

Chapter 2

Provisions of the bill

Introduction

2.1 This chapter sets out the background to the Seacare scheme and outlines the main provisions and aims of the bills package.

Background to the Seacare scheme

2.2 Seacare is a national scheme of occupational health and safety, rehabilitation and workers' compensation arrangements which applies to defined seafarers and, in the case of occupational health and safety, to defined third parties. According to the bill's Regulation Impact Statement (RIS), the scheme 'has generally been understood to cover employers and seafarers on vessels which are engaged in interstate, international or intra-territorial trade or commerce.'¹

2.3 It is a privately underwritten scheme, with employers required to hold workers' compensation insurance to cover their liabilities under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act).²

2.4 The scheme also incorporates the Seafarers Safety Net Fund (the Fund). The Fund enables injured seafarers to lodge a claim when there is no employer against whom a claim can be made, for example in cases where an employer becomes bankrupt, insolvent, is wound up or ceases to exist.³ It is maintained under legislation that allows for the collection of levies, which currently stand at \$15 per berth.⁴

2.5 The Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority) was established under the Seafarers Act to oversee the Seacare scheme. It administers both the Seafarers Act and the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act). It has a number of powers and functions conferred on it to ensure the safety of employees covered under the OHS(MI) Act, as well as to ensure the early and safe return to work and access to compensation for injured employees under the Seafarers Act. The inspectorate function under the OHS(MI) Act is conferred on the Australian Maritime Safety Authority (AMSA).⁵

1 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. vii.

2 Seafarers Safety, Rehabilitation and Compensation Authority, *Annual Report 2015-16*, p. 2.

3 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. vii.

4 Seafarers Safety, Rehabilitation and Compensation Authority, *Annual Report 2015-16*, p. 2.

5 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. iv.

Legislative and policy development

2.6 Multiple reviews of the Seacare scheme have been undertaken since the 1990s.⁶ In 2012, three significant reviews took place. Mr Peter Hanks QC and Mr Allan Hawke AC reviewed the *Safety, Rehabilitation and Compensation Act 1988*, producing two separate reports. Mr Hanks made over 100 recommendations to modernise the Act and increase the focus on early intervention and rehabilitation for injured workers.⁷ Mr Hawke outlined 33 recommendations to improve the performance and operation of the scheme.⁸

2.7 An extensive review was also undertaken by Mr Robin Stewart-Crompton. His final report was released in March 2013, and contained 67 recommendations to improve the scheme coverage, governance arrangements, work health and safety, and workers' compensation legislation and scheme costs. These included recommendations to align the Seafarers Act with the changes to the *Safety, Rehabilitation and Compensation Act 1988* proposed by Mr Hanks.⁹ Some of the report's recommendations are being implemented by the bills being considered by this committee.

2.8 In addition to these reviews, The Department of Employment (the department) undertook a consultation process with industry and employee representatives during the development of the bills package.¹⁰ The department received submissions over a six week period upon the release of the consultation Regulation Impact Statement in December 2015. Subsequently, in March and April 2016, stakeholders had the opportunity to review the draft bills package and comment on the proposed reforms. Through August and September 2016, the department provided Seacare stakeholders with further information on the proposed bills package and invited them to meet with the department to further discuss the package.¹¹

2.9 The Federal Court's decision in the 2014 case *Samson Maritime Pty Ltd v. Noel Aucote* (the Aucote decision) substantially changed the scope of workers'

6 For an overview see Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, pp. iv, vii; Department of Employment, *Submission 2*, p. 4.

7 Peter Hanks, *Safety, Rehabilitation and Compensation Act review report- February 2013*, https://docs.employment.gov.au/system/files/doc/other/src_act_review_report.pdf (accessed 10 December 2016).

8 Allan Hawke, *Safety, Rehabilitation and Compensation Act review: report of the Comcare scheme's performance, governance and framework*, https://docs.employment.gov.au/system/files/doc/other/src_act_review_hawke_final_report.pdf (accessed 10 December 2016).

