



Australian Government

Department of Employment

**SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT**

SEAFARERS SAFETY AND COMPENSATION BILLS PACKAGE

**SUBMISSION OF THE
DEPARTMENT OF EMPLOYMENT**

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INTRODUCTION

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Standing Committee on Education and Employment Inquiry into the Seafarers Safety and Compensation Bills Package (Bills Package), which includes the:
 - 1.1. Seafarers and Other Legislation Amendment Bill 2016 (Seafarers Bill)
 - 1.2. Seafarers Safety and Compensation Levies Bill 2016 (Levies Bill), and
 - 1.3. Seafarers Safety and Compensation Levies Collection Bill 2016 (Levies Collection Bill).
2. In March 2015 the Committee considered the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015. The Department made a submission to the Senate Committee Inquiry into that Bill.¹
3. The current Bills Package is more comprehensive than the 2015 Bill, but issues relating to coverage of the Seacare scheme remain the same. The Department relies on its submission to the 2015 inquiry as part of this current inquiry, in particular paragraphs 13 to 31.

PURPOSE OF THIS SUBMISSION

4. This submission provides an overview of the Seacare scheme, outlines the need for reform and the reform package, and details the impacts of the reforms on scheme participants and on the governance of the Seacare scheme.

OVERVIEW OF THE SEACARE SCHEME

5. The Seacare scheme is a workers' compensation and work health and safety (WHS) scheme covering a small defined segment of the Australian maritime industry. The Seacare scheme covers around 30 employers, 220 vessels and 6,000 seafarers.² It is established by the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act).
6. The Seafarers Act provides support for seafarers who have been injured at work by way of weekly compensation payments, payment of medical expenses, permanent impairment benefits and other benefits, such as access to rehabilitation support.
7. The Seafarers Act establishes the Seacare Authority to oversee the operation of the Seacare scheme.
8. The OHS(MI) Act provides a WHS regime for largely the same section of the maritime industry as the Seafarers Act. It confers broad WHS oversight functions on the Seacare Authority and prescribes the Australian Maritime Safety Authority (AMSA) as the WHS inspectorate for the Seacare scheme.
9. The scheme is supported by the Seafarers Safety Net Fund (the Fund). The Fund is supported by two levy Acts, the *Seafarers Rehabilitation and Compensation Levy Act 1992* (Levy Act) and the *Seafarers Rehabilitation and Compensation Levy Collection Act 1992* (Levy Collection Act), which establish a levy on scheme employers for the Fund that provides a safety net for injured seafarers where an employer cannot meet its workers' compensation obligations.

¹The Department's submission can be found on the parliament House website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Seafarers_Amendment_Bill/Submissions

² Seafarers Safety, Rehabilitation and Compensation Authority (2016), *Annual Report 2015–16*

THE NEED FOR REFORM OF THE SEACARE SCHEME

10. Two independent reviews of the Seacare scheme conducted by Ernst and Young in 2005 and Mr Robin Stewart-Crompton in 2012-13 highlighted that it needs widespread reform. Both reviews highlighted significant issues with the scheme's coverage rules. Both reviews recommended greater alignment between the Seacare and Comcare workers' compensation schemes.³ Both reviews also noted that the limited resources of the Seacare Authority and AMSA are likely to limit their ability to carry out their functions under the Seafarers Act and OHS(MI) Act. The Stewart-Crompton review also recommended greater alignment of Seacare WHS legislation with the model WHS laws.⁴
11. Changes to the Maritime Labour Convention (2006) (MLC), the increase in the age of eligibility for the Age Pension and the introduction of the National Injury Insurance Scheme also necessitate amendments to the Seacare scheme.
12. The need for reform of the Seacare scheme is further detailed in Part 1 of the Regulation Impact Statement (RIS) (RIS pages vii – xv).

OUTLINE OF SEACARE SCHEME REFORMS

13. The reforms contained in the Seafarers Bill will make long overdue updates to the Seacare scheme by:
 - 13.1. introducing a new test to clarify coverage of the Seafarers Act
 - 13.2. repealing the OHS(MI) Act and extending the coverage of the *Work Health and Safety Act 2011* (Cth) (WHS Act) to vessels covered by the Seafarers Act
 - 13.3. updating the workers' compensation provisions in the Seafarers Act to restore the alignment with broader Commonwealth workers' compensation laws
 - 13.4. abolishing the Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) and transferring its functions to the Safety, Rehabilitation and Compensation Commission (the Commission) and Comcare, and
 - 13.5. giving effect to recent changes to the MLC to ensure ongoing compliance.
14. These reforms to the Seacare scheme are supported by the Levies Bill and the Levies Collection Bill, which will impose the Seafarers Insurance Levy (the existing Safety Net Fund Levy) and provide a mechanism to charge a new Cost Recovery Levy on scheme employers.
15. The Bills Package gives effect to recommendations of the Stewart-Crompton Review and previous Ernst and Young Review so far as the recommendations are supported by stakeholder consultation.
16. The Bills Package also includes general amendments to the WHS Act, including amendments to give effect to changes to the model WHS laws developed by Safe Work Australia following decisions of Commonwealth, state and territory WHS Ministers consistent with the process outlined in the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the IGA).

