# JURISDICTION OF THE TRIBUNAL/SCOPE OF REVIEW

## *Safety, Rehabilitation and Compensation Act 1988 (Cth)*

## Hot Topics in Commonwealth Compensation

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## Introduction

1. The *Administrative Appeals Tribunal Act 1975 (Cth)* (**AAT Act**) created a regime of administrative merits review by establishing the Administrative Appeals Tribunal (**Tribunal**)[1] to re-exercise the functions of original decision makers.[2]

2. When considering applications, the Tribunal is subject to the same general constraints as the original decision-maker and should generally only address the same question that the original decision-maker was required to address.[3]

3. Those constraints have caused a considerable amount of judicial scrutiny in identifying the scope of the Tribunal's jurisdiction when reviewing decisions under the *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**).

4. This paper analyses the main cases that have dealt with this issue, including the recent case of *Ellison v Comcare* [2022] FCA 95.

## Three-tiered decision making process

5. The SRC Act establishes what is commonly referred to as a "three-tiered decision making process"[4] in determining an employee's entitlement to compensation benefits.

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[1] Section 5 of the AAT Act.
[2] Sections 25 and 43 of the AAT Act.
[3] See discussion in *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250; [2019] HCA 16 , at [14], [15], [51].
[4] *Lees v Comcare* [1999] FCA 753, [32]; (1999) 56 ALD 84, 91; *Comcare v Muir* [2016] FCA 346, [12].

6. After an employee makes a claim for compensation for an injury under section 54, Comcare (or a licensee) is obliged to issue a determination on whether compensation is payable for the claimed injury under section 14.[5]

7. An aggrieved employee can request a reconsideration of that determination.[6] Such a request requires Comcare or the licensee to reconsider the determination,[7] and to issue a reviewable decision either affirming, revoking or varying the determination in such a manner as the person thinks fit.[8]

8. If the employee is still aggrieved, section 64 of the SRC Act provides for the review of that reviewable decision by the Tribunal.[9]

9. The scope of the Tribunal's jurisdiction, by virtue of section 64 of the SRC Act and section 43(1) of the *Administrative Appeals Tribunal Act 1975 (Cth)* (**AAT Act**), is limited to reviewing the reviewable decision.

10. Pursuant to those sections, the powers and discretions that the Tribunal may exercise is limited to those that were conferred by the SRC Act on the determining authority for the purposes of reconsidering a determination under section 62 of the Act, not powers that may be exercised at large.[10]

11. The Tribunal will not be authorised on review of a reviewable decision to exercise any powers and discretions which would not have been available to the determining authority at the second tier decision-making stage, albeit that such powers and discretions might have been available to the determining authority at the first tier decision-making stage.[11]

## Old Position

### *Telstra v Barrow* (1994) 35 ALD 461

12. One of the first cases that addressed the Tribunal's jurisdiction for claims under the SRC Act was *Telstra Corporation Ltd v Barrow*[12].

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[5] Section 61(1A) of the SRC Act.
[6] Section 62(2)(a) of the SRC Act.
[7] Section 62(4) of the SRC Act.
[8] Section 62(5) of the SRC Act.
[9] Section 60 relevantly defines a "reviewable decision" as one made under section 62.
[10] *Lees, ibid,* [39].
[11] *Lees, ibid,* [39].
[12] (1994) 19 AAR 523; (1994) 35 ALD 461

13. In that case, a worker for Telstra was involved in a motor bike accident on the way home from work, injuring his neck. The worker lodged a claim under the SRC Act against Telstra for the neck injury, claiming that it was caused by the drilling activities he was involved in between 1983 and 1985.

14. By determination, Telstra accepted liability for an aggravation of a neck injury, however the worker requested review contending that his work at Telstra caused the entire condition. The reviewable decision affirmed the original determination and in turn the worker sought relief in the Tribunal.

15. About six weeks before the Tribunal hearing, the worker was examined by an orthopaedic surgeon at the behest of Telstra. The orthopaedic surgeon sent the worker off for a CT scan which showed a disc protrusion which was not originally prevalent on the x-rays. In light of this the orthopaedic surgeon was of the opinion that it was the motor bike accident that caused the injury. It was this opinion that was ultimately accepted by the Tribunal and accordingly a work related injury was found.

16. Telstra appealed the Tribunal's decision to the Federal Court and subsequently to the Full Federal Court contending that it did not have jurisdiction to consider whether the motor bike incident gave rise to a compensable injury, it could only determine whether the events between 1983 and 1985 did, as it was only the latter events which were originally claimed.

17. The Full Federal Court disagreed with Telstra's contention. It was held that the task for the decision maker was to determine whether the claimed injury was compensable under the SRC Act and they had the discretion to investigate beyond the facts articulated by the worker when assessing that entitlement. Therefore, that discretion equally extended to the Tribunal. The critical paragraph is at [32]:

> *"The respondent was seeking compensation for an injury caused him in the course of his employment or, as it turned out before the Tribunal, on his periodic journey. If contrary to the fact, the delegate had been aware of the new medical evidence at the time he made his decision, it would seem to have been an overtechnical and pointless exercise to have compelled the applicant in respect of the same injury to present a new claim for compensation. That is particularly so bearing in mind that the statute is an employees' compensation statute and contains the provisions in paras 69(a) and 72(a) to which his Honour referred. Section 43 of the Administrative Appeals Tribunal Act makes it clear that, for the purpose of reviewing a decision, the Tribunal may*

> *exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision. It is to make a decision in writing and that decision may set aside the decision under review and make a decision in substitution for the decision so set aside. That is what it did in the present case. It had the powers of the delegate and it acted accordingly. It was empowered to make a determination in substitution for the decision appealed from. We are satisfied that in those circumstances it had jurisdiction to take the course which it did."*

### ***Crozier and Comcare Australia*** **(1995) 37 ALD 550**

18. The next significant case that dealt with jurisdiction of the Tribunal for claims under the SRC Act was *Crozier and Comcare Australia*.[13]

19. In that case, Mr Crozier claimed compensation for a neck injury, and liability was rejected for the injury under section 14 of the SRC Act. Mr Crozier sought review through the various channels, making its way to the Tribunal. Mr Crozier raised a claim for permanent impairment under section 24 for the first time in the Tribunal proceedings, and Deputy President McDonald was asked to make a preliminary ruling on the Tribunal's jurisdiction to consider the permanent impairment claim.

