MARITIME INDUSTRY AUSTRALIA LIMITED

Inquiry into Seafarers and Other Legislation Amendment Bill 2016, the Seafarers Safety and Compensation Levies Bill 2016 and the Seafarers Safety and Compensation Levies Collection Bill 2016

MIAL Submission to Senate Standing Committee on Education and Employment

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1 Introduction

This submission is made on behalf of Maritime Industry Australia Ltd (MIAL), previously known as the Australian Shipowners Association (ASA). MIAL represents Australian companies which own or operate: international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; utility vessels and ferries.

MIAL also represents employers of Australian and international maritime labour and operators of vessels under Australian and foreign flags.

MIAL provides an important focal point for the companies who choose to base their shipping and seafaring employment operations in Australia.

MIAL represents the collective interests of maritime businesses, primarily those operating vessels or facilities from Australia. MIAL is uniquely positioned to provide dedicated maritime expertise and advice, and is driven to promote a sustainable, vibrant and competitive Australian maritime industry and to expand the Australian maritime cluster.

MIAL welcomes the opportunity to provide a submission to the Inquiry into *Seafarers and Other Legislation Amendment Bill 2016*, (Seafarers Bill 2016) the *Seafarers Safety and Compensation Levies Bill 2016* and the *Seafarers Safety and Compensation Levies Collection Bill 2016* (Compensation Bills 2016). MIAL made a previous submission to a Consultation Paper issued by Department of Employment in February of 2016. Parts of that submission are restated here and the full submission is included at Attachment A.

2 Executive Summary

The Bills currently under consideration by the Senate Committee are the result of a review process conducted by the Department of Employment (the Department) including the release of a Consultation Paper in December 2015 which considered three options for reform to the *Occupational Health and Safety (Maritime Industry) Act 1993* (OSHMI Act) and the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act), collectively known as the Seacare scheme.

There is no doubt from the maritime employers represented by Maritime Industry Australia Ltd (MIAL) that the Seacare scheme is flawed and requires urgent attention to provide maritime businesses and workers with appropriate, reliable and sustainable workers compensation and WHS coverage. Unfortunately, the proposed Bills do not provide this outcome and, in fact, exacerbate some existing problems and create new ones for the industry.

The reforms included in the Bills attempt to but do not address the significant issue of the complexity and lack of certainty around coverage (and implications of that). In addition they do not address the additional costs incurred to administer a scheme that is already expensive in comparison to that available under other jurisdictions and which make it unsustainable financially for a small and declining industry.

Critical to achieving the objective of providing the industry with an appropriate, reliable and sustainable scheme is the question of coverage of the scheme. There have been longstanding questions regarding Seacare scheme coverage and these have recently been exacerbated by the *Aucote* (2014)[1] decision which dramatically broadened coverage beyond what it had been understood to be. The Department rightly, in our view, has sought to remedy the untenable situation created by the *Aucote* (2014) decision. Unfortunately, their chosen solution of scheme reform is anything but a remedy. The new proposed coverage provisions continue to leave enormous grey areas while extending coverage to some operations previously considered outside

[1] Samson Maritime Pty Ltd v Aucote [2014] FCAFC 182

the scheme – thus imposing considerable costs and regulatory imposts on those operators. The simple fact is that it is not possible to provide absolute certainty regarding coverage within the scheme as MIAL noted in our February 2016 submission to the Department.[2] Without this the scheme is, and will remain, unsustainable and a source of continued dispute.

Further, the lack of certainty regarding coverage creates an unacceptably high risk to the Safety Net Fund (the insurer of last resort) as it results in circumstances where businesses who have had no previous interface with the scheme (and potentially no ability to participate in this consultation) will likely remain in ignorance of their obligations, particularly with regard to insurance coverage. This exposes the scheme participants, who are responsible for ensuring the Safety Net Fund can meet such liabilities, to potentially enormous cost burdens.

The Bills also make changes to WHS coverage by removing the OSHMI Act and replacing it with the WHS Act. MIAL members cannot see the rationale for maintaining a separate workers' compensation scheme when the maritime industry does not need a separate WHS scheme. The Department's consultation paper itself conceded that there is no justifiable reason for a separate industry WHS regime and there is nothing in the consultation paper or Explanatory Memorandum which provides a meaningful basis for retaining a separate industry workers' compensation regime.

Finally, the Bills seek to make 'administrative' changes via the abolition of the Seacare Authority and the inevitable increasing of levies associated with the scheme. These changes are not insignificant, as they add further cost and uncertainty to an already unsustainably expensive regime, however they pale in comparison to the substantive issue which is the lack of certainty of scheme coverage and all the issues that arise from that.

Abolishing the scheme and allowing work health and safety (WHS) regulation and workers' compensation coverage to revert to the state and territory schemes is the only way to achieve certainty and provide a sustainable regime for the industry. Employers recognise that to make this transition a solution needs to found regarding the obligations and potential future exposure to the Safety Net Fund. The employers covered by the scheme are only continuing to decrease and the opportunity to leverage economies of scale to abolish the scheme and develop a solution to the issue posed by Safety Net Fund liability is disappearing. The smaller the scheme becomes, the more the risk to those employers remaining is increased.

Abolishing the Seacare scheme is not just required, it is urgent.

3 Need for change

In terms of scheme coverage, the Seacare scheme was introduced in part to provide clarity around the appropriate work health and safety coverage and workers compensation for seafarers when working at sea. Now that state and territory workers' compensation jurisdiction is so clearly defined through the state-of-connection test,[3] there is no longer a risk of seafarers not being covered or so called "forum shopping" by injured workers covered by state and territory schemes. Forum shopping still occurs, of course, by those looking to be covered by the Seacare scheme.

Nevertheless the scheme continues, though its drafting is increasingly out of sync with the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) on which it was originally based; other workers' compensation legislation and national standards such as retirement age. The scheme would required significant updates in order to bring it into line with national standards and ongoing

[2] Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation – MIAL Response to Consultation Paper Issues by Department of Employment, 5 February 2016
[3] https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0013/131161/State-of-Connection-VWA.pdf

constant updating thereafter. From the scheme's introduction in 1992 to date this has been a time consuming and not entirely successful process.

The Regulatory Impact Statement (RIS) states that the Bill 'addresses the most urgent problems with the current Seacare scheme.' Though they attempt to do so, MIAL does not believe the Bills address the most urgent problem of all – clarity of coverage (discussed in detail at section 5). The RIS also states that 'The reform option imposes a minimal regulatory cost on Seacare scheme employers, which is largely a one-off cost of transitioning to the WHS Act, while providing overall benefits from improved work health and safety outcomes.'[4] Characterising the reform as 'minimal regulatory cost' is inaccurate when the feedback from industry to date has been that the current costs associated with the Seacare scheme are not sustainable. What the Compensation Bills 2016 do is increase that cost over time. Without true root cause analysis of the high costs of running the scheme, the current outcomes delivered by the scheme or the high insurance premiums (the highest in the country), MIAL cannot support the statement that the reforms will have minimal costs or achieve improved outcomes. Without root cause analysis MIAL cannot see how the proposed reforms will address systemic issues with the Seacare scheme in the way that the RIS suggests.

There are now just 33 employers in the Seacare scheme, the smallest scheme in Australia[5] covering just 6,863 employees in an industry where workforce size has been decreasing since at least 2007.[6] It is expected that future scheme membership numbers would reflect the enduring and severe downturn in the offshore sector and the ongoing decline of the trading ship sector.

The vast majority of the businesses covered by Seacare are not large businesses. Wearing costs and administrative burdens beyond those applicable to the general business community in Australia is unsustainable.

4 Option 2 – Abolish the scheme

4.1.1 Why does the scheme need to be abolished?

Were the Seacare scheme to be abolished, the automatic and logical outcome would mean that the responsibility for the sector currently covered by the scheme would rest with state and territory schemes. These currently cover the overwhelming majority of Australian employers and employees, including the majority of maritime employers and employees.

These schemes are seen by maritime industry employers to be clearer, easier to navigate, easier to find competitive premium rates for, usually provide access to dedicated claims management expertise, have mature and well utilised dispute resolution procedures in place, contained more refined rehabilitation provisions and support for implementation of them, enjoy economies of scale, and have the benefit of state wide public awareness, advertising, safety campaigns and resources.

The justification for maintaining Australia's only industry specific WHS and workers' compensation scheme would be enhanced if the scheme were achieving above average outcomes in safety, rehabilitation, claims management and return to work. Unfortunately this cannot be said for the Seacare scheme, with its performance statistically lagging behind all other schemes. Further, according to the Comparison of Workers' Compensation Arrangements in Australia and New Zealand, the standardised average premium rate is the highest of all Australian jurisdictions.[7]

[4] Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

[5] Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, pg. 197.

[6] http://www.industry.gov.au/Office-of-the-Chief-Economist/Research-Papers/Documents/Research-Paper-5-The-business-size-distribution-in-Australia.pdf (Fig 2.3)

[7] Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, pg. 197

Maritime operators who operate within one state (traditionally considered not covered by the Seacare scheme) or who have exercised an option available to them under a Ministerial Direction or the Seacare Authority Exemption Guidelines, report that obtaining insurance for maritime operations under state schemes is less expensive than under the Seacare scheme.

The Government has indicated that it intends to transfer the role of the Seacare Authority, the body with industry representation charged with oversight of the scheme, to the Safety Rehabilitation and Compensation Commission (SRCC), the body with oversight for the Comcare scheme. It is strange to remove direct industry oversight of an industry scheme yet maintain the infrastructure of the scheme at a cost to the industry.

It has also been evident that previous attempts at reform since the scheme's introduction in 1992 have, for various reasons, been challenging. This has meant that employers and employees have failed to benefit from contemporary arrangements that are the subject of continuous review as part of the state schemes. By reverting to coverage under these state schemes, employers and employees in the maritime industry will enjoy the same benefits, rights and obligations as all other members of the community engaged in private enterprise.

