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Workers Compensation Policy Team
Safety and Compensation Policy Branch
Attorney-General's Department

Via e-mail: workerscompensationpolicy@ag.gov.au

To whom it may concern,

Review of the specified diseases and employment declared for the purposes of the *Seafarers Rehabilitation and Compensation Rehabilitation and Compensation Act 1992*

We refer to your department's correspondence of 10 September 2020 and thank you for the opportunity to make a submission in relation to the above review. We give our permission for you to publish this submission on the Department's website, as requested.

In our view, it is inappropriate to proceed with the review on the basis of the terms of reference proposed and we join with and support our affiliates the Maritime Division of the Construction, Forestry, Maritime, Mining and Energy Union, the Australian Maritime Officers Union and the Australian Institute of Marine & Power Engineers in proposing the amended terms of reference annexed to this correspondence.

In our view, the review the Department proposes to conduct is flawed in that it:

(a) Ignores the different legal frameworks under which the declared diseases and employment listings in Seacare and Comcare operate;
(b) Ignores the unique workplace characteristics of workers covered by the Seacare scheme; and
(c) Accordingly, does not permit a genuine assessment of the appropriateness of adopting minimum employment periods as a feature of the specification of employment and diseases in the Seacare scheme.

These flaws are highly likely to bias the review toward supporting the adoption of a specified diseases and employment instrument which retains the key design features of the instrument the Department has proposed and differs only in some matters of detail.

We agree with the very general characterisation of "deemed diseases lists" in the background material provided with the terms of reference. All deemed diseases lists create a presumption that the factual causation issue in respect of that disease has been proven to a particular standard by an applicant for compensation. Including minimum employment period specifications in such lists functions to *reduce* the number of workers suffering from notorious occupational diseases that are eligible to access that presumption, which is at odds with expressed policy intent of simplifying their claims for compensation. We have opposed such minimum employment prescriptions for that reason and continue to do so.

The design of deemed diseases lists aims to specify the causal issues in occupational disease development which are known to satisfy *the relevant standard* for the particular compensation scheme under which the list will operate, in order to relieve the applicant of a burden which is unnecessary in the circumstances. The relevant standard differs between various compensation schemes. Were the relevant standard for a particular scheme not taken into account in the design of a deemed diseases list for that scheme, it could unfairly benefit one party's interests.

Under Comcare, a right to compensation ordinarily exists in respect of a disease (or aggravation thereof) if:

- The disease (or aggravation) results in death, incapacity for work or impairment; and
- The disease (or its aggravation) was contributed to, *to a significant degree*, by the employees' employment by the Commonwealth or a licensee.[1]

The legislation governing the Comcare scheme provides that "*significant degree* means a degree that is substantially more than material"[2]. This is a legislative prescription of a principle of causation of injury which departs from, and is a far higher bar, than the ordinary common law standard where a material contribution is often sufficient.[3]

The function of the prescription of specified diseases and employment in the *Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017* ('the Comcare Instrument') is to create a presumption that employment of the specified kind *did* contribute *to a significant degree* to the contraction of the specified disease. It is to be assumed that this policy and legal function of the

[1] *Safety, Rehabilitation and Compensation Act* 1988, s. 5A(a), 5B, 14.
[2] *Safety, Rehabilitation and Compensation Act* 1988, s. 5B(3)
[3] See *XLRC and Comcare (Compensation)* [2019] AATA 3553 at [8] – [19]

prescription of specified diseases and employment was understood at the time the *Comcare Instrument* was developed and that the high bar to causation established by the legislation underlay both the selection of the diseases listed in the *Comcare instrument* and the prescription of the type and duration of employment those diseases were specified to relate to. That is, the epidemiological standard that ought to have been applied in the selection of diseases and employment settings for the purposes of the *Comcare Instrument* was whether or not the data supported a view that it was more likely that not that employment of that type contributed *to a significant degree* to the contraction of the relevant disease in the workplace settings governed by the scheme (although it seems in relation to asbestos at least that some other unspecified and indefensible standard was in fact applied).

