Federal Court of Australia

 Leach v Comcare [2021] FCAFC 134

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| Appeal from: | *Leach v Comcare* [2019] FCA 1698 |
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| File number(s): |  |
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| Judgment of: | **COLLIER, CHARLESWORTH, SNADEN JJ** |
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| Date of judgment: | 30 July 2021 |
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| Catchwords: | **WORKERS COMPENSATION** – where primary Judge dismissed an appeal from the Administrative Appeals Tribunal (**Tribunal**) with respect to the operation of s 53(3)(c) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**) – where appellant sought relief under SRC Act for mental injury claimed to have been suffered prior to 1997 – where workers’ compensation claim in respect of injury not lodged until 2016 – whether appellant gave notice as soon as practicable after becoming aware of injury – whether Tribunal and primary Judge erred in findings concerning onus of proof – whether open to Tribunal to make factual findings concerning advice given to appellant in 1997 by appellant’s psychologist – whether Tribunal ignored the operation of the rule in *Jones v Dunkel* (2016) 258 CLR 308; [2016] HCA 35 – whether primary Judge incorrectly applied principles of reasonableness – whether primary Judge conducted impermissible merits review |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 33, 35(3)(b), 44*Occupational Health and Safety (Machinery) Regulations 1985* (Vic)*Occupational Health and Safety Act 1985* (Vic) ss 21(1). 21(2)(a)*Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 53, 53(1)(a), 53(3) |
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| Cases cited: | *Abebe v The Commonwealth* (1999) 197 CLR 510*Australian Postal Corporation v D’Rozario* (2014) 222 FCR 303*Carr v Baker* (1936) 36 SR (NSW) 301*Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249; [1990] HCA 41*Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407*Cox v Smail* [1912] VLR 274*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60*Ekinci v Civil Aviation Safety Authority* (2014) 227 FCR 459; [2014] FCAFC 180*Green v Minister for Immigration and Citizenship* [2008] FCA 125*Haritos v Commissioner of Taxation* (2015) 233 FCR 315; [2015] FCAFC 92*Hart v Commissioner of Taxation* (2018) 261 FCR 406*Howes v Comcare* [2016] FCA 1521*Jones v Dunkel* (2016) 258 CLR 308; [2016] HCA 35*Leach v Comcare* [2018] AATA 1632*Leach v Comcare* [2019] FCA 1698*McDonald v Director-General of Social Security* (1984) 1 FCR 354*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; [2016] FCAFC 28*Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164*Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26*Re Day* (2017) 340 ALR 368; [2017] HCA 2*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286*Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152*Tarrant v Australian Securities and Investments Commission* (2015) 317 ALR 328; [2015] FCAFC 8 JD Heydon, *Cross on Evidence* (LexisNexis, 12th ed, 2020) |
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| Date of last submission/s: | 7 August 2020 (Respondent) 1 September 2020 (Appellant) |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Appellant: | Mr M L Robertson QC and Ms F J Chen |
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| Solicitor for the Appellant: | Holding Redlich |
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| Counsel for the Respondent: | Mr A Berger QC and Ms K Slack |
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| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

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|  | QUD 704 of 2019 |
|   |
| BETWEEN: | CRAIG LEACHAppellant |
| AND: | COMCARERespondent |

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| order made by: | COLLIER, CHARLESWORTH, SNADEN JJ |
| DATE OF ORDER: | 30 JULY 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, to be assessed in default of agreement in accordance with the court’s Costs Practice Note (GPN-COSTS).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1. Before the Court is an appeal from the decision of the Federal Court of Australia in *Leach v Comcare* [2019] FCA 1698, in which the primary Judge dismissed an appeal from the Administrative Appeals Tribunal (**Tribunal**) (see *Leach v Comcare* [2018] AATA 1632).
2. The appellant, Mr Leach, had made a claim pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**) for a mental injury he alleged was caused as a result of his employment with the Australian Federal Police (**AFP**) prior to the termination of his employment in 1997. Section 53(1)(a) of the SRC Act requires a notice in writing of an injury to be given to the relevant authority as soon as possible after the employee becomes aware of the injury. The decision of the Tribunal concerned a preliminary issue, namely whether, in respect of the appellant’s claim, the respondent, Comcare, was entitled to rely on a defence in s 53(3) of the SRC Act.
3. In particular, by operation of s 53(3) of the SRC Act a notice will be taken to nonetheless comply with s 53 if as regards the time of the giving of the notice it failed to comply with the section’s requirements, but:
* the relevant authority would not be prejudiced by the notice being treated as sufficient notice, or
* the failure by the claimant to give notice resulted from (relevantly) ignorance, mistake or other reasonable cause.
1. In substance, the Tribunal found that the appellant was aware in 1997 that he could seek compensation from Comcare, but did not do so, and this inaction did not arise from ignorance or mistake. The Tribunal was also satisfied that Comcare was prejudiced by the appellant not having given it notice of his claims.
2. Relevant issues for this Court are raised both by the notice of appeal filed by the appellant on 13 November 2019, and a notice of contention filed by the respondent on 21 August 2020.
3. The appeal should be dismissed for the following reasons.

# Background

1. The appellant was employed by the AFP between 3 February 1986 and 21 November 1997. The majority of the appellant’s work was as a detective in organised crime and in drug related areas. In 1989, an AFP Assistant Commissioner was murdered, and the appellant was subsequently involved in investigating the Calabrian Mafia aspect of this murder.
2. In 1995, an investigation was launched by the AFP’s Internal Security and Auditing Division (**ISA**). As part of this investigation process, the appellant became aware in 1996 that he was the subject of surveillance and “special projects”, which included telephone intercepts, hidden cameras and listening devices.
3. On 23 May 1997 the appellant’s employment was suspended based on suspicions that he had committed a disciplinary offence, being threats of physical violence against members of ISA and other members of the AFP during a security interview on 8 April 1997. On 21 November 1997 the appellant’s employment was formally terminated.
4. The appellant lodged a workers’ compensation claim on 8 March 2016 with respect to a “mental injury” he alleged was a result of his employment with the AFP.
5. On 6 May 2016, the respondent made a determination that the appellant’s claim for compensation was excluded by operation of section 53(1)(a) of the SRC Act, as the appellant had not provided notice of the injury as soon as practicable after he had become aware of his injury. It also determined that, on the balance of probabilities, there was insufficient medical evidence to support the appellant’s claim that his employment with the AFP was more than a mere contributing factor to his condition.
6. The appellant requested a review of the determination on 6 May 2016. On 1 July 2016 the original determination was affirmed.
7. On 9 August 2016, the appellant lodged an application for review with the Tribunal.

# Decision of the tribunal

1. At [60] of its reasons the Tribunal found that the appellant had not given notice of his injury to the respondent as soon as practicable after he became aware of his injury in accordance with s 53(1) of the SRC Act.
2. The Tribunal examined whether any of the exceptions in s 53(3)(c) of the SRC Act were satisfied.
3. The Tribunal divided its consideration of s 53(3)(c) into four parts.
4. First, the Tribunal considered whether the respondent was prejudiced by the appellant not having given notice to the respondent as soon as practicable after he became aware of the injury in accordance with s 53(1) of the SRC Act. It observed that it was not possible to draw a conclusion that the respondent would not, by reason of the failure to give notice, be prejudiced if the notice given by the appellant was treated as a sufficient notice.
5. When the appellant first noticed his injury in 1996, he attended upon Ms Sonja Jacob, a psychologist, and Dr Peter Jones, a psychiatrist. The Tribunal noted that the medical records and reports of Ms Jacob and Dr Jones from 1996 were not available. The Tribunal considered that these records would contain evidence which in turn would have enabled the Tribunal to make a decision as to whether the appellant was actually injured in the course of his employment with the AFP. Moreover, in cross-examination, the appellant conceded that he would not be able to remember precisely what was said at the sessions with Ms Jacob. In light of this, the Tribunal found that the respondent was prejudiced by reason of not having access to the records of Ms Jacob and Dr Jones.
6. Second, the Tribunal dismissed the availability of the exceptions in s 53(3)(c) of the SRC Act relating to death or absence from Australia as having no relevance.
7. Third, the Tribunal considered whether the appellant’s failure to comply with s 53 was a result of ignorance or mistake. It acknowledged the evidence given by the appellant that he was only made aware of his right to make a claim with the respondent by 2008, and that he only appreciated that a psychological injury was a valid injury in 2014 when he made a claim with AMP. However, in evidence before the Tribunal was a file note of Ms Jacob, bearing the date of 15 May 1997, which indicated that the appellant had been told of his right to make a claim to the respondent. The Tribunal observed at [72] of its reasons:

72. I have to consider whether the applicant knew of Comcare before 2008. In evidence is a file note by Ms Jacobs bearing the date 15 May 1997 which was made after the applicant had been subject to a probe by the ISA. The applicant was asked if he had been told of his right to make a claim to Comcare as early as 1997. The file note of Ms Jacobs referred to “Comcare”. In cross-examination the applicant was asked if it was possible that Ms Jacobs had then told him that he was able to lodge a Comcare claim. The applicant answered: “It's possible that she could have done that, but she didn't”. It was put to the applicant that after the telephone conference recorded in the file note that Ms Jacobs had then said to him that he was experiencing symptoms and that he is able to lodge a Comcare claim; the applicant answered: “I'm saying definitely not”. The answers that were given in cross-examination by the applicant are not consistent and do not satisfy me that the applicant was not advised by Ms Jacobs of his right to then make a claim. At that time the applicant was in regular contact by telephone and personal visits with the AFP psychologist over a period of some six months. I consider that it is entirely plausible that Ms Jacobs had informed the applicant of his right to make a claim. I do not consider that this is a case of either ignorance or mistake.

1. Fourth, the Tribunal considered whether the appellant’s failure to comply with s 53 of the SRC Act was a result of any other reasonable cause within the meaning of s 53(3)(c). It noted that the appellant stated he made an undertaking to not mention the ISA investigation process to anyone, otherwise he would face disciplinary action. However, the Tribunal recognised that such an undertaking would have no force after the employment of the appellant was terminated in 1997. It followed that there was no cogent evidence that the failure to comply with s 54 of the SRC Act resulted from any other reasonable cause within the meaning of s 53(3)(c).
2. As none of the exceptions in s 53(3)(c) of the SRC Act were satisfied and the respondent was prejudiced by the appellant not having given notice to the respondent after he became aware of his injury, the Tribunal affirmed the decision under review.

# Decision of the primary judge

1. On 9 July 2018, the appellant appealed from the decision of the Tribunal to the Federal Court of Australia in respect of whether the respondent was entitled to rely on s 53(3) of the SRC Act.
2. The appellant’s notice of appeal from the Tribunal advanced the following questions of law:

1. Whether the Tribunal failed to comply with the statutory requirement to "include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based" in accordance with s 43(2B) of the *Administrative Appeals Tribunal Act*;

2. Whether the Tribunal afforded the Applicant procedural fairness by:

a. admitting, against objection, irrelevant, inadmissible and prejudicial evidence of Dr Duke;

b. admitting, against objection, the "AMP material" as evidence without regard to the prejudicial, or potentially prejudicial, nature of untested hearsay material;

c. failing to control the conduct of the Respondent (a model litigant), in particular by:

i. allowing it to adduce inadmissible and prejudicial evidence by improperly instructing its expert witness (Dr Duke) with the "AMP material" and soliciting from him an opinion as to the Applicant's credibility;

ii. allowing it to urge the use made of Dalton J's comments in *Leach v Ross* (2013) QSC 333 to “determine[d] issues of the applicant's credibility”;

iii. accepting any of the its submissions, assuming it did so, referred to at par 55 of the decision, all of which are made without any proper evidential basis;

iv. allowing improper and confusing questions by the Respondent's counsel in her cross-examination of the Applicant;

d. not allowing the Applicant the opportunity at the hearing to present his case in respect of the issue concerning when the applicant “first became aware” of his symptoms and then ignoring the explanation provided in respect of that issue in the applicant's submissions;

e. refusing to make available to the Applicant a copy of the Transcript for the purposes of preparing written submissions.