Coverage

17. The coverage provisions of the Seafarers Act and the OHS(MI) Act are not readily understood by maritime industry employers, employees and Seacare scheme regulators. There has been significant

³ The Comcare workers' compensation scheme is established by the *Safety, Rehabilitation and Compensation Act 1988*. It provides for compensation and rehabilitation of injured employees within the Australian Government and private sector licensees.

⁴ The model WHS laws are enacted in the Commonwealth through the *Work Health and Safety Act 2011*.

uncertainty about the coverage provisions since the Full Federal Court decision in *Tiwi Barge Services Pty Ltd v Julie Ann Stark* [1997].⁵

18. Coverage is currently defined with reference to the *Navigation Act 1912*, which was repealed in 2012 and replaced with the *Navigation Act 2012*. Some vessels remain covered by the Seacare scheme by virtue of declarations made under the repealed *Navigation Act 1912*, which no longer have any force except for the operation of the Seacare scheme. There is potential for jurisdictional churn since vessels can move in and out of coverage on a voyage by voyage basis depending on the nature of each voyage.
19. The Full Federal Court decision in *Samson Maritime Pty Ltd v Aucote* [2014]⁶ (*Aucote* decision) exacerbated these issues by significantly expanding coverage of the Seacare scheme. Coverage of the scheme is now dependent on administrative measures and ministerial declarations put in place to maintain the status quo, some of which need to be renewed on an annual basis.
20. The Seafarers Bill inserts new provisions into the Seafarers Act to clarify the coverage of the Seacare scheme while maintaining similar scope.
21. The new coverage test will be two tiered:
 - 21.1. a vessel must be a 'prescribed vessel', and
 - 21.2. the vessel must not be used wholly or predominantly for voyages or other tasks that are within the territorial sea of a particular state or territory.
22. A range of coverage options were considered during extensive consultations with industry participants. These included fixing coverage by referring to an objective standard (such as the size of the vessel or the number of seafarer berths), relating coverage to an existing classification (such as registration on the Australian Register of Ships or as a domestic commercial vessel) and setting out a comprehensive list of classes of vessels that would be in and out of the scheme.
23. None of these options was unanimously supported by stakeholders. The approach in the Seafarers Bill is intended as a compromise position between those stakeholders.
24. The aim of the new coverage test is to reflect the same pool of vessels while addressing the main sources of uncertainty in the current coverage rule (both pre and post *Aucote*). The new coverage test avoids the need to consider, on a case by case basis, whether a vessel is engaged in trade and commerce between Australia and places outside Australia, between two places outside Australia, among the states or within a territory. The new coverage test treats the Northern Territory in the same way as any state. Vessels operating wholly within the Northern Territory are currently able to seek exemptions from the scheme.
25. There are options for 'prescribed vessels' that are not covered by the scheme to opt in to the scheme. These provisions reflect the flexibility that previously operated under the repealed *Navigation Act 1912* opt-in declarations. The old opt-in declarations operated for the period set in the declaration. For greater certainty, the new scheme will limit these to three years, with an option for further renewal. The flexibility for vessels to seek an exemption from the Seacare scheme will remain, although the new coverage test is intended to reduce the use of exemptions.
26. If a vessel falls outside of coverage by the Seacare scheme because it is no longer a 'prescribed vessel' and is not eligible to opt-in to the scheme, employers will be able to apply for a transitional declaration of coverage so that the vessel may remain covered. An example is a fishing vessel that goes overseas. About five fishing vessels are listed in the Seacare Scheme Annual Report 2015-2016. It is not clear whether any of these travel overseas. This exclusion reduces the complexity of coverage for fishing vessels by providing that only one level of insurance is required, regardless of the voyage.