20. In deciding that it does, Deputy President McDonald stated:[14]

> *"There is no requirement on a person claiming compensation to nominate a head of compensation. As the provisions outlined earlier in this Decision demonstrate, and as will be expected with beneficial legislation of this sort, once the claim is made it is the duty of the determining authority to assess it in light of the evidence available and if compensation is to be granted, to reach a decision as to the most appropriate head of compensation which would be applicable. The Tribunal must carry out the same exercise on the material before it and the Tribunal is not bound to consider only the heads of compensation nominated by the original decision maker or the review officer."*

[13] [1995] AATA 134; (1995) 21 AAR 398; (1995) 37 ALD 550
[14] Paragraph [5].

## *Revisiting the Position*

### *Lees v Comcare* (1999) 56 ALD 84

21. Comcare challenged the correctness of *Crozier* in the Full Federal Court in *Lees v Comcare*[15]*.* That decision was a joint one affecting two workers' rights, Ms Lees and Mr O'Donoghue.

22. In Ms Lees' case, she applied to the Tribunal for review of Comcare's refusal to pay her taxi fares to attend medical treatment under section 16 of the SRC Act. In Mr O'Donoghue's case, he applied to the Tribunal for review of Comcare's decision to deny liability for his claimed condition of major depression altogether under section 14 of the SRC Act.

23. In both these cases the workers asked the Tribunal to consider their respective entitlement to permanent impairment compensation under section 24 despite not making such requests at the initial determination and reconsideration levels.

24. The Full Court held that in both these cases the Tribunal did not have jurisdiction to consider the permanent impairment issue. The Court held that the Tribunal can only review reviewable decisions and did not have powers that can be exercised at large. The Tribunal does not have the authority to exercise any powers which would not have been available to the determining authority at the second tier decision-making stage.[16]

25. The critical point in the outcome of *Lees* was the fact that the workers did not ask Comcare to consider permanent impairment at the decision making stages. The result would have been entirely different if they did, even if Comcare didn't address them in the decisions.

### *Re Paul Fuad and Telstra Corporation Limited* (2004) 39 AAR 496

26. The principal in *Lees* was confirmed by Justice Downes the *Re Paul Fuad and Telstra Corporation Limited*[17] with a slight extension.

27. In *Fuad's* case, the worker had an accepted injury under the SRC Act, however Telstra subsequently determined that it *"ceased to be liable to pay*

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[15] (1999) 56 ALD 84
[16] *Lees, ibid,* [39].
[17] (2004) 39 AAR 496

*compensation…on and from 4 May 2004."* As Telstra had ceased liability from that date, it refused to deal with the worker's subsequent claims for incapacity payments.

28. The worker appealed the decision ceasing liability to the Tribunal and was successful. The Tribunal found that *"an employee can never be deprived of his entitlement to claim further compensation relating to the established injury if the injury again causes some incapacity."*

29. The second issue that arose in that case was whether the Tribunal had jurisdiction to consider whether the worker had an entitlement to the claimed incapacity payments, given that the decision maker's decision was limited to addressing liability to pay compensation and did not address an entitlement to incapacity payments. In deciding that the Tribunal did have jurisdiction, Downes J held:

> *"...all matters put before the decision-maker as part of a claim under the Act are before this Tribunal for review when an application for review is made, even though the decision may not address them in any particular way."*

## *Progressive and evolving decision making*

### ***Telstra Corporation Limited v Hannaford*** **(2006) 90 ALD 263**

30. The next significant case was the Full Federal Court decision of *Telstra Corporation Limited v Hannaford.*[18]

31. In that case, the worker lodged a claim under section 14 of the SRC Act for Ross River fever. Telstra initially accepted the claim and paid medical expenses and weekly payments for incapacity however subsequently determined that it was no longer liable to pay compensation for medical expenses or incapacity.

32. In the meantime, the worker made a claim for compensation for permanent impairment which was denied. The worker sought review by the Tribunal of both reconsideration decisions.

33. In the course of the Tribunal application, it became apparent from further testing found in the worker's medical records that the positive IgM antibody, essential for a diagnosis of Ross River fever, was not present in Mr Hannaford's serology.

[18] (2006) 90 ALD 263

34. The Tribunal accordingly affirmed Telstra's decisions to deny the worker's entitlement to medical expenses, incapacity and permanent impairment for Ross River Fever, because *"[w]hatever ailed the applicant in February/March 2002 [the time when he had claimed the infection] I am satisfied that on the basis of the blood tests performed it was not Ross River fever."*

35. This decision was the subject of single Judge and Full Federal Court appeals. The issue in both appeals was whether the Tribunal had jurisdiction to consider whether the worker suffered from a work-related condition when the decision accepting liability for that condition was not appealed to the Tribunal.