3. Erred by making findings for which there was no evidence, that were illogical, irrational or not based on findings or inferences supported by logical grounds, or so unreasonable that no reasonable decision maker could have made them, including but not limited to the following:

a. "later in 1995, it was alleged the applicant had been associated with the organised crime aspect of this murder and an investigation was launched by AFP's Internal Security and Auditing Division ("ISA")": par 1;

b. referring to inconsistencies in the Applicant's evidence in respect of his knowledge of, or participation in, a telephone conference, and what might have been discussed at that telephone conference: par 72; and from that:

i. finding, in the absence of any evidence, that "I consider that it is entirely plausible that Ms Jacobs had informed the applicant of his right to make a claim": par 72;

c. rejecting (which impliedly it did) the Applicant’s evidence that he first became aware of his "injury" in 2016; and subsequently:

i. "I do not find that there is any cogent evidence that the failure to comply with section 53 of the SRC Act is from ignorance or from a mistake within the meaning of section 53(3)(c) of the SRC Act"; par 70;

ii. "It is certainly not plausible that the applicant was unaware by ignorance or mistake of his rights to claim compensation until he gave his notice in 2016"; par 70.

d. accepting the Respondent's submission (made without evidence) that the Applicant was aware of his right to claim workers compensation and (for a reason not explained) declined to seek it; pars 50, 55, 60 & 76;

e. failing to consider at all (or rejecting without explanation) the Applicant's clarification in respect of the "inconsistency ... with the answer provided by the applicant in his claim form that he first noticed the "symptoms/injury" in 1996" and wrongly treating as a "concession" made in cross-examination that "the applicant first noticed the "symptoms/injury" in 1996, and it was likely that he discussed his stress condition with AFP doctors in 1997": pars 60, 62 [The Applicant contends that whilst he was aware of symptoms in 1996, he was ignorant that those symptoms were indicative of a compensable injury];

(Underlying in original).

1. In support of these questions of law, the appellant relied on the following grounds of appeal:
2. The Tribunal's written reasons for decision fails to make clear findings and, to the extent that it may be inferred that findings were made, it has not set out the evidence on which any such findings were made, or its reasons for assessing the evidence in the manner it did.
3. It has merely provided an incomplete summary of the evidence and failed to give reasons for rejecting the Applicant's sworn testimony in favour of what can only be its own speculations, unexplained inferences or, alternatively, material that was adduced which should not have been.

For example, the Applicant is left to speculate as to what weight, if any, the Tribunal gave to:

a. the adverse comments made by Dalton J in *Leach v Ross*;

b. the (inadmissible) comments of Dr Duke in his second report;

c. the diagnosis of Dr Lotz;

d. the diagnosis of Cameron Brown (psychologist);

e. the material obtained from the “AMP material”­­ – all of which was untested hearsay evidence.

3. Moreover, the Applicant contends that the Tribunal's rejection of his claims and evidence was unjust and made in circumstances in which it should have been slow to do so: *Re Tierney and Reserve Bank of Australia* (1988)15 ALD 534 at 535. Although it is not expressly stated, the Tribunal must have found that the AFP itself was aware of the Applicant's injury and that he was in a position to make a Comcare claim. This is so since the key basis of its rejection of the Applicant's contention that he was ignorant of his right to lodge a claim until 2016 appears to be because it "consider[ed] that it is entirely plausible that Ms Jacobs had informed the applicant of his right to make a claim": par 72.

4. Although not expressed as a firm finding of fact, it is evident that the Tribunal has formed the conclusion that Ms Jacobs did in fact inform the Applicant of his right in 1997, thus countering the Applicant’s contention that he was ignorant of that right until 2016. The Tribunal could only have reached this conclusion on the basis of an inference that was not open to it to make, and in circumstances where it gave greater weight to this inference than to the Applicant's direct sworn evidence that Ms Jacobs did not so inform him and, further, that he was ignorant of his right to make a claim until 2016. As noted above, the Tribunal has not given any reasons for rejecting the Applicant's evidence.

5. The Applicant intends to provide written submissions addressing in detail the above points.

1. At the hearing before the primary Judge, the submissions of the appellant focussed on the third question of law and the Tribunal’s finding that the appellant was not ‘ignorant’ (within the meaning of section 53(3)(c) of the SRC Act) of his right to make a Comcare claim. The appellant contended that this conclusion was “unreasonable and illogical” and therefore wrong in law because there was no logical connection between it and the evidence before the Tribunal. He claimed that the Tribunal’s conclusion at [72] that Ms Jacob told him about his right to make a claim to the respondent was mere speculation, and was just one of many possibilities.
2. Various other contentions were made by the appellant in the appeal, however at [25] the primary Judge rejected these contentions on the basis that they invited impermissible merits review.
3. In light of the appellant’s main contention, the primary Judge considered it necessary to set out some further aspects of the factual context to the appeal, as follows:

13 Ms Jacob (who is mentioned at [72] of the Tribunal’s reasons above) is a psychologist who Mr Leach consulted for approximately six months in 1996 and 1997. In its reasons, the Tribunal recorded the following details of Ms Jacob’s involvement (at [16]–[17]):

16. [Mr Leach] states that around October 1996, after attending a VIP close protection training course in Canberra, he began to feel the first signs of suffering a psychological injury, however he considered that a psychological injury would ruin his career so he remained in denial. As part of the course, the applicant underwent a mental state evaluation by Ms Sonja Jacob, psychologist, who voiced concerns regarding [Mr Leach’s] results. [Mr Leach] informed Ms Jacob that “there was nothing wrong” although told Ms Jacob at another meeting that he was the subject of an unwarranted and lengthy investigation process. [Mr Leach] submits he asked Ms Jacob to keep their discussions confidential as he was concerned about an adverse mental assessment finding which could negatively affect his career. [Mr Leach] submits that Ms Jacob continued to “check in” on [him] over the next six months but was always reserved in their discussions.

17. Ms Jacobs [sic – Jacob] referred [Mr Leach] for specialist treatment to Dr Peter Jones of Davidson Trahaire Psychorp. [Mr Leach] stated that he interpreted this referral as being for anger management treatment and as such he was resistant to the treatment.

(Footnote omitted)

14 I interpose to record that, during the hearing before the Tribunal, Mr Leach submitted a letter of support from Ms Jacob dated 27 April 2016.

15 As is mentioned at [72] of the Tribunal’s reasons, on 15 May 1997, Ms Jacob made a file note of a teleconference in which she was involved with a number of Australian Federal Police (AFP) personnel concerning Mr Leach’s situation. Those persons and the positions they filled at that time were identified during the hearing before the Tribunal by reference to Ms Jacob’s file note as: Assistant Commissioner Bob McDonald, who was in charge of the Eastern Region Sydney; Mr Wayne Morrison, an AFP administration officer; Ms Vicky Bendle, the National Staff Welfare Officer; Mr Ray Tinker, who was Mr Leach’s supervisor; Mr Rodd Leffers, the National Officer in Charge of Personnel; Mr Paul Jackson, the Officer in Charge of the AFP’s Internal Security and Auditing Division (ISA) nationally; and Mr Steve Jackson, the Officer in Charge of the ISA in the Eastern Region Sydney.

16 In his evidence-in-chief before the Tribunal, Mr Leach did not mention Ms Jacob’s file note. However, he must have been aware that Comcare placed particular reliance on that document because, in its pre-hearing submissions before the Tribunal, Comcare contended:

27. Accordingly, [Mr Leach’s] contention properly falls for consideration by reference to the ‘ignorance’ exception. However, it cannot be said that [Mr Leach] was ignorant of his right to claim compensation because:

…

b. Ms Jacob, in her file note of 15 May 1997 referred to ‘Comcare’ and so, it can be inferred that Comcare was discussed by her with [Mr Leach].

(Footnote omitted)

17 Ms Jacob’s file note was introduced during Mr Leach’s cross-examination before the Tribunal. The cross-examination in respect of that file note occupied approximately five pages of the hearing transcript. The following is a summary of, and excerpts from, the pertinent parts of that transcript:

(a) at T24, Mr Leach was asked the following questions about his recollection of the events of 20 years ago and gave the following responses:

[Q.] Do [you] accept that it would be difficult for you to recall precisely what was discussed with Ms Jacob 20 years ago?

[A.] Yes, precisely it would be, yes.

[Q.] And it would also be difficult to recall what even happened in some of those, or in all of those sessions?

[A.] I have a good memory of that, because it was something I never wanted to ever be in a situation where I had to see a psychologist.

(b) at T25–T28, Mr Leach was asked to decipher Ms Jacob’s file note. In that process, among other things, he described who was in attendance during the teleconference (see above at [0]); he said that the file note recorded that he had spoken with a Mr Gerald Fletcher, a work mate, for advice; and he said that the file note also included the statement “symptoms for Comcare claim”. Mr Leach also said that he was not present during that teleconference;

(c) at T28, Mr Leach was asked the following questions about whether he was advised to lodge a Comcare claim and he gave the following responses:

[Q.] And this note also might indicate that she had discussed with you after this telephone conference that you were able to lodge a Comcare claim?

[A.] Are you saying that’s possible? Is that what you said?

[Q.] Possible, yes?

[A.] It’s possible that she could have done that, but she didn’t.

[Q.] Well, you’ve already accepted that your recollection of things that happened 20 years ago is not concise?

[A.] No, what I said was “precise conversation.”

…

[Q.] She had a telephone conference with these people and then she says to you afterwards, “You are experiencing symptoms, you are able to lodge a Comcare claim.” She may have discussed that with you, mightn’t she?

[A.] I’m saying definitely not.

[Q.] Yet, you have also agreed that your recollection is imprecise from 20 years ago?

[A.] I can assure you that I would remember that, and it didn’t happen. I have a good recollection of all the conversations I had with Sonia [sic – Sonja] Jacob and Peter Jones outside, and I can assure you - and I can assure the Deputy President - that that was never mentioned, so I am going to say it didn’t happen, and you are saying it’s possible it happened, but it didn’t happen.

(d) at T29, Mr Leach claimed that if he had known about Comcare at that time, seven days before his retirement, he would have taken the Comcare “parachute”. He added: “I didn’t know anything about Comcare back then, so the thought of lodging a Comcare claim never entered my head at all”.

It should be noted that Mr Leach’s reference in (d) above to “seven days before his retirement” would appear to relate to his suspension from duty on 23 May 1997.

1. In relation to the issue of legal unreasonableness, the primary Judge observed at [25] that the essence of the appellant’s contention attacking the Tribunal’s conclusion at [72] was that there was no evidence to support that conclusion and, consequently, the Tribunal’s conclusion was founded on unreasonable speculation. For the following reasons the primary judge rejected this contention:

26. … There are, in my view, at least four features of the Tribunal’s reasoning at [72] which explain why it came to its ultimate conclusion about Mr Leach’s awareness of his right to make a Comcare claim, as highlighted at [11] above. First, there is the Tribunal’s mention of Ms Jacob’s file note and the fact that it referred to “Comcare”. Secondly, there is the Tribunal’s reference to the timing of Ms Jacob’s file note vis-à-vis the ISA probe. As Comcare pointed out in its submissions, Mr Leach claimed that probe was the initial cause of his psychological condition. Thirdly, and perhaps most importantly, there is the Tribunal’s recorded view that the answers Mr Leach gave in cross-examination were “not consistent and [did] not satisfy [it] that [Mr Leach] was not advised by Ms Jacobs [sic – Jacob] of his right to then make a claim”.

27 There are two aspects of this view that bear highlighting. First, it is to be noted that the two answers to which the Tribunal referred were, in fact, consistent with each other. That is to say, in both, Mr Leach completely excluded the possibility that he was told in 1997 that he was able to make a Comcare claim. That being so, when the Tribunal said that those answers were “not consistent”, I consider it meant that both answers were inconsistent with common experience of the limits to human memory. Put differently, I consider the Tribunal was saying that it did not accept Mr Leach’s claims that Ms Jacob definitely did not tell him in 1997 (some 20 years earlier) that he was able to lodge a Comcare claim.