Employers in the Seacare scheme are also covered by state and workers' compensation schemes for their shore based employees and, in some cases, for workers who work part of the time at sea and part of the time ashore. To revert to state and territory schemes would be a clear and simple process and employees and employers would be covered by a single workers' compensation regime.

In addition, the reform proposed in the Bills for WHS purposes is to repeal the maritime specific WHS legislation (OSHMI Act

) and have seafarers covered by the harmonised Commonwealth WHS laws. Only a separate workers' compensation scheme would remain, failing to meet spirit of the government's objective of Australia-wide harmonisation.[8]

MIAL cannot see any compelling evidence that retaining the scheme provides a benefit to the maritime industry. The reforms in the Bills do not make the costs of the scheme to employers comparable with costs under a state or territory scheme for workers' compensation. This is in the context of the number of ships being covered by the scheme reducing, and further likely to reduce in the immediate future as a result of decreasing activity in the offshore oil and gas sector and trading ships sector.

A potential concern is the status of the Safety Net Fund in the event that the scheme no longer exists. MIAL recognises that this would likely require further consideration as to how the Fund may manage future liabilities but does not consider this to be an insurmountable challenge.

4.1.2 Consultation on 'Option 2 – Abolish the scheme'

The RIS states that 'The Department has engaged in significant consultation with maritime industry employers and unions, insurers and other stakeholders over proposed reform to the Seacare scheme.' It is regretful that consultation has exclusively been on the Department's preferred option of reforming the Seacare Scheme and no consultation has taken place on MIAL and industry's preferred option of removing the scheme. MIAL anticipates that consultation on this option could address issues arising out of stakeholder opposition.

[8] Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, Council of Australian Governments (COAG), 3 July 2008.

To date, MIAL has not seen evidence of genuine consideration of Option 2. Indeed, a disproportionately small amount of the consultation paper was devoted to this[9] and the Bills had already been drafted while consultation on the paper was still open. It is in this context that MIAL must take issue with the following statement made in the RIS which comprises the entirety of the government response on abolishing Seacare:

> *Option 2 is not preferred. It is not likely to provide any significant actual regulatory benefits to employers because they will be required to comply with state and territory workers' compensation and work health and safety legislation. This option would take time to implement and due to legacy workers' compensation claims the Seafarers Act would still need to be in operation for a number of years. Union stakeholders are strongly opposed to abolishing the Seacare scheme. This option is not preferred at this time given the long time it will take to achieve and stakeholder opposition.*[10]

Contrary to this statement, there would be significant regulatory benefits to employers from abolishing Seacare because, in many cases, instead of being covered by Seacare in addition to the appropriate state and territory schemes, they would only be covered by the latter. This would harmonise workers compensation approaches within each organisation. This observation is made earlier in the RIS: 'Vessels can move in and out of coverage from voyage to voyage. This means vessels need to have insurance cover to meet the state or territory and the national law.'[11] With the changed coverage provisions proposed the kinds of businesses now likely to be covered by the scheme make it increasingly common for workers to undertake both sea-based and shore-based work, where they are covered by the relevant state and territory scheme, and most employers also employ shore-based staff who are also covered by the relevant scheme. Maintaining the Seacare scheme is an unnecessary duplication and costly burden.

As noted in the RIS statement above, it would take time to implement legislative change to revoke the Seacare Scheme and legacy arrangements would need to be made, for example to deal with the Safety Net Fund. The time required is not a reason not to take this much needed step. MIAL members are committed to finding solutions. Additionally, as participation in the scheme continues to dwindle, it will only become even more unsustainable and the ability to leverage off a larger scheme membership to develop an alternative will no longer be an option. MIAL members want to work with government to find the right outcome and not just the fastest one.

Finally, the RIS statement also justifies the proposed Bill with stakeholder (i.e. union) opposition to abolishing the Seacare scheme. MIAL wishes to reiterate that it supports engaging with all interested parties on substantive issues and working to resolve them. This is necessary in order to create an ongoing viable maritime industry. Without understanding what, if any, issues are driving the union opposition to abolishing the scheme and the government's use of this to justify not doing so, MIAL is not in a position to engage with or respond to this crucial point.

5 Coverage

MIAL has advocated for the necessity of scheme coverage provisions that are clear, simple for stakeholders to understand and reflect the pool of vessels that had previously been understood to have been covered by the scheme. MIAL opposes any increase to the jurisdictional footprint of the scheme such as that contained in the Seafarers Bill 2016. State and territory laws are capable of

[9] Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation – MIAL Response to Consultation Paper Issues by Department of Employment, 5 February 2016
[10] Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement
[11] Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

covering workers in the maritime industry and have been doing so without apparent difficulty for many years. Employers who employ people working across multiple jurisdictions across all other Australian industries are able to ensure their workers have appropriate worker's compensation coverage. State and Territory governments have ensured that workers who work in multiple jurisdictions have clear coverage through the "state of connection test".[12]

MIAL sought coverage provisions that:

- Ensured that coverage was consistent (a vessel is either in or it is out and does not chop and change);
- Minimised the need for vessels to apply for exemptions, but facilitated this when necessary;
- Reduced the risk that a vessel/employer who thought they were not covered are found to be covered. This is particularly critical in a privately underwritten scheme.

It is critical that an operator/employer is able to determine whether they are definitely covered (or not) by the scheme. The coverage of the scheme previously was understood to be based on the voyage pattern of the vessel concerned; that is, voyages between states and internationally as described. There was always a level of contention over this interpretation. The risk that an employer did not consider itself covered by the scheme (and did not have in place appropriate insurance) and considered themselves within the state scheme has always existed in the context of this uncertainty. The decision in *Aucote* (2014) exposed a far broader risk that had not been comprehended, but served to further ingrain in the minds of industry participants the need for certainty.

The proposed coverage test in the Seafarers Bill 2016 is:

> *(1) A vessel must be a prescribed vessel*
>
> *AND*
>
> (2) *The vessel must not be used wholly or predominantly for voyages or other tasks that are within the territorial sea of a particular state or territory.*

Territorial sea is defined as 12 nautical miles when the scheme was previously understood to apply outside 3 nautical miles. Although at first glance the geographical footprint of the scheme appears smaller, MIAL is concerned that the proposed coverage provisions will, in practice, change the specific vessels covered by the scheme and not achieve the stated desired outcome to retain the pool of existing vessels covered. There are operators who operate out of one state who have been participating within state WHS and workers' compensation regimes without difficulty and who may well be captured under the new definition. There is no justification to move these operators to the Seacare scheme. Further, because such operators have never had any interaction with the scheme, there may be many who are unaware of this consultation process and its proposals.

The coverage definition in the Bill considers whether vessels operate *predominantly* in territorial seas. The new concept of "predominantly" introduces ambiguity, presenting questions such as; what percentage of operations are included; is this test only to be applied to the seagoing portion of employment for workers or to all of it; and, is the time period assessed over a year, a month, or a day? The scheme is therefore likely to continue to experience the extraordinarily high levels of disputation (the highest of any scheme in Australia and five times higher than the national rate).

Because previous understanding of scheme coverage had been based on the geographical location of vessel operations, a move away from this is going to see a change in the pool of vessels covered. A lack of consultation with potentially newly captured operators or any attempt to seek them out or

[12] https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0013/131161/State-of-Connection-VWA.pdf

communicate with them is deeply concerning to remaining members of the Seacare scheme and exposes the Safety Net Fund to untenable risk. Section 5.2 discusses this further.

Further, the RIS itself states that 'The doubt over coverage creates incentives for employees to make claims under the Seafarers Act, rather than under state or territory workers' compensation schemes.' MIAL considers that this is likely to continue, especially when the generous compensation arrangements under the Seacare scheme remain in place.

MIAL has, in previous submissions, stated that it is incredibly difficult to conceive of a coverage provisions that achieve the two critical outcomes that should be the goal of this reform, 1) retaining the existing participants; and 2) creating coverage and certain to which operations and in, and which are out of scheme coverage. MIAL has reached the conclusion that no coverage provisions will provide the clarity so urgently needed in this sector and that without this, the scheme must be abolished. It is clear that the existing legislation is deficient, and has operated on the basis of the assumptions of operators within the scheme. It is the opinion of MIAL that the State of Connection test would offer clarity regarding coverage.

5.1 Cost savings

Although the RIS states that 'clarifying the coverage of the Seacare scheme is expected to provide a benefit by reducing administration costs for Seacare scheme employers,' MIAL unfortuneately sees no evidence for this view. A change in coverage definition that does not provide full clarity is likely to result in increased disputation and other actions, not to mention increased costs. This is to say nothing of the sudden nature of the cost increases for employers caught in the scheme who were not previously captured by it.

5.2 Safety Net Fund

In addition to the highest average premiums across all schemes, Seacare scheme participants are also required to contribute to the maintenance of a Safety Net Fund, which acts as a default employer where a seafarer is injured under the Seacare Act and no employer can be found. This money is collected through a levy.

Without full clarity of coverage there is an increased risk of operators being unaware that they are covered by the scheme and operating without insurance. Most operators are small and an uninsured claim could bankrupt them, thus leaving the Safety Net Fund responsible for the claim. As a result, employers currently covered by Seacare will also bear the risk of increased exposure to the Safety Net Fund from operators who have not been contributing to the fund because they are unaware that they fall under the scheme.

It is MIAL's position that no new coverage definition can fully replicate the current coverage which reflects industry understanding of coverage prior to the *Aucote* (2014) decision. As the RIS notes, 'Vessels can move in and out of coverage from voyage to voyage. This means vessels need to have insurance cover to meet the state or territory and the national law.'[13] The most logical way of dealing with this absence of certainty is therefore to abolish the scheme and let coverage revert to the far more effective and financially viable state and territory worker's compensation schemes.

