

The Senate

Education and Employment
Legislation Committee

Seafarers and Other Legislation Amendment
Bill 2016 [Provisions]

Seafarers Safety and Compensation Levies
Bill 2016 [Provisions]

Seafarers Safety and Compensation Levies
Collection Bill 2016 [Provisions]

February 2017

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ISBN: 978-1-76010-508-2

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TABLE OF CONTENTS

MEMBERSHIP OF THE COMMITTEE	iii
Chapter 1	1
Introduction	1
Reference	1
Conduct of the inquiry	1
Structure of the report.....	1
Compatibility with human rights.....	2
Scrutiny of Bills Committee	2
Financial Impact Statement	3
Chapter 2	5
Provisions of the bill	5
Introduction	5
Background to the Seacare scheme	5
Purpose and overview of the bill.....	8
Chapter 3	13
Key issues	13
Introduction	13
Proposed new coverage test.....	14
Workers' compensation reforms	15
Changes to governance arrangements	16
Committee view.....	18
Labor Senators' Dissenting Report	21
Australian Greens Senators' Dissenting Report	25

Appendix 1	27
Submissions received	27

Chapter 1

Introduction

Reference

1.1 The Seafarers and Other Legislation Amendment Bill 2016 (the bill), the Seafarers Safety and Compensation Levies Bill 2016, Seafarers Safety and Compensation Levies Collection Bill 2016 (related bills) were introduced into the House of Representatives on 13 October 2016 by the Hon. Angus Taylor MP, Assistant Minister for Cities and Digital Transformation.¹

1.2 On 10 November 2016, the provisions of the bills were referred to the Senate Education and Employment Legislation Committee (the committee) for inquiry and report by 7 February 2017.²

Conduct of the inquiry

1.3 Details of the inquiry were made available on the committee's website.³ The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from seven organisations, as detailed in Appendix 1.

1.4 The committee decided to conduct this inquiry on the basis of written submissions and not to hold public hearings.

Structure of the report

1.5 The report focusses on issues pertaining to the Seafarers and Other Legislation Amendment Bill 2016. This introductory chapter sets out the background to the inquiry. Chapter two of this report examines the background and detail of the bill and the existing Seacare scheme.⁴

1.6 Chapter three considers the key issues identified by submitters in relation to the bill, including the proposed:

1 *Votes and Proceedings*, No. 11, 13 October 2016, p. 211.

2 *Journals of the Senate*, No. 15, 10 November 2016, p. 448.

3 Senate Standing Committee on Education and Employment, *Seafarers and Other Legislation Amendment Bill 2016* and related bills, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SeafarersBill45th (accessed 21 November 2016).

4 The Seacare scheme, currently administered by the Seacare Authority, 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.

- new coverage test;
- changes to workers' compensation and work, health and safety arrangements; and
- new governance arrangements.

Compatibility with human rights

1.7 According to the bill's Statement of Compatibility with Human Rights, the bill engages the following rights:

- the right to equality and non-discrimination in Article 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR);
- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the rights of persons with disabilities in Article 26 of the Convention on the Rights of Person with Disabilities (CRPD);
- the right to safe and healthy working conditions in Article 7 of ICESCR;
- the right to privacy in Article 17 of the ICCPR; and
- the right to be presumed innocent until proved guilty in Article 14 of the ICCPR.⁵

1.8 The bill's Statement of Compatibility with Human Rights also states that the bill is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁶

Scrutiny of Bills Committee

1.9 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has considered the three bills.⁷ With regard to the Seafarers and Other Legislation Amendment Bill 2016, the Scrutiny of Bills Committee noted that certain provisions introduce strict liability for offences with no justification in the explanatory memorandum. The Scrutiny of Bills Committee 'expects the explanatory memorandum to provide a clear justification for any imposition of strict liability,

5 Seafarers and Other Legislation Amendment Bill 2016, Statement of Compatibility with Human Rights, *Explanatory Memorandum*, p. ii.

6 Seafarers and Other Legislation Amendment Bill 2016, Statement of Compatibility with Human Rights, *Explanatory Memorandum*, p. i.

