MUA Submission:

Seafarers' Safety and Compensation Bills Package Inquiry

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Senate Education and Employment Legislation Committee

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1. Introduction

The Maritime Union of Australia (MUA) represents approximately 14,000 workers' in the shipping, hydrocarbons, recreational dive tourism, stevedoring, port services and diving sectors of the Australian maritime industry. Approximately half the MUA membership are seafarers, primarily Integrated Ratings, who work alongside Deck Officers (Masters/Mates) and Engineers.

Seafarer members of the MUA work in a range of seafaring occupations across all facets of the maritime sector including on coastal cargo vessels (dry bulk cargo, liquid bulk cargo, refrigerated cargo, project cargo, container cargo, general cargo) as well as passenger vessels, towage vessels, salvage vessels, dredges, ferries, cruise ships, recreational dive tourism vessels. In the offshore oil and gas industry, MUA members work in a variety of occupations on vessels which support offshore oil and gas exploration e.g. on drilling rigs, seismic vessels; in offshore oil and gas construction projects including construction barges, pipe-layers, cable-layers, rock-dumpers, dredges, accommodation vessels, support vessels; and during offshore oil and gas production, on Floating Production Storage and Offtake Tankers (FPSOs), FSOs and support vessels. MUA members work on LNG tankers engaged in international LNG transportation. Many former ship based seafarers work in onshore roles.

For Seacare claims, MUA members are found mainly in the 'Integrated Rating' (IR) and 'Catering' categories, which made up 73% of the total accepted Seacare claims in 2015-16 (71 out of 97 accepted claims). MUA members who are IRs and caterers work in the most dangerous areas of the vessel: on deck and in the galley, the two spaces that made up 59% of accepted Seacare claims for injury.[1]

[1] *2015-16 Compendium of Seacare Statistics*, p. 14,16.

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3. Recommendations

Recommendation: Delete S.148 of the SOLA Bill that makes the dispute resolution process through Comcare optional.

Recommendation: The SOLA Bill should introduce penalties for insurers and employers compliance with the time limit in SRCA s.79 and the dispute resolution process in s.78(4).

Recommendation: We propose the following coverage for Seacare, which could also be incorporated into the future maritime sector of the WHS Act. This would involve significant amendment to s.82-84 of the SOLA Bill.

1. Maintain as the sole coverage provision SRCA sub-section 19(1) in its existing form (s.82 of the SOLA Bill repeals s. 19 is entirely).

2. Maintain the repeal of the alternate coverage provisions contained in SRCA sub-sections 19(2)-(5).

3. Adopt the definition of "prescribed ship" contained in Section 62 (3A) of the SOLA Bill, but delete reference to "offshore floating storage or production unit" and "offshore industry mobile unit". These vessels are covered under the existing scheme if subject to a declaration under either Section 8A of the former *Navigation Act*, or a declaration under Section 19(1C) of the SRCA.

4. Delete 3A (3) in Section 62 of the SOLA Bill "The legislative rules may declare a vessel not to be a prescribed vessel". This could be used to arbitrarily deny workers compensation coverage. Such a vessel would not be allowed to opt back into coverage (section 9.6 and 11).

5. Amend the opt-in provision in of the SOLA Bill (Division 3, 25E(1)(a) in s.84) to apply to 'vessels' rather than just 'prescribed vessels'.

Recommendation: If the definition of state 'designated waters' must be adopted, it should be 3nm from the Territorial Baseline, as in the *Coastal Waters (State Powers) Act 1980* and the *Petroleum (Submerged Lands) Act,* not 12n,. This would reduce (but not eliminate) the geographic areas of confusion where the 12nm limit runs through the middle of offshore oil and gas fields.

Recommendation: Compensation for seafarers must always be designed with a view that seafarers are part of a national labour pool and most do not work in their state of residence. There are considerable practical difficulties in accessing workers' compensation in a state you do not live in.

Recommendation: Amend the SOLA Bill to reflect the SRCA coverage clause recommended earlier in this submission. Amend s.191 of the SOLA Bill to reflect this changed coverage clause in the maritime sector of the WHS Act.

Recommendation: Delete s. 229 of the SOLA Bill that reduces the power of PIN notices issued by Health and Safety Representatives.

Recommendation: Delete s. 195 of the SOLA Bill that removes the right of unions to participate in the development of safety codes of practice in the maritime sector.

Recommendation: Amend Section 38(3) of 'Schedule 3 – Application and transitional provisions' of the SOLA Bill to ensure that preserved Codes of Practice are only cease to have effect when the Minister has approved a replacement Code of Practice to cover offshore supply vessels and blue water seafarers.

Recommendation: speed up the revision of the Offshore Supply Vessel Code of Practice to incorporate the lessons learned from the death of Andrew Kelly.

Recommendation: Delete s.228 of the SOLA Bill which removes the requirement for employers to provide Comcare with lists of HSRs.

Recommendation: Employers should not be able to opt-in part-crews or single employees on any vessel. This creates greater uncertainty, particularly where there is no stringent requirement or guidelines for Employers to notify the employee(s) or registered organisations of any opt-in declaration.

Recommendation: Amend the opt-in provision in of the SOLA Bill (Division 3, 25E(1)(a) in s.84) to apply to 'vessels' rather than just 'prescribed vessels'.

Recommendation: Employees must be individually notified of possible changes to their compensation scheme, both to their home address and on board the vessel. The relevant unions much also be directly notified. A 30-day comment period is required. An accurate list of prescribed vessels must be published on the Seacare website.

Recommendation: the definition of 'harbour' in the SOLA Bill (s.43) should be amended to ensure that it does not include any unsheltered locations such as offshore installations, particularly if it is used to exclude vessels from Seacare or WHS coverage.

Recommendation: the offshore vessel definitions in the SOLA Bill (s.63) should be reviewed to ensure they are not unnecessarily broad, particularly as they are being used in the Bill to exempt vessels from Seacare coverage, and consequential gaps in coverage are created.

Recommendation: delete s.176 of the SOLA Bill that repeals Part 8 of the SRCA and abolishes the Seacare Authority, and make further amendments to the SOLA as necessary to

retain an independent Seacare Authority with strong maritime industry expertise and representation from all three maritime unions.

Recommendation: proper maps of designated waters and the relevant petroleum installations, an audit of how the changes to the coverage provisions will affect current vessels in Seacare, and a comparison of compensation levels between Seacare and state schemes should be provided to Parliament before the SOLA Bill is voted on.

4. Summary

There is a problem with the high rate of disputation in the Seacare seafarers compensation scheme. An astonishing 60% of claims went to the Administrative Appeals Tribunal (**AAT**) in 2015-16.[2] These appeals are lengthy, costly and difficult for seafarers who are already struggling to deal with a serious injury. The Government contends that this problem is caused by "the lack of clarity over coverage and different incentives of employee and employers" due to different levels of coverage in state and Seacare schemes.[3] Unfortunately this argument completely misrepresents the reasons for this high rate of AAT appeals.

In this submission, we demonstrate:

- That the high rate of Seacare AAT appeals is caused by insurers and employers:
  a) delaying making a determination on claims; and
  b) avoiding the initial dispute resolution process required under s.78(4) of the *Seafarers Rehabilitation and Compensation Act 1992* (**SRCA**).
  The content of these appeals is rarely coverage but more typical compensation disputes: liability per se, and the extent and duration of incapacity (Section 6 of this submission).
- An extraordinary 61 out of 97 Seacare claims in 2015-16 went to the AAT in 2015-16, and these cases took 396 days to settle, on average (Section 6). Yet only 6 claims were rejected in that year.
- The high rate of disputation could be addressed by introducing stronger penalties for:
  a) non-compliance with time limits on determination (s.79(6) of SRCA); and
  b) for not using the SRCA 78(4) dispute resolution process as required.
- Yet instead of addressing this problem, the *Seafarers and Other Legislation Amendment Bill (***SOLA Bill**) proposes to amend s. 78(4) to make the initial dispute resolution process optional ("may" instead of "must"). This will only increase the disputation and length of time to settle claims.

[2] Seafarers' Safety, Rehabilitation and Compensation Authority, *2015-16 Annual Report Seacare*, p. 17.
[3] *Seacare Reforms Regulation Impact Statement September 2016* p.ix, which is contained in the *Seafarers and Other Legislation Amendment Bill 2016 - Explanatory Memorandum*.

- Further, the Government proposes a completely new coverage clause for Seacare that not only does not address these reasons for disputation, but will lead to even greater disputes and uncertainties as significant numbers of vessels will no longer be included in Seacare coverage (Section 9).

We do acknowledge that the *Samson Maritime Pty Ltd v Aucote* decision and the replacement of the *Navigation Act 191*2 with the *Navigation Act 2012* has caused concern over the coverage of the Seacare scheme. However, the Government's proposal for a wholesale change in coverage of the SRCA goes far beyond what is needed to fix the (limited) problem that exists. The new coverage proposals in the SOLA Bill will not include a significant number of vessels and seafarers who are currently covered by the Seacare scheme. The new coverage proposals will introduce more uncertainty by creating new maritime jurisdictions and definitions and throwing out over 100 years of case law in this complex area.

In this submission, we propose:

- Mechanisms for reducing the disputation in the Seacare scheme and speeding up the time to settle claims (Section 6).
- A simpler mechanism for resolving the Seacare coverage concerns that will lead to less disputation and uncertainty. This coverage clause could also be used for defining the maritime sector of a harmonised Commonwealth WHS Act (Sections 8 and 10.4)
- Other improvements to the SOLA Bill that protect the health, safety and rights of seafarers, and of workers in other industries. These are summarised in the Recommendations (Section 3).