Under Seacare, a right to compensation ordinarily exists in respect of a disease (or aggravation thereof) if:

- The disease (or aggravation) results in death, incapacity for work or impairment; and
- The disease (or its aggravation) was contributed to *in a material degree*, by the employee's employment as a seafarer or trainee or other relevant person. [4]

The function of the prescription of specified diseases and employment in the *Seafarers Rehabilitation and Compensation Act 1992 – Notice of Declarations and Specifications* ('the Seacare Instrument') is to create a presumption that employment of the specified kind *did contribute in a material degree* to the contraction of the specified disease.[5]

It is plainly evident that a "a material degree" and "a degree that *is substantially more than* material" are not equivalent standards.[6] Accordingly, the selection of specified diseases and employment to be declared for the purposes of the Seacare scheme should adopt the more beneficial standard that is legislated in that scheme. The epidemiological standard to be applied in such selection ought to be whether or not the data supports a view that it is more likely than not that employment of particular type contributes in any material degree to the contraction of the particular disease, without regard to whether the contribution is also "substantially more than material".

In addition, the application of any epidemiological review to the Seacare context needs to take into account that the unique environment in which Seafarers work will bear on the question of materiality. Specifically, Seafarers covered by the Seacare scheme are physically prevented from leaving their confined workplaces at all for a month or more at a time. The cumulative exposure levels that are

[4] *Seafarers Rehabilitation and Compensation Act 1992*, s. 3 (definitions of injury and disease), s. 26.
[5] *Seafarers Rehabilitation and Compensation Act 1992*, s.10(1).
[6] See *XLRC and Comcare Op. Cit.*

estimated to be reached over particular minimum employment levels for the purposes of the Comcare scheme do not take into account the concentration or intensity associated with exposures that occur in the Seagoing environment. The assumptions underlying minimum employment periods in more typical workplace settings cannot be unquestioningly adopted.

Moreover, the assumptions adopted in the *Comcare instrument* in relation to asbestos at least are clearly indefensible even in respect of unexceptional workplace settings. It is an accepted public health fact that there is no known cause for mesothelioma other than exposure to asbestos[7]. Given that fact and Professor Driscoll's acceptance in 2017 that "brief periods (days to weeks) of significant exposure can *meaningfully increase* the risk of developing mesothelioma"[8], there was no sound basis for including a minimum period of employment of "one year.... involving work with asbestos or asbestos containing materials" in the *Comcare instrument* to begin with. The inclusion of the same minimum employment specification in the proposed new instrument for the Seacare scheme is more incongruous still, given the matters referred to above.

If the *Comcare Instrument* is to be used as a starting point for a revised *Seacare Instrument*, as the Department has proposed, then a genuine review would be reasonably expected to involve additional diseases being specified and/or minimum employment periods being abolished if not substantially reduced.

Yours faithfully,

Liam O'Brien
Assistant Secretary

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[7] See, for example, Cancer Council Australia: Causes of mesothelioma, Safe Work Australia: Mesothelioma Registry

[8] *Deemed Diseases Approach – Information to support the update of the Comcare Scheme's current Deemed Diseases legislative instrument*, Professor Tim Driscoll, Safe Work Australia, August 2017, at 21.

SUGGESTED AMENDED TERMS OF REFERENCE
TO REVIEW OF THE SPECIFIED DISEASES & EMPLOYMENT
DECLARED FOR THE PURPOSES OF
THE SEAFARERS REHABILITATION & COMPENSATION ACT 1992

1. Whether the SRC Act Instrument is an appropriate model for the Seafarers Act Instrument in view of the different employment connection tests imposed under each Act for diseases.

2. Whether any additional occupational diseases should be included for the Seacare Scheme.

3. If an occupational disease should be included what, if any, employment related causative factors should apply in relation to that disease?

4. What is the epidemiological data to validly support the incorporation of a minimum employment period(s) test in relation to occupational diseases?

5. Whether any minimum employment period test should be omitted or reduced for the Seacare Scheme, in view of the seafarer's presence, and thus likely exposure (whether working or not) on board vessels for 24 hours per day and for rostered work periods of 4 to 6 weeks at a time.