



Comcare **tricks** and **traps:**

s14 and s16 determinations and settlement terms

By David Richards

Recent federal court decisions have established that various practices effectively denying a claimant's entitlements to compensation under the *Safety Rehabilitation And Compensation Act 1988* are unlawful.

Although these cases essentially re-state old law, it has been common and accepted practice for a decision-maker to cease liability for a previously accepted claim, to prohibit a further claim after a settlement, and to deny a claim based on a past decision to do so. The court's re-statement of the law has also clarified that s14 is not a 'gateway' to s16, despite this being accepted law for many years.

SECTION 14 AND 16 DETERMINATIONS

Section 14 of the Safety Rehabilitation and Compensation Act 1988 ('the SRC Act') – initial liability

Section 14 provides:

'14(1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.'

The issues in an s14 determination are as follows:

1. Whether the claimant was an employee at the time of the injury as defined by ss4 and 5;
2. Whether the claimant has satisfied the requirements of ss53 (notification) and 54 (claim form);
3. Whether the claimant suffered an injury as defined by s4 (1);
4. Whether the injury results in death, incapacity for work (s4 (9)) or impairment (s4 (1)).

Section 16 of the SRC Act – liability for medical expenses

Section 16 provides:

'(1) Where an employee suffers an injury, Comcare is liable to pay, in respect of the cost of medical treatment obtained in relation to the injury (being treatment that it was reasonable for the employee to

obtain in the circumstances), compensation of such amount as Comcare determines is appropriate to that medical treatment.

- (2) *Subsection (1) applies whether or not the injury results in death, incapacity for work, or impairment.'*

The issues relevant for a finding that a claimant satisfies s16 are:

1. Whether the claimant was an employee at the time of the injury as defined by ss4 and 5;
2. Whether the claimant has satisfied the requirements of ss53 (notification) and 54 (claim form);
3. Whether the claimant suffered an injury as defined by s4(1);
4. Whether medical treatment was obtained by the claimant as a result of the injury;
5. Whether it was reasonable for the claimant to obtain the medical treatment in the circumstances.

THE GATEWAY SECTIONS

Section 14 of the SRC Act is often referred to as a 'gateway section' to ss19, 20, 21, 21A, 24, 25, 27 30, 36, 37 and 39 in that a s14 decision is a prerequisite to a decision that compensation is payable under those provisions.

Although the requirements for a s14 determination differ from those of a s16 determination, confusion has persisted as to whether a favourable determination under s14 is required for a claimant to be entitled to s16 compensation.

The law is now clear that s16 is a stand-alone section and that entitlement to compensation under s16 of the SRC Act does **not** require a favourable s14 decision. This issue was considered in the Full Court of the Federal Court decision of *Lees v Comcare*¹ when Wilcox, Branson and Tamberlin JJ, in interpreting s14, held: *'Section 15 and Section 16 of the SRC*

Act provide for the payment of compensation to employees in circumstances which fall outside of s14. Section 15 provides for compensation to be paid to an employee who has an accident arising out of and in the course of his or her employment and, although the employee suffers no injury, he or she does suffer loss or damage to property. Section 16 provides for an employee who suffers an injury to receive compensation in respect of medical expenses whether or not the injury results in death, incapacity for work, or impairment.'

The requirement that a s14 decision is a prerequisite to a s16 entitlement is inconsistent with s16(2), which provides that a determining authority is liable to pay the cost of medical treatment whether or not the injury results in death, incapacity for work or impairment. It follows that if an employee does not satisfy the requirements for s14, in that she or he is not incapacitated for work or impaired, a determining authority may still be liable to pay the cost of medical treatment, notwithstanding a decision that it/a determining authority is not liable to pay compensation to the employee under s14.

In *Liu v Comcare*,² the Administrative Appeals Tribunal (AAT) held:

'Section 14 of the SRC Act creates a general liability for the payment of compensation to injured workers covered by the Act. It does not address categories of compensation. It does not address quantification. That is left to other sections of the Act. An initial determination of entitlement to compensation under the Act will normally incorporate a finding in favour of the claimant both under s14 and also under one of the other sections of the Act (for example, s16, 19 or 24).'

This decision is not inconsistent with *Lees v Comcare*. The AAT merely held that the initial determination of an entitlement to compensation under the SRC Act will usually incorporate >>

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a finding in favour of the claimant under s14 and also under one of the other sections of the SRC Act, such as s16.

