Senate Education and Employment Legislation

Committee Inquiry

into the

Seafarers Safety and Compensation Bills Package

AMOU Submission

Arrangement

Introduction

The Australian Maritime Officers' Union (AMOU) is an organisation of employees registered pursuant to the *Fair Work (Registered Organisations) Act* 2009.

The AMOU represents the industrial and professional interests of its approximately 2400 members who include Deck Officers (Masters and Mates) including Cadets. Not all AMOU members work on vessels covered by the Seacare Scheme.

AMOU members operate a range of different types of vessels used in the Seagoing, Offshore Oil and Gas, Towage and Dredging Industries as well as Floating Production Storage Offtake (FPSO) and Floating Storage Offtake (FSO) vessels.

The AMOU is but one of the three Australian maritime Unions. The Australian Institute of Marine and Power Engineers (AIMPE) represents Engineer Officers. The Maritime Union of Australia (MUA) representing Integrated Ratings, Cooks and Caterers.

The AMOU, together with the AIMPE and MUA, contributed significantly to the creation of the Seafarers Rehabilitation and Compensation Scheme which replaced the Seamens' Compensation Act 1911. These employee organisations have willingly continued to contribute to the Seacare Authority since its inception for the common good of their respective members and the Industry generally.

We welcome the opportunity to provide the Senate Committee with a Submission.

The maritime Industry is unique.

The Seacare Scheme is a bespoke, no fault, privately underwritten, national workers' compensation scheme for this unique Industry.

Summary

The Seacare Scheme is created by the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) (OHS(MI) Act). The Seacare Authority is assisted by the Australian Maritime Safety Authority (AMSA) and Comcare, those arrangements set out in Agreements between the Seacare Authority and the relevant Agency.

The Government contends the Seacare Scheme has foundered. The reasons for this being:

- Seacare Scheme coverage is unclear;
- the 1993 OHS(MI) Act is outdated by the creation of a model *Work Health and Safety Act;*
- Seacare Scheme governance is inefficient;
- Seacare Scheme administration and regulation is not adequately funded.

- the Seafarers Act no longer mirrors the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

In this Submission, we discuss:

- the origins of the Seacare Scheme;
- Seacare Scheme coverage including opting-in and opting-out;
- Work health and safety arrangements;
- The Seacare Authority; and
- Workers' Compensation changes.

Origins of the Seacare Scheme

On 14 October 1992, the Hon W. E Snowden, Northern Territory-Parliamentary Secretary to the Minister for Employment, Education and Training moved that the Seafarers Rehabilitation and Compensation Bill 1992, be now read for a second time.

We would invite all Committee Members to reacquaint themselves with the speech by Mr Snowden.

In his speech, Mr Snowden:

- discusses the history and development of the Bill (now known as the Seafarers Act);

- acknowledges the size, complexity and many technical provisions;

- discusses the significant features including:
    - individual employer liability;
    - acknowledges that employers and Insurers had made the necessary arrangements which included Protection and Indemnity Associations, noting that the imposition of a Government Fund on a small industry of 6000 employees would not be cost effective;
    - the creation of the Safety Net Fund;
    - the benefits to employees;
    - the provision of a Review Process;

- the creation of the Authority, its composition, functions, how it will be serviced and cost recovery;
- made concluding comments on the objectives of the Bill;

  and importantly that:

- *this reform represents another step in the Government's comprehensive shipping reform program which has resulted in significantly increased Australian shipping competitiveness including a 50 per cent reduction in crew sizes on modern, technologically advanced ships. (Our emphasis)*

We make the point that the Seafarers Act was agreed by the Industry Employers with and through their Association; the Industry Unions and their members and by Government; in the context of a broad industry reform known as MIDC. The changes brought about by MIDC endure to this day.

It is not apparent to us that anywhere near a majority the Industry employers support all of the Government's proposed amendments.

The employee organisations and their members do not support all of the Government's proposed amendments.

The Seacare Scheme was part of a greater and we say most importantly agreed (Government, Employers and Unions) Industry reform which cannot be overlooked.