6 Cost Recovery and Fees

MIAL has previously submitted that it is unreasonable to require employers to subscribe to a high-cost, low-outcome scheme where the Safety Net Fund is exposed to unknown risk because of poor scheme coverage definitions that result in employers not knowing they are part of the scheme. For this reason MIAL does not support levy increases. That fact that these have not been stipulated

[13] Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

clearly in the *Seafarers Safety and Compensation Levies Bill 2016* or the *Seafarers Safety and Compensation Levies Collection Bill 2016* does not change the fact that they are inevitable under the proposal. The Australian Government Cost Recovery Guidelines (the Guidelines) referenced by the government in the justification of cost-recovery only stipulate that in a scenario such as the Seacare Scheme "where appropriate, nongovernment recipients of specific government activities should be charged some or all of the costs of those activities." The Guidelines do not require full cost-recovery. Additionally, the Guidelines require that consideration be given to "the impact of cost recovery on competition, innovation or the financial viability of those who may need to pay charges."

The Compensation Bills 2016 introduce a cost recovery levy and fees for the Seacare scheme to cover the costs of the Safety Rehabilitation and Compensation Commission (SRCC), Comcare and the Australian Maritime Safety Authority (AMSA) undertaking their regulatory functions. This will add additional costs to a scheme that is already the most expensive in the country and produces poor safety, rehabilitation and return to work outcomes comparative with state and territory schemes.

The RIS identifies that it is estimated that the combined unfunded costs to Comcare and AMSA in managing the Seacare scheme under the current arrangements are around $1.6 million. This lack of resources for the Seacare Authority (and Comcare to assist the Authority) and AMSA limits their ability to ensure the effective operation of Seacare workers' compensation and work health and safety arrangements and enforce work health and safety laws. MIAL supports additional funding but can see no reason to recover this from employers when they are being forced to be part of a costly scheme and the simpler option of abolishing the scheme is open to the Government.

Furthermore, based on information received from the Department, there are various ways and means that contributions to scheme administration are collected in the state schemes – in some cases such as in Victoria the cost of regulation provided through Worksafe Victoria is factored in to the premium paid for insurance while independent statutory agency Safework Australia, the cost of operating is directly funded by government. Even in states where the costs of regulation are incorporated within the insurance premium, these premiums remain lower than under the Seacare scheme, with no proportion of the premium being attributed to the regulatory costs.

6.1.1 Additional costs

MIAL does not support the Compensation Bills 2016 as they will add an additional cost to the Australian shipping sector, which is already struggling to be competitive with other ships who are not burdened with the same costs in the global market is facing the most prolonged and challenging economic climate in half a century. Imposing additional costs on Australian operators will further expand the existing cost differential with international operators, creating a disincentive to operate Australian ships and employ Australian seafarers.

The Department's consultation paper stated that phasing in of cost recovery will alleviate employer concerns about affordability. MIAL does not agree that it alleviates concerns, it merely has the effect of delaying the impact of the additional financial burden. The increase in costs recovered from employers in the scheme will broaden the gap between what employers in the maritime industry pay and what other employers generally pay. It is difficult to see how the government can justify retaining a separate industry scheme in these circumstances.

MIAL notes the statement in the RIS that 'While the lack of clarity over coverage creates administrative burden and other potential costs for employers, these are not understood to be significant enough to affect overall employment or business activity in the maritime industry.' This is simply not true and MIAL has consistently advocated the opposite – it is apparent that the lack of clarity in coverage contributes to the high level of disputation and corresponding high premiums. The costs of the Seacare scheme are already burdensome and in the industry climate they are unsustainable. Furthermore, for the RIS to make this statement after industry consultation where

stakeholders clearly articulated the significant cost impact on their business is misleading.[14] It is also unclear whether any effort has been made to assess the impact that the high insurance premiums are having on decisions by potential operators to enter the Australian market.

7 Minimal modernisation

Notwithstanding MIALs overarching strong opposition to the Bills as they don't meet the overall objectives laid out in the Department of Education's consultation paper, MIAL has reviewed the proposed WHS and workers compensation changes, noting that since consultation further efforts have been made to predict the impact of these changes on industry.

The remaining elements of the Seafarers Bill 2016 include minimal steps towards modernisation of language in the Acts to align them more closely with the Work Health and Safety Act (WHS Act) and the SRC Act, and to revoke the OSHMI Act and tie the national WHS Act to the scheme. MIAL notes that the major issues with the drafting of the legislation that were causing its unsustainability and burdensome nature have not been addressed. MIAL and its members broadly support a modern WHS and worker's compensation scheme for seafarers. However, MIAL does not agree with the piecemeal approach that has been taken to reform. The proposed changes in the Bill only increase disparity between the maritime industry and other private enterprises. Finally, if an industry specific WHS scheme is not required then MIAL must ask how the Seacare Act itself is justified.[15]

MIAL has reviewed the proposed changes and notes that by our assessment the overwhelming majority of them do not effectively result in substantive change to the operation of the legislation. For example, section 55 clarifies that election by an employee to institute an action or proceeding against their employer or another employee for non-economic loss does not prevent the employee from doing any other thing that constitutes an action for non-economic loss. This is not precluded in the current legislation. Similarly, section 54 clarifies that dependents of deceased employees have access to common law remedies against the employer but the existing legislation does not preclude dependents from pursuing common law remedies in this scenario. A table of the changes and their minimal impact has been compiled at Attachment B.

The RIS notes that 'Two independent reviews of the Seacare scheme (the "Ernst & Young Actuarial Business Consultants Pty Ltd Evaluation of the Seacare Scheme") (EY Review), conducted in 2005, and the "Review of the Seacare Scheme by Mr Robin Stewart-Crompton" (Stewart-Crompton Review), conducted in 2012- 13) have highlighted that it needs widespread reform.'[16] Widespread reform is not what is contained in the tabled Bills. If the goal is to align the workers' compensation provisions that apply to seafarers with those that apply to other Australian employees, then MIAL supports this and this should include the standard workers' compensation arrangements and their associated benefits for employers and employees. However, the re-drafting of parts of the Acts does not achieve this necessary widespread reform or the spirit of the harmonisation that Australian governments agreed to.[17]

7.1.1 Union Right of Entry

The OSHMI Act does not contain right of entry for union officials. To the best of our knowledge this has not resulted in any disadvantage to employees while operating under the OSHMI Act. MIAL does

[14] Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation – MIAL Response to Consultation Paper Issues by Department of Employment, 5 February 2016
[15] Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, Table 2.12, pg. 39.
[16] Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement
[17] Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, Council of Australian Governments (COAG), 3 July 2008

not consider that it is necessary to create this additional right which has not previously existed in the industry. The Seafarers Bill 2016 would create an additional union right, which employers would be required to manage even though there has been no deficiency identified in current arrangements.

While right of entry already exists under the *Fair Work Act 2009*, the inclusion of this in WHS legislation that applies to the maritime industry creates additional avenues to allow trade union access on board ships. The notice requirements and the reasons for entry may be different. This represents the potential for further disruptions to business, where the timeliness of operational movements can be critical.

The investigation of safety concerns is rightly the domain of the safety regulator AMSA. Right of entry that currently exists under the *Fair Work Act 2009* is the appropriate avenue.

7.1.2 Additional licencing requirements and costs

The existing WHS regime contains additional licencing requirements for persons performing certain types of work. Current licencing arrangements on board vessels covered by the OSHMI Act are found in Marine Orders. For vessels carrying international certificates, this is based on the international convention *Standards of Training Certification and Watchkeeping for Seafarers* (STCW) which are minimum training standards developed by the International Maritime Organisation (IMO).

Currently AMSA does not require any additional licences to be held other than those required under the marine orders. It is likely that high risk licences would be required for certain work under the WHS Act. Currently there is an overriding obligation on employers to ensure that persons performing work are suitably trained and competent in the work they are required to perform. Having systems in place ensuring that persons performing certain work are competent to do so is, in MIAL's view, an effective way for an employer to meet their WHS obligations. This need not necessarily be achieved through a requirement to hold a specific licence.

It is not clear to MIAL that the introduction of shore based licensing arrangements for certain types of work will result in better health and safety outcomes for the industry. It will result in an increase in costs and regulatory burden. MIAL suggests further discussions need to be entered into with industry concerning the unique working arrangement in the maritime industry and what if any equivalent licencing arrangements would need to be developed. To simply require seafarers to obtain "high risk" or crane licences which have been developed for the land based construction industry would be ineffective in ensuring safety within the maritime industry.

MIAL notes the PwC analysis conducted to inform the December 2015 consultation with respect to costs that may be incurred by industry. It seems that the analysis principally relates to the costs of applying for and being issued a licence. It is unclear whether to obtain such licences would require additional training for industry participants and whether any such costs are included in the analysis.

7.1.3 Compensation arrangements

Compensation paid pursuant to a workers' compensation scheme is one of the key drivers (along with claims history and return to work outcomes experiences) in determining premiums set for employers. MIAL (as ASA) has previously maintained the position that compensation arrangements for maritime industry participants should be in line with the rest of the Australian community. Seacare Scheme coverage entitles employees to 45 weeks off at 100% of weekly payments, and 75% thereafter. Entitlements under State based schemes vary but by way of example, NSW and Victoria allow for 13 weeks at 95%, then 80% and then stops after 5 years unless impairment is greater than 20%.

MIAL is aware that there are a number of studies which support step downs in compensation entitlements as having a positive impact on rehabilitation and return to work outcomes by providing

incentives to employees to actively pursue these outcomes,[18] as well as providing fairness between the rights of employers and the rights of employees in a compensation regime that does not attribute fault.