THE EFFECT OF A FAILURE TO MAKE A SECTION 16 DETERMINATION

It has been accepted practice for some time that upon a claimant submitting a claim for compensation using the 'Claim for Rehabilitation and Compensation claim form', a s14 determination is issued denying liability. The Federal Court held in *Commonwealth v Ford*³ and *Lees v Comcare*⁴ that a claimant is not required to specify the particular type of compensation sought. If it is accepted that s14 is the gateway section to ss19, 20, 21, 21A, 24, 25, 27 30, 36, 37 and 39, and that s16 is a stand-alone section of liability for medical expenses, then a determining authority may be required to make a determination pursuant to both s14 and s16 if the claim for compensation indicates that the claimant has sought or obtained medical treatment. Section 54 of the SRC Act provides that other than a claim for compensation under s16 or s17, a claim shall be taken not to have been made unless a certificate by a legally qualified medical practitioner is given to the determining authority. A certificate from a legally qualified medical practitioner provided to the determining authority by the claimant with the claim form will, however, likely be evidence of medical treatment obtained by the claimant. This evidence of medical treatment provided to the determining authority will be notice to the determining authority that a determination pursuant to s16 is required.

Where a determination is made that liability does not arise under s14 without reference to the claimant's entitlement under s16, in circumstances in which a claimant has obtained medical treatment and this has been indicated in the claim form, the issue that may arise is whether the determining authority has, by implication, refused to make a determination pursuant to s16.

There are indications that it is at least arguable that an AAT will have



jurisdiction to determine whether a claimant has an entitlement to medical expenses under s16, even when s16 has not been discussed in either the original determination or the reviewable decision. Section 61 of the SRC Act offers some support to this contention, where treatment expenses are payable to another person. In these circumstances, a determination pursuant to s16 does not have to be in writing and reasons do not need to be given to the claimant. Sub-section s3 (3) of the *Administrative Appeals Tribunal Act 1975* (the 'AAT Act') also offers support, in that a decision refusing to make a determination is defined as a determination.

In *Australian Postal Corporation (APC) v Oudyn*,⁵ the Federal Court found that a refusal to make a decision on reconsideration under s62 of the SRC Act was, by the extended definition, a determination made under s62, and was thus reviewable by the AAT pursuant to s64 (1) of the SRC Act.

THE PRACTICAL IMPLICATIONS FOR THE AAT

The AAT may be the subject of judicial review in the Federal Court if it fails to make a finding on a claimant's entitlement to medical expenses under s16. Where the AAT makes a finding on s14 alone, it is by implication failing to consider whether the claimant has an entitlement to compensation for medical expenses under s16. As stated above, it is open to a determining authority, such as the AAT, to find that a claimant does NOT satisfy the requirements of s14 – in that the claimant is not incapacitated for work or impaired – and to simultaneously find that the claimant is entitled to medical expenses under s16 of the SRC Act. As such, the AAT is required to consider a claimant's entitlement to compensation under s16 where it is within the reviewable decision that is the subject of the application for review.

CLAIMS FOR SECTION 16 MEDICAL EXPENSES AFTER A SECTION 14 DENIAL

It is not uncommon for a claimant to submit a claim for medical expenses,

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such as the cost of a MRI investigation, some time after a determination has been issued denying liability pursuant to s14. Usually a decision-maker will refer to the s14 determination and refuse payment pursuant to s16. A denial of compensation under s14 does not necessarily involve consideration of the issues arising under s16. Further, the Federal Court in *APC v Oudyn*⁶ held that a determining authority cannot bind itself in advance to reject any future application.

Binding a future decision-maker

Justice Cooper in *APC v Oudyn*⁷ said:

'APC cannot bind itself in advance to reject any future application on the basis of a determination made to cease payment of compensation for an injury under a particular section of the Act: Plumb v Comcare (1992) 39 FCR 236 (FC) at 240. Nor can that result be achieved by purporting to determine on a reconsideration of a determination under s14 that a liability, which correctly and effectively attached to APC in respect of a particular injury, ceased on the date of the determination and that entitlement to compensation under any section of the Act was thereafter excluded in respect of the injury. The Act does not contemplate the making of such a determination once liability under s14 of the Act has properly arisen and a determination made to accept a claim made in accordance with s54 of the Act.'

This decision follows the authority of Black CJ, Lockhart and Gummow JJ in the Full Court of the Federal Court decision of *Plumb v Comcare*,⁸ in which it was held that a determining authority cannot bind itself, in advance, to reject any future application on the basis of a determination made to cease payment of compensation for an injury under a

particular section of the Act.

In *Rosillo v Telstra Corporation Limited*,⁹ Madgwick J followed *APC v Oudyn*¹⁰ and found that a determining authority cannot bind itself to reject any future claim in respect of the same injury.

