

ADMINISTRATIVE REVIEW TRIBUNAL BILL

Comments on the Veterans' and Workers' Compensation and Division and Generally

1. The *Administrative Review Tribunal Bill 2023* (the “ART Bill”) proposes the abolition of the existing Administrative Review Tribunal (AAT) with a new Administrative Review Tribunal (ART).
2. One of the principal divisions of the new Tribunal is that of the Veterans' and Workers' Compensation and Division.
3. The overview of the draft legislation on the Attorney'-General's Department website notes that further amendments will be required to “*approximately 120 Acts that refer to the AAT*”, presumably Acts other than the 138 Commonwealth Acts referred to in the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023* (the “Transitional Bill”) sets out a schedule of amendments to those enactments which currently confer jurisdiction to the present Tribunal to hear and determine particular decisions.
4. This short submission deals only with some aspects of the necessary amendments to Commonwealth enactments that will likely confer jurisdiction to review by the ART's Veterans' and Workers' Compensation and Division.

Jurisdiction to review - Veterans' and Workers' Compensation and Division

5. The Transitional Bill setting out a schedule of amendments to those enactments which currently confer jurisdiction to the present Tribunal, in particular, relevant to the new Veterans' and Workers' Compensation and Division includes the following principal enactments:
 - (a) *The Military Rehabilitation and Compensation Act 2004*;
 - (b) *The Safety, Rehabilitation and Compensation Act (Defence-related Claims) Act 1988*;
 - (c) *The Veterans' Entitlements Act 1986*.
6. The remaining principal enactments relevant to the work of the new Veterans' and Workers' Compensation and Division are.
 - (a) *The Safety Rehabilitation and Compensation Act 1988* (SRC Act); and
 - (b) *The Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act).
7. The two enactments cover the employment of all public servants, employees of Commonwealth authorities, and licensed corporations as well as seafarers in the interstate coasting trade covered by the *Navigation Act 1912* and those in the offshore mining industry. Relevant sections of those enactments for amendment in the light of the new ART include:
 - (a) *Safety Rehabilitation and Compensation Act 1988* Part VI – Reconsideration and review of determinations, sections:

- (i) 60 Interpretation (with particular reference to the definition of the word “decision”).
- (ii) 63 Reviewable decision to be notified in writing.
- (iii) 64 Applications to the Administrative Appeals Tribunal.
- (iv) 65 Modifications of the Administrative Appeals Tribunal Act.
- (v) 66 Evidence in proceedings before the Administrative Appeals Tribunal.
- (vi) 67 Costs in proceedings before the Administrative Appeals Tribunal.
- (b) *Seafarers Rehabilitation and Compensation Act 1992* Part 6 – Reconsideration and review of determinations by the Administrative Appeals Tribunal:
 - (i) The heading to Part 6 and to Division 3 of that Part referring to the AAT and then sections:
 - (I) 3 General Definitions (with particular reference to the definition of “AAT”).
 - (II) 76 Interpretation.
 - (III) 87 Reviewable decision to be notified in writing.
 - (IV) 88 Applications to the AAT.
 - (V) 89 Modified AAT Act to apply.
 - (VI) 90 Evidence in proceedings before AAT.
 - (VII) 91 Costs of proceedings before AAT—general.
 - (VIII) 92 Costs of proceedings before AAT--when costs payable by employer.

Decisions subject to review by ART

- 8. Remainder of this submission will deal with the *Safety Rehabilitation and Compensation Act 1988*. Analogous amendments to remaining compensation statutes mentioned above ought to be considered in like terms.
- 9. The present SRC Act provides for the review of various decisions in Part VI that can be the subject of a reviewable decision and thereby the subject of review by the Tribunal. The range of decisions is set out in the definition of “determination” given in s 60 of the SRC Act:

Interpretation

- (1) In this Part:

...

determination means a determination, decision or requirement made under section 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.

