EXTENT OF POWER OF THE ADMINISTRATIVE APPEALS TRIBUNAL WHEN REVIEWING REVIEWABLE DECISIONS

PURPOSE

To provide decision makers with scheme guidance on the jurisdiction of the Administrative Appeals Tribunal (AAT) to review decisions and determine compensation entitlements under section 64 of the Safety, Rehabilitation and Compensation Act 1988 (SRC Act).

BACKGROUND

The SRC Act outlines a three-tiered decision making process. A first tier decision is referred to as a ‘determination’ which is defined under section 60 of the SRC Act and means a determination, decision or requirement made under a specific section or division of the SRC Act.\(^1\)

A first tier determination can be reviewed under section 38\(^2\) or section 62 of the SRC Act. Second tier decision making arises from a request from an employee or Commonwealth employer\(^3\) for a reconsideration of a first tier determination. A decision maker can also choose to reconsider a first tier determination on their own motion.

A second tier decision is referred to as a ‘reviewable decision’ which is defined in section 60 of the SRC Act.

The AAT conducts independent reviews of administrative decisions made under Commonwealth laws. Under section 64 of the SRC Act, the AAT is only able to review reviewable decisions. The AAT does not have the authority to exercise any powers which would not have been available to the decision maker at the second tier decision making stage.

Relevant cases

In a joint decision in the cases of Lees v Comcare and Comcare v O’Donohue\(^4\), the Full Federal Court held that it is only after the two-tiered internal review process has been completed that the AAT is able to review a decision. The AAT’s powers under section 43(1) of the Administrative Appeals Tribunal Act 1975 (AAT Act)\(^5\) are powers to review the reviewable decision, not powers that can be exercised at large.

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\(^1\) Sections 8, 14, 15, 16, 17, 18, 19, 20, 21, 21A, 22, 24, 25, 27, 29, 29A, 30, 31, 34, 36, 37 or 39, under paragraph 114B(5)(a) or under Division 3 of Part X of the SRC Act.

\(^2\) Section 38 of the SRC Act requires Comcare to review certain rehabilitation determinations under Part III of the SRC Act. Section 38 does not allow decision makers to reconsider a determination made on its own motion. Determinations made under Part III of the SRC Act by licensees are reconsidered under section 62.

\(^3\) Section 62(2) sets out that the Commonwealth or a Commonwealth authority can request a determining authority to reconsider a determination. This same provision does not apply to self-insured licensees who manage claims under their own delegation, including when those powers are delegated to a third-party claims provider.

\(^4\) Lees v Comcare (1999) FCA 753 (7 June 1999)

\(^5\) See section 43(1) of the AAT Act here
In *O’Donohue*, the Court found that even though Comcare had made a determination on compensation for injury under section 14 of the SRC Act and the reviewable decision affirmed that finding, the AAT did not have jurisdiction to allow it to determine any entitlement to compensation under section 24 of the SRC Act as those matters had not been through the two tier decision making process of determination and reconsideration.

In *Kennedy v Comcare* the Federal Court referred to the cases of *Telstra Corporation Ltd v Kotevski* and *Irwin v Military Rehabilitation and Compensation Commission*, and found that if a request for reconsideration is before a decision maker and they do not deal with it expressly, the decision maker might be taken to have implicitly rejected it. This is to say that a failure to make a decision on an issue before the decision maker, is a decision for the purposes of the SRC Act and therefore reviewable by the AAT.

**GUIDANCE**

Only the third tier of decision making is conducted by the AAT. An applicant who already has a reviewable decision before the AAT cannot add another issue unless it has been the subject of a claim, determination and a reviewable decision.

There may be occasions when a matter is before the AAT and the decision maker wishes to have a new issue reviewed by the AAT as part of the same proceedings. It is open to the decision maker to determine and reconsider the new issue. The reconsideration may be on the decision maker’s own motion. This would bring the issue within the jurisdiction of the AAT and, subject to the agreement of all parties, the matters could then be subject to the same AAT review process.

Settlements authorised under section 42C of the AAT Act require the AAT to be satisfied that the decision agreed to by the parties would be within the powers of the AAT. Such settlements must not include issues that have not been the subject of a determination and reviewable decision by the decision makers.

**FURTHER INFORMATION**

Scheme guidance on considerations in the reconsideration process can be found on the Comcare website.

For further information, please contact Comcare’s Scheme Policy and Design team on 1300 366 979 or email: scheme.policy@comcare.gov.au

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6 *Kennedy v Comcare* [2014] FCA 82 (18 February 2014)
7 *Telstra Corporation Ltd v Kotevski* (2013) FCA 27 (25 January 2013)
9 See section 42C of the AAT Act [here](#)