This RIS concedes that the current compensation arrangements have a negative impact on employees. 'There are significant barriers preventing effective return to work for seafarers under the Seacare scheme, in particular the limited opportunities for graduated return to work or alternative duties. Incentives for return to work in the Seacare scheme are limited, with weekly benefits for total incapacity paid at 100 per cent for the first 45 weeks of incapacity.' The Seafarers Bill 2016 fails to address this.

MIAL supports step-down workers' compensation provisions more in line with Australian community standards as provided by other compensation regimes rather than those contained in the current legislation. These also provide appropriate incentives for workers to engage in effective return to work programs. The Bills do not include these provisions.

Instead, the Bills increase the age at which payments can be made beyond the age of 65 to align with the increased national standard for retirement age which is likely to increase costs for employers and insurers, increasing premiums.

8 Scheme Administration

8.1 Issues with the current proposal

The proposed Seafarers Bill 2016 includes provisions for the transfer of the functions of the Seacare Authority to the SRCC. MIAL acknowledges that the composition of the Seacare Authority does, at times, make it difficult for the Authority to act as a purely regulatory body exercising statutory functions. It has not in the past functioned as well as it could have. However, the proposal is to retain a separate workers' compensation scheme for the maritime industry. The government's proposal to disband the Seacare Authority and transfer the power to a body responsible for administrating a compensation scheme for commonwealth public servants makes MIAL wonder why a separate scheme is necessary when a separate Authority comprising of industry representatives is not required to administer it.

The RIS states that 'The Seacare Authority will be abolished and the functions split between Comcare and the SRCC. Industry representation will be maintained by enabling the Chairperson of the SRCC to appoint an advisory group, constituted of employee and employer representative(s), to provide support and industry expertise to the SRCC and Comcare, as required.'[19] Leaving it to the discretion of one individual (the SRCC Chair) to decide if and when industry will be involved creates increased risk to an already dangerously overexposed scheme.

Where a separate industry scheme is to be maintained it defies logic not to retain industry expertise for the administration of it. Employers who will likely be paying more than they would under a state scheme will then lose a voice on the body administering the scheme. If a body that does not have industry representation on it is tasked with administration of an industry specific scheme, then that body must be obliged to consider industry advice as part of that administration.

[18] Productivity Commission 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, Report No. 27, Canberra, March. Pg. 263-264

[19] Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

That a body that has no industry representative potentially has the power to determine costs that may be imposed on such participants (i.e. the amount of the levy which under the Bills will be determined in part by the SRCC) is completely unsatisfactory from MIAL's perspective.

8.1.1 Lack of mandated industry input

It is counterintuitive to oblige maritime employers to be part of a costly and ineffective scheme and remove control of any decision making from maritime employers. This is what the Seafarers Bill 2016 does. The advantage offered by the Seacare Authority is industry expertise and knowledge. Without input from maritime employer's claims could be made against the Safety Net fund when in fact the employer is still traceable. If the Safety, Rehabilitation and Compensation Commission (the SRCC, a Commonwealth body) appropriately uses maritime expertise this risk may be minimised. The preference of maritime employers is for the Seacare scheme to be removed altogether so that worker's compensation and WHS can be administered by a body that is an expert across a range of industries.

8.1.2 No ongoing requirement for separate industry scheme

The proposal to disband the Seacare Authority and transfer the power to a body responsible for administrating a compensation scheme for commonwealth public servants makes MIAL question why a separate scheme for seafarers is necessary when a separate authority comprising of industry representatives is not required to administer it. Employers propose that if there is no need for specialist management of this ever-shrinking scheme then it should be removed in its entirety.

MARITIME INDUSTRY AUSTRALIA LIMITED

Seacare Scheme – Reforms to Work Health and Safety and Workers' Compensation

MIAL Response to Consultation Paper Issued by Department of Employment

5 February 2016

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Contents

1 Executive Summary

The Consultation Paper released by the Department of Employment in December 2015 makes a number of proposals to reform the *Occupational Health and Safety (Maritime Industry) Act 1993* (OSHMI Act) and the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act), collectively known as the Seacare scheme.

MIAL has examined in detail the reform proposals outlined within the consultation document and concludes that the reform proposals are incapable of achieving an outcome that is equivalent to or better than what would be achieved if the maritime industry is covered by state and territory schemes that currently apply to the overwhelming majority of Australian workers.

MIAL considers that the best option for industry is the abolition of the Seacare scheme, with work health and safety (WHS) regulation and workers' compensation coverage reverting to the state and territory schemes as outlined in Option 2. The consultation paper itself concedes that there is no justifiable reason for a separate industry WHS regime and there is nothing in the paper which provides a meaningful basis for retaining a separate industry workers' compensation regime.

With regard to the other options outlined in the paper, in the case of the critical issue of scheme coverage, the proposed coverage provision provided at Option 3 will not achieve the outcome of maintaining a similar jurisdictional footprint. Given the proposal to fundamentally change the way the coverage is defined MIAL consider there will be great difficulty in drafting legislative provisions that could achieve this result. The result would be an expanded footprint into operations previously untouched by Seacare.

In addition, the proposed changes to governance and increase in costs proposed in the consultation paper will result in the scheme being financially unviable in the near future, with participants continuing to dwindle.

MIAL strongly submits that Option 1 (status quo) as identified in the consultation paper is untenable. The significant uncertainty over coverage and the high number of employers who would, without their knowledge or input, be brought into a scheme that is more expensive and provides no discernible benefits to their business is an unsustainable proposition. Further, the risk to the Safety Net Fund (and consequently scheme participants) is unacceptably high in circumstances where businesses who have had no previous interface with the scheme (and potentially no ability to participate in this consultation) will likely remain in ignorance of their obligations, particularly with regard to insurance coverage. The same could be said for businesses that would be covered by the proposed scheme coverage change identified in Option 3.

While less than ideal and certainly not MIAL's preferred position, Option 3 and subsequent scheme reform does make efforts to modernise the scheme and make it consistent with Australian community standards in terms of the rights, obligations and benefits that it confers. The issues MIAL members identify is the complexity and lack of certainty around coverage (and implications of that), as well as the additional costs incurred to administer a scheme that is already expensive by comparison which make it unsustainable financially for a declining industry.

2 Introduction

This submission is made on behalf of Maritime Industry Australia Ltd (MIAL), previously known as the Australian Shipowners Association (ASA). MIAL represents Australian companies which own or operate: international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; utility vessels and ferries.

MIAL also represents employers of Australian and international maritime labour and operators of vessels under Australian and foreign flags.

MIAL provides an important focal point for the companies who choose to base their shipping and seafaring employment operations in Australia.

MIAL represents the collective interests of maritime businesses, primarily those operating vessels or facilities from Australia.

MIAL is uniquely positioned to provide dedicated maritime expertise and advice, and is driven to promote a sustainable, vibrant and competitive Australian maritime industry and to expand the Australian maritime cluster.

3 The Threshold Question – Seacare Scheme Reform Options

On page 17 of the Consultation Paper a critical threshold question is put to stakeholders, in the form of three options relating to the future of the Seacare scheme. Given the significant impact any of the three options would have on industry participants, MIAL considers these options warrant further consideration. The paper clearly is driven towards the adoption of option 3.

Prior to further comments on the proposed specifics of any reform, MIAL makes the following comments in relation to the proposed options. MIAL has attempted to form considered views about the options identified, although the consultation paper provides limited information about the consequences and potential impediments to options 1 and 2.

3.1 Option 1 – Maintain the status quo

Such is the uncertainty around the existing scheme coverage provisions, highlighted by the Full Federal Court's decision in *Samson Maritime Pty Ltd v Aucote [2014] FCAFC 182* and the consequential unanticipated exposure for employers, employees and the Safety Net Fund, maintaining the status quo with no reform is in our submission untenable. Section 6 of this submission outlines the risks to the Safety Net Fund. To do nothing makes the scheme unviable and is an unacceptable risk to the Safety Net Fund, employers and employees in the industry.

3.2 Option 2 – Abolish the scheme

As is pointed out on page 17 of the paper, the Australian Government Guide to Regulation requires a non-regulatory option to be considered which would result in the abolition of the scheme. As a result, the responsibility for the sector currently covered by the scheme would rest with state and territory schemes, which currently cover the overwhelming majority of Australian employers and employees.

Consideration of this option within the consultation paper consists of some 5 short paragraphs on pages 17-18 of the 67 page consultation paper. These paragraphs highlight some of the savings and costs that may be made or incurred by scheme employers in the event that the scheme was abolished. It also highlights that there are 33 employers involved in the scheme. The most current

annual Seacare report (2014-2015) reveals there are some 6,863 employees covered by the scheme, Australia's smallest by a considerable margin[1].

The justification for maintaining Australia's only industry specific WHS and workers compensation scheme would be enhanced if the scheme were achieving above average outcomes in safety, rehabilitation, claims management and return to work. Unfortunately this cannot be said for the Seacare scheme, with its performance statistically lagging behind all other schemes. Further, according to the Comparison of Workers' Compensation Arrangements in Australia and New Zealand, the standardised average premium rate is the highest of all Australian jurisdictions.[2]

While it could be argued that the average premium rate in a state or territory scheme is across both low and high risk industries, maritime operators who operate within one state (traditionally considered not covered by the Seacare scheme) or who have exercised an option available to them under a Ministerial directions/ exemption guidelines, report that obtaining insurance for maritime operations under state schemes is less expensive than under the Seacare scheme.

The consultation paper does not appear to give adequate or indeed any consideration as to why a separate industry specific scheme ought to be maintained. In fact, the Government has already indicated that it intends to transfer the role of the Seacare Authority, the body with industry representation charged with oversight of the scheme, to the Safety Rehabilitation and Compensation Commission (SRCC), the body with oversight for the Comcare scheme. Given this, it appears strange to remove direct industry oversight of an industry scheme yet maintain the infrastructure of the scheme, at a cost to the industry which no longer has ultimate oversight of it.