9 Robin Stewart-Crompton, *Review of the Seacare scheme*, https://docs.employment.gov.au/system/files/doc/other/review_of_the_seacare_scheme_report.pdf (accessed 10 December 2016).

10 Department of Employment, *Supplementary Submission 2.1*, Attachment A.

11 Department of Employment, *Supplementary Submission 2.1*, [p. 1].

compensation and work health and safety arrangements in the Australian maritime industry.¹² Previously, the Seacare scheme applied to limited circumstances set out in subsection 19(1) of the Seafarers Act. Namely, the scheme was not intended to apply to employees engaged on ships undertaking intrastate voyages who have the benefit of state and territory workers' compensation schemes and work health and safety regulation.¹³ The Aucote decision, however, significantly broadened the scope of the scheme by concluding that a seafarer engaged in purely intrastate trade could be covered by the scheme by virtue of being employed by a trading corporation.¹⁴

2.10 The effect of this decision was outlined in the second reading speech by the Hon. Angus Taylor MP, Assistant Minister for Cities and Digital Transformation:

Before the Aucote decision, the Seacare scheme was understood to apply to around 330 ships. Following the decision, the Seacare scheme could cover as many as 11,000 ships—from 330 to 11,000—or even more, with potential retrospective effect going back to 1993...

This responsibility cannot be supported from existing resources, as the scheme and its funding were never designed to accommodate such costs. It represents a massive cost shift from the states to the Commonwealth—at a time when of course the Commonwealth cannot afford it—and could require the recouping of insurance fees and money from formerly injured workers going back to 1993, which is something we clearly do not want to see.¹⁵

2.11 In response to the Aucote decision, the government introduced the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015. That bill was inquired into and reported on by the Senate Education and Employment Legislation Committee in March 2015.¹⁶

2.12 That bill was passed by both Houses of Parliament on 14 May 2015 and restored the coverage of the Seacare scheme to what it was previously understood to be. In particular, the Seafarers Act and OHS(MI) Act were amended to clarify that they do not apply to intrastate voyages, and to ensure that employers are not liable for

12 *Samson Maritime Pty Ltd v Aucote* (2014) FCAFC 182.

13 Senate Education and Employment Legislation Committee, *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 [Provisions]*, March 2015, p. 2.

14 Senate Education and Employment Legislation Committee, *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 [Provisions]*, March 2015, p. 5; Maritime Union of Australia, *Submission 4*, p. 17; Australian Mines and Metals Association, *Submission 3*, pp. 4–5.

15 The Hon. Angus Taylor MP, *House of Representatives Hansard*, 24 March 2015, pp. 3146–7.

16 Senate Education and Employment Legislation Committee, *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 [Provisions]*, March 2015.

the levy in respect of employees whose employment is not covered by the Seacare scheme.¹⁷

Purpose and overview of the bill

2.13 The explanatory memorandum of the *Seafarers and Other Legislation Amendment Bill 2016* (the bill) states that although the Aucote decision was significant, it exacerbated existing issues that were hampering the operation of the Seacare scheme, and which persist despite the 2015 amendments to the Act.¹⁸

2.14 According to the RIS, the scheme 'is not sufficiently funded to be adequately administered and regulated; coverage of the Seacare scheme is unclear; and its governance arrangements are regarded as inefficient.'¹⁹ Furthermore, the scheme has not kept pace with changes in the industry, including employment arrangements and working conditions, and the OHS(MI) Act is outdated and not aligned with work health and safety laws that operate throughout the rest of Australia.²⁰

2.15 According to the RIS, the key objectives of the bill are to:

- clarify the coverage of the Seacare scheme by having clear rules that operate consistently to minimise jurisdictional uncertainty and enable maritime industry employers and employees to easily determine if they are covered by the scheme;
- provide modern and effective work health and safety laws for maritime industry employers and workers that adequately protect workers against risks to their health and safety at work;
- make overdue and necessary updates to the Seacare workers' compensation arrangements;
- provide efficient and effective governance arrangements for the Seacare scheme; and
- ensure that the bodies responsible for Seacare scheme administration and regulation are adequately resourced to effectively monitor workers' compensation and work health and safety arrangements and enforce compliance with work health and safety laws.²¹

17 Senate Education and Employment Legislation Committee, *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015*, March 2015, p. 7.