7 Senate Standing Committee on Scrutiny of Bills, *Alert Digest 8/16*, 9 November 2016, pp. 40–45.

including commenting whether the approach is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.⁸

1.10 Furthermore, the proposed section 25M provides that the Safety, Rehabilitation and Compensation Commission (SRCC) may make a written instrument exempting the employment of certain employees on a particular vessel from the application of the proposed Acts, without providing sufficient guidance for the administration of this discretionary power.⁹

1.11 The Scrutiny of Bills Committee also raised concerns about proposed section 25R, which provides that if the SRCC on its own initiative decides to make such an exemption, there is no right to seek merits review of that decision.¹⁰

1.12 With regard to the Seafarers Safety and Compensation Levies Collection Bill 2016, the Scrutiny of Bills Committee expressed concern at the abrogation of self-incrimination arising in subclause 9(7).¹¹

1.13 The Scrutiny of Bills Committee has sought an explanation from the Minister for Employment, Senator the Hon Michaelia Cash on each of these areas of concern. The committee understands that Minister Cash has provided a response to the Scrutiny of Bills Committee. That committee will report to the Senate in due course.

Financial Impact Statement

1.14 No financial impact statement was provided.

Acknowledgement

1.15 The committee thanks those organisations who contributed to the inquiry by preparing written submissions.

8 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 8/16*, 9 November 2016, p. 40.

9 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 8/16*, 9 November 2016, p. 41.

10 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 8/16*, 9 November 2016, p. 42.

11 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 8/16*, 9 November 2016, p. 44.

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.

Chapter 3

Key issues

Introduction

3.1 The committee received seven submissions regarding the bill. There was broad agreement that the Seacare scheme needs to be updated, but no consensus on the appropriate future model.

3.2 The Department of Employment (the department) argued that both employers and employees would benefit in a multitude of ways from the provisions of the bill:

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 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.¹

3.3 There were divergent views expressed by industry stakeholders regarding the proposed reforms to the Seacare scheme. The Australian Mines and Metals Association (AMMA) and Maritime Industry Australia Limited (MIAL), for example, called for the abolition of both the Seacare Authority and the Seacare scheme altogether,² while the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA) preferred that the Seacare Authority remain in existence.³

3.4 Other issues raised by industry and employee representative groups include the:

- proposed new coverage test;⁴
- work health and safety and workers' compensation reforms;⁵ and

1 Department of Employment, *Submission 2*, p. 10.

2 Australian Mines and Metals Association, *Submission 3*, p. 1; Maritime Industry Australia Limited, *Submission 1*, p. 5.

3 Australian Council of Trade Unions, *Submission 5*, p. 5; Maritime Union of Australia, *Submission 4*, p. 39.

4 Maritime Union of Australia, *Submission 4*, p. 39; Maritime Industry Australia Limited, *Submission 1*, p. 8; Australian Mines and Metals Association, *Submission 3*, p. 6; and Department of Employment, *Submission 2*, p. 5.

5 Maritime Union of Australia, *Submission 4*, p. 40; Australian Council of Trade Unions, *Submission 5*, p. 6; Australian Mines and Metals Association, *Submission 3*, p. 8; and Maritime Industry Australia Limited, *Submission 1*, p. 12.

- changes in governance arrangements.⁶

3.5 More broadly, support was expressed for particular aspects of the scheme. In particular, submitters agreed that the Seacare scheme's workplace health and safety arrangements needed to be modernised,⁷ and that the definition of medical treatment and lowering the threshold for binaural hearing loss should be extended.⁸

Proposed new coverage test

3.6 The new coverage test would significantly clarify the scheme's application because the proposed test is simpler, 'avoid[ing] 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.'⁹ The department indicated that this is intended to be a compromise option, as none of the options put forward during consultation were unanimously supported by stakeholders.¹⁰

3.7 MIAL argued that the new coverage test would not alleviate confusion and could jeopardise the Safety Net fund through employers not taking out appropriate coverage, which would leave the Seacare scheme as the default provider.¹¹

3.8 Unions also criticised the new test. The MUA contended that the Aucote decision was incorrectly pinpointed by the government as the prime reason for disputation of claims in the operation of the Seacare scheme. The MUA asserted that delays and the high rate of Seacare appeals to the Administrative Appeals Tribunal are a result of employers avoiding their duties to resolve compensation claims, and since the bill did not address these problems the operation of the scheme would not improve.¹²

3.9 The department, however, stated that the new test would improve governance of the Seacare scheme because coverage 'will no longer be reliant on repealed legislation and a patchwork of legislative instruments' and thus 'it will be much easier for Seacare regulators to determine if a vessel is covered by the scheme.'¹³

6 Maritime Union of Australia, *Submission 4*, pp. 39–40; Australian Council of Trade Unions, *Submission 5*, p. 5; and Maritime Industry Australia Limited, *Submission 1*, p. 13.

