Richards and Comcare (Compensation) [2015] AATA 1031 (23 October 2015)

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| Division |  |
| File Number | 2015/3204 |
| Re |  |
|  | APPLICANT |
| And | Comcare |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President J W Constance** |
| Date | **23 October 2015** |
| Date of written reasons | **11 January 2016** |
| Place | **Sydney** |

The Tribunal does not have jurisdiction to make a declaration that Ms Richards has a reasonable excuse for not attending a medical appointment with Dr McGill on 30 October 2015.

..................[SGD]............................................

J W Constance

Deputy President

# Catchwords

COMPENSATION - Applicant's attendance at medical appointment – reasonable excuse not to attend an appointment - section 57 notice to attend medical appointment – AAT’s jurisdiction to review section 57 notices – application for declaration refused

# Legislation

Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 37(7), 57, 60(1), 62, 64

Administrative Appeals Tribunal Act 1975 (Cth) ss 25(1)

# Cases

Australian Postal Corporation v Forgie (in her capacity as Deputy President of the Administrative Appeals Tribunal) and Another [2003] FCAFC 223

Buck v Comcare (1966) 66 FCR 359

Peter Steele and Pacific National Pty Limited [2009] AATA 321

Von Stieglitz and Comcare [2012] AATA 729

# WRITTEN REASONS FOR DECISION

**Deputy President J W Constance**

**11 January 2016**

# introduction

1. On 15 February 2010, Ms Richards suffered sprain injuries to her neck and thoracic region. Comcare accepted liability under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) to compensate her for these injuries.
2. By a decision made 12 June 2015, Comcare affirmed an earlier determination that it was not liable to pay certain medical expenses, incapacity payments and household services and attendant care service expenses claimed by Ms Richards to have been incurred as a result of her injuries. She has applied to the Tribunal to review this decision.
3. Since making her claim, Ms Richards has attended a number of medical appointments arranged by either Comcare or her employer. The purpose of these appointments was to obtain medical opinion to assist in processing Ms Richards claim.
4. By email of 24 August 2015 the Solicitors for Comcare advised the Solicitors for Ms Richards as follows:

We are instructed to arrange for your client to be re-examined by rheumatologist Dr Neil McGill for the purposes of obtaining a medical report from him. We have scheduled the appointment for Dr McGill’s next available date – i.e. 30 October 2015 at 11:30 am.

The appointment was to take place at Dr McGill’s rooms in Newtown, a suburb of Sydney.

1. As Ms Richards indicated a reluctance to attend this appointment, on 4 September 2015 Comcare issued to Ms Richards a notice requiring her to attend the examination by Dr McGill. The notice was issued pursuant to section 57 of the Act.
2. On 24 September 2015, Ms Richards applied to the Tribunal *“for a direction that the s.57 Notice issued by the Respondent on 4 September is invalid because it asks the Applicant to attend an appointment because they* [sic] *have a reasonable excuse not to attend”.*
3. On 23 October 2015 I refused the application for the direction sought by the Applicant. I now provide my written reasons for this decision.

# legislation

## Comcare’s power to require attendance at a medical examination

1. Section 57 of the SRC Act provides, in part:

Where:

1. a notice has been given to a relevant authority under section 53 in relation to an employee; or
2. an employee has made a claim for compensation under section 54;

the relevant authority may require the employee to undergo an examination by one legally qualified medical practitioner nominated by the relevant authority.

Where an employee refuses or fails, without reasonable excuse, to undergo an examination, or in any way obstructs an examination, the employee’s rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the examination takes place.

## The Tribunal’s power to review decisions made under the Safety, Rehabilitation and Compensation Act 1988.

1. The Tribunal’s power to review a decision depends upon a grant of power by an enactment. Subsection 25(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), (*“the AAT Act”)* provides:
2. An enactment may provide that applications may be made to the Tribunal:
	1. *for review of decisions made in the exercise of powers conferred by that enactment; or*
	2. *for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.*
3. Section 64 of the *SRC Act* provides that a claimant may apply to the Tribunal for a review of a *“reviewable decision”*. *“Reviewable decision”* is defined in subsection 60(1) to include a decision made under section 62. Section 62 provides for Comcare to make a decision reconsidering a *“determination”* made by it.
4. *“Determination”* is defined in subsection 60(1) to mean *“a determination, decision or requirement”* made under specified sections of the Act. It is to be noted that section 57 is not included in the specified sections.

# issues for determination

1. The following issues arise.

(1) Does the Tribunal have jurisdiction to make the declaration sought?

(2) If so, should such a declaration be made?

# Ms richards’ argument

1. Counsel for Ms Richards put that the only basis for seeking the declaration was that she has been assessed by eleven doctors on behalf of her employer and Comcare in relation to her claim and that two of those doctors were rheumatologists other than Dr McGill. It was put that she had been examined by two rheumatologists of her choice, by one at the request of her employer and by one at the request of Comcare. Reports were available to Comcare from all these practitioners.
2. Ms Richards does not object to being re-examined by either the rheumatologist she had attended at the request of her employer or the rheumatologist she attended at the request of Comcare. However it was argued that she had a reasonable excuse to refuse to attend an appointment with Dr McGill as she has not been examined by him previously. Counsel argued that the making of the appointment with Dr McGill suggested that Comcare was engaging in *“doctor-shopping”.*

# consideration

## Issue 1: Does the Tribunal have jurisdiction to make the declaration sought?

1. In *Australian Postal Corporation v Forgie (in her capacity as Deputy President of the Administrative Appeals Tribunal) and Another[[1]](#footnote-1)* the Full Court of the Federal Court considered the Tribunal’s jurisdiction to review a decision made under subsection 37(7) of the SRC Act, which provides:

Where an employee refuses or fails, without reasonable excuse, to undertake a rehabilitation program provided for the employee under this section, the employee’s rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the employee begins to undertake the program.

