



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 38² or section 62 of the SRC Act. Second tier decision making arises from a request from an employee or Commonwealth employer³ 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

Two-tier decision making

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.

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.

Refusal or failure to make a decision

In *Semunigus v Minister for Immigration and Multicultural Affairs*⁶ the Federal Court found that to make a determination, a decision maker must reach a conclusion following some form of consideration or analysis. A clear and specific refusal to make a decision on an issue may be taken to be a determination and therefore reviewable, but failure to give any consideration or analysis of the facts is unlikely to be a determination.

Refusal to make a decision should be distinguished from a failure to make a decision. In *Kennedy v Comcare*⁷ the Federal Court (citing *Telstra Corporation Ltd v Kotevski*⁸ and *Irwin v Military Rehabilitation and Compensation Commission*⁹) 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. If a decision maker fails to address part of a claim that is before them, it may be found that an implicit decision has been made and that the AAT has jurisdiction to consider the claim.

Scope of the decision under review

In *Szabo v Comcare*¹⁰ the Full Federal Court acknowledged the AAT's finding that the notice of injury and claim for compensation were in respect of a specific aggravation of a pre-existing condition and not in respect of the 'nature and conditions' of the employee's employment. The Court upheld the AAT's finding that it did not have jurisdiction to consider further notices of injury and medical opinions supporting a 'nature and conditions' claim that were given after the claim for a specific aggravation was determined.

In *Ellison v Comcare*¹¹, the applicant raised a new medical condition at reconsideration following a determination of no present liability. The Federal Court found that the AAT had jurisdiction to consider liability in respect of a new injury raised at the reconsideration stage even if that injury had not been subject to a primary determination by Comcare. The Court was satisfied that a medical report provided at the reconsideration stage which identified a new or different injury was sufficient to constitute notice and a claim for compensation in respect of that new injury for the purpose of sections 53¹² and 54¹³ of the SRC Act.

GUIDANCE

Considerations when refusing to make a decision

Where a decision maker refuses to make a decision on a claim, the decision maker should provide clear and considered reasoning for that decision. A refusal to make a decision may be a determination for the purposes of section 60(1) of the SRC Act which can be subject to review, so long as the refusal complies with the formal requirements for a determination under section 61(1).¹⁴

6 *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (14 April 1999)

7 *Kennedy v Comcare* [2014] FCA 82 (18 February 2014)

8 *Telstra Corporation Ltd v Kotevski* [2013] FCA 27 (25 January 2013)

9 *Irwin v Military Rehabilitation and Compensation Commission* [2009] FCAFC 33 (20 March 2009)

10 *Szabo v Comcare* [2012] FCAFC 129 (7 September 2012)

11 *Ellison v Comcare* [2022] FCA 95 (14 February 2022)

12 Section 53 of the SRC Act requires an employee to provide notice to the relevant authority (the licensee for an employee employed by a licensee or Comcare for any other employee) as soon as practicable after they become aware of their injury

13 Section 54 of the SRC Act requires a written claim on an approved form and a medical certificate by a legally qualified medical practitioner (except where the claim is for medical treatment or work-related death) for a claim for compensation to be made

14 Section 61(1) sets out that as soon as practicable after a determining authority makes a determination, an employee shall receive a notice in writing setting out the terms of the determination and the reasons for the determination.

Considerations for additional injuries that are outside the scope of the claim

In most circumstances, 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.

The findings in *Ellison* highlight the importance of ensuring that the scope of the claim at the initial determination and reconsideration stage is clear. Where the available evidence suggests additional injuries may have a causal nexus with employment (but are outside the scope of the claim made or accepted), decision makers should invite employees to submit a further claim for compensation. Decision makers should not assume that an employee wants liability assessed and determined for a particular injury. Inviting an employee to make further claims in respect of additional injuries can be done at any time (including during the reconsideration process or AAT proceedings) and Comcare or the licensee would be required to determine the subsequent claim. Where the relevant authority has engaged with evidence in respect of additional injuries at first or second tier review, the AAT may have jurisdiction to make decisions in respect of those injuries even if they have not been the subject of a determination.

Example one: Employee seeks to reformulate claim

If section 14 liability has been claimed and determined on the basis of a frank injury and the employee later seeks to reformulate the claim as a 'disease', decision makers at second-tier review should decline to deal with that matter under the current claim and invite the employee to submit a new disease-based claim under section 54 of the SRC Act, and subsequently only deal with the new claim on that basis.

Alternatively, it is open to a decision maker to choose to deal with a new disease-based claim on its merits under the existing 'injury (other than a disease)' claim, however the AAT will have jurisdiction to review both claimed conditions/methods of causation in any subsequent application for review (per *Ellison*).

Where an applicant seeks to reformulate their claim to raise new conditions or substantially new issues of causation for the first time in proceedings before the AAT, Comcare and licensees are entitled to investigate those matters raised and may take either of the following actions:

- > seek an adjournment of the matter to allow new evidence to be considered/obtained, or
- > assert that the employee is required to submit a new claim for compensation in respect of any new conditions or substantially new issues of causation in accordance with sections 53 and 54 of the SRC Act and section 43 of the AAT Act.

Where AAT litigation is resolved by consent agreement, section 42C of the AAT Act¹⁵ requires the AAT to be satisfied that the agreement of the parties would be within the powers of the AAT. Therefore, such agreements cannot relate to matters that were not within the jurisdiction of the AAT initially (i.e. matters must have been the subject of a determination and reviewable decision by the relevant authority).

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

¹⁵ See section 42C of the AAT Act [here](#)