7 Maritime Industry Australia Limited, *Submission 1*, p. 3; Department of Employment, *Submission 2*, p. 4; Australian Mines and Metals Association, *Submission 3*, pp. 1–2.

8 Australian Maritime Officers Union, *Submission 6*, p. 15.

9 Department of Employment, *Submission 2*, pp. 5 and 7.

10 Department of Employment, *Submission 2*, p. 5.

11 Maritime Industry Australia Limited, *Submission 1*, p. 8.

12 Maritime Union of Australia, *Submission 4*, p. 7.

13 Department of Employment, *Submission 2*, p. 8.

3.10 The department also explained that the opt-in provisions, which allow for prescribed vessels to choose to be covered by the scheme, would maintain the flexibility the scheme had under the provisions of the *Navigation Act 1912*.¹⁴

Work health and safety reforms

3.11 There were both positive and negative views expressed about certain aspects of the proposed work health and safety reforms.

3.12 The RIS states that:

The duties and requirements in the WHS Act and WHS Regulations are broad based and are capable of applying to a range of sectors, industries and businesses. The section of the maritime industry that is covered by the Seacare scheme is not significantly different from other industries that are covered by general Commonwealth, state or territory work health and safety laws to justify the continuation of separate work health and safety arrangements. Maritime industry employers not currently covered by the OHS(MI) Act already operate under general work health and safety laws in the states and territories.¹⁵

3.13 The ACTU endorsed the principle of harmonisation of the maritime industry work health and safety laws with national standards but raised concerns about the consultation process regarding this issue.¹⁶

3.14 AMMA expressed concerns that the application of the *Work Health and Safety Act* (WHS Act) to vessels covered by Seacare would be too much of a concession to unions, which can use the provisions of the WHS Act to gain right of entry to vessels.¹⁷ MIAL echoed this view, asserting that the creation of an explicit right of entry 'represents the potential for further disruptions to business, where the timeliness of operational movements can be critical.'¹⁸

Workers' compensation reforms

3.15 Similarly, there were arguments for and against the proposed changes to workers' compensation arrangements.

3.16 The Australian Maritime Officers Union (AMOU) supported extending the definition of medical treatment and lowering the threshold for binaural hearing loss.¹⁹

3.17 The MUA opposed section 59 of the bill which sought to expand the definition of superannuation scheme to include a retirement savings account.²⁰ It also

14 Department of Employment, *Submission 2*, p. 5.

15 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xviii.

16 Australian Council of Trade Unions, *Submission 5*, pp. 2–3.

17 Australian Mines and Metals Association, *Submission 3*, p. 8.

18 Maritime Industry Australia Limited, *Submission 1*, p. 12.

19 Australian Maritime Officers Union, *Submission 6*, p. 15.

opposed increasing the 'eligibility threshold to which employment must contribute to an injury or a disease from a "material" to a "significant" degree' because, in the union's view, it:

...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... There is no neat boundary between personal and work life.²¹

3.18 Further, the ACTU argued that more compensation claims will be rejected because of the provisions in the bills that seek to change the 'reasonable disciplinary action' exclusion for claims involving psychological injuries to a broader 'reasonable [administrative] action' exclusion.²²

3.19 MIAL, however, voiced concern that the bills package may not provide appropriate incentives for employees to return to work after an injury, namely in the form of step downs in compensation payments overtime.²³ In addition, MIAL was concerned that the extension of the payments beyond the age of 65 will increase costs for employers.²⁴

3.20 In its submission the department stated that in general the new workers' compensations arrangements will have a limited impact:

...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.²⁵

Changes to governance arrangements

3.21 There was a range of views regarding the changes to the governance arrangements of the Seacare scheme. In particular, some submitters voiced concern that there would be a loss of maritime specific expertise in the oversight of the scheme,²⁶ and questions were raised about whether placing the scheme under the

20 The bill provides for injured seafarers to receive compensation until they reach retirement age at which point they must rely on the aged pension or their superannuation. Maritime Union of Australia, *Submission 4*, p. 40; Seafarers and Other Legislation Amendment Bill 2016, Notes on Clauses, *Explanatory Memorandum*, p. 30.