⁵ [1997] FCA 874

⁶ [2014] FCAFC 182

27. Tourism vessels have also been expressly excluded, following consultation. While there is some ambiguity about the current position of these vessels, there was some feedback in response to the Department's consultation paper⁷ published in December 2015 that excluding these tourism vessels would be consistent with current practice. This led to this change to the list of vessels that are not prescribed vessels.
28. Consistent with current practice, employees not covered by the Seacare scheme will be covered by state or territory workers' compensation laws.

Work Health and Safety

29. The OHS (MI) Act will be repealed, and the WHS Act will be extended to apply to the Seacare scheme with some sector-specific amendments to that Act.
30. The WHS Act comprises modern, best practice WHS laws and facilitates the implementation of modern WHS practices. By comparison, the OHS(MI) Act has not been amended substantively since it commenced in 1993 and contains outdated WHS laws that were designed for workplaces of the early 1980s and 1990s.
31. The WHS Act forms part of a harmonised scheme of WHS laws which operate across most of Australia. It is aligned with the national model WHS laws that were developed by Safe Work Australia following an expert report and through a tripartite process involving Commonwealth, state and territory governments, employer associations and unions. The WHS Act was enacted in the Commonwealth jurisdiction in 2012.
32. The duties and requirements of the WHS Act are broad-based and capable of applying to a range of sectors, industries and workplaces. In jurisdictions that have adopted the model WHS laws, these laws will already apply to maritime industry employers that are not otherwise covered by the OHS(MI) Act.
33. Extending the WHS Act to the sector will mean that future changes to the WHS Act will immediately flow to the Seacare scheme.
34. AMSA will continue to be the WHS regulator or 'inspectorate' for the Seacare scheme.
35. Other general amendments to the WHS Act:
 - 35.1. clarify that the Act applies to 'upstream duty holders', such as suppliers or manufacturers, where the activity involves a potential risk to workers covered by that Act,
 - 35.2. clarify that Judges and Heads of Mission are not 'officers' for the purpose of that Act,
 - 35.3. remove the requirement on businesses to provide Comcare with an up-to-date list of Health and Safety Representatives, and
 - 35.4. clarify that a Provisional Improvement Notice (PIN) may include recommendations, rather than directions, about measures that may be taken by a person to prevent or remedy a contravention.

Workers' Compensation

36. The Seafarers Act will be updated to restore the historic link with the Comcare scheme.
37. The Seafarers Act will also be clarified to ensure that injuries suffered during 'shore leave' are covered, but injuries suffered during holidays at the end of a work-related journey are not.

⁷ Department of Employment, Seacare scheme – *Reforms to Work Health and Safety and Workers' Compensation, Consultation Regulation Impact Statement* (<https://submissions.employment.gov.au/empforms/Seacare-Reforms/Documents/Seacare-consultation-paper.pdf>)

38. The Seafarers Act will be amended to ensure that persons in receipt of incapacity payments can continue to receive those payments until they reach 'pension age', which is increasing as a result of changes to the *Social Security Act 1991* (Cth), and to align the Act with minimum benchmarks to be set by the National Injury Insurance Scheme. Mirror amendments to equivalent provisions of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) will also be made at this time.
39. Changes to the MLC which come into force for Australia on 18 January 2017, will be implemented by amendments to the compulsory insurance arrangements in the Seafarers Act.

Governance

40. The Seacare Authority will be abolished and its functions split between Comcare and the Commission.⁸
41. The Bill will enable the Chair of the Commission to establish a Seacare Advisory Group comprised of Seacare employer and maritime unions representatives to provide support and industry expertise to Comcare and the Commission as required.

Scheme Costs and Funding

42. A new cost recovery levy will be payable, consistent with the Australian Government Cost Recovery Guidelines and how WHS regulatory schemes are funded in the Commonwealth and states and territories.
43. The levy will not be payable immediately and will be phased in to ensure AMSA and Comcare are appropriately resourced to perform their WHS functions.
44. Employers will also pay a Seafarers Insurance Levy, which will operate in the same manner as the existing Safety Net Fund Levy. The Insurance Levy will begin at \$15 per berth, which is the same amount as the current Safety Net Fund levy.
45. Individual services, such as processing exemption applications, will also be funded by one-off fees to the applicant, rather than by the Cost Recovery Levy.

IMPACTS OF SEACARE REFORMS

46. The impacts of the Seacare reforms on scheme participants, including workers and employers, are canvassed in detail in sections 4.3 and 5 of the RIS (RIS pages xxxiii – xlv). Key impacts are summarised below.
47. The proposed Seacare reforms will result in overall regulatory costs for employers and employees of approximately \$95,000 per year (averaged over ten years) across the Seacare scheme. These costs will be mostly upfront costs and will be significantly outweighed by ongoing benefits from reductions in costs associated with workplace injuries of up to \$3.75 million per year, with the main beneficiary being workers who would avoid costs arising from workplace injuries.

