

Exclusionary Provisions

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Introduction to exclusionary provisions

The SRC Act provides that in some situations employees are excluded from receiving compensation. Compensation is not payable to an employee if the injury is:

- intentionally self inflicted
- caused by serious and wilful misconduct by the employee
- caused as a result of the employee being under the influence of alcohol or a drug
- sustained because the employee voluntarily and unreasonably submitting to an abnormal risk of injury
- as a result of reasonable administrative action (RAA) undertaken in a reasonable manner against the employee.

Compensation is also not payable if an employee makes a false representation, connected with their employment, that they did not suffer from a disease.

Important: The exclusionary provisions apply to primary and secondary conditions.

See:

- [Determining liability__compliance and injury claims online legislative training module](#)
- [Determining liability - disease claims online legislative training module](#)
- [Determining liability__psychological injury and reasonable administrative actions online legislative training module](#)

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Intentionally self-inflicted

Under section 14(2), an employee cannot be paid compensation in respect of an injury that they deliberately inflicted on themselves.

You must consider whether the effects of a psychological injury meant that an employee did not realise their actions would result in self-harm.

An 'intentional' act is one of a person's own volition. Carelessness or accident is also not sufficient to establish an intention for self harm.

Serious and wilful misconduct

Under section 14(3) of the SRC Act, compensation is not payable for an injury that is caused by an employee's serious and wilful misconduct but is not intentionally self-inflicted.

Serious means the misconduct in question, not the consequences. Wilful means that the misconduct was deliberate, not accidental. If the act was thoughtless or negligent, it is not wilful for the purpose of the SRC Act.

For the exclusion to apply, the misconduct must have been the cause of an injury. That is, the injury would not have happened, if not for the misconduct.

If serious and wilful misconduct results in death, or serious and permanent impairment, this exclusion will not apply.

Under the influence of alcohol or a drug

Under section 4(13) of the SRC Act, an employee under the influence of alcohol or non-prescribed drugs is taken to be guilty of serious and wilful misconduct.

There must be evidence that an employee was under the influence of a substance.

If an employee is taken to be guilty of serious and wilful misconduct under the provision of section 4(13), you then need to consider whether the injury resulted in serious and permanent impairment, before payment of compensation is precluded under section 14(3).

Employee voluntarily and unreasonably submitting to an abnormal risk of injury

Under section 6(3) compensation is not payable if an injury is sustained because the employee voluntarily and unreasonably submitted to an abnormal risk of injury. To correctly apply this exclusion, it is necessary that you consider, whether:

- the activity which led to the employee's injury was dangerous in any way
- the employee voluntarily undertook the activity despite knowledge of the dangers involved, and
- it was unreasonable for the employee to undertake the activity.

Note: The Federal Court in the decision *O'Loughlin v Linfox Australia Pty Ltd* [2017] FCA 1394 found section 6(3) can only be applied to the deeming provision in section 6(1) that was relied upon to find the injury to an employee arose out of, or in the course of, the employee's employment. For further guidance refer to the [Injuries under section 6\(1\)](#) page.

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False representation made

Under section 7(7) of the SRC Act, a disease, or an aggravation of a disease is not taken to be an injury for the purposes of the Act if the employee has at any time, for purposes connected with their employment by the Commonwealth, made a wilful and false representation that they did not suffer, or had not previously suffered, from that disease.

To apply this exclusion, you must be satisfied:

- an employee had a pre-existing disease
- an employee made both a wilful and false representation that they did not suffer, or had not previously suffered, from that disease, and
- the representation was for purposes connected with their employment by the Commonwealth.

To be wilful there must be an intention to mislead. A false statement that arises from carelessness or mistake is not sufficient for the purpose of applying this exclusion. For further guidance refer to the [Injury and disease under the SRC Act](#) and [Considerations relevant to disease claims](#) pages.

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Definition of injury before 13 April 2007

Before 13 April 2007 (the date of the Safety, Rehabilitation, Compensation and Other Legislation Amendment Act (SRCOLA 2007) amendments), the definition of injury in section 4 of the SRC Act excluded a disease, injury or aggravation suffered by an employee as a result of:

- reasonable disciplinary action taken against the employee, or
- failure by the employee to obtain a promotion, transfer or benefit in connection with their employment.

This definition has since been amended, but still applies to claims with a date of injury prior to 13 April 2007.

On 13 April 2007, section 5A (Definition of injury) was inserted, amending the definition of injury. From 13 April 2007, injury does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

Reasonable administrative action taken in a reasonable manner

Under section 5A(1) of the SRC Act compensation is not payable if the injury is as a result of 'Reasonable Administrative Action' (RAA) undertaken in a reasonable manner.