It has also been evident that previous attempts at reform since the scheme's introduction in 1992/93 have, for various reasons been challenging. This has mean that employers and employees have failed to benefit from contemporary arrangements that are the subject of continuous review as with the state schemes. By reverting to coverage under these schemes, employers and employees in the maritime industry will enjoy the same benefits, rights and obligations as all other members of the community engaged in private enterprise.

In addition, the reform proposed in the consultation paper for WHS purposes is to repeal the maritime specific WHS legislation and have seafarers covered by the Commonwealth, harmonised, WHS laws. This would mean that only a separate workers' compensation scheme remains.

The paper does not provide any instruction on any difficulties or issues that would face scheme participants in the event the scheme is abolished. It is therefore difficult to provide any feedback on what might be done to alleviate such concerns. We cannot see any compelling evidence that retaining the scheme provides a benefit to the maritime industry. Indeed even if the reforms outlined in option 3 were to proceed, it is unlikely that this would make the costs of the scheme to employers comparable with costs under a state or territory scheme for workers compensation. This is in the context of the number of ships being covered by the scheme reducing, and further likely to reduce in the immediate future.

A potential concern is the status of the Safety Net Fund in the event that the scheme no longer exists. MIAL recognises that this would likely require further consideration as to how the Fund may manage future liabilities.

In terms of ensuring that employees will continue to enjoy the benefits of a workers' compensation regime, given the cross jurisdictional arrangements currently in place which determine a state of connection test, we cannot readily identify where these tests would not identify appropriate

[1] Seafarers Safety Rehabilitation and Compensation Authority Annual Report 2014-15 scheme snapshot
[2] Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, pg. 197.

coverage for workers working in the Australian maritime industry. The consultation paper doesn't seek to address this.

3.3 Option 3 – Scheme Reform

The overwhelming majority of the consultation paper is dedicated to this option. Options 1 and 2 are addressed specifically in section 5 of the paper, with scheme reform considered throughout the paper. In these circumstances, and subject to MIAL's primary position that the scheme be repealed, MIAL will comment on each reform proposal as appropriate. This option is much more desirable than option 1.

In this submission we have highlighted significant concerns in relation to coverage, governance and costs that are proposed as part of the scheme reform. The MIAL submission addresses these immediately below rather than the order that they appear in the discussion paper, as it is considered these go directly to the financial viability of the scheme.

4 Cost Recovery and Fees

The paper proposes a cost recovery levy and fees be introduced for the Seacare scheme to cover the costs of the Safety Rehabilitation and Compensation Commission (SRCC), Comcare and the Australian Maritime Safety Authority (AMSA) undertaking their regulatory functions. This will add additional costs to a scheme that is already the most expensive in the country and produces poor safety, rehabilitation and return to work outcomes comparative with state and territory schemes. In addition to the highest average premiums across all schemes, Seacare scheme participants are also required to contribute to the maintenance of a safety net fund, which acts as a default employer where a seafarer is injured under the Seacare Act and no employer can be found. This money is collected through a levy.

Based on information received from the department, there are various ways and means that contributions to those schemes administration is collected in the state schemes – in some cases the cost of regulation is factored in to the premium paid for insurance. In others, the cost is directly funded by government. Even in states where the costs of regulation are incorporated within the insurance premium, these premiums remain lower than under the Seacare scheme, with no proportion of the premium being attributed to the regulatory costs.

MIAL does not support this proposal as it will add an additional cost to Australian shipping, which is already struggling to be competitive with other ships who are not burdened with the same costs in the global market. Imposing additional costs on Australian operators will further expand the existing cost differential with international operators, creating a disincentive to operate Australian ships and employ Australian seafarers. The consultation paper states that phasing in of cost recovery will alleviate employer concerns about affordability. MIAL does not agree that it alleviates concerns, it merely has the effect of delaying the impact of the change being felt. The increase in costs recovered from employers in the scheme will broaden the gap between what employers in the maritime industry pay and what other employers generally pay. It is difficult to see how the government can justify retaining a separate industry scheme in these circumstances.

This proposal if adopted adversely affects employers under the scheme through higher costs and indirectly employees as an increase in employment costs through the scheme will invariably need to be offset elsewhere.

In the event that this is introduced, the proposal to minimise the additional regulatory burden on employers through utilising existing collection mechanisms would be the most sensible approach. MIAL considers that there are further administrative burdens inherent in the existing scheme structure that could be alleviated, through streamlining reporting requirements. The consultation paper does not consider this in any detail, and MIAL strongly submits that where legislative change is

required to streamline reporting/levy collection requirements, then these ought to be made as part of any reform.

Where possible to implement a cost recovery charge, then MIAL agrees that this is a more fair and equitable way of distributing costs where a service is being provided to one participant (or an exemption applicant). This could include costs payable by participants not complying with information requirements under scheme administration.

5 Coverage

The following comments do not and should not be seen as detracting from MIAL's principal position that the scheme should be abolished. They are provided in response to the consultation paper.

MIAL supports scheme coverage provisions that are clear, simple for stakeholders to understand and reflect the pool of vessels that had previously been understood to have been covered by the scheme. MIAL opposes any increase to the jurisdictional footprint of the scheme. State and territory laws are capable of covering workers in the maritime industry and have been doing so without apparent difficulty for many years. Employers who employ people working across multiple jurisdictions across all other Australian industries are able to ensure their workers have appropriate workers compensation coverage. State and Territory governments have ensured that workers who work in multiple jurisdictions are capable of appropriate coverage through the "state of connection test".[3]

These schemes are seen by maritime industry employers to be clearer, easier to navigate, easier to find competitive premium rates for, usually provide access to dedicated claims management expertise, have mature and well utilised dispute resolution procedures in place, contained more refined rehabilitation provisions and support for implementation of them, enjoy economies of scale, have the benefit of state wide public awareness, advertising, safety campaigns and resources.

MIAL supports the principals described in the consultation paper for determining coverage of the scheme that aims to clearly capture existing participants. We consider that existing participants are best described in the most recent Seacare Annual Report. However, MIAL is concerned that the wording of the legislation on the basis that it is proposed is not capable of achieving the intended outcome. MIAL would like to see coverage provisions that:

- Ensure that coverage is consistent (a vessel is either in or it is out and does not chop and change);
- Minimise the need for vessels to apply for exemptions, but facilitate this when necessary;
- Reduce the risk that a vessel/employer who thought they were not covered are found to be covered. This is particularly critical in a privately underwritten scheme.

The coverage of the scheme previously was understood to be based on the voyage pattern of the vessel concerned; that is, voyages between states and internationally as described. There was always a level of contention over this interpretation. The risk that an employer did not consider itself covered by the scheme (and did not have in place appropriate insurance) and considered themselves within the state scheme has always existed in the context of this uncertainty. The decision in *Samson Maritime* exposed a far broader risk that had not been comprehended, but served to further ingrain in the minds of industry participants the need for certainty.

[3] http://www.workcover.nsw.gov.au/__data/assets/pdf_file/0005/18968/cross_border_arrangements_for_workers_compensation_guide_48141.pdf guidelines from NSW.

There are significant benefits in clarifying coverage provisions for all employers and employees in the maritime industry, whether they are scheme participants or not. If the scheme continues, it is imperative that the existing provisions be amended to achieve clarity.

It is critical that an operator/employer is able to determine whether they are definitely covered (or not) by the scheme. Accordingly, the proposed coverage provisions need to contain the ability via declarations or exemptions that vessels are covered or not covered by the scheme. The ability for a vessel operator to exempt the vessel is not discussed in 10.1, although a declaration through legislative rules that a vessel is not a prescribed ship is included.

MIAL is concerned that the proposed coverage applying to vessels outside of 3 nautical miles will, in practice, greatly increase the amount of vessels covered by the scheme and not achieve the stated desired outcome to retain the pool of existing vessels covered. There are a great many operators who operate out of one state who have been participating within state WHS and workers' compensation regimes without difficulty. The proposal to cover vessels operating outside 3nm will capture these operators. Marine tourism operators are an obvious example, as well as a number of intrastate operations who consider themselves covered by the state or territory schemes of the area in which they operate. There is no justification to move these operators to a federal scheme that has been identified in the consultation paper. Further, because such operators have never had any interaction with the scheme, there may be many who are unaware of this consultation process and its proposals.

In considering alternative coverage models, MIAL has considered what would likely result in achieving the government's intention, that is retain existing participants and not expand the reach of the scheme. Because previous understanding had been based on the geographical location of vessel operations, a move away from this is likely going to see a change in the pool of vessels covered.

It is incredibly difficult to conceive of a coverage provisions that achieves the two critical outcomes that should be the goal of this reform, 1) retaining the existing participants; and 2) creating coverage and certain to which operations and in, and which are out of scheme coverage. It is clear that the existing legislation is deficient, and has operated on the basis of the assumptions of operators within the scheme.

6 Safety Net Fund

The consultation paper does not appear to explore in any great detail the role of the Safety Net Fund. The role of the Fund is to act in the place of an employer in the case of a default event, and where there is no employer to provide compensation to an injured employee or their dependant pursuant to the scheme.

The Court decision interpreting the coverage provisions demonstrated the exposure on the Fund where there is no clarity around who is part of the scheme. If employers were not aware they are covered by the scheme, they will not have in place an Authority approved insurance policy as required under the Seacare Act (although they are likely to have a state or territory policy) and they would not have been contributing to the maintenance of the safety net fund. If an employer in these circumstances was unable to meet their liability (i.e. the employer goes bankrupt) and there is no policy in place under the Seacare scheme (potentially through ignorance of this requirement) there is a significant risk of a claim being made against the Fund. It is manifestly unfair for scheme employers, small in number and likely to further contract, to be funding claims in such circumstances.

