MARITIME UNION OF AUSTRALIA (MUA)

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

INQUIRY INTO THE SEAFARERS REHABILITATION AND COMPENSATION AND OTHER LEGISLATION AMENDMENT BILL 2015

13 MARCH 2015

1. Introduction

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

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

1.3 The MUA is continuing to advocate for retention of the Seafarers Safety Rehabilitation and Compensation Authority (Seacare Authority) as an independent and stand alone stakeholder representative governance body for Seacare scheme legislation. It has been an effective and cost efficient regulator that is highly regarded in the industry and continues to play a valuable role in promoting improved productivity in the Austlakn shipping industry in the way it manages and supports effective OHS and injured seafarers.

2. The MUAs recommended approach for the Senate Committee to consider

2.1 The Maritime Union of Australia (MUA) is strongly opposed to the passage of the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the Bill).

2.2 We urge the Senate Education and Employment Legislation Committee (the Committee) to recommend against passage of the Bill because there has not been proper consideration of its detrimental effect on the rights and protections of Australian seafarers, employers of seafarers and the insurance companies that offer workers' compensation insurance under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act).

2.3 In addition, there has been no proper consideration of its implications for the work health and safety of seafarers under the Commonwealth *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act).

2.4 It is our submission that the Government has inexcusably been caught unprepared by the decision of the Full Federal Court in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC182 of December 2014 notwithstanding the decision of the Administrative Appeals Tribunal (AAT) *Aucote and Samson Maritime Pty Ltd [2014] AATA 296* some 6 months earlier in May 2014. Consequently, we say the Government has responded with undue haste in bringing this Bill before the Parliament without consulting the stakeholders and seafarers who will be affected by the Bill and without proper consideration as to its implications.

2.5 In both the 2005 and 2012 reviews of Seacare scheme legislation[1] the industry stakeholders sought Government assistance to resolve the varying interpretations of scheme coverage through a consensus approach. Regrettably, the Government has failed to respond to either of those opportunities. None of the recommendations of those 2 reviews have been addressed by respective Governments, let alone implemented.

2.6 The Bill is flawed and should not be allowed to pass the Parliament in its present form.

2.7 There is no immediate risk that requires a Bill to be rushed through the Parliament. It is highly improbable that there will be any significant number of new or unexpected claims arising from the Federal Court decision.

2.8 Furthermore, the Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) has already determined in-principle to exempt some 59,500 ships and the seafarers engaged on those ships from the operation of the Seafarers Act, in a majority decision of 19 February 2015.

2.9 There is a willingness on the part of the principal stakeholders to confer with the aim of reaching a new consensus on a sensible and practical delineation (between the Commonwealth and States/NT) for coverage of Seacare scheme legislation going forward. This was borne out by the discussion at a Seacare Authority sponsored Jurisdiction Coverage Workshop held in Canberra where the stakeholders and a number of Government agencies participated.

2.10 We urge the Committee to recommend that the employer parties and parties representing seafarers, with the participation of the Australian Maritime Safety Authority (AMSA) confer under the direction of a neutral facilitator with the aim of reaching agreement on the appropriate coverage under the Seacare scheme legislation, and reporting back to the Committee, before it makes a final report to Parliament.

3. The MUA summary of reasons why the Committee should not recommend passage of the Bill

3.1 The Bill unnecessarily limits coverage beyond anything ever intended.

[1] Ernst & Young Review of Seacare May 2005 and Robin Stewart-Crompton Review of Seacare February 2013

3.2 The Bill goes beyond simply restoring the alleged pre-Federal Court consensus on coverage. The proposed addition of the words "directly and substantially" in s19 of the Seafarers Act will have the effect of unnecessarily winding back what is alleged to be a consensus position of the pre-Federal Court decision coverage.

3.3 The current coverage provision has been in the 1992 Seafarers Act since its commencement and was in the former *Seamen's Compensation Act 1911* since 1960, so there is a 50 year period where the pre-Federal Court decision coverage has, by and large, operated efficiently, notwithstanding different stakeholder interpretations of coverage.

3.4 Such a substantial new amendment to the coverage provision will provide fertile ground for insurers to decline liability, even in cases where the employer maintains a Seacare insurance policy. It will create uncertainty and add to costs in the scheme.

3.5 The proposed changes would lead to fewer vessels being covered and a contraction of the scheme. This will lead to greater insurance costs for the remaining participants, as the pool of employers paying insurance premiums reduces.

