

## **EJA Briefing – Merits Review of Mutual Obligation Decisions**

November 2024

EJA is concerned about poor administrative review processes available to people seeking review of decisions made by employment services. Despite those decisions being made under social security law, internal review processes are limited and external appeals almost non-existent. There is an urgent need to ensure that people who are affected by decision-making in employment services contexts have access to robust merits review processes.

Employment services decisions encompass a range of activities that give rise to adverse outcomes, including imposing mutual obligations which participants aren't able to meet, to (indirectly) suspend or cancel payments, or create financial penalties. These decisions are made in relation to job plans, reasons for attendance or non-attendance at activities or appointments, or failure to meet a Points or job search target (i.e. reasonable excuse provisions).

Weaknesses in the provision of merits review are identified in relation to the provision of clear explanations for decisions, the right to written reasons for affected individuals, the general applicability of merits review for administrative decisions, and the importance of maintaining review mechanisms even when government services are outsourced.

This briefing explains how administrative review of social security decisions made in employment services is provided for in legislation, and the ways in which current employment services practices limit access to this 'merits' review. It draws on the *Australian Administrative Law Policy Guide* (2011) which sets out best practice for administrative decision-making, emphasising procedural fairness, effective communication, and merits review.

### **Legislative basis of employment services' decision making and reviewability**

#### **Decision Making by Employment Services – Reviewability**

Decisions in social security law are usually subject to merits review, providing recipients an opportunity to challenge or correct incorrect decisions.

#### **Reviewability of Decisions by an Authorised Review Officer**

An Authorised Review Officer (ARO) can review mutual obligations decisions because they are made by an officer under the social security law:

- *The Social Security Administration Act (SSA Act)* s 23(17) defines 'the social security law' which includes the *Social Security Act (SS Act)*, the *SSA Act*, any other acts which express they are part of social security law, and any legislative instrument made under any of these acts.
  - Mutual obligation decisions are generally contained within the *SSA Act*, so are made under social security law.

- ss 126 and 129<sup>1</sup> legislate review by an ARO.
  - The former is for Secretary own motion reviews, while the latter is for application by someone affected by a decision. The latter is most relevant as it is the section relied upon when individuals appeal.
  - Both allow review where a decision has been made by an “officer” under “the social security law”. Both terms need to be considered separately.
  - SSA Act s135 specifies that a review by an Authorised Review Officer of a decision made by an officer of the Employment Department must be by an officer of the Employment Department (i.e. DEWR).
- SSA Act s 201A defines “officer” as having the same meaning as in SS Act<sup>2</sup> s 23(1). Officer is defined as a person performing the duties, or exercising the powers or functions, under or in relation to social security law.
  - This should include employment services, provided the decisions are made under social security law.

### **Administrative law principles**

In addition to the specific references contained in the relevant Acts, administrative law provides for the following, either as prescribed in legislation or as outlined in the *Australian Administrative Law Policy Guide*.

- **Procedural Fairness**

Decision-makers must adhere to procedural fairness standards, including freedom from bias and a fair hearing. This ensures compliance with common law and the *Administrative Decisions (Judicial Review) Act*.

- **Reasons and Effective Communication**

Best practice guidelines require that clear reasons are provided at the time a decision is made. Affected individuals also have the right to written decisions under social security law.<sup>3</sup> Clear communication, especially in adverse decisions, is crucial to ensure the affected person understands the reason for a decision.

- **Merits Review**

Administrative decision should be subject to merit review where they will, or are likely to, adversely affect the interests of a person, unless inappropriate or there are factors justifying the exclusion of merits review.

- **Outsourcing of Government Decision-making**

Avenues for internal and merits review should remain accessible where government services are outsourced, consistent with services delivered directly by government.

### **Reviewability by the Administrative Appeals/Review Tribunal**

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<sup>1</sup> *Social Security (Administration) Act 1999* (Cth).

<sup>2</sup> *Social Security Act 1991* (Cth).

<sup>3</sup> *SSA Act* s 236.