21 Maritime Union of Australia, *Submission 4*, p. 40.

22 Australian Council of Trade Unions, *Submission 5*, p. 6.

23 Maritime Industry Australia Limited, *Submission 1*, pp. 12–13.

24 Maritime Industry Australia Limited, *Submission 1*, p. 13.

25 Department of Employment, *Submission 2*, p. 9.

26 Australian Mines and Metals Association, *Submission 3*, p. 2; Maritime Union of Australia, *Submission 4*, pp. 39–40; Australian Council of Trade Unions, *Submission 5*, p. 5; Maritime Industry Australia Limited, *Submission 1*, p. 13.

purview of the Safety, Rehabilitation and Compensation Commission (SRCC) would hamper productivity and the resolution of claims.²⁷

3.22 The MUA argued that the seafaring is a unique industry which poses specific dangers and risks to employees, including:

- the operation and manipulation of heavy objects and machinery;
- living in the workplace;
- fatigue; and
- isolation.²⁸

3.23 In addition, the MUA submitted that because seafarers must be prepared to deal with an emergency at all times they are unable to return to work until they have returned to 100 per cent of their normal functioning and capabilities. The union's submission stated that 'under the broader administration of the SRCC and Comcare...seafarers will be under even more pressure to return to work before they are ready.'²⁹

3.24 MIAL raised concerns about the potential for a loss of expertise, arguing that 'where a separate industry scheme is to be maintained it defies logic not to retain industry expertise for the administration of it.'³⁰

3.25 The ACTU agreed with these sentiments and also contended that placing the scheme directly under the oversight of the SRCC would not streamline the claims process, but would rather make it more adversarial and 'add regulatory limitations.'³¹

3.26 The department submitted that the Seacare scheme would not be affected by loss of expertise because the bill allows the chairperson of the SRCC to establish an Advisory Group.³² Furthermore, the department explained that placing the scheme under the purview of the SRCC is a consolidation of many of the functions that the SRCC already carries out under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act). Consequently, it argued that the SRCC is well-placed to take on the Seacare scheme and it will make the administration of the scheme more efficient.³³

27 Australian Council of Trade Unions, *Submission 5*, p. 5.

28 Maritime Union of Australia, *Submission 4*, p. 11

29 Maritime Union of Australia, *Submission 4*, p. 12, 39–40.

30 Maritime Industry Australia Limited, *Submission 1*, p. 13.

31 Australian Council of Trade Unions, *Submission 5*, p. 5.

32 Department of Employment, *Submission 2*, p. 10.

33 Department of Employment, *Submission 2*, p. 10.

Committee view

3.27 There is widespread agreement that the Seacare scheme needs to be reformed.³⁴ Various governments over time have commissioned numerous independent expert reviews and undertaken consultation with industry and stakeholders to confirm the need for change.

3.28 After extensive consultation, there is no universal agreement on how the scheme should be structured or operated.³⁵ The bills package is designed to be a compromise option that safeguards the Seacare scheme and the Safety Net Fund, while allowing the industry to move forward with less confusion about coverage and providing value for taxpayers by stopping the states from shifting costs on to the Commonwealth Seacare scheme.³⁶

3.29 With regard to coverage, the committee is satisfied that the confusion and uncertainty arising from the Aucote decision and the evolving nature of seafaring will be remedied by the bills package. The committee also supports the opt-in arrangements that may simplify the operations of certain maritime operators.

3.30 The committee is of the view that the application of the WHS Act provides greater certainty to the maritime industry and is a positive step for the national framework of work health and safety regulations.