18 *Seafarers and Other Legislation Amendment Bill 2016, Explanatory Memorandum*, p. i; see also *Seafarers and Other Legislation Amendment Bill 2016, Regulation Impact Statement*, p. iv.

19 *Seafarers and Other Legislation Amendment Bill 2016, Regulation Impact Statement*, p. iv.

20 *Seafarers and Other Legislation Amendment Bill 2016, Regulation Impact Statement*, p. iv.

21 *Seafarers and Other Legislation Amendment Bill 2016, Regulation Impact Statement*, p. xv.

2.16 The bill also gives effect to recent changes to the Maritime Labour Convention and makes minor amendments to broader Commonwealth workers compensation and work health and safety laws.²²

2.17 The Seafarers Safety and Compensation Levies Bill 2016 and the Seafarers Safety and Compensation Levies Collection Bill 2016 support this reform package by establishing new cost recovery arrangements to fund the regulatory oversight of the Seacare scheme.²³

2.18 The next section of this chapter outlines the purpose of the bill in four distinct areas: coverage of the bill, work health and safety changes, workers' compensation changes and governance.

Coverage

2.19 While the *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Act 2015* restored the coverage of the Seacare scheme as it was understood to be prior to the Aucote decision, it did not address longer term issues with the seafarers' compensation framework. Its provisions only restored the coverage of the scheme until the date the Act received Royal Assent. After this date, the Seacare Authority and the Minister for Employment made declarations to continue to confine the coverage of the scheme. However, the former declarations are due to expire throughout March and April 2017 and the latter in June 2017, thus not resolving longer term uncertainty surrounding the scheme.²⁴

2.20 Both the Seafarers Act and the OHS(MI) Act define coverage with reference to the repealed *Navigation Act 1912* (Navigation Act), and the engagement of vessels in certain types of trade or commerce. Due to the changing profile of the maritime industry, including the increasing number of vessels operating in the offshore oil and gas sector, assessing whether a vessel is covered by the scheme can be difficult, and can be dependent on the specific nature of each voyage undertaken.²⁵ Factors taken into account by the employer when determining coverage include:

- the flag and ownership of a vessel;
- the nationalities of seafarers on board;
- the nature of trade and commerce of each voyage; and
- whether the vessel falls within specified categories in the Seafarers Act.²⁶

22 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. i.

23 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. i.

24 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. ix.

25 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. i;
Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. viii.

26 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. viii.

2.21 The determination of coverage on a voyage-by-voyage basis has constituted an administrative burden for maritime industry employers. However, it has also detrimentally impacted employees. When an employee is injured, it is the employer who must determine whether the vessel on which the affected employee worked was covered by the scheme or not, which can be difficult and give rise to disputes.²⁷

2.22 Furthermore, the perceived generosity of the Seacare scheme in comparison to state and territory schemes provides incentives for both employees and employers to potentially misuse the scheme. The former has an incentive to make a claim under the Seacare scheme, while the latter has a motive to reject claims on the basis that the employee is covered under a state or territory scheme.²⁸ The bill's RIS states that this is the rationale for the claim disputation rate under the Seacare scheme being five times higher than other workers' compensation schemes across Australia.²⁹

2.23 The bill clarifies the coverage of the Seafarers Act by creating a new two-tiered test:

- (1) A vessel must be a 'prescribed vessel'; and
- (2) The vessel must not be used wholly or predominantly for voyages or other tasks that are within the territorial sea of a particular state or territory.³⁰