For completeness, any decision reviewed by an ARO is reviewable by the Administrative Review Tribunal (ART). The same was true for the Administrative Appeals Tribunal (AAT) previously.

## **Decisions made by Employment Services**

Employment services are involved in many decisions that affect people's social security payments. Those decisions are made under social security law, which both makes those decisions reviewable.

There are six kinds of decisions to consider:

### *1. Decisions about imposing mutual obligations/entering job plans*

Employment services are responsible for asking people to enter into employment pathway plans (job plans) and for the content of those plans. These are decisions under the SSA Act and should be appealable through merit review processes.

Employment pathway plans also form part of the eligibility criteria for numerous payments. A person who does not enter an employment pathway plan can have their payment cancelled due to not being eligible. Normally this decision would be made by Centrelink but would be based on information obtained from the employment service.

### *2. Content of job plans and associated points targets*

Employment services are responsible for decisions about which activities to include in job plans, and the associated setting of points and job search targets. They may refer people to activities such as training and Work for the Dole. All such decisions require interpretation of relevant guideline provisions which have a legislative base. They also interpret whether points reductions are appropriate given a person's individual circumstances (e.g. personal crisis)

### *3. Decisions about non-compliance with mutual obligations/job plans*

Employment services are responsible for recording when a person hasn't complied with their obligations, but decisions about the consequences of non-compliance (including penalties and suspensions) will likely be made by Centrelink.

### *4. Decisions about demerit points and penalty zones*

Employment service, including automated processes, are responsible for recording demerits. Centrelink is responsible for decisions about the consequences of demerits when they have accrued to meet the definition in the *Administration)(Non-compliance) Determination 2018 (No. 1)*.

Importantly, demerits do not appear to fall under social security law, although decisions made following demerits do (See <https://guides.dss.gov.au/social-security-guide/3/11/13/40>).

### *5. Decisions about the suitability of work*

Employment services make decisions about the kind of work that is suitable for a person. The decision about the referral to a job because it is suitable is made by employment services. The decision about whether work is suitable can lead to a work refusal failure which results in a payment suspension and four-week payment penalty. The decision to impose a work refusal penalty is made by Services Australia.

### *6. Decisions about reasonable excuses*

Decisions about whether a person has a reasonable excuse for a mutual obligation are open to interpretation based on guidelines, but those decisions refer to a listing of relevant factors described in social security law.

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## Administrative Law Issues

There are two main issues that present as themes.

1. **Lack of access to merit review:** Currently employment service providers make numerous types of decisions that are not subject to merit review through normal administrative review processes.

Other decisions that are reviewable are not being reviewed, likely as a result of people not knowing this option is available. EJA research on decisions between January 2015 and August 2024 has found that despite the content of employment pathway plans (job plans) being outlined in the SSA Act, they were not being reviewed at the AAT.

2. **Jurisdictional issues for reviews:** The AAT was, and now the Administrative Review Tribunal (ART) is, unable to review a decision where the live issue has been resolved, for example, where a person has received a payment suspension, but it has been “corrected” after the person has reconnected with the employment service. While the person will receive their current social security entitlement and any backpay, the decision relating to the suspension has additional repercussions through the demerits system. Consequently, the decision should remain reviewable. Current administrative practice is undermining this right to review. See *Lee and Secretary, Dept of Social Services (Social Services Second Review)* [2023] AATA 393.

## Specific examples

EJA's analysis of the availability of administrative review shows there are weaknesses across a wide range of processes administered by employment services, including the requirement to enter into a job plan, the content of a job plan, referral to activities in a job plan, referrals to employment deemed suitable, reasonable excuses for a mutual obligation failure, and the notification of a 'mutual obligation' requirement and its status under social security law.