In making this submission we have drawn on the experience of our seafarer members: in November 2016, 1,594 seafarers who are MUA members participated in an online survey about their experience of workplace injuries and of claiming compensation for them. We have also sought advice from David Trainor, partner at McNally Jones Staff, who has acted as a legal representative for injured seafarers since the 1980s.

The MUA is strongly opposed to the passage of the SOLA Bill in its current form because it:

- Attacks maritime workers' ability to get proper compensation for injuries they suffer in the dangerous jobs they work in by introducing a new coverage clause that does not include many vessels currently covered by Seacare. We are currently carrying out an audit of the 219 vessels covered by Seacare in 2015-16 to determine the impact of the proposed coverage definition, which will be submitted to the Inquiry by 19 December (Section 9).

- Consequently, many seafarers will be pushed into inferior State and Territory compensation schemes in a state they do not reside in (especially those working in WA and the NT), or potentially into a limbo between schemes. Approximately 70% of MUA members who have filed a compensation claim live in a different state than they were injured or regularly work in, which can cause significant difficult in accessing lawyer and Independent Medical Examiners with the appropriate accreditation and expertise (Section 9).

- These vessels would be pushed to state OHS inspectorates which are not as well equipped to do inspections as the AMSA OHS inspectorate is (Section 9.6).

- A significant reduction in vessels numbers would threaten the future survival of the already-small national Seacare scheme.

- The proposed opt-in mechanism for Seacare is restricted to 'prescribed vessels', and this proposed definition excludes categories of vessels currently covered by the scheme, such as FPSOs and offshore accommodation units. These vessels and vessels like them would therefore be prevented from remaining in the Seacare scheme even if they wished to (section 11).

- Increases the disputation over coverage of the scheme by getting rid of a coverage clause that is well-known and understood through significant case law, and introducing a whole number of new definitions and concepts (Section 9).

- Introduces a similar level of uncertainty and disputation into WHS coverage as with Seacare coverage, and recreates and possibly expands the existing gap between maritime and offshore OHS legislation (Section 10.4).

- Attacks the ability of maritime unions to ensure that workers are represented in important decisions about the scheme, for example, whether vessels are exempted from it, by abolishing the Seacare Authority Board and replacing it with an advisory group called at the discretion of the Safety, Rehabilitation and Compensation Commission chair (Section 13).

- Removes the right of unions to participate in the making of safety Codes of Practice in the maritime industry. This right is entrenched in the WHS Act for every other industry in Australia. Makes provision for the current blue water and offshore supply vessel code of practice to be repealed before a replacement Code of Practice is in place (Section 10.2).

- The legislation also makes some significant changes to the Commonwealth WHS Act that will apply across multiple industries and not just the maritime industry. These

include undermining the ability of Health and Safety Representatives (HSRs) to use Provisional Improvement Notices (PIN notices) to fix safety issues in the workplace (Section 10.1).

- The Regulatory Impact Statement (RIS) accompanying the Bills falls significantly short in evaluating the impact of the bills. It does not include a map of the new jurisdiction the legislation relies on (state and territory 'designated waters'), does not assess what vessels will be affected by being moved out of coverage, and does not assess what the impact will be on seafarers who are moved onto State and Territory workers' compensation and OHS schemes (Section 15).
- The effect of the Bills will be to push more vessels into state and territory workers' compensation, OHS legislation, and OHS inspectorates. This runs counter to the initiatives recently taken by Australian Governments to create a more uniform national maritime system (for example, with the *Navigation Act 2012* and the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*).
- The MUA wants the maritime sector harmonised into the WHS Act, but not in this way. We propose an alternate mechanism for harmonising maritime WHS in Section 8 and 10.

5. Health and safety of seafarers, and the Seacare scheme

All studies indicate that seafaring is a very hazardous job, and that seafarers have a fatality rate much greater than the average worker in all countries where studies have been carried out.[4] A recent survey of global injuries and fatalities for seafarers concludes:

> Whether measured in terms of occupational mortality, injuries, physical or mental ill health or incidents of harm as the result of violence, studies on the nature and extent of work-related morbidity and mortality reviewed in the previous section show that seafaring remains a hazardous occupation. *Indeed, by these measures it is clearly ranked among the most hazardous of occupations*.[5]

[4] David Walters and Nick Bailey, 2013, *Lives in Peril: Profit or Safety in the Global Maritime Industry?* New York: Palgrave McMillan, p.18-35.

[5] David Walters and Nick Bailey, 2013, *Lives in Peril: Profit or Safety in the Global Maritime Industry?* New York: Palgrave McMillan, p.35. Emphasis added.

The hazardous nature of seafaring work was reflected in our survey of seafarers which found:

- 38% of 1,594 respondents had worked on a ship where there had been a serious injury or fatality to another member of the crew. Such events can have a lasting impact on any person.
- 28% of respondents had made a compensation claim for an injury or disease due to their own seafaring work.

Unfortunately, the Regulation Impact Statement in the Explanatory Memorandum for the SOLA Bill implies that it is the administrative design or level of benefits in the Seacare scheme that is responsible for the high rate of claims in the industry. This is misleading.

The MUA supports the harmonisation of the maritime sector in the WHS Act as a measure to improve safety. However, the current proposals leave gaps and will cause uncertainty in WHS coverage. It must also be recognised that there are a number of structural features of the seagoing industry that increase the hazards that seafarers face in the course of their work, namely:

- The operation and manipulation of heavy and often massive objects and machinery, 24 hours a day, in an environment of constant motion and change and sometimes poor weather.
- Fatigue. As the Safe Work Australia 'Guide for Managing the Risk of Fatigue at Work' states, "fatigue can adversely affect safety at the workplace" (p.4). According to the risk factors for fatigue in Appendix A of the Guide, most offshore supply crew would answer 'Yes' to *all 17 questions* used to assess the risk of fatigue. The Guide says that, "If the answer is yes to *any* of these questions, fatigue risks may need to be further assessed and control measures implemented".[6]
- Living in your workplace. All breaks, meals and rest take place in a high-risk work environment for 3-6 weeks at a time. In addition to the known safety effects of fatigue in shore-based 24-hour shift work, sleep at sea is frequently disturbed due to noise from the constant operation of the engines and other machinery, significant vibration carried through the steel hull and bulkheads, and the ship's movement and activities.
- Isolation and lack of access to medical treatment, leading to significant delays in treatment and potential complications of injuries.[7]

[6] Safe Work Australia, *Guide for Managing the Risk of Fatigue at Work*, p.16, our emphasis.
[7] In the North-West Shelf oil and gas fields, most offshore facilities are within 250km of Onslow and Karratha. However, the hospital facilities in Onslow and Karratha are limited, so major injuries may need to be treated in Perth, which is 1,200-1,400km away. However, gas fields like the Alaric field are over 500km offshore, operating in the higher risk environment of ultra-deepwater drilling

- Particularly in the offshore industry, project-based work with significant time pressures.
- Reduced numbers of crew due to cost pressure from companies and upstream contractors.

The main objective of any compensation scheme for seafarers is to ensure that they are comprehensively covered and fairly compensated for injuries and diseases they do suffer. Even the most generous compensation scheme cannot make up for the loss of quality of life that workers can suffer as a direct result of a work-related injury. As one MUA member put it in the survey, "to get less than 2 years pay for having my life ruined and left in pain for the rest of my life is crap".

In reforming the Seacare scheme, it must be remembered that it is uniquely difficult for injured seafarers to return to work until they have reached 100% capacity. If they are on board a ship they must be prepared to deal with an emergency at all times. There are no 'light-duties' at sea, particularly for IR and caterers in the offshore industry, who make up most of the people covered by the Seacare scheme. 66% of Seacare vessels are in the offshore sector, and the offshore sector has the largest proportion of both employees and claims in the Seacare scheme.[8]

When seafarers are injured, they could use this time to revalidate and update training and certification, particularly if new requirements are brought in as a result of maritime sector harmonisation into the WHS Act. These factors require the specialised maritime knowledge that the Seacare Authority provides, and are an important reason why it should not be abolished.

