

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

Terms of Reference

The purpose of the review is to examine a proposed replacement specified diseases and employment instrument (the proposed instrument) to ensure it is appropriate for the Seacare scheme. The proposed instrument is the same as the [equivalent instrument](#) made under the *Safety Rehabilitation and Compensation Act 1988* (the SRC Act instrument), with the exception that it will be an instrument made under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act). The Attorney-General's Department (the department) will engage an epidemiologist to consider scientific and any other relevant evidence to advise on:

- Whether any additional occupational diseases should be included for the Seacare scheme.
- If an occupational disease should be included, what employment-related causative factors and what, if any, minimum employment period should apply in relation to that disease.
- Whether any minimum employment period(s) should be amended for the Seacare scheme.
- If the minimum employment period for a particular disease should be amended from the SRC Act Instrument for the Seacare scheme, what minimum employment period should apply in relation to that disease.

Background

The Seacare scheme is established under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* to provide work health and safety, workers' compensation and rehabilitation arrangements for approximately 4400 employees in the maritime industry.

Most jurisdictions in Australia have a 'deemed diseases list' as part of their workers' compensation system. Such a list comprises a list of diseases that are deemed to be work-related. The effect of this is to reverse the onus of proof, that is, a worker with the disease who has been exposed to the relevant exposure in the course of their work is assumed to have developed that disease because of the exposure unless there is strong evidence to the contrary. Diseases that are not included on the 'deemed diseases list' can still be the subject of a workers' compensation claim through the normal approach, where the reverse onus of proof would not apply. The 'deemed diseases list' approach simplifies relevant claims on the assumption that there is a high likelihood that the disease has arisen as a result of work-related exposures.¹

The [Notice of Declarations and Specifications 1993](#) (current Seafarers Notice) which contains the 'deemed diseases list' for the Seacare scheme, has not been relevantly updated since the Notice was made in 1993 and does not include some diseases for which there is strong contemporaneous evidence of a causal link to work-related exposures. Further, the

¹ Professor T Driscoll, *Deemed Diseases in Australia* 2015
<https://www.safeworkaustralia.gov.au/system/files/documents/1702/deemed-diseases.pdf>

current Seafarers Notice will sunset on 1 April 2021 and unless a new instrument is made, there will not be a ‘deemed diseases list’ for the purposes of the Seafarers Act.

Additionally, under the current Seafarers Notice, for the presumption to apply, the employee is required to establish that their disease was *caused by* a particular agent (see occupational diseases column). It is not sufficient for the employee to establish that generally, some cases of the disease have been known to have been caused by the relevant agent (*Bird v Commonwealth* [1988] HCA 23), or that the employee was exposed to the relevant agent as part of their employment.

Beneficially for employees, the proposed instrument will not include the requirement under the current Seafarers Notice for an employee to establish that a specified disease was *caused by* a particular person, thing or agent² (see column 1 of schedule 1) by establishing, on the balance of probabilities that their condition was contributed to in a material degree by their employment. Under the proposed instrument, an employee suffering from a specified disease need only establish that their employment involved work and/or contact with, or exposure to, a listed person, agent or thing, and the minimum employment period (MEP) threshold, where relevant, was met. Not all of the diseases listed in schedule 1 of the proposed instrument specify MEPs. Where MEPs requirements are detailed, the employee must have engaged in one or more periods of employment with a Seacare employer and the period or sum total of periods (whether consecutive or not) must have been no less than the MEP for that condition.

It will remain possible for an employee (or their dependants) suffering from a specified disease who has not met the specified MEP to establish, on the balance of probabilities, that their condition was contributed to in a material degree by their employment. That is, the proposed instrument would not remove or change the existing capacity for an employee to make a ‘disease’ claim in the ordinary way under the Seafarers Act and current instrument but will instead, where the MEP and other relevant criteria are met, offer an additional and more streamlined process for establishing that a disease was contributed to in a material degree by the employee’s employment.

The proposed instrument would also contain specific diseases rather than general disease categories (for example, ‘Parkinson’s disease’ rather than ‘diseases caused by manganese or its toxic compounds’).

The inclusion of MEPs in the proposed instrument is supported by Professor Driscoll’s rationale for the inclusion of MEPs in the SRC Act instrument, ‘that typical workers with exposure to a particular hazardous substance have similar levels of exposure, which means that if they are exposed for a similar length of time they will have a similar cumulative exposure and thus a similar risk of developing the disease related to the exposure.’³ This does not mean that a shorter, intense, exposure could not result in the development of a disease. However, with the absence of useful workplace exposure data to establish a cumulative exposure of an individual worker, experts advise that the appropriate approach is to recommend an MEP.⁴

Stakeholders will be invited to make submissions to the review on evidence that relates to the terms of reference.

² Although the causation requirement of the current instrument will be retained in relation to primary malignant disease of the lung caused by asbestos.

³ Driscoll, Tim, *Deemed Diseases approach - information to support the update of the Comcare Scheme’s current deemed diseases legislative instrument*, 2017, p 19.

⁴ *Ibid.*