These issues arise because:

- Employment services workers lack knowledge of the interpretive scope of many legal instruments, and make decisions by following prescriptive guidelines or routines that save time for the providers.
- People are not notified that a reviewable decision has been made and review mechanisms are not explained or made accessible.
- Unclear or insufficient communication regarding reasons for decisions and avenues for review results in limited understanding among affected individuals about their rights and options for challenging decisions.
- Procedural fairness is limited by inadequate explanations and opportunities for individuals to respond to adverse decisions; and there are concerns about bias and

- fairness of decision making due to lack of transparency in decision-making processes.
- Merits review is limited because decisions are outsourced to private entities, which means that accountability and transparency in decision-making processes is not open to the scrutiny of an independent arbiter.

## Legislative Mapping of Employment Service and Related Decision Making

The following table outlines decision making sources, responsibility, reviewability, and potential issues from an administrative law perspective.

<b>Decision</b>	<b>Legislative sources/adverse decisions</b>	<b>Decision maker</b>	<b>Merit review available?</b>	<b>Administrative Law Reform Issues</b>	<b>DEWR Procedures/Issues</b>
<p><i>Requirement to enter into a job plan</i></p>	<p><b>Legislation:</b> Requirement is incorporated into the qualification criteria of the relevant payments:</p> <ul style="list-style-type: none"> <li>• JobSeeker Payment – SS Act s 593</li> <li>• Youth Allowance – SS Act s 540</li> <li>• Parenting Payment – SS Act s 500</li> <li>• Special Benefit – SS Act s 729</li> </ul> <p>All are framed similarly. The person must satisfy the employment plan requirements and satisfy the Employment Secretary that the person is willing to actively seek work.</p> <p><b>Adverse decisions:</b> Cancellation or suspension due to being ineligible if the person doesn't enter into a job plan.</p>	<p>Centrelink</p>	<p>Yes</p>	<p>None specific to this requirement. These decisions are regularly being appealed.</p>	<p>See below.</p>

	<p><b>Legislation:</b> Employment Pathway Plans are governed in the SSA Act, see ss 40A to 40Y.</p> <ul style="list-style-type: none"> <li>• SSA Act s 40A – Compulsion to enter into an employment pathway plan. It can be where one is not in force, or one is but a new one should be.</li> <li>• SSA Act s 40D – A person can enter a plan prepared by the Employment Secretary by notice.</li> <li>• SSA Act s 40E – Streamlined version of the above. Refers back to matters in s 40B. Might just be to allow this to be done using tech.</li> </ul> <p>These probably don't represent a genuine choice or decision, though they are framed in this way. In essence, there is a compulsion to enter a job plan, and if the person doesn't, they don't qualify for payment. The power imbalance is resolved in favour of the agency/employment service.</p> <p><b>Adverse decisions:</b> As above, cancellation or suspension. Also as below, having to perform an unsuitable job plan.</p>	Centrelink Job Providers administer the plans in practice	Yes, where it leads to cancellation. Challenging the requirement itself unlikely to lead to a successful review	None specific to this requirement. These decisions are regularly being appealed.	The Provider is required to formally notify the Participant that they must agree to their Job Plan and advise them of the consequences of failing to do so. A script is available on the Department's IT Systems for the Provider to read to the Participant and includes a compliance warning that is required to be given to Participants if they do not agree to the Job Plan within 2 Business Days.
<i>Contents of job plan</i>	<b>Legislation:</b> Governed by SSA Act ss 40F-40K. These include matters that need to be taken into account,	Job Providers	Yes	<b>Lack of access to merit review:</b> EJA was unable to identify any matters	If a client believes that their Job Plan, their Mutual Obligation Requirements, Points targets and/or mandatory