3.6 If the coverage is tightened by passage of the Bill and additional seafarers are excluded from the Commonwealth scheme for seafarers, it cannot be automatically assumed that they will be covered under state workers' compensation schemes. This arises due to restrictions on the application of some State workers' compensation Acts.

3.7 There is no immediate risk to the Seacare scheme and no need therefore to rush poorly drafted legislation through the Parliament.

3.8 The stakeholders have not been consulted.

3.9 There is goodwill among the key stakeholders to reach a consensus on what the overage should be going forward.

3.10 The Government has wrongly stated there is a shared understanding on the pre Federal Court decision coverage as a basis for proceeding with the Bill – this is not correct.

4. The reasoning in more detail

Preposed amendments to the Seafarers Act

4.1 The Explanatory Memorandum to the Bill says that it amends the coverage provisions of the Seacare scheme to 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.

4.2 The MUA contends that such a statement is a distortion of the facts.

4.3 First, there has never been an intention that the Seafarers Act should only cover a very limited cohort of seafarers who might otherwise be covered by State and Territory workers' compensation legislation as the Government is implying.

4.4 All seafarers could technically be covered by State and Territory workers compensation schemes. However, since 1911 the Commonwealth has provided legislation to cover Australian seafarers under a Commonwealth scheme of workers' compensation and both the Parliament and the Courts have sought to keep that coverage comprehensive within the Constitutional head/s of powers available to the Commonwealth.

4.5 This is because of the nature of seafaring work, which necessarily involves considerable and regular mobility across State and Territory borders and internationally. The Committee should note that, seafarers within the Northern Territory (NT) are, and have been for many years, clearly and specifically covered by the Commonwealth legislation (Seafarers Act).

4.6 Second, rather than clarifying coverage that accords with an alleged understanding of coverage prior to the Administrative Appeals Tribunal and Federal Court decisions of 2014 (as implied by the Hon Luke Hartsuyker MP (Cowper—Deputy Leader of the House and Assistant Minister for Employment) in the Second reading speech, the Bill significantly alters and narrows coverage in a way that was never intended and has not existed to date. The current coverage provision has been in the 1992 Seafarers Act since its commencement and was in the former *Seamen's Compensation Act 1911* since 1960.

4.7 Third, it is wrong of the Government to claim in introducing the Bill to the Parliament on 26 February that the decisions of the Full Federal Court in Samson Maritime Pty Ltd v Aucote and the original Administrative Appeals Tribunal decision of Aucote and Samson Maritime Pty Ltd interpreted the coverage of the Seafarers Act as being beyond what had widely been understood to be the coverage, by including within its scope intrastate trade or commerce.

4.8 It is wrong for the Government to state in the Parliament that since the Seafarers Act and OHS(MI) Act commenced, successive governments and maritime industry employers, unions and regulators have operated on the basis that the Seacare scheme generally covers the employment of employees on prescribed ships engaged in interstate or international trade or commerce.

4.9 The MUA for one has disputed this interpretation of coverage for many years. We have made our position clear in submissions to the Government on several occasions, including in both the 2005 (Ernst and Young) and 2012 (Robin Stewart-Crompton) reviews of Seacare scheme legislation. No Government has acted on the recommendations of either of those reviews.

4.10 Fourth, even the Australian Government Solicitor (in fact the then Solicitor General, Mr Henry Burmester), in advice to the Seacare Authority in November 2004 raised concerns about the so called consensus

interpretation, and recommended clarifying legislation. The Burmester advice was that interpreting Seafarer Act coverage by referencing the *Navigation Act 1912* was only necessary for definitional purposes, not for interpreting the overall application of the Seafarers Act (s19), given that the Seafarers and OHS (MI) Acts both contain express provisions which go beyond what was contained in the Navigation Act. Burmester advised that the coverage provisions in both the Seafarers and OHS (MI) Acts should not be read down by the provisions of the former Navigation Act.

4.11 What the Government is attempting to do with the present Bill is further read down an already disputed interpretation of the Seafarers Act by explicit legislative amendment. We strongly recommend the Committee to conclude that this should not occur. The proposed changes would if enacted, lead to fewer vessels being covered and a contraction of the scheme, potentially impacting on its viability. This will lead to higher insurance costs for the remaining employers and introduce more uncertainty into the application of the Seafarers and OHS(MI) Act..