36. The Full Federal Court held that the Tribunal could not disturb the determination accepting liability. However, the Tribunal, when deciding upon the issues that are before it, can make findings of fact that are inconsistent with that liability decision. Therefore, in this case, the Court found that the Tribunal, when deciding whether the worker had an entitlement to permanent impairment for Ross River Fever, could decide that he did not because he never suffered from that condition in the first place.

37. The Full Federal Court highlighted the flexible approach that is to be adopted in determining claims under the SRC Act. It was held:[19]

> *"The statutory scheme allows for progressive and evolving decision-making giving effect to the provisions of ongoing review of relief or entitlements in the nature of course of workers compensation, being review which allows for adjustment or change in the light of events and circumstances which may subsequently happen."*

## ***Broad and generous interpretation of claims***

### ***Abrahams v Comcare* (2006) 93 ALD 147**

38. The High Court's decision in *Canute*[20] highlighted the centrality of compensation for *"injury"* under the SRC Act, as opposed to *"workplace accident"*. Following that decision, a series of Tribunal decisions on jurisdiction followed in circumstances where the nature of the injury initially claimed had evolved by the time the matter had reached the Tribunal.

[19] Paragraph [57].
[20] (2006) 226 CLR 535

39. This was the issue in *Abrahams v Comcare*. [21] In that case, the worker was employed by Centrelink in a clerical capacity since 1994. In 2001 he lodged a claim for a right arm condition, which was accepted by Comcare for a closed period. He subsequently sought further medical treatment for his right arm in mid-2003 and was diagnosed as having carpal tunnel syndrome. He lodged a new claim and described the injury as carpal tunnel in the claim form. Comcare rejected liability by determination and reviewable decision. The worker appealed that decision to the Tribunal.

40. As the worker's case was further investigated for the purposes of the Tribunal hearing, more medical evidence supported the contention that the worker's right arm condition was not carpal tunnel but was some physical injury, of an aetiology difficult to establish, or had genuine psychosomatic pain arising from an initial physical injury.

41. The Tribunal Member at the Tribunal hearing found that it only had jurisdiction to hear whether the worker was suffering from carpal tunnel and could not consider these alternative diagnoses. The worker appealed this decision to the Federal Court.

42. Madgwick J allowed the appeal and held that it would have been open to the Tribunal to consider the injury more broadly designated than as right carpal tunnel syndrome, or to change it from that diagnosis, provided that the *"same symptoms, disability and timeframe were still being asserted"*.

43. His Honour put forward the following legal propositions in relation to this issue:[22]

> 1. *In construing a document purporting to be a notice of injury under the Act, a broad, generous and practical interpretation should be made, consistent with both the beneficial purposes of the Act and the likelihood that laypeople of differing levels of education, differing levels of medical advice and differing levels of legal advice (indeed in most cases they would not have any) will be giving the notice.*
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> 2. *In deciding what injury it is, as to which a claimant has given notice, the purposes of giving notice must be borne in mind. These are to enable Comcare, with the aid of the relevant employing agency, to determine whether the claim should be met.*

[21] (2006) 93 ALD 147
[22] Paragraph [18].

3. *The powers of an original decision-maker would extend to regarding informal notice as having been given in amplification of a notice formally given.*

4. *Those powers would further extend to enabling a consideration of a claim better explaining, or better justifying, a claim in respect of an injury in respect of which notice had been fairly given.*

5. *There is not always a bright dividing line available to assist in the decision whether powers of the kinds mentioned are being exercised in aid of a better understanding of a claim made in respect of an injury of which notice has been given, or whether the changed notice is sufficiently fundamental as to indicate that a different injury is being asserted, which will require a different decision from a decision in respect of the originally claimed injury under consideration. In determining that matter, considerations of the purpose of giving notice of injury, and more generally of enabling the decision-maker to have a fair opportunity to investigate the claim properly, are paramount.*

44. His Honour was careful to draw the distinction between investigating new possible diagnoses in order to fully investigate the nature of the claim subject to review and investigating an entirely different condition altogether. He confirmed that the latter was not reviewable by the Tribunal.

***Buhr v Comcare* [2007] FCA 575**

45. The Federal Court was asked to consider a similar issue to *Abrahams* in *Buhr v Comcare*[23].

46. In that case, the worker was employed by various Commonwealth departments from 1987 until his medical incapacity on or around 1990. Through the course of his employment, he lodged claims for back and neck injuries sustained when travelling by train on the way home from work, and a subsequent psychological injury claim claimed to have arisen due to the *"attitude of Public service towards me".* Comcare accepted liability for the physical injuries as well as an *"adjustment disorder with features of anxiety and depression"*.

47. In 2003 Comcare arranged for the worker to be periodically medically reviewed by Dr Brown, Psychiatrist, who opined that the worker was no longer suffering from an

[23] [2007] FCA 575

adjustment disorder that was work related but was suffering from a constitutional *"delusional disorder"*.

48. The diagnosis of a delusional disorder was then supported by the worker's own psychiatrist, however he related it to events that had occurred back when the worker was employed with one of the Commonwealth Departments.

49. Following receipt of these reports, Comcare determined that the worker was not presently entitled to medical and incapacity benefits for his adjustment disorder, and that the delusional disorder was not a compensable injury under the SRC Act. That decision was affirmed by both reviewable decision and in the Tribunal.

50. The worker appealed to the Federal Court arguing that the Tribunal exceeded its jurisdiction by deciding that the delusional disorder was not work related. It was argued by the worker that because the worker did not lodge a formal claim for the delusional disorder, it could not be considered by the initial decision maker, the review delegate or the Tribunal.

51. The Federal Court dismissed the appeal and highlighted section 54(5) of the SRC Act which states that strict compliance with lodging a claim under the SRC Act is not required in order for a valid claim to be made, as long as *"substantial compliance"* was met.