During the life of the Seacare Scheme, the AMOU together with the other Unions have participated in Reviews (External and Internal) as well as made various Submissions as to proposed changes. The same can be said of the Employers and their Association(s).

Some changes identified by the Unions and the Employers as being desirable years ago have not been acted upon. An example, being the re-entry of P & I Clubs to provide cover in competition to Insurers. This change was identified as desirable prior to the Ernst & Young Report.

Seacare Scheme Coverage

Whilst the Government asserts the coverage of the Seacare Scheme is unclear, it admits, *there would be minor benefits for employers from clarifying the coverage of the Seacare scheme*: RIS at p. *xliii.*

If a *lack of clarity over coverage* exists in relation to the Seacare scheme, the government admits any *administrative burden and other potential costs ... are not understood to be significant enough to affect overall employment or business activity in the maritime industry*: RIS at p. *viii*.

We contend, and the Committee will note we are not alone in the view that, the proposed amendments will not somehow make clear or clarify coverage; but rather are intended to shrink the number of vessels covered by the scheme, will result in increased disputation and the demise of the Seacare Scheme.

As far back as October 1992, The Hon W. E. Snowden observed that the Bill would apply to a small industry of 6000 employees; and it can be complex with many essentially technical provisions.

The first point we would make about the observation above is that 6000 employees would not have been all the employees engaged in the Australian maritime Industry at that time and therefore the Seafarers Act did not cover the whole of the Industry.

The second point we would make is that while the Seafarers Act can be complex and technical, it is not honest to assert that due to a vessels unique circumstances, which will require consideration to determine if the vessel satisfies the Tests for coverage; this means the Seacare Act is unclear.

There are a number of vessels at work in and around Australia in circumstances where if one was to apply the current Tests for coverage it is not an arduous task to determine if they are in or out of the Seacare Scheme.

Over the years, any controversy as to coverage has only been in respect of a handful of vessels.

By way of example, an FSO or FPSO; the operator repeatedly contended this vessel was not in the Seacare Scheme. The controversy was to be dealt with by the Federal Court of Australia. Shortly before the matter was to be heard, the operator applied for a s.20A Exemption so as to exclude the vessel from the Seacare Scheme.

Significantly, the operator applied for the 20A Exemption on the basis that it could obtain workers' compensation insurance under a State scheme at a lower price.

We note at Item 83, the SOLA Bill proposes to repeal s.20A.

The Committee would observe from Item 62 at paragraph 105 of the RIS to the SOLA Bill, the new proposed section 3D defines the term 'offshore floating storage or production unit' which is excluded from the definition of 'prescribed vessel' in the new s.3A. The AMOU does not support exclusion of vessels including: *Dampier Spirit, Montara Venture, Nganhurra, Ngujima Yin, Ningaloo Vision* and *Okha.*

These vessels are manned by AMOU members.

By way of example, manning for the *Dampier Spirit* and *Ningaloo Vision* is provided by Teekay Shipping (Australia) Pty Ltd ('Teekay'). This proposal leads to the outcome that some AMOU members employed by Teekay have the benefit of Seacare Scheme coverage in the event they become ill or injured and some don't; and that could be for no other reason that the company transferred them to that ship.

In June 2011, a seafarer was injured onboard the *Samson Mariner* which was engaged in the construction of a wharf. The vessel appeared in the list of vessels covered by the Seacare Scheme in the 2010-2011 Seacare Annual Report. Samson Maritime had a policy of Insurance for Seacare Scheme and State workers' compensation insurance with an Insurer. The Seacare Scheme is a "no fault" workers' compensation scheme.

The Employer/Insurer denied liability on the basis that the vessel was not covered by the Scheme.

This Employer was successful in winning a Seacare Award for Work Health and Safety Management in the 2014 Seacare Awards. The cover of the 2013-14 Seacare Annual Report features the image of a Samson Maritime vessel engaged in the very same project as the *Samson Mariner* was engaged in.

