

## EXPLANATORY STATEMENT

*Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*

Issued by the Minister for Veterans' Affairs

### **Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021**

#### Overview

The *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (“DRCA”) provides rehabilitation support and health care for employees who are defined as members of the Defence Forces (“employee”). The DRCA also provides compensation payments for those employees and their dependants.

The *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021* (“2021 Instrument”) is made under paragraph 7(1)(b) of the DRCA and amends the *Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017* (“Specified Diseases and Employment Instrument”), for the purposes of claims for certain diseases under the DRCA.

#### Specified Disease and Employment Instrument

The Specified Diseases and Employment Instrument specifies, for the purposes of subsection 7(1) of the *Safety, Rehabilitation and Compensation Act 1988* (“SRC Act”) and the DRCA, the circumstances in which employment is deemed to have contributed, to a significant degree, to the contraction of a disease suffered by an employee.

The Specified Diseases and Employment Instrument specifies what are commonly referred to as occupational diseases. An occupational disease is a disease associated with a particular kind of employment because the employment involves a particular risk.

#### 2021 Instrument – Objectives and issues giving rise to the instrument

The 2021 Instrument expands those circumstances to recognise the risks faced by ADF Firefighters who served at RAAF Base Point Cook between 1 January 1957 and 31 December 1986 (“Point Cook Firefighters”). In doing so, it implements the 2021-22 Budget measure “Supporting Australian Defence Force Firefighters” and recognises the potential for a broad range of health effects on Point Cook Firefighters from exposure to a wide range of hazardous (and at times unknown) substances during fire suppression training, at a time when personal protective equipment was not of the same standard available today.

The 2021 Instrument specifies conditions that are taken to be related to Australian Defence Force (ADF) Firefighter service at the Royal Australian Air Force (RAAF) Base Point Cook between 1 January 1957 and 31 December 1986. This includes employees who participated in a firefighter training course or served as an instructor.

In effect, the 2021 Instrument reverses the onus on Point Cook Firefighters to provide evidence in support of compensation claims under the DRCA for 31 conditions (including all cancers).

The 2021 Instrument will commence on 20 September 2021.

## ***Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021***

### Operation of the 2021 Instrument

The 2021 Instrument is made under paragraph 7(1)(b) of the DRCA. The purpose of the 2021 Instrument is to implement a Budget 2021-22 measure to reverse the onus of proof diseases listed in the instrument for an employee who served as an ADF Firefighter or participated in a firefighter training course (including as an instructor) at RAAF Base Point Cook between 1 January 1957 and 31 December 1986.

Details of Schedule 1 to the 2021 Instrument are set out in Attachment A.

The 2021 Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

### Interaction with subsection 7(8) of the DRCA

There is an overlap of diseases mentioned under subsection 7(8) of the DRCA and certain diseases covered under the 2021 Instrument made under paragraph 7(1)(b). Subsection 7(10) of the DRCA makes it clear that the power available under subsection 7(1) is not confined or restricted by subsection 7(8).

This means that a person who is eligible under the 2021 Instrument does not have to satisfy the qualifying periods, or otherwise satisfy the criteria, under subsection 7(8) of the DRCA in relation to claims for cancer that are listed in that subsection.

For the avoidance of doubt, the 2021 Instrument covers all cancers for employees who served as an ADF firefighters or participated in a firefighter training course (including as an instructor) at RAAF Base Point Cook between 1 January 1957 and 31 December 1986.

### Interaction with the Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017

By virtue of item 63 of Schedule 1 to the *Safety, Rehabilitation and Compensation Legislation Amendment (Defence Force) Act 2017*, any legislative instrument that was made under the SRC Act that was in force immediately before the commencement of the DRCA on 12 October 2017 is taken to have been made under the DRCA, if there is a corresponding empowering provision under the DRCA.

The Specified Diseases and Employment Instrument is one such instrument as it was registered on 3 October 2017, and retrospectively commenced on 1 October 2017.

This means that the Specified Diseases and Employment Instrument applies for the purposes of the DRCA, even though it was made under the SRC Act.

