pathology (stomach ulcers, tumours etc)
- psychological conditions (depression, adjustment disorders etc)
- repetitive use conditions or inflammations (carpal tunnel syndrome, epicondylitis, etc)
- degenerative conditions (spondylosis etc).

Aggravation of disease

Decision makers will need to satisfy themselves that there has been a material contribution by employment to the aggravation of a disease.

The concept of aggravation has been examined by the AAT, the Federal Court and the High Court. Useful guidance can be found in [*Casarotto v Australian Postal Commission \(1989\)*](#), [*Martin v Australian Postal Corporation \(1999\)*](#) and especially [*Holt v Comcare \(2003\)*](#), where the Full Federal Court discussed the principles of aggravation and the relevant authorities.

Employment

Is not defined in subsection 4(1) of the 1988 Act. The courts have broadly interpreted the meaning of 'employment' and a commonly cited interpretation is contained in *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 642 per Windeyer J as follows:

When the Act speaks of employment as a contributing factor it refers not to the fact of being employed but to what the worker in fact does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed.

Material

'Material' is not defined in subsection 4(1) of the 1988 Act. The Federal Court in *Sahu-Khan* considered that the meaning of the word 'materially' in the Shorter Oxford English Dictionary, as 'substantially, considerably' - probably captured 'the essence of what the legislature was conveying'.

Decision makers should now have regard to the decision in *Sahu-Khan* in determining whether employment materially contributed to a disease. This means that there need to be a stronger employment contribution threshold for a disease to be compensable than the requirement that was identified in *Treloar*, i.e. that the employment need only be a mere contributing factor.

Contribution

There have been a number of cases before the AAT and the Courts concerning what constitutes a contribution.

In [*Federal Broom Co Pty Ltd v Semlitch* \(1964\)](#), the High Court, per Windeyer J, noted that:

When the Act speaks of employment as a contributing factor it refers not to the fact of being employed but to what the worker in fact does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed.

In [*Favelle Mort v Murray* \(1976\)](#), the High Court noted, per Mason J, that :

...all that need be shown is that the employment contributes to the injury, not that it is the real, the effective or proximate cause of the injury.

It can be seen that the mere fact of being employed does not, of itself, constitute a contribution. There must be some factor in the employment that helped to bring about the onset of the condition, even if that factor is not the only cause or even the major cause.

Evidence Collection

To determine whether there is a material contribution by an employee's employment to a disease, two categories of evidence should be obtained:

- evidence based on facts, and
- evidence based on medical opinion.

Factual Evidence

Can include but is not limited to:

- employer and employee statements providing a sequence of events
- the duties or the actual employment tasks undertaken
- activities or circumstances of the employee incidental to or not related to employment
- working arrangements and conditions of employment
- sick leave records or medical records relating to the employee's health
- records of earlier manifestations or claims for the same or similar condition
- ergonomic assessments or statements about the workplace environment, and
- duration of employment.

Factual evidence held by the employee can be obtained under section 58 of the SRC Act.

Medical Evidence

Can include but is not limited to medical reports providing relevant details such as:

- predisposing or lifestyle contributing factors
- history of condition and other matters affecting the employee's health
- nature and extent of any pre-existing or co-related condition
- contributing factors, including those that are not employment related
- opinion on stated cause and its link, if any, to claimed condition
- aetiology, diagnosis and prognosis
- medial and diagnostic reports, and
- rehabilitation assessment reports

Medical evidence can be obtained under the 1988 Act by the Relevant Authority through a section 57 medical examination and by the Rehabilitation Authority through a section 36 rehabilitation assessment.

Note: Appropriate questions need to be asked of the relevant medical health professional in order to weigh the significance of the contributing factors.

Weighing the Evidence

Once evidence is collected, decision makers will need to weigh that evidence to ascertain whether there is a material contribution between the employment and the disease.

