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Our Ref. GI:lg:130094

Senate Committee

*Inquiry into the Proposed amendments to the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the Bill) to amend the Seafarers Rehabilitation and Compensation Act 1992 (the Seafarers Act) and the Occupational Health and Safety (Maritime Industry) Act 1993 (the OHS(MI) Act).**

Prepared By:
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15 March 2015

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"*Inquiry into the Proposed amendments to the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the Bill) to amend the Seafarers Rehabilitation and Compensation Act 1992 (the Seafarers Act) and the Occupational Health and Safety (Maritime Industry) Act 1993 (the OHS(MI) Act)*".

1. Outline

1.1 Greg Isolani has practiced in the Seacare jurisdiction since 1995 representing members of the 3 main Maritime unions; *Maritime Union of Australia* (MUA). *Australian Marine Officers Union of Australia* (AMOU) and the *Australian Institute of Marine and Power Engineers – AIMPE.*

1.2 Our legal representation of these employee organisation members through the Administrative Appeals Tribunal (AAT) the Federal court and assisting with related issues arising from the Navigation Act, AMSA investigation and the Application of Marine Orders have provided us with intimate experience of the issues that affect seafarers.

1.3 Accordingly we welcome the opportunity to make a submission with respect to the proposed Bill in consultation with the AIMPE as to the potential effects of the Bill on their members.

1.4 The AIMPE is concerned as to the operation of the Bill on its members who may undertake employment duties like Mr Aucote, and may be considered broadly not to fall under subsection 19(1) of the Seacare Act i.e. not working on a ship engaged in trade or commerce between Australia and places outside Australia. The employment duties may in fact relate to assistance with that construction of or working on a wharf i.e. Port engineers that is, at first instance only dealing with 'intra State' employment".

1.5 Whilst some AIMPE members may be covered by the relevant workers' compensation and work health and safety legislation of the State or Territory in which they work, a substantial issue may arise as to whether the Worker's compensation scheme is in fact comparable to i.e. better or worse than the benefit available under the Seacare scheme.

1.6 Additionally whether the OHS (MI) Act should apply consistently across Australia to all engineers (and arguably maritime workers) who may be injured in circumstances when, due to the decision of Sampson Mariner, the extension of the OHS (MI) Act should be considered to apply.

Specific Considerations of the Proposed Amendments

Item 1- Definition of Employee

I. The proposed amendment to cover Trainees and employees who are required under an Award to attend a Seafarers Engagement Centre that is linked to the prescribed ship in order that they remain covered under the Seacare scheme is not controversial assuming that the Seacare Act and not a Workers compensation Act apply in the first place.

Item 2- Activities of the Ship and the Engagement in Trade or Commerce

The "Direct" and "Substantial" test

I. Whilst this amendment introduces a concept of a ship's activities being '*directly and substantially'* engaged the relevant activity in trade or commerce, as opposed to incidental relationship, the term remains undefined and will be the subject of close scrutiny presumably by the Administrative Appeals Tribunal – AAT and the Federal court. The nature of the employment relationship was s substantial consideration by the Full Federal court in the Samson Mariner decision given what small detail may need to be gleaned to understand what is "Direct and "Substantial" with respect to the particular activity and enterprise of the ship being undertaken.

ii. This uncertainty creates the potential for those who believe their circumstances and employment that MAY or MAY NOT be directly and substantially engaged' to argue such a relationship. That is, an injured employee may want the opportunity to 'cherry pick' what Worker's conisation scheme applies by virtue of the employment relationship.

iii. There should be an opportunity for a potential contract of employment or Enterprise Agreement to make reference to whether the Seacare Act applies i.e. if such activity undertaken is in fact directly and substantially engaged in such trade or commerce to invoke the Seacare scheme.

iv. This will provide some certainty at the outset and possibly by agreement with the relevant employee representative i.e. the AIMPE that their members will be covered by the Seacare scheme and not a State or Territory Worker's compensation scheme.

