Comcare- cease effects decisions

By David Richards*

Until recently, practitioners in this jurisdiction accepted that future liability could be ceased by Comcare or a licenced authority by simply noting that a claimant had not submitted a claim for compensation for some time or by having the claimant reviewed by a consultant medical specialist who formed an opinion that symptoms of the claimant no longer related to the original injury.

This type of decisionthe preparation before trial or hearing and the conduct of the case itself should all be aimed is commonly known as a "cease effects" decision. However, the provisions of the *Safety Rehabilitation and Compensation* Act 1988 (the SRC Act) have been recently interpreted by the Federal Court to mean that once liability has been accepted by Comcare or the licenced authority a decision ceasing liability is not consistent with the provisions of the SRC Act. The Federal Court has found that there are two reasons why a cease effects decision in inconsistent with the SRC act. First because once a s. 14 decision is made a decision maker can not make a further s. 14 decision at a later time, and second because a decision maker can not attempt to bind a future decision maker.

Practitioners should note that where they have previously acted for an Applicant in proceedings unsuccessfully challenging a cease effects decision, their clients should be advised that the decision affirming the cease effects decision by the Administrative Appeals Tribunal (the AAT) is unsustainable. Unsuccessful Applicants should be advised that they may submit a further claim for compensation which will be heard on its merits notwithstanding an earlier AAT affirming a decision to cease entitlements for their work injury.

The SRC Act – s. 14

With the exception of s. 15 and s. 16, s.14 is the gateway section to compensation payable under the SRC Act. A finding that a claimant satisfies s. 14 does not mean that a claimant will be entitled to compensation, it is merely the gateway requirement that the claimant suffered an injury at work which results in incapacity or impairment.

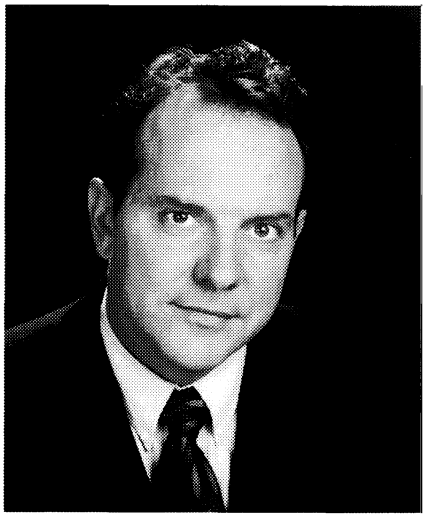
Section 14 provides:

> *"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.*
>
> ...

A determining authority attempting to undo an earlier s 14 determination

Once a s. 14 decision is made by Comcare or a licenced authority, s. 14 can not be considered again unless it is argued that the original s. 14 decision was incorrect.

The decision in *Australian Postal Corporation v Oudyn* [1] is authority for this. The effect in a practical sense is that a determining authority can not make a decision accepting liability for a period of time under s. 14 and thereafter determine that the claim does not satisfy s. 14 for a more recent period of time. However, a decision maker is not prohibited from reconsidering a determination on its own motion under s 62(1) of the SRC Act. Having said this, 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 contradicts evidence that was contemporaneous to the claim at the time of lodgment or determination. It is also complicated if payments have been made to a claimant pursuant to the SRC Act in the intervening period.

In *Oudyn* [2] Cooper J found that the decision maker could not refuse to make a decision under s. 24 with regard to permanent impairment on the basis that liability had "ceased". As stated above liability can not "cease" pursuant to s. 14 unless the determining authority were to issue a motion pursuant to s. 62(1) to vary or set aside the earlier s. 14 decision. In *Oudyn* [3]the decision maker was required to determine whether the claimant had an entitlement to compensation under s. 24. Justice Cooper found that the refusal to make a decision amounted to a "decision" which was also reviewable by the Tribunal (See s.3 (3) of the *Administrative Appeals Tribunal* Act 1975).

Where a s. 14 determination is made and a claim for compensation is made under s 19 or s 24, a determining authority is restricted to considering the claimant's entitlement under s. 19 or s. 24 alone and not with regard to liability under s. 14.

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Where a s. 14 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.

An attempt to bind a future decision maker

A decision make can not make a decision which attempts to bind a future decision maker. In other words, the decision can not speak as to an entitlement to compensation with regard to any time after the date of the decision.