28 The second aspect of this view that bears highlighting is that, in expressing it in the terms that it did, I do not consider that the Tribunal was, as Mr Leach contended, reversing the onus of proof. That is so because s 53(3)(c) of the SRC Act provides an exception to the requirement for a person making a claim to give notice of an injury “as soon as practicable” after that person becomes aware of the injury concerned. Hence, the person relying on that exception bears the onus of proving the facts necessary to establish that the exception exists (see *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249 at 258). In this matter, that meant Mr Leach bore the onus of establishing that his failure to provide the notice of his injury “as soon as practicable” after becoming aware of it resulted from ignorance.

29 Fourthly, and finally, there is the Tribunal’s reference to the fact that Mr Leach and Ms Jacob were, at this time in 1997, in regular contact by telephone and personal visits over a period of some six months.

30 When one takes account of these four features of the reasoning which immediately preceded the Tribunal’s conclusion at [72] of its reasons and applies a fair reading to those reasons, that is, not reading them overzealously with “an eye keenly attuned to the perception of error” (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272), I consider that the Tribunal demonstrated an “evident and intelligible justification” for its conclusion at [72] (see the sixth principle in Eden above). I therefore reject Mr Leach’s contentions that the Tribunal’s conclusion at [72] was legally unreasonable.

1. In relation to the first and second questions of law raised by the appellant, the primary Judge held that, as the appellant did not make any submissions in support of these questions, but instead claimed they raised the same issues as the third question, they were to be rejected for the same reasons.
2. The primary Judge concluded that none of the appellant’s questions of law had merit, and ordered the appeal be dismissed.

# notice of appeal and notice of contention

1. The appellant appeals from the whole of the judgment of the primary Judge and seeks orders including that the application be remitted to the Tribunal, differently constituted, for review according to law.
2. The appellant’s notice of appeal to this Court advanced the following four questions of law:

1. The Court erred by not allowing the appeal.

2. Whether the Court erred by allowing findings for which there was no evidence, that were illogical, irrational or not based on findings or inferences supported by logical grounds, or so unreasonable that no reasonable decision maker could have made them, including but not limited to the following:

a. Finding in the absence of evidence that former AFP Psychologist Ms Sonja Jacob advised the Appellant to lodge a Comcare claim.

b. Finding inconsistencies in the Appellant's answers that led to the Tribunal rejecting the claim as outlined in paragraph 72 of the Tribunal decision.

c. Relying on speculation regarding the critical Tribunal paragraph 72 finding that the Appellant's answers were not consistent.

3. Whether the Court erred by placing the onus onto the Appellant to disprove possibilities raised by the Respondent rather than have the Respondent provide supporting evidence, including the possibility Ms Jacob advised the Appellant to lodge the claim in 1997, which later became the critical finding of fact.

4. The Tribunal and the Appeal Court asserting that the Appellant did not rely on the mistake exception. In paragraph 10 of the Appeal Court Judgement it is stated: *It should be noted that, before the Tribunal, Mr Leach did not seek to rely on the "mistake" exception (Tribunal's reasons at [46])*.

(Italics in original).

1. In support of these questions of law, the appellant relied on the following grounds of appeal:

1.

a. There is no evidence that Ms Jacob advised the Appellant to lodge a claim.

ii. A reference to Comcare in a handwritten file note of a teleconference the Appellant knew nothing about, and the fact that the teleconference occurred during the 2 year ISA investigation, cannot be extrapolated into the finding of fact that Ms Jacob then went on to advise the Appellant to lodge a claim.

iii. The only direct evidence before the Tribunal was the Appellant's sworn written and oral testimony which denied Ms Jacob advised the Appellant to lodge a claim. There was no evidence to the contrary.

iv. The Appellant's testimony regarding Ms Jacob was not rebutted by the Respondent and no reason was given for rejecting his testimony.

v. The Respondent produced no evidence of Ms Jacob advising the Appellant to lodge a claim. The correct balance of competing facts was not properly observed.

vi. The Respondent did not suggest that Ms Jacob told the Appellant to lodge a claim in their Tribunal closing submissions. It was merely one of many possibilities raised in earlier submissions and cross examination.

vii. Ms Jacob had denied that she advised the Appellant to lodge a claim. It was not her role, and she has described the finding as wrong and pure speculation.

viii. There is no reason given why speculation triumphs over unrebutted direct sworn evidence. The finding that Ms Jacob advised the Appellant to lodge a claim, based on the scant evidence outlined in 1a(ii) above, is speculation.

b. There were no inconsistencies in the two answers nominated in paragraph 72 of the Tribunal's decision. The Appellant was consistently adamant that Ms Jacob did not advise him to lodge a Comcare claim.

i.The Court speculated that the Tribunal's paragraph 72 reference to the Appellant's alleged inconsistent answers meant something entirely different to how it would be read and understood by a normal prudent person. Stating: *That being so, when the Tribunal said that those answers were "not consistent", I consider it meant that both answers were inconsistent with common experience of the limits to human memory. Put differently, I consider the Tribunal was saying that it did not accept Mr Leach's claims that Ms Jacob definitely did not tell him in 1997 (some 20 years earlier) that he was able to lodge a Comcare claim*.

i. The Court is engaging in speculation to theorise or try to make sense of the Tribunal finding.

ii. A normal prudent person reading the Tribunal finding would observe that the inconsistencies relied on by the Tribunal is a reference to the belief that the two answers are inconsistent with each other.

iii. The Court found that the inconsistent answers related to the limits of human memory. This guess is not referred to in the reason for the Tribunal rejecting the ignorance or mistake claim.

iv. It is not open to the Court to substitute the true meaning of the written words, with a completely different meaning based on how the Court guesses the Tribunal might have wanted the finding interpreted. The fact that the Court can find room to vary the meaning of the all important inconsistencies finding, clearly demonstrates how incoherent the tribunal decision was. Which puts the Appellant at a distinct disadvantage to mount an appeal when there is no common ground about how to interpret the critical, key finding which led to the claim being rejected.

b. The tribunal should not be considered an expert in "the limits of human memory". Most people would have a good memory of the topics of conversation during important events in their lives without remembering the conversation word for word, or "precisely".

2. There were several unfounded possibilities put to the Tribunal regarding Ms Jacob's file note with the Comcare reference. One of the Respondents possibilities was that it could indicate Ms Jacob later advised the Appellant to lodge a claim.

a. The Respondent was in a far better position than the Appellant to adduce evidence from Ms Jacob to support the possibility and chose not to. The Jones v Dunkel rule applies. The Respondent appears to have adhered to the rule when having decided to not seek evidence from Ms Jacob, the theory was not relied on in their closing submissions

b. As the Respondent chose not to obtain evidence, or call Ms Jacob as a witness, the Tribunal should have followed the Jones v Dunkel rule and drawn the conclusion that Ms Jacob would not be a helpful witness for the Respondent and dismissed any further unfounded possibility that Ms Jacob advised the Appellant to lodge a claim.

c. When the Tribunal first speculated that Ms Jacob advised the Appellant to lodge a claim, it would have been fair and reasonable for the Tribunal to give notice to the parties of the Tribunal's position and given the self represented Appellant the opportunity to approach Ms Jacob for a sworn affidavit.

d. After the Tribunal finding that Ms Jacob advised the Appellant to lodge a claim, and prior to the appeal hearing, the Appellant approached Ms Jacob and obtained a sworn affidavit from her where she stated that she did not tell the Appellant to file a claim, it was not her role to do so, and declared the finding wrong and pure speculation. Ms Jacob's affidavit was rejected by the Court, stating the Appellant should have obtained the affidavit at the time the Respondent raised the possibility. The Court effectively reversed the onus of the Jones v Dunkel rule.

3. At all times throughout the process, it is clear the Appellant relied on both the ignorance and mistake exception.

(Errors, formatting and numbering in original).

1. On 21 August 2020, the respondent filed a notice of contention. The respondent contended that the judgment of the primary Judge dismissing the appellant’s notice of appeal filed 9 July 2018 should be affirmed on grounds other than those relied on by the Court, namely:

1. The Tribunal’s conclusion, in [72] of its Reasons for Decision (**the Tribunal’s reasons**), that the appellant had given answers in cross-examination that are not consistent and did not positively satisfy the Tribunal that the appellant had not been advised by Ms Jacob of his right to then make a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the **SRC Act**) was open to it, in light of the following answers the appellant gave in cross-examination:

1.1. The following answers he gave in relation to his ability to remember precisely what was said in consultations with Ms Jacob in 1996 and 1997:

Do you accept that it would be difficult for you to recall precisely what was discussed with Ms Jacob 20 years ago? --- Yes, precisely it would be, yes.

And it would also be difficult to recall what even happened in some of those, or in all of those sessions? --- I have a good memory of that, because it was something I never wanted to ever be in a situation where I had to see a psychologist.

Well, you’ve said yourself that you were experiencing psychological symptoms at that time? --- In hindsight, yes.

They may have impaired your ability to remember precisely what was said? --- Precisely, yes.

1.2. his answer that ‘It’s possible that she [Ms Jacob] could have done that [told him he was able to lodge a Comcare claim] but she didn’t (see the Tribunal’s reasons at [67]); and,

1.3. his answer that Ms Jacob had ‘definitely not’ told him that he was experiencing symptoms and was able to lodge a Comcare claim (see the Tribunal’s reasons at [67]).

2. Whilst the primary judge’s reliance, in [28] of his Reasons for Judgment, on the principle established by *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249 was inapt:

2.1. his Honour’s conclusion (at [28]) that the appellant bore the onus of establishing the facts necessary to establish that the exception in s 53(3)(c) of the SRC Act existed, was correct; and

2.2. the Tribunal’s conclusion (in [75]-[76] of the Tribunal’s reasons) that the decision under review should be affirmed because there was no cogent evidence that the exceptions in s 53(c) of the SRC Act are satisfied did not involve any error of law.