One of the risks of having a privately underwritten scheme is that any one claim has the potential to greatly diminish the Safety Net Fund. It is then up to a small number of employers to replenish the Fund. This situation would not occur under state and territory regimes which have a much larger

pool of employers and have in place default insurance arrangements where an employer cannot meet its liability/does not have insurance, many of which are supported by state governments.[4]

In the event the scheme were abolished, consideration needs to be given to the continued operation of the Safety Net Fund.

7 Governance

MIAL is aware that the government has already made the decision to transfer the statutory functions of the Seacare Authority to the SRCC. MIAL acknowledges that the composition of the Seacare Authority does, at times, make it difficult for the Authority to act as a purely regulatory body exercising statutory functions. It has not in the past functioned as well as it could have. However, the proposal is to retain a separate workers compensation scheme for the maritime industry. The government's proposal to disband the Seacare Authority and transfer the power to a body responsible for administrating a compensation scheme for commonwealth public servants makes MIAL wonder why a separate scheme is necessary when a separate Authority comprising of industry representatives is not required to administer it.

Where a separate industry scheme is to be maintained it defies logic not to retain industry expertise for the administration of it. Employers who will likely be paying more than they would under a state scheme will then lose a voice on the body administering the scheme. If a body that does not have industry representation on it is tasked with administration of an industry specific scheme, then that body must be obliged to consider industry advice as part of that administration.

That a body that has no industry representative has the power to determine costs that may be imposed on such participants (i.e. the amount of the levy) is completely unsatisfactory from MIAL's perspective.

Detail of Scheme Reform Proposals

8 Work Health and Safety

The reform proposal for Work Health and Safety (WHS) involves repealing the *Occupational Health and Safety (Maritime Industry) Act 1993* (OSHMI Act) and amending the Commonwealth *Work Health and Safety Act 2011* (WHS Act). The consultation states that the broad range of duties and requirements in the WHS Act and regulations are capable of applying to a range of sectors, industries and businesses.[5] Further, the consultation paper states, in essence, that the retention of an industry specific scheme is no longer necessary and that the sector is not significantly different from other industries which fall under generally applying Commonwealth, state or territory WHS laws to justify the continuation of separate WHS arrangements.[6]

MIAL does not object to the concept of applying duties and obligations imputed to other Australian workplaces in the maritime industry, if this will have the effect of ensuring better occupational health and safety outcomes for maritime industry participants.

8.1 Health and Safety Duties

The duties prescribed to a person conducting a business or undertaking are not dissimilar to those currently applying to the operator of a prescribed ship. However, the employment and operational structures on board ships will in many cases mean a different entity will be considered an operator

[4] Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, Table 2.12, pg. 39.
[5] Section 6.1 Consultation paper, pg. 19.
[6] Section 6.1 Consultation paper, pg. 19.

of the ship than the entity that will be employing the crew. The owner of the vessel may well be a separate entity, meaning it is crucial that the relevant duty holder can clearly be identified through the legislation.

Seafarers will from time to time be working alongside the vessel or otherwise performing work (or on an authorised break) other than on the vessel. While with the harmonisation of WHS laws changing jurisdictions may not be the issue that it once was, it is crucial for maritime industry stakeholders that requirements are clearly articulated. MIAL also believes that one regulator, AMSA, should be charged with regulating, investigating and prosecuting WHS issues in the maritime industry. It is the experience generally of our Members that advice and action from state WHS regulators can differ from that provided by AMSA and this uncertainty is extremely undesirable. Clarity about what applies to whom and when is essential.

8.2 Key differences

As the proposals are based on the premise that it is no longer possible to justify an industry specific scheme for work health and safety for maritime, it seems that the provisions of the WHS Act will apply to maritime industry participants without distinction. MIAL makes the following observations under this section.

8.2.1 Duties of officers

As is mentioned on page 22 of the consultation document, most officers of PCBUs are likely to be shore based managers and will not for oversight purposes be based on board a vessel. The person with ultimate responsibility on board a ship is its Master.

8.2.2 Duties of other persons at the workplace

Under the OSHMI Act, the principal duties fall upon the operator (person who has management or control of the ship or unit), the person in command (generally the master), persons erecting or maintaining plant on the ship, persons engaged in loading or unloading or employees.

As the consultation paper stated that stevedores unloading the ship will be subject to State WHS laws even while on board the ship[7], this may have the potential to cause confusion about persons other than employees of stevedoring companies engaged in loading and unloading of ships. In addition, there may be some confusion about the safety regime that securing of cargo may come under. In the event of an incident involving the securing of cargo, who is the appropriate investigator authority? AMSA or the state Regulator? We understand memoranda of understanding are currently in place, however industry would benefit from transparency around these arrangements.

8.2.3 Offences and penalties

Empowering the regulator with a broader range of enforcement mechanisms to ensure compliance with occupational health and safety regulations is a welcome advancement and consistent with contemporary regimes, which aim to educate, deter and punish as is appropriate. The proposal would see a substantial increase in maximum penalties.

MIAL and its Members recognise the importance of a robust enforcement and penalty regime for any party that does not meet its WHS obligations.

Given that it is a new regime which participants will be complying with, it would be MIAL's expectation that a reasonable period of education and "light touch" enforcement would be administered by the regulator in recognition of the necessary adjustment by industry participants, particularly for less serious infractions.

[7] See Table 4, pg. 20 of Consultation Paper

8.2.4 Representation and Participation

It seems sensible that an HSR ought to have the relevant training before being able to issue a PIN. Given the remoteness of a workplace, the ability of an inspector to attend a workplace to assist with resolving an issue may be limited.

8.2.5 Union Right of Entry

The OSHMI Act does not contain right of entry for union officials. To the best of our knowledge this has not resulted in any disadvantage to employees while operating under the OSHMI Act. MIAL does not consider that it is necessary to create this additional right which has not previously existed in the industry. This would create an additional union right, which employers would be required to manage, even though there has been no deficiency identified in current arrangements.

While right of entry already exists under the *Fair Work Act 2009*, the inclusion of this in WHS legislation that applies to the maritime industry creates additional avenues to allow trade union access on board ships. The notice requirements and the reasons for entry may be different. This represents the potential for further disruptions to business, where the timeliness of operational movements can be critical.

The investigation of safety concerns is rightly the domain of the safety regulator AMSA. Right of entry that currently exists under the *Fair Work Act 2009* is the appropriate avenue.

8.2.6 Additional licencing

The existing WHS regime contains additional licencing requirements for persons performing certain types of work. Current licencing arrangements on board vessels covered by the OSHMI Act are found in Marine Orders. For vessels carrying international certificates, this is based on the international *Convention Standards of Training Certification and Watchkeeping for Seafarers* (STCW) which minimum are training standards developed by the International Maritime Organisation (IMO).

Currently AMSA does not require any additional licences to be held other than those required under the marine orders. It is likely that high risk licences would be required for certain work under the WHS Act. Currently there is an overriding obligation on employers to ensure that persons performing work are suitably trained and competent in the work they are required to perform. Having systems in place ensuring that persons performing certain work are competent to do so is, in MIAL's view, an effective way for an employer to meet their WHS obligations. This need not necessarily be achieved through a requirement to hold a specific licence.

It is not clear to MIAL that the introduction of shore based licensing arrangements for certain types of work will result in better health and safety outcomes for the industry. It will result in an increase in costs and regulatory burden. MIAL suggests further discussions need to be entered into with industry concerning the unique working arrangement in the maritime industry and what if any equivalent licencing arrangements would need to be developed. To simply require seafarers to obtain "high risk" or crane licences which have been developed for the land based construction industry would be ineffective in ensuring safety within the maritime industry.

MIAL notes the PwC analysis with respect to costs that may be incurred by industry. It seems that the analysis principally relates to the costs of applying for and being issued a licence. It is unclear whether to obtain such licences would require additional training for industry participants and whether any such costs are included in the analysis.

8.2.7 WHS Regulations

The existing WHS Regulations were prepared on the basis that they did not apply to vessels covered by the OSHMI Act. It would be anticipated that this would necessarily mean that these will need to be reviewed to facilitate their application in the maritime industry. MIAL invites further discussion

with the department about how this would be achieved. The same applies for Codes of Practice which are currently the subject of review.

8.2.8 Overall Costs and Benefits

MIAL is not in a position to comment on the projected reduction in workplace injuries resulting from expanding the WHS Act to include Seacare scheme participants. Maritime is a heavily regulated industry and much has been done to improve safety performance by Australian operators.

For many operators who employ both shore based and sea staff, it is likely that there will be some longer term benefits of harmonisation, particularly with respect to training and awareness of duties.

It is necessary to ensure that any new WHS regime complies with Australia's duties under international conventions including the *Safety of Life at Sea Convention* (SOLAS), *International Convention for the Prevention of Pollution from Ships*, 1973 (MARPOL), STCW and the *Maritime Labour Convention* (MLC).

9 Workers Compensation

The following comments do not and should not be seen as detracting from MIAL's principal position that the scheme should be abolished. They are provided in response to the consultation paper.

Unlike the proposal in relation to WHS, it is not proposed to repeal the separate legislation covering workers' compensation. It is difficult to understand the rationale that a separate WHS scheme from the rest of the community is not justified, but a separate workers compensation scheme is justifiable.

9.1 Eligibility for Compensation

The proposal to change the test for contribution for an injury/disease to have arisen out of employment from 'material' to 'significant' is supported. This is consistent with other Australian compensation regimes. There must be a significant connection to employment for an employer to be liable for injuries/diseases.

9.2 Designated injuries

MIAL supports the proposed amendment with respect to certain designated injuries and agrees with the rationale set out in the consultation paper under paragraph 7.3.2.

9.3 Reasonable Management Act

MIAL supports the proposed amendment to align with terminology used in the *Fair Work Act 2009*. MIAL is slightly confused about the intention of the final sub paragraph under 7.3.4. Further explanation as to what is intended by the "incident or state of affairs that follow from management action" would be useful.

