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All at sea – a rough guide to seafarers' compensation

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In this article, Angela Sdrinis navigates the murky waters of seafarers' legislation, including an overview of Seacare – the national seafarers' compensation scheme.

Because of the unique nature of the maritime industry, shipping and all its facets has required specialised legislation. Accordingly, although there are less than 3,000 seafarers[1] involved in interstate and international shipping, they are covered by a specific workers' compensation scheme known as Seacare.

Shipping and seafaring have necessarily been covered by federal legislation. The first Act covering seafarers' compensation was passed in the early 1900s.[2]

By the early 1990s the *Seamen's Compensation Act 1911* had severe limitations and simply did not address the needs of modern workers.

Seamens' compensation legislation has traditionally been modelled on federal workers' compensation legislation. However, unlike the *Commonwealth Workers Compensation Act 1912*, which was substantially revised in 1971 and again in 1988, the *Seamen's Compensation Act* was left virtually untouched until the early 1990s when ▶

Professor Harold Luntz was asked to prepare a submission on seafarers' compensation.

There is no doubt that there were real problems with the 1911 Act. Firstly, benefits under that Act were grossly inadequate. By 1992 it was not uncommon for seafarers to be earning in the vicinity of $50,000.00 per annum. At the same time, the maximum weekly payment under the *Seamen's Compensation Act* was $241.30 per week, plus $63.20 for a totally dependent spouse and $30.00 for each dependent child.

Like most old workers' compensation schemes, receipt of a lump sum under the Table of Maims meant that no further loss of earnings benefits were payable under the Act.

In addition, a lump sum for industrial loss under the Table of Maims was not available unless the injury had resulted in incapacity.

This meant in the main that the overwhelming majority of seafarers could not access lump sum payments for hearing loss (as it was very unusual for hearing loss to result in incapacity) which meant that in practical terms, no compensation was payable for an injury which was literally an occupational hazard.

Another problem with the old Act was that there was no requirement for employers to be insured. There was also no requirement for an employer to provide rehabilitation following injuries.

These were just some of the problems of the *Seamen's Compensation Act 1911* and coupled with the woefully inadequate benefits, it was clear that new legislation was required.

Accordingly, on 24 June 1993, the *Seafarers Rehabilitation and Compensation Act 1992* (SRCA) replaced the *Seamen's Compensation Act 1911*.

Seafarers Rehabilitation and Compensation Act 1992

The SRCA generally covers seafarers involved in interstate or international shipping and including the offshore industry, that is, seafarers who work on

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"prescribed ships" as defined in Part 11 of the *Navigation Act 1912*.

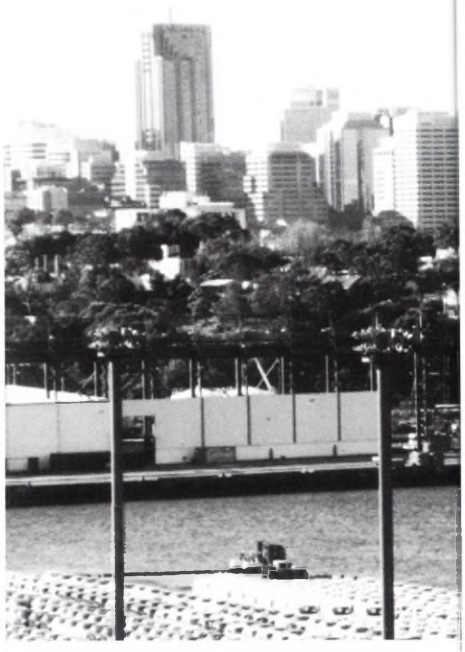
Accordingly, seafarers involved in intrastate shipping, for example, on tugs, river ferries, etc will not be covered by the SRCA but will be covered by the relevant state workers' compensation scheme.

The SRCA was largely modelled on the *Safety Rehabilitation and Compensation Act 1988* which covers Commonwealth employees via a scheme known as Comcare. Indeed, any practitioner familiar with the Comcare scheme will recognise large chunks of the SRCA

Differences between the schemes are relatively minor, the major difference being that the SRCA provides for individual employer liability rather than for a central fund as is the case with Comcare. The SRCA does, however, provide for a fund which covers trainees and acts as a nominal defendant where an employer is uninsured.

There is also one very practical difference between the two schemes. Unlike the *Safety Rehabilitation and Compensation Act 1988*, where employers do not face time limits in responding to a claim, under the SRCA an employer must respond to a claim for incapacity benefits and medical expenses within 12 days[3], lump sum claims within 30 days[4] and 60 days in relation to a death claim[5].

If there has been no response within these time periods, the employer is deemed to have rejected the claim and a request for reconsideration must be made. If there is no response within 60 days of receipt of a request for reconsideration, the claim is again deemed to have been rejected and an application for review can be lodged in the



Administrative Appeals Tribunal (AAT).[6]

There is no jurisdiction to order a seafarer to pay an employer's costs if the claim is unsuccessful[7] and a worker will be awarded costs if the determination is varied or set aside by the AAT[8].

