



## Jurisdictional Policy Advice No. 2006/09

### *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*.

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#### 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.

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

The Full Federal Court (FFC) judgment, [Comcare v Canute](#) [2005] (*Canute*) 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’. The FFC made this observation after considering the effect of the Second Reading Speech to the 1988 Act which provides that the intended test is ‘for an employee to show that there is a close connection between the disease and the employment’ for that condition to be compensable.

This is a significant observation, recognising the intention of the employment contribution requirement for disease claims. **The requirement for employment to contribute to the disease or aggravation of disease should be applied in accordance with the intention of the 1988 Act, ie that there is a ‘close connection between the disease and the employment’.**

This will change the way all disease claims in this jurisdiction are assessed.

The application of this Jurisdictional Policy Advice (JPA) applies to claims for disease or aggravation of disease made under the 1988 Act with a date of injury on or after 1 December 1988.

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## Background

Sub-section 14(1) of the 1988 Act creates a liability to pay compensation in respect of an injury suffered by an employee that results in death, incapacity or impairment. A determination under section 14 involves a finding of facts, one of those facts being that the employee suffers from an injury as defined in section 4 of the 1988 Act. Injury, by definition, includes disease which is also defined in this section.

The requirement for an employment contribution to a disease or aggravation of 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**)

In *Canute* the FFC examined the intention of the inclusion of the term 'material' in the phrase 'contributed to in a material degree by the employee's employment'. This was because Mr Canute had claimed for a permanent impairment entitlement arising from a disease (adjustment disorder) which arose out of his compensable physical injury (back injury).

In considering the employment contribution requirement, the FFC had regard to the previous interpretation of 'contributed to in a material degree' given in [Treloar v Australian Telecommunications Commission](#) (1990). The FFC confined that interpretation (ie that employment need only be a mere contributing factor) to claims for diseases made under the *Compensation (Commonwealth Government Employees) Act 1971* (the 1971 Act), rather than the 1988 Act.

This is best summarised by quoting, in part, from the FFC finding in *Canute*:

**In the majority judgement, French and Stone JJ observed:**

In the case of an injury which is a disease, a causal connection is always necessary between the employment and the contraction of the disease. That causal connection is defined by the words 'contributed to in a material degree by the employee's employment by the Commonwealth ...' (s 4). This definition differs from that considered by the Full Court in *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316. In *Treloar*, the Full Court was concerned with the antecedent legislation, the *Compensation (Commonwealth Government Employees) Act 1971* (Cth) (the 1971 Act), which merely required the employment be 'a contributing factor' to the disease without any requirement that the contribution be 'material'.

The FFC in *Canute* noted that one of the changes from the 1971 Act was the introduction of a requirement that the employee show that their employment contributed ‘in a material degree’ to the contraction of the disease. The Second Reading Speech<sup>1</sup> provided the intent of the meaning of ‘material’.

**Second reading speech – 1988**

It is intended that the test will require an employee to demonstrate that his or her **employment was more than a mere contributing factor** in the contraction of the disease. Accordingly, it will be necessary for an employee to show that **there is a close connection between the disease and the employment** in which he or she was engaged.

In determining whether employment contributed in a material degree to the contraction of a disease in a particular case, regard would be had to **whether the employment in which the employee was engaged carried an inherent risk of the employee contracting the disease** in question and **whether some characteristic or feature of the employment tended to cause, aggravate or accelerate the disease**. A disease which has been contributed to in a material degree by employment will be deemed to be an injury. Compensation will be payable if that injury results in the death, incapacity or impairment of the employee.’(emphasis added)

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<sup>1</sup> Second Reading Speech: Explains to Parliament the intent of proposed new legislation. The *Commonwealth Employees’ Rehabilitation and Compensation Bill 1988* was delivered by the then Minister for Social Security, The Hon Brian Howe and contained an explanatory memorandum and a supplementary explanatory memorandum for amendments.

## **Process Guidelines**

Licensee delegates must make decisions based on the factual information available (objective decision making) and apply the civil standard of proof. This standard requires the weighing up or comparison of competing possibilities. A fact is proved to be true on the balance of probabilities if its existence is more probable than not<sup>2</sup>.

In considering whether the employment contributed in a material degree, decision makers must weigh the available evidence and make a determination as to whether there is a close connection between the employee's disease (or aggravation of disease) and their employment. 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 (workplace stressors)
- be idiopathic (unknown cause)
- autogenous (self generated).