10. The sections referred to include sections:
- (a) 8 - The determination of ‘normal weekly earnings’ for the purposes of weekly payments of compensation to an injured employee for incapacity for work.
 - (b) 14, 15 - The finding of entitlement to compensation for injury resulting in death, incapacity for work or impairment.
 - (c) 16 – Compensation for the cost of medical treatment for injury.
 - (d) 17, 18 – Compensation for death resulting from injury.
 - (e) 19, 20, 21, 21A, 22 – Compensation for incapacity for work resulting from injury.
 - (f) 24, 25, 27 – Compensation for impairment and non-economic loss resulting from injury.
 - (g) 29, 29A, 30, 31 – Compensation for household services and domestic care services, redemption of weekly compensation payments.
 - (h) 34, 36, 37, 39 – Determinations with respect to rehabilitation programs and compensation in respect of certain alterations for those who undertake, or have undertaken or been assessed as not capable of undertaking a rehabilitation program, including the suspension of compensation .
 - (i) 114B(5)(a) – A determination as to whether an overpayment of compensation has been made within two days of receipt of particulars from the administrator of a superannuation scheme as to the rate of pension or lump sum payable to a retired employee.
 - (j) Division 3, Part X – Reduction of weekly compensation payable to certain employees under Transitional Provisions to certain employees entitled under superseded legislation (the 1971 or 1930 Acts) after turning 65 years of age.
11. The definition of “*determination*” in the SRC Act should be amended to allow for review of a broader range of decisions affecting injured workers. The absence of jurisdiction to hear and determine routing issues affecting compensation claims results in the removal of review by a specialist review body such as the ART that is quick, efficient and inexpensive resulting in an application to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1975*, as the only alternative and a costly and time consuming one at that. Determinations under the following additional sections should be included in the definition:
- (a) Review of the decision to find an “entitlement” to compensation pursuant to s 14 of the SRC Act does not thereby decide any specific compensation. It is frequently the case that the review of disputed entitlements pursuant to determination pursuant to s 14 of the SRC Act can continue for months if not years. Upon the successful setting aside of the decision on review, no provision can be made in respect of payment of medical and like expenses for the treatment of injury or the payment of weekly compensation in respect of incapacity for work simply because the determining authority has opted not to make decisions pursuant to sections 16 or 19 of the SRC Act. Further delay, sometimes measured

in months, possibly in years if subsequent determinations are reviewed, can and have resulted. One possible inducement to determining authorities for delay is the avoidance of taking responsibility for the costs of treatment, sometimes including major surgery, when delay forces the injured employee to seek treatment as a public patient. Whether so or not, it leads to delay and potentially the inefficient multiplicity of proceedings, where, on review, the Tribunal is restricted only to the question of entitlement to compensation. In all cases, injury results in the practical need for treatment and its attendant costs as well as for compensation for lost time due to incapacity for work. The Act should be amended to allow review by the Tribunal of entitlements to compensation pursuant to sections 16 and 19 in respect of any claim denied under s 14 of the SRC Act.

- (b) Subsection 37(1) of the SRC Act refers to the determination that an employee shall participate in a rehabilitation program. Failure to take-up or continue with such a program may result in the suspension of compensation (save for medical treatment costs) pursuant to s 37(7) of the SRC Act until such time as the employee commences or resumes such a program unless the employee provides a reasonable excuse for non-participation. The suspension also suspends the employee's right to "institute or continue any proceedings under this Act in relation to compensation". These programs often involve stepped increases in hours and duties as part of a return to work plan that can extend over several months. These are two separate types of determination within the one section but owing to that fact, and the limitation on time limits, a review of the suspension cannot review the suitability of the antecedent determination of the program itself in the light of the experience of that program¹. The restriction placed on the review of a suspension decision in being unable to assess the suitability of the program in the light of experience of that program or the facts coming to light subsequent to the making of the determination results in the multiplicity of applications for review, out of time and with no certain entitlement to extension of time. An obvious unfairness to the employee thereby results and the review is restricted from considering relevant factual matters going to the refusal or failure of an employee to participate. The Act should be reviewed to allow assessment of the determination of the original program in any suspension case in the light of the employee's experience or relevant facts that come to light after its initial determination.
- (c) Power to suspend compensation or to "institute or continue any proceedings under this Act in relation to compensation" also arises under section 57 of the SRC Act where an employee "refuses or fails, without reasonable excuse, to undergo an examination by one legally qualified medical practitioner nominated by the relevant authority". A determining authority may "refuse to deal" pursuant to s 58 of the SRC Act with a claim where a claimant "refuses or fails, without reasonable excuse, to comply with a notice" to provide "information or