The Seacare Authority states at page 2 of 2015-16 Seacare Annual Report that:

> *sections 19(2)-(4) of the Seafarers Act extend the operation of the Act beyond the limited circumstances set out in section 19(1). Based on the Federal Court's decision, the scheme applies to any employee of a trading, financial or foreign corporation with the limitation that*

the ship be engaged in trade or commerce beyond the boundary of a State of within a Territory.

This decision has substantially shifted the understanding of workers' compensation and work health and safety arrangements in the Australian maritime industry. Ships and employees that were historically considered to be covered by state arrangements may now be covered by the Seacare scheme.

The AMOU understands the proposed amendments to the Seafarers Act are intended by the Government to reflect an intention that the Seacare Scheme is not intended to apply to employees engaged on vessels that undertake intra state voyages who have the benefit of State and Territory workers' compensation schemes.

The Government's intended scope of coverage of the scheme is at odds with a number of vessels presently covered.

The Committee will observe from Item 84 at paragraphs 143 to 145 of the RIS to the SOLA Bill that a vessel engaged in work akin to what the *Samson Mariner* was doing would no longer be covered by the Seacare Scheme by way of an Exclusion.

The Exclusion being *the vessel is used <u>wholly or predominantly</u> for voyages or other tasks which are wholly within the <u>designated waters</u> of a particular state or the Northern Territory.(<u>Our emphasis</u>).*

The language *designated waters* infers whatever meaning is ascribed to it at a particular time.

However it is presently defined to mean: *the portion of the 'territorial sea' which are adjacent to that state or territory, plus the internal waters of the state or territory.* Note further that, *this term will capture all waters within 12 nautical miles of the state or territory's coast line.*

Depending upon the state or territory concerned, there may be islands or baselines that require consideration. This could mean that the "designated waters" of that State or Territory may extend well beyond the 12nm for the coastline.

This proposal does not provide clarity and will generate further disputes in relation to coverage.

The proposal will see a number of vessels presently covered or future vessels doing work by vessels that were covered, being excluded from the Seacare Scheme.

The Committee will observe that from Item 84 at paragraph 146 of the RIS to the SOLA Bill that, *unlike the <u>current</u> coverage of the Seacare scheme, subsection 25B(1) will treat ships operating in the Northern Territory in the same way as ships operating in any state.(<u>Our emphasis</u>).*

This proposal will see a number of *prescribed vessels excluded from coverage of the Seacare Scheme*: RIS at p.*xxxiv.*

The Committee will observe that from Item 84 at paragraphs 148 to 149 of the RIS to the SOLA Bill that:

> *New subsections 25B(5) and (6) clarify how the coverage rule will operate in relation to intra-state coastal trading. The provisions are intended to make sure that a voyage between 2 places in the same state are treated as a voyage 'wholly within' that state's (or territory's) designated waters, even if the vessel left the designated waters for part of the voyage because doing otherwise would not be reasonably practicable. This recognises that intra-state (intra-territorial) shipping routes may involve a vessel leaving the designated waters of a state (or territory) for a variety of reasons. Such voyages should still be regarded as intra-state, given their beginning and end is with the same state, and the vessel is only leaving the state's designated waters because this is the safest or most effective route. A reference to a 'particular state' is synonymous with a 'single state'. Subsection 25B(7) has the same effect for intra-territorial voyages.(Our emphasis).*

The proposal will see a number of vessels presently covered (*Accolade II, RTM Piiramu, RTM Twarra, RTM* Wakmatha and *RTM Weipa)* or future vessels doing work of these vessels that were covered being excluded from the Seacare Scheme.

The *RTM Piiramu, RTM Twarra, RTM Wakmatha* and *RTM Weipa* that trade between Gladstone and Weipa are manned by AMOU members. Manning for these vessels is provided by ASP Ship Management Pty Ltd ('ASPSM'). This proposal leads to the outcome that some AMOU members employed by ASPSM have the benefit of Seacare Scheme coverage and some don't; and that could be for no other reason that the company transferred them to that ship.