Coverage

48. The new coverage test, which provides greater certainty over the coverage of the Seacare scheme while retaining the same scope of coverage, is expected to have significant benefits for Seacare employers and employees and improve the governance of the Seacare scheme.
49. Employees will benefit from greater certainty over the coverage of the Seacare scheme through reductions in the number of disputed claims. Disputed claims have costs for employees and can delay them from receiving compensation.

⁸ The Safety, Rehabilitation and Compensation Commission is established under the SRC Act. It is a statutory body that carries out regulatory functions in relation to Comcare and other authorities that determine workers' compensation claims under the SRC Act.

50. Employers will benefit by:
 - 50.1. reducing costs of determining if vessels are covered by the Seacare scheme
 - 50.2. reducing the number of disputed claims
 - 50.3. removing the need for some vessels to obtain workers' compensation insurance under both the Seacare scheme and a state or territory workers' compensation scheme, and
 - 50.4. removing the need for employers to obtain exemptions from coverage by the Seacare scheme for one-off or irregular voyages as under the new test vessels are either in or out of the scheme.
51. Governance of the Seacare scheme will be improved by the new coverage test since coverage will no longer be reliant on repealed legislation and a patchwork of legislative instruments. It will be much easier for Seacare regulators to determine if a vessel is covered by the scheme.

Work Health and Safety

52. Australia's maritime industry is a dangerous industry to work in. Despite improvements over the last decade, Seacare scheme workers are almost twice as likely as the average worker to sustain a serious injury while at work, and are more likely to be injured than workers in other high-risk industries such as agriculture, mining and construction.
53. Repealing the OHS(MI) Act and extending the WHS Act to the Seacare scheme is expected to have significant benefits from modern WHS protections that are expected to improve safety outcomes for the Seacare scheme. According to Safe Work Australia data, injury incidence rates have trended downward more quickly in jurisdictions that have adopted the model WHS laws since those laws were adopted (RIS page xii, Graph 3 – Analysis of injury rates for model WHS law jurisdictions prior to and following implementation of model WHS laws).
54. Improving safety outcomes for the Seacare scheme will benefit workers through:
 - 54.1. elimination of injury costs that are not covered by workers' compensation
 - 54.2. greater income from working compared to what they would receive through workers' compensation while injured, and
 - 54.3. improved quality of life from not being injured.
55. Improving safety outcomes for the Seacare scheme will benefit employers through:
 - 55.1. lower workers' compensation premiums
 - 55.2. less time lost due to injury, and
 - 55.3. avoiding costs associated with replacing employees either temporarily or permanently injured.
56. Employers will also benefit from the adoption of the model WHS laws that are in effect in most jurisdictions in Australia as it will mean they can have one WHS management system for all of their workers, including those working on vessels that are not covered by the Seacare scheme.
57. Governance of the Seacare scheme will not be affected by the proposed changes to WHS arrangements since AMSA will remain responsible for enforcing WHS laws for the scheme.
58. The general amendment to the WHS Act removing the requirement for employers to provide Comcare with an up-to-date list of Health and Safety Representatives will provide a minor reduction in regulatory costs for employers. However, they will still need to maintain such a list and provide it to Comcare if requested.
59. The general amendment relating to PINs will benefit both workers and employers because it will allow employers (the Person Conducting a Business or Undertaking) to implement the best control to manage the health and safety risk identified in a PIN, rather than being limited to the control outlined in the PIN.