The Seacare Scheme

Provided an injury arises out of, or in the course of, employment a seafarer is entitled to the benefits of the SRCA. Injury is defined as being a disease or a physical or mental injury. Aggravation of a physical or mental injury is also covered except in circumstances where the injury has been caused by reasonable disciplinary action taken against the employee, or failure by the employee to obtain a promotion, transfer or benefit in connection, with employment[9].

An employee is also covered whilst travelling from his or her place of residence to and from work, to and from training courses, to and from medical treatment, whilst travelling for the purpose of registering for the availability of employment and whilst undertaking training[10].

The usual exclusions apply with respect to journey claims, for example, if a deviation substantially increases the risk of sustaining an injury[11].

"In the course of employment" has been given a very broad meaning in the context of seafarers' claims. In the matter of *Taylor v ASP Ship Management*[12] a trainee seafarer injured his leg whilst at

a discotheque while onshore in his non-home port. The evidence was that he had consumed a considerable amount of alcohol.

The AAT held that the concept of employment had to be widened to take into account employees being in a certain time and place as a result of statements, acts or conduct of an employer and that the seafarer's attendance at the licensed premises would have been within the contemplation of the ship's officer who granted permission for the trainee to go ashore.

Further, the tribunal decided that section 26 which provides "compensation is not payable for injury that is not intentionally self-inflicted but is caused by the serious and wilful misconduct of the employee unless the injury results in death or serious and permanent impairment" did not apply in this case because the seafarer's injuries were "serious".

Below is a summary of the benefits the SRCA provides.

Incapacity Benefits

A claimant is entitled to normal weekly earnings for the first 45 weeks of incapacity and 75% thereafter[13]. The right to claim incapacity benefits continues until age 65. There is power to reduce weekly benefits on the basis that a claimant has a notional earning capacity[14].

The issue of notional earning capacity was considered by the Federal Court in the matter of *Esam v ASP Ship Management*[15]. The key issue in this case was whether the state of the labour market was a relevant consideration when calculating the amount of compensation payable.

The evidence was that the claimant was fit for light work. Such work was not available to him through his employer and whilst the applicant had sought such work he had been unsuccessful. Mr Esam's compensation was reduced on the basis that he was capable of undertaking clerical work. The AAT dismissed the application for review on the basis that the failure to secure work was caused by economic reasons, that is, the state of the labour market and not because of any incapacity for work.

The Federal Court set aside the AAT's decision and applied the "but for" test, that is, that Mr Esam would not have been looking for work if not for his injury and that it was not possible to say that the inability to find work was caused exclusively by the poor state of the labour market.

Rehabilitation

An employer "must" assess an employee's capacity to undertake a rehabilitation program within 28 days of receiving notice of an injury. In my experience, this rarely happens and the failure to provide rehabilitation is one of the failings of the Seacare scheme.

Having said that, rehabilitation of injured workers can be difficult in the maritime industry. Opportunities to provide light work on a ship are extremely limited where, for safety reasons, a fully fit manning level is mandatory. Most often, rehabilitation involves an injured worker returning to work on a supernumerary basis, that is, above normal manning levels. The jobs are not "real", that is, are extra to manning requirements which is a source of expense to employers and frustration to injured seafarers.

Further, most seafarers do not have readily transferable skills. That is, if a seafarer is not fit for manual work they often do not have the skills or the education to undertake sedentary work.

Medical and Like Expenses

Medical and like expenses are payable under the SRCA[16]. The definition of medical treatment includes treatment by a legally qualified medical practitioner, physiotherapy, osteotherapy, massage and chiropractic treatment. It also includes the examination and provision of a medical report. Hospital and nursing care is also covered[17].

Death Claims

If an employee dies of injuries sustained in the course of employment leaving dependants (wholly or partly dependant) the dependants are entitled to a lump sum.[18] In addition, dependant children of the deceased are entitled to a weekly benefit.[19]

Reasonable funeral expenses are also payable, although these are indexed to a statutory maximum.[20]

Impairment Benefits

A lump sum is payable if the claimant has sustained a whole person impairment of 10% or more as a result of the compensable injury.[21]

The guide to the assessment of permanent impairment under the SRCA is modelled on the Comcare guide. This guide was recently the subject of a review and a draft of the proposed guide was released by Comcare earlier this year. If the proposed guide is adopted without change a number of conditions which would currently meet the 10% threshold would be excluded, particularly in relation to orthopaedic and psychiatric injury.