Subsequent amendments made by instruments under the SRC Act and the DRCA amend the Specified Diseases and Employment Instrument only for the purposes of the Act under which the amendment instrument is made. This means that the 2021 Instrument only amends the Specified Diseases and Employment Instrument for the purposes of the DRCA.

### Interaction with Part X of the DRCA – Transitional Provisions

The DRCA provides for Transitional Provisions, under Part X, for an injury, loss or damage suffered by an employee whether before or after the commencement of the DRCA (1 December 1988).

The ordinary application of the DRCA is modified by Part X in relation to an injury, loss or damage suffered before the commencement date (i.e. pre-existing injuries).

Ordinarily the DRCA provides that liability for an injury must be determined under subsection 14(1) of the DRCA by the MRCC. Liability to pay compensation must include:

- consideration of the relevant definition of ‘injury’ (which under subsection 5A(1) includes ‘a disease’); and
- whether the circumstances in which the employee was injured arose out of or in the course of the employee’s employment.

Under section 124 of the DRCA an employee will only be entitled to compensation under the DRCA for a pre-existing injury if compensation was, or would have been, payable in respect of that injury under the Act that applied to Commonwealth employees at that time.

Given the period of service of the eligible employees who served or participated in a firefighter training course (including as an instructor) at RAAF Base Point Cook under the 2021 Instrument the Transitional Provisions in Part X of the DRCA may be enlivened for an injury, loss or damage suffered before 1 December 1988 (commencement of the DRCA).

The effect of the 2021 Instrument for pre-existing injuries is:

#### Operation of the 2021 Instrument – Injuries, loss or damage suffered on and after 1 December 1988 – Application of the DRCA

For an injury, loss or damage or impairment in relation to compensation that is suffered on or after 1 December 1988, the provisions of the DRCA will operate on their terms.

For example if an eligible employee suffers from malignant neoplasms at any time after 1 December 1988, the normal (non-transitional) provisions of the DRCA will apply.

The effect of the 2021 Instrument will be to reverse the onus of proof in relation to a claim for compensation once it is established that:

- an employee suffered or suffers from a disease of a specified kind; and
- the employee engaged in employment of a specified kind at any time before symptoms of the disease first became apparent.

Once these facts are established, a claimant is not required to further establish that, on the balance of probabilities, the employee’s employment contributed to the contraction of the disease.

Instead, the Military Rehabilitation and Compensation Commission (MRCC) (the relevant authority for the claim) may determine that the employee has suffered, or is suffering, from a ‘disease’ for the purpose of paragraph 5A(1)(a).

The MRCC is required to make such a determination unless it establishes that, on the balance of probabilities, the employee's employment did not contribute, to a significant degree, to the contraction of the disease.

Despite the instrument operating in relation to ADF Firefighters who served at RAAF Base Point Cook between 1 January 1957 and 31 December 1986, an injury, loss or damage may be taken to have arisen out of or in the course of employment even if the 'injury' (which includes 'disease' under subsection 5A(1)) is diagnosed after that period of service.

For example cancer is often not diagnosed upon its onset. If an ADF firefighter under this instrument is diagnosed with cancer at any time after 1 December 1988, that cancer is still taken to have arisen out of or in the course of their employment at RAAF Base Point Cook between 1 January 1957 and 31 December 1986, unless the MRCC can establish on the balance of probabilities, the employment did not contribute, to a significant degree, to the contract of the disease.

*Operation of the 2021 Instrument – Injuries, loss or damage suffered between 1 September 1971 and 30 November 1988 – Application of the '1971 Act'*

Subsections 124(1) and 124(1A) of the DRCA provide that a person is entitled to compensation under the DRCA for an injury, loss or damage suffered before the commencement date (1 December 1988) where compensation was, or would have been, payable to the person in respect of that injury, loss or damage under the *Commonwealth Employees' Compensation Act 1930* ("1930 Act") or the *Compensation (Commonwealth Employees) Act 1971* ("1971 Act").