Administrative actions are outlined under section 5A(2) and includes, but is not limited to:

- (a) a reasonable appraisal of the employee's performance;
- (b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
- (c) a reasonable suspension action in respect of the employee's employment;
- (d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- (e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
- (f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

The intent of the exclusionary provision is to exclude claims arising from legitimate management processes, when undertaken in a reasonable manner.

The exclusion only applies where an injury is sustained as a result of a RAA, noting the RAA does not need to be the sole cause of the injury.

What is administrative action?

Administrative action must be directed specifically to the employee as an individual in respect of their employment.

Administrative action does not include 'operational' actions directed at the way in which an employee is required to carry out their duties.

'Operational' actions include:

- ordinary work routine and changes to routine,
- regular meetings, and
- directions to perform work.

In determining what is administrative action you will need to consider the specific employment factors that contributed to the development of the condition and assess whether any of those factors are administrative actions.

Examples of administrative actions include:

- an employer acting on the recommendation of a fitness for duty assessment undertaken in respect of an employee, and
- transfer of an employee to a different position under a broader agency policy that it is specifically directed to the employee.

When is administrative action reasonable?

Determining whether administrative action is reasonable requires an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time, including the:

- circumstances that led to and created the need for the administrative action to be taken

- circumstances while the administrative action was being taken including the emotional state and psychological health of the employee involved [*Georges and Telstra Corporation Limited* [2009] AATA 731 [23]; *Jing Yu v Comcare* [2010] AATA 80], and
- consequences that flowed from the administrative action [*Georges and Telstra Corporation Limited* [2009] AATA 731 [23]].

The test is whether the administrative action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable' [*Bropho v HREOC* (2004) 135 FCR 105 [79]]

In general:

- administrative actions do not need to be perfect or ideal to be considered reasonable
- a course of action may still be 'reasonable action' even if particular steps are not (*Department of Education & Training v Sinclair* [2005] NSWCA 465)
- any 'unreasonableness' must arise from the actual administrative action in question, rather than the employee's perception of it (*Martinez and Comcare* [2013] AATA 949), and
- consideration may be given as to whether the administrative action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.

What is a reasonable manner?

Whether the administrative action was taken in a reasonable manner includes consideration of:

- the action
- the facts and circumstances initiating the action
- the way in which the action impacts the employee
- the circumstances in which the action was implemented
- whether established policies and procedures were followed
- whether any investigations were carried out in a timely manner, and
- any other relevant matters.

The impact on the employee cannot by itself establish whether or not the administrative action was carried out in a reasonable manner and some degree of humiliation may often be the consequence of a manager exercising their legitimate authority at work (*Comcare v Martinez* (no.2) [2013] FCA 439).

Was the injury 'as a result of' the RAA?

The RAA exclusion can only be applied where the employee's injury was sustained as a result of the RAA.

The High Court decision in *Comcare v Martin* [2016] HCA 43 clarified the circumstances in which the RAA exclusion can apply and sets out the necessary causal connection considerations. The subsequent Full Federal Court decision in *Lim v Comcare* [2017] FCAFC 64 provided further clarification about the application of the RAA provisions in the SRC Act.

To assess whether the injury was as a result of RAA, you need to consider whether the action made the difference between the employee sustaining or not sustaining the injury (refer to the process for assessing if the RAA applies for further guidance).

Process for assessing if the reasonable administrative action exclusion applies

The following process details how to assess if the RAA exclusion applies:

Important: There may be claims received where it is difficult to assess if the RAA exclusion applies. Escalate these claims to your Assistant Director, Director and seek legal advice to support consistency in decision making.

1. Does the employee have an ailment (or aggravation of)?

- if yes, identify causative factors and consider any:

- o employment factors
 - o non-employment factors
 - o factors listed under section 5B(2) of the SRC Act.
- if no, further consideration is not required as the employee has not suffered from an ailment.
2. Do the employment factors significantly contribute to the ailment?
- if yes, were any of the factors RAA? This will require an assessment of whether each identified action is:
 - o administrative
 - o reasonable
 - o taken in a reasonable manner
 - o in respect of the employee's employment?
 - if no, further consideration is not required as the significant degree test under section 5B(1) is not met.
3. Temporarily discount the RAA factors and consider all other employment factors.
4. Based on the employment factors (non RAA), would the employee still have suffered the ailment?
- if yes, RAA exclusion does not apply
 - if no, RAA exclusion applies.
- [Scheme guidance – injury suffered as a result of reasonable administrative action](#)
 - [Scheme guidance – injury suffered as a result of the reasonable administrative action – Attachment A – Applying the reasonable administration action exclusion \(RAA exclusion\)](#)
 - [RAA flow chart: Last step to determine if there is an injury as defined in the SRC Act](#)