4.12 Fifth, it is wrong of the Government to characterise the alleged availability of State and NT legislation as being "equivalent" to the provisions in the Seafarers Act as claimed in the Explanatory Memorandum where it says that "……where an employee's employment is not covered by the Seacare scheme (and so is instead covered by equivalent state legislation)".

4.13 State and Territory workers' compensation is invariably inferior, particularly so in WA where the majority of Australian seafarers work in the offshore oil and gas industry where OHS risk is escalated due to the high risk nature of the work environment.

4.14 The MUA has provided an example of how seafarers are disadvantaged if pushed back under WA workers' compensation law at **Attachment A.**

The implications for the OHS(MI) Act

4,15 The Committee should reject the rationale presented in the Explanatory Memorandum for making consequential amendments to the OHS(MI) Act, because the rationale contradicts two important policy objectives of not only the current Government but by all recent Governments. The first principle is to reduce regulatory burden on employers, and the second is to streamline regulation for multi-State/NT employers.

4.16 The very purpose of OHS harmonisation, which is supported by all segments of the business community, is to streamline the regulation of OHS to make it easier for employers who operate multi-jurisdictional businesses to only need one OHS law to apply to their entire business. There is bi-partisan agreement on that important principle. Second, the current Government has made much of its policy of reducing 'red-tape' aimed at reducing the cost of doing business and making the economy more competitive.

4.17 The effect of this Bill is to increase significantly the number of seafarers who will now be covered by State and NT OHS legislation, forcing employers to apply multiple OHS Acts to their employees, depending on the nature of the vessel operation and voyage pattern. Notwithstanding attempts to harmonise OHS laws, there is now increasing divergence in State and OHS laws, while some jurisdictions such as WA are yet to harmonise.

4.18 It is an extremely poor and untenable argument as made out in the Explanatory Memorandum that Commonwealth failure to harmonise the OHS(MI) Act to ensure it adopts the best practice standards in the Commonwealth *Work Health and Safety Act 2011* (WHS Act) is a reason to force employees back under State and NT OHS laws, when there is agreement among the employers and unions that the OHS(MI) Act should be harmonised, and a Bill to give that effect could be introduced without delay and gain bi-partisan support.

4.19 The very issue that gave rise to the Australian Government Solicitor's advice of 2004 (the Burmester advice) was a separate advice that the Australian Maritime Safety Authority (AMSA), as the OHS Inspectorate, had obtained when the employee representative members of the Seacare Authority challenged AMSA's limited range of ships for which it was (and still is) providing OHS Inspectorate services. The Burmester advice contradicted the private chamber's advice obtained by AMSA.

4.20 Notwithstanding that AMSA has never expanded its OHS Inspectorate services in accordance with the Burmester advice, that cannot be interpreted as meaning there is a shared understanding of what the OHS)MI) Act coverage should be. The MUA has repeatedly challenged the Seacare Authority and AMSA interpretations of coverage.

The implication of amending the definition of seafarer berth as proposed in the Bill

4.21 We draw to the Committees attention a negative implication arising from the proposal in the Bill to amend the definition of seafarer berth. The current definition is a fair mechanism to spread as widely as possible the obligation to contribute to maintenance of a fund to cover circumstances where the employer is insolvent and cannot meet its obligations, or the employer entity ceases to exist before liabilities cease.

4.22 The Bill will have the effect of limiting that obligation and so creating a larger burden on remaining employers. Again, there is no actuarial advice as to the estimated impact. In the absence of better information we believe it would be prudent for the committee to recommend against this specific amendment. The current arrangement works well, is cost effective and requires no fix.

5. An explanation of how the Bill seeks to narrow coverage of the Seafarers Act

5.1 The thrust of the Bill is to substantially alter the coverage provisions set out in Section 19 of the Seafarers Act. It does this in two ways:

5.2 First, by adding a restriction to Section19 (1) by the addition of the words "directly and substantially".

5.3 This represents a substantial watering down of coverage under the Act. The addition of the words "directly and substantially" to the principal coverage provision goes much further than simply attempting to erase the effect of the Federal Court's decision in Aucote. Sub-section 19(1) has been in the Act since its inception in 1993. A very similar coverage provision was contained in the former Act since 1960.

5.4 The intent of the Bill is clearly to narrow the scope of sub-section 19(1) to make the legislation only applicable to ships undertaking voyages of interstate or overseas trade. This is a retrograde step and goes beyond anything which arises out of the Aucote decision. It had never been part of the Act or its predecessor in the last 100 years.