3.31 The committee considers that the associated right of entry provisions of the WHS Act will not hamper productivity in the sector as unions can already apply for a right of entry permit to vessels under the *Fair Work Act 2009*, and thus the bill is not introducing a right for unions that has not previously existed.³⁷ Nevertheless, given industry concerns, the government should monitor closely any adverse impacts on the sector in this regard.

3.32 The committee also supports the new workers' compensation arrangements, which overall rationalise the compensation framework while maintaining existing benefits for seafarers.

3.33 Furthermore, the committee considers that the proposed new governance arrangements for the Seacare scheme will not materially impact either employers through increased regulation or employees through lack of maritime-specific expertise. The bill's explanatory memorandum acknowledges that seafaring is a dangerous industry, thus demonstrating that the needs of industry have been at the forefront of the government's mind throughout the drafting of the legislation.³⁸ In addition, if the chair of the SRCC decides against appointing an advisory committee

34 Maritime Industry Australia Limited, *Submission 1*, p. 3; Department of Employment, *Submission 2*, p. 4; Australian Mines and Metals Association, *Submission 3*, pp. 1–2.

35 For an overview of the consultation process in the development of the bills package, see chapter 2 of this report and Department of Employment, *Supplementary Submission 2.1*.

36 Department of Employment, *Submission 2*, p. 5.

37 Seafarers and Other Legislation Amendment Bill 2016, *Regulation Impact Statement*, p. xxxv.

38 Seafarers and Other Legislation Amendment Bill 2016, *Explanatory Memorandum*, p. 8.

the reasons for this will have to be published in the SRCC's annual report, thus ensuring accountability in the operation of the scheme.³⁹ Again, this should be an issue that the government should monitor closely to ensure that the transition to the new governance arrangements is implemented in a manner that takes into account the specific attributes of the maritime sector.

Recommendation 1

3.34 The committee recommends that the Senate pass the package of bills.

Senator Bridget McKenzie

Chair

39 Seafarers and Other Legislation Amendment Bill 2016, Notes on Clauses, *Explanatory Memorandum*, p. 9.

Labor Senators' Dissenting Report

Introduction

1.1 Labor senators are opposed to the package of bills currently before parliament which propose to radically alter the Seacare scheme. The Seafarers and Other Legislation Amendment Bill 2016 (the bill) in particular represents a piecemeal attempt to restructure the Seacare scheme. However it is the view of Labor senators that it will not result in any worthwhile change.

1.2 While the Department of Employment (the department) has argued that the bill represents a compromise position to strike a balance between unions and industry bodies,¹ submissions to this inquiry demonstrate that this could not be further from the truth. Submissions from both employer and employee representatives express significant reservations about the bills package.²

1.3 In essence, the bill would hinder injured seafarers' ability to return to work after an injury. The bill would also result in more confusion over the scheme's coverage, leading to even more costly, time-consuming and unnecessary litigation. Labor is very concerned about this development.

Key issues

Coverage

1.4 As both union and industry submissions argued, the bills package will not alleviate confusion about the Seacare scheme's coverage. These concerns are detailed in the majority report at paragraphs 3.7 to 3.8.

Harmonising WHS laws

1.5 While the attempts to harmonise WHS laws across the maritime sector are a welcome development, Labor is concerned that the government did not consult adequately on this matter and as a result there are flaws in the WHS components of the bill.³

Workers' compensation

1.6 The compensation provisions also demonstrate a lack of concern for injured seafarers. Labor shares the ACTU's view that the bill erodes existing protections and payments for injured seafarers.⁴

1 Department of Employment, *Submission 2*, p. 5.

2 For example Maritime Industry Australia Limited, *Submission 1*; the Australian Mines and Metals Association, *Submission 3*; Australian Council of Trade Unions, *Submission 5*; and the Maritime Union of Australia, *Submission 4*.