v. There should also be the opportunity for the Fair Work Commission to have jurisdiction in the event that there is uncertainty at the time of or after negotiating an agreement as to whether the employment relationship between the activities of the ship and the relevant engagement in trade or commerce are direct and substantial so that Seacre Act applies or if such activities incidental only.

vi. The clarification at the outset of or ensuring which Worker's compensation scheme may apply is a substantial issue to consider given the potential disparity of benefits that may be payable in the event of injury, disease or death.

vii. In particular, the **"Human Rights Implications"** in the Bill with respect to Article 9 of the *International Covenant on Economic Social and Cultural Rights (ICESCR)* acknowledges that:

> *"While the precise quantum of entitlements available under each scheme varies, every workers 'compensation scheme in Australia provides protection and support to injured employees, required by the right to social security. Further, the change to the rights of these employees to workers' compensation will align their actual rights with those which they had been understood to have had prior to the Aucote decision." (Emphasis Added).*

vii Herein lays the problem when, subject to what Worker's compensation scheme applies in what State or Territory, the benefits vary substantially including the calculation and duration of the incapacity payments, right to sue for damages for both economic and non-economic loss, the quantum of benefits payable in the event of death for the dependants, the appeal rights for adverse decisions that can vary substantially and so forth.

Proposed Solution:

viii. The injured maritime worked should have a 'no detriment' clause inserted in the proposed Bill that provides for the scenario that if the Seacre scheme does or does not apply, the Commonwealth or the relevant Worker's compensation insurer must provide for no less than what is payable under the Seacre scheme.

ix. This will provide the most beneficial worker's compensation scheme or, at least no less than what is payable as being fair, reasonable and proportionate.

Item 5 – Application of amendments

i. The amendments apply retrospectively i.e. to any injury, loss or damage suffered on or after 24 June 1993 and not to those injuries where a notice of an injury has been made prior to the introduction of the Bill. Clearly there may be some employees injured since June 1993 who are governed by a less beneficial Worker's compensation scheme as opposed to the Seacare scheme.

Accordingly consideration should be given for a "Sunset Clause" to allow those seafaers who may in fact be able to claim under the Seacare scheme as a result of the Samson Mariner decision. This will ensure that, irrespective if there have been any claims made under the relevant State or Territory worker's compensation scheme that they be allowed the right to re-claim under the Seacare scheme and not be disadvantaged by the arbitrary date of terminating the potential right to do so by virtue of when the Bill was introduced.

Item 6 – Compensation for acquisition of property

i Whilst it is welcome to see a proposed clause whereby if there is the unintended consequence of the bill which results in the acquisition of property that is not on, 'just terms' as envisaged by paragraph 51(xxxi) of the Constitution, then;

> *"the Commonwealth is liable to pay a reasonable amount of compensation to the person whose property is acquired, the Commonwealth will be liable to pay reasonable compensation to that person."(Emphasis added)*

ii. However, there is no guidance or indication as to how such a calculation should be made. For example, is it subject to the potential lost opportunity of being covered under the Seacare scheme if a person can establish at some earlier point in time, a direct and substantial employment relationship to argue that they want to claim the potential loss of worker's compensation benefits when compared to the State or Territory workers compensation that applied.

iii. We note Sub-item (2) enables compensation to be;

"Negotiated and agreed between the Commonwealth and the person or, failing agreement, for the person to institute proceedings in the Federal Court"

However, there is no Guidance or memorandum of agreement to establish how to calculate the loss, whether a time limit applies to a person making the claim, whether it works retrospectively for people who cannot establish the 'direct and substantial relationship' to their activity but can argue by the operation of Samson Mariner that the Seacare scheme should apply.

Iv. Whilst there is a mechanism for the review of the failure (or refusal?) to arrive at an agreement between the parties, the appeal mechanism to the Federal court is costly. It is proposed that such a dispute mechanism be to the Administrative Appeals Tribunal – AAT and this can be achieved by amending the AAT Act 1975 with respect to including such disputes that arise from this subsection to be included.

Conclusion

We welcome the opportunity to expand, amplify or clarify any issues raised herein.

Greg Isolani
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