Workers' Compensation

60. The amendments to workers' compensation arrangements reflect a balanced approach. Some amendments increase access to compensation for employees and the amount of compensation they will receive while other amendments will impact eligibility for compensation.
61. Overall, the workers' compensation amendments are not expected to have a significant overall impact on Seacare scheme employers and employees, given the minor nature of the amendments and the very limited number of claims that are expected to be affected. There will be a minor overall benefit for employees.
62. Employees will benefit from changes to:
 - 62.1. the definition of medical treatment enabling workers to access additional types of compensable treatment, including occupational therapists, optometrists, podiatrists, psychologists and speech therapists without the need for a referral from a medical practitioner
 - 62.2. the maximum amount payable to workers' families for funeral expenses, which will increase from \$6,337.74 (the current amount, indexed annually) to \$11,654.06
 - 62.3. reduce the threshold for compensation for a permanent impairment that is a binaural hearing loss from 10 per cent to 5 per cent, which will mean that more employees will be eligible to receive compensation for hearing loss
 - 62.4. align the retirement age in both the Seafarers Act and SRC Act with the age of eligibility for the Age Pension, which will enable employees to receive workers' compensation until they are eligible to claim the Age Pension, and
 - 62.5. remove existing caps in both the Seafarers Act and SRC Act on compensation for household and attendant care for employees who suffer catastrophic injuries,⁹ which will ensure that these workers can receive sufficient levels of household and attendant care to meet their needs.
63. Employees will be impacted by changes to:
 - 63.1. increase the threshold for level of contribution to injury for diseases to be compensable from a 'material degree' to a 'significant degree', which could reduce access to compensation for some employees (the Bill does not change that certain diseases with known links to their type of employment are presumed to have had a contribution and the number of Seacare claims for disease-related injuries is small), and
 - 63.2. exclude compensation for injuries suffered as a result of 'reasonable administrative action taken in a reasonable manner' (rather than just 'reasonable disciplinary action'), which could also reduce access to compensation for some employees (although given that claims for psychological injury represent only a small proportion of Seacare claims, it is unlikely that many, if any, claims will be affected).
64. Changes to provisions for journey claims will benefit both Seacare employers and employees by providing greater certainty as to when an injury incurred during a journey is associated with work and is therefore compensable.

Levies

65. The introduction of a cost recovery levy will improve the governance of the Seacare scheme by ensuring that AMSA, Comcare and the Commission are adequately resourced to perform their regulatory functions.

⁹ 'Catastrophic injuries' include spinal cord injury, traumatic brain injury, significant amputations, serious burns and permanent traumatic blindness.

66. This will benefit Seacare scheme workers and employers since adequately funded regulators will be proactive, more responsive and better able to oversee the administration of the Seacare workers' compensation scheme and enforce WHS laws.
67. Once charged, a Cost Recovery Levy will have an additional financial impact on employers. The Seafarers Insurance Levy will not have any additional financial impact on employers compared to the existing Safety Net Fund levy, on which it is based.

Governance

68. The transfer of certain Seacare Authority functions to the Commission and the consolidation of certain Seacare administrative functions which are similar to functions performed by Comcare under the SRC Act within Comcare will provide for more efficient and effective governance of the Seacare scheme.
69. Industry input into the governance of the Seacare scheme will be retained through the ability of the Chairperson of the Commission to establish an Advisory Group. The Advisory Group balances the need for stakeholders to contribute to decision making affecting employers and workers covered by the scheme without recreating a Seacare Authority-like body. If the Chair does not constitute the Advisory Group the Annual Report must include a statement that sets out the reasons why it was not constituted.

CONSULTATION

70. The Seacare reforms have been the subject of extensive consultation with stakeholders over a number of years, including two independent reviews, a number of workshop consultations held by the Department, the public release of a consultation RIS and two previews of draft Seacare reform legislation. This consultation is detailed in the RIS (RIS pages I – IV)
71. The Seacare reforms broadly reflect the findings of the two reviews while incorporating feedback provided during consultations held by the Department with Seacare employer representatives and maritime unions.
72. Amendments to the WHS Act dealing with providing Comcare an up-to-date list of Health and Safety Representatives and PINs have been subject to consultation with employer representatives and unions and agreed by a majority of Safe Work Australia members and Commonwealth, state and territory WHS Ministers consistent with the process outlined in the IGA.

CONCLUSION

73. The Seacare scheme commenced in 1993 and has not been substantially updated since that time. Two independent reviews of the Seacare scheme concluded that it needs widespread reform. The Federal Court's *Aucote* decision significantly expanded the coverage of the Seacare scheme, exacerbating the need for reform.
74. The Bills Package will bring the Seacare scheme into the 21st century by modernising its WHS and workers' compensation legislation and providing for more efficient and effective governance of the scheme. The Seafarers Bill will protect the immediate sustainability by providing certainty over the coverage of the scheme.
75. The proposed reforms to the Seacare scheme are expected to provide significant benefits to Seacare employers and employees through improvements in safety outcomes, reducing the costs of workplace injuries for both employers and employees, and reducing costs associated with the current uncertainty over the coverage of the scheme.
76. The Seafarers Bill will also ensure for both the Seacare and Comcare schemes that injured employees can receive compensation until they can claim the Age Pension and that catastrophically injured workers can receive sufficient household and attendant care services to meet their needs.

77. The Bills Package represents a balanced package of reforms that reflects the recommendations of the two independent reviews into the Seacare scheme. The Bills Package has been discussed at length with maritime industry employers and employees over recent years.