9.4 Journey claims and recess breaks

MIAL agrees that any injury occurring during travel undertaken at the direction and request of the employer should be considered in the course of the employee's employment. MIAL understands this to be reasonably consistent across other Australian regimes.

The circumstances where an injury will not be compensable as arising out of employment, as outlined in bullet points under paragraph 7.3.4 are also supported.

MIAL (as the Australian Shipowners Association) has previously made submissions to various Seacare reviews about the exclusion of certain journey claims from compensation. Employers have been very reluctant to allow seafarers to remain in destinations other than their home port for any time after the conclusion of a work period, due to uncertainty around whether or not any injury sustained would be considered in the course of employment. Clarifying that an injury in such situations will not

be employment related allows employers and employees to negotiate travel arrangements after a period of work is concluded.

Off vessel authorised recess breaks continue to be covered, as does training. This is assumed to be training at an approved course and as directed by an employer. MIAL would like a better understanding of the circumstances where an injury would otherwise be arising out of employment but will not be a compensable injury (for example, wilful misconduct by an employee).

9.5 Rehabilitation

It has long been the position of the MIAL membership that a core element of any workers compensation is a mutual dedication by both employers and employees to achieve timely and effective return to work outcomes through engagement in a rehabilitation process.

MIAL supports a regime that encourages and places an onus on all parties to constructively engage at the earliest opportunity to achieve a positive return to work outcome.

As the consultation paper points out, there are some inherent difficulties in achieving return to work outcomes where such an outcome necessarily involves the provision of suitable alternative employment. Some employers may solely be involved in the provision of manning services, meaning only sea based roles are available. Many vessels depending on their area of operation may not be able to accommodate a seafarer sailing on restricted duties. MIAL understands that the taking of all reasonably practicable steps would not extend to "inventing" jobs. The limitations on employers providing suitable alternative duties should be recognised, but this should not stop employers seeking to assist in finding suitable alternative employment where they cannot provide it.

To this end, the body responsible for administering the Seacare scheme (currently the Seacare Authority, proposed to be the SRCC) has an educative function to engage scheme participants to develop and promote strategies within the industry to improve return to work and rehabilitation outcomes for the benefit of employees and businesses. Positive return to work outcomes are generally significantly lower than the national average.[8] The ability of the body administering the scheme to effect real change is limited by the small number of participants, meaning it cannot leverage the economy of scale available to industries operating within state and territory regimes. State wide advertising campaigns that depict workers and situations in other industries are not realistically going to be targeted toward Seacare scheme participants, and the scheme is not resourced to undertake such activities as to do so the cost would need to come directly from scheme employers.

The scheme is simply not resourced to undertake the desirable levels of proactive engagement and education with stakeholders that are a feature of other schemes. MIAL suspects the costs of desirable resourcing would be cost prohibitive for a privately underwritten scheme that covers less than 7,000 employees.

9.6 Compensation

Compensation paid pursuant to a workers compensation scheme is one of the key drivers (along with claims history and return to work outcomes experiences) in determining premiums set for employers. MIAL (as ASA) has previously maintained the position that compensation arrangements for maritime industry participants should be in line with the rest of the Australian community.

[8] Seacare Annual Report 2014/15 – Table 5 Seacare Return to Work Trend Data in 2013/14 revealed Seacare RTW 71% compared to national average 87%. Durable return to work rate 64% compared to national average 79%. Pg15

9.6.1 Calculation of weekly payment rate

The proposal to amend the formula by which incapacity payments are calculated may in practical effect have little impact. Those vessels and employers who are covered by the Scheme will usually be employed on a swing basis meaning that payments are based on an annual salary.

MIAL seeks greater clarity about the allowances that would be included in the proposed calculation.

9.6.2 Additional step down provisions

MIAL is aware that there are a number of studies which support step downs in compensation entitlements as having a positive impact on rehabilitation and return to work outcomes by providing incentives to employees to actively pursue these outcomes[9], as well as providing fairness between the rights of employers and the rights of employees in a compensation regime that does not attribute fault.

MIAL supports the proposed step down provisions as these are more in line with Australian community standards and other compensation regimes than those contained in the current legislation. These also provide appropriate incentives for workers to engage in effective return to work programs.

The proposal to align the cut off for incapacity payments with the aged pension qualification, which will gradually increase is noted. While MIAL does understand the rationale behind this move it will result in a likely increase in costs for employers and insurers which will likely impact on premiums.

9.6.3 Provisional medical expenses payments

MIAL supports the concept of the payment of provisional medical expenses to seafarers to allow injured seafarers to obtain medical treatment in the critical early stages of injury. The consultation paper indicates that such a payment be available before a claim is made. MIAL queries whether a payment ought to be available before a claim is MADE or before it is ACCEPTED.

In addition, the grounds on which an employer may decline to make such a payment should be clear to all stakeholders. For example, where the employer has a reasonable suspicion that an injury has not arisen out of employment/is not compensable, then this should be such a circumstance. Given there is no ability to recover that expenditure (except for fraud) there must be some grounds by which an employer may be able to refuse making such payments. This should not discourage early medical intervention where appropriate and prior to a claim being accepted.

9.6.4 Medical expenses and house hold attended services

MIAL supports the proposal to create some rigour around how medical expenses are incurred and determining appropriate attendant care services. We understand the changes align with changes to the *Safety Rehabilitation and Compensation Act 1988*.

9.6.5 Redemptions

MIAL does not think that the change to the redemption threshold will have any practical effect on redemptions under the legislation. It has long been MIAL's position that provided that there are reasonable criteria in place, an opportunity to redeem a claim should be available by agreement between the employer and the employee. MIAL recommends examining objectively appropriate circumstances and safeguards that allow for redemptions of claims, as in many cases this will be in the best interests of both employers and employees to finalise any interaction they are required to have.

[9] Productivity Commission 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, Report No. 27, Canberra, March. Pg. 263-264

Most insurances required for shipping operations are provided by International P&I clubs. Before the introduction of the Seacare Act, this included workers compensation insurance. The International P&I Clubs exited the Australian workers compensation insurance market when the Seacare Act was introduced. One of the reasons was the long tail nature of the scheme's claims. If there were to be any chance of P&I Clubs re-entering this market (which MIAL concedes is unlikely due to the high costs under the scheme), there would need to be an effective ability to redeem claims within the scheme.

9.6.6 Absences from Australia

In the maritime industry, it is not necessary to live in Australia due to the nature of swing arrangements. In some cases an employee may be employed on the basis that they don't normally reside in Australia (the employment arrangement may determine a "home port" for the purposes of determining where the employer is obliged to return an employee after completion of their swing). Others may move overseas after employment commences. There needs to be a balance to ensure that effective rehabilitation and alternative employment scenarios can be accomplished, while recognising an employee's residence may not necessarily be in Australia.

Allowing employers to exempt a seafarer from the rules relating to suspension of compensation provides some flexibility during absences from Australia, but MIAL suggests that the obligation to engage in rehabilitation needs to be prominent throughout the regime.

9.6.7 Permanent impairment

It stands to reason that calculation of compensation for permanent impairment should be based on level of impairment impacting on amount of compensation based on a sliding scale.

It has been MIAL's contention that workers compensation applying to seafarers should be based on community standards, and if what is proposed is what is contained in other regimes then this should be supported.

The Seacare scheme is commonly said to be (and is conceded in the consultation paper) an expensive scheme by comparison to schemes which cover all other Australian workers. Any increase in compensation will likely increase the premiums payable under the scheme, although this specific question should be one for scheme insurers. Therefore the changes to the scheme which impact on the amount of compensation to be paid need to be looked at in totality to ensure fairness for employers who are obliged to insure under the scheme.

9.6.8 Mutual Obligations and Sanctions

MIAL supports the changes proposed in 7.3.13. Members report very limited options available to them in the event a seafarer is unwilling to engage in a rehabilitation/return to work process. The availability of staged sanction regime for failure of a seafarer to comply with obligations with respect to mutuality when an employer is providing rehabilitation and return to work opportunities is a welcome improvement to the current scheme.

Any sanctions against employees will not be actionable unless an employer has first met their obligations, ensuring that employees will not bear the sole onus of initiating return to work.

9.6.9 Claim determination timeframes

MIAL has no specific comments to make about the proposals to change claim determination timeframes. It appears to be a simple alignment.

MIAL makes the comment that due to the private nature of the scheme, and the structure of the insurance policies in place, many employers (rather than their insurers) assess claims themselves. Our experience is that it would be rare for all employers under the regime to have a dedicated claims management professional assessing and dealing with claims. This represents challenges for

shipping companies that are not usually faced by other employers (other than self-insurers) who have the luxury of dedicated claims management expertise to call on.

9.6.10 Legal costs

MIAL has made the observation in previous reviews that the level of disputation in the Seacare scheme is very high compared with all other schemes.[10] It has always been MIAL's position that where costs are necessarily incurred by an employer to resist a claim which is rejected (by the employer and in any subsequent tribunal proceedings), there should be an opportunity to recover legal costs. This should help discourage frivolous claims (or indeed rejection of claims that should be accepted).

The proposal to prescribe a schedule of costs recoverable seems sensible. This will hopefully discourage practitioners incurring unnecessary costs, which is in the interests of both employers and employees.

9.7 Analysis of cost benefits

The consultation paper notes that PwC conducted a costs benefit analysis of the possible changes to WHS and workers compensation arrangements. MIAL was one organisation consulted. The focus of the discussion with PwC was on the WHS rather than workers compensation elements, so we have limited ability to comment on the veracity of the statements in 7.4. It seems consistent with our understanding of which proposals are likely to result in costs/savings. However on balance it is unlikely to make the costs comparable to those that would be incurred under a state or territory scheme.