3 Australian Council of Trade Unions, *Submission 5*, pp. 2–3.

4 Australian Council of Trade Unions, *Submission 5*, p. 6.

Governance

1.7 The proposed changes to governance arrangements reveal the government's lack of commitment to effective reform. Submissions from the unions and MIAL clearly explained that if these changes come into force, maritime employees and their families will be subject to costly and time-consuming litigation, which will further damage employees' ability to undergo rehabilitation and return to work.⁵

1.8 Labor is also greatly concerned that the provision of maritime expertise is not a mandatory requirement of the proposed scheme. It is not satisfactory to simply give the chair of the SRCC a discretionary ability to appoint a maritime advisory panel. The reasons for this are laid out in depth in the MUA's submission and include:

- the operation and manipulation of heavy objects and machinery;
- living in the workplace;
- fatigue and isolation;⁶ and
- being prepared to deal with an emergency at all times.⁷

1.9 Furthermore, MIAL stated that:

Where a separate industry scheme is to be maintained it defies logic not to retain industry expertise for the administration of it... If a body that does not have industry representation on it is tasked with administration of an industry specific scheme, then that body must be obliged to consider industry advice as part of that administration.⁸

Labor's view

1.10 Despite many years in preparation, the seafarers bills package is not supported by either the unions or industry representatives. Other than the department, no submitters support the package.

1.11 Overall, the bills package constitutes a muddled attempt to reform the Seacare scheme. The government has wasted much time appearing to be consultative and has developed a so-called compromise option that produces a piecemeal package of bills that will ultimately undermine the Seacare scheme.

1.12 The bills won't enhance the operations of the maritime sector or the protection of workers. They will, rather, hamper the industry, as they do not alleviate coverage issues, will result in more litigation and will not cater for the specific needs of the maritime sector.

5 Maritime Union of Australia, *Submission 4*, p. 40; Australian Council of Trade Unions, *Submission 5*, p. 6; Maritime Industry Australia Limited, *Submission 1*, pp. 12–13.

6 Maritime Union of Australia, *Submission 4*, p. 11

7 Maritime Union of Australia, *Submission 4*, p. 12.

8 Maritime Industry Australia Limited, *Submission 1*, p. 13.

Recommendation 1

1.13 Labor Senators recommend that the Senate not pass the seafarers package of bills.

Senator Gavin Marshall

Deputy Chair

Australian Greens Senators' Dissenting Report

1.1 Seafaring and the maritime industry is a very hazardous industry. Workers in the industry have much greater fatality rates than workers in most other industries.

1.2 Therefore any reform to workplace health and safety and compensation arrangements in the industry must be conducted with great caution and with proper consultation.

1.3 The Australian Greens support the appropriate integration of the maritime industry into the broader workplace health and safety regime in consultation with industry.

1.4 However the Seafarers Safety and Compensation Bills package proposed by the government has not been developed with proper consultation with industry, in particular maritime unions, and will have significant detrimental consequences for workers in the maritime sector.

1.5 Evidence to the committee by the ACTU and the Maritime Union of Australia outlined many flaws and dangers in the bills and made detailed recommendations on how reform of the workplace health and safety regime in the maritime industry could be undertaken.

1.6 The Maritime Union of Australia's submission to the inquiry outlined their strong opposition to the bills in their current form. Their concerns included:

- Attacks on 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;
- Concerns that 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;
- Many vessels would be pushed to state OHS inspectorates which are not as well equipped to do inspections;
- A significant reduction in vessels numbers would threaten the future survival of the already-small national Seacare scheme;
- 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;
- 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;
- 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.¹

1.7 Other detrimental changes include an inferior consultation model for codes of practice; preventing health and safety representatives from giving directions in provisional improvements notices; and changes to the Safety, Rehabilitation and Compensation Act that will have impacts beyond the maritime industry.

1.8 The ACTU stated in evidence to the inquiry:

The ACTU regrets the failure of the Australian Government to establish a tripartite process to develop the Bills similar to the process used to develop the model work health and safety laws and submits that the passage of the Bills be delayed until such time that this consultation process has occurred.²

Recommendation 1

1.9 The Australian Greens recommend the bills not proceed and government engage in proper consultation with the industry on any future reform.

Senator Sarah Hanson-Young

1 Maritime Union of Australia, *Submission 1*, pp. 8–10.

2 Australian Council of Trade Unions, *Submission 5*, p. 3.

Appendix 1

Submissions received

Submission Number	Submitter
1	Maritime Industry Australia Limited
2	Department of Employment
3	Australian Mines and Metals Association
4	Maritime Union of Australia
5	Australian Council of Trade Unions
6	Australian Maritime Officers Union
7	Sea Swift