¹ In *Australian Postal Corporation v Pascoe* [2003] FCA 390 at [18], Whitlam J noted the "draconian nature" of s. 37(7) and that the relevant antecedent determination of the program made under s 37(1) had not been the subject of review. The Full Court (Hill, Marshall and Finkelstein JJ) on appeal in *Pascoe v Australian Postal Corporation* [2004] FCAFC 4 stated at [14], "*Unless the employee has sought a reconsideration, when considering whether an employee has a reasonable excuse for failing to undertake a rehabilitation program, the program in question is to be taken to be appropriate for the employee. It is no part of the s 37(7) exercise to gainsay the program made by an approved program provider following a s 37(1) determination.*"

a document” relevant to the claim or “may obtain such information or a copy of such a document without unreasonable expense or inconvenience”. These powers are excessive. However, should these powers to suspend rights be retained, any determination under either ss 57(2) and 58(3), since it involves the determination of whether there has been a refusal or “failure” to comply and whether the employee had “reasonable excuse” should be subject of review by the ART as the expertise and capacity for quick merits review of disputes rather than judicial review in the Federal Court.

- (d) The SRC Act should be amended to provide that the termination of continuing compensation benefits, such a medical treatments, weekly compensation for incapacity, household and domestic care services, can only be made prospectively. There has been a tendency among some determining authorities to determine the discontinuation of compensation at an antecedent date, sometimes years earlier. The Act presently permits such a determination leaving vulnerable compensation recipients with demands for arrears, failing payment of which, the determining authority is authorised to seek recovery as a debt, including recovery from superannuation funds. Such action should only be allowed in proven cases of fraud. The retrospective termination of compensation forces the employee on review to find evidence that may now be lost by years simply to maintain a continuing benefit. In some cases, this is impossible and may only have been justified by the determining authority on the opinion of one medicolegal engaged to review ambiguous medical records and no contemporaneous medical involvement. The SRC Act ought to be amended so as to provide:
 - (i) The circumstances for the termination of continuing or ongoing entitlements to such benefits as medical treatment (s 16), weekly compensation for incapacity (ss. 19-21A) or household and domestic case (s 29) to be made on notice to be effective at a particular date on or after the making of the determination.
 - (ii) The only circumstances for the retrospective recovery of compensation paid is to be on a proven case of fraud on the part of the employee. The finding of fraud to be made only by a court of competent jurisdiction and the recovery of compensation decision to be reviewable by the Tribunal for hardship and like grounds.
- (e) The raising and recovery of any overpayment make due to error on the part of the determining authority is provided for by sections 114 and 114B while decisions can be made to waive the debt or write off such debt under sections 114C and 114D of the SRC Act. The waiver or write off of debt is not a determination within the meaning of the definition at 60(1) of the SRC Act and hence is not reviewable by the Tribunal, These provisions should all be the subject of review as to the correctness of the decision, the circumstances of administrative incompetence or error and the hardship that recovery might entail. In any event, recovery of compensation ought not to result in the diminution of superannuation.