The Committee will observe that from Part 8 of Schedule 3 at paragraphs 422 and 423 of the RIS to the SOLA Bill that *vessels which are currently covered by the scheme that would not meet the new definition of 'prescribed vessel' can continue to be covered by the scheme if they choose to be. (Our emphasis). Vessel operators and owners will have from Royal Assent until six months after the transition time to seek a transitional declaration.*

The Bill puts Owners/Operators and/or Employers to time, cost and trouble in order to maintain the *status quo;* in circumstances where we submit a significant majority are content to be covered by the Seacare Scheme.

Opting-in

The AMOU supports the concept of opting in to the Seacare Scheme.

Vessels used to be able to opt in to the Seacare Scheme using an 8A or 8AA Declaration under the *Navigation Act* 1912.

The AMOU, AIMPE and the MUA have made various submissions in relation to *opting-in* to the Seacare Scheme including by way of industrial instrument. Many industrial instruments already contain clauses in relation to Seacare Scheme coverage of employees. The AMOU would support an amendment to the Seafarers Act that also provides for *opting-in* through industrial instruments.

Paragraph 158 on page 24 of the RIS in support of the SOLA Bill provides:

> *This section enables the owner or operator of a prescribed vessel, or an employer of employees on a prescribed vessel, to apply to the SRCC for an opt-in declaration in relation to the vessel.*

The AMOU understands, section 25E enables an owner/operator or employer to make an application limited to a specified group or groups of employees or a specified employee or specified employees on a vessel. (Our emphasis).

The limitation is not new as it exists in the present s.20A Exemption. However, the limitation is new in the context of *opting-in*.

We are very concerned about s.25E. No commentary or otherwise has been provided as to the circumstances where it is appropriate to *limit* coverage to a *specified group or groups of employees* or a *specified employee(s)*.

How might a person use this limitation in the context of an *opt-in* under s.25E?

The Seafarers Act defines an "Employee" as a "seafarer" or "trainee"... . The term "seafarer" was defined in the Seafarers Act by reference to the Navigation Act definition. The SOLA Bill defines a seafarer, in similar terms as the Navigation Act, as being *"anybody employed in any capacity on a prescribed vessel, on the business of the vessel"* other than and goes on to list persons excluded which we don't need to worry about.

Whilst the Government have gone out of their way to provide examples of coverage, no such example is provided in relation to s.25E.

Equally, we are very concerned about the process envisaged by s.25E. Paragraph 160 on page 24 of the RIS in support of the SOLA Bill only requires:

> *...the applicant to state they have taken reasonable steps to inform affected employees and their representatives of the application. Because an application for an opt-in declaration could affect the workers' compensation entitlements and work health and safety protections of employees on a vessel, it is important these employees are made aware of the application.*

We believe the requirement to only take reasonable steps to inform affected employees and their representatives of the application is insufficient and contrary to the principles of procedural fairness.

We submit a copy of the Application must be given to the affected employees and their Union.

By way of comparison an employer making an enterprise agreement is required to comply with a number of mandatory procedural steps which include giving employees notice; providing employees with a copy of the agreement and any other documents referred to in the agreement; etc etc whilst observing the various timeframes.

If employers can undertake these steps in the context of making an enterprise agreement there is no reason why Employers cannot give their employees and their Union notice and a copy of the Application.

Also by way of example, the *Fair Work Act* 2009 and industrial instruments made under the Act, require employers to consult their employees and their representatives about certain changes. In our experience, the Employers have been able to communicate to employees and their representatives about such.

In the circumstances, we don't agree with Government's contention that to require the applicant *to directly notify every affected employee would be excessively burdensome*. In this day and age of modern communications, Employers are easily able to communicate with their employees and their representatives and do so on a range of matters on a frequent basis.

The AMOU submits a requirement to directly notify employees and their Union should extend to renewal applications: s.25E; further information: s.25F; the withdrawal of applications: s.25G; the refusal to make a declaration: s.25H; suspension or revocation: s.25J.

Opting-out (Exemption of employment)

We note at Item 83, the SOLA Bill proposes to repeal s.20A.

