



Jurisdictional Policy Advice No. 2007/07
Safety, Rehabilitation and Compensation Act 1988
Amendments to ‘injury’ and ‘disease’ provisions of the Act

Background

1. The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (SRCOLA) received Royal Assent on 12 April 2007.
2. This Act amends the provisions of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). The amendments will, among other things:
 - provide a new definition of ‘**injury**’ to exclude injuries arising from reasonable management action taken by the employer in a reasonable manner
 - provide a new definition of ‘**disease**’ to strengthen the connection between an employee’s employment and the disease.
3. In introducing these amendments, the Minister for Employment and Workplace Relations, in his Second Reading Speech, made clear it was the intention of the Government to strengthen the connection between the employee’s employment and the employee’s eligibility for workers’ compensation under the scheme.

Definition of ‘injury’

4. The following is an extract from the second reading speech on the definition of ‘injury’:

“The current definition of ‘injury’ contains exclusionary provisions which prevent compensation claims being used to obstruct legitimate administrative action by management. These provisions ensure that compensation is not payable in respect of an injury, usually a psychological injury, which arises from reasonable disciplinary action taken against an employee, or failure to obtain a promotion, transfer or benefit in connection with employment. These exclusionary provisions are being updated and expanded to include other similar activities which are also regarded as normal management responsibilities – provided, of course, that they are reasonably undertaken. These include matters such as a reasonable appraisal of the employee’s performance and reasonable counselling action taken in respect of the employee’s employment.

The amendment reads:

Sub-section 4(1) (definition of *injury*)

Repeal the definition, substitute:

injury has the meaning given by section 5A.

After section 5

Insert:

5A Definition of injury

(1) In this Act:

injury means:

- (a) a disease suffered by an employee; or
- (b) an injury (other than a disease) suffered by an employee, that is 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), that is an aggravation that arose out of, or in the course of, that employment.

but does not include a disease, injury or aggravation suffered **as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.** (emphasis added)

(2) For the purposes of subsection (1) and without limiting that subsection, *reasonable administrative action* is taken to include the following:

- (a) a reasonable appraisal of the employee's performance;
- (b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
- (c) a reasonable suspension action in respect of the employee's employment;
- (d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- (e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
- (f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

Definition of ‘disease’

5. The following is an extract from the Second Reading Speech on the definition of ‘disease’:

“The act currently requires a material contribution from employment to a disease before compensation is payable. When originally enacted this provision was meant to establish a test requiring that an employee . . . ‘demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease ’ . . . Notwithstanding this clear expression of legislative intent, the courts have read down the expression ‘in a material degree’ to emphasise the causal connection between employment and the condition complained of rather than the extent of the contribution itself.

The bill therefore includes an amendment to restore the initial legislative intent by requiring that an employee’s employment must have contributed in a significant way to the contraction or aggravation of the employee’s ailment.”

The amendment reads:

Sub-section 4(1) (definition of *disease*)

Repeal the definition, substitute:

disease has the meaning given by section 5B.

After section 5

Insert:

5B Definition of disease

- (1) In this Act:

disease means:

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

that was contributed to, **to a significant degree**, by the employee’s employment by the Commonwealth or a licensee (emphasis added).

- (2) In determining whether an ailment or aggravation was contributed to, to a significant degree, by an employee’s employment by the Commonwealth or a licensee, the following matters may be taken into account:

- (a) the duration of the employment;
- (b) the nature of, and particular tasks involved in, the employment;
- (c) any predisposition of the employee to the ailment or aggravation;
- (d) any activities of the employee not related to the employment;
- (e) any other matters affecting the employee’s health.

This subsection does not limit the matters that may be taken into account.

- (3) In this Act:

significant degree means a degree that is substantially more than material.

Interpretations

6. **Definition of injury:** The amendment has not changed the ‘injury simpliciter’ concept, i.e. injuries which are not diseases. However, the injury **exclusionary provisions**, which previously involved the ‘disease’ aspects of injury, particularly psychological conditions, have been widened from ‘reasonable disciplinary action’ and ‘failure by the employee to obtain a promotion, transfer or benefit’ to the intentionally broader ‘*as a result of reasonable administrative action taken in a reasonable manner in respect of the employee’s employment*’.
7. Further, a list of non-exclusive administrative actions is provided. This list includes reasonable appraisal, counselling, suspension and disciplinary action as well as anything reasonable done in connection with those actions and anything reasonably done in connection with the employee’s failure to obtain a promotion, transfer or benefit.
8. It will now be necessary for the decision maker to:
 - firstly decide whether the employee suffers from an injury (under section 14 - Compensation for injuries - taking into account the separate exclusions contained within that section); then
 - consider whether any of the new section 5A exclusionary provisions might apply.

In considering these exclusionary provisions, it will be necessary to assess from evidence supplied or collected, whether any administrative action which might be a contributory factor to the cause or aggravation of an injury or disease was reasonable as well as being reasonably undertaken.

9. A decision maker should ascertain whether the action or actions taken were consistent with the employer’s policies and procedures on performance appraisal, counselling and disciplinary matters etc and how they were applied. A further consideration may be to establish whether the claimant sought internal or external review of that action and whether there was an outcome in the claimant’s favour. This may indicate that the administrative action taken may not have been reasonable in the circumstances.
10. If one of the exclusionary factors contributes to the development or contraction of the disease, there is no ‘injury’ within the meaning of the definition under the SRC Act, and therefore liability does not exist¹. That factor does not have to be the sole cause, or predominant cause but it has to be a significant factor in a chain of events that led to the injury in order for the exclusion to apply (liability would not be found)².
11. **Definition of disease:** The amendment now requires that employment is at least a ‘significant’ contributing factor to the contraction or aggravation of a disease. This change is intended to provide eligibility for work-related diseases and aggravations

¹ See the Full Federal Court decision, *Hart v Comcare* [2005] FCAFC 16 (11 March 2005). Also see JPA 2006/03

² See *Weigand v Comcare (no 2)* [2007] FCA 237 (1 March 2007)

consistent with the original intention of the SRC Act and consistent with eligibility in most other State schemes, while at the same time minimising the scope for uncertainty and disputation. The 'to a significant degree' contribution from the employment test provides a clearer mechanism for achieving the legislative intent of a 'causal connection' between an employee's employment and the contraction or aggravation of a disease than the previous definition.

12. Subsection 5B(2) of the definition of disease provides a non-exclusive list of practical matters which may be taken into account in considering whether the contribution from employment was significant or not. It may or may not be necessary to consider each of these matters in coming to a decision as it will depend on the circumstances in each case.
13. Subsection 5B(3) of the definition stipulates that 'significant degree' means a degree that is substantially more than material. This further affirms that the intention of the amendment is to allow the decision maker to apply a more stringent test to a disease claim.

Policy Advice

14. Determining authorities are to incorporate suitable processes and procedures to ensure that these amendments are applied correctly to new claims for compensation.
15. This advice is to be applied to claims with a date of injury on and from 13 April 2007, the day following the date of Royal Assent to the Act.
16. Any issues relevant to this policy advice may be discussed with Alex Brown on (02) 6276 0308.

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