Justice Cooper in *Oudyn* [4] said at paragraph 34 of the decision:

34 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 s 14 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 s 14 of the Act has properly arisen and a determination made to accept a claim made in accordance with s 54 of the Act.

35 The determination of APC made on 18 May 2000 involved two elements. The first was that the effects of the injury sustained on 2 August 1999 had resolved. That is, that the injury no longer resulted in an incapacity for work or an impairment. The second element was a consequence of the first. It was to terminate, as and from the date of the determination, the payment of compensation then being made to Mr Oudyn under one or more sections of the Act. To the extent that APC attempted to exonerate itself from future liability and to foreclose any future claims by Mr Oudyn by the determination, APC was in error as to its power to do so by the determination.

36 For the reasons which I set out above, the determination did not, and could not, for the future preclude Mr Oudyn from an entitlement to compensation in respect of the injury sustained on 2 August 1999 if he was otherwise entitled to receive compensation in accordance with 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* [5] 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* [6] Madgwick J followed *Oudyn* [7] and found that a determining authority can not bind itself to reject any future claim in respect of the same injury. President Downes in *Lui v Comcare* [8], a decision of the AAT, followed *Oudyn* [9] and *Rosillo* [10] and set down principles restricting settlements under the SRC Act which purported to bind a future decision maker.

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 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 s 19 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 (ie. 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 s 16 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.
5. An SRC Act s. 42C request for decision which asks a tribunal to make a consent order which accepts or does not accept an entitlement to compensation under the SRC Act using the words "on and from".

Conclusion

It is now settled law that once a s. 14 decision has been made, neither the AAT or a decision maker can make a s. 14 finding at a later date. Nor can the AAT or a decision maker make any decision which speaks of liability past the date of the decision or past the date of an AAT Hearing. This means that cease effects decisions can no longer be made as they are inconsistent with the provisions of the SRC Act. This may be unfortunate for Comcare or a licenced authority who may wish to remove inactive claims from their books. However, without an

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feature

Proposed new laws to protect good samaritans

During the October 2004 parliamentary sittings, the Attorney-General announced that the government would "shortly put forward an Amendment Bill to protect 'good samaritans' and emergency workers from assaults while trying to provide assistance".

In the same sittings of parliament, the Government defeated an amendment bill with a similar aim which was first put forward by the Member for Macdonnell, John Elferink, in 2002.

"While the Opposition should be acknowledged for attempting to provide similar legislation, unfortunately it fails to capture the full range of conduct that could interfere with assistance," Dr Toyne said.

Mr Elferink criticised the Government for delaying the amendment and suggested that amendments could have been made to the current proposal instead of the Government introducing its own Bill.

Under the proposed new laws, people who attack 'good samaritans' or emergency workers while they are providing assistance to someone will face up to seven years in jail.

The Criminal Code Amendment Bill will create an offence of unlawfully assaulting or obstructing a person who is providing assistance to another.

A person who assaults, obstructs, hinders or prevents a person who is providing rescue, resuscitation, medical treatment, first aid or succour of any kind is liable to five years jail.

If their actions endanger the life or causes actual harm to the person being helped the offender is liable to imprisonment for seven years.

Dr Toyne said the amendments will protect people giving assistance and deter potential attackers.

"This is all about providing a protective hand to those who give a helping hand," he said.

"Assaults in the context of an emergency have the potential to endanger not just the person responding to the situation but also to the victim and other persons.

"All states and territories protect police from such attacks - but the same backing is only offered piece-meal for other professions, if at all.

"I've stepped in to provide the same protection for everyone, whether you are an ambulance officer or a member of the community giving first-aid to someone on the street."

The proposed changes are expected to be introduced during the November/December sittings.

Review into federal sentencing laws

Federal prisoners are receiving different treatment despite similar sentences - depending on which state or territory they happen to be in, according to the Australian Law Reform Commission (ALRC).

ALRC President Professor David Weisbrot said there are about 800 federal prisoners in state and territory jails, and the federal *Crimes Act* was supposed to ensure they are treated equally, no matter where they are doing their time.

"There are concerns that's not what is happening in practice. Federal crimes are prosecuted in state and territory courts - then offenders have their sentences administered by state and territory correctional authorities, who are bound by their own rules and regulations," Professor Weisbrot said.

"An example of this is the recent controversy surrounding stockbroker Rene Rivkin, who was convicted of a federal offence and sentenced by a NSW court to weekend detention for two years - with state officials making decisions about his medical condition and how and whether he actually would serve out his sentence.