# submissions of the parties

## Appellant’s submissions

1. In submissions filed on 23 June 2020, the appellant submitted in summary:
* The Tribunal’s fact finding process was infected by error of law.
* There ought not have been any re-evaluation of evidence by the primary Judge, as the Court’s jurisdiction was to review the Tribunal’s findings of fact.
* The primary Judge erroneously applied the seven principles set out in *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; [2016] FCAFC 28.
* The primary Judge erroneously undertook his own evaluation of the appellant’s evidence to recast what his Honour found to be a faulty finding of fact by the Tribunal to support the Tribunal’s finding.
* The primary Judge erred in not allowing the appellant’s appeal immediately because conjecture, however likely, was an impermissible basis to reach a conclusion on the ultimate issue.
* The primary Judge erred in deciding that the appellant bore the onus of proof before the Tribunal, namely, “the onus of establishing that his failure to provide the notice of his injury ‘as soon as practicable’ after becoming aware of it resulted from ignorance”.
* The file note was not rationally probative evidence from which an inference as to the applicant’s state of mind could be drawn.
1. In his submissions, the appellant referred to legal principles to be applied with respect to rationally probative evidence versus conjecture. In summary, the appellant submitted:
* A tribunal’s finding of fact is legally unreasonable if the Court finds that it is not based on rationally probative evidence.
* “[I]f there is no probative evidence of a fact and no logical grounds to support the fact, the finding of that fact will involve error of law …”: (*Rawson Finances Pty Ltd v Commissioner of Taxation* [2013] FCAFC 26, [84]).
* A tribunal of fact is “not concerned with a choice between rival conjectures” and is not authorised to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must from a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied: (*Jones v Dunkel* (2016) 258 CLR 308, 305 [2]; [2016] HCA 35).
* The tribunal will err in law if it undertakes a balancing or weighing exercise between, on one side of the scales, rational probative evidence from which the fact may be inferred and, on the other side of the scales, a rival conjecture, which can *never* support an inference of fact: (*Carr v Baker* (1936) 36 SR (NSW) 301, 306 [86]).
* The initial legal onus is rarely of importance in fact-finding, as after all the evidence is in, it is rare that competing probative evidence will balance the scales precisely: (*Dorman Long Steel Ltd v Bell* [1964] 1 WLR 333, 335).
1. The appellant then referred the Court to legal principles to be applied with respect to rationally probative evidence of state of mind. The appellant submitted, in summary:
* The state of a person’s mind must be inferred from rational probative evidence.
* An applicant’s sworn evidence of his or her state of mind is rationally probative evidence from which that state of mind may be inferred.
* The probative force of an honest applicant’s own evidence is not *prima facie* unacceptable. It must be considered on its merits, in light of the circumstances of the case, without any prepossession, favourable or unfavourable: (*McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284, 302; [1979] HCA 18).
* After close and cautious testing, if an applicant is believed, he or she “of course succeeds” or, to the same end, his or her evidence has “the special weight of an honest witness”. It outweighs objective circumstances that would otherwise point to the contrary (*Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1, 6).
* An honest applicant’s own evidence of his or her state of mind either has to be shaken to nothing in cross-examination or has to be met with counter rationally probative evidence that outweighs it.
1. Applying these principles to the Tribunal’s fact finding process, the appellant submitted, in summary:
* Contrary to the decision of the primary Judge, there was no legal onus upon the appellant before the Tribunal.
* The appellant’s evidence as to his state of mind had, of itself, “special weight” and, more prosaically, was “a reasonable basis for a definite conclusion affirmatively drawn of the trust of which the tribunal of fact may reasonably be satisfied”.
* The Tribunal erred in finding that the possibility that the appellant was advised by Ms Jacob of his right to make a Comcare claim was plausible. More so, it was erroneous for the Tribunal to rely on this plausibility to find that this was not in fact a case of the appellant’s ignorance. The proper course was to reject the possibility as unsupported by rationally probative evidence and as wholly irrelevant.
* The respondent’s submission to the Tribunal that ‘Ms Jacob, in her file note of 15 May 1997, referred to “Comcare” so it can be inferred that Comcare was discussed with the applicant’, was plainly wrong.
* The Tribunal’s rejection of the appellant’s sworn evidence due to the plausibility of a possibility arising from the file note was an error in the process of fact-finding.
1. Moreover, in relation to the decision of the primary Judge, the appellant submitted:
* The primary Judge correctly found that the appellant’s sworn evidence was unshaken after extensive cross-examination.
* The primary Judge erred in finding that Ms Jacob’s file note was of such “significance” that the appellant, having been given advance warning that it would be put to him, ought to have called Ms Jacob before the Tribunal to give evidence.
* It was not a permissible exercise of the primary Judge’s powers in conducting a judicial review of a question of law under s 44 of the *Administrative Appeals Act 1975* (Cth) (**AAT Act**)to evaluate the evidence and make a reliability finding arising from a witness’ evidence in substitution for the findings manifested by the reasons of the Tribunal, *a fortiori* where the basis of that finding was not tested in the Tribunal.
* The primary Judge’s finding about the appellant’s own memory simply renders the respondent’s cross-examination based on Ms Jacob’s file note into impossible conversations that occurred in 1997 an irrelevant exercise that could produce no reliable positive evidence about what, if any, conversations the appellant had with any person in 1997.
* The only value of the file note was as an *aide memoire* to its writer.
* The primary Judge ought to have allowed the appeal, found on the rationally probative evidence before the Tribunal that the Tribunal ought to have found that the appellant was ignorant within s 53(3) of the SRC Act, and remitted the matter to the Tribunal to proceed with a review of the merits of his claim.
1. Finally, on a subsidiary issue, the appellant referred the Court to the opening paragraph of the Tribunal’s decision, which the primary Judge also noted at paragraph [3] of the primary judgement. Materially, that paragraph read:
2. [Mr Leach] was employed by the Australian Federal Police (“AFP”) between 3 February 1986 and 21 November 1997. The majority of [Mr Leach’s] work was as a detective in organised crime and drug related areas. In 1989, an AFP Assistant Commissioner was murdered; [Mr Leach] was involved in investigating the Calabrian Mafia aspect of this murder. Later in 1995, it was alleged [Mr Leach] had been associated with the organised crime aspect of this murder and an investigation was launched by AFP’s Internal Security and Auditing Division (“ISA”).
3. The appellant contended that the final sentence of that paragraph was entirely mistaken and unsupported by any evidence. According to the appellant, the final sentence should read:

Later in 1995, an investigation was launched into Mr Leach by AFP’s Internal Security and Auditing Division (“ISA”), which was headed up by one of the detectives involved in a separate aspect of the Winchester murder investigation. It was alleged [Mr Leach] had not reported an association with an alleged criminal as required by the terms of his employment.

1. In relation to this, the appellant submitted:
* This sentence was redacted from the published decision of the Tribunal, following a joint submission.
* In submissions, this error was brought to the attention of the primary Judge before publication of the primary judgment.
* The matter was raised again, and it was incumbent on the primary Judge to deal with those submissions and to correct the error.
* The primary Judge declined the appellant’s request for the primary judgment to be corrected on an erroneous basis that no reasons within s 37G of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) had been satisfied.
1. Finally, the appellant submitted:
* Sections 37J and 37G of the *FCA Act* are directed at suppressing material that ought be included in a judgment, not material that ought not be included in a judgment.
* The Court should observe by way of correction of the record or erratum that the sentence:
	1. was not a finding made by the Tribunal;
	2. was omitted from the Tribunal’s reasons; and
	3. ought to have been omitted from the primary judgment.

## Respondent’s submissions

1. In submissions filed on 7 August 2020, the respondent submitted that the appellant contended the primary Judge fell into error for the following four reasons:
2. In applying the *Eden* principles;
3. ‘re-evaluating’ or ‘recasting’ the evidence that was before the Tribunal;
4. finding that the appellant bore an onus of proof before the Tribunal; and
5. failing to recognise that the Tribunal’s finding that the ignorance exception did not apply was based on conjecture which was not capable of supporting a conclusion on that issue.
6. The respondent individually addressed each of the above submissions.
7. In respect of the first issue, the respondent submitted, in summary:
* The primary Judge’s reasons for decision clearly demonstrated that he was conscious of the need to consider whether there was in fact ‘no evidence’ to support the Tribunal’s conclusion that it was entirely plausible that Ms Jacob’s had informed the appellant of his right to make a claim, and this was not a case of either ignorance or mistake. The primary Judge identified the hurdle the appellant was required to clear to succeed on a ‘no evidence’ ground and explained, in a manner that was entirely consistent with settled law, why he failed to clear it.
* The *Eden* principles were highly relevant to the appeal the appellant advanced before the primary Judge. There were a number of authorities which post-dated the authorities relied on by the appellant that supported the primary Judge’s approach.
1. In respect of the second issue, the respondent submitted, in summary:
* The primary Judge did not re-evaluate or recast the evidence as the appellant contended.
* There was nothing improper in the primary Judge considering the relevant evidence to decide upon the legality of the Tribunal’s fact-finding process.
* It was entirely appropriate for the primary Judge to analyse the Tribunal’s reasons in a common sense and realistic way, in order to understand its reasons as a whole.
* If the primary Judge misread the Tribunal’s reasons, he did so in a way that was unduly favourable to the appellant.
* It was open to the Tribunal to conclude that the appellant had given answers in cross-examination which were inconsistent and did not positively satisfy the Tribunal that he had not been advised by Ms Jacob of his right to make a claim for compensation under the SRC Act.
1. In respect of the third issue, the respondent submitted, in summary:
* His Honour’s findings in respect of onus were correct notwithstanding the reference to *Chugg v Pacific Dunlop Limited* (1990) 170 CLR 249; [1990] HCA 41.
* A practical onus lay on the appellant to adduce evidence to establish either:
	1. he did give notice in writing of the injury as soon as practicable after he became aware of it; or
	2. alternatively, his failure to give notice would not prejudice the respondent or, relevantly, resulted from ignorance, mistake or from any other reasonable cause.
* The appellant failed to point to anything in the Tribunal’s reasons that suggested the Tribunal’s conclusion (that the decision under review should be affirmed because there was no cogent evidence that the exceptions in s 53(c) of the SRC Act were satisfied) involved any error of law, or that the Tribunal otherwise misdirected itself in relation to the practical onus that lay on the appellant.
1. In respect of the fourth issue, the respondent submitted, in summary:
* There was no impermissible conjecture or fact finding by the Tribunal.
* The Tribunal did not find that former AFP Psychologist Ms Jacob advised the appellant to lodge a Comcare claim. Rather, it found it was entirely plausible that she did. On the probative evidence before it, it was open to the Tribunal to make this finding.
* The appellant’s submissions that the Tribunal erred by relying on ‘mere conjecture’ do not withstand a fair reading of the whole of the Tribunal’s reasons.
1. The respondent referred to a subsidiary issue raised by the appellant, namely whether the final sentence at [1] of the primary Judge’s reasons should be omitted from the primary Judgment under the slip rule. The respondent disputed the appellant’s contention that that sentence was not a finding that was made by the Tribunal. In any event, the Tribunal decided, pursuant to s 35(3)(b) of the AAT Act, that it would restrict publication of the final sentence of its reasons at [1]. The respondent submitted that that order operated only for the purposes of the Tribunal proceedings. Further, the respondent submitted that there was no provision in the AAT Act which served to preserve the effect of the Tribunal’s s 35 order.
2. In view of this, the respondent submitted that the Court should be satisfied that the reasons advanced by the appellant for seeking to amend [3(1)] of the primary judgment under the slip rule were both accurate and appropriate before granting such relief.
3. In the event that the Court were to allow this appeal, the respondent further submitted, in summary:
* The appellant submitted that this Court should make a factual finding that reversed the Tribunal’s conclusion that the appellant was not ignorant of his right to lodge a claim prior to 2016. No such order, however, was sought in the appellant’s notice of appeal.
* The appropriate course was for the Tribunal to reconsider the evidence having regard to any further submissions the parties wished to advance.
* Even if the appellant is ultimately found to have been ignorant of his right to claim compensation prior to 2016, that ignorance must nevertheless have resulted in the appellant’s failure to make the claim within time. There was therefore a subsidiary question that remained outstanding, and determination of both issues should be made by the Tribunal.
* Subject to findings made by this Court, it may be fresh evidence could be required. Accordingly, remitting the matter would not be a futile exercise in the circumstances of this case.
* Whether the Tribunal should be differently constituted should be left to be resolved by the President of the Tribunal.

# Consideration

1. The key issue before the Tribunal, the primary Judge, and in turn this Court, is the interpretation and application of s 53 of the SRC Act by the Tribunal. Section 53(1) provides:

**Notice of injury or loss of, or damage to, property**

(1) This Act does not apply in relation to an injury to an employee unless notice in writing of the injury is given to the relevant authority:

(a) as soon as practicable after the employee becomes aware of the injury; or

(b) if the employee dies without having become so aware or before it is practicable to serve such a notice--as soon as practicable after the employee's death.

1. However, s 53(3) relevantly provides:

(3) Where:

(a) a notice purporting to be a notice referred to in this section has been given to the relevant authority;

(b) the notice, as regards the time of giving the notice or otherwise, failed to comply with the requirements of this section; and

(c) the relevant authority would not, by reason of the failure, be prejudiced if the notice were treated as a sufficient notice, or the failure resulted from the death, or absence from Australia, of a person, from ignorance, from a mistake or from any other reasonable cause;

the notice shall be taken to have been given under this section.