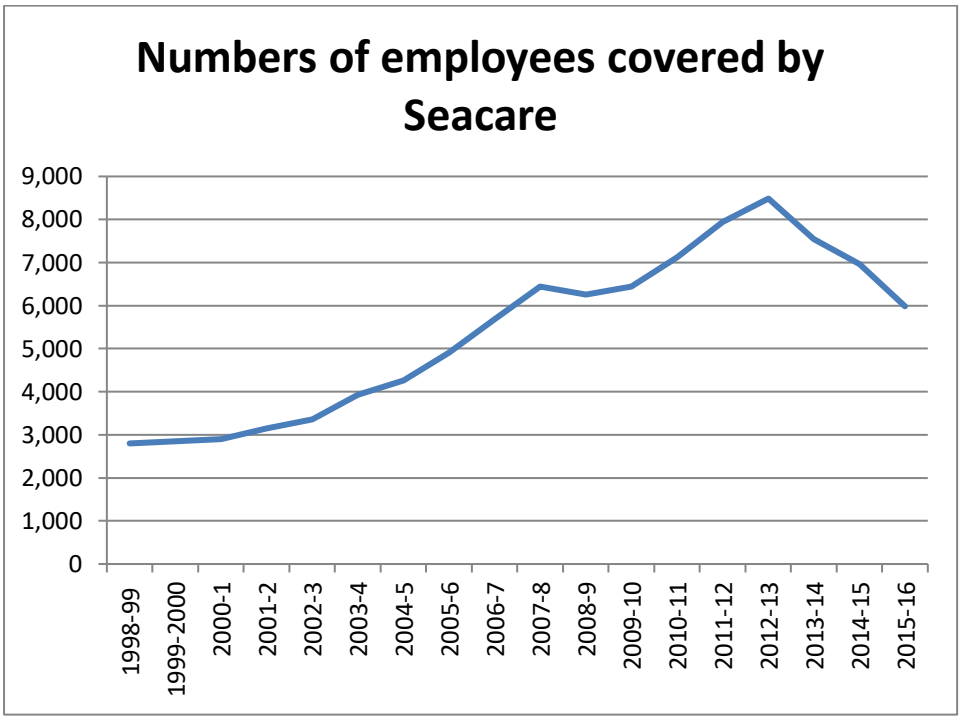
We do not accept that administrative convenience or lower cost are acceptable objectives for reforming a workers' compensation scheme. The objective must always be to assist the worker to recover fully, and to return to work in their area of skill or expertise when they are ready.

Despite a widespread perception that the Seacare scheme is shrinking, the number of workers in the scheme in 2015-16 was approximately double that of the initial 12 years of the Seacare schemes existence (1992-2004). An offshore oil and gas construction boom fuelled a spike in number of employees in Seacare from 2007-2013, while enrolment in the scheme is now returning to more normal levels (Figure 1).

(1,960m). In the Timor Sea oil fields, all facilities are over 250km from Darwin, with some up to 1000km from Darwin. If a helicopter needed to be flown from Darwin, a medical evacuation could take 9-10 hours.

[8] Seafarers' Safety, Rehabilitation and Compensation Authority, *2015-16 Annual Report Seacare*, p.vii, *2015-16 Compendium of Seacare Statistics*, p. 10.

Figure 1: Numbers of employees covered by Seacare 1998 to the present.



Source: 1998-99 Seacare annual report, 2004-5 Seacare annual report, 2009-10 Seacare annual report, 2014-15 compendium of Seacare statistics p.6, 1.

6. Delays, appeals and disputation in Seacare claims

It is entirely incorrect for the Government to suggest that the supposed "lack of clarity over coverage … manifests itself through a large number of disputed claims in the Seacare scheme."[9]

There have only been three Seacare coverage disputes that have ended up in the Federal Court since 1993 (see Section 7). The vast majority of disputes which end up in the AAT relate to the same types of issues which arise in every compensation jurisdiction; namely disputes concerning liability per se, and the extent and duration of incapacity.

We can identify two significant factors which contribute to the disputation rate. Both factors stem from the failure of employers and their insurers to deal with claims in accordance with the requirements of the SRCA.

Firstly, all the disputes which end up in the AAT do so because of either a determination by an employer or insurer to decline liability, or because the employer/insurer has failed to make any determination (resulting in a deemed refusal of the claim under Section 79(6)).

[9] *Seacare Reforms Regulation Impact Statement September 2016,* p.ix.

The number of claims going to the AAT where no determination has been made is not available, but Seacare employers and insurers have a poor track record in relation to compliance with their statutory obligations. According to the Seacare Annual Reports, the percentage of claims determined within the statutory time limits in recent years has been poor (Table 1).

Table 1: Percentage of Seacare claims resolved with statutory time limits.

Year	Percentage of Seacare claims resolved within statutory time limits
2012 – 2013	79%
2013 – 2014	73%
2014 – 2015	86%
2015 – 2016	67%

Source: Seacare annual reports.

The second factor contributing to the higher than average disputation rate is the failure of employers and insurers to comply with the alternate dispute resolution mechanism contained in the SRCA. Section 78 provides that an employee may ask an employer to reconsider a determination to decline a claim. Sub-section (4) provides that on receipt of such a request the employer must arrange for a Comcare Officer to assist the employer in reconsidering the determination. This provision required an employer to obtain an unbiased advisory decision. Frequently, those advisory opinions made recommendations that determinations be set aside and liability accepted, particularly when the grounds for denial of liability were weak or spurious. Not every employer or insurer, however, complies with the obligation to consult with Comcare.

It has been the invariable practice of the largest Seacare insurer, Allianz, not to do so in nearly every case. It is able to do so because there is no effective sanction in the Act for a failure to refer a matter to Comcare.

Although (understandably) there is no clearly identifiable data on claims not referred to Comcare, there is some information which shows the extent of the avoidance of the s. 78(4)

dispute resolution mechanism. It could be assumed that as there is a requirement to refer all disputed claims, if there was full compliance, that there would be an equivalency between claims referred and applications filed. This, however, is not the case. According to data from Seacare, perhaps less than half of all disputed claims are referred to Comcare, perhaps down to only a quarter in 2015-16 (Table 2).

Table 2: Comparison between claims referred to Comcare and AAT applications filed 2012-2016.

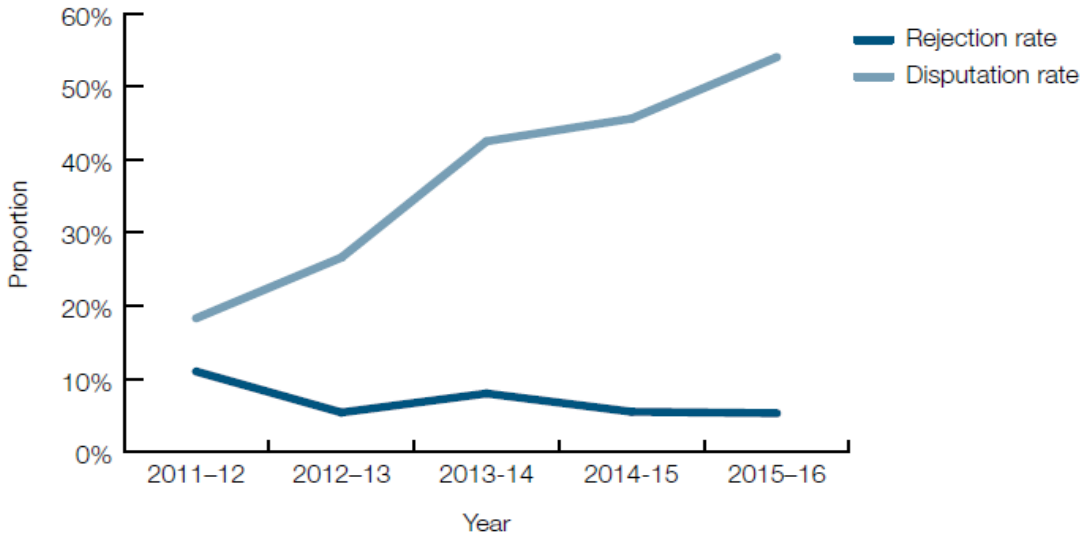
Year	Comcare Referrals	AAT Applications	Compliance Rate with s.78(4) and/or s.79 time limit
2012 – 2013	28	64	44%
2013 – 2014	45	85	53%
2014 – 2015	34	83	41%
2015 – 2016	16	61	26%

Source: *2015-16 Compendium of Seacare Statistics*, p.20 and 22.

In 2015-16 the length of time for claims referred to the AAT to be determined increased from 287 days to 396 days, which is appalling, particularly considering that 61 of 97 claims went to the AAT in that year. The extraordinary waste of time and effort that this represents is emphasised by the fact that only 6 claims were rejected in 2015-16, the lowest number for several years.[10] Figure 2 shows the rate of AAT appeals rapidly increasing, while the rejection rate of claims declines. It appears that seafarers making legitimate claims for injury compensation are being dragged through a difficult and lengthy claims process for no good reason.

[10] *2015-16 Compendium of Seacare Statistics*, p.21-2.

Figure 2: AAT claims and levels of claim rejection in the Seacare scheme.



Source: *2015-16 Compendium of Seacare Statistics*, p.21.

Yet instead of trying to address this problem by imposing a sanction for non-compliance by employers with s.78(4) dispute resolution process and the time limit in s.79, the Government proposes to scrap the mandatory requirement to refer matters to Comcare. The draft SOLA Bill (s.148) proposes to amend Section 78(4) to delete the mandatory requirement and provide that an employer "may" arrange for a referral to a Comcare officer, instead of "must".

We cannot understand why the Government would propose this measure. No other alternate dispute mechanism is proposed in the Bill.

Recommendation: Delete S.148 of the SOLA Bill that makes the dispute resolution process through Comcare optional.

Recommendation: The SOLA Bill should introduce penalties for insurers and employer's compliance with the time limit in SRCA s.79 and the dispute resolution process in s.78(4).

7. Seacare Coverage: The "uncertainty" argument

From the outset, it should be noted that any uncertainty in the coverage of the Seacare scheme only found full voice after the Federal Court handed down its decision in *Samson Maritime Pty Ltd v Aucote*[11]. The Court upheld the decision of the President of the Administrative Appeals Tribunal who applied the alternate coverage provisions relying upon

[11] [2014] FCFCA 182

the corporation's provisions imposed by Sections 19(2) and (5) of the SRCA. The Court found that the scheme applied to any employee of a trading, financial or foreign corporation without the requirement to establish that the vessel was engaged in trade or commerce overseas or between the boundaries of a State or within a Territory. As a result of this finding, the Court did not need to rule on the second basis for coverage found by the President of the AAT; namely that the work the vessel did in Port Sampson (being the construction of a wharf for use in the export iron ore trade) was engagement in overseas trade or commerce within the meaning of Section 19(1) SRCA.