52. Edmonds J agreed with the Tribunal finding[24] that the medical reports available to Comcare referring to the diagnosis of delusional disorder and its cause was sufficient to meet the requirements of a valid claim and could therefore reach a decision on it.

***Australian Postal Corporation v Sellick* (2008) 101 ALD 245**

53. In *Australian Postal Corporation v Sellick,*[25] the worker lodged a claim for '*pain in right shoulder*' which was initially accepted by Australia Post, however upon review of a medical report it was subsequently determined that the worker's ongoing symptoms were '*more than likely to be the result of your pre-accident condition in the form of degenerative spinal disease*' and ceased his entitlement.

54. The Tribunal agreed with Australia Post's decisions and found that the worker no longer suffered from a compensable right shoulder condition and that his ongoing

[24] Paragraphs [41], [46].
[25] (2008) 101 ALD 245

symptoms were referred pain from a thoracic spine condition. However, the Tribunal went further and found that the symptoms resultant from that spine condition were caused by his employment at Australia Post and therefore compensable.

55. Australia Post appealed the Tribunal decision to the Federal Court, partly on the contention that the Tribunal had no jurisdiction to consider whether the back condition was a compensable condition under the Act. Bennett J agreed with this contention on the basis that the worker's back condition was not the subject of a claim, determination and reviewable decision and therefore could not be reviewed by the Tribunal.

56. When the matter was remitted back to the Tribunal, a subsequent decision was made without considering the spine condition as directed by Bennett J. The worker then appealed that subsequent Tribunal decision to the Full Federal Court[26].

57. One of the contentions made by Counsel for the worker in the Full Federal Court appeal was that Bennett J's decision was wrong in confining the Tribunal's jurisdiction to the shoulder complaint. The Full Federal Court held that they could not hear that argument because the worker did not appeal Bennett J's decision.

58. Nonetheless, the Court still made the following obiter remarks:[27]

> *"There is something to be said for the proposition that the notice of injury initially given by the applicant, namely "pain in the right shoulder" was, by the subsequent presentation of various medical certificates and medical reports, sufficient to have constituted a claim that the pain in his right shoulder flowed either from soft tissue injury in the shoulder, or from aggravation of a degenerative spinal condition, or from chronic sprained interspinous ligament, or from a combination of those conditions: see eg the remarks of Madgwick J in Abrahams v Comcare, and in Telstra Corporation Ltd v Hannaford. They were matters addressed in the first AAT decision. However, that is not what was decided by Bennett J in the decision referred to in [3] above, and the AAT was bound to give effect to her Honour's conclusions, in the absence of any appeal from her Honour's orders"*

59. Buchanan J made the following further comments about whether the Tribunal had jurisdiction to review a claim relating to a hernia suffered as a result of lifting bins of

[26] *Sellick v Australian Postal Corporation* [2009] FCAFC 146
[27] At paragraph [7].

mail, in circumstances where the notice of injury referred only to the effects of walking:[28]

> *"There may be a real question whether the [Tribunal] is jurisdictionally confined by the particular description given by an employee of the cause of an otherwise compensable injury. Although it is necessary that an injury, in order to properly found a claim for compensation, arise out of or in the course of employment it may not be necessary, at least in every case, that absolute precision be supplied if it is otherwise clear that a sufficient connection with employment exists. I would not, without further consideration, endorse a suggestion that a claim that a medical condition was based on walking would exclude from consideration, in any jurisdictional sense, the possibility that the true explanation, supported by medical evidence, was that it was caused by lifting. However, it is not necessary to give further attention to that issue in the present case."*

## *Claiming multiple benefits*

### ***Irwin v Military Rehabilitation & Compensation Commission* (2009) 174 FCR 574**

60. In *Irwin v Military Rehabilitation & Compensation Commission*,[29] the Full Court gave reasons for a decision by consent, addressing a jurisdictional issue under the *Military Rehabilitation and Compensation Act 2004* (Cth). The issue was whether a claim could be made that simultaneously sought acceptance of liability and a payment of compensation. The Full Court held that the decision-maker could consider such a joint claim:[30]

> *"That finding [rejection of liability] made it unnecessary for it to deal with the compensation aspect of the claim. This did not mean that the compensation determination could not have been made contemporaneously had the Commission made a positive finding on the liability issue. Indeed, in such circumstances, it would have been required, by s 333, to do so. It can, therefore, be said that the rejection determination involved both an explicit rejection of the liability claim and an implicit rejection of the compensation claim. This conjoint determination was reviewable."*

[28] At paragraph [23].
[29] [2009] FCAFC 33; (2009) 174 FCR 574
[30] Paragraph [24].

## *Identifying the scope of the claim*

### *Re Durham and TNT Australia Pty Ltd* (2011) 124 ALD 136

61. Jagot J, sitting as a presidential member of the Tribunal, had to consider another jurisdictional issue in *Re Durham and TNT Australia Pty Ltd*.[31] In that case, Mr Durham's notice of injury provided to TNT described the "injury and body part" simply as "right knee". In the field asking Mr Durham to "describe how the injury happened" he recorded, "wear and tear over 26 years as a [pick-up and delivery] driver". The date of the injury was reported as "unknown". In the actual claim for compensation, Mr Durham's "injury or illness" was described as "knee right – total replacement arthroplasty". In response to the question, "What were you doing at the time you were injured or contracted your illness?" Mr Durham wrote, "getting in and out of van".

62. TNT treated the compensation claim as being one for osteoarthritis and rejected the claim on the basis that this condition was pre-existing, and unrelated to his employment with TNT. In the Tribunal, Mr Durham argued that the injury was, in fact, an aggravation of his underlying arthritis, and the issue was whether Mr Durham in fact claimed an aggravation, as opposed to the arthritis condition itself.