"Differences in law and approach to sentencing options - such as non-parole periods, probation orders, remissions, community service orders and diversion programs - mean that federal offenders in, say Queensland or the Northern Territory, may serve a sentence in a very different way to a person convicted of the same crime in Victoria or Tasmania.

"We must decide, as a matter of policy, whether that situation should continue, or whether we should try to promote greater parity in federal sentencing."

Professor Weisbrot said the federal Attorney-General has asked the ALRC to review Part 1B of the *Crimes Act 1914* (Cth), which governs the sentencing, imprisonment and administration of federal offenders. Terms of reference have been released.

Professor Weisbrot said the relevant sections of the *Crimes Act* were structured in an unnecessarily complex way and judges and magistrates have complained that they are uncertain about how to apply the law.

The ALRC will consider the best way to provide all Australian courts with a suitable range of sentencing alternatives for imposing punishment on federal offenders. The ALRC also will need to consider current debates about the merits of short sentences of imprisonment and the application of guideline judgments.

Professor Weisbrot said the ALRC has commenced a period of research and community consultation, and expects to release a paper for public comment in the first half of 2005.

The review is scheduled to be completed in early 2006.

readers forum - book review

Between the Lines: A legal guide for writers and illustrators

By Lynne Spender
Published by Keesing Press
Binding
RRP: $38.50

After reading the first few pages of this book, I became gripped with fear about the possible ramifications of infringing Lynne Spender's moral rights in having her literary work protected from derogatory treatment. But, as the chapter progressed, I began to relax: I was not going to commit criminal defamation or treat Lynne Spender's book in a way that denigrated her reputation. The book was excellent. Although her description of the law of defamation as "arcane and legalistic" was a little harsh, I thought. I was half tempted to bang out a writ against the author just to see if this statement would attract the defence of truth or fair comment in court. But I am still convinced that Lynne Spender's "Between the Lines" would make an excellent Christmas gift for people other than lawyers - journalists and designers and illustrators involved in digital publications would definitely benefit from owning a copy, as would the budding romance novelist or community organisation involved in the production and distribution of indigenous art. I would also recommend the book to post-graduate students and academics, as well as people considering working as freelance journalists or contract staff to government departments.

Spender's advice is broad and comprehensive - she contemplates diverse categories of cultural production - while being easy to understand. Most importantly, she provides contact details for different organisations concerned in the regulation of cultural production in Australia and abroad. Spender's sensitive and nuanced treatment of issues relating to indigenous identity, digitally recorded material and diverse cultural formations kept me engaged and challenged long after I'd finished reading her book. For the Arts graduates among us, Spender grapples with issues as nebulous as literary ethics and authorial identity. And even these parts of the book are peppered with case studies from Australian publishing history – the most up-to-date and fascinating ones to my knowledge – which enliven and contextualise the material (for non-Arts graduates). This successful blend of pragmatism and academic rigour underpins the entire book. For example: Spender devotes three chapters to purely practical matters – including tax law and the legal framework surrounding grants such as those offered by the Australia Council – without causing her reader to lapse into unconsciousness. The fact that Spender has managed to produce a book only 272 pages long that draws all these disparate strands together testifies to her sensible, economic treatment of the subject matter. The major strength of this book is the way it functions as a portal to further, more specialised sources. It really is a testament to the adage that information is power.

The chapter that most appealed to me, however, was the final one, "Politics of Authorship," and the section entitled "Future Directions," which discusses the oft-quoted concept of the "information age" and the exciting possibilities this throws up for cultural life in the new millennium. Definitely - a book that will make you think.

- Robyn Curnow, solicitor with the Commonwealth Director of Public Prosecutions ①

TEWLS calls for volunteers

The Top End Women's Legal Service (TEWLS) needs volunteer solicitors. TEWLS provides free legal advice to women in and around Darwin and is located at 62 Cavenagh Street.

TEWLS has a free legal advice clinic every Wednesday night. Legal advice at these clinics is provided by our volunteers on a roster basis - usually, each Wednesday two volunteers see two clients each, starting at 5.15pm.

The Principal Solicitor is always on hand to assist and to sign off on all advice given. Clients present with a wide variety of interesting legal problems, from family to civil to criminal - and if you don't know the answer on the night it is OK, we can always get back to the client later.

For further information, please contact Joanna Martin at TEWLS on 8982 3000. ①

Are you interested in CLEs?