It is incorrect to suggest that there was much real uncertainty in relation to the coverage provisions in the Seacare scheme prior to *Aucote*.

The "problem" created by the *Aucote* decision was largely resolved by the passage of the *Seafarers' Rehabilitation & Compensation and Other Legislative Amendments Act* 2015 (**the Amendment Act**). That Act removed reference to the alternate coverage relating to the employment of employees of trading, financial or foreign corporations.

In practical terms, coverage in every seafarer's compensation claim prior to *Aucote* was based on the application of sub-section 19(1) and was not based on the corporation's provisions contained in sub-sections 19(2)-(5).

Sub-section 19(1) provides as follows:

> "*This Act applies to the employment of employees on a prescribed ship that is engaged in trade or commerce:*
>
> *(a) between Australia and places outside Australia; or*
>
> *(aa) between two places outside Australia; or*
>
> *(b) among the states; or*
>
> *(c) within a Territory, between a State and a Territory or between two Territories.*"

This provision mirrors the trade and commerce constitutional power. In Australian legal parlance, this is an extraordinarily well-recognised phrase. It has stood the test of time and has been the cornerstone of the SRCA since 1993, and the preceding legislation (the *Seafarers' Compensation Act*) since 1911. Its terms are well understood. There is no evidence that the provision gives rise to any real uncertainty. If that were the case, it could be expected that there would be a significant number of cases illustrating those

uncertainties. In fact, (apart from *Aucote*) there have been only two Federal Court cases which involved consideration of Section 19(1).[12]

In *Tiwi Barge Service Pty Ltd v Stark*[13] the Court considered whether a seafarer died in the course of an interstate voyage when the vessel capsized before reaching its destination and whilst still in Northern Territory waters.

In *Hingston v Pacific Tug Australia Pty Ltd*[14] the Court considered whether a seafarer (who joined the vessel in Fremantle) was engaged in an overseas voyage when he was injured in Dampier en-route to New Guinea.

Three appellate decisions in the course of a quarter of a century would not support the Government's contention that "scheme participants have significant difficulty determining with certainty whether a ship and is employees are covered by the Seacare scheme".[15]

All employers have an obligation to ensure that their employees are appropriately covered for workers' compensation. A maritime employer's obligation to do so is no more onerous than the task faced by any national employer who has employees working in different States and covered under the various State compensation schemes.

Vessels may well move in and out of coverage when their voyaging patterns alter, but this is a relatively infrequent event, and there is no evidence to suggest that this was a significant problem.

Nothing prevents a maritime employer in obtaining insurance to cover its employees under both the Seacare scheme and whatever relevant state workers' compensation act might be considered applicable. In fact, it was common ground in the *Aucote* case that the employer had coverage under both schemes. It was the employer's insurers who argued that the Seacare scheme did not apply and that Mr Aucote should abandon that claim and pursue an entitlement under the inferior Western Australian workers' compensation legislation.

Furthermore, the Government concedes that the supposed "lack of clarity over coverage" does not create any administrative burden significant enough to affect "overall employment or business activity in the maritime industry".[16]

Lastly, if it were the case that employers were under significant administrative burden and felt uncertain as to what insurance arrangements to put in place, it could be expected that this would be reflected in a spike in uninsured claims and the number of claims on the

[12] There have been other SRCA appeals to the Federal Court from the AAT, but they relate to matters other than coverage.
[13] [1997] FCA 874
[14] [2012] FCFCA 119
[15] *Seacare Reforms Regulation Impact Statement September 2016*, p.iv.
[16] *Seacare Reforms Regulation Impact Statement September 2016,* p. viii.

Seafarers' Safety Net Fund established by the SRCA. That Fund covers, inter alia, the liability of employers who are unable to meet their liabilities under the Act. According to the Seacare Annual Reports, only one claim has been made on the Fund in the past three years (Table 3).

Table 3: Number of claims under Seafarers Safety Net Fund

Year	Number of Seafarers Safety Net Fund claims
2013 – 2014	Nil
2014 – 2015	Nil
2015 – 2016	1

Source: Seacare annual reports.

8. MUA proposed Seacare (and WHS) Coverage

If the policy decision was taken that the existing SRCA coverage provision (Section 19) required re-writing in order to address the difficulties perceived to arise by the *Aucote* decision, logically the re-write would be limited to removing reference to the corporation's clauses (sub-section 19(2) – (5)). In large measure the 2015 Amendment Act achieved that result, although within a limited time period.

The coverage clause proposed in the SOLA Bill (Section 25B in s. 82-84) goes far beyond what is necessary to address any legitimate concerns about the existing law as it was interpreted in *Aucote*. The proposal will create significant uncertainty and will exclude vessels and seafarers from the scheme, which is dealt with further in paragraph 3 below.

Recommendation: We propose the following coverage for Seacare, which could also be incorporated into the future maritime sector of the WHS Act. This would involve significant amendment to s.82-84 of the SOLA Bill.

1. Maintain as the sole coverage provision SRCA sub-section 19(1) in its existing form (s.82 of the SOLA Bill repeals s. 19 is entirely).

2. Maintain the repeal of the alternate coverage provisions contained in SRCA sub-sections 19(2)-(5).

3. Adopt the definition of "prescribed ship" contained in Section 62 (3A) of the SOLA Bill, but delete reference to "offshore floating storage or production unit" and "offshore industry mobile unit". These vessels are covered under the existing scheme if subject to a declaration under either Section 8A of the former *Navigation Act*, or a declaration under Section 19(1C) of the SRCA.

4. Delete 3A (3) in Section 62 of the SOLA Bill "The legislative rules may declare a vessel not to be a prescribed vessel". This could be used to arbitrarily deny workers compensation coverage. Such a vessel would not be allowed to opt back into coverage (section 9.6 and 11).

5. Amend the opt-in provision in of the SOLA Bill (Division 3, 25E(1)(a) in s.84) to apply to 'vessels' rather than just 'prescribed vessels'.

A proviso also could be added to the existing sub-section 19(1) to provide that no coverage exists in relation to vessels which are used in the normal course of operations within a port or harbour. That model would exclude harbour tugs, launches and other working vessels carrying out the sort of activities involved in the *Aucote* case (namely the construction of a wharf). That model, in our view, would achieve everything which the employers could reasonably require. However, if such a measure was adopted, the proposed definition of 'harbour' in the SOLA Bill would need to amended as it includes areas which are not at all sheltered, such as an' offshore terminal' (Section 12).

9. Problems created by the proposed coverage clause in the SOLA Bill

9.1 Exclusion of vessels

The coverage clause proposed in the SOLA Bill (25B in s. 84) does not address the considerable problems seafarers are facing, in terms of the disputation and delays in getting proper compensation (Section 6). It is also likely to seriously impact on the number of vessels covered by the Seacare scheme. Exactly to what extent will be difficult to determine because of the number of matters which will have to be considered to determine whether coverage exists. At the present time, this question is determined based simply on whether the vessel is engaged in interstate or overseas trade and commerce, and that question can usually be determined by looking at the voyage in question when the seafarer was injured.

The MUA is carrying out an audit to approximate the number of vessels that will not be included in Seacare coverage if the new coverage clause is passed, and we will submit this to the Committee on 19 December.

The number of vessels covered by the Seacare scheme is likely to be reduced in the following ways:

(a) Under the present coverage provision, any vessel which in the course of its usual operations engages in an overseas or interstate voyage will be covered. Under the proposal, that vessel would only remain in the scheme if the majority of its voyages are overseas or interstate. Inevitably, there will be vessels which will be caught by this provision and excluded from the scheme. Their exclusion is likely to have an adverse impact on the viability of the scheme, and place increasing pressure on premiums.

(b) Under the existing scheme, all vessels which engaged in voyages within the Northern Territory came within the scheme. They will now no longer be covered unless they operate for the majority of the time outside of the Territory.

(c) The proposed definition of "prescribed ship" contained in Section 3A excludes offshore industry vessels which are covered under the existing scheme in sub-section 19(1A), provided they held a declaration under sub-section 8A of the repealed *Navigation Act*, or sub-section 1C of the SRCA provision. Moreover, these vessels are also prevented from opting into the Seacare scheme even if the employer wishes (Section 11).

(d) The sheer complexity of the matters to be ascertained for the purposes of determining coverage will guarantee that vessels will be lost to the scheme.

9.2 "Designated waters"

This is a new term and required for the purposes of Section 25B. "Intrastate voyage or task" is defined as a voyage or task wholly within the designated waters of a particular state, and the Northern Territory. The "designated waters" of a state will encompass the Territorial Sea of Australia adjacent to the State, and the Northern Territory. The Territorial Sea is a belt of water not exceeding 12 nautical miles measured from the Territorial Sea base line. Accordingly, depending on the location of islands off the coast, the Territorial Sea can extend well beyond 12 miles from the coastline.

Australia's sovereignty extends to the Territorial Sea and is exercised in accordance with international law. State coastal waters are generally defined as extending 3 nautical miles from the Territorial Sea baseline. These definitions and other arrangements are defined by the Offshore Constitutional Settlement. In our view, the "designated waters" of a State should be defined by reference to the 3-nautical mile limit and not the 12-nautical mile limit.