63. After analysing the principles, Jagot J stated:[32]

> *"It will be apparent from the discussion above that, in conducting a review under s 64 of the Act, the Tribunal's jurisdiction does not depend on the respondent's characterisation of the applicant's claim. Rather, the Tribunal must assess for itself the true scope of the claim and is empowered to conduct its review on that basis.*
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> *This is not to say that the jurisdictional preconditions set out in the Act (and identified by the respondent in its submissions) are dispensed with where the Tribunal's characterisation of an applicant's claim differs from that of the respondent. In such a case, it must be understood that the claim itself – interpretive issues aside – has been the subject of a determination, an application for reconsideration, a reviewable decision and an application to the Tribunal, and that the Tribunal's jurisdiction under s 64 has therefore been enlivened.*
>
> *The result is that the question whether the Tribunal has jurisdiction in the present case is to be resolved by reference to the scope of Mr Durham's claim for compensation."*

[31] (2011) 124 ALD 136; [2011] AATA 802.
[32] Paragraphs [51] – [53].

64. Her Honour concluded that, "on a broad, generous and practical interpretation"[33] Mr Durham's claim was properly construed as relating to a progressive aggravation of an existing injury.[34]

***Szabo v Comcare* (2012) 58 AAR 152**

65. In *Szabo v Comcare*,[35] the Tribunal decided that it had no jurisdiction to consider a claim that the employee's back injury was due to the nature and conditions of his employment.

66. Consistently with *Durham*, the Tribunal, Primary Judge and Full Court looked at the material to determine what the true scope of the claim was, not how the decision maker characterised it.

67. The primary judge held that the Tribunal did not err in law in making this decision and the Full Court dismissed the appeal, Emmett and Greenwood JJ holding[36] that Mr Szabo's claim was for an injury arising from a discrete incident, and it was not possible to find in the documents submitted by Mr Szabo to Comcare a claim in respect of some injury or disease arising out of the nature and conditions of his employment.

68. Their Honours held[37] that *"until such a claim is made, and has been determined by Comcare, there can be no decision that could be the subject of review by the Tribunal"*.

## *Multiple benefit claims revisited*

***Telstra Corporation Ltd v Kotevski* (2013) 209 FCR 558**

69. In *Telstra Corporation Ltd v Kotevski*,[38] Mr Kotevski, a former employee of Telstra, submitted a compensation claim for hearing loss, and in that claim was a report from an audiologist supporting a need for hearing aids, and a quote for the cost of those hearing aids. Telstra accepted liability under section 14 of the SRC Act for hearing loss but did not address the report and quote for hearing aids.

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[33] Paragraph [60].
[34] Paragraph [59].
[35] (2012) 58 AAR 152; [2012] FCAFC 129
[36] At [41].
[37] At [42].
[38] [2013] FCA 27; (2013) 209 FCR 558

70. Mr Kotevski subsequently claimed permanent impairment compensation under section 24 for the hearing loss. Telstra issued a determination awarding only some amount for permanent impairment. Mr Kotevski sought reconsideration of that determination and, upon affirmation on reconsideration, Mr Kotevski took that reconsideration to the Tribunal.

71. At the Tribunal level, the Deputy President found that the claim for hearing aids was clearly before the decision maker at the time of making the section 14 determination and was overlooked. It was further found that the failure continued when the permanent impairment claim was determined, and thus the Tribunal was seized of jurisdiction to consider the hearing aids claim. On appeal, Rares J held:[39]

> *"Mr Kotevski's claims were not complicated, once Telstra accepted liability and worked out the apportionment of the compensation payable for permanent impairment under ss 24 and 124 of the SRC Act. No decision-maker acting according to law could have ignored the concurring opinions of Dr Howison and Dr Gillam that Mr Kotevski should try hearing aids. But to all appearances, both decision-makers seemed to have made a decision not to pay compensation for the supply of hearing aids under s 16 as part of the original and reconsideration decisions. Apart from those decisions, Telstra remained silent on that topic for several months after receiving Mr Kotevski's solicitors' letter of 2 August 2011. Of course, the change in the estimated cost of the hearing aids may have been a matter that Telstra needed to address. Had it done so, sensible, efficient administrative decisions should have been made, if that were the case, to inform Mr Kotevski that Telstra was considering the s 16 claim.*
>
> *I am of opinion that the s 16 claim was before both Ms Kelly and Ms Blanchard and that each of them implicitly rejected it: Irwin 174 FCR at 580 [26]. Thus, the Tribunal did have jurisdiction to determine the s 16 claim. The conclusion of implicit rejection in that case was one of fact, as is mine. There is no question that under the SRC Act different determinations can be, and often are, made for claims under provisions such as ss 14, 24 and 16. That is because such claims ordinarily are made sequentially not, as here, contemporaneously: see Lees 56 ALD at 91 [31]-[32]. Here, once Telstra had made its decision to accept liability under s 14 on 4 May 2011, Mr Kotevski had a straightforward claim for compensation for both permanent impairment and the supply of hearing aids to assist him in dealing with that impairment that was at all times before Telstra for determination under the SRC Act."*

[39] Paragraphs [51] – [52].

***Comcare v Lofts* (2013) 217 FCR 220**

72. The Applicant tried to run a similar jurisdiction argument to *Kotevski* in *Comcare v Lofts*.[40] In that case, Comcare had accepted liability under section 14 of the SRC Act with respect to a number of different injuries suffered by Ms Lofts. She subsequently made a claim for compensation for 'dysphagia' under section 14 of the SRC Act.