1. The appellant sought relief under the SRC Act in respect of a mental injury he claims to have suffered prior to 1997. He lodged a workers’ compensation claim on 8 March 2016 in respect of this claimed injury. The respondent accepted that the appellant’s claim constituted notice in writing for the purposes of s 53 of the SRC Act; however, the respondent contended that there was no evidence that he gave notice of his condition prior to 2016, that he did not give notice “as soon as practicable after [he became] aware of the injury” within the meaning of s 53(1) of the SRC Act, and that it was prejudiced by that failure to give notice within the meaning of s 53(c) because this delay resulted in lost opportunities to obtain contemporaneous factual and medical evidence and to determine the veracity of his claims. The appellant was unsuccessful in respect of his claim
2. In the notice of appeal the appellant referred to four questions of law, and relied on numerous grounds of appeal. However examining these questions and the grounds of appeal, it is evident that they raise only two issues of substance, namely:
	1. Whether the Tribunal and the primary Judge erred in their findings concerning the onus of proof (questions of law (3)); and
	2. Whether it was open to the Tribunal to make factual findings concerning advice to the appellant in 1997 by the appellant’s psychologist, Ms Sonja Jacob (questions of law 2 (a)-(c) and 4; ground of appeal 1 (a)(ii)-(viii), (b)(i)-(iv), (b)[*second paragraph numbered (b)*], ground of appeal 2 (a)-(d), ground of appeal 3).
3. I note that the Notice of Contention filed by the respondent also referred to these issues.
4. However, in his written submissions the appellant also addressed the following matters:
	1. Whether the Tribunal ignored the operation of the rule in *Jones v Dunkel*.
	2. Whether the primary Judge incorrectly applied principles of reasonableness explained in *Eden*.
	3. Whether the primary Judge himself evaluated the evidence and made a reliability findings arising from a witness’ evidence, thus straying into impermissible merits review.
	4. Whether there was a material error in paragraph 3(1.) of the primary Judge’s decision.
5. As the respondent was able to respond to these arguments, and in circumstances where the appeal was determined on the papers, it is also convenient to consider these issues.

## a. Did the Tribunal and/or the primary Judge err in respect of the onus of proof?

1. At [24]-[30] the primary Judge considered issues of legal unreasonableness. At [26] his Honour explained why the appellant’s legal unreasonableness contentions were rejected, observing that there were at least four features of the Tribunal’s reasoning at [72] which explained why it came to its ultimate conclusion about the appellant’s awareness of his right to make a Comcare claim. Relevantly his Honour said:

26. … Thirdly, and perhaps most importantly, there is the Tribunal’s recorded view that the answers Mr Leach gave in cross-examination were “not consistent and [did] not satisfy [it] that [Mr Leach] was not advised by Ms Jacobs [sic – Jacob] of his right to then make a claim”.

27. The second aspect of this view that bears highlighting is that, in expressing it in the terms that it did, I do not consider that the Tribunal was, as Mr Leach contended, reversing the onus of proof. That is so because s 53(3)(c) of the SRC Act provides an exception to the requirement for a person making a claim to give notice of an injury “as soon as practicable” after that person becomes aware of the injury concerned. Hence, the person relying on that exception bears the onus of proving the facts necessary to establish that the exception exists (see *Chugg v Pacific Dunlop Limited* [1990] HCA 41; (1990) 170 CLR 249 at 258). In this matter, that meant Mr Leach bore the onus of establishing that his failure to provide the notice of his injury “as soon as practicable” after becoming aware of it resulted from ignorance.

1. *Chugg v Pacific Dunlop Limited* concerned a prosecution of an occupier of a factory under the *Occupational Health and Safety Act 1985* (Vic) (**OHS Act**) and the *Occupational Health and Safety (Machinery) Regulations 1985* (Vic) following a fatality of an employee of the factory. The relevant legislative provisions were ss 21(1) and (2)(a) of the OHS Act which provided (materially):

(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.

(2) Without in any way limiting the generality of sub-section (1), an employer contravenes that sub-section if the employer fails -

(a) to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health

1. The primary issue raised in that appeal was whether, in a prosecution under s 21 of the OHS Act, the informant or the defendant bore the onus of proof.
2. In my view the considerations which informed the decision of the High Court in that case, and in that legislative context, do not assist this Court in interpreting s 53 of the SRC Act. I agree with the contention of the respondent that the decision of the High Court in *Chugg* is not authority for the proposition his Honour stated at [27].
3. This does not mean that the conclusion of his Honour at [28] was incorrect.
4. Section 53(1)(a) excludes the operation of the SRC Act in relation to an injury to an employee unless notice in writing of the injury is given to the relevant authority as soon as practicable after the employee becomes aware of the injury. The word “practicable” is a common term, defined by the Macquarie Dictionary as:

capable of being put into practice, done, or effected, especially with the available means or with reason or prudence; feasible.

1. The evidence before the Tribunal suggested that the appellant was aware of his injury many years before he gave the respondent notice in writing. The Tribunal noted:

16. The applicant states that around October 1996, after attending a VIP close protection training course in Canberra, he began to feel the first signs of suffering a psychological injury, however he considered that a psychological injury would ruin his career so he remained in denial. As part of the course, the applicant underwent a mental state evaluation by Ms Sonja Jacob, psychologist, who voiced concerns regarding the applicant’s results. The applicant informed Ms Jacob that “there was nothing wrong” although told Ms Jacob at another meeting that he was the subject of an unwarranted and lengthy investigation process. The applicant submits he asked Ms Jacob to keep their discussions confidential as he was concerned about an adverse mental assessment finding which could negatively affect his career. The applicant submits that Ms Jacob continued to “check in” on the applicant over the next six months but was always reserved in their discussions.

17. Ms Jacobs referred the applicant for specialist treatment to Dr Peter Jones of Davidson Trahaire Psychorp. The applicant stated that he interpreted this referral as being for anger management treatment and as such he was resistant to the treatment.

1. Later, the Tribunal at [60] noted evidence of the appellant that:
* he first noticed the “symptoms/injury” in 1996;
* he had never previously lodged a claim for compensation at any time with Comcare; and
* between 1996 and the date of his claim form he had not notified Comcare of his psychological condition.
1. The appellant gave notice in writing of his claimed psychological injury to Comcare in 2016, twenty years after the Tribunal found that he became aware of the injury. The Tribunal found at [60] that the applicant had not given notice to the respondent, being the relevant authority, as soon as practicable after he became aware of the injury in accordance with section 53(1) of the SRC Act. As a general proposition such a finding was open to the Tribunal.
2. Section 53(3) of the SRC Act deems a notice in writing to be taken to have been given under s 53 when three criteria are satisfied:
* a notice purporting to be a notice referred to in this section has been given to the relevant authority (s 53 (3)(a)). For the purposes of s 53(3)(a), the respondent did not dispute that a notice purporting to be a notice referred to in s 53 had been given to it by the appellant;
* the notice, as regards the time of giving the notice or otherwise, failed to comply with the requirements of this section (s 53 (3)(b)). The lengthy period of time which expired between the date the appellant became aware of the injury and the date the appellant gave notice in writing to Comcare, meant that, for the purposes of s 53(3)(b), the notice as regards the time of giving the notice (or otherwise) failed to comply with the s 53(1)(a); and
* the relevant authority would not, by reason of the failure, be prejudiced if the notice were treated as a sufficient notice, or the failure resulted from the death, or absence from Australia, of a person, from ignorance, from a mistake or from any other reasonable cause (s 53(3)(c)).
1. The elements of s 53(3)(c) of the SRC Act are expressed in the alternative. Assuming that the conditions stipulated in s 53(3)(a) and (b) exist, the Tribunal must be satisfied of the existence of **one** of the elements in s 5 (3)(c) before the notice can be taken to have been given under s  53 of the SRC Act. Practically, in order for the Tribunal to be satisfied that the relevant authority would not, by reason of the failure, be prejudiced if the notice were treated as a sufficient notice, it is for the relevant authority to produce evidence to that effect, being information peculiarly within the knowledge of the authority. Similarly, if the failure of the notice to comply with the section in light of the timing at which it was given resulted from the death, or absence from Australia, of a person, from ignorance, from a mistake or from any other reasonable cause, such information is peculiarly within the knowledge of the employee, and it is for the employee to so assert and substantiate.
2. To the extent that the primary Judge found that the appellant “bore the onus” of establishing that his failure to provide the notice of his injury “as soon as practicable” after becoming aware of it resulted from ignorance, his Honour was clearly referring to the evidentiary onus of establishing this fact, which correctly resided with the appellant.
3. In my view no error is apparent in this conclusion of his Honour, or the reasoning of the Tribunal to which his Honour referred.

## b. Whether it was open to the Tribunal to make factual findings concerning advice to the appellant in 1997 by the appellant’s psychologist, Ms Sonja Jacob

1. In his notice of appeal and written submissions the appellant contended, *inter alia*, that the Tribunal made a finding that Ms Jacob advised the appellant to lodge a claim, that the Tribunal’s process of fact-finding was erroneously based on mere conjecture, and that the Court should have accepted an affidavit the appellant obtained from Ms Jacob supporting his case after the Tribunal decision had been delivered.
2. In respect of the contention of “mere conjecture”, the appellant relevantly submitted:

14. The Respondent emphatically agreed at [23] of its Amended Written Submissions that the Tribunal had not drawn an inference of fact from Ms Jacob’s file note that Ms Jacob had informed Mr Leach of his right to make a Comcare claim. Thus, the Tribunal had let all the possibilities it heard from the Respondent during Mr Leach’s cross examination remain in the realm of mere conjecture. A possibility that Mr Leach might have known of his right to make a Comcare claim in 1997 is not a lawful positive reason for thinking that the jurisdictional fact does not exist, i.e. that “this is not a case of ignorance”. The primary judge erred in not allowing Mr Leach’s appeal immediately because conjecture, howsoever likely, is an impermissible basis to reach a conclusion on the ultimate issue.

…

26. This Court in *Rawson* referred to the decision of the House of Lords in *Caswell v Powell Duffryn Associated Collieries Ltd*, where it was stated:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some case the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

27. In *R v Baden-Clay* the High Court said:

“For an inference to be reasonable, it " (sic) must rest upon something more than mere conjecture.”

28. A tribunal of fact is “not concerned with a choice between rival conjectures” and is not authorised to:

“choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.”

(Footnotes omitted).

1. In this respect the appellant relied on principles explained by Dixon CJ and Kitto J in *Jones v Dunkel*, for example at 305 where Dixon CJ stated:

But the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.

1. Similarly at 305 Kitto J said:

One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed.

1. I also note more recent observations of Gordon J in *Re Day* (2017) 340 ALR 368; [2017] HCA 2 at [18] where, in referring to *Jones v Dunkel*, her Honour explained:

18. The tribunal must feel an actual persuasion of the occurrence or existence of a fact before it can be found. Where direct proof is not available and satisfaction of the civil standard depends on inference, "there must be something more than mere conjecture, guesswork or surmise" – there must be more than "conflicting inferences of equal degrees of probability so that the choice between them is [a] mere matter of conjecture". An inference will be no more than conjecture unless some fact is found which positively suggests, or provides a reason in the circumstances particular to the case, that a specific event happened or a specific state of affairs existed.

(Footnotes omitted).

1. The key paragraph in the reasons of the Tribunal is [72] under the heading “Ignorance, mistake”. To recap, this paragraph is as follows:

I have to consider whether the applicant knew of Comcare before 2008. In evidence is a file note by Ms Jacobs bearing the date 15 May 1997 which was made after the applicant had been subject to a probe by the ISA. The applicant was asked if he had been told of his right to make a claim to Comcare as early as 1997. The file note of Ms Jacobs referred to “Comcare”. In cross-examination the applicant was asked if it was possible that Ms Jacobs had then told him that he was able to lodge a Comcare claim. The applicant answered: “It’s possible that she could have done that, but she didn’t”. It was put to the applicant that after the telephone conference recorded in the file note that Ms Jacobs had then said to him that he was experiencing symptoms and that he is able to lodge a Comcare claim; the applicant answered: “I’m saying definitely not”. The answers that were given in cross-examination by the applicant are not consistent and do not satisfy me that the applicant was not advised by Ms Jacobs of his right to then make a claim. At that time the applicant was in regular contact by telephone and personal visits with the AFP psychologist over a period of some six months. I consider that it is entirely plausible that Ms Jacobs had informed the applicant of his right to make a claim. I do not consider that this is a case of either ignorance or mistake.