If the purpose of the SOLA Bill is to exclude from the scheme "intrastate voyages or tasks"[17], designated waters should be defined in the same terms as the expression "coastal waters of the State" are defined in the *Coastal Waters (State Powers) Act* 1980. Section 3 of that Act defines "coastal waters of the State" to mean the same thing as it does under the *Petroleum (Submerged Lands) Act*; namely the Territorial Sea to a breadth of not more than 3 nautical miles.

The need to have regard to this definition for the purposes of working out a compensation entitlement is another example of the deficiency in the proposed coverage model contained in the SOLA Bill.

A result of this definition is that in some circumstances, lengthy voyages carried out quite far offshore will not be included in the Seacare coverage, and seafarers on these vessels will be pushed on to inferior state compensation schemes. These types of vessels are likely to employ a national workforce who are likely not to live in the same state they work in (section 4 and 9.3). This is particularly likely in Western Australia. For example, the oil and gas platforms located in the Varanus and Thevenard production areas are supplied from Dampier. These areas are up to 70km off the coast of Western Australia, but are within the territorial baseline due to the arrangement of islands and thus are within the designated waters of Western Australia.

Another example is in relation to the vessels which regularly operate between Dampier and the Pyrenees FPSO, which is within 12 miles of the baseline and therefore within Western Australian designated waters. The voyage, however, is a round trip of approximately 600km. Based on the proposed definition, this vessel would also fall outside the operation of the Act.

The oil and gas offshore area in Victoria straddles the 12nm limit, which means that vessels working almost alongside each other might have different coverage.

Recommendation: If the definition of state 'designated waters' must be adopted, it should be 3nm from the Territorial Baseline, as in the *Coastal Waters (State Powers) Act 1980* and the *Petroleum (Submerged Lands) Act,* not 12n,. This would reduce (but not eliminate) the geographic areas of confusion where the 12nm limit runs through the middle of offshore oil and gas fields.

[17]See S. 25A "Simplified Outline of this Part"

9.3 The mobility of seafarers and the importance of a national workers' compensation scheme

The importance of a national compensation scheme for seafarers was emphasised by the results of the MUA survey, which found that only 31% of seafarers lived in the same state in which they suffered the injury for which they claimed compensation.[18] If these seafarers are pushed into State and Territory schemes they will face significant obstacles in finding a local lawyer with experience in another state's compensation system, or travelling to another state for meetings with their lawyer, the state's designated Independent Medical Examiners (**IME**s), hearings and other necessary appointments.

Where assessment by an IME is required as part of the workers' compensation claim process, IMEs will be trained to assess against a particular state scheme. Where a worker is injured in Western Australia but resides in New South Wales, for example, it will create complications, delays, and additional costs and administrative burden to find an IME in New South Wales who is both familiar with and trained in assessing the injury against the Western Australia scheme. A national scheme with a pool of Seacare trained and accredited assessors eliminates these issues.

Simply because a vessel in engaged in intrastate voyages does not mean that it employs workers from that state. Seafarers form part of a national labour pool, especially those working in the offshore oil and gas industry that makes up the majority of Seacare scheme. This is why the Seacare scheme exists.

Recommendation: Compensation for seafarers must always be designed with a view that seafarers are part of a national labour pool and most do not work in their state of residence. There are considerable practical difficulties in accessing workers' compensation in a state you do not live in.

9.4 Particular impact on WA and NT vessels and seafarers

Seafarers working in the Northern Territory and in Western Australia will be disproportionately impacted by the new coverage clause, and definition of 'designated waters', as many of the vessels that will no longer be included operate in these two areas. Unfortunately, workers' compensation schemes in both the NT and WA offer workers less compensation for their injuries.

[18] Of the 246 seafarers who provided clear information about their residence and work details at the time of their compensation claim.

No justification is offered in the Regulatory Impact Statement (**RIS**) of why vessels operating in the Northern Territory should not be excluded from Seacare coverage. The RIS simply says that:

> "While the proposed changes would remove coverage for 'prescribed ships' operating in the Northern Territory (unless they meet other coverage criteria), this is not expected to have any significant impact on the coverage of the Seacare scheme since a number of vessels operating solely within the Northern Territory maintain exemptions from the Seacare scheme."[19]

Despite this statement, many Toll Marine Logistics vessels carrying out community supply along the NT coast, and Paspalay pearling vessels operating in the NT, were covered by Seacare in 2015-16.[20] At least 18 NT vessels and their crew are likely not to be included by the new coverage clause in the SOLA Bill– we will be able to provide better information in our follow-up submission to be made on 19 December.

Seacare offers workers better protections than the NT workers compensation scheme – for example in the NT, workers who suffer total incapacity as result of their work-related injury have a reduction in wages after only 26 weeks, whereas in the Seacare scheme this does not take place until 46 weeks (Figure 3).[21]

In the WA state workers' compensation scheme, workers also have a reduction in wages after only 13 weeks of injury, and there is a total cap on benefits (Figure 3).[22] We anticipate that many of the vessels who will not be included by the new coverage clause work in Western Australia. This is because:

- Most of Australia's offshore industry in based in Western Australia
- Most seafarers and claims in the Seacare scheme are in the offshore industry
- The new definition of 'designated waters' will run 12nm outside of Barrow Island and North-West Cape.

[19] *Seacare Reforms Regulation Impact Statement September 2016,* p.xxxiv.
[20] Seafarers' Safety, Rehabilitation and Compensation Authority, *2015-16 Annual Report Seacare*, p. 56-64.
[21] Commonwealth of Australia (Safe Work Australia), *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* July 2013, p. 29-32.
[22] Commonwealth of Australia (Safe Work Australia), *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* July 2013, p. 29-32.

Figure 3: Comparison of step-down incapacity entitlement for total incapacity.

Source: Safety, Rehabilitation and Compensation Amendments (Improving the Comcare Scheme) Bill March 2015, Regulation Impact Statement, p.10.

Measures which reduce wages after a particular length of time have a particularly bad impact on seafarers who usually cannot return to work until they have reached 100% capacity, due to the physical demands of seagoing work and inability for vessels to accommodate light duties employment and/or graduated return to work programs.

9.5 Seafarers losing coverage

There is a significant risk that some seafarers will be excluded from Seacare coverage as a consequence of the SOLA Bill. This is likely to arise in the following circumstances:

(a) <u>Exclusion due to coverage disputes</u>

The proposed coverage provision will provide ample scope for Seacare employers and their insurers to decline claims, not based on the merits, but on the assertion that the vessel was not wholly or predominantly used for intrastate voyages. As indicated above, there are a number of complex matters which need to be considered; any one of which could provide the trigger to decline cover. The issues which have to be considered include the following:

- Over what period of time must the vessels' voyages be scrutinised for the purposes of determining whether it was wholly or predominantly engaged in intrastate activities?

- Does this period extend back over weeks, months or years? Is it to be determined by reference to the seafarer's period of service on the vessel? If that was how the Courts eventually interpreted the provision, this could lead to the curious result that two different seafarers on the same vessel might be compensated under different schemes. One might ask how that brings any certainty to the situation.

- What is required is a close analysis of the vessel's voyages over an uncertain and unspecified period of time. It could well be imagined that the employer will choose a period which best suits its contention. The necessary records and documents may be in the possession of the employer, but they will be beyond the reach of the seafarer. The employer will have every incentive to reject claims based on coverage because of the lower rates of benefits applicable under State jurisdictions and the generally lower insurance premiums applicable. This possibility was acknowledged by the Government:

  > (The doubt over coverage) "*creates incentives for employers (or their insurers) to reject claims under the Seafarers' Act on the basis that the employee is covered under State schemes*"[23].

- It is likely that it will take an extensive period of time for an employer or insurer to analyse the date in order to make a determination either accepting or rejecting coverage. Delay in deliver of benefits under a workers' compensation statute is a significant impediment to a speedy recovery and return to work.

- The Bill introduces a definition of "designated waters" which is deal with further below. That definition is complex and adds a further complication which does not exist under the current provision.

As indicated above, in comparison, the existing provisions have only been the subject of three Federal Court challenges on coverage since the SRCA's commencement. The proposed new coverage provision will dramatically increase the number of disputed claims.

Denial of coverage will have serious consequences to the affected seafarer. He will have the choice of either attempting to lodge a fresh claim under a State jurisdiction,

[23] *Seacare Reforms Regulation Impact Statement September 2016,* p.viii.

or challenging the Seacare employer's decision in the Administrative Appeals Tribunal, with the consequent likelihood of further appeal to the Federal Court. Even if he decided not to challenge the Seacare employer's decision, there is no guarantee that his claim would be accepted by a State based workers' compensation insurer. Insurers are not motivated by altruism, and will decline liability for a claim if they believe they have arguable grounds to do so.

Whilst the States have some extra-territorial power, it is limited. To address issues concerning cases which overlap, all State jurisdictions have enacted template provisions requiring a relevant State connection test. These provisions set out a number of identical criteria to be applied to determine which State workers' compensation scheme is applicable. These provisions are designed to work out coverage as between the various State Acts; they will not assist in working out coverage between a State Act and the Seacare scheme. In fact, the template provision states explicitly that compensation is not payable under the State Act if the SRCA applies[24]. Furthermore, Section 139 of the SRCA provides that the Commonwealth Act applies to the exclusion of any State workers' compensation law in the event of any inconsistency.

