Australian Shipowners Association

Submission to Senate Employment and Education Legislation Committee

Amendments to the Seafarers Rehabilitation and Compensation Act 1992

Submission by: Australian Shipowners Association
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1. Recommendation to the Senate Employment and Education Legislation Committee

1.1. The ASA recommends that the Senate Employment and Legislation Committee carefully consider the broad detrimental impacts, as articulated in the submission below that not passing this legislation will have on maritime industry participants. Accordingly, ASA asks the Committee to recommend that this legislation be passed by both houses of parliament without delay to avoid confusion and uncertainty.

2. Introduction

2.1. This submission is made on behalf of the Australian Shipowners Association (ASA). ASA Members represent a very broad cross-section of the maritime industry including:

a. international and domestic trading ships;
b. floating production storage and offloading units (FPSO);
c. cruise ships;
d. offshore oil and gas support vessels;
e. domestic towage and salvage tugs;
f. scientific research vessels;
g. dredges; and
h. floating storage off-take units (FSO).

2.2. ASA represents employers of Australian and international maritime labour and operators of vessels under Australian and foreign flags.

2.3. ASA provides an important focal point for the companies who choose to base their shipping and seafaring employment operations in Australia.

2.4. ASA's purpose is to pursue strategic reforms that provide for a sustainable, vibrant and competitive Australian shipping industry and to promote Australian participation in meeting domestic needs for sea transport services and contribution to Australia's international trade to the benefit of Australian shipowners, their customers and the nation.

2.5. A member of the ASA secretariat (currently Sarah Cerche) is, and has been for a number of years, a Deputy Member of the Seacare Authority.

2.6. ASA's Members are

ANL Container Line	MODEC Management Services	Sugar Australia
ASP Ship Management	The Port of Newcastle	Svitzer Australia
BP Australia	North West Shelf Shipping	Swire Pacific Offshore
Caltex Australia Limited	Service	Teekay Shipping
Carnival Australia	Origin Energy	(Australia)
EMAS Offshore	P & O Maritime Services	Viva Energy
Farstad Shipping (Indian	Rio Tinto Marine	Tidewater Marine
Pacific)	SeaRoad Shipping	Toll Marine Logistics
Maersk Supply Service	Shell Tankers Australia	Woodside
MMA Offshore	Smit Lamnalco	

3. The Seacare Scheme

3.1. The Seacare scheme is made up principally of two pieces of legislation; the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (OSHMI Act). There is other ancillary legislation (such as the legislation for extracting levies from scheme participants for the maintenance of a safety net fund which underwrites the workers compensation element of the scheme) and subordinate legislation (such as regulations) which goes to the framework of the scheme.

3.2. Traditionally coverage of a variety of pieces of maritime legislation, including the principal piece of maritime legislation, the *Navigation Act 1912* (Nav Act 1912), was determined on the basis of the voyage being undertaken by the vessel in question. There was historically some level of confusion as to the interaction of the provisions of the Nav Act 1912 and the OSHMI and Seacare Acts, which consequently caused uncertainty about when, if at all, operators are covered by this commonwealth legislation. Operators were able to gain some apparent clarity through declarations under the Nav Act 1912 s8A and s8AA.

3.3. It is understood by industry that the benefits to employees under Seacare, when looked at in totality in terms of payments of compensation and circumstances when compensation will be payable, are more beneficial to the employee than in most state and territory based compensation regimes. Accordingly, the costs to participants in the scheme, in terms of premiums and ancillary costs, as well as potential exposure, is generally higher than for state and territory schemes.

3.4. In relation to workers compensation, it has long been understood by employers in the maritime industry that vessels that are operating wholly within a state would be covered

by state workers' compensation regimes, and those operating interstate and overseas, would be covered by the Seacare Act. This reflects that people working on vessels operating on vessels wholly within one state and in near coastal services enjoy all the benefits of Australian health care and facilities and their terms and conditions of employment in terms of hours and location is similar in many respects to normal shift workers. The benefits the Seacare Act provides were designed principally to protect those in short sea and international shipping, where working arrangements differ significantly (i.e. in marine towage for example, the crew go home after their shift and are not required to live on board for weeks at a time, unlike blue water were swings can last 8 weeks).

3.5. The Seacare Act, recognising that there will be occasions when a ship may have a single voyage that brings the vessel within its scope temporarily, allows exemptions from the scheme for a variety of reasons. Included in these reasons are that voyages undertaken by the prescribed ship which make the prescribed ship subject to the operation of the Seacare Act are incidental to the primary operations of the prescribed ship (see page 5 of Exemption Application – Feb 2015).

3.6. It is clear from these guidelines that the Authority itself considers the fact of a ship being a prescribed ship, and the character of its operation, as being relevant to determining coverage of the scheme. This is what has been understood by operators, who have obtained insurance as required by the Seacare Act, or exemptions under s20A as appropriate. This was wholly at odds with the decision of the Full Federal Court in *Samson Maritime v Aucote [2014] FCAFC 182*, where the previously understood limits on coverage were not found to apply through an interpretation of sections 19(2), 19(3) and 19(4) as well as a broad interpretation what constituted a sufficient connection with trade and commerce between Australia and a place outside of Australia (s19(1)(a)) as was found by the Administrative Appeals Tribunal at first instance.

3.7. The decision has significant consequences for all employers of people who work on vessels.

4. Consequences for Operators in the Seacare Scheme

4.1. At first blush, the impact of this decision on operators who already fall (and have always considered their vessels and operations) within the Scheme is limited. However, this is not necessarily the case.