1. From this paragraph it is plain that the Tribunal did not find that Ms Jacob had ***advised*** the appellant to make a Comcare claim. The finding of the Tribunal at [72] was that it was ***entirely plausible*** that Ms Jacob had informed the applicant of his right to make a claim. As Comcare submitted, the probative evidence supporting this conclusion was:
* As the Tribunal noted, Ms Jacob had written a file note dated 15 May 1997 which included the words “Symptoms for Comcare claim”;
* that file note was prepared after the ISA probe commenced, which Mr Leach contended was the cause of his psychological condition;
* it was contemporaneous evidence of Ms Jacob;
* at that time, Mr Leach was “in regular contact by telephone and personal visits” with Ms Jacob over a six month period; and
* the appellant accepted that it would be difficult for him to recall precisely what he discussed with Ms Jacob 20 years before.
1. Clearly, in reaching this conclusion, the Tribunal also had regard to the appellant’s oral evidence during cross-examination rejecting the proposition that, in 1997, Ms Jacob had told him that he could make a Comcare claim.
2. Importantly however, the Tribunal also had regard to further evidence before it that, between 1997 and 2016 (when the appellant gave his notice in writing to Comcare), the appellant had been aware of the possibility of making a claim to Comcare in respect of his claimed injury. In particular the Tribunal observed at [71]:

The applicant asserts that he had learnt of Comcare in 2008 when a work colleague was given income support payments from Comcare. At that time he had met a Comcare investigator on a number of occasions and had gained a good rapport with him. By 2008 on the account of the applicant he was made aware of his right to make a claim with Comcare. The applicant had made a claim with AMP for his depression condition some 18 months previously in 2014. The applicant asserts that he only appreciated that a psychological injury was a valid injury in 2014 when he made a claim with AMP.

1. The key finding of the Tribunal, explained at [71]-[72] of its reasons, was:

70. I do not find that there is any cogent evidence that the failure to comply with section 53 of the SRC Act is from ignorance or from a mistake within the meaning of section 53(3)(c) of the SRC Act. It is certainly not plausible that the applicant was unaware by ignorance or mistake of his rights to claim compensation until he gave his notice in 2016.

1. As this Court said in *Tarrant v Australian Securities and Investments Commission* (2015) 317 ALR 328; [2015] FCAFC 8 at [100]:

…

(g) the weighing and evaluation of various pieces of evidence is a matter for the AAT and is generally not susceptible to review in either judicial review proceedings for jurisdictional error (see *Abebe v Commonwealth of Australia* [1999] HCA 14; (1999) 197 CLR 510 at [197] per Gummow and Hayne JJ and *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; (2010) 243 CLR 164 (**SZJSS**) at [33] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), or in an “appeal” under s 44 of the AAT Act (see *Brown v Repatriation Commission* [2006] FCA 914 at [7] per Branson J and *Fisse v Secretary, Department of the Treasury* [2008] FCAFC 188; (2008) 172 FCR 513 at [152] per Flick J). As the Full Court (Fox, Deane and Morling JJ) observed in *Collins v Minister for Immigration and Ethnic Affairs* [1981] FCA 147; (1981) 58 FLR 407 at 410-411 in the context of an appeal under s 44 of the AAT Act and in response to a claim that a Tribunal decision was against the evidence or the weight of the evidence (emphasis added):

A number of authorities was cited by counsel for the appellant in support of the propositions that the making of a decision against the evidence or the weight of the evidence and the making of an unreasonable decision are errors of law. We find it unnecessary to examine these authorities for the reason that, in our opinion, there is no factual basis to found those propositions. We would, however, comment that the concepts of a decision being against the evidence and of being against the weight of the evidence belong to appeals from courts of law and have particular application to jury verdicts. Even in that context, they did not involve questions of law. **They certainly have no place when the appeal, or review, is of proceedings of an administrative tribunal which is not bound by the rules of evidence, subject to their obligation to observe the requirements of natural justice, can inform itself as it chooses** (see, s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975*.) An appellant who attacks a conclusion of the Tribunal because of deficiency of proof said to amount to error of law must show, if he is to succeed, that there was no material before the Tribunal upon which the conclusion could properly be based…

1. The evidentiary onus was on the appellant to establish that he was unaware of his right to make a Comcare claim prior to 2016, or that his failure to do so was a mistake. In my view it was open to the Tribunal to conclude that the evidence before it did not support the appellant’s claim that he was ignorant of his rights and obligations prior to 2016, or that his failure to give notice of the injury to Comcare was a mistake. That evidence was not only the file note of Ms Jacob dating from 1997 where she referred to a “Comcare claim” in the context of her consultations with the appellant, but evidence of the appellant referable to his conduct in 2008 and 2014 indicating his awareness of both his medical condition and the potential availability of claims against Comcare for such injuries.
2. I am are not persuaded that the Tribunal made its findings based on “mere conjecture” – rather the Tribunal’s conclusions were determined by reference to the evidence before it.

## c. Whether the Tribunal ignored the operation of the rule in *Jones v Dunkel*

1. The rule in *Jones v Dunkel* recognises that unexplained failure by a party to give evidence may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted the party’s case (see JD Heydon, *Cross on Evidence* (LexisNexis, 12th ed, 2020) at [1215]).
2. Relevantly in this case the appellant submitted as follows:

50. But, in contrast, it was open to the Respondent to call any person in the world to give evidence that he or she did inform Mr Leach; one person, or even a single document read by him, would be enough to require an explanation or contradiction. The Respondent left no stone unturned to find the slightest rationally probative documentary evidence. It found none. Instead, it simply resorted to criticising Mr Leach as a witness. Nevertheless it shied away from calling Ms Jacob, and any of the other persons whom it alleged *might* have informed Mr Leach. In *Hellicar* the High Court, in considering the failure to call a witness, held:

“If a party provides limited evidence when further evidence was available, a tribunal of fact is entitled to consider that failure when assessing whether the party has produced evidence to satisfy the standard of proof.”

51. Here the file note was not a document known to Mr Leach. He was asked if he had seen it, and answered in the negative. It was incumbent on the Respondent, given that Mr Leach’s evidence was rationally probative evidence of his state of mind and of special weight, to make good its mere assertion that Mr Leach was not ignorant of his right to make a Comcare claim; to adduce rationally probative evidence, not to particularise that mere assertion into numerous possibilities as to how he could have been informed. The streams of possibilities can rise no higher than their source of assertion. The Respondent ought to have called Ms Jacob to explain the file note. And then it could only function as an *aide memoire*. The Tribunal fell into error. It ought to have inferred that Ms Jacob could not have assisted the Respondent’s case and rejected the file note as irrelevant because it was not rationally probative evidence of Mr Leach’s state of mind.

(Footnotes omitted and emphasis in original).

1. In respect of this issue I make the following observations.
2. First, the Tribunal is not bound by the rules of evidence: s 33(c) AAT Act, *Green v Minister for Immigration and Citizenship* [2008] FCA 125 at [41], *Howes v Comcare* [2016] FCA 1521 at [68].
3. Second, there is no evidence before the Court that this issue was raised before his Honour. I do not consider it appropriate to make rulings in respect of matters which ought properly have been first raised before the primary Judge.
4. Third, before the primary Judge the appellant sought to tender an affidavit of Ms Jacob, to which his Honour did not have regard. However the primary Judge noted at [23] the appellant was aware of Comcare’s intention to rely on Ms Jacob’s file note, and could equally have called her as a witness:

… If Mr Leach wished to adduce evidence from Ms Jacob of the kind contained in this affidavit, he should have done so at the hearing before the Tribunal. In this respect, Mr Leach’s claim that he was not aware of the significance of Ms Jacob’s file note is immaterial. Even if it were, I would have had difficulty accepting it because, as is already noted above, Comcare clearly signalled its reliance on Ms Jacob’s file note in its pre-hearing submissions to the Tribunal. For these reasons, I do not propose to have regard to either of these two affidavits.

1. To the extent that the appellant contended that the Tribunal erred in failing to apply the rule in *Jones v Dunkel* in respect of the failure of Comcare to call Ms Jacob as a witness, I reject that submission.

## d. Whether the primary Judge incorrectly applied principles of reasonableness explained in *Eden*

1. At [20] of the primary judgment his Honour referred to the seven point summary of the principles bearing on the concept of legal unreasonableness in the Full Court decision in *Eden*. His Honour observed that the following points had particular resonance in the matter:

59. Second, the Court’s task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory (*Li* at [66]). It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision’s reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision-maker: *Li* at [66] (Hayne, Kiefel and Bell JJ); *Stretton* at [12] (Allsop CJ) and [58] (Griffiths J); see also *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 90 ALJR 197 at [23]. Nor does it involve the Court remaking the decision according to its own view of reasonableness: *Stretton* at [8] (Allsop CJ).

…

64. Sixth, where reasons for the decision are available, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable: *Singh* at [45]-[47]. Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable: *Singh* at [47] ...

1. In relation to the second principle, his Honour commented:

23. The affidavit of Ms Jacob sought to be tendered by the appellant] is similarly irrelevant to the legal reasonableness issue that Mr Leach has sought to raise with respect to the Tribunal’s conclusion at [72] of its reasons. Instead of providing any evidence relating to that issue, Ms Jacob’s affidavit makes a direct challenge to the Tribunal’s findings of fact in that paragraph. As such, it constitutes a thinly veiled, if not plainly overt, attempt at merits review of the kind which is rejected by the second principle in *Eden* above. It is not the role of this Court in this appeal to review the factual issues that may have arisen from Ms Jacob’s file note.

1. In relation to the sixth principle, his Honour commented:

24. As the Full Court pointed out in the sixth principle in *Eden*, where reasons are available for a decision, as they are in this matter, they will be the most likely focus of any assessment whether the decision concerned is legally unreasonable. Both parties appear to have accepted this approach because the Tribunal’s reasons in this matter, and particularly the conclusion it reached at [72], have been the central focus of this appeal.

…

30. When one takes account of these four features of the reasoning which immediately preceded the Tribunal’s conclusion at [72] of its reasons and applies a fair reading to those reasons, that is, not reading them overzealously with “an eye keenly attuned to the perception of error” (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272), I consider that the Tribunal demonstrated an “evident and intelligible justification” for its conclusion at [72] (see the sixth principle in *Eden* above). I therefore reject Mr Leach’s contentions that the Tribunal’s conclusion at [72] was legally unreasonable.

1. The appellant submitted that the primary Judge was in error “because the *Eden* principles concern a judicial review for legal unreasonableness of the exercise of an administrative discretion, not a judicial review of an administrative finding of fact.”
2. I note that a similar issue was the subject of discussion by Griffiths J in *Howes v Comcare*, where his Honour observed at [59] that such cases as *Eden* involved judicial review for jurisdictional error and not an appeal under s 44 of the AAT Act, and further:

… The two forms of review of administrative action have a different legal foundation and some caution should be exercised in transferring concepts and principles which have been developed in a judicial review context, which has a Constitutional underpinning, into a statutory right of appeal on a question of law. The same may be said in respect of transferring holus-bolus concepts and principles in the other direction.

1. His Honour continued however:

60. That is not to say that the concept of unreasonableness in the legal sense has no relevance to an appeal under s 44 of the AAT Act. In *Ekinci v Civil Aviation Safety Authority* [2014] FCAFC 180; 227 FCR 459 (***Ekinci***), the Full Court (Bennett, Nicholas and Griffiths JJ) noted at [70] that *Li* deals with the legal sense of unreasonableness as a ground of review of jurisdictional error. The Full Court then accepted, however, that the High Court’s discussion of that concept “also **broadly** applies to the concept of unreasonableness in the context of a s 44 AAT Act appeal”.

(Emphasis in original).

1. Looking in turn at *Ekinci v Civil Aviation Safety Authority* (2014) 227 FCR 459; [2014] FCAFC 180, an appeal from the Tribunal under s 44 of the AAT Act, the Full Court in that case said:

71. The following propositions are established in that case by the joint judgment of Hayne, Kiefel and Bell JJ [in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332]:

(a) the standard of legal unreasonableness does not involve the court substituting its view as to how a discretion should be exercised for that of the primary decision-maker (at [66]);

(b) the legal standard of reasonableness is the standard indicated by the proper construction of the statute ([67]);

(c) by reference to the scope and purpose of the statute, legal unreasonableness may be established where a decision-maker is shown to have committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally (notwithstanding that, ordinarily, the weight to be accorded to relevant matters is for the decision-maker to determine) (at [72]); and

(d) where the decision-maker provides reasons, the review court may not be able to comprehend how the decision was arrived at. In those circumstances, legal unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification (at [76]).