For example an injury, loss or damage or impairment suffered during the operation of the 1971 Act between 1 September 1971 and 30 November 1988 (inclusive), will be subject to the provisions of Part X of the DRCA.

The effect of the 2021 Instrument is that where an eligible employee who served or participated in firefighting training (including as an instructor) at RAAF Base Point Cook between 1 January 1957 and 31 August 1971, makes a claim for an injury that is a disease listed in Schedule 3 of this instrument, in relation to an injury that arose out of or in the course of employment between 1 September 1971 and 30 November 1988, the MRCC may still rely on the 2021 Instrument to make a determination of liability.

For example, if an eligible employee made a claim for Spinal Muscular Atrophy which the eligible employee has evidence was first diagnosed between 1 September 1971 and 30 November 1988, the 2021 Instrument provides that the MRCC would need to accept that the disease was an injury that arose out of or in the course of employment.

By operation of section 124(4) of the DRCA, the amount of compensation that a person is entitled to for an injury, loss or damage or impairment that was suffered between 1 September 1971 and 30 November 1988 (inclusive) is the amount of compensation that the person would have been entitled to under the 1971 Act.

This means that while the eligible employee has the benefit of the 2021 Instrument in reversing the onus of proof required for a claim under the DRCA, the compensation payable for a disease that arose out of or in the course of employment between 1 September 1971 and 30 November 1988 will be impacted by the level of compensation available under the 1971 Act.

Operation of the 2021 Instrument – Injuries, loss or damage suffered before 1 September 1971 – Application of the ‘1930 Act’

Where an injury, loss or damage was suffered before 1 September 1971, paragraph 124(2)(b) of the DRCA provides that a person is *not* entitled to compensation under the DRCA in respect of an injury, loss or damage suffered before the commencement date (1 December 1988) if compensation was *not payable* in respect of the injury, loss or damage.

The 1930 Act covered Defence Force personnel from 3 January 1949 until 31 August 1971. Under the 1930 Act compensation was payable if the claimed loss was of a kind specified in section 10, section 12, Schedule 2 or Schedule 3 of that Act.

The conditions in the 2021 Instrument are not covered by the 1930 Act. This means that a claim for compensation in relation to an injury, loss or damage in relation to those conditions that were suffered prior to 1 September 1971 would **not** lead to an entitlement under the DRCA. No compensation would be payable.

Because medical treatment under the DRCA and the 1930 Act is provided as a form of compensation, the Military Rehabilitation and Compensation Commission cannot make provision for medical treatment in relation to an injury, loss or damage suffered before 1 September 1971. The 2021 Instrument will have no effect on persons who suffer injuries, loss or damage before 1 September 1971.

### **Consultation**

The Department of Veterans’ Affairs (DVA) consulted with Mr Carl Schiller, National President, Air Force Association and other key ex-serving Point Cook firefighters during 2020 and 2021. Similarly, DVA has been working with another cohort of firefighter representatives since 2012. Feedback has been positive with representatives satisfied with the proposed scheme. Representatives have not identified any issues with the scheme.

### **Regulation Impact Statement**

The Office of Best Practice Regulation has confirmed that a Regulation Impact Statement is not required (OBPR ID 43592).

## Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### **Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021**

This legislative instrument is compatible with the human rights and freedoms recognised or declared by the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

The *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* (DRCA) provides rehabilitation support for employees who are defined as members of the Defence Forces (“employee”). The DRCA also provides compensation payments for those employees and their dependants.

In the *Safety, Rehabilitation and Compensation (Specified Diseases and Employment) Instrument 2017* (Specified Diseases and Employment Instrument), the Minister specified the circumstances in which employment is deemed to have contributed, to a significant degree, to the contraction of a disease suffered by an employee.

The Specified Diseases and Employment Instrument specifies what are commonly referred to as occupational diseases. An occupational disease is a disease associated with a particular kind of employment because the employment involves a particular risk.

The *Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021* (“2021 Instrument”) amends the Specified Diseases and Employment Instrument for the purposes of subsection 7(1) of the DRCA.