73. Comcare denied liability for that condition, and that rejection was taken to the Tribunal. During the Tribunal's review, Ms Lofts asked the Tribunal to determine whether Comcare were also liable to pay medical expenses in relation to the dysphagia condition under section 16 of the SRC Act.

74. The Tribunal determined that, because Ms Lofts marked in her claim form that she was undertaking pharmaceuticals and counselling, and that there was a correspondence between Comcare and Peninsula Private Hospital about a gastroscopy and colonoscopy procedure, that was sufficient for a claim for medical treatment under section 16, and thus the Tribunal had jurisdiction to consider it, notwithstanding Comcare did not consider it in the primary decisions.

75. On appeal, Mortimer J held that there was no jurisdiction to consider a section 16 claim:[41]

> *"…s 16 operates on a claim for specific costs of medical treatment, whether in relation to the past or the future. The specificity is integral to the operation of the provision because of the need for Comcare (or the Tribunal on review) to determine whether the treatment costs are "reasonable" and whether payment is "appropriate". That determination cannot be made if particular costs are not claimed.*
>
> *…the description of matters being "put before" the decision-maker can only be useful when it reflects the scheme of the SRC Act — that is, the requirements of ss 54, 61 and 62, and the limits and qualifications imposed by other compensation provisions such as, for example, ss 16, 19 or 24. Subject to what is outlined in paragraphs [82] to [84] below, it was not possible, consistently with the ambit of s 16 of the SRC Act, for the kinds of matters identified by the Tribunal in its reasons to be the subject of a claim, or a decision, under s 16. No amounts were claimed on which an assessment of reasonableness could be undertaken. Nor did Comcare purport to make any such decision, or to decline to make any decision under s 16. The debate about the operation of s 16(2) does not affect this conclusion."*

[40] [2013] FCA 1197; (2013) 217 FCR 220
[41] Paragraphs [74], [79].

## *Fair opportunity for the decision maker*

### *Kennedy v Comcare* [2014] FCA 82

76. In *Kennedy v* Comcare,[42] Ms Kennedy, a customer service advisor in a Centrelink call centre, lodged a claim for a psychiatric injury due to "ongoing harassment/bullying". In support of her claim, she submitted a lengthy statement "regarding harassment/bullying during [her] employment at the relevant call centre between 2005 and 2010."

77. The Tribunal dealt with the claim on the basis that Ms Kennedy suffered injuries as a result of events that occurred in 2007 and 2010. The Tribunal found that both those injuries were a result of reasonable administrative action taken in a reasonable manner, and thus excluded from compensation under the SRC Act. Ms Kennedy appealed, claiming that the Tribunal failed to deal with an aggravation that occurred in the latter half of 2019. One of the issues on appeal was whether the Tribunal had jurisdiction to deal with that claim.

78. In finding that it did, Katzmann J held:[43]

> *"In a case of psychiatric injury, however, it is not always easy to discern the nature of a claim. Neither the original decision-maker nor the review officer referred to a claim for compensation for injury in 2009. But the tribunal's jurisdiction does not depend on how Comcare characterises the claim. To the contrary, "the tribunal must assess for itself the true scope of the claim" and conduct the review on that basis: Re Durham and TNT Australia Pty Ltd (2011) 124 ALD 136; [2011] AATA 802 ("Durham") (Jagot J, sitting as a presidential member of the tribunal) at [51]. The question of whether the tribunal lacked jurisdiction to deal with the submission depends on the scope of the applicant's claim for compensation: Durham at [53]"*

79. Again, on a "a broad, generous and practical interpretation" of the statement provided as part of the claim, Her Honour was satisfied that Ms Kennedy had given notice to Comcare of an injury in 2009 and had made a claim for it.

### *Comcare v Muir* [2016] FCA 346

80. In *Comcare v Muir*,[44] Ms Muir lodged a claim for compensation in relation to a condition of anxiety, depression and stress said to have arisen from an employment

[42] [2014] FCA 82.
[43] Paragraph [45].
[44] [216] FCA 346.

incident on 23 October 2013. The claim was rejected and was eventually put before the Tribunal for review.

81. In the Tribunal, Ms Muir sought to rely on a series of incidents that occurred between 2010 and 2013 in addition to the specific incident on 23 October 2013. The Tribunal found that the earlier incidents caused an injury and accepted liability on that basis.

82. On appeal, the Court held that the Tribunal was in error, because the applicant's claim and Comcare's decisions about that claim were based only on the injury said to have been suffered on 23 October 2013 (not an injury suffered earlier in 2010/2011).[45] Flick J noted, when construing the true scope of the claim:[46]

> *"…is the extent to which the description of an injury may later confine the jurisdiction entrusted to the Tribunal for review. Not surprisingly, some flexibility in the formulation of a claim has been permitted. Frequently, many claims for compensation have been drafted by claimants without the benefit of legal assistance, and in many cases a medical condition may change and evolve over time."*

83. However, Flick J noted the following:[47]

> *"No unnecessary emphasis should be placed, for example, upon the answers provided in a claim form. And the terms of emails forwarded on behalf of a claimant should not be parsed and analysed with a view to limiting what is otherwise a more generally-expressed claim for compensation. A practical and common-sense approach, even a "generous" approach, should be adopted in reaching an informed decision regarding the nature of the claim sought to be resolved. Even though a claim may be generally expressed, it must nevertheless properly and adequately inform Comcare such that Comcare can make an informed decision on whether the claim as made should be met: cf. Abrahams [2006] FCA 1829 at [18], (2006) 93 ALD at 152. Nor does it promote good administration and the proper resolution of claims for compensation to encourage a course whereby claimants may opportunistically (for example) seek to re-characterise a claim as one other than that in fact made in order to avoid the consequence of findings already made, or which may be made, that would exclude any entitlement to compensation (such as findings that an injury resulted from "reasonable administrative action taken in a reasonable manner")."*

[45] Paragraphs [28] – [29].
[46] Paragraph [13]
[47] Paragraph [30].