The risk is that a seafarer, who has an otherwise legitimate claim will fall between the cracks and incur potentially significant legal costs and suffer considerable delay in pursuing his entitlement. These problems have not been a concern to date because of the relatively broad and inclusive nature of the existing coverage provision.

(b) Exclusion due to the narrowing of the Seacare scheme

The proposed coverage provision, as well as inviting disputes on whether vessels are "*wholly or predominantly used for intrastate voyages*" also considerably narrows the application of the Seacare scheme in the ways set out in paragraph 3 above.

9.6 Offshore vessels and the 'prescribed vessel' definition

No justification is offered as to why, "offshore floating storage or production unit" and "offshore industry mobile unit" are excluded from the definition of a 'prescribed vessel'. These vessels are hazardous to work on, use a national labour pool, and should be included in the Seacare scheme. Excluding them from Seacare coverage also creates further problems when including them in the WHS Act coverage – see for example the cumbersome language in the SOLA Bill s. 191 8E. As discussed in section 13, these problems have not been adequately addressed in the SOLA Bill, leaving an unacceptable gap in coverage. This was

[24] See, for example, S.9AA(7) WCA (NSW), & S.20(9) WC&IMA (WA).

precisely the gap that was exposed by the death of Trevor Moore on the FPSO Karratha Spirit in 2008 (section 13).

Further, where an offshore vessel or any other vessel is excluded from the definition of a prescribed vessel, for example a Floating Production, Storage and Offloading unit (**FPSO**) or offshore industry mobile unit, there is no legally binding avenue for it to be opted-in to the Seacare scheme. This would be the case even where an agreement is made between the Employer, Employees, and any relevant registered organisation, such as through the insertion of a clause in any applicable Enterprise Agreement. Opt-ins can only apply to prescribed vessels and the exclusionary nature of this definition raises concerns and inconsistency.

One important and welcome change to the definition of "prescribed vessel" relates to foreign vessels. The old definition in relation to foreign vessels required that the majority of the crew be Australian residents, and that the vessel be operated by a person, firm or company having an Australian connection. The new definition covers foreign vessels of which the majority of the crew are Australian residents and does not require proof that the operator had any Australian connection. This measure should be retained and reflects the current nature of the Australian offshore industry.

9.6 OHS Inspectorates

The proposed coverage provision will cause some vessels, especially those operating in the NT and WA to fall out of the coverage of the AMSA OHS inspectorate (section 9.4). Currently, state WHS inspectorates are not sufficiently equipped to do maritime inspections, particularly of the larger vessels making more extensive seagoing voyages that may fall into State and Territory coverage as a result of the new coverage provisions.

10. Unsatisfactory harmonisation of the maritime sector into the WHS Act

The MUA supports the harmonisation of the maritime sector into the WHS Act, if this is done in a way that genuinely improves safety in this sector.

Unfortunately, we cannot support the SOLA Bill in its current form. We do not support the proposed new definition of the 'maritime sector' in the WHS Act as it relies on the proposed new 25B coverage clause for the SRCA, which we have shown is unnecessarily restrictive and will be prone to disputation as it is both unclear and it relies on the creation of new definitions in the maritime sector. It also leaves a potential gap with the coverage of the *Offshore Petroleum & Greenhouse Gas Storage Act* (**OPGGS**).

WHS coverage must be comprehensive and clear. The potential gap we have identified between the WHS Act and the OPGGS Act is not a theoretical matter: two MUA members have been killed in recent years while working in precisely these gaps.[25] In both cases it was determined by the Australian Transport Safety Bureau that Australian OHS law did not apply at the time of either tragedy. The Parliament must take this opportunity to ensure that this problem is remedied and does not continue.

The SOLA Bill also makes unacceptable changes to the WHS Act that will reduce safety for workers in many industries across Australia. These include changes to Provisional Improvement Notices (PINs) and the removal of unions' right to participate in the development and amendment of safety codes of practice. Further, the SOLA Bill does not ensure that a replacement Code of Practice covering Offshore Supply Vessels and blue water trading vessels is in place before the current Code is made obsolete by a sunset clause.

Recommendation: Amend the SOLA Bill to reflect the SRCA coverage clause recommended earlier in this submission. Amend s.191 of the SOLA Bill to reflect this changed coverage clause in the maritime sector of the WHS Act.

10.1 Provisional Improvement Notices (PINs)

The MUA strongly opposes the changes made by the SOLA Bill (s. 229) to the WHS Act (s.274) that downgrade the 'directions' that a Health and Safety Representative can give in a Provisional Improvement Notice to 'recommendations'. The importance of worker participation in improving safety is a cornerstone of Australia's WHS system. No justification is given for the erosion of that right. Workers who are familiar with WHS problems in their own workplace are best placed to advise on sustainable and functional remedies to those problems. Employers already have access to some flexibility in this area, as they can ask an Inspector for permission to vary the directions in a PIN.

The same section of the SOLA bill (s. 229) also removes the reference to Codes of Practice in matters that can be included in a PIN Notice. This must be retained to guide workers to the relevant advice that already exists.

Recommendation: Delete s. 229 of the SOLA Bill that reduces the power of PIN notices issued by Health and Safety Representatives.

[25] Trevor Moore was killed on the *Karratha Spirit* in 2008 as the FPSO was leaving its mooring buoy. Andrew Kelly was killed on board the *Skandi Pacific* in July 2015 shortly after this supply vessel was leaving the drilling rig *Atwood Osprey*.

10.2 Safety codes of practice

The SOLA Bill (s.195) removes the right of unions to participate in the development and amendment of safety codes of practice in the maritime sector, as provided in WHS Act (s.274). Instead, the Safety Rehabilitation and Compensation Commission is consulted. Unions must be consulted in the development of safety codes of practice, and a harmonised WHS Act must preserve that right.

The SOLA Bill also provides for a 2-year sunset clause for the current Seacare Code of Practice, which incorporate a code of practice for both blue water seafarers and offshore supply vessels. It is described as a 'preserved code of practice'. The preserved Seacare Code of Practice must only cease to have effect when a replacement code of practice for seafarers *and* for offshore supply vessels has been approved under the WHS Act.

As the legislation is currently drafted, the current Seacare Code of Practice could cease to have effect before a new Code of Practice is in place. This is particularly important for work on dangerous offshore supply vessels, where MUA member Andrew Kelly was killed in July 2015 on board the *Skandi Pacific.* The Australian Transport and Safety Bureau found that:

- no Australian OHS law or agency had jurisdiction over the Australian-crewed *Skandi Pacific* at the time of this tragic incident in the Australian Exclusive Economic Zone;
- the safety management system on board was inadequate, with no defined limits for working in poor weather or the additional risks of working in an open-sterned vessel where the sea is free to wash over the deck; and
- the *Skandi Pacific*'s safety management system was not based in Australian safety legislation, but instead on the offshore industry document *Guidelines for Offshore Marine Operations*.[26] The MUA has previously highlighted problems with this document.[27]

Recommendation: Delete s. 195 of the SOLA Bill that removes the right of unions to participate in the development of safety codes of practice in the maritime sector.

Recommendation: Amend Section 38(3) of 'Schedule 3 – Application and transitional provisions' of the SOLA Bill to ensure that preserved Codes of Practice are only cease to have effect when the Minister has approved a replacement Code of Practice to cover offshore supply vessels and blue water seafarers.

Recommendation: speed up the revision of the Offshore Supply Vessel Code of Practice to incorporate the lessons learned from the death of Andrew Kelly.

[26] Australian Transport Safety Bureau, *Fatality on board* Skandi Pacific *off the Pilbara coast, Western Australia, 14 July 2015*.
[27] MUA Submission to AMSA on *Guidelines for Offshore Marine Operations, September 2014*.

10.3 Lists of HSRs

The SOLA Bill (s.228) removes the requirement for PCBU's across the whole Commonwealth WHS Act jurisdiction to provide the Comcare with a list of HSRs (by deleting s.74(2) of WHS Act). Comcare should be using these lists to assess if there are sufficient numbers of HSRs in companies and across specific industries. If there are not sufficient numbers, Comcare should be assessing why this is the case and taking steps to improve the situation (repeal of on p.90 of Seafarers and Other Legislation Amendment Bill 2016).

Recommendation: Delete s.228 of the SOLA Bill which removes the requirement for employers to provide Comcare with lists of HSRs.

10.4 Problems with WHS coverage

The SOLA Bill proposes the repeal of *Occupational Health & Safety (Maritime Industry) Act* (**OHSMI**) and the amendment of the *Work Health & Safety Act* (**WHS**) by expanding the scope of that legislation to cover vessels to which the SRCA applies. Coverage under the WHS Act exists if the SRCA applies to the employment of an employee on a vessel[28]. Therefore, the WHS Act would impose the same requirement of establishing employment on a prescribed vessel which is not used wholly or predominantly for intrastate voyages or tasks. In Section 9 we highlighted the considerable problems with this definition of coverage, which under the SOLA Bill would be extended to WHS coverage and could leave vessels without WHS coverage.

It is also proposed that the WHS marine provisions will be subject to Section 640 of the OPGGS Act.

Currently, the coverage provisions of the SRCA and the OHSMI are for most practical purposes the same, with one important exception.