5.5 The proposed amendment will inevitably cause ongoing doubt about coverage, adding as it does a gloss on words which have been in the legislation for many years. 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.

5.6 Vessels which operate in mixed intra-state and inter-state activities will be in limbo. For example, whether a vessel which voyages between two or more intra-state ports and then an inter-state or overseas port is "directly and substantially" engaged in inter-state or overseas trade, may be open to challenge. A seafarer who was injured between the two intra-state ports, may well be met with a denial of liability. Many vessels which re-supply platforms and construction activity in the offshore oil and gas industry may meet a similar fate, although in the past they have been recognised by the Seacare Authority as falling within the scope of the Seafarers Act.

5.7 Seafarers should not be disadvantaged in their rights and entitlements simply because of some narrow definition of the voyage characteristics of the ship they happen to be on when a compensable injury is sustained. This is tantamount to saying that Commonwealth public servants working in front line service delivery just in say NSW should be covered by the NSW State workers' compensation scheme and not the Comcare scheme.

5.8 The proposed amendment will bring no clarity to the coverage provisions, and will provide fertile ground for Seacare insurers to decline claims with resulting significant hardship to injured seafarers and stimulate costly litigation. Their plight will be to either pursue sterile jurisdiction arguments which may well end up in the Federal Court (as occurred to Mr Aucote), or start afresh new claims in state jurisdictions.

5.9 It is no solution for employers and others to note that alternate coverage may exist under any of the states' schemes. State workers' compensation legislation does not operate as a safety net if there is no coverage under the Seacare scheme. A state workers' compensation insurer may well decide to decline such a claim if the injury occurs outside the state and

there is not a sufficient legislative connection with the State. See, for example, Section 9AA of the *Workers Compensation Act 1987* (NSW). We understand the other jurisdictions have enacted similar provisions. Furthermore, many state workers' compensation schemes provide benefits which are inferior to the Seacare legislation as we have demonstrated in Attachment A.

5.10 Second, the Bill repeals other essential elements of coverage provisions contained in sub-section 19(2) to (5). These provisions are necessary to erase doubt about the powers of the Commonwealth to legislate to cover seafarers, by explicit referral to the corporation's power under the Constitution.

5.11 This is now a common feature of Commonwealth labour law, such as utilised in the *Fair Work Act 2009*.

5.12 The proposal to repeal provisions that apply the Seacare scheme to any employees who are employed by a trading, financial or foreign corporation, is unnecessarily restrictive and again, could lead to unnecessary litigation.

5.13 By way of background, the Principal Act commenced operation on 24 June 1993. It repealed and replaced the earlier *Seamen's Compensation Act 1911*. It was introduced following a review commissioned by the then Government into seamen's compensation legislation conducted by Professor Harold Luntz. The purpose of the Act was to provide a "detailed and comprehensive code with respect to the compensation of seafarers"[2].

5.14 The clear intention was that the Act would be a broad and comprehensive code. On the Second Reading speech, the Minister stated:

> *"This Bill introduces a new scheme of compensation and rehabilitation for seafarers who are injured in the course of their employment. It will replace the outdated and inadequate Seamen's Compensation Act 1911 with modern and comprehensive rehabilitation and compensation arrangements, similar to those applicable to Commonwealth employees*
> *... Professor Luntz's review of seamen's compensation was tabled in Parliament in June 1988. Since that time the Luntz review recommendations have been the subject of extensive consultations*
> *involving ship owners, the maritime unions and the ACTU. The outcome of this process is a Bill which radically moves away from the outmoded compensation regime which the Seamen's Compensation Act provides.*
> *The new scheme will combine fair, earnings related benefits with comprehensive rehabilitation requirements and other measures aimed at getting injured employees restored to health and back to work as quickly as possible.*[3]"

[2] Associated Steamships Pty Ltd v Hore (1995) 61 FCR 506.
[3] House of Reps, No. 4, 12-15 October 1992 at P2145

5.15 Sub-section 19(1) is the principal coverage provision. It is in essentially the same terms as had existed in the predecessor legislation, the *Seamen's' Compensation Act 1911*. It was clearly based on the Commonwealth trade and commerce power and had been the subject of previous judicial interpretation which extended its operation to beyond simply the movements of a particular vessel. See, for example, the decision of the Workers Compensation Board of Western Australia in *Newbury v Adelaide Steamships Pty Ltd (1982) 1WCR (WA} (Part 1) 157* where the Tribunal found that a tugboat which did not venture beyond Port Hedland Harbour was nonetheless engaged in trade and commerce with other countries or among the States for the purposes of the predecessor to Section 19(1), because the tug's role at Port Hedland was to assist ships or vessels engaged in overseas or interstate trade.