1. The Full Court concluded:

[86] This is a case in which the express words of the statute must govern the outcome. Section 37(7) of the SRC Act is a provision which requires a “determination” within the meaning of s 60(1) to be made. An employee can request a reconsideration of such a “determination” under s 62, which is what Mr Long did in this case. This resulted in a Senior Claims Manager at Australia Post making a “reviewable decision” on 15 July 2002

[87] Pursuant to s 64, the Tribunal has jurisdiction to review “reviewable decisions” under the SRC Act. The Tribunal, therefore, has jurisdiction to hear Mr Long’s application. This will require the tribunal to assess whether Mr Long has: (1) refused or fail to comply with his rehabilitation program; and (2) whether or not he had a reasonable excuse for doing so.

1. In reaching this conclusion, the Full Court had cause to consider the provisions of subsection 57(2) of the SRC Act (see above) as it was argued that the Court had previously held that the Tribunal did not have jurisdiction to review action under this subsection, which is worded similarly to subsection 37(7).
2. The Full Court affirmed the view that the suspension of rights under s 57(2) did not require a decision of an administrative character made under an enactment.[[2]](#footnote-2) It said:

[73] Thus it is said there is no policy or principle to justify a distinction being drawn between s 37(7) and s 57(2), so that it would not be expected that merits review was intended in one case and not in the other. The short answer to this submission is that s 37 is specified in the s 60(1) definition of “determination” as one of the sections under which there can be a determination. Section 57, however, is not listed in this way. It is excluded from the definition in s 60(1). Accordingly, although both sections have a similar structure, the presence of one and the absence of the other from the definition of “determination” is a clear indication that the legislature intended them to be treated differently the purposes of the availability of merits review before the Tribunal.

1. As I observed at the outset of these reasons, the Tribunal’s powers are those given to it by various enactments. As the operation of section 57(2) is not subject to merits review by the Tribunal, it follows that the Tribunal does not have the power to make a declaration that an applicant has a *“reasonable excuse”* for refusing to attend a medical appointment at some time in the future.
2. My conclusion is consistent with decisions of the Tribunal in *Peter Steele and Pacific National Pty Limited [[3]](#footnote-3)* and in *Von Stieglitz and Comcare. [[4]](#footnote-4)* I agree with the reasoning set out in those decisions.

## Issue 2: Should the declaration sought be made?

1. In view of the conclusion I have reached as to the Tribunal’s jurisdiction, this issue does not arise.

# comment

1. Although I have referred to the difference between the applications of section 57 and section 37 of the SRC Act, nothing I have said in these reasons should be taken to indicate that the Tribunal does have the power to issue a declaration in relation to the reasonableness or otherwise of an employee’s excuse for refusing of failing to undertake a rehabilitation program. So far as I am aware, the power of the Tribunal to make declarations is not settled and I have not given consideration to this issue in relation to section 37.
2. Further, my decision that the Tribunal does not have jurisdiction to make the declaration sought, does not mean that in future the Tribunal cannot consider whether Ms Richards had a reasonable excuse for failing to attend a medical appointment, if such be the case. In this regard I agree with the following reasoning of Member Webb in *Von Stieglitz:*

If Ms von Stieglitz refuses or fails to undergo the examination and seeks to advance her review proceedings, it will then be necessary for the Tribunal to determine whether or not it has jurisdiction to proceed with her application. In that context, and for that purpose, alone, it will necessary for the Tribunal to determine the jurisdictional facts, namely whether Ms von Stieglitz refused or failed to undergo a medical examination required under s 57(1) , and if so, whether she had a reasonable excuse for refusing or failing to do so in the particular circumstances, having regard to the “text, context and purpose” of the section.[[5]](#footnote-5)

# Conclusion

1. It will be decided that the Tribunal does not have jurisdiction to make a declaration that Ms Richards has a reasonable excuse for not attending a medical appointment with Dr McGill on 30 October 2015.

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| I certify that the preceding 24 (twenty -four) paragraphs are a true copy of the reasons for the decision herein of  |

...................[SGD]...................................

Associate

Dated 11 January 2016

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| Date of hearing | **16 October 2015** |
| Solicitors for the Applicant | **P Hansen; Carroll & O'Dea Lawyers** |
| Solicitors for the Respondent | **B Dean; Australian Government Solicitor** |

1. [2003] FCAFC 223. [↑](#footnote-ref-1)
2. The Federal Court so held in Buck v Comcare (1966) 66 FCR 359. [↑](#footnote-ref-2)
3. [2009]AATA 321. [↑](#footnote-ref-3)
4. [2012] AATA 729. [↑](#footnote-ref-4)
5. At para.14. [↑](#footnote-ref-5)