Lodgement of application and processes

12. The present compensation provisions allow for the lodgement of an application for review within 60 days of the date of the receipt of a written reviewable decision (section 65 of the SRC Act). This is a more generous time period of the application of review than general decisions and should not be restricted. However, there is no particular reason why, in the veterans' and workers' compensation jurisdiction, that a one year time limit should not be permitted.
13. Equally, the present rules permitting the recovery of legal costs by an applicant successful in obtaining a more favourable decision should be retained. These provision are in s 67 of the SRC Act.
14. Clause 23 of the ART Bill provides for the determining authority to provide reasons for the decision and a copy of every document in its "possession or control" that it "relevant to the Tribunal's review of the decision" within 28 days of being notified of the application for review. Further provisions (ss 24-29) establish the continuing nature of the obligation to provide relevant documents.
15. As to the conduct of proceedings, by cl 36(1) ART Bill, the Tribunal President is empowered to make Practice Directions concerning, among other things, the operation. Procedure and conduct of the Tribunal, including the "*sorting, prioritisation allocation and treatment of applications for review*". It would be useful to clarify that these Directions may provide for the shortening of procedural steps and provision of accelerated hearing of a review in particular cases, such as those injured employee who is facing life threatening disease or who is in urgent need of surgical or other medical treatment. Delay in consideration of such questions is clearly undesirable especially if early medical treatment is the best prospect of restoring an injured employee to the greatest capacity possible after injury.

Restriction on decision makers after commencement of review

16. By s 62 SRC Act determining authorities are presently empowered to make "*own motion*" reviewable decisions after the making of an initial reviewable decision "*whether or not a proceeding has been instituted or completed under this Part*". This has been the subject of controversy for some years and with the introduction of amendments to s 26 of the AAT Act a determining authority may alter its decision to the "*relevant Act expressly authorised the decision to be altered*". It has been accepted that in the compensation jurisdiction, any decision so altered would result in review proceedings being rendered abortive with costs consequences under s 67 of the SRC Act.
17. However, the altered decision, though reviewable, is outside the Tribunal's jurisdiction unless a further review application is commenced. The result is further delay.
18. New cl 31 of the ART Bill restates the general rule restricting alteration of a decision once within the Tribunal's jurisdiction. No reference is made to any power to make an "*own motion*" reviewable decision authorised in any other enactment. Alteration of the decision is either done following review or alteration pursuant to paragraph 31(2) by the consent of the parties and the Tribunal or following remitter under cl 85 of the ART Bill.

19. This provision permits genuine consent decision making to resolve differences of the parties rather than leave the variation to the determining authority alone with the potential for further proceedings and delay. Such consent decisions are provided for by cl 103 of the ART Bill. Such process can also deal with costs consequences under s 67 of the SRC Act. It would therefore be useful to remove the provision in s 62 of the SRC Act as it presently stands permitting the determining authority for continue to deal with the decision after the Tribunal is properly seized of jurisdiction.
20. A related matter is the power of determining authorities to require medical examination and demand information of employees seeking review pursuant to ss 57 and 58 of the SRC Act while the Tribunal is conducting its review. The ART Bill provides that the Tribunal may exercise the powers of the decision make and this ought to be clarified that the determining authority must cease exercising decision making and investigation powers during the period review save as provided by the Tribunal's general practice directions or by specific Directions in the course of proceedings.

General matters - Offences

21. The ART Bill, at Division 11 (clauses 116-120) establishes offences including for breaches of orders and contempt of Tribunal. The Bill does not specify what mechanism exists for the prosecution of such offences. The AAT has similar penalties for contempt of Tribunal but as administrative bodies have no judicial powers they cannot try such issues, make findings of guilt or impose sentences. The Bill would be strengthened if there was a transparent process for the reporting and referral of alleged breaches of the Act to the relevant prosecutorial body. The monitoring and preliminary evaluation of such alleged offences would provide a basis for the measure of compliance with the Act and with possible future amendments to the Act to improve the overall function as an authoritative administrative review body.
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