Examples of a determining authority attempting to bind itself in the future include:

1. Determining that a claimant is entitled to, or not entitled to compensation under any provision of the SRC Act for any period of time after the date of the decision;
2. Determining that a claimant's condition has resolved and that the claimant will not have entitlement to compensation under the SRC Act in the future;
3. Determining that a claimant is entitled to compensation under s19 of the SRC Act for incapacity payments for a closed period, past the date of the decision;
4. Determining that a claimant is entitled to medical expenses for treatment (that is, physiotherapy) limited to a certain number of treatments for any period of time after the date of the decision. Please note that a determining authority may make a declaratory determination of entitlement to compensation under s16 of the Act before a claimant actually incurs specific treatment (see *Capital Territory Health Commission v Cavanagh*¹¹). However, contrast this to a determination attempting to bind a future decision-maker that a claimant is not or will not become entitled to additional medical treatment.





A determining authority cannot make a decision accepting liability for a period of time under s14 and then decide that the claim does not satisfy s14 for a more recent period of time.

SECTION 42C AAT ACT DECISIONS

Where settlement is reached and the parties request that the AAT make a decision pursuant to s42C of the AAT Act, care needs to be taken when drafting the s42C terms. President Downes held in *Lui v Comcare*¹² that the AAT must be satisfied that an agreement would be within the powers of the Tribunal and that the decision is appropriate for the AAT to make. A request for a consent decision pursuant to s42C of the AAT Act should therefore contain reference to the claimant's entitlement pursuant to s16 for initial liability determinations, assuming that a claimant has indicated in the original claim form that they sought medical treatment relating to the injury.

Terms of settlement – criteria consistent and appropriate

A request for consent decision made by the parties pursuant to s42C of the AAT Act must be consistent with the SRC Act and must be appropriate in the circumstances.

Justice Lockhart in the Full Court of the Federal Court decision of *Plumb and Comcare*¹³ held:

'The 1988 decision of the AAT was

based on the evidence that was before it and considered the applicant's case asserting incapacity upon the evidence as it stood at that time. In the circumstances of this case, the AAT did not have power, nor did the original decision-maker have power, to make a decision that extended beyond the date of the decision. It is true that the AAT said in its reasons which led to the 1988 decision that from 20 July 1987 the applicant "ceased to be incapacitated to any degree whatsoever". But, as mentioned earlier, it said later in its reasons that it could not "pre-judge any new application which may arise as a result of the alleged recurrence of the applicant's disease".'

Justice Downes, President, Deputy President Handley and Senior Member Allen in *Liu v Comcare*¹⁴ held that two conditions precedent must be present where the AAT makes a decision in accordance with the parties' agreement pursuant to s42C of the AAT Act:

1. The AAT must be satisfied that a decision in or consistent with the terms of the agreement 'would be within the powers of the Tribunal'; and
2. It must appear to the AAT to be appropriate for it to make such a decision.

In *Lui v Comcare*¹⁵ the Tribunal discussed terms of settlement generally within the jurisdiction in the context of parties attempting to bind a future decision-maker. Justice Downes set out a list of useful principles for the parties to consider when drafting s42C decisions. These principles include the following:

- a. The words 'on and from' should not be used;
- b. The words 'respondent's liability ceased' should not be used;
- c. The s42C should not suggest that no future liability can exist;
- d. The s42C should speak only as to present liability;
- e. The s42C should speak only as to the present date.

SRC Commission settlement guidelines

The SRC Commission has issued guidelines pursuant to s73A of the SRC Act, which provide as follows:

1. In settling disputed claims, determining authorities must act consistently with provisions of the SRC Act and the AAT Act;
2. In attending conciliation conferences, determining authorities should act in accordance with the AAT's *Conciliation Conferences Direction*. A copy of the direction can be found on the AAT's website.
3. Determining authorities must act honestly, fairly and consistently as between claimants in negotiating settlements.
4. Terms of settlements cannot reduce statutory entitlements below, nor increase them above, the amounts permitted or prescribed by the SRC Act.
5. Terms of settlements cannot include terms purporting to prevent employees from pursuing rights available under the SRC Act, nor can they seek to allow determining authorities to contract out of any existing or future liabilities under the SRC Act.
6. Where it is clear that an employee has an entitlement under the SRC Act, the determining authority should

consider, without unreasonable delay, settling the disputed claim.