***Mununggurr v Comcare* [2020] FCA 1786**

84. In *Mununggurr v Comcare*,[48] Ms Mununggurr claimed compensation for a psychiatric condition she described as *"Depression – reactive"* arising out of an incident that occurred on 12 April 2014. Comcare accepted liability under section 14 for "Post Traumatic Stress Disorder" (PSTD).

85. Ms Mununggurr subsequently claimed permanent impairment compensation for the accepted injury. As part of her permanent impairment claim, she relied on a report from psychiatrist Dr Estensen, who diagnosed both PTSD and Major Depressive Disorder (MDD). Comcare denied the claim, labelling the condition as "adjustment reaction with mixed emotional features". Ms Mununggurr took the matter to the Tribunal and one of the issues in the Tribunal, and on appeal, was whether the Tribunal could consider a permanent impairment claim for both the PTSD and MDD.

86. Collier J was not persuaded that a permanent impairment claim was made of MDD, and thus the Tribunal did not have jurisdiction to consider it. Her Honour made the following general observations:

> *"First, it is important to keep in mind that the Tribunal is not exercising its powers* ***at large****. As the Full Court pointed out in Lees, the powers of the Tribunal are powers for the purpose of reviewing the reviewable decision. The starting point for any exercise of power by the Tribunal is accordingly the reviewable decision, in this case that of the Senior Review Officer at Comcare. In this respect I also note the Tribunal's statement at [19] of its reasons that the Tribunal was notified – for the first time – of the applicant's intention to advance an argument for permanent impairment compensation under ss 24 and 27 of the SRC Act* ***arising from an MDD 'injury'*** *and to ventilate the jurisdictional issue during closing submissions after all of the evidence was closed. The Tribunal clearly took the view, on the basis of the material before it, that an MDD "injury" had never been raised by the applicant before Comcare.*
>
> *Second, while claims for compensation for an injury, and in respect of injuries resulting in permanent impairment, under the SRC Act are often commenced by non-expert applications by an injured lay person, such that the nature of the injury need not be precisely described at the commencement of the process (and indeed may change over time), nonetheless what is clear from both the statutory framework and the authorities is that:*

[48] [2020] FCA 1786

- *The **injury** the claimant identifies is key to any claim for permanent impairment in respect of that injury under s 24 (and s 27) of the SRC Act.*

- *Because of the potential imprecision of the description of the injury by the claimant in the claim form, the manner in which the claim was agitated before Comcare, and the material relied on by the claimant in the course of the claims process, may be important in determining the nature of the injury identified by the claimant before the decision maker, and subsequently before the Tribunal.*

- *The acceptance or otherwise by Comcare of a claim for compensation in respect of an injury does not determine the characterisation or parameters of the injury in circumstances where the claimant seeks review of Comcare's decision in the Tribunal. However it is likely that a determination by Comcare that it is liable for compensation for an injury reflects the manner in which the claimant has pressed the claim for compensation, and the manner in which the claimant identified the relevant injury."*

***Ellison v Comcare* [2022] FCA 95**

87. The most recent decision on jurisdiction was *Ellison v Comcare*.[49] In that case, Mr Ellison was employed by the Australian Customs Service (Customs). On 21 April 2009 he felt pain in his lower back during a training exercise in the course of his employment. He subsequently lodged a claim, identifying the specific incident on 21 April 2009 as the cause of his injury.

88. Comcare accepted liability under section 14 of the SRC Act for a "lumbar sprain" and Mr Ellison was paid benefits accordingly.

89. In October 2017 Comcare arranged for Mr Ellison to be medically examined by Dr Philip Haynes, who opined that Mr Ellison's incapacity was not contributed to by his employment with Customs, but rather was related to degenerative changes in the lumbar spine. Comcare gave Mr Ellison notice of Comcare's intention to determine that it was no longer liable to pay him compensation and gave him an opportunity to provide further medical evidence to support his claim.

90. Mr Ellison provided a report of Dr Sewell to Comcare in which he opined that "lumbar sprain" was not an appropriate description of the condition from which Mr Ellison suffered. He agreed with Dr Haynes' opinion that Mr Ellison was suffering from disc changes at the L4/L5 and L5/S1 levels of the lumbar region consistent with

[49] [2022] FCA 95.

a degenerative process, but strongly disagreed that those degenerative changes were due to ageing processes. In his opinion the degenerative changes in Mr Ellison's spine were related to the incident which occurred on 21 April 2009, and also his duties as a Marine Tactical Officer for a period of seven years which included sitting on a moving boat, bouncing up and down in waves for up to 8 to 12 hours per day, lifting heavy objects in confined spaces, moving up and down confined ladders, boarding moving vessels, crawling through fishing boats, and lifting heavy objects off fishing boats and other boats that were intercepted in the course of his work.

91. Comcare then determined to cease compensation payments on and from that date, deciding that Mr Ellison's low back condition at that time was related to pre-existent degenerative changes consistent with ageing and was not related to the "lumbar sprain" injury that he sustained in the course of his employment on 21 April 2009. Mr Ellison took that matter to the Tribunal, and the Tribunal found that it did not have jurisdiction to consider whether the Applicant was entitled to compensation for a lower back injury caused by his physically demanding work between 2002 and 2009, and was limited to reviewing ongoing entitlement to compensation for the isolated incident that occurred on 21 April 2009.

