Remittal Orders and Reconsiderations in the AAT

By David Richards*

When should the Administrative Appeals Tribunal (the Tribunal) use its discretion under s. 42D of the *Administrative Appeals Tribunal* Act 1975 (the AAT Act) to remit a decision back to the decision maker when the decision is clearly incorrect in law? This issue has been commonly the topic of heated debate in jurisdictional hearings before the Tribunal since the Federal Court decisions of *Australian Postal Corporation v Oudyn*[1] and *Rosillo v Telstra Corporation Limited*[2].

The issue of when the Tribunal should use its discretion to remit under s. 42D is still not clear, despite the recent decisions of Downes J, the Acting President of the Tribunal in *Fuad v Telstra Corporation Limited*[3] and *Kelleher v Telstra Corporation Limited*[4]. Although the Acting President refused to grant both Applications by Telstra to remit the decision back to the decision maker in *Fuad* and *Kelleher*, he did not provide any assistance as to when it may be appropriate for the Tribunal to use or not to use its discretion under s. 42D. These decisions, although providing no legal principle on the general use of s. 42D, have settled the longstanding argument of whether such an order should be made by the Tribunal, where a decision is inconsistent with *Safety Rehabilitation and Compensation* Act 1988 (the SRC Act). Clearly, as both s. 42D applications were rejected in *Fuad* and *Kelleher*, an application under s. 42D is unlikely to be granted by a Tribunal where the Tribunal can deal with the issue by way of the Tribunal process.

The legislation

Section 42D of the AAT Act provides that the Tribunal may at any stage in proceedings remit a decision back to the decision maker for reconsideration. The decision maker may then affirm, vary or set aside the decision. Under s. 42D the varied or substituted decision becomes the reviewable decision before the Tribunal.

Section 62 (1) of the SRC Act provides that a determining authority may at any time, whether or not proceedings have been instituted, reconsider a determination made by it.

Section 67 (2) of the SRC Act provides that where proceedings are rendered abortive following a reconsideration under s. 62 (1) the determining authority is liable to reimburse the claimants' costs of the proceedings. Whether or not the proceedings are rendered abortive by a reconsideration under s. 62(1) is a question of fact given the original decision and the effect the reconsideration has on the original decision.

The choice – s. 42D by the Tribunal or a s. 62(1) reconsideration

A determining authority need not make a request to the Tribunal to make a s. 42D order as the authority can simply reconsider the determination under s. 62 (1) of the "SRC Act". The determining authority by making a request to the Tribunal may be seen to be attempting to avoid s. 67 (2) of the SRC Act, that is attempting to avoid the payment of costs to the Applicant.

Where a Tribunal makes an order under s. 42D at the request of a Respondent, the Applicant to a proceeding before the Tribunal will not be entitled to costs, notwithstanding

that the Applicant has incurred costs in challenging a decision and notwithstanding that s. 67(2) of the SRC Act provides for the payment of the Applicant's costs in these circumstances.

If a determining authority does not exercise its discretion to make a reconsideration of own motion under s. 62(2), then the Respondent must accept that it will be at risk of further costs of the Applicant at the Hearing (see s. 67 of the SRC Act). Member Webb in *Pisani v Comcare*[5] found that notwithstanding the Applicant was unsuccessful in establishing that he had an entitlement to ongoing compensation, as the decision of the Tribunal was more favourable to the Applicant, the Respondent was ordered to pay the reasonable costs of the Applicant under s. 67 of the SRC Act. This decision provides further incentive to a Respondent to correct the decision by way of s. 62(1) of the SRC Act as soon as becoming aware that a decision can not be affirmed by the Tribunal.

An alternative method to a s. 62(1) reconsideration on its own motion by the determining authority, is where the parties reach agreement and seek a s. 42C request for consent decision from the Tribunal.

When should a Tribunal exercise its discretion under s. 42D?

Section 42D was an amendment to the SRC which commenced on 16 December 1995.

Section 42D was discussed in *Daniel*

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Michael Lavery v. Registrar, Supreme Court of Queensland (1996) 23 AAR 52. Deputy President Forgie did not exercise a discretion under s. 42D in this decision and noted that it was not clear as when a discretion should be exercised under s. 42D. Deputy President Forgie referred to the Explanatory Memorandum but noted that no clear guidance was offered in the Memorandum.