Examples of disease types include:

- stomach ulcers
- psychological injury (depression, adjustment disorders etc)
- repetitive use conditions (carpal tunnel syndrome, epicondylitis etc)
- degenerative conditions (spondylosis etc).

### **Aggravation of disease**

Is defined in subsection 4(1) of the 1988 Act (see relevant legislation) but further guidance can be obtained from the Repatriation and Medical Authority<sup>3</sup> which noted that:

An aggravation is a clinical worsening of the underlying pathology of the disease, causing increased frequency and severity of symptoms including the need for lifestyle modifications or an increased level of treatment to control symptoms.

### **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 Company v Semlitch* as follows:

<sup>2</sup> Butterworths Australian Legal Dictionary, 1997 page 108, refers to *Reifeck v McElroy* (1965)

<sup>3</sup> Repatriation Medical Authority Repatriation Medical Authority is an independent statutory authority consisting of a panel of five practitioners eminent in fields of medical science whose role is to determine Statements of Principles (SOPs) for any disease, injury or death that could be related to military service, based on sound medical-scientific evidence.

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.

This definition is quite similar to that given in the second reading speech (see above)

### **Material**

Is not defined in subsection 4(1) of the 1988 Act. The FFC in *Canute* observed that the use of the word 'material' imposes an 'evaluative threshold', in other words the employment contribution is able to be measured. Having regard to the Second Reading Speech, the employment contribution to the contraction or aggravation of a disease should be assessed to ascertain whether there is a 'close connection' between the employment and the disease.

## **Close Connection**

The Second Reading Speech refers to the requirement for a ‘close connection’ between a disease and employment. While that doesn’t give particular guidance as to what exactly this term means, the FFC held that the intention was to require that the employment was ‘more than a mere contributing factor’ to the contraction or aggravation of the disease claimed for.

Accordingly, decision makers should now have regard to the observations made in *Canute* and the reference in the Second Reading Speech to the requirement for a ‘close connection’ between a disease and employment. This means that there is a stronger employment contribution requirement for a disease or an aggravation of 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. This interpretation is justifiable given the FFC’s observations.

### **Examples of what might constitute ‘close connection’**

#### **Example 1**

An immediate reaction to a work related event satisfies the requirement for a close connection to employment. For instance, a rash appearing within 24 hours of exposure to a chemical in the workplace would probably enable the decision maker to find that, on the balance of probabilities, there is a close connection between disease and employment.

However a delay of a week would require the decision maker to consider the relevant facts and medical evidence to assess whether a close connection to employment exists given the lapse of time between exposure and the rash appearing.

#### **Example 2**

The closer the connection in distance/physical proximity, the more likely the contribution can be viewed as providing a close connection to employment. For instance, in the example above, if the claimant was on a different floor in the same building where the chemical was exposed, the decision maker would need to consider the relevant facts and medical evidence to assess whether a close connection to employment exists. For example, the decision maker would need to make a determination, on the balance of probabilities, and based on the available evidence, that the exposure of a chemical could still cause a reaction even though the employee was not in the immediate vicinity when the chemical was exposed.

### Example 3

A claim has been made for the aggravation of a degenerative back condition. If the claimant was able to show that there was increased pain and symptomology occurring close in time after some work related activity which would have clearly placed stress on the employee's back, then the test is probably satisfied because there is a strong and immediate connection.

However, if the pain only occurred some time later or after an activity that is less likely to aggravate an underlying condition, the decision maker would be required to consider the relevant facts and medical evidence to assess whether, on the balance of probabilities, a close connection to employment exists given the lapse of time between the event(s) causing pain and the condition arising.

The contribution made by a non work related factor could be assessed by using the same methodology. If it could be established that a non work related factor could be shown to have a close(r) connection to the condition claimed, then, by inference, the decision maker may determine that the work contribution is less likely to have a close connection.

### **Contribution**

Is not defined in subsection 4(1) of the 1988 Act. However, the second reading speech noted that:

In determining whether employment contributed in a material degree to the contraction of a disease in a particular case, regard would be had to whether the employment in which the employee was engaged carried an inherent risk of the employee contracting the disease in question and whether some characteristic or feature of the employment tended to cause, aggravate or accelerate the disease.

It can be seen that the mere fact of being employed does not, of itself, constitute a contribution.

