

# LABOR SENATORS' DISSENTING REPORT

1.1 Labor Senators hold some concern about aspects of the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the Bill).

1.2 Whilst we appreciate that this Bill was introduced to reduce uncertainty in the industry, Labor Senators were not persuaded by the evidence submitted to the Committee that the Bill would restore the alleged shared understanding of the operation and coverage of the *Seafarers Act* prior to the decision of the Federal Court of December 2014 (*Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (22 December 2014)).

## **The intention of the Bill**

1.3 This Bill amends two Acts, the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993 (the OHS(MI) Act)* returning the coverage of the Seacare scheme to what it has been commonly understood to be since the commencement of the scheme in 1993.

1.4 The Bill amends the coverage provisions of the Seacare scheme to, as the Government claims, clarify that the scheme is 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.

1.5 There is evidence to suggest there has never existed an intention that the Seafarers Act should only cover a very limited cohort of seafarers.

1.6 The intent of this Bill is to make the legislation only applicable to ships undertaking a voyage of interstate or overseas trade.

1.7 Labor Senators assert that the Bill goes much further than anything which arises out of the Aucote decision, and that the use of the term "directly and substantially" in the Bill is likely to create further confusion about the way in which coverage is interpreted.

1.8 Only those vessels which can be said to be explicitly involved in interstate or overseas trade will be clearly within the scope of the Act. Vessels which operate in mixed intra-state and inter-state activities will be in limbo.<sup>1</sup>

1.9 Evidence indicates that hundreds of ships that are currently accepted as being covered by the Seafarers Act are not strictly engaged in undertaking voyages on an interstate or international nature. AIMPE calculated that "...73.8% or almost three quarters of the vessels currently under Seacare are not engaged in what was traditionally known as interstate trading."

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<sup>1</sup> Maritime Union of Australia, *Submission 1*, p. 8.

1.10 The Bill will also restrict the number of seafarers covered by the legislative scheme so that it would cover only a fraction of the seafarers currently encompassed by the scheme.

### **Lack of consultation**

1.11 Evidence submitted to the Committee demonstrated the lack of bona fide consultation undertaken by the Government in the process of drafting this legislation. Key employer and employee groups such as the Maritime Union of Australia, the Australian Shipowners Association, and the Australian Maritime Officers Union, confirmed that they were not adequately consulted:

Notwithstanding the fact that the AMOU is one of the three unions representing workers who will be directly affected by this legislation, our comment on the Bill was not sought by Government or any relevant Departments or Agencies prior to its introduction into the Parliament.<sup>2</sup>

### **Implication on workers' rights**

1.12 Labor Senators also note the following from the AMOU's submission to the Committee:

The Australia Government by virtue of being a signatory to the International Labor Organisation Occupational Safety and Health Convention 1981, Convention 155 (ILO C155)<sup>1</sup> has international obligations to consult with workers about matters that will affect their health and safety.<sup>3</sup>

1.13 The clarification of which worker's compensation scheme may apply to a worker is a substantial issue considering the extreme disparity of benefits that may be payable in the event of injury or death for seafarers. This clarification also evokes implications under the International Covenant on Economic Social and Cultural Rights regarding the alignment of the quantum of rights with a person's actual rights.<sup>4</sup>

1.14 The MUA provided actual examples of the implications of the legislation on the rights to work, providing analysis of a worker's access to compensation under the WA workers' compensation legislation versus the Seafarers Act:

Under the Western Australian scheme, a seafarer aged 30 with a dependent wife and children who was earning, say, \$2,500.00 per week gross pre-accident (not an unusual wage in the offshore sector) and who is permanently incapacitated for work will exhaust his weekly compensation payments after only 2 years. He or she will then presumably be thrown onto the social security system. If he or she needs major spinal surgery that will very soon exhaust any entitlement to medical expenses which are capped at only \$55,018.00. A cap of under \$13,000.00 for rehabilitation costs will prevent in many cases any meaningful rehabilitation, certainly if retraining is required.

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<sup>2</sup> Australian Maritime Officers Union, *Submission 2*, p. 2.

<sup>3</sup> Australian Maritime Officers Union, *Submission 2*, p. 3.

<sup>4</sup> KCI Lawyers, *Submission 5*, p. 3.

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On the other hand, under the Seafarers Act, a seafarer in similar circumstances will be entitled to ongoing weekly compensation payments if required, until 65 years of age. Such seafarers will be entitled to medical expenses and rehabilitation on a needs basis (and subject to a test of reasonableness) for so long as required.<sup>5</sup>

1.15 Labor Senators believe it is worth reminding the Senate that when worker's compensation has been exhausted, injured workers are usually forced to access the welfare system, resulting in the possibility of significant "cost-shifting" for workers who are unable to return to work.

1.16 Furthermore, Labor Senators note evidence submitted showing that if additional seafarers are excluded from the Commonwealth scheme for seafarers by the passage of the Bill, it cannot be automatically assumed that they will be covered under state workers' compensation schemes. A state workers' compensation insurer may decline a claim if the injury occurs outside the state and there is not a sufficient legislative connection with the State. Section 9AA of the *Workers Compensation Act 1987* (NSW) for example appears to provide significant discretion for State schemes to deny liability that could become applicable should the Bill be passed in its current form.

### **Alternative resolution**

1.17 Labor Senators recommend that at this stage, the Bill should be rejected, and that the best way forward would be for the Government and stakeholders to resolve the issues. We believe that an industry wide supported Bill can be achieved through negotiation. KPI Lawyers propose a solution in their submission that a 'no detriment' clause be inserted into any proposed Bill clarifying seafarers' rights to worker's compensation<sup>6</sup>, ensuring access to the most beneficial, or at least more proportionate benefits. Although Labor Senators do not directly recommend this proposal, we suggest it as a point of discussion.

1.18 Labor Senators of the Committee believe it is absolutely incumbent on the Government to meet with industry, employer organisations and employee organisations, to arrive at a sensible solution rather than rush a Bill through the Senate Committee process.

1.19 We also believe that a summary of the relevant case law should be compiled by the Government to assist the parties in finalising an agreed coverage position.

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<sup>5</sup> Maritime Union of Australia, *Submission 1*, p. 15.

<sup>6</sup> KCI Lawyers, *Submission 5*, p. 3.

## **Recommendation 1**

**1.20 That the Senate reject the Bill, and implore Senator Abetz to facilitate discussions and negotiations directly with industry, employer organisations and employee organisations.**

**Senator Sue Lines**

**Deputy Chair**