	<p>examples, and matters that must not be taken into account.</p> <ul style="list-style-type: none"> <li>• SSA Act s 40F – Employment pathway plan matters, including things like age, disability, availability of works, education, etc.</li> <li>• SSA Act s 40G – Employment pathway plan example</li> <li>• SSA Act s 40H – Can’t include a requirement to undertake unsuitable work.</li> <li>• SSA Act s 40J – Can’t include a requirement to participate in Work for the Dole (in certain circumstances).</li> <li>• SSA Act s 40K – Power to make a legislative instrument for other matters.</li> </ul> <p>Unsuitable work defined at SSA Act s 40X, and covers things like not being forced into the army, not having an unreasonable commute, not having to move, and not causing or aggravating injuries.</p> <p><b>Adverse decisions:</b> Unsuitable job plans that the person cannot perform, putting them at risk of suspension, cancellation or penalty.</p>			<p>at AAT2 about the contents of a job plan (cf a cancellation or other decision related to mutual obligation failures). While it is possible these are being appealed and resolved at lower unreported levels, it seems unlikely that none of those cases would proceed to AAT2.</p>	<p>activities are not appropriate for their circumstances, they should, in the first instance, speak to their provider or the DSCC if they are in Online.</p> <p>If the client is not satisfied with the response from their provider, or don't feel comfortable talking to their provider, they can contact the NCSL. The NCSL can also assist with requests to transfer to a new provider or lodge a complaint on the client's behalf.</p> <p>There may be issues with DEWR officers/job network providers interpreting and applying these provisions.</p>
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<p><i>Exemptions from mutual obligations or job plan</i></p>	<p><b>Legislation:</b> General power to be exempt from the job plan requirements contained in SSA Act s 40L. Vests power in the Employment Secretary. Includes reference to the medical exemption rules, though is more general than just this.</p> <p>SSA Act ss 40M-40U give further guidance about specific situations.</p> <ul style="list-style-type: none"> <li>• SSA Act s 40M – Exemption for death of partner.</li> <li>• SSA Act s 40N – Exemption for domestic violence within last 26 weeks.</li> <li>• SSA Act s 40P – Exemption for caring responsibilities.</li> <li>• SSA Act s 40Q – Pregnancy exemptions.</li> <li>• SSA Act s 40R – Work exemptions, in some circumstances only.</li> <li>• SSA Act s 40S – Certain exemptions for JSP relating to education and rehabilitation.</li> <li>• SSA Act s 40T – General exemption for exceptional circumstances.</li> <li>• SSA Act s 40U – General rules for exemptions.</li> </ul> <p><b>Adverse decisions:</b> Exemptions not being granted, placing payment at risk due to mutual obligation failures.</p>	<p>Centrelink (particularly for medical exemptions)</p> <p>Job Providers in some instances</p>	<p>Yes</p>	<p><b>Lack of access to merit review:</b> Similar to the above, this is something that doesn't seem to make it to merit review.</p>	<p>No specific notes. Usually Centrelink will handle these decisions.</p>
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<p><i>Mutual obligation failure</i></p>	<p><b>Legislation:</b> SSA Act s 42AC defines these. Essentially where the person does not comply with job plan, but is broader and includes acting inappropriately, not looking for work, and doing things that could prevent getting work.</p> <p>SSA Act s 42AF provides for suspension where there is such a failure.</p> <p>SSA Act s 42AL provides for the length of the suspension (in short, until reconnection happens) and provides for backpay following reconnection.</p> <p>SSA Act s 42AM sets out reconnection requirements.</p> <p><b>Adverse decisions:</b> As above. Suspensions, with backpay on reconnection. Demerits are also recorded at this point, though this is not controlled by the legislation (see below).</p>	<p>Centrelink Job Provider is recording the failure on the system, but may not be making the decision about suspension directly</p>	<p>Yes, where there is a suspension</p>	<p><b>Jurisdictional issues:</b> Decisions may not be reviewable where the suspension has been corrected following a reconnection. This means there may not be an opportunity to remove a demerit through review if the person has already reconnected. See below. See also <i>Lee and Secretary, Dept of Social Services (Social Services Second Review)</i>[2023] AATA 393.</p>	<p>If a client believes the compliance action under the Targeted Compliance Framework has been incorrectly or inappropriately applied, or if they believe they have a valid reason for not meeting a requirement, they should, in the first instance, speak to their provider or the DSCC if they are in Online.</p> <p>If the client is not satisfied with the response from their provider, they can contact the NCSL to request a transfer to a new provider or lodge a complaint about their current provider. Questions regarding the application of compliance by providers are generally referred to the Compliance Team for review and actioning.</p>
<p><i>Persistent mutual obligation failures</i></p>	<p><b>Legislation:</b> SSA Act s 42AF also covers this. Provides that there can be a reduction in payment or cancellation for persistent failures.</p> <p>SSA Act s 42AN deals with reductions.</p> <p>SSA Act s 42AP deals with cancellations.</p>	<p>Centrelink, with involvement of Job Provider</p>	<p>Yes</p>	<p>See the points on demerits below.</p> <p>n/a</p>	<p>See above.</p>