Section 640 of the OPGGS excludes the operation of OHSMI in relation to a "facility" located in the offshore area of State or Territory. "Facility" is defined in wide terms to include vessels or structures (Schedule 3). "Offshore area" is defined as the relevant scheduled area for the State concerned which extends beyond the coastal waters of the State to the limit of the coastal shelf (Section 8).

The definition of "facility" is a vessel or structure located at a site in Commonwealth waters which is being used or prepared for use for the recovery of petroleum. Once the operations

[28] See S. 12(8A)

cease "and the vessel or structure has been returned either to a navigable form or to a form in which it can be towed to another place"[29], it falls outside the scope of the safety provisions of the OPGGS.

The new coverage clause in the WHS is in wide terms and extends to persons conducting a business or undertaking on a vessel to which the SRCA applies. It also covers employers, employees, contractors, owners and operators, as well as vessels to which the SRCA applies.

Section 12(8E) brings within the WHS the following:

(a) Offshore floating storage or production units;

(b) Offshore industry mobile units that are self-propelled or under tow[30].

An offshore floating storage or production unit is defined in terms which would generally encompass FPSOs; i.e. vessels modified or constructed to store petroleum and permit transfer to another tanker or pipeline and which can be disconnected from a mooring and run from bad weather, or for the purposes of maintenance.

An offshore industry mobile unit is defined as a floating structure, living quarters, barge, or drilling vessel.

Excluded from the WHS Act are offshore industry mobile units whilst neither self-propelled nor under tow[31].

This creates a risk that these vessels will fall outside the protections of the Work Health & Safety Act and possibly also the OPGGS.

The risk of a gap in coverage in relation to vessels operating within the scope of the OPGGS which exists under the current arrangements will be perpetuated under the SOLA Bill. They will only fall within the WHS Act when self-propelled or under tow. They may or may not be covered by the OPGGS, depending on whether or not they are located in Commonwealth waters and undertaking operations[32]. Once the vessel returns to navigable form, it will fall outside the OPGGS.

It is unwise, in our view, for a vessel to fall within statutory safety regime depending on whether it is attached to a buoy, and falling perhaps into another safety regime when it is in navigable form. This should be avoided.

[29] Offshore Petroleum & Greenhouse Gas Storage Act, Schedule 3, Clause 4(7)
[30] Sub-section 12(8E)(a)
[31] Sub-section 12(8E)(b)
[32] The OPGGS Act applies to facilities located in offshore areas. Section 8 defines that term to mean, in the case of Western Australia for example, waters beyond the outer limits of the coastal waters of the State, and within the outer limits of the Continental Shelf and not within the Joint Petroleum Development Area.

An example of the problems which may arise is demonstrated by the death of MUA member Trevor Moore on board the *Karratha Spirit* in 2008. The investigation report[33] conducted by the Australian Transport Safety Bureau sets out at paragraph 2.8 the regulatory positions under the OHSMI and the OPGGS.

The Bureau found that at the relevant time the *Karratha Spirit* was not in navigable form and therefore came under NOPSA's jurisdiction under the OPGGS. Things could have been different and the report illustrates the problem that if the accident had occurred a short time after the *Karratha Spirit* had departed from the buoy, there may well have been no jurisdiction under any Australian safety regulatory regime.

Certainly, the OPGGS would not have applied, and neither apparently would the *Western Australian Marine Act* have applied.

The Bureau concluded that the *Navigation Act* (and thus OHSMI) did not apply for two reasons:

(a) As the vessel was already outside Australian Territorial waters and was running from a cyclone, it was not on an "interstate or international voyage, and thus did not meet the application criteria of the *Navigation Act*".

With respect, we do not see the relevance of this observation. Firstly, the voyage provisions are contained in Section 6 of the OHSMI, and not in the *Navigation Act*. The voyage planned by the Master falls within Section 6(1)(a); namely a voyage "*between two places outside Australia*"[34].

(b) No Section 8A or 8AA declaration had been made in relation to the vessel.

A "*prescribed ship*" is defined in the OHSMI as a ship to which Part 2 of the *Navigation Act* applies. Section 10 of the *Navigation Act* (which is located within Part 2) provides a definition of a ship for the purposes of the Part. That definition does not make any reference to a requirement that the ship be a vessel to which a Section 8A or Section 8AA declaration has been made. Although there is a view that a prescribed ship for the purposes of Part 2 must also satisfy the requirements of Part 1 of the Act (which contains the Section 8A and Section 8AA), that opinion is contrary to the decision of the Full Federal Court in the *Tiwi Barge* case.

Nevertheless, the point is well made by the authors of the ATSB report that:

[33] *Independent investigation into the fatality on board the Australian registered floating storage and offloading tanker* Karratha Spirit *off Dampier, Western Australia, 24 December 2008*, ATSB Marine Occurrence Investigation No. 261.
[34] This sub-section was inserted by the *Marine Personnel Legislation Amendment Act* 1997.

"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."[35]

In our submission, the provisions contained in the WHS should apply at all times, and not be overridden by the OPGGS.

The principal weaknesses in relation to the proposed WHS Act arrangements in the SOLA Act are:

(a) Coverage under the WHS Act exists if the SRCA applies to the employment of an employee on a vessel (Section 12(8A)). Accordingly, if a prescribed vessel is not used "wholly or predominantly for intrastate voyages or tasks" (within Section 25B) then it will not be covered under the WHS Act. The result could well be that an accident involving the death or injury of a seafarer on a vessel which although operating on an interstate or overseas voyage at the time of the accident, may fall outside the scope of the WHS Act, if the vessel spends a majority of its time on intrastate voyages. Depending on the circumstances, the accident may well also fall outside the scope of the OPGGS Act and any State maritime occupational health law.

(b) It is unsatisfactory to have as a point of demarcation between the OHS regime under the OPGGS Act and the OHS regime under the WHS Act technical requirements such as whether the vessel is in Commonwealth waters or not, whether the vessel is in navigable form or not, or whether the vessel is engaged in petroleum related operations or not. All of these points of demarcation are a potential source of gaps in coverage depending upon individual circumstances. These problems can be avoided by deleting the provisions that give primacy to the OPGGS Act over the WHS Act.

10.5 High risk tickets

The MUA supports the introduction of high-risk tickets in the maritime sector as a result of WHS harmonisation. This is long overdue and will improve safety. The Regulation Impact Statement says that the process of introducing them should take two years. This should be expedited as quickly as possible.

[35] *Independent investigation into the fatality on board the Australian registered floating storage and offloading tanker* Karratha Spirit *off Dampier, Western Australia, 24 December 2008*, ATSB Marine Occurrence Investigation No. 261, p.35.

11. Opting-in, or applying for an exemption from Seacare

Both the current power to opt-in a vessel to Seacare coverage and the proposed power is limited to prescribed vessels; i.e. vessels which met the definition of a prescribed ship under the repealed *Navigation Act*, or under Section 3A of the SOLA Bill.

The current opt-in provisions in SRCA bring into coverage prescribed ships which:

(a) are offshore industry vessels within the meaning of the repealed *Navigation Act* and which were either covered by a Section 8A declaration under that Act, or by a declaration under sub-section 19(1C); and

(b) trading ships within the meaning of the repealed *Navigation Act* and which were covered by a Section 8AA declaration under that Act, or by a declaration under sub-section 19(1C).

Both definitions are broadly constituted, allowing a wide range of vessels with a wide range of trading patterns to opt in to Seacare.

The current opt-out provision is contained in Section 19(1D) SRCA.

No details were contained in the repealed *Navigation Act*, or in the current SRCA as to the scope or circumstances governing the Authority's power to make either an opt-in or an opt-out declaration.

Guidelines issued by the Authority do not identify particularly the factors to be established when considering an opt-in declaration, other than to say that each vessel must meet the definition of "offshore industry vessel" or "trading ship", and that in relation to trading ships that it must be satisfied that such vessels must be engaged in interstate or overseas trade and commerce.[36]

In relation to the making of an opt-out declaration, the Guidelines indicate nothing more than the Authority may make such declaration if requested to do so by the relevant employer and operator, and furthermore may also make such declaration if satisfied that the ship no longer exists, or if the name or other details of the ship have been changed, or if the ship no longer operates in Australia.[37]

In both situations, the Guidelines indicate that the Authority will consider any other matter that it considers relevant.

[36] Guidelines: Declarations by the Seacare Authority that the SRCA and OHS(MI) Acts do or do not apply to a ship, November 2014.
[37] See, for example, S.9AA(7) WCA (NSW), & S.20(9) WC&IMA (WA)

Under the SOLA Bill, vessels which are the subject of an opt-in declaration are covered under the scheme (S. 25C).

Division 3 (Sections 25E to 25L) make provisions in relation to the making of opt-in declarations and the suspension or revocation of opt-in declarations.

These provisions are far more extensive than the provisions in the current Act.

Our concerns in relation to the above provisions are summarised as follows:

(a) Applications for opt-in declarations: S.25E

- The provision permits an owner/operator or employer to make an application limited to a specified group of employees, or a specified employee on a vessel. The circumstances under which that might be considered appropriate are not clear.

  "Employee" is defined in the SRCA as a "*seafarer*" or "*trainee*" or a person who "*although ordinarily employed … is not so employed or engaged but is required under an award to attend at a seafarer's engagement centre*"[38]. "Seafarer" was defined in the SRCA by reference to the *Navigation Act* definition. The SOLA Bill defines seafarer in similar terms as being "*anybody employed in any capacity on a prescribed vessel, on the business of the vessel*" other than the pilot, the owner, law enforcement personnel, special personnel, temporary employees in port, and persons prescribed by the regulations made for the purposes of the definition of seafarer in Section 14 of the *Navigation Act*.