Paragraph 99 of the Explanatory Memorandum[6] details how prior to the commencement of s. 42D, matters could proceed to Hearing even where the parties agreed that the decision maker should review the decision. It is arguable that when considering both the Explanatory Memorandum and the decision of the Federal Court in *N1112/00A,* the Tribunal should not, as a general rule, exercise its discretion under s. 42D without the consent of the parties to the review. Section 15AB (2) (e) of the *Acts Interpretation* Act[7] provides authority to rely on the Explanatory Memorandum in statutory interpretation.

Section 42D allows the Tribunal a discretion to remit decisions under review back to a decision maker in proceedings under all legislation which confers jurisdiction on the Tribunal. There are presently 395 separate Acts and Instruments vesting jurisdiction in the AAT.[8] The majority of these Acts and Instruments do not provide for costs orders of the reviews before the Tribunal. As such, there is no effect on the Applicant's entitlement to costs caused by the Tribunal making an order under s. 42D unless costs are provided by the legislation vesting jurisdiction in the Tribunal. However, in circumstances where costs are not payable to a successful Applicant under the vesting legislation, it may not be appropriate for the Tribunal to make a s. 42D order. Where costs are payable to a successful Applicant by virtue of the vesting legislation, and in particular where provision is made in the vesting legislation for costs to be paid where a reconsideration aborts proceedings under review, it is arguable that it is inappropriate for the Tribunal to exercise its discretion under s. 42D as this has the effect of excluding an entitlement of costs to the Applicant as provided by the vesting legislation. The SRC Act provides for costs to be paid to a successful Applicant and the SRC Act provides for costs to be paid to an Applicant where a determining authority reconsiders a decision which aborts a proceeding.

Should s. 42D be exercised where there is no consent of the parties

Section 42D was discussed by the Federal Court in *N1112/00A v Minister for Immigration & Multicultural Affairs*[9]. Emmett J found that the circumstances in which the Tribunal would be bound to exercise its discretion under s. 42D where the parties do not consent must be rare, if there are in fact any such circumstances.

Deputy President Block in *Cafarella and Minister for Immigration and Multicultural Affairs*[10] briefly discussed the issue of s. 42D. This was an immigration matter where after the date of the decision the Applicant gave birth in Australia and was married. Despite this connection with Australia and the effect this would have on the original decision, Deputy President Block refused to exercise the discretion under s. 42D as both parties did not consent and the matter proceeded to Hearing.

In *Egan and Commissioner of Taxation* [11] Senior Member Pascoe agreed to remit a taxation issue back to the decision maker where both parties consented to a s. 42D order.

Abuse of process?

Where a Tribunal, upon an application by a Respondent to a review, orders that a decision under review is reconsidered by the decision maker pursuant to s.42D in circumstances where the party seeking the order can make such a reconsideration without an application to the Tribunal, it is at least arguable that the Tribunal by acceding to the request of the party is allowing the party to avoid the costs provisions of the SRC Act. This use of the Tribunal process to avoid a costs exposure under the SRC Act may be seen to be an abuse of process. After all, such an application under s. 42D, is an application to the Tribunal to remit the decision back to itself when it does not need the Tribunal to do this in order to reconsider the decision. The Respondent can simply reconsider the decision on its own motion under s. 62(1) of the SRC Act.

Conclusion

Despite recent decisions of the Tribunal it remains unclear when a Tribunal should exercise its discretion under s. 42D of the AAT to remit a decision under review back to the decision maker for reconsideration. Where both parties consent to such an order it may be appropriate for the Tribunal to make an order under s. 42D, particularly given that matters should be dealt with as simply and as efficiently as possible within the Tribunal by virtue of s. 33 of the AAT.

However, where both parties do not consent to a s. 42D order the discretion should only be exercised by the Tribunal in exceptional circumstances. And further, where provision is made under the vesting legislation for reconsideration of decisions which are before a Tribunal, as provided by s. 62(1) and s. 67(2) of the SRC Act, a s 42D order should not be made by the Tribunal without consent of both parties as this may be an abuse of process. ①

ENDNOTES

1 (2003) FCA 318.
2 (2003) FCA 628.
3 (2004) AATA 1182.
4 (2004) AATA 1156.
5 (2004) AATA 441.
6 Law and Justice Legislation Amendment Bill (No.3) 1994.
7 1901.
8 The Administrative Appeals Tribunal Annual Report 2003.
9 [2000] FCA 1597.
10 [2001] AATA 30.
11 [2001] AATA 449.