



## CONSIDERATIONS IN THE RECONSIDERATION PROCESS

### PURPOSE

To provide scheme guidance about relevant considerations in the reconsideration of determinations under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

### GUIDANCE

#### Interpretation

Only determinations can be reconsidered under the SRC Act. Determinations are defined under section 60 of the SRC Act and mean a determination, decision or requirement made under a specific section or division of the SRC Act.<sup>1</sup>

Section 62 of the SRC Act provides for a determining authority to:

- > on its own motion, reconsider a determination; or
- > upon request, reconsider a determination.

The determining authority<sup>2</sup> can also delegate this power to another person, being a person other than the person who carried out the initial determination (or was involved in the determination process).<sup>3</sup>

If a person makes a decision or a determination without delegation, then the decision or determination is invalid.

#### Role of the decision-maker

Decision-makers are obliged to accurately and quickly consider requests for reconsideration as part of the functions they are undertaking under the SRC Act. They are required to comply with legal and procedural requirements in the reconsideration of determinations.

#### Reconsideration of own motion

A decision-maker may make a reconsideration of own motion where the original determination contains an error of fact or law:

- > **an error of fact:** examples include situations where claim facts have been misinterpreted; relevant evidence provided in relation to a claim has not been taken into account; or new evidence was received after a determination was made, which makes the determination unsustainable.
- > **an error of law:** applies when a decision was inconsistent with legislation or case law.

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

3 A licensee, as part of their licensee arrangements, may also be subject to conditions of licence in respect of reconsiderations.

In some cases, a decision by a Court (known as a precedent) may clarify the interpretation and application of a provision of the SRC Act. In such cases, a decision-maker is not obliged to self-initiate action to identify and reconsider determinations made prior to the precedent-setting decision.

In deciding whether to undertake a reconsideration of own motion, a decision-maker should have regard to how a reconsideration of own motion on a past decision (made in good faith and based on relevant policy at the time) may adversely affect the rights, interests or legitimate expectations of an employee.

**Attachment A** provides examples of when a reconsideration of own motion may be appropriate.

## ***When a reconsideration of own motion may not be appropriate***

### **New injuries**

A reconsideration of own motion is not appropriate for new injuries (including secondary injuries). A new injury that results from a separate workplace incident, event or state of affairs should be considered a new claim. For a secondary injury (injury claimed in relation to a previously accepted condition), a separate determination under section 14 of the SRC Act is required.

### **Administrative corrections**

Minor administrative corrections to claim details do not warrant a reconsideration of own motion. Administrative corrections can include changes to a claim due to clerical and typographical errors. These corrections do not need to be undertaken as a reconsideration of own motion where they do not change the outcome of the determination, or the quantum or duration of entitlements paid or payable. In such cases, a decision-maker should contact the employee advising of the error and ensure any amendments to the original determination are documented.

Where, however, a clerical or typographical change will have implications in relation to past or future entitlements under the SRC Act, the change should be undertaken as a reconsideration of own motion. Refer to examples in **Attachment A**.

## **Request for reconsideration**

Following a determination, the employee or employer<sup>4</sup> may not agree with the terms and reasons for the determination and request a reconsideration.

Section 62 sets out the requirements for a request for reconsideration. A request may be made by the employee or employer and must:

- > set out the reasons for the request; and
- > be made within 30 (calendar) days after the employee or employer receives the determination, unless an extension of time has been granted by the decision-maker.

It is not necessary for an employee or employer requesting a reconsideration to establish in their reasons that there has been an error of fact or law. Even if a decision-maker considers that there has been no change in claim circumstances, a request for reconsideration must be actioned accordingly.

There is no legislative requirement that the request be in writing, but this is preferable. Where a request for reconsideration is made verbally, that request should be documented. A request for reconsideration can be implied from the circumstances of the case and need not be explicitly stated.<sup>5</sup> For example, if an employee provides new evidence or information, it may be treated as a request for reconsideration as long as it meets the requirements in section 62 of the SRC Act. If correspondence is unclear, clarification should be sought.