The 2021 Instrument does not affect the operation of the Specified Diseases and Employment Instrument for the purposes of claims made under the *Safety, Rehabilitation and Compensation Act 1988*.

The purpose of the 2021 Instrument is to implement a Budget 2021-22 measure to reverse the onus of proof for an employee who served as an Australian Defence Force (ADF) Firefighter or participated in a firefighter training course (including as an instructor) at the Royal Australian Air Force (RAAF) Base Point Cook between 1 January 1957 and 31 December 1986, in relation to a claim for compensation once it established that they suffer or suffered from a disease specified in the 2021 Instrument, and they engaged in employment of a specified kind before symptoms of the disease first became apparent.

The 2021 Instrument amends the Specified Diseases and Employment Instrument to introduce a new schedule, Schedule 3, which provides for a list of specified diseases for the purposes of subsection 7(1) of the DRCA in relation to an employee’s service as a firefighter or participation in a firefighter training course, or role as an instructor of a firefighter training course, at the RAAF Base Point Cook between 1 January 1957 and 31 December 1986.

## **Human rights implications**

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* provides for the right of everyone to social security, including social insurance. General Comment 19 by the Committee on Economic, Social and Cultural Rights elaborates on Article 9, stating that the ‘States parties should ... ensure the protection of workers who are injured in the course of employment or other productive work’.<sup>1</sup> Workers’ compensation is analogous to social insurance in that it provides payment of wages and medical costs to employees for injuries occurring as a result of their employment.

The 2021 Instrument assists an eligible employee in relation to a claim made in respect of a disease of a kind specified in the instrument, where the employee was engaged in employment of a kind specified in the instrument before symptoms of the disease first became apparent. It does this by enlivening subsection 7(1) of the DRCA, which effectively reverses the onus of proof in relation to the claimed disease. This reduces the evidentiary burden on the claimant for the purposes of establishing an entitlement to workers’ compensation and other benefits under the DRCA.

If an employee does not satisfy the requirements of an item of the Specified Diseases and Employment Instrument as amended by the 2021 Instrument, it remains open for the employee to otherwise establish, either through s 7(8) or on the balance of probabilities, that the disease was contributed to, to a significant degree, by the employee’s employment as a member of the Defence Forces.

## **Conclusion**

This legislative instrument is compatible with human rights.

**The Hon Andrew Gee MP**

Minister for Veterans’ Affairs and Defence Personnel

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17].

**Safety, Rehabilitation and Compensation (Defence-related Claims) (Specified Diseases and Employment) Amendment Instrument 2021**

**Section 1 (Name)**

This section sets out the name of the instrument.

**Section 2 (Commencement)**

This section provides that the instrument commences on 20 September 2021.

**Section 3 (Authority)**

This section sets out the legal authority for the making of the instrument, being paragraph 7(1)(b) of the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

**Section 4 (Schedule)**

This section provides that the instrument specified in the Schedule is amended as set out in the applicable items and that any other item in the Schedule has effect according to its terms.

**Schedule 1—Amendments relating to firefighters**

**Part 1 – Amendments**

**Item 1**

Item 1 inserts a new definition to section 4 of the Specified Diseases and Employment Instrument. This new definition provides for definition of an *ICD-10-AM* reference. This was inserted for the purposes of Column 2 of Schedule 3, which identifies the disease in Column 1 by its ICD-10-AM reference.

The ICD-10-AM 11<sup>th</sup> edition referred to is the current edition, at the time of this amendment instrument's commencement, used in Australian clinical practice as an alphanumeric coding scheme for diseases and external causes of injury. It is structured by body system and aetiology and comprises three, four and five character categories.

The DRCA does not provide an explicit reference that legislative instruments may apply, adopt or incorporate matters contained in an instrument or other writing as in force or existing from time to time. This means that the contrary intention in subsection 14(2) of the DRCA does not apply.

Therefore when the ICD-10-AM is updated or replaced, and potentially requires new alphanumeric references, then the Specified Diseases and Employment Instrument as amended will need subsequent amendments to specify the new alphanumeric references.