Paragraph 183 on page 27 of the RIS in support of the SOLA Bill provides:

> *New section 25M provides that the SRCC may exempt, either generally or otherwise, the employment of some of all employees on a particular vessel from the application of the Seafarers Act, and the levies established by the Levies Bill and Levies Collection Bill. The SRCC can do so either on its own initiative or on application by an owner, operator or employer.*

The new sections 25M to 25S set out arrangements for *opting-out*.

These arrangements are significantly broader than the typical grounds of exemption that have been used as a basis for a s.20A including: non-regular trading pattern or insurance available at lower cost than Seacare Scheme.

The AMOU is concerned how this significantly broader power to exempt: all employees: s.25M(1)(a) or a specified group or specified groups of employees: s.25M(1)(b) or a specified employee or specified employees: s.25M(1)(c) from the application of the Act: s.25M(1)(d) may be utilised by the Commission:s.25M(3)(a) or the owner/operator or employer: s.25M(b)(i) and (ii) respectively.

The AMOU is also concerned about the minimum consultation requirements contained in s.25M(14).

We are concerned that employees and/or their representatives may not be made aware of the Application, whether on the initiative of the Commission or by an owner, operator and/or employer resulting in a denial procedural fairness.

We are concerned that the 7-day period for person(s) to make submissions may, depending upon the nature and scope of the Exemption proposed, not be an adequate period of time in which to prepare a submission in response; and/or an inadequate period of time in which to prepare a reply to other submissions made by interested persons; also resulting in a denial of procedural fairness.

Historically, the Authority has granted s.20A Exemptions to a single vessel as well as multiple vessels on both the Australian General Register of Ships and Domestic Commercial Vessels.

The 7-day period is inconsistent with the consultation process undertaken by the Seacare Authority when it made the multiple vessels Exemption.

Work Health and Safety Arrangements

Every worker and every workplace must be covered by laws relating to Health and Safety.

The authors of the Independent Investigation into the fatality onboard the Australian registered floating storage and offloading tanker *Karratha Spirit* off Dampier, Western Australia, 24 December 2008, ATSB Marine Occurrence Investigation No. 261, at p.35 said:

> *There should be no ambiguity about the safety regime applicable to every Australian vessel or facility, regardless of its mode of operation, and coverage should be seamless and continuous.*

The AMOU continues to support the harmonisation of the maritime industry with the model Work Health and Safety Law.

The model Work Health and Safety Law should not be overridden by the *Offshore Petroleum and Greenhouse Gas Storage Act* (OPGGS).

Provisional Improvement Notices (PINs)

We do not support s.229 of the SOLA Bill which affects s.274 of the *Work Health and Safety Act* (WHS Act) by downgrading a 'Direction' a Health and Safety Representative (HSR) may make to that of a 'Recommendation'.

Codes of Practice

We do not support s.195 of the SOLA Bill which affects s.274 of the WHS Act, removing the rights of employee organisations to participate in the development of safety Codes of Practice.

This is inconsistent with the activity currently being undertaken by the Seacare Code of Working Practice Working Group which is currently developing replacement Codes of Practice for the Bluewater sector and will commence work in the New Year on a Code of Practice for the Offshore Sector.

Health and Safety Representatives (HSRs)

We do not support s.228 of the SOLA Bill which affects s.74(2) of the WHS Act, removing the requirement for PCBU's to provide Comcare with a list of HSR's.

This is inconsistent with the work the Seacare Authority has been doing to try to identify and develop a list of HSR's in the maritime industry.

High Risk Licenses

The AMOU supports the introduction of "High Risk Licenses" in the Australian maritime industry as part of the *Work Health and Safety* model law harmonisation process. The building and construction industry has had nationally recognised "high risk licenses" for years. The idea that the Australian maritime industry is yet to introduce high risk licenses for activities such as scaffolding, dogging, rigging, cranes etc is, if true, staggering. The introduction of "high risk licenses" should be regarded as urgent.

The Seacare Authority

We do not support s.176 of the SOLA Bill which has the effect of abolishing the Seacare Authority.

Efficiency

We contend Seacare Scheme Governance is efficient; furthermore it meets or exceeds all Government legislative and other best practice standards. We are yet to be provided with any evidence to the contrary.

