

10 December 2018

Workers' Compensation Policy Branch
Department of Jobs and Small Business
Australian Government

By email: workerscompensationpolicy@jobs.gov.au

To Whom It May Concern,

CONSULTATION ON SUNSETTING INSTRUMENTS IN THE SEACARE SCHEME

We refer to the above consultation and the Department's proposal to make four legislative instruments under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) replacing items 1,2,4 and 5 of the *Seafarers Rehabilitation and Compensation Act 1992 - Notice of Declarations and Specifications* (the Current Instrument).

We do not support the proposed *Seafarers Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2018* (Specified Diseases Instrument). This instrument would significantly alter the list of deemed diseases in the current instrument by introducing minimum employment/exposure periods. For example, the current instrument covers lung cancer or mesotheliomas caused by asbestos related to "Employment involving exposure to asbestos"¹, whereas the proposed instrument would only cover asbestosis related to "Employment for at least 5 years (whether consecutive or not) involving work with: a) asbestos or b) asbestos-containing material".² The effect of these minimum exposure/employment periods would be to limit the circumstances in which a claimant is entitled to the presumption of a causal connection between the claimant's disease and his or her workplace exposure.

¹ See subitem 27 of item 1 of the current instrument.

² See Schedule 1, item 33 of the proposed Specified Diseases Instrument.

We note that the stated rationale for this change is to bring the current instrument in line with the latest scientific evidence and with changes to the operation of the Comcare Scheme under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) made via the replacement of the *Safety, Rehabilitation and Compensation (Specified Diseases) Notice 2007* with the *Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017* (SRC Instrument) on 3 October 2017. The SRC Instrument appears to have introduced similar changes to the deemed diseases list and minimum employment periods that at the time were said to be based on two expert reports by Professor Dr Tim Driscoll, the first commissioned by Safe Work Australia in 2015 and peer reviewed by Professor Malcolm Sim and a supplementary report commissioned by the Department of Employment in 2017.³

However, the reports did not provide a proper basis for the introduction of minimum exposure/employment periods in the SRC Instrument. Professor Driscoll's 2015 report explained the rationale for deemed disease lists in Australian workers' compensation schemes as follows:

*"All jurisdictions in Australia provide some form of workers' compensation scheme. For most work-related diseases, the worker (the claimant) must establish that there is a causal connection between a particular work exposure and the disease on which the claim is based. This appears a sensible approach where there is significant uncertainty as to whether a particular exposure does indeed cause the disease. However, where there is strong evidence of a causal connection between the exposure and the disease, there seems little point expending time and resources requiring each individual worker to prove that connection. The Deemed Diseases approach reverses the onus of proof when a claim is made, but does not guarantee the success of a claim. The worker still has to demonstrate they have had sufficient occupational exposure to the relevant exposure."*⁴

Accordingly, that report refrained from nominating minimum exposure/employment periods. It went on to say the following about avoiding mandating 'sufficient exposure' periods:

"Since most occupational diseases can also be caused by non-occupational exposures, the final content of the List must be a balance between a restrictive approach and a more inclusive approach. The final decision on which diseases to include on the List is therefore based partly on the relative likelihood of a worker being exposed to the required occupational exposure

³ See Explanatory Statement to the *Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017* available [here](#).

⁴ Driscoll, *Deemed Diseases in Australia*, Safe Work Australia, August 2015, p10.

circumstances. Therefore, there may be benefit in including an explicit requirement that there be “sufficient” exposure to the identified exposure in the exposure-outcome pair. Sufficient exposure in this context means exposure of sufficient duration and intensity to be reasonably capable of causing the development of the condition. Relevant non-occupational exposures would not alter this. For example, persons with sufficient occupational exposure to an agent that is known to cause lung cancer should not be precluded from being included on the List simply because they smoke (even though smoking is also known to increase the risk of developing lung cancer).

A disadvantage of including such a stipulation is the difficulty in characterising what “sufficient” is or how it would be demonstrated. This would make it more difficult for a worker whose disease has arisen from a particular exposure to make a claim, something that the Deemed Diseases approach is designed to try to minimise.

The final decision for this project, as directed by the TAG [Temporary Advisory Group (TAG) established by the Strategic Issue Group for Workers’ Compensation], was to not include a stipulation about sufficient exposure being required.”⁵

The Department of Employment then commissioned a supplementary report that went on to nominate various exposure periods, in our view, without proper foundation and in contradiction to the concerns expressed about doing so in the first report. We note that unlike the first report, the supplementary report was not, as far as we are aware, peer reviewed.

Further to the above, we are concerned that where the presumption of a causal connection between employment and a disease does not apply, the SRC Act requires a worker’s employment to have contributed to a ‘significant’ degree to the contraction of a disease, whereas the Seafarers Act is concerned in that case with employment that contributes to a ‘material’ degree to the contraction of a disease. This difference between the schemes and the context of the presumption in both schemes undermines the notion of equivalence between the SRC Act and the Seafarers Scheme.

We strongly endorse the argument made by the Australian Institute of Marine and Power Engineers (AIMPE) in its response of 7 December 2017 that the weakening of the presumption of a causal link between various occupational diseases and employment in the proposed Specified Diseases Instrument would present a number of significant practical and evidential barriers to injured seafarers and introduce

⁵ Driscoll, Deemed Diseases in Australia, Safe Work Australia, August 2015, p15-16.

an unnecessarily confrontational litigious process into a non-litigious safety net scheme that shows no sign of abuse.

Accordingly, we object to the introduction of minimum employment/exposure periods in the Specified Diseases Instrument.

Yours sincerely,

Tom Roberts
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