As mentioned above, there are problems with respect to lump sums for hearing loss claims under the old Act. These problems were meant to be remedied by the SRCA, and in particular a special section was introduced to deal with hearing loss claims, namely that the date of injury was the date of the claim.[22]

In the matter of *Richards v Howard Smith Industries*[23] the AAT found that notwithstanding that hearing loss had occurred before the commencing day, the effect of section 11 of the SRCA was ▶

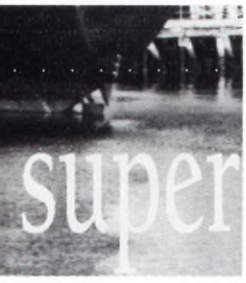
to deem the whole of the hearing loss to have arisen as at the date of claim.

On appeal to the Federal Court Justice Goldberg found that where there had been employment before the commencing day it would be necessary for a claimant to show that hearing loss constituting 10% whole person impairment had been caused or contributed to by employment *after* the commencing day, namely after 24 June 1993.[24]

Common Law Claims

There is also a right to sue for damages which is restricted to non-pecuniary loss. In order to sue for damages, there must be a permanent impairment of 10% or more.[25]

A written election must be made before the issuing of a common law claim.[26] The maximum payable by way of damages is $138,570.52.[27] As in the case of the *Safety Rehabilitation and Compensation Act* (where the maximum payable for damages is $110,000.00) this figure has not been indexed since the commencement of the SRCA. The clear intent of the failure to index is to discourage claimants to sue for damages, given that the maximum payable by way of impairment benefits is indexed annually.



Superannuation

Unlike the *Safety Rehabilitation and Compensation Act,* where a formula is applied to reduce loss of earnings benefits on receipt of a lump sum by way of superannuation, even if that lump sum is rolled over, there is virtually no reduction to incapacity benefits under the SRCA provided that the lump sum is rolled over in its entirety.[28]

Some employers have tried to argue that the decision of *Archer v Comcare*[29] which applied a very broad interpretation to the words "receives a lump sum benefit under a superannuation scheme" for the purposes of reducing weekly benefits under the *Safety Rehabilitation and Compensation Act* should also be applied to the SRCA.

In my view, there is no basis for doing so, given the clear wording of the analogous section of the SRCA.[30]

What Does the Future Hold?

It is my view that the SRCA provides a fair and workable compensation system for seafarers and their employers.

The Administrative Appeals Tribunal is a user friendly and economical jurisdiction in which to pursue disputed claims (although the Howard Government did do its best to try and abolish the right to legal representation and to generally disadvantage claimants by introducing a Bill amending the *Administrative Appeals Tribunal Act* which fortunately lapsed before passage prior to the last election.)

It does not appear at this time that major changes to the SRCA are envisaged, at least not by the Seacare Authority.

A recent discussion paper issued by Seacare on 25 March 2002[31] foreshadowed that changes to the SRCA were likely to be made mirroring the changes made to the *Safety Rehabilitation and Compensation Act* following the enactment of the *Safety Rehabilitation and Compensation and Other Legislation Amendment Act 2001*, which was passed on 1 October 2001.

This Act made minor amendments to the *Safety Rehabilitation and Compensation Act* including relating to the indexation of normal weekly earnings, clarifying that non-economic loss was not payable where impairment became permanent prior to the enactment of the *Safety Rehabilitation and Compensation Act,* and changes relating to payment of compensation to workers who were injured after age 63.

It is likely that the SRCA will also be amended to reflect these changes.

There are also some proposed changes to the fund arrangements, particularly in relation to the fund acting as a nominal defendant.

In conclusion however, the current system is under threat for four primary reasons. Firstly, the Howard Government has attacked the maritime unions since it came to power. Secondly, ship owners have been exerting some pressure for change of the system which they say is costing too much. Thirdly, in the current climate where insurers are constantly crying poor, the debate about major changes to the system may resurface. Finally, compared to some state systems of compensation, the system may be seen to be "generous" to workers, particularly if those workers are seafarers. PL

Footnotes:

1. There are 2,800 employees covered under the *Seafarers' Rehabilitation and Compensation Act*. 64% are in the merchant section and 36% are in the offshore sector. Annual report of the Seacare Authority 1999 – 2000.
2. *Seamen's Compensation Act 1911*.
3. Section 73.
4. Section 73A.
5. Section 72.
6. Section 79.
7. Section 91.
8. Section 92.
9. Section 3.
10. Section 9.
11. Section 9 (3).
12. [2000] AAT 254.
13. Section 31.
14. Section 32.
15. [1998] 1129 FCA.
16. Section 28.
17. Section 3.
18. Section 29 (3) & (4).
19. Section 29 (5).
20. Section 30.
21. Sections 39 to 42.
22. Section 11.
23. 2 February 1988.
24. *Howard Smith Industries v James Richards* Federal Court 10 September 1999.
25. Part 4.
26. Section 55.
27. Section 55 (5).
28. Section 36.
29. [2000] FCA 1296.
30. Section 36.
31. Review of Seacare Scheme Legislation 2002 issue paper 25 March 2002.