4.2. Seacare is a privately underwritten industry scheme that, according to its last annual report, covered 283 ships and 7516 employees. As part of its statutory framework, the Seacare Authority is responsible for the maintenance of the Seafarers Safety Net Fund (Fund), which in simple terms becomes a seafarers default employer where there is no employer against whom a claim may be made (for example, the employer has long since been wound up).

4.3. The Fund is maintained through the collection of monies from scheme employers under the *Seafarers Rehabilitation and Compensation Levy Act 1992* and the *Seafarers Rehabilitation and Compensation Levy Collection Act 1992"* (Levy legislation). In the latest reporting period, 33 employers were paying $15 per berth for a total levy collect of $153, 775.

4.4. If the number of employers and employees covered by the scheme increases at the rate it would if the legislation proposed does not pass, then it stands to reason that the Fund would need significant additional funds to ensure it could meet its potential liabilities. However, the collection of such funds is limited to seafarer berths on "prescribed ships", meaning the Ley legislation gives the Seacare Authority no power to collect money other than from employers of seafarers on board prescribed ships, presumably, where those ships have "berths". Therefore, while the numbers of employers and employees to which the scheme applies has increased significantly, the number of employers required to contribute for the purposes of the Levy legislation remains limited to those operating prescribed ships with berths. It is not clear what this means for levy collections. It is impossible to estimate what this shortfall this might be. It follows that the cost of the levy per berth, currently at $15, would need to increase significantly to meet the potential liability of the Fund.

5. Consequences to operators not currently within the Scheme.

5.1. It is very difficult to estimate the number of vessels, and employers of people working on such vessels, who, according to *Samson v Aucote*, fall within the coverage of the Seacare scheme. Tens of thousands of domestic commercial vessels may now come within the coverage, although these vessels may only have one or two employees on board, if any. The Committee is invited to examine a proposed exemption under s20A to granted by Seacare (available at www.seacare.gov.au) and the schedule of that proposed exemption, to assess the breadth of impact that a failure to pass these amendments would have.

5.2. The difficulty is that many of these employers will always have assumed that the state workers compensation regime had covered them. Any workers compensation policies in place will be state or territory based. This means that they will not necessarily have in place a policy of insurance in place from an insurer approved by the Seacare Authority, as is required by s93 of the Seacare Act. This is a technical breach of the Seacare Act, even though the employer may well have had workers compensation insurance in place through a state or territory scheme.

5.3. There is a reasonable argument to suggest that having a state based insurance policy in place will not assist the employer and the employee, as an insurer may argue that the policy is specific to the liabilities that arise under the workers compensation regime as legislated particular to the state, as opposed to Seacare. Further, they may have insurance with an insurer that is not approved by the Seacare Authority, which would not meet the requirements of the Seacare Act. The process for claims, the situations where liabilities arise and the compensation payable are different under each state and territory regime, so in a strict legal sense this *could* mean that employers are uninsured in the event that an employee is injured. It is not in the best interests of an employee that their employer is uninsured, as it will likely lead to delays in accepting liability, or, in even more dire cases, an employer being unable to meet its obligations to pay compensation. Many operators in the domestic commercial vessel industry are quite small, and are unlikely to even be aware of this decision and its impacts.

6. Consequences to the Scheme

6.1. In 2006, then Minister Andrews issued a Ministerial Direction that in the event that workers' compensation insurance is available to a relevant employer under a State or Territory scheme at a cost lower than that available under the Seacare scheme, than this is a primary factor in determining an application for exemption under s20A of the Seacare Act (see Seafarers Safety Rehabilitation and Compensation Directions 2006(1)).

6.2. As has been articulated earlier, the berth levy will likely rise significantly if the coverage provisions of the Seacare Scheme were not to be clarified and returned to that which had been previously understood by operators in the maritime industry. These costs would add a significant burden to operators within the scheme, and may encourage them to utilise the exemption to ensure they are not covered by the scheme, as it seems highly likely that cheaper insurance would be available under a state or territory regime.

6.3. Employers currently covered (who consider themselves covered) electing to exempt themselves due to the expense in remaining within the scheme will make the scheme unviable.

6.4. An additional consequence is the significant increase in exposure to claims against the Fund. This would be a result of claims against employers who had long considered themselves covered by state and territory regimes being effectively uninsured. This would necessitate affected employees claiming against the Fund, if their employer is unable to meet their obligations and is uninsured, a process which can be time consuming and complex, resulting in delays to a person receiving any workers compensation entitlements at all.

7. Conclusion

7.1. It is for the reasons articulated above that ASA strongly urges the committee to recommend the passing of legislation that clarifies the Seacare jurisdiction and restores a level of certainty to industry operators. A failure to pass this legislation will lead to confusion, uncertainty and potentially thousands of employers being technically uninsured against their workers compensation obligations. The decision of the Full Federal Court in *Samson Maritime v Aucote* flies in the face of what had been operators' understanding for many years.

7.2. For an employee who is entitled to compensation under any workers compensation regime, their ultimate goal would likely be a smooth non-adversarial claims process with fast access to their entitlements, medical assistance and rehabilitation services, to ensure that they are in a position to return to their pre-injury employment, and are appropriately compensated while working towards that goal.

7.3. Restoring maritime employers' understanding about what their obligations are will go as long way to ensuring that this occurs. Importantly, employees will be clear about the regime under which they are covered, will have transparency in respect to their entitlement to compensation and the circumstances that this accrues.

7.4. Further, the potentially crippling exposure of the Fund will be averted, as it will be clear, with retrospective effect that employers have had in place the correct workers compensation insurance relevant to their particular workforce.