5.16 There is nothing particularly novel or surprising in the Newbury decision which was not the subject of any appeal, and is clearly within the operation of subsection 19(1) when it is appreciated that the section refers to the engagement of vessels and not their voyages. There is no doubt that activities which are ancillary to state trade and commerce by sea are themselves in the purview of the power under the Constitution[4].

Implications for employers and insurers

5.17 If the Bill passed in its present form, employers will face uncertainty about their liabilities, and face increased costs. The more limited coverage will reduce the size of the premium pool and drive up workers' compensation premium costs[5], which as the Explanatory Memorandum states at Pviii are "… significantly more expensive than those of state and territory workers' compensation schemes."

5.18 The Bill does not assist insurers. In fact it disadvantages insurers. They offer workers' compensation to an employer for all seafarers in the employ of that employer, not to a ship or specific voyage, so again, the Bill will create further uncertainty as to exactly which seafarers the insurer needs to insure for. Ships move in an out of jurisdictions, while the seafarer remains with the employer (the constitutional corporation). The Bill does nothing to create certainty as to which seafarers at which time in what circumstances are covered by which jurisdiction.

5.19 Furthermore, it is wrong to assert as is done in the Explanatory Memorandum that scheme viability is enhanced by the proposed Bill, because liabilities could be created in circumstances where some employers may not have insurance. Under the Seacare scheme, private insurers underwrite liabilities, so this is a commercial market for insurance.

---

[4] Huddart Parker Ltd v The Commonwealth (1931) 44 CLR 491; and The Queen v Wright ex parte Waterside Workers Federation (1955) 93 CLR 528

[5] The Seacare scheme has the highest premiums of any scheme in Australia. In 2012/13 its premium costs were 2.78% compared to the Australian average of 1.53%. See Indicator 14 – Standardised average premium rates (including insured and self-insured sectors) by jurisdiction in Safe Work Australia, *Comparative Performance Monitoring 2012–13* found at *http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/884/CPM16-Web.pdf*

The insurers are very likely to respond rapidly to any commercial opportunity to ensure that all employers can obtain competitively priced compensation insurance for seafarers. The market (insurers) could readily provide a solution for their clients in terms of a special "in-case insurance" schedule to cover them for Seacare liabilities.

5.20 We ask the Committee to note that no actuarial modelling has been advanced by the Government to support its connections about scheme viability, but the laws of supply and demand operate in the commercial insurance market, such that an increase in the demand for insurance will inevitably reduce the price of insurance.

6. The Bill in context

6.1 This Bill, notwithstanding its flaws, needs to be understood in the wider context of Government neglect of the Seacare scheme. There is a litany of inaction in bringing about reform, certainty and improvements to Seacare scheme legislation.

6.2 This has added costs, it has failed to stem the high incidence of workplace injury within the Seacare jurisdiction and has disadvantaged a cohort of the Australian workforce. A summary of that inaction is provided below:

- There was no response to the recommendations of the 2005 Ernst and Young review of Seacare scheme legislation.
- There has been no response to the recommendations of the 2012 Robin Stewart-Crompton review of Seacare scheme legislation.
- The Seacare scheme legislation has fallen behind the standards in the Comcare legislation, notwithstanding the historical nexus.
- The Seacare OHS legislation has not been harmonised to ensure consistency with the Commonwealth's model *Work Health and Safety Act 2011* and associated Regulations.
- The interface issues between the OHS(MI) Act and Schedule 3 (OHS) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) remain unresolved notwithstanding numerous reviews that have recommended, in various ways, the need for the interface issues to be resolved[6].

