



## INJURY SUFFERED AS A RESULT OF REASONABLE ADMINISTRATIVE ACTION

### PURPOSE

To provide determining authorities<sup>1</sup> with guidance about the level of employment contribution required for the purpose of applying the 'suffered as a result of' reasonable administrative action exclusion (RAA exclusion) in section 5A of *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

### BACKGROUND

Section 5A of the SRC Act excludes compensation for an injury<sup>2</sup> suffered as a result of reasonable administrative action<sup>3</sup> taken in a reasonable manner in respect of the employee's employment. The expression 'suffered as a result of' in section 5A(1) provides the necessary causal connection test between the claimed injury and the reasonable administrative action.

The High Court (*Comcare v Martin*<sup>4</sup>) clarified the circumstances in which the RAA exclusion could apply and set out the necessary causal connection considerations. Further clarity was provided by the Full Federal Court (*Lim v Comcare*<sup>5</sup>).

### GUIDANCE

A reasonable administrative action does not need to be the sole cause of an injury for the RAA exclusion to apply.<sup>6</sup>

To apply the RAA exclusion, a decision-maker must be satisfied that the employee would not have suffered the injury (that was contributed to, to a significant degree by employment), without the reasonable administrative action. This involves an assessment of the impact the reasonable administrative action had on the development of the injury.

The employee's perception of the consequences of the reasonable administrative action, whether personal or professional, direct or indirect, real or imagined, are irrelevant to this causal enquiry.<sup>7</sup>

1 Determining authority, in relation to a determination, means the person who made the determination [section 60(1) of the SRC Act]. For the purposes of this guidance, the determining authority will be referred to as the 'decision-maker'

2 Injury is defined in section 5A of the SRC Act as: a disease; or a physical or mental injury (or aggravation of)

3 Reasonable administrative action [section 5A(2)] is taken to include:

- > a reasonable appraisal of the employee's performance, counselling action, suspension action, disciplinary action
- > anything reasonable done in connection with the above
- > anything reasonable done in connection with the failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit

4 *Comcare v Martin* [2016] HCA 43

5 *Lim v Comcare* [2017] FCAFC 64

6 *Hart v Comcare* [2005] FCAFC 16 as confirmed by the High Court in *Comcare v Martin* [2016] HCA 43

7 *Comcare v Martin* [2016] HCA 43

## Assessing the impact of reasonable administrative action

In order to assess whether the RAA exclusion applies, the decision-maker is required to consider the following:

### Does the employee suffer from an ailment or aggravation of an ailment?

Reasonable administrative action most commonly arises in the context of psychological injury. Psychological injury will usually be characterised as a disease.

The meaning of injury includes a disease suffered by an employee [section 5A(1)]. Disease means an ailment or an aggravation of an ailment that was contributed to, to a significant degree, by the employee's employment [section 5B(1)]. Ailment means any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development) [section 4(1)].

The decision-maker will decide whether the claimed condition is an ailment or aggravation of an ailment by reference to the employee's circumstances and medical evidence.

### Was the ailment or aggravation of contributed to, to a significant degree, by the employee's employment?

For the ailment or aggravation of to meet the definition of 'disease', a decision-maker must be satisfied that employment contributed to the ailment or aggravation of an ailment to a significant degree. 'Significant degree' is defined in section 5B(3) to mean 'a degree that is substantially more than material.'

This requires the decision-maker to consider the following, having regard to the matters set out in 5B(2):

- > Do the causative factors fall within the meaning of employment?<sup>8</sup>
- > What impact did those employment causative factors have on the injury?
- > Are there any non-employment causative factors?
- > What impact did those non-employment causative factors have on the injury?

Decision-makers may have to rely heavily on the medical evidence to identify and confirm the role the causative factors played in the development or aggravation of the ailment.

Having identified all the contributing employment factors (including any reasonable administrative action), a decision-maker must then be satisfied that the contribution of the employment factor(s) in total was significant in the development or aggravation of the ailment.

### Do the employment causative factors include reasonable administrative action?

If the decision-maker considers that the employee's employment contributed, to a significant degree, to the ailment or aggravation of an ailment, the decision-maker must next identify whether any of those causative employment factors fall within the meaning of reasonable administrative action.

This will require an assessment of whether each identified employment action is:

- > administrative<sup>9</sup> (such as actions affecting the employee's ordinary work duties or a direction about the employee's duties or how to perform those duties)
- > reasonable
- > taken in a reasonable manner, and
- > taken in respect of the employee's employment (meaning the action must be directed specifically to the employee).

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8 Employment is not defined in the SRC Act but guidance has been provided by the Courts. The most commonly cited interpretation is from *Windeyer J in Federal Broom Company v Semlitch* [1964] 110 CLR 626:

"when the Act speaks of 'the 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 employment or some characteristic of the work performed or the conditions in which it was performed."

9 *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21; *Drenth v Comcare* [2012] FCAFC 86; *Comcare v Drinkwater* [2018] FCAFC 62

Whether the administrative action was reasonable or undertaken in a reasonable manner, is determined on a case by case basis. It is an objective test as to whether the action was reasonable or taken reasonably, not whether it could have been more reasonable or taken more reasonably.<sup>10</sup>

### **Was the disease suffered as a result of reasonable administrative action?**

The words 'suffered as a result of' in section 5A(1) must be read in the context of the employee having suffered an ailment that was contributed to, to a significant degree, by employment.

To assess whether the disease was 'suffered as a result of' reasonable administrative action, the decision-maker needs to consider whether the reasonable administrative action made the difference between the employee suffering and not suffering the disease for the purposes of the SRC Act.

For the exclusion to apply, the decision-maker will need to be satisfied that without the reasonable administrative action the employee:

- > would not have suffered an ailment (or aggravation of) that was contributed to, to a significant degree, by their employment; or
- > would have suffered an ailment (or aggravation of) but that ailment was not contributed to, to a significant degree, by their employment.

Deciding whether the reasonable administrative action made such a difference involves assessing the impact the action had on the development of the ailment. Relevant considerations in this assessment include:

- > the proximity between the reasonable administrative action and the date the ailment or aggravation of was sustained
- > whether the ailment or aggravation would have been suffered without the reasonable administrative action factors
- > the relative impact that work-related, non-reasonable administrative action and non-employment factors had on the development of the ailment or aggravation, and
- > whether employment still contributed to the ailment or aggravation to a significant degree without the reasonable administrative action factors.

**Attachment A** provides a flow chart on applying the RAA exclusion.

## **PROCESS AND PRACTICES**

Decision-makers are advised to have processes and practices in place to assist in considering the RAA exclusion when determining whether an employee has a compensable injury under the SRC Act.

## **FURTHER INFORMATION**

For further information, please contact Comcare's Scheme Policy team on 1300 366 979 or email: [scheme.policy@comcare.gov.au](mailto:scheme.policy@comcare.gov.au).

## **ATTACHMENTS**

**Attachment A**—Applying the RAA exclusion

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<sup>10</sup> *Bropho v HREOC* (2004) FCAFC 16

<sup>11</sup> Section 7(4) of the SRC Act provides that an employee shall be taken to have sustained a disease, or an aggravation of a disease, on the day when:

- > the employee first sought medical treatment for the disease, or aggravation; or
- > the disease or aggravation resulted in the death of an employee or first resulted in the incapacity for work, or impairment of the employee; whichever happens first.

# ATTACHMENT A

## Applying the RAA exclusion

The following flow chart can be used as a guide to assess whether the RAA exclusion applies. If the exclusion does not apply, the legislative tests may be applicable and should be considered where relevant.