Decision makers will need to consider the following:

- what is the nature of the claimed disease and what causes or contributes to a disease of that nature?
- what is the known aetiology of a disease of that nature?
- what are the employment related events that are claimed to have contributed to the cause of or contributed to the disease?
- is the claim that employment related events caused or contributed to the disease supported by medical evidence?

Once this is determined, decision makers will also need to consider the following:

- what factual evidence is available (as outlined above)?
- does the evidence reveal non employment related factors that may have contributed to the disease?

Decision makers will then need to weigh the evidence to determine whether there is a material contribution between the employment and the disease.

Decision makers should note that Justice Finn in *Sahu-Khan* stated that ‘in a material degree’ **requires an evaluation of all relevant contributing factors** for the purpose of asking whether the employee’s employment did or did not contribute materially to the suffering of the ailment, etc, in question (‘the threshold evaluation’) (emphasis added).

Exclusions

If it is determined that the employee’s employment did contribute in a material degree to their disease, the exclusionary provisions must then be examined. If one of the exclusionary provisions contributes, but at least to a material degree, compensation for injury under section 14(1) of the Act is not payable.

In this regard, of particular importance is the decision in [Hart v Comcare](#) [2005] FCAFC 16, which found that if one or more of the contributing factors (or “operative causes”) of an employee’s ‘injury’ fell within the meaning of an exclusion, liability for the ‘injury’ is precluded. It is important to note that the material contribution by employment must first be established before the exclusionary provisions can be considered.

Relevant JPA: 2006/03 - Exclusionary provisions – impact of Full Federal Court decision in ‘Hart’.

Application

The principle of this JPA applies to all claims with a date of injury between the date of commencement of the SRC Act – 1 December 1988, and 12 April 2007, the date of effect of the SRCOLA Act. The SRCOLA Act changed the required contribution from **material** degree to **significant** degree. Accordingly, for injuries sustained from 13 April 2007, please refer to JPA 2007/08. It should be noted that the principles outlined in this JPA can still be used in decision making processes related to injuries sustained from 13 April 2007, albeit by applying the ‘significant degree’ criterion.

Whilst the determining authority may reconsider pre *Sahu-Khan* decisions on its own motion, there is no requirement that it do so simply due to the *Sahu-Khan* decision. Previous decisions made under s14 of the Act were made pursuant to what had been accepted to be the correct interpretation of s14. Those decisions were valid at the time they were made and they remain so.

However, if it is necessary to reconsider a past claim and it is decided that a sufficient material contribution *never existed* between employment and injury, then the preferable course would be to revoke initial liability. Consideration could be given to whether to waive an overpayment recovery. In doing so, consideration should be given to circumstances whereby benefits were received by an employee in good faith.

Relevant Legislation

Definitions

[Subsection 4\(1\)](#) provides the following relevant definitions:

injury means:

- (a) a disease suffered by an employee; or
- (b) an injury (other than a disease) suffered by an employee, being a physical or mental injury arising out of, or in the course of, the employee's employment; or

- (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), being an aggravation that arose out of, or in the course of, that employment;

but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

disease means:

- (a) any ailment suffered by an employee; or
- (b) the aggravation of any such ailment;

being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth or a licensed corporation.

[Section 14](#) provides for compensation for injuries.

14 Compensation for injuries

- (i) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

Revocation of initial liability would result in an overpayment under the Act [see s114(1)(b)] with the overpaid amount being recoverable by the relevant authority in a court of competent authority as a debt due to the relevant authority.

Relevant Law

[Comcare v Canute](#) [2005] FCAFC 262

[Comcare v Sahu-Khan](#) (2007) FCA 15

[Hart v Comcare](#) [2005] FCAFC 16

[Treloar v Australian Telecommunications Commission](#) (1990) 26 FCR 316

Any issues relevant to this advice may be discussed with Alex O'Shea, Director, SRC Policy Section, telephone (02) 6276 0310.

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