**Items 2 and 3**

Items 2 and 3 provide for minor technical amendments to section 5 of the Specified Diseases and Employment Instrument. Item 2 provides for a minor heading change for the general application section. This is because Item 4 inserts a new application section that is specific to employees covered by the amendments introduced in the 2021 Instrument.



Item 3 clarifies the scope of section 5 of the Specified Diseases and Employment Instrument in relation to the general provisions of Schedule 1, rather than the specific provisions in Schedule 2.

#### **Item 4**

Item 4 inserts a new section 5A into the Specified Diseases and Employment Instrument, under subsection 7(1) of the DRCA, for a specified application of the Instrument to a specified class of employees who have suffered or are suffering a specified disease.

New subsection 5A(1) provides that employees that were engaged by the Commonwealth in the employment of a specified kind provided in paragraphs 5A(1)(a) to (c), that is a firefighter, participant in a firefighter training course, or as an instructor of a fighter training course at RAAF Base Point Cook between 1 January 1957 and 31 December 1986, who suffered, or are suffering from a disease specified in the new Schedule 3, will have the instrument apply to them.

This means that for the purposes of the DRCA, the employment specified in subparagraphs 5A(1)(a) to (c) will be taken to have contributed, to a significant degree, to the contraction of the disease in Schedule 3, unless the contrary is established.

New subsection 5A(2) ensures that nature of a person's employment listed in 5A(1) is a sufficient connection to employment for the purposes of subsection 7(1) of the DRCA. This ensures that the onus of proof is reversed, as was intended under subsection 7(1).

#### **Item 5**

Item 5 is a minor technical amendment because Item 6 provides for a new subsection 7(2), which means the existing text is now identified as subsection 7(1).

#### **Item 6**

Item 6 inserts a new subsection 7(2) to the Specified Diseases and Employment Instrument. This new subsection clarifies that disease in column 1 of an item should be read by reference to their ICD-10-AM reference in column 2 to identify the relevant disease.

#### **Item 7**

Item 7 repeals the current heading 'Schedule 1 – Specification' and substitutes 'Schedule 1 – Specified disease relating to specified employment'.

This clarifies that the original Schedule 1 refers to general specifications, whereas the new Schedule 3 relates specifically to firefighters.

#### **Item 8**

Item 8 inserts new Schedule 3 to the Specified Diseases and Employment Instrument.

For the purposes of paragraph 7(1)(b), Column 1 of the table in Schedule 3 sets out disease(s) of a kind specified by the Minister as a disease related to employment of a specified kind. Column 2 identifies the relevant ICD Code in relation to the disease to provide greater specificity of what disease is identified. Column 3 of the table in Schedule 3 sets out the specified kinds of employment.

## **Part 2 – Application provision**

### **Item 9**

Item 9 is an application provision that provides that the amendments in Part 1 apply in relation to a claim made under the DRCA by a firefighter, as defined in item 9(2), or by a personal representative of a firefighter whose death occurred on or after 11 May 2021.

11 May 2021 is the date the Treasurer delivered the Federal Budget.

The effect of this application provision is that where a firefighter passed away before 11 May 2021, their personal representative (per subsection 55(1) of the DRCA) will not have the benefit of the 2021 Instrument in making that claim.

Where a firefighter passed away prior to 11 May 2021 of a disease listed in the new ‘Schedule 3 – Specified diseases relating to firefighters’, the personal representative of the estate of the firefighter will need to make a claim which will be subject to the ordinary requirements of the DRCA to show that the injury arose out of, or in the course of, employment.

Delegates of the MRCC will not be able to rely on the instrument under paragraph 7(1)(b) to reverse the onus of proof in making a determination of liability, and must otherwise be satisfied that the Commonwealth is liable for the disease.

For any death that occurred on or after 11 May 2021, personal representatives will have the benefit of this instrument in making a claim for a disease listed in Schedule 3 to reverse the onus of proof for the relevant claim.