We reject the assertion it is inefficient to retain the Seacare Authority.

Those asserting that the Seacare Scheme Governance is inefficient have not provided any explanation as to how or why this is so. Moreover those asserting that the Seacare Scheme Governance is inefficient have not provided any explanation as to how or why it will be more efficient after the Seacare Authority is abolished. The assertion is even stranger given Comcare and AMSA will continue to provide the same services as they presently provide to the Seacare Scheme after the Authority is abolished. In our respectful submission Committee Members should approach this proposal, radars on.

Committee Members should be aware that both Comcare and AMSA have for many years complained about resourcing the Seacare Scheme from their budgets in the case where they either do receive an appropriate or the appropriation does not cover all of their costs.

Committee Members should also be aware that the Health and Safety Inspectorate (AMSA) does not share the Seacare Authority's view on the scope of the OHS(MI) Act based on cost.

Robin Steward-Crompton in his Review of the Seacare Scheme recommended the role of the Seacare Authority be strengthened.

At page *xli* of the Regulation Impact Statement (RIS) in support of the SOLA Act, the Government have said:

> *The transfer of the Seacare Authority's functions to the SRCC and Comcare is estimated to result in savings of $10,000 for the Government as a result of no longer paying the Chairperson's daily sitting rate or travel costs of Seacare Authority members. The Advisory Group will not have any costs since members will not be remunerated.*

There exists a significant difference between the saving identified in the RIS and the saving identified in an earlier budget paper relating to "*smaller government*".

Committee Members should be aware that Seacare Authority Employee Member Representatives do not receive any remuneration (other than that paid by their respective employers) for their time and work associated with the Seacare Scheme. Nor have we asked to be remunerated.

The Seacare Scheme was set up as a tripartite Industry Scheme and in our submission should remain so. To abolish the Seacare Authority would fundamentally alter the nature of the Seacare Scheme such that it could no longer be described as a Scheme.

We do not share the view that, *this change* (abolishing the Authority) *is <u>not</u> expected to have an impact on Seacare employers or employees*: RIS at page *xli*. (*<u>Our emphasis</u>*).

At page *xxxi* of the RIS in support of the SOLA Act the Government discuss efficiency:

> *A direct transfer of the Seacare Authority's functions to the SRCC would result in the SRCC performing certain functions under the Seafarers Act that are performed by Comcare, rather than the SRCC under the SRC Act. I would not be appropriate or efficient for the SRCC to perform functions for the Seacare Scheme that it does not perform for the Comcare scheme. To address the issue, it is proposed that these functions of the Authority be transferred directly to Comcare, rather than the SRCC.*

Committee Members should be alert to this developing tension between the SRCC and Comcare if the Seacare Authority is abolished.

Assuming the functions of the Authority are transferred directly to Comcare, there is no evidence Comcare will be providing services any different to what they currently do for the Seacare Authority; and therefore no more efficient.

Funding

The Seacare Authority has limited resources.

Comcare and AMSA both complain about appropriations or the lack thereof.

We are not aware of any suggestion the Seacare Authority is not carrying out its functions.

Committee Members should be aware of the possibility that not all the Seacare Scheme Employers are aware of the proposal for a new Levy. There is also a possibility that Seacare Scheme Employers may not be aware of the potential sum any new levy may increase to.

The Levy issue is something we would expect the Seacare Scheme Employers to make submissions about. However, the employee organisations are very much aware of the state of the industry as a result of world economic circumstances and other policy settings and the issue of cost sensitivity.

A number of employers have made the observation, *there will be fewer of them, paying more*.

Whilst it can be said that Seacare Scheme Employers do not directly financially contribute to the cost of being regulated by the Seacare Scheme (through a Seafarers Insurance Levy); it should be acknowledged that the Australian maritime Industry does indirectly contribute through taxes as well as a raft of other levies and charges. We have no doubt about the Employers ability to provide Committee Members with an explanation of such.

Seafarers also contribute through application fees paid to AMSA for Certificates of Competency etc; meeting the employment costs of the employee representatives on the Seacare Authority since its inception and otherwise participating in the promotion of the Seacare Scheme and Health and Safety on vessels.