One matter that will likely impact the empirical data which has been examined in the Seacare reports is the structure of insurance arrangements that are implemented by scheme participants. Due to the high costs of the Seacare scheme, many participants operate under a high deductable (i.e. they assume risk for the cost of $XX of the claim), meaning that they assume that risk and an insurance policy takes effect only after that amount has been exceeded.

MIAL is not in a position to comment on the amount of estimated benefits amount predicted in section 8 in the consultation paper. It does appear likely, from an employer's perspective, that there will be benefits and savings if the proposals are adopted compared to a retention of the status quo. Measures that result in costs savings and promote opportunities for all parties to achieve better rehabilitation and return to work outcomes will be welcomed by scheme employers.

10 Matters not directly addressed in the Consultation Paper

The following are scheme matters that have not been addressed in any detail in the consultation paper.

10.1 Self-insurance

There is no proposal to permit self-insurance under the scheme. MIAL (as ASA) has in the past advocated that self-insurance under the scheme should be available provided adequate safeguards are in place. Currently under the Seacare scheme most operators engage in a form of self-insurance through managing their premiums and assuming a high level of risk under their Seacare scheme policies.

[10] Seacare Annual Report 2014/15 -Table 2 Seacare Scheme performance indicators shows a claim disputation rate of 48% when the target is less than 15%. Pg. 13.

10.2 Exemptions

Presently there are a number or circumstance where a vessel may apply for an exemption from the Seacare Act. In all circumstances the employer must show a current state/territory policy is in place to cover those employees.

Where there may be uncertainty about coverage, for the reasons identified and particularly for the preservation of the Safety Net Fund, there should be a mechanism to ensure clarity of coverage. This can be achieved through exemptions from the scheme or declarations of coverage. Ideally these would be minimal. In cases of exemptions there should be appropriate safe guards in place to ensure that exemption is appropriate. However, it should not be overly onerous or time consuming to apply for or be granted an exemption. Any seafarer worker or employer not covered the scheme will be covered by a state or territory regime and according to those schemes will be required to have the appropriate insurance in place.

MIAL suggests that the current circumstances when an exemption can be obtained should be retained.

10.3 Dependency

The level of dependency for a spouse or child of an employee should be determined according to the actual level of dependency. S15(2) deems a spouse or child wholly dependent if they were living with the employee at the time of death/injury. The level of dependency should be determined on a case by case basis.

10.4 Contributions

Currently there is limited capacity for employers to seek contribution among successive employers where compensation is paid to a dependant rather than an employee. It should be the same process for seeking contributions regardless of whether compensation is paid to an employee or a dependant of an employee, provided it is paid pursuant to the Act.

To this end, further streamlining of the ability for employers to claim contributions for third parties would be of benefit in claims were liability rests not only with the employer.

10.5 Industry Trainees

Although not specifically mentioned in the consultation, there is no longer a need to cover industry trainees as these are no longer a feature of the industry. The retention of this clause would be confusing.

ATTACHMENT B

Summary of WHS changes in Seafarers and Other Legislation Amendment Bill 2016including MIAL Comments

Definitions	Effect of DoE change	MIAL Comments
'action for non-economic loss' – s 3	Clarifies an action for non-economic loss is not restricted to the formal institution of proceedings but can include processes like settlement negotiations and consultations.	The effect of this clarification is to prevent employees from receiving compensation for non-economic loss but then claiming that the compensation was not made through a *formal* action and so also claim worker's compensation under the Act. This was a problem under the Safety, Rehabilitation and Compensation Act (the national workers compensation scheme that the Seacare scheme is being compared to) but has not been an issue for Seacare. The clarification expands the current definition of an action for non-economic loss in section 55 to include less formal mechanisms where an employee can elect to institute an action against the employer for non-economic loss. The election still needs to meet the requirements in s55(2) of being given in writing to the employer before compensation is paid. Once an election is made then compensation is not payable.
'medical treatment' – s 3	Enables legislative rules to be made to include a wider range of compensable medical treatment.	It is unclear if this change will have any material impact. The current definition of medical treatment is focused on treatment delivered by legally registered practitioners and includes artificial limbs.

		The change to the definition allows the making of regulations that can broaden the definition. By way of example, most state based workers' compensation schemes also include crutches, artificial aids or spectacles, home and vehicle modifications and domestic assistance services. Medical practitioner delivery is still required.
'superannuation scheme' – s 3	Extends the definition of superannuation scheme to include retirement savings accounts, reflecting updated approaches to superannuation arrangements.	This changes a loophole that allowed for potential double-payment of superannuation and workers compensation if the employee was receiving superannuation from an overseas account. This hasn't been an issue in the Seacare jurisdiction but apparently was an issue for the federal scheme (the SRCC). The Act allows for employees who are incapacitated from an injury and who retire and receive superannuation as a result to continue to receive workers compensation top ups. A retirement savings account (RSA) is high-interest account that employees can transfer their superannuation fund into on retirement. This change has no effect since RSAs would have been approved deposit funds, and if they weren't (e.g. if they were overseas), the change is just closing a loophole that has not actually been never exploited.

Benefit changes	Effect of DoE change	MIAL Comments
Payment of medical related expenses – s 28	Enables reimbursement of medical related expenses (at the direction of the employee) to the medical treatment provider or the employee if they have paid for the treatment.	The impact of the change is unclear as the current legislative provisions appear to provide for employees to request payment to be made directly to providers.
Reduction in threshold for binaural hearing loss to improve access to compensation where permanent impairment - s 40	Reduces the qualifying threshold for a permanent impairment that is a binaural hearing loss from 10% to 5% to align with the SRC Act and other jurisdictions.	S40 sets the threshold for compensable permanent impairment at 10%. The change makes an exception for hearing loss, reducing the threshold to 5%.
Increase to funeral benefit **– s 30(2)**	Aligns the maximum amount of compensation payable in respect of funeral expenses with the SRC Act.	S30(2) currently caps funeral reimbursement at $3500. The SRC Act, at section 18, caps it at $9000 but increases this regularly through regulation – it is presently at $11,000. The proposed change ties s30(2) to s18(4)(b) and thus allows for periodic regulatory changes to the maximum.
Improvements to scheme integrity	**Effect of DoE change**	**MIAL Comments**
Clarification that dependents of deceased employees have access to common law remedies against the employer of the deceased **– s 54**	Clarifies that where an employee's injury results in death, the dependants of the deceased employee are not prevented from bringing an action against the employer, even where the employee may have made a previous election not to bring an action for damages against the employer.	Effectively no change as the Act never explicitly prevented common law claims by dependents in the case of death. Where an employee makes an election under section 55 not to being an action for damages and then their injury subsequently results in death, the dependents of the deceased employee can still bring an action for damages against the employer.

Clarification of employee's ability to bring action for non-economic loss **– s 55**	Clarifies that an election by an employee to institute an action or proceeding against their employer or another employee does not prevent the employee from doing any other thing that constitutes an action for non-economic loss.	Effectively no change as the Act never precluded employees from instituting multiple actions for economic loss.
Clarification of requirements in relation to proceedings and consequences of election and payment of damages **– ss 56-60**	Aligns provisions with the Safety and Rehabilitation Act (the SRC, the federal workers' compensation law) by substituting references to 'proceedings' with the broader term of 'claims'. 'Claims' encompasses settlements resulting from negotiation whether or not that claim or action progressed to the formal institution of proceedings or was made at common law.	This simply aligns the text of the Act with the new definition of 'action for non-economic loss' that has been added into section 3.

Changes to eligibility thresholds	Effect of DoE change	MIAL Comments
Injury which is a disease - contribution of employment to shift from the 'material degree' to a 'significant degree' – s 3 and new s 5B	Increases threshold to align with the SRC Act. Employment must contribute to disease suffered by employee to a 'significant degree' rather than 'material degree'.	Employment has to have significantly contributed to the disease caused, which is a higher threshold than merely a material degree. This modernises the Act to align with the wording the in the federal workers compensation Act (the SRC) and to an extent the state workers compensation schemes, which require a similar test, e.g. that the employment has been 'the main contributing factor' to the disease (NSW)

Other technical changes	Effect of DoE change	MIAL Comments
Psychological injuries-exclusions - shift from 'reasonable disciplinary action' to 'reasonable administrative action' **– new s 5A**	The Seafarers Act currently excludes compensation for injuries as a result of 'reasonable disciplinary action' or an employee's 'failure to obtain a promotion, transfer or benefit'. This definition will be replaced with the concept of 'reasonable administrative action taken in a reasonable manner'. A new section will also be added providing a non-exhaustive list of the actions which may constitute 'reasonable administrative action'. This will align with the SRC Act.	Although this is simply modernising the language to align with the federal workers compensation scheme (the SRC), the broader definition of the kind of action that is excluded is beneficial.
Updates to references to other Commonwealth legislation – s 135	Updates references to other Commonwealth legislation - the *Child Support (Registration and Collection) Act 1988*, the *Social Security Act 1991*, and the *Family Law Act 1975* – to reflect current practice regarding the treatment of compensation payments for the purposes of assignment and attachment.	Effectively no change.
Removal of redundant references	References to "industry panel", "Seafarers Engagement Centre" and "industry trainee" will be removed.	This has been done as per MIAL advice.
Administrative Appeals Tribunal – Costs – s 91	Clarifies that the AAT may order claimants costs where determination about eligibility for compensation is reconsidered by a determining authority on its own motion and proceedings are rendered abortive.	There is effectively no change as a result of this as section 91 already provides for this. The proposed change to the wording is as a result of a single decision in the Comcare (SRC) jurisdiction that had tax implications for a claimant. MIAL has made submissions requesting that the AAT also allow employers to recoup legal costs for AAT proceedings from claimants in some circumstances, but this recommendation has not been adopted.