92. Murphy J upheld the appeal and found that the Tribunal did have jurisdiction. His Honour provided the following neat summary of the principles to apply:[50]

> *(a) a broad, generous and practical approach is appropriate in construing a document purporting to be a notice of injury under the SRC Act (Abrahams at [18(1)]);*
>
> *(b) notice is taken to have been given even if the notice fails to comply with the requirements under s 53(1) where the failure is caused by ignorance, mistake or any other reasonable cause, or where the relevant authority would not be prejudiced if the notice is treated as sufficient: s 53(3);*
>
> *(c) strict compliance with the requirements of the prescribed claim form under s 54 is not required; substantial compliance is sufficient: s 54(5);*
>
> *(d) the notice of injury requirements by the legislation are to be construed beneficially for claimants: Abrahams at [18(1)] and Sellick at [23];*

[50] Paragraph [141].

*(e) medical diagnoses as to the nature and aetiology of an injury commonly evolve over time: Abrahams at [21];*

*(f) the statutory scheme allows for "progressive and evolving decision-making" in the light of subsequent events and circumstances: Hannaford at [57];*

*(g) the purpose of requiring notice of injury is so that Comcare is appropriately informed as to "the nature of an injury or ailment and its connection with the employment": Frosch at [8]; and*

*(h) the purpose of requiring notice and of enabling the decision-maker to have a fair opportunity to properly investigate the claim are paramount considerations when determining whether notice of injury has been given under the SRC Act: Abrahams at [18(5)].*

93. His Honour concluded:[51]

> *"The paramount consideration is whether Comcare was appropriately informed as to the nature of the claimed injury and its connection with the employment; and whether it was provided a fair opportunity to properly investigate that claim. As I have said, the materials before Comcare in the reconsideration application raised that claim. Comcare was on notice of it and had ample opportunity to properly investigate it. That it had notice of the claim is plain when one considers that, after Comcare gave notice of its intention to cease compensation payments and provided Mr Ellison with an opportunity to provide further medical evidence, Dr Sewell provided his December 2017 report to Comcare. That report expressly informed Comcare of Dr Sewell's opinion that Mr Ellison was incapacitated for work by reason of spinal degeneration in his low back which was related both to the 2009 Workplace Incident and to his employment with Customs from 2002 to 2009. That report was plainly significant to the reconsideration application; and the review officer specifically referred to and briefly summarised it. That broader claim had been before Comcare in the reconsideration application, and the Tribunal had jurisdiction to consider and decide it."*

## Conclusion

94. Based on the above authorities, the following principles can be applied in determining the Tribunal's jurisdiction:

[51] Paragraph [143].

(a) The scope of the Tribunal's jurisdiction, by virtue of section 64 of the SRC Act and the powers and discretions that the Tribunal may exercise, is limited to those that were conferred by the SRC Act on the determining authority for the purposes of reconsidering a determination under section 62 of the Act, not powers that may be exercised at large.[52]

(b) The Tribunal will not be authorised on review of a reviewable decision to exercise any powers and discretions which would not have been available to the determining authority at the second tier decision-making stage, albeit that such powers and discretions might have been available to the determining authority at the first tier decision-making stage.[53]

(c) In determining the scope of the Tribunal's jurisdiction, the "starting point" to determine the exercise of power by the Tribunal is the reviewable decision.[54] However, the Tribunal's jurisdiction does not depend on how the Respondent characterises the claim. To the contrary, the Tribunal must assess for itself the true scope of the claim and conduct the review on that basis.[55]

(d) Strict compliance with the requirements of the prescribed claim form under s 54 is not required, and substantial compliance is sufficient: s 54(5). A broad, generous and practical approach is appropriate in construing a document purporting to be a notice of injury under the SRC Act, noting that the notice of injury requirements by the legislation are to be construed beneficially for claimants.[56]

(e) A medical diagnosis as to the nature and aetiology of an injury commonly evolve over time.[57] Further, the statutory scheme allows for "progressive and evolving decision-making" in the light of subsequent events and circumstances.[58]

(f) Because of the potential imprecision of the description of the injury by the claimant in the claim form, the manner in which the claim was agitated before the Respondent, and the material relied on by the claimant in the course of the

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[52] *Lees, ibid,* [39].
[53] *Lees, ibid,* [39].
[54] *Mununggurr v Comcare* [2020] FCA 1786, [80].
[55] *Re Durham and TNT Australia Pty Ltd* (2011) 124 ALD 136; [2011] AATA 802, per Jagot J, sitting as a presidential member of the Tribunal at [51]; *Kennedy v Comcare [2014] FCA 82*, [45]
[56] *Abrahams,* [18]; *Sellick*, [23].
[57] *Abrahams,* [21].
[58] *Hannaford*, [57].

claims process, may be important in determining the nature of the injury identified by the claimant before the decision maker, and subsequently before the Tribunal.[59]

(g) Even though a claim may be generally expressed, it must nevertheless properly and adequately inform the Respondent such that it can make an informed decision on whether the claim as made should be met. It does not promote good administration and the proper resolution of claims for compensation to encourage a course whereby claimants may opportunistically (for example) seek to re-characterise a claim as one other than that in fact made in order to avoid the consequence of findings already made, or which may be made, that would exclude any entitlement to compensation.[60]

(h) The paramount consideration is whether Comcare was appropriately informed as to the nature of the claimed injury and its connection with the employment; and whether it was provided a fair opportunity to properly investigate that claim.[61]

[59] *Mununggurr*, *ibid,* [81].
[60] *Comcare v Muir* [2016] FCA 346, [30]
[61] *Ellison*, [143].