---

[6] Review of the National Offshore Petroleum Safety Authority - Operational Activities (First NOPSA Review) - 2008
The Offshore Petroleum Safety Inquiry Reports – 2009 (A joint independent inquiry into the effectiveness of regulation for upstream petroleum operations, announced by the Commonwealth and Western Australian Governments on 9 January 2009 following the Apache fire and extended following the *Castoro Otto* and *Karratha Spirit* incidents during Cyclone Billy in December 2008) resulting in 2 reports:

- Better Practice and the Effectiveness of NOPSA Report; and
- Marine Issues Report

Productivity Commission Review of the Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector - 2009
Montara Commission of Inquiry Report – 2010
ATSB Independent investigation into the fatality on board the Australian registered floating storage and offloading tanker *Karratha Spirit* off Dampier, Western Australia on 24 December 2008 – of 2010
Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority (Second NOPSEMA Review) - 2011
Australian National Audit Office Report (ANAO)- Establishment and Administration of the National Offshore Petroleum Safety and Environmental Management Authority - 2014

- There has been no actuarial or other analysis of the impact of the Ministerial Direction issued by the Howard Government that remains in the Seafarers Act s20A Exemption Guidelines allowing opting out of the Seafarers Act on the basis of cost, thus forcing hundreds of seafarers who were intended to be covered by Commonwealth legislation into inferior State workers' compensation schemes.
- There has been no advice as to the potential implications of the December 2014 announcement as part of the mid year budget forecasts, where, in a complementary report entitled *Smaller Government-Towards a Sustainable Future* it was announced that the Seacare Authority's functions would be transferred to the Safety Rehabilitation and Compensation Commission i.e. Comcare (a merger) with alleged savings of a miniscule $95,000.
  - This announcement followed the May 2014 Commission of Audit Report recommendation that the Seacare Authority be absorbed into the functions of the Department of Employment which would presumably result in abolition of the tripartite governance arrangements for Seacare (the Seacare Authority), resulting in no shipping employer or seafarer representation in the governance of the Seacare scheme.
- There is no budget allocation from either the Employment portfolio (which administers Comcare and Seacare) nor the Infrastructure and Regional Development portfolio (which administers AMSA, being the co-regulator of shipping industry OHS) to enable AMSA to perform the OHS Inspectorate function as it is statutorily required to perform under the OHS(MI) Act (hence it always seeks to narrow its jurisdictional coverage to limit its obligations). AMSA levy regulations do not attract levies from industry to pay for its OHS Inspectorate function.

6.3 The implications of all these failures of Government and policy neglect are:

- The Seacare scheme is being undermined, which appears to be an attempt to make it unviable so that it can be abolished and seafarers pushed back under State jurisdiction for both OHS and workers' compensation purposes:
  - The two key concerns here are: (i) the application of the s20A exemption provision developed in response to a Ministerial Direction; and (ii) the lack of attention to the application (coverage) of the Acts, especially the Seafarers Act, in light of the wishes of the parties as submitted in various reviews, the 2004 AGS advice (the Burmester advice) and more recently AAT and Federal Court decisions:
    - The size of the premium pool is a significant factor in the cost of workers' compensation.
- Seafarers entitlements and rights have fallen behind national standards.
- Opportunities for sensible reforms that would improve scheme performance and reduce costs to employers have not been developed, nor implemented
- The Seacare Authority secretariat is under resourced.
- The OHS Inspectorate function is under resourced, not withstanding the poor relative performance of the scheme[7].

---

[7] See comparative performance shown by Indicator 2 – Incidence rates (serious claims per 1000 employees) and percentage improvement of serious* compensated injury and musculoskeletal claims by jurisdiction; Indicator 4 – Incidence rates of serious* injury and disease claims by jurisdiction; Indicator 6 – Incidence rates of long term (12 weeks or more compensation) injury and

- Injury rates continue to trend above national averages and disputation rates are high, due in part to uncertainty about jurisdiction which impacts on claim acceptance and early intervention, being the key to successful return to work.

7. The implications of the Bill for Mr Aucote

7.1 Mr Aucote, the applicant in the AAT and Federal Court matters, may have his rights extinguished by the Bill.

7.2 It is ironic that the Seacare Authority itself accepted the ship on which Mr Aucote was injured (the *Samson Mariner*) was in the Seacare scheme[8].

7.3 The insurer for the employer, Allianz, had offered a policy of insurance covering, among other seafarers, Mr Aucote, had accepted premiums and accepted liability in his case.

7.4 In addition, the company had accepted liability for Mr Aucote's injuries and had been paying him benefits in accordance with the Act for 1 year before company lawyers apparently recommended the company challenge ongoing payments on jurisdictional grounds.