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<sup>4</sup> Employer means a Commonwealth agency, a Commonwealth authority or a licensee.

<sup>5</sup> *Comcare v Willems* (1996) 138 ALR 469; 43 ALD 253

## Extension of time (EOT)

A request for reconsideration should be submitted within 30 days of receipt of a determination, however a request for extension of time (EOT) can be made at any point after the original determination, including after the 30-day period has lapsed. An employee or employer can request an EOT for the submission of a request for reconsideration or an EOT to submit evidence in support of a reconsideration.

The decision-maker has the discretion to allow an EOT. A decision to not grant an EOT (including a refusal to consider an out of time request<sup>6</sup>), is a reviewable decision.<sup>7</sup>

Considerations when assessing a request for an EOT may include:

- > the cause of, and the explanation for, the delay in submitting the request<sup>8</sup>
- > the time elapsed since the initial determination
- > any previous EOT requests
- > whether the EOT would be fair and equitable
- > merits of the substantive application
- > the consequences to the decision-maker of the delay
- > any other relevant matter.

For example, it may be reasonable to provide an EOT in circumstances such as: debilitating medical conditions; hospital admissions; delays in receiving the initial determination; and/or delays in obtaining medical or other information relevant to the reconsideration.

## Reviewable decision

Once a reconsideration of a determination is completed, that decision is a 'reviewable decision.'

Section 63 sets out the requirements for a reviewable decision to:

- > be in writing
- > provide the terms and reasons for the decision, and
- > include a statement that an application may be made to the Administrative Appeals Tribunal (Tribunal) where an employee or employer is not satisfied with the reviewable decision.

## Reconsiderations during AAT proceedings

A decision-maker may undertake a reconsideration of own motion at any time, including during the course of a Tribunal proceeding.

Where a Tribunal proceeding is set aside because a new reviewable decision has been made under subsection 62(1), the responsible authority<sup>9</sup> is responsible for reimbursing the claimant for costs reasonably incurred in relation to the Tribunal proceeding. Refer to **Attachment A** for an example.

## MORE INFORMATION

For more 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).

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6 Re Young and Telstra Corporation Limited (1993).

7 Reviewable decision means a decision made under subsection 38(4) or section 62. A reviewable decision can be reviewed by the Administrative Appeals Tribunal.

8 Re *Comcare v Willems* (1996).

9 Responsible authority, in relation to a determination, means:

(a) if the determination affected the Commonwealth or Commonwealth authority—Comcare

(b) if the determination affected a Commonwealth authority, or a corporation, that holds a licence—that authority or corporation.

## ATTACHMENT A—RECONSIDERATION OF OWN MOTION EXAMPLES

Claim actions	Section (SRC Act)	Reason for reconsideration of own motion
Change injury label/descriptor (diagnosis)	14	Changes the injury treatment and liability profile of an injury, as well as the potential duration of compensation paid or payable.
Change date of injury	14	Compensation is payable from an earlier or later date than first determined. <b>Note:</b> A decision regarding the date of injury is not a determination in itself but forms part of an initial (section 14) determination and can only be reviewed as part of a reconsideration of that determination. It is important to be aware that if review of the decision progresses to the Tribunal, all aspects of the initial determination are open to review (not just the date of injury).
Change of normal weekly earnings (NWE) or incapacity payments	8, 19, 20, 21, 21A	Changes the quantum or period of incapacity compensation paid or payable.
Revocation of a primary determination	14	Liability for injury should not have been accepted (or compensation paid) in respect of the injury.
Apportionment of death compensation	17	Changes the amount of compensation payable between dependants.
Tribunal application in relation to NWE figure and periods of incapacity paid	8, 19	A reconsideration of own motion can be used to review the NWE determination if there was a miscalculation or new evidence is provided. <b>Note:</b> If a Tribunal proceeding is set aside, costs incurred by the claimant are payable by the responsible authority (Comcare/licensee).