7. Where an employee is not legally represented, the determining authority must explain to the employee the terms of the settlement and the consequences of agreeing to the settlement. The determining authority must not proceed to settle the claim if it is apparent to it that the terms of the proposed settlement or the known consequences of it are not properly understood by the employee.
8. The terms of settlement filed under s42C of the AAT Act should only cover matters arising from the disputed entitlement(s) before the AAT under the application(s) for review, and cannot include any matter that is outside the scope of the SRC Act. Agreement by the parties to terms of settlement filed under s42C of the AAT Act is distinct from the employee's acceptance of any separate settlement dealing with employment issues. Any such separate settlement should be reflected in separate documentation.
9. Terms of settlement filed under s42C of the AAT Act should record all pertinent facts as agreed, should indicate the relevant provisions under which any entitlements to compensation payments arise in the given circumstances, and should specify all relevant amounts; for example, amounts for loss of earnings (incapacity), redemptions, permanent impairments and medical and travel expenses, as well as legal costs.
10. (Intentionally blank).
11. Implementation of the terms of settlement, as given effect by a decision of the AAT pursuant to s42C of the AAT Act, should be promptly actioned by the determining authority.

A DETERMINING AUTHORITY ATTEMPTING TO UNDO AN EARLIER SECTION 14 DETERMINATION

The decision in *APC v Oudyn*¹⁶ is also authority for the proposition that, once a determination has been properly made in respect of liability pursuant to s14, a future decision-maker cannot make a further s14 decision unless the decision-maker sets aside the original s14 decision.

This effectively means that a determining authority cannot make a decision accepting liability for a period of time under s14 and thereafter determine that the claim does not satisfy s14 for a more recent period of time. However, a decision-maker is not prohibited from reconsidering a determination on its own motion under s62 of the SRC Act. But the decision-maker would require evidence that the original decision was incorrect to vary it, or set it aside. The difficulties of this include the weight that a Tribunal may place on more recent evidence that >>



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contradicts evidence available at the time of lodgement or determination. It is also complicated if payments have been made to a claimant pursuant to the Act in the intervening period.

In *APC v Oudyn*,¹⁷ Cooper J found that the decision-maker could not refuse to make a decision under s24 with regard to permanent impairment on the basis that liability had 'ceased'. As stated above, liability cannot 'cease' pursuant to s14 unless the determining authority were to issue an own motion pursuant to s62 to vary or set aside the earlier s14 decision. In these circumstances, the decision-maker was required to determine whether the claimant had an entitlement to compensation under s24.

Justice Cooper, in *APC v Oudyn*¹⁸ found that the refusal to make a decision amounted to a 'decision' which was also reviewable by the Tribunal.

In other words, the effect of the decision-maker's determination to deny the claimant an entitlement to compensation on the grounds that liability under s14 had 'ceased', and to fail to consider s24, was that the decision-maker refused to make a decision. The refusal was a decision in itself as defined in s3 (3) of the AAT Act, which was also reviewable.

Once a determining authority has determined a claimant's entitlement to compensation under s14:

1. The determining authority cannot make a further s14 determination unless it reconsiders the original

determination;

2. Where a s14 determination is made and a claim for compensation is made under s19 or s24, a determining authority is restricted to considering the claimant's entitlement under s19 or s24 alone and not with regard to liability under s14; and
3. Where a s14 determination has been made, a determining authority must determine any and all future claims for compensation based on the merits of the claim as at the date of the decision, regardless of any earlier decision under a similar section of the SRC Act.

CONCLUSION

It is prudent for a determining authority issuing an original determination and/or a reviewable decision to make a finding under s16 of the SRC Act for all claims made regarding initial liability where a claimant has sought medical treatment. This will not only avoid disputes on jurisdiction, but will also provide a claimant certainty as to whether his or her claim for compensation for medical expenses has been considered or accepted.

A determining authority must consider all the requirements for a s16 determination whenever a claim for medical treatment expenses is made. It is outside the provisions of the SRC Act to deny liability to pay compensation pursuant to s14 based on a determination that deals only with liability under s14. In any event, an

earlier decision-maker cannot bind a later decision-maker on any provision of the SRC Act.

In order to avoid unnecessary federal court litigation, the AAT must therefore make findings on a claimant's entitlement to s16 medical expenses for all initial liability matters where a claimant has sought medical treatment, if this is evident from the original claim for compensation. Furthermore, requests for decisions pursuant to s42C of the AAT Act should refer to a claimant's entitlement under s16, where necessary, or the Tribunal may not accept the decision. ■

- Notes:** **1** [1999] FCA 753, at para 18. **2** [2004] AATA 617, at para 1. **3** [1986] 65 ALR 323. **4** [1999] FCA 753. **5** [2003] FCA 318, at para 18. **6** [2003] FCA 318. **7** [2003] FCA 318, at para 34. **8** (1992) 39 FCR 236, at 240. **9** [2003] FCA 1628. **10** [2003] FCA 318. **11** Unreported Federal Court 78/0008, 3 March 1978. **12** [2004] AATA 617. **13** (1992) 39 FCR 236 at para 24. **14** [2004] AATA 617 at para 8. **15** [2004] AATA 617. **16** [2003] FCA 318. **17** [2003] FCA 318. **18** [2003] FCA 318.

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