8. Recommendations

8.1 The MUA submission makes three recommendations to the Committee:

Recommendation 1: That the Committee recommend to the Parliament that the Bill be withdrawn in its current form and be reintroduced after the social partners have conferred and reported back to the Committee on a consensus coverage provision for both the Seafarers and OHS(MI) Acts.

Recommendation 2: That the Committee report to the Parliament that it proposes to recommend that the employer parties and parties representing seafarers, with the participation of the Australian Maritime Safety Authority, confer under the direction of a neutral facilitator engaged by the Department of Employment and Training with the aim of reaching agreement on the appropriate coverage under the Seacare scheme legislation, and reporting back to this Committee by 20 March 2015, before it makes a final report to Parliament by 26 March 2015.

---

disease claims by jurisdiction in Safe Work Australia, Comparative Performance Monitoring Report Comparison of work health and safety and workers' compensation schemes in Australia and New Zealand Sixteenth Edition October 2014found at http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/884/CPM16-Web.pdf

See also Seacare Authority Annual Report 2013/14 Table 2 which reports that "In 2013–14, the Seacare scheme did not meet the targets set for claims determination times, claim disputation rate and durable return to work rate, with the rate of disputation in the scheme over three times the target set by the Seacare Authority. The Annual report also shows that there were 85 AAT appeals lodged in 2013/14, compared to 64 in 2012/13.

[8] See Seacare Authority Annual Report 2013/14 Appendix 4 P60 found at http://www.seacare.gov.au/__data/assets/pdf_file/0004/144634/Seacare_Annual_Report_201314.pdf

Recommendation 3: That the Committee recommend to the Minister for Employment and Training that a process be immediately established to consult stakeholders on the amendments required to the OHS(MI) Act, drawing on the findings and recommendations in the 2012 review of Seacare scheme legislation, to achieve OHS harmonisation, to the extent practicable, with the *Work Health and Safety Act 2011* and Regulations, with a view to bringing a harmonisation Bill before the Parliament in the June 2015 sittings of Parliament.

Attachment A

Analysis of WA workers' compensation legislation

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.

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.

An actual example demonstrating this injustice is set out in relation to an actual case study which is produced with the permission of the seafarer involved.

Case Study – Garry Smith

Mr Smith is a resident of Tasmania and was the chief integrated rating on the FPSO Cossack Pioneer up until 20 September 2010. He is now 56 years of age and has worked in the Australian maritime industry since he was 17. He is a married man with a dependent wife and one child who still attends university. Consistent with his experience and position as a senior seafarer his annual salary was $189,000.00 per annum.

On 20 September 2010 Mr Smith was working on board the vessel assisting in the transfer of a heavy steel plate. In the course of moving that plate using a monorail crane the load swung out of control, striking him severely and throwing him off his feet. Although wearing a helmet, he lost consciousness. He was evacuated by helicopter to Karratha and subsequently to Royal Perth Hospital. He suffered a depressed fracture of the skull and brain damage. Surgery to remove the skull fragments was not attempted due to the risk of hemorrhage to an artery. He was hospitalised for an extensive period of time and has now returned home to Tasmania where he continues to convalesce. He has been informed by his treating neurosurgeon that future maritime employment is out of the question as there is a significant risk of further injury or death should he sustain another knock to the head. He has ongoing impairments in relation to vision, dizziness, hearing, memory loss and fine motor skills.

His working days in the Australian maritime industry are over. His impairments are likely to significantly affect his ability to find shore based work.

Under the Western Australian legislation Mr Smith's weekly compensation payments will cease once he reaches the cap of $183,394.00. This will occur in about December of this year. His medical treatment costs to date are unknown

but are likely to have been considerable. Under the Western Australian legislation his medical expenses are capped at $55,018.00. It is likely that he will have no further cover for medical expenses in the near future.

Mr Smith's future is bleak in the extreme and it is likely that he will be thrown onto the social security system and will be left without further workers compensation coverage after little more than 12 months from the date of his accident.

On the other hand, if the Authority had not issued an exemption, Mr Smith would have at least been afforded the comfort of entitlements under the SRCA which would include ongoing weekly payments to retirement age based at 75% of his pre-accident earnings and not subject to any cap. Furthermore, he would have been entitled to cover for medical expenses and rehabilitation costs without cap and subject only to a test of reasonableness.

Mr Smith's case is not an isolated example and we can point to other instances involving similar hardship.