2.24 According to the RIS, this test retains the scope of coverage prior to the Aucote decision, but provides greater certainty over when a vessel is covered. The RIS also states that this resolves jurisdictional uncertainty by ensuring vessels are continually covered rather than moving in and out of the Seacare scheme depending on what voyage is undertaken. While the new test would cover all Australian registered vessels and all foreign vessels with a majority Australian crew whose operations are not confined to a single state or territory, certain activities and vessels would be excluded from the scheme, including:

- recreational vessels;
- inland waterways vessels;
- fishing vessels;
- floating production storage and offloading vessels;³¹
- tourism vessels; and
- government vessels.³²

27 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. viii.

28 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. viii.

29 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. ix.

30 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. ii.

31 These vessels are excluded from workers' compensation coverage only. See Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xvii.

32 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xvii.

2.25 A mechanism to allow maritime industry employers not covered by the Seacare scheme to 'opt in' to the coverage of the Seacare scheme through an application to the Safety, Rehabilitation and Compensation Commission (SRCC) will also be introduced. This will enable employers with some vessels in the Seacare scheme and some in state or territory schemes to elect to have all of their vessels covered by the Seacare scheme.³³ Similarly, the ability for the Minister for Employment to make legislative instruments to declare that a vessel is, or is not, a 'prescribed ship' will be retained.³⁴

Work health and safety changes

2.26 Under the bill, the OHS(MI) Act would be repealed and the Commonwealth's *Work Health and Safety Act 2011* would be amended to extend its application to the Seacare scheme. According to the bill's RIS, the OHS(MI) Act is out-of-date and has contributed to the poor safety performance of the Seacare scheme.³⁵

Workers' compensation changes

2.27 With respect to workers' compensation changes, the bill's Explanatory Memorandum states that the bill would:

- extend the definition of 'medical treatment' to include further types of compensable treatment;
- reduce the threshold for compensation for a permanent impairment that is a binaural hearing loss from 10 per cent to 5 per cent;
- change the level of contribution of employment to an injury that is a disease from a 'material' to a 'significant' degree; and
- change the coverage of psychological injuries to exclude injuries suffered as a result of 'reasonable administrative action taken in a reasonable manner' instead of as a result of 'reasonable disciplinary action'.³⁶

2.28 In addition, 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*, and align the Act with minimum benchmarks to be set by the National Injury Insurance Scheme for workplace accidents.³⁷

33 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xvii.

34 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xvii.

35 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xvii.

36 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. ii.

37 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. ii.

2.29 According to the department's submission, 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 work trips are not.³⁸

Governance

2.30 The bill aims to improve the Seacare scheme's governance arrangements by integrating the functions currently performed by the Seacare Authority into the Commonwealth workers' compensation scheme (Comcare scheme).

2.31 The Seacare Authority does not receive any appropriation from the Government to perform its functions for the Seacare scheme. In comparison, Comcare receives an annual appropriation of around \$400 000 to provide the Seacare Authority with secretariat and administrative support to perform its functions. However, this appropriation does not cover Comcare's full costs of providing assistance to the Seacare Authority.³⁹

2.32 In addition, according to the RIS, the Seacare Authority 'does not have the capacity to effectively monitor the work health and safety and return to work performance of Seacare scheme participants or administer its workers' compensation arrangement,' while the SRCC 'has a strong track record at regulating self-insurers under the SRC Act.'⁴⁰

2.33 If the bill package is passed, the Seacare Authority will be abolished and the functions split between Comcare and the SRCC. Industry representation will be maintained by enabling the chairperson of the SRCC to appoint an advisory group, constituted of employee and employer representatives, to provide support and industry expertise to the SRCC and Comcare, as required. AMSA's current work health and safety regulatory role will be maintained.⁴¹

38 Department of Employment, *Submission 2*, p. 6.

39 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xiv.

40 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xiv.

41 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. iii.