1. Returning to the present appeal, it is evident that the principles the primary Judge applied were correct, by reference to the decision of the High Court in *Li* and the Full Court in *Ekinci*, if not the decision in *Eden*.

## e. Whether the primary Judge himself evaluated the evidence and made reliability findings arising from a witness’ evidence, thus straying into impermissible merits review.

1. Relevantly the appellant submitted as follows:

13. The primary judge also made another error at P[27] by undertaking his own evaluation of Mr Leach’s evidence to recast what his Honour had held to be a faulty finding of fact by the Tribunal to support the Tribunal’s finding of plausibility and its conclusion (at AATD [72]).

1. It is clear to me that the primary Judge did not “recast” the evidence before the Tribunal. Rather, it was appropriate for the primary Judge to have regard to that evidence in considering whether there was probative evidence supporting the findings of the Tribunal, or whether those findings were illogical, irrational or legally unreasonable. As this Court observed in *Haritos v Commissioner of Taxation* (2015) 233 FCR 315; [2015] FCAFC 92:

194. As the High Court said in *Owens*, the purpose of limiting an appeal to a question of law is to ensure that the merits of the case are dealt with not by the Federal Court but by the Tribunal. This distribution of function is critical to the correct operation of the administrative review process. See also *O’Brien* at 430 where Gibbs CJ, Wilson and Dawson JJ said that on an appeal under s 44 the appellate body should not usurp the fact-finding function of the Tribunal. ***But such fact finding is an entirely different exercise from the evaluation of the fact-finding process of the Tribunal (as fact-finder) to decide upon its legality***.

(Emphasis added).

1. In my view this issue has no merit.

## f. Whether there was a material error in paragraph 3 (1.) of the primary Judge’s decision.

1. The appellant in submissions takes issue with the final sentence in paragraph 3(1.) of the primary Judge’s decision, which the appellant submitted was entirely mistaken and unsupported by evidence, had caused him significant personal distress, and should be corrected under the slip rule.
2. I note that there appears to be a partial redaction of para 1 of the reasons of the Tribunal pursuant to s 35(3)(b) of the AAT Act. Section 35(3)(b) provides that:

(3) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:

(a) information tending to reveal the identity of:

(i) a party to or witness in a proceeding before the Tribunal; or

(ii) any person related to or otherwise associated with any party to or witness in a proceeding before the Tribunal; or

(b) information otherwise concerning a person referred to in paragraph (a).

1. On the material before the Court, the reason for the partial redaction of para 1 of the reasons of the Tribunal in terms of s 35(3)(b) of the AAT Act is unclear to me. It is also unclear to me whether the redacted material relates to the final sentence of para 3(1.).
2. Further, it appears that the only basis for making an order of the type sought by the appellant is s 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth), which empowers the Court to make a suppression order or non-publication order on the basis that the order is necessary to prevent prejudice to the proper administration of justice. I am not persuaded that s 37AG(1)(a) is enlivened in the present circumstances.

# Conclusion

1. In my view the appeal should be dismissed with costs.

|  |
| --- |
| I certify that the preceding one hundred and nine (109) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 30 July 2021

REASONS FOR JUDGMENT

CHARLESWORTH J:

1. I have had the benefit of considering the reasons for judgment of Collier J in draft. I agree that this appeal should be dismissed, although I prefer to identify and dispose of the issues differently.
2. The appeal before the primary judge was limited to questions of law. By his third ground of appeal at first instance Mr Leach alleged that a factual finding expressed at [72] of the Administrative Appeal **Tribunal**’s reasons was affected by legal unreasonableness (the unreasonableness issue). As the primary judge properly identified, in considering the unreasonableness issue, the Court was concerned with the legality of the Tribunal’s fact-finding processes, not with the merits of the finding itself. The primary judge rejected Mr Leach’s arguments for reasons expressed at [24] to [30] of his Honour’s reasons. The primary judge otherwise observed that Mr Leach had not made any submissions in relation to the first two questions of law advanced at first instance. His Honour concluded (correctly) that the second of those questions was not a question of law in any event. Those findings are not challenged. This appeal is confined to the disposition of the third question, going to the unreasonableness issue.

# ISSUES

1. The Amended Notice of Appeal contains allegations of error under the two headings “Questions of law” and “Grounds relied on”. There is some repetition in the arguments appearing under each heading. Considered as a whole, the Amended Notice of Appeal may be fairly understood to allege the following three appealable errors on the part of the primary judge in his disposition of the unreasonableness issue:
2. The primary judge erred in rejecting the argument that there was no evidence that Ms Jacob advised Mr Leach that he could lodge a Comcare claim (Ground 1(a), Question of law 2(a), Ground 2).
3. Relatedly, the primary judge erred in “placing the onus” on Mr Leach in relation to the question of whether Ms Jacob advised Mr Leach that he could lodge a Comcare claim (Question of law 3, Ground 2).
4. Having found that the two answers referred to at [72] of the Tribunal’s reasons were not inconsistent, the primary judge erred in speculating that the Tribunal had identified a different kind of inconsistency:  between the two answers on the one hand and “common experience of the limits to human memory” on the other. In proceeding in that way, the primary judge substituted the Tribunal’s actual reasons with his own conceptualisation of the evidence and so strayed into merits review (Question of law 2(b) and (c)).
5. The multiple sub-paragraphs under the heading “Grounds relied on” are in the nature of submissions supporting one or more of these three asserted errors.
6. To the extent that Mr Leach’s written submissions raise issues that are not fairly encapsulated in the grounds of appeal, I prefer to express no view on them. In particular, I express no view as to whether there is a proper basis to remove from publication any part of the reasons published by the Tribunal or by the primary judge.

# CONSIDERATION

1. The three alleged errors interrelate. It is convenient to consider them collectively.
2. In my view the primary judge did not rely on wholly inapplicable authority in his reference to ***Chugg*** *v Pacific Dunlop* Ltd (1990) 170 CLR 249 at 258. Rather, his Honour may be understood to have drawn upon the uncontroversial principle that where facts are peculiarly within the knowledge of a person, it is usually for that person to prove the relevant facts:  *Chugg* at 258 – 259.
3. In the usual run of cases it will be inappropriate or “artificial” to use the terminology of “onus of proof” in connection with proceedings in the Tribunal:  *McDonald v Director-General of Social Security* (1984) 1 FCR 354, Woodward J (at 356 – 357). As the High Court said in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [40], it is not useful to speak in terms of onus of proof in relation to proceedings that are inquisitorial rather than adversarial in their nature. That general proposition may be displaced where a legislative intention to impose the concept of an onus of proof may be discerned either from an express legislative provision or by necessary implication:  *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220, Flick and Rangiah JJ (at [71]). Given the present statutory context, the primary judge did not err in identifying that the power in question was one requiring the Tribunal to determine whether a relevant exception in s 53(3)(c) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) existed, being an exception turning on Mr Leach’s state of mind. It was for Mr Leach to persuade the original decision-maker that the failure to notify in accordance with s 53(1) resulted from ignorance or mistake. Before the Tribunal, Mr Leach had the benefit of Comcare’s determination of his claim and he plainly understood that the existence of the facts necessary to fulfil the exception was an issue for the Tribunal to consider and determine.
4. The task of the Tribunal was to make the “correct and preferable decision” on the information then before it:  *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, Bowen CJ and Deane J (at 68); as approved in ***Shi*** *v Migration Agents Registration Authority* (2008) 235 CLR 286, Kiefel J (as her Honour then was) (at [140] – [142]). In the performance of its review function, the Tribunal stood in the shoes of the original decision-maker:  *Shi* at [134]. It is in that sense that Mr Leach may be said to have borne an onus before the Tribunal. Expressed another way, it was not for Comcare to persuade the Tribunal that the exception in s 53(3)(c) of the SRC Act did not apply.
5. The primary judge correctly identified that Mr Leach was on notice that a file note of Ms Jacob was to be put before the Tribunal and that the Tribunal would be asked to draw inferences from the evidence that were potentially harmful to his case. In the proceedings before the Tribunal, Mr Leach was not deprived of the opportunity to adduce evidence from Ms Jacob, if that is how he wanted to present his case. In the circumstances described, the primary judge did not err in refusing to admit into evidence an affidavit from Ms Jacob on the appeal at first instance. To the extent that the grounds of appeal contend that the primary judge erred in refusing to receive the affidavit, the contention is rejected.
6. Submissions concerning the principle stated in ***Jones v Dunkel*** (1959) 101 CLR 298 were not advanced before the Tribunal, nor were they advanced before the primary judge. It is not at all obvious that Ms Jacob was naturally a “witness” for one party or the other, so as to enliven the principle in *Jones v Dunkel* in any event.
7. Mr Leach is otherwise correct to submit that the question to be determined under s 53(3)(c) of the SRC Act is a question of fact. The relevant error of law Mr Leach alleged at first instance was that the Tribunal’s fact finding processes were affected by legal unreasonableness. The primary judge did not misstate the principles concerning legal unreasonableness (as they apply in a judicial review context) as summarised in *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158. His Honour identified (at [30]) that the task of the Court was to identify whether the reasons of the Tribunal demonstrated an “evident and intelligible justification” for its factual findings. On this appeal there is no dispute that the same test may apply on an appeal brought pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) founded on a question of law.
8. At this juncture it is necessary to return to what the Tribunal said at [70] – [72] of its reasons:

70. I do not find that there is any cogent evidence that the failure to comply with section 53 of the SRC Act is from ignorance or from a mistake within the meaning of section 53(3)(c) of the SRC Act. It is certainly not plausible that the applicant was unaware by ignorance or mistake of his rights to claim compensation until he gave his notice in 2016.

71. The applicant asserts that he had learnt of Comcare in 2008 when a work colleague was given income support payments from Comcare. At that time he had met a Comcare investigator on a number of occasions and had gained a good rapport with him. By 2008 on the account of the applicant he was made aware of his right to make a claim with Comcare. The applicant had made a claim with AMP for his depression condition some 18 months previously in 2014. The applicant asserts that he only appreciated that a psychological injury was a valid injury in 2014 when he made a claim with AMP.

72. I have to consider whether the applicant knew of Comcare before 2008. In evidence is a file note by Ms Jacobs bearing the date 15 May 1997 which was made after the applicant had been subject to a probe by the ISA. The applicant was asked if he had been told of his right to make a claim to Comcare as early as 1997. The file note of Ms Jacobs referred to ‘Comcare’. In cross-examination the applicant was asked if it was possible that Ms Jacobs had then told him that he was able to lodge a Comcare claim. The applicant answered: ‘It’s possible that she could have done that, but she didn’t’. It was put to the applicant that after the telephone conference recorded in the file note that Ms Jacobs had then said to him that he was experiencing symptoms and that he is able to lodge a Comcare claim; the applicant answered:  ‘I’m saying definitely not’. The answers that were given in cross-examination by the applicant are not consistent and do not satisfy me that the applicant was not advised by Ms Jacobs of his right to then make a claim. At that time the applicant was in regular contact by telephone and personal visits with the AFP psychologist over a period of some six months. I consider that it is entirely plausible that Ms Jacobs had informed the applicant of his right to make a claim. I do not consider that this is a case of either ignorance or mistake.