	<p><b>Adverse decisions:</b> Cancellations and financial penalties (mostly). Harsher than regular penalties where reconnection means there is basically no consequence.</p>				
<p><i>Work refusal failure</i></p>	<p><b>Legislation:</b> SSA Act s 42AD defines this as refusing to accept work.</p> <p>SSA Act s 42AG sets out similar compliance action to mutual obligation failures, using the same sections above.</p> <p><b>Adverse decisions:</b> Same as for mutual obligation failures.</p>	<p>Centrelink, with involvement of Job Provider</p>	<p>Yes</p>	<p>n/a</p>	<p>If a client is offered a job or has commenced in a job and voluntarily leaves that job, their provider may lodge Work Refusal Failure or an Unemployment Failure. These are serious failures that are investigated and applied manually by Services Australia. A key consideration in determining whether to apply a Work Refusal Failure or an Unemployment Failure is whether the job was suitable for the client as per the requirements Section 40X of the Social Security Admin Act.</p> <p>When assessing the suitability of the work, Services Australia will discuss with the client their reason for not accepting or for leaving the job and whether the job was suitable based on the client's individual circumstances.</p>
<p><i>Employment refusal failure</i></p>	<p><b>Legislation:</b> SSA Act s 42AE defines this as deliberately becoming unemployed or becoming unemployed through misconduct.</p> <p>SSA Act s 42AH sets out consequences, which is jumping straight to cancellation.</p>	<p>Centrelink, with involvement of Job Provider</p>	<p>Yes</p>	<p>n/a</p>	<p>See above</p>

	<b>Adverse decision:</b> Cancellation, and preclusion from payment.				
<i>Reasonable excuse/valid reason</i>	<p><b>Legislation:</b> SSA Act ss 42AI-42AJ set this out. Mostly guidance and directs to a legislative instrument.</p> <p><i>Social Security (Administration) (Reasonable Excuse - Participation Payments) Determination 2018 (No. 1)</i> is the instrument mentioned above. Has factors that need to be taken into account, and factors that cannot be.</p> <p><b>Adverse decision:</b> No direct adverse decisions. This is something to be considered for other adverse decisions above.</p>	Job Provider primarily, though Centrelink in some cases.	Not in isolation of another decision, but yes	n/a	There are issues with DEWR officers/job network providers interpreting and applying the legislation correctly.
<i>Demerits and penalty zones</i>	<p><b>Legislation:</b> Not contained in any primary legislation but is referred to in <i>Social Security (Administration) (Non-compliance) Determination 2018 (No. 1)</i>.</p> <p>Social Security Guide 3.11.13.40 claims that decisions made about these aren't made under social security law.</p> <p><b>Adverse decisions:</b> Demerits are themselves adverse decisions and make harsher consequences more likely.</p>	Job Providers are responsible for recording the failure.	No, as they are not decisions under social security law	<b>Lack of access to merit review:</b> These decisions can't be reviewed unless part of a decision to suspend or cancel a payment, or otherwise related to a reviewable decision.	No specific notes.

**Recommendations:**

- Improve communication about the availability of review of decisions in employment services.
- Provide written reasons for decisions to affected individuals and improve accessibility and clarity of information on avenues for review.
- Ensure merits review is available for all decisions with adverse effects.
- Establish mechanisms for monitoring and evaluating the implementation of administrative review processes.