Want to stay up-to-date on changing legislation? Interested in new areas of law? Want to keep expanding your legal knowledge? Get involved in the Law Society's CLE program.

The Law Society notifies members about upcoming workshops, seminars and Continuing Legal Education opportunities via fax and email.

If you would like to be added to either of these lists, please contact Debra at the Secretariat on (08) 8981 5104 or via email at frontofficemgr@lawsocnt.asn.au.

readers forum - book review

Luck will run your way!

A book review by Rex Wild QC, Director of Public Prosecutions

Gary Player, the famous South African golfer, won millions of dollars and many, many tournaments. He often played miraculous shots. In his prime, he was accused by those he vanquished of being lucky. He used to reply to the effect that the harder he practised and the more he applied himself and prepared for tournaments, the luckier he got.

This is a curious introduction to a review of a book on a legal topic. Hopefully all will become clear.

Before proceeding further, I should declare interests. The book being reviewed is by David Ross QC and the title of it is *Advocacy*.

David and I commenced the law course in Melbourne University together in 1962. I was from Sydney. I knew no one. David befriended me on my first day. We have been friends ever since; that is, for over 40 years. David went to the Victorian Bar in 1967. I arrived there in 1973 having been a solicitor for some years. I read at the Bar with David. In 1974 he left the Bar for some years to be the first Director of Practical Training at the Leo Cussen Institute, which was established that year. He asked me to be one of the teachers. I was pleased to do so and taught Civil Litigation.

When I had my first criminal trial (and my first significant criminal anything) it was to David I went for advice. In 1979 I was asked to co-ordinate and structure the first Readers Course at the Victorian Bar. Again, it was to David that I went to obtain advice about the course preparation, the syllabus, choice of presenters and the like.

Readers of *Balance* will know David is a re gular visitor to the Northern Territory and has been for many years. We have been opposed in a number of trials in Darwin and Alice Springs and he has been briefed on behalf of the Crown. He gives freely of his time and has presented seminars to Territory lawyers during his visits. He is a born teacher as well as a fine advocate. Whenever he appears here in Darwin there seems to be a flock of young people gathering around him outside the court wanting to see him in action. He is an eminent advocate with extensive experience in trials and appeals throughout Australia. He has also taught advocacy in many countries.

So it is, then, that the readers of his new small book on advocacy will be certain to receive sound instruction and good advice.

It is a very pleasant and digestible book to read. Simple propositions are put plainly. They are demonstrated by unobtrusive, and often entertaining, bon mots or short references to cases. What he says makes sense. He is instructive and encouraging.

We have learnt that advocacy is the art of persuasion in court. David says that:

> "Advocacy is winning cases. Nothing more and nothing less. It consists in persuading a court to do what you want. The court may have serious misgivings, but the good advocate gives them no choice".

What is a *win* in a particular case of course might be open to argument. It might be in terms of getting the best possible result in the circumstances for your client. That might be a suspended sentence rather than an actual term of imprisonment where an outright acquittal is not possible. In a civil claim, a win might be minimising the plaintiff's damages in a clear case of negligence (I'm assuming that counsel acts for the defendant!). On the other hand, as we know, prosecutors never win cases; they just *minister* to the cause of justice!

There is good advice as to using plain and simple language in dealing with witnesses. Although cross-examination is often regarded as the glamorous part of the business (who has written a book on the *Great Examinations-in-Chief?*), the ability to get a witness to *tell the tale* is one which every advocate must attain. As the author says, *evidence-in-chief wins most cases*.

The author deals with all the issues that might arise in the daily activities

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amendment to the SRC Act all claims once accepted under s. 14 of the SRC Act as being a work related injury remain active into the future. A claimant thereafter has a continuing right to submit claim for an entitlement to compensation which must then be considered on its merits.

Practitioners should consider past matters where the AAT affirmed a cease effects decision or where the AAT affirmed a decision to deny a s. 14 claim at a time after an earlier s. 14 acceptance as an affirmation by the AAT on this basis is clearly unsustainable given the Federal Court's interpretation of the SRC Act.①

Footnotes

1 [2003] FCA 318.
2 [2003] FCA 318.
3 [2003] FCA 318.
4 [2003] FCA 318.
5 (1992) 39 FCR 236 at 240.
6 [2003] FCA 1628.
7 [2003] FCA 318.
8 [2004] AATA 617.
9 [2003] FCA 318.
10 [2003] FCA 1628.
11 Unreported Federal Court 78/0008 3 March 1978.