1. Comcare submits that in those passages, the Tribunal did not make a positive finding that Ms Jacob had told Mr Leach of his right to make a Comcare claim. Comcare submits that the Tribunal went no further than to observe that it was “entirely plausible” that she had. Mr Leach has enthusiastically embraced those submissions. He further submits that the material before the Tribunal was not capable of outweighing his denials (made under oath) that any such discussion occurred. In other words, he submits, the mere circumstance that the fact of a discussion was entirely plausible is not sufficient to prove the fact, nor to displace his denials (made under oath) that no such discussion in fact occurred.
2. Nothing in this aspect of Mr Leach’s submissions demonstrates error on the part of the primary judge.
3. The Tribunal’s conclusion was that it did not “consider that this is a case of either ignorance or mistake”. Most of the material referred to by the Tribunal in support of that conclusion was relevant to the question of whether Ms Jacob had told Mr Leach about his right to make a Comcare claim in or around 1997. That factual issue had loomed large at the hearing, including in the course of cross-examination of Mr Leach.
4. In my view, given the context, the Tribunal’s rejection of Mr Leach’s assertion to have been ignorant about his right to make a Comcare claim necessarily encompassed a finding that Ms Jacob had told him of that right. The Tribunal’s observation that it was “entirely plausible” that Ms Jacob had informed Mr Leach of his right to make a claim is not to be understood as an ultimate finding. Rather, it should be fairly understood as a circumstance (among others) that the Tribunal took into account in arriving at its conclusion that the case was not one of ignorance or mistake. To similar effect, the Tribunal observed that it was not plausible that Mr Leach was unaware by ignorance or mistake of his right to make a claim until 2016. Those observations are not to be mistaken with the Tribunal’s ultimate conclusion on the factual question before it. Rather, the Tribunal may be understood as having taken into account the inherent plausibility or implausibility of the respective factual cases before it in the course of a wider fact finding process.
5. The Tribunal’s conclusion (at [76]) that there was “no cogent evidence” that the failure to comply with s 53 of the SRC Act was from ignorance or mistake must also be understood in its proper context. The Tribunal had before it the evidence of Mr Leach in relation to his dealings with Ms Jacob. It was of course for the Tribunal to determine what weight was to be given to that evidence. It is plain from the result that the Tribunal did not accept Mr Leach’s denials, notwithstanding that they were given under oath. Its explanation for not accepting the denials is extremely brief. The Tribunal referred to two answers given by Mr Leach in cross-examination and said that the answers “are not consistent”. The Tribunal did not explain the nature of the inconsistency. Whilst I do not consider the brevity of the reasons as such to give rise to an error of law, it would plainly have been preferable for the Tribunal to have expressed itself with more clarity on that topic, particularly given Mr Leach’s status as a self-represented litigant. Its failure to do so has been productive of unnecessary argument, delay and expense.
6. Mr Leach embraces the conclusion of the primary judge that the two answers referred to in [72] of the Tribunal’s reasons were not inconsistent as between themselves. From there, he submits that the primary judge was in error to explain away the absence of inconsistency by “speculating” or “guessing” about another form of inconsistency:  that is, an inconsistency between the two answers (on the one hand) and “common experience of the limits to human memory” (on the other). Mr Leach submits that this aspect of the reasoning of the primary judge involved an impermissible recasting of the evidence before the Tribunal, or at least an impermissible reframing of the Tribunal’s reasoning.
7. Having considered the submissions I am satisfied that the Tribunal did not engage in the reasoning process attributed to it by the primary judge. I accept the submissions of Mr Leach on that issue. In my view, the primary judge should have found that the Tribunal meant what it said when it said that the answers given by Mr Leach under cross-examination were inconsistent. The only answers considered by the Tribunal were the two answers to which it had referred in the preceding sentence. The Tribunal was either correct to identify an inconsistency between the two answers or it was not. If the Tribunal had intended to reject Mr Leach’s evidence on the basis of “common experience of the limits to human memory” in my view it could and would have expressed itself quite differently. It may, for example, have referred back to other responses given by Mr Leach which tended to suggest that his memory of his discussions with Ms Jacob was fallible. But that was not the course of reasoning the Tribunal in fact adopted.
8. It does not follow that the appeal should be allowed.
9. It is to be recalled that the case advanced by Mr Leach at first instance was that it was not open to the Tribunal to find that the two responses referred to at [72] of its reasons were inconsistent.
10. By a Notice of Contention filed on this appeal, Comcare contends that it was open to the Tribunal to conclude that Mr Leach’s answers in cross-examination were indeed inconsistent. The Notice of Contention refers to the same two answers given by Mr Leach referred to by the Tribunal at [72] of its reasons. It also calls in aid an exchange in cross-examination that the Tribunal did not take into account in determining the question of whether there had been either ignorance or mistake.
11. In my view, Comcare’s contention should be upheld to the extent that it is confined to the two answers upon which the Tribunal based its reasoning.
12. In its reference to an inconsistency between the two statements, the Tribunal may be fairly understood as identifying an inconsistency between Mr Leach’s use of the phrase “it’s possible that she could have done that” (admitting of a possibility) in the first response, in comparison with the definitive denial (excluding any possibility) in the second response. I respectfully consider any other interpretation of the reasons to be erroneous.
13. The primary judge ought to have found that it was open to the Tribunal to characterise the answers as inconsistent, so rejecting a critical component of the third question of law as originally agitated by Mr Leach.
14. The inconsistency was capable of informing the Tribunal’s assessment as to whether Mr Leach’s definitive assertion in his second response should be accepted. It may be that the inconsistency was insufficient, of itself, to support the ultimate decision but, as the primary judge correctly found, the Tribunal did not act on the content of the cross-examination evidence alone. Rather, the content of the evidence was one of a number of considerations that together provided an evident and intelligible justification for the outcome. In the outcome, it is implicit that the Tribunal did not accept that Mr Leach had the recollection he professed to have. The process of reasoning the Tribunal in fact adopted to arrive at that conclusion was one that was open to it. It matters not that there were alternative routes available to the same result, nor that there may have been an alternate route to a result more favourable to Mr Leach.
15. In the circumstances, it is unnecessary to consider whether it is permissible or appropriate for Comcare to call in aid oral evidence not in fact referred to by the Tribunal in the critical portion of its reasons.
16. The Notice of Contention should be upheld to the extent that it is based on the two answers to which the Tribunal referred.
17. Accordingly, I will join in the order that the appeal be dismissed.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth. |

Associate:

Dated: 30 July 2021

REASONS FOR JUDGMENT

SNADEN J:

1. I have had the privilege of reviewing drafts of the reasons for judgment of Collier and Charlesworth JJ. I respectfully agree with their Honours that the appeal should be dismissed, with the usual order as to costs.
2. Their Honours’ careful recitation of the background facts and the issues with which this appeal engages affords me the luxury of brevity. Although those issues have been variously—and not always clearly—expressed in the material that is presently before the court, they conveniently distil into a single, central question: did the second respondent (the “**Tribunal**”) err at law by concluding that the appellant’s failure to give notice of his injury as soon as possible after he became aware of it was not a product of ignorance or mistake on his part?
3. Before the primary judge (and before this court on appeal), it was (and is) not in dispute that such a failure occurred. The Tribunal determined (on the basis of his own admissions) that the appellant had become aware of his injury in 1996. It was not until some twenty years later that he sought to make a claim under the *Safety, Rehabilitation and Compensation Act 1988* (“**the SRC Act**”) in respect of it. Perhaps unsurprisingly, the Tribunal accepted that the appellant had not given notice of his injury as promptly as s 53(1) of the SRC Act requires.
4. Having drawn that conclusion, the Tribunal’s attention then turned to whether or not s 53(3) of the SRC Act was engaged so as to regularise the notice that the appellant *did* give. That relevantly turned upon whether or not the appellant’s failure to provide more timely notice of his injury was a function of ignorance or mistake on his part (specifically as to his right to claim compensation under the SRC Act in respect of it).
5. Before the Tribunal, the appellant gave evidence on oath that, until shortly before he made his claim in 2016, he did not know that he was entitled under the SRC Act to claim compensation in respect of his injury. That evidence, had it been accepted, would or could have gone some way to establishing ignorance or mistake for the purposes of s 53(3)(c) of the SRC Act. The Tribunal, though, did not accept it. Its reasoning in that regard appears at [70]-[72] of its written decision, which have already been replicated (and which I do not here repeat).
6. The Tribunal was not obliged to accept the appellant’s evidence as to what was or was not within his “mental field of vision”. Indeed, although it was appropriate and orthodox for the appellant to give the hindsight-assisted evidence that he gave, it was properly to be approached with at least some caution, given its inherently self-serving nature: *Cox v Smail* [1912] VLR 274, 283 (Cussen J), *Hart v Commissioner of Taxation* (2018) 261 FCR 406, 444 [86] (Robertson, Wigney and Steward JJ).
7. Moreover, in rejecting the appellant’s contention that his failure to provide more timely notice of his injury reflected ignorance or mistake on his part, the Tribunal was not obliged positively to find that the appellant was, in fact, not ignorant or mistaken; that is to say, that he had in fact come to possess knowledge of his right to claim compensation in respect of that injury at a point in time earlier than that at which he did so. That observation is important because the Tribunal did not make any such finding. It simply concluded (at [70]) that it was “…not plausible that the [appellant] was unaware by ignorance or mistake of his rights to claim compensation until he gave his notice in 2016”.
8. That conclusion was partly informed by the evidence that was given concerning Ms Jacob. Ms Jacob had herself had occasion to consider the appellant’s injury from the perspective of a potential compensation claim. There was no evidence to demonstrate that she and the appellant had discussed it in that context; but there was evidence nonetheless of their interactions, which relevantly and legitimately informed the Tribunal’s assessment of the possibility that they might have done so.
9. As has already been rehearsed, the appellant was cross-examined about whether Ms Jacob might have informed him that his injury was relevantly compensable. At the risk of repetition, his evidence was that “[i]t’s possible that she could have done that, but she didn’t”; and, later, that she “definitely [did] not”. The Tribunal considered that those answers were not consistent. The Primary Judge did not agree. Respectfully and for the reasons that Charlesworth J has identified (above, [134]), his Honour erred in construing as he did the Tribunal’s conclusion about the appellant’s cross-examination.
10. That, though, is not reason enough to allow the appeal. The inconsistency to which the Tribunal referred legitimately served as a foundation (or part of a foundation) upon which the Tribunal could reason, as it did, that it was “…entirely plausible that Ms Jacob[ ]had informed the [appellant] of his right to make a claim”. The Tribunal did not find that Ms Jacob had told the appellant of his right to claim compensation; it merely left open the possibility that she might have. Given the regular interactions that the appellant and Ms Jacob had shared over a prolonged period, and the amount of time that had passed since those interactions had occurred, the existence of that possibility legitimately informed whether or not the Tribunal should have been satisfied that the appellant’s failure to give timely notice of his injury was a product of ignorance or mistake.
11. It was for the Tribunal alone to decide what ought to have been made of the evidence and other material with which it was seized: *Abebe v The Commonwealth* (1999) 197 CLR 510, 580 [197] (Gummow and Hayne JJ); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 176 [33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). In order that he might impugn the Tribunal’s refusal to accept that his failure to give timely notice of his injury was a product of ignorance or mistake, the appellant must demonstrate that there was no material upon which that refusal could properly rest: *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407, 410-411 (Fox, Deane and Morling JJ); *Australian Postal Corporation v D’Rozario* (2014) 222 FCR 303, 309 [15], 311 [24] (Besanko J), 327 [77] (Jessup J), 334 [118] (Bromberg J). In effect, he must demonstrate that, on the evidence placed before it, the Tribunal had no reasonable alternative but to be satisfied that the explanation that the appellant gave for that failure should be accepted.
12. That, with respect, the appellant cannot do. It was open to the Tribunal on the material before it to be unpersuaded that the appellant’s delay in giving notice of his injury was occasioned by ignorance or mistake on his part. By the accumulation of circumstances—including Ms Jacob’s apparent consciousness of the appellant’s right to claim compensation in respect of his injury, the occasions that she and the appellant had to discuss that and other matters, the obvious difficulty associated with reliably recalling discussions that might or might not have occurred such a long time ago, the unavoidably self-serving nature of the appellant’s evidence about the state of his knowledge over time, and the appellant’s concession (however inconsistent it was with other aspects of his evidence) that “[i]t’s possible that [Ms Jacob] could have” discussed with him the possibility of a Comcare claim—the Tribunal was entitled to some scepticism of the appellant’s narrative. Reading its reasons fairly, the Tribunal did no more than give effect to that scepticism. Doing so did not involve any error of law.
13. With those observations stated, I otherwise respectfully agree with the orders proposed by the other members of the court and with the reasons for which they propose them.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 30 July 2021