  We do not understand the logic of permitting an opt-in declaration to be made which might exclude some or a group of seafarers employed on the vessel.

- There is no requirement for a copy of any application to be submitted to any union or employee likely to be affected. The applicant need only state that he took "*reasonable steps to inform*" a registered organisation or employee "*of a proposal to make the application*". This is deficient. At the very least the provision should require that a copy of the application itself be served on the organisation. This is particularly so if the employer proposes to make an application only in relation to some of the seafarers on board the vessel. The approved form of application "may require" the applicant to state that he took reasonable steps to inform any registered organisation and its

[38] Section 4, SRCA

employees. Here again, there is no requirement for a copy of the application to be served, merely that the proposal is notified.

(b) The making of opt-in declarations: S. 25H

- We make the same observation as above; that the Commission may make an opt-in declaration, but limited only to specified groups of seafarers.
- The Act does not specify the circumstances which the Commission should have regard to when making an opt-in declaration. This is a weakness both in the current scheme and in the proposed Bill. Parliament should lay down the criteria for the making of opt-in declarations.
- We are concerned that if the Commission fails to consider an opt-in declaration within 28 days it is deemed to have made a declaration. Whilst generally it is in the interests of seafarers for opt-in declarations to be made, the harm is that the deemed declaration will be made limited to the "*employees covered by the application*". Accordingly, the failure of the Commission to properly oversight the application could see a significant omission.
- There is nothing contained in the provision requiring the Commission to consult with the employees likely to be affected, or any industrial organisation representing their interests. This is particularly important if the application is made only in relation to some of the employees likely to be affected.
- The obligation on the Commission to notify affected parties is limited to putting a notice on the website and providing a copy of the declaration to the owner/operator or employer. Here again, adequate steps should be put in place to ensure that the relevant union is notified, and the employees.

(c) Suspension or revocation of opt-in declarations: S. 25J

- The decision to suspend or revoke an opt-in declaration is likely to be of considerable significance to the employees. As with the making of the application itself, the requirement to give notice is weak.
- The requirement for the Commission to consult before making a suspension or revocation is weak. It is only required to publish a draft of the instrument on its website and provide persons to make submissions within 7 days after the notice is published. This appears to be entirely inadequate, and is not likely to bring the matter to the attention of the relevant employees or the

trade union concerned. 7 days' notice is also not a sufficient period of time within which to make submissions.

- The notification provision is weak; although there is a requirement to publish the decision again on the website, there is no requirement to give a copy of the notice to the employees or relevant union.

(d) Review of decisions: S. 25K

- There is power to apply to the AAT for the review of a decision to either grant or refuse an opt-in or opt-out declaration. S.27 of the *Administrative Appeals Tribunal Act* provides that an application may be made for review by any person "*whose interests are affected by the decision*". The Act permits an organisation or association of persons to apply *"if the decision relates to a matter included in the objects or purposes of the organisation or association"*.

  Our view is that if the Commission made a decision suspending or revoking an opt-in declaration, the seafarers and their union would probably have standing to challenge the decision in the AAT.

Recommendation: Employers should not be able to opt-in part-crews or single employees on any vessel. This creates greater uncertainty, particularly where there is no stringent requirement or guidelines for Employers to notify the employee(s) or registered organisations of any opt-in declaration.

Recommendation: Amend the opt-in provision in of the SOLA Bill (Division 3, 25E(1)(a) in s.84) to apply to 'vessels' rather than just 'prescribed vessels'.

11.1 Notification of employees

Not only are the notification provisions in the SOLA Bill very weak, the Explanatory Memorandum to the Bill says in five places that it is 'too burdensome' to notify employees of changes to their compensation scheme due to opting-in, revocation of opt-ins, or exemption[39]. This is a disgrace, particularly in the context of an injury compensation scheme where it is implicit that the employees in question are risking their bodily safety in order to carry out a job for their employer.

Recommendation: Employees must be individually notified of possible changes to their compensation scheme, both to their home address and on board the vessel. The relevant

[39] *Seafarers and Other Legislation Amendment Bill 2016 - Explanatory Memorandum*, para 161 p. 24, para 173 p.26, para 195 p. 28, para 429 p.62, para 442 p.63.

unions much also be directly notified. A 30-day comment period is required. An accurate list of prescribed vessels must be published on the Seacare website.

12. Maritime industry definitions

s.43 (p.23) of the SOLA bill includes a definition of 'harbour' that includes 'offshore terminal' and 'any other place in or at which vessels can obtain shelter or load and unload goods'. We are concerned that this definition will include areas which are not at all sheltered – such as offshore platforms, FPSOs, FSOs and floating LNG ships, and that this definition could be used to apply a lower level of workers' compensation or WHS protection in those areas.

We are also concerned with the very braod definitions of in the SOLA Bill s.63 (p. 28-30) of 'offshore industry mobile unit' (p.28) and 'offshore industry floating structure' and 'offshore industry living quarters barge' which are being used in the definition of a 'prescibed vessel' to implement a lower level of workers' compensation coverage on these vessels. We are concerned that this logic could also be applied to WHS protection in those areas, and it certainly creates some gaps in WHS coverage (Section 10.4) . There have been consistent attempts to exclude the offshore industry from onshore WHS protections, and we are concerned that these definitions are another step in this direction.

Recommendation: the definition of 'harbour' in the SOLA Bill (s.43) should be amended to ensure that it does not include any unsheltered locations such as offshore installations, particularly if it is used to exclude vessels from Seacare or WHS coverage.

Recommendation: the offshore vessel definitions in the SOLA Bill (s.63) should be reviewed to ensure they are not unnecessarily broad, particularly as they are being used in the Bill to exempt vessels from Seacare coverage, and consequential gaps in coverage are created.

13. Seacare governance

We strongly oppose the abolition of the Seacare Authority outlined in the SOLA Bill. S. 176 of the SOLA Bill repeals Part 8 – Administration of the SRCA in its entirety and substitutes a new Part 8. In addition, amendments throughout the SOLA Bill distribute the functions of the Seacare Authority to Comcare and to the Safety Rehabilitation and Compensation Commission (**SRCC**).

The creation of a new Seacare Advisory Group in s.17 of the SOLA Bill is not a sufficient replacement for the Seacare Authority as it is called only at the discretion of the SRCC chair.

We are very concerned that under the broader administration of the SRCC and Comcare, less attention will be paid to the special difficulty of returning to work as an injured seafarer, and seafarers will be under even more pressure to return to work before they are ready.

Recommendation: delete s.176 of the SOLA Bill that repeals Part 8 of the SRCA and abolishes the Seacare Authority, and make further amendments to the SOLA as necessary to retain an independent Seacare Authority with strong maritime industry expertise and representation from all three maritime unions.

14. Compensation

We oppose expanding the definition of retirement savings that workers will be required to use up if they are on compensation (SOLA s.59). Injured workers should not be required to spend any of their retirement savings as a result of their injury – this cost is the employers' responsibility.

We oppose increasing the eligibility threshold to which employment must contribute to an injury or a disease from a 'material' to a 'significant' degree (SOLA s.58 and 71). This will have the effect of restricting coverage for diseases that may have multiple causes e.g. depression could be due to both family issues and problems at work. We believe the maritime industry requires special consideration in this area due to the all-consuming nature of work at sea and the requirement to be away from home for long periods of time. The result is that work affects all other problems and makes them more difficult for seafarers to deal with. There is no neat boundary between personal and work life.

15. Seacare reform - Regulation Impact Statement

We have a number of concerns about the Regulation Impact Statement accompanying this legislation. The result is that it is very difficult for stakeholders to assess the impact of the proposed bills.

First, there has been no audit of the 219 vessels covered by Seacare to determine how the proposed new coverage rules will affect them. The MUA is undertaking an audit, which we will from to the Inquiry on 19 December. When we have inquired with the Department of Employment they have told us that they do not anticipate any change in coverage – however, our investigations to date have found a significant number of vessels will not be included under the new coverage rules.

Second, there is no map included with the RIS of the 'designated waters' that are part of the new definition of coverage for the Bill. This is particularly important for determining the coverage of offshore vessels – if a supply boat services a platform less than 12nm from the Territorial Baseline, they would not be included in the new coverage clause. Unfortunately, the line running 12nm from the Territorial Baseline goes through a number of oilfields making a precise map necessary for determining coverage.

Third, no comparison of benefits was offered in the RIS to assess the impact of the proposed coverage changes on workers. Instead, the RIS says:

> "Some employees may experience a reduction in workers' compensation benefits under state and territory workers' compensation schemes, compared to what they would have received under the Seacare scheme. The overall amount of this reduction has not been quantified because of the complexities of calculating differences in compensation amounts, including weekly compensation and permanent impairment compensation, between the Seacare scheme and each state and territory scheme" (*Seacare Reforms Regulation Impact Statement September 2016,* p.xxxiv).

This is not acceptable – legislation changing workers' compensation must assess the impact of such a change on the workers who will be affected.

Recommendation: proper maps of designated waters and the relevant petroleum installations, an audit of how the changes to the coverage provisions will affect current vessels in Seacare, and a comparison of compensation levels between Seacare and state schemes should be provided to Parliament before the SOLA Bill is voted on.