Delays and disputation

The Seacare Scheme is a "no fault" workers' compensation scheme.

In our submission there are two significant factors that contribute to the disputation rate of the Seacare Scheme. And despite the best endeavours of the Seacare Authority which has published Best Practice Guides including in relation to claims management, issues persist.

Both factors arise out of failures by Employers and Insurers to deal with claims in accordance with the Seafarers Act.

The disputes that come before the Administrative Appeals Tribunal do so because an employer or insurer (subrogation rights) decline liability or because they (Employer/Insurer) fail to make any determination at all (rather relying upon the deemed denial of the claim pursuant to s.79(6)).

A number of Seacare Scheme Employers/Insurers need to improve in relation to their statutory obligations in this area. We would refer Committee Members to the Seacare Annual Reports, particularly in respect of the *Percentage of Seacare Claims Resolved Within Statutory Time Limits*.

We make the Submission that, in the context of a "no fault" workers' compensation scheme the deemed denial provisions should be a last resort; and a failure to make a determination is not within the spirit and intendment of the Seafarers Act having regard to its "beneficial" nature.

The failure by some Seacare Scheme Employers/Insurers to comply with the dispute resolution procedure contained in s.78 of the Seafarers Act also contributes to the disputation rate in this "no fault" workers' compensation scheme. Section 78 of the Seafarers Act provides that an employee may request a reconsideration by an Employer to decline a claim. Section 78(4) provides that on receipt of such a request the Employer must arrange for a Comcare Officer to assist the employer in reconsidering its determination. This provision is intended to require the employer to obtain an unbiased advisory decision. Frequently, these advisory opinions recommend that the determination be set aside and liability be accepted. We submit not all Seacare Scheme Employers comply with their statutory obligation to consult Comcare.

It is in these circumstances, the Government propose in s.148 of the SOLA Act to amend s.78(4) to delete the mandatory requirement to consult Comcare and provide that an employer "may" arrange

for a referral to a Comcare Officer. Oddly, the Government do not propose any other dispute mechanism in its place.

The contemporary thinking on compliance with a statutory obligation is a regime of graduated enforcement. Yet in this case, because Employers/Insurers for whatever reason have failed to comply with the Seafarers Act, then the Act should be changed.

Workers Compensation Changes

Extending the definition of 'medical treatment'

The AMOU would support extending the definition of 'medical treatment' so as to include further types of compensable treatment.

Reducing the binaural hearing loss threshold

The AMOU would support the reduction of the threshold for compensation for a permanent hearing impairment that is a binaural hearing loss from 10% to 5%.

The threshold for impairment compensation under the Seafarers Act for all injuries (excluding impairments to the fingers, toes or senses of taste and smell) is 10%: s.37(7). This is on a whole of person basis.

The threshold under the SRC Act is the same except in relation to claims for hearing loss. Since 2001, the SRC Act has provided for a threshold in hearing loss cases of 5% on a binaural basis: s.25(7A). A binaural loss is divided by 2 to convert to a whole of person impairment. Therefore the SRC Act threshold is a quarter of the Seafarers Act threshold.

To recover compensation for hearing impairment under the Seafarers Act the seafarer must establish a binaural loss of 20%. This is a very significant level of impairment, particularly after the automatic deductions made for age related changes (prebysusis) are taken into account. As a result most claims for industrial deafness for seafarers fail to reach the threshold. Given the nature and extent of most seafarers noise exposure this is an area requiring urgent reform.

The current Seafarers Act threshold is out of step with all other jurisdictions. As an example the threshold in NSW is 6% binaural (or 3% on a whole of person impairment basis).

The maritime Unions made this point 11 years ago in 2005.

Reduction in compensable diseases

The AMOU maintains its opposition to the change from 'material degree' to 'significant degree'.

What constitutes a contribution to 'a significant degree' is not defined in the SRC Act although the following matters may be taken into account:

(a) the duration of employment;
(b) the nature of, and particular tasks involved in, the employment;
(c) any predisposition of the employee to the ailment or aggravation;
(d) any activities of the employee not related to the employment;
(e) any other matters affecting the employee's health.