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## **Evidence Collection**

To assist in the consideration of determining whether there is a material contribution by an employee's employment, 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
- activities or circumstances of the employee incidental to or not related to employment
- certified agreements/or AWA
- duty statements
- sick leave records
- ergonomic assessments or statements about the workplace environment
- 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:
  - hereditary and lifestyle contributing factors
  - history of condition
  - nature and extent of any pre-existing condition
  - contributing factors, including those that are not employment related
  - opinion on stated cause and its link, if any, to claimed condition
  - diagnosis and prognosis
  - medial and diagnostic reports
  - other matters affecting the employee's health.
- Rehabilitation 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 measure the significance of the contributing factors.

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## **Weighing the Evidence**

Once evidence is collected, decision makers will need to weigh that evidence to ascertain whether there is a 'close connection' between the employment and the disease or aggravation of a disease.

Decision makers will need to consider the following:

- what is the nature of the claimed condition and what causes or contributes to the condition
- what are the employment related events that are claimed to have caused or contributed to the disease or aggravation of disease
- is the claim that employment related events caused or contributed to the disease or aggravation 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 caused or contributed to the disease or aggravation of disease.

Decision makers will then need to compare and weigh the evidence to determine whether there is a close connection between the employment and the disease. This is a finding of fact which may be reviewed by the Administrative Appeals Tribunal.

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## Mental Disorders - Perception

Mental diseases have been treated differently in the past. The decision in [Wiegand v Comcare](#) (2002) held that where there is an actual event in the workplace which creates a perception in the mind of the employee, if that perception contributes to an aggravation of a disease, whether the perception is reasonable or not, the disease will be compensable.

Decision makers should now undertake an assessment of whether or not the employment itself contributed in a material degree to the onset or aggravation of a disease. This is a question of fact and the nature of the perception, the disease and its relationship to the employment will need to be considered.

For compensation to be payable, there must be a causal link from the incident or state of affairs, through the perception to the development of the disease. Through this process, it is necessary to establish that the employment was actually operative in a material degree in causing or aggravating the condition claimed for. That is, that there must be a close connection between the employment and the disease.

In *Kirkpatrick v Commonwealth*<sup>4</sup> the FFC outlined a circumstance where a neurosis would not be compensable. This example related to an employee who wrongly believed that a boil was suffered as a result of dust at work and became resentful upon the proper rejection of his claim. The worker then suffered a neurosis which arose solely out of the correct refusal of the claim for compensation for the boil. This would not be compensable as the employment did not actually contribute to the development of the employee's disease. Accordingly, a perception that employment contributed to a disease will not always give rise to a compensable condition.

When considering claims for compensation for a mental disease, decision makers should:

- identify the nature of the claimed condition and what causes or contributes to the condition
- identify the event(s) that are claimed to have caused or contributed to the condition
- identify what the employee's perception of the event(s) were
- obtain medical evidence regarding what it is about the employee's perception that materially contributed to the disease
- obtain medical evidence regarding what impact the event(s) had on the employee's perceptions, ie was the event more than a mere contributing factor
- obtain medical evidence relating to whether or not the perceptions were a part of the disease, ie did the disease cause the employee's perceptions.

Decision makers must then weigh the evidence obtained and assess whether the employment caused or aggravated the disease, ie was the employment more than a mere contributing factor.

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<sup>4</sup> (1985) 9 FCR 36

## Exclusions

If it is decided that the employee's employment did contribute in a material degree to their claimed condition, the exclusionary provisions must then be examined. If one of the exclusionary provisions applies, 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 in the causation or worsening of an employees 'injury' fell within the meaning of an exclusion (in this case failure to obtain a promotion in connection with employment), liability for the 'injury' is disqualified. It is important to note that the material contribution of the employment factor must first be established before the exclusionary provisions can be considered.

<b>Relevant JPA: 2006/03</b> - Exclusionary provisions – impact of Full Federal Court decision in 'Hart'.
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## Application

The principle of this JPA applies to all claims with a date of injury on and from the date of commencement of the SRC Act – 1 December 1988. For practical purposes, decision-makers should restrict the application of this JPA to new claims only.

However, if it is necessary to reconsider a past claim and it is decided that a sufficiently 'close connection' *never existed* between employment and injury, then the preferable course would be to revoke initial liability<sup>5</sup>. Consideration could be given to waiving such a debt pursuant to section 114D(1) of the SRC Act.

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<sup>5</sup> 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 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.

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## Relevant Law

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

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

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

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Any issues relevant to this advice may be discussed with Comcare's Compensation and Injury Management Policy Group, telephone (02) 6276 0310.

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