The other guidance given is the admonition that "significant degree means a degree substantially more than material". That perhaps goes without saying but it does not necessarily provide any further guidance.

The decision to amend the definition of disease to incorporate a "significant contribution" test arose out of concern in Comcare about the high number and cost of psychological injury claims from Government agencies. In fact of the number of AAT cases dealing with the amended test since its introduction into the SRC Act, the vast majority relate to psychological injuries.

The same imperative cannot be said to exist in the maritime industry. The experience in the Seacare Scheme is that there are relatively few psychological injury claims with an almost insignificant number being accepted. We submit this demonstrates there is little or no propensity to claim for these conditions and therefore no cost rationale which would support the need to alter the current definition of disease by the adoption of an employment contribution test.

In other jurisdictions the addition of a "significant contribution test" has done nothing to add clarity. A similar provision in the *NSW Workers' Compensation Act* requiring employment to be a substantial contributing factor (Section 9A) has been the subject of several decisions of the NSW Court of Appeal without delivering any significant guidance about what the words really mean as a matter of practice. In the decision of *Badawai v Nexon Asia Pacific Pty Ltd [2009] NSWCA 324* the court concluded that the words "substantial contributing factor" mean no more than "real and of substance".

For practical purposes in almost every case where the disease arose out of or in the course of employment, it can be concluded that employment was a contribution to a significant degree.

<u>Exclusionary Provision</u>

The AMOU maintains its opposition to the change from 'disciplinary action' to 'reasonable administrative action'.

In our view, the Seafarers Act currently contains an adequate exclusionary provision. The current definition of injury excludes a disease or injury if "suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain promotion, transfer or benefit in connection with his or her employment".

The main point of departure between the Seafarers Act and the SRC Act provision is the latter refers to a disease or injury suffered as a result of reasonable administrative action. Administrative actions

are further defined to include appraisal of work performance, counselling, suspension, disciplinary action and things done in relation to failures to obtain promotion, transfer or other benefit.

For practical purposes the main point of distinction between the 2 provisions is limited to administrative actions which fall short of actions in relation to promotions, transfers or other benefits in connection with employment. While they might be hard to envisage and our submission is that the current SRC Act provision adds little beyond what is currently contained in the Seafarers Act provision and no reason for change has been demonstrated or made out.

Journey provisions

The SRC Act was amended to exclude journey claims in April 2007. A significant argument advanced to exclude coverage was said to be the lack of the ability of an employer to control events outside of its workplace and that it was unfair in those circumstances to impose an obligation to cover journeys.

That argument does not hold the same sway in relation to seafarers. Seafarers have unique journey arrangements and usually live a considerable distance from their places of engagement. Furthermore, the nature of the seafarers roster means that there are very few work journeys as these will only occur at a minimum of 4 weeks or so.

This can be contrasted with most Australian workers who make a work journey twice a day. Most seafarers work journeys involve air travel which represents a far less risky mode than that of motor vehicle travel.

In these circumstances the number of journey claims have been relatively few.

The Seafarers Act excludes liability for a journey where the route taken substantially increases the risk of injury, compared with a more direct route or where there was an interruption to the journey which increased the risk of injury: s.9(3).

We do not understand why there is a need for these amendments (9(3A), 9(3B) and 9(C)).

Pension Age

The “pension age” proposal is a step in the right direction.

Assuming the pension age was 67; and assuming the seafarer was 66.5 years when he was injured; the injured seafarers weekly payments are cut off after 26 weeks.

The SRC Act provides that payments extend to a maximum of 104 weeks (whether consecutive or not) and regardless of when the incapacity commences.

Catastrophically injured workers

The AMOU broadly supports any amendments to legislation that would improve the benefits for catastrophically injured worker.

We support lifting the maximum payment to an amount in excess of $449 per week; and the removal of the 28 day preclusion period.

Conclusion

We submit the Senate Education and Employment Legislation Committee should recommend the Australian Senate decline to pass the Seafarers Safety and Compensation Bills package.