Submission to the Senate Education & Employment Legislation Committee

Seafarers Safety and Compensation Bills Package

December 2016

AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 97 years, AMMA's membership spans the entire resource industry value chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA works to ensure Australia's resource industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

The resource industry is and will remain a major pillar of the national economy, and its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resource industry currently directly generates over 8% of Australia's GDP. In 2015-16 the value of Australian resource exports were $157.1 billion. This is projected to increase to $232 billion in 2020-21[1]. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Approximately 50% of the value of all Australian exports are from the resource industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserve.

AMMA members across the resource industry are responsible for significant level of employment in Australia. The resources extraction and services industry directly employs 222,300 people. Adding resource-related construction and manufacturing, the industry directly accounts for 4 per cent of total employment in Australia.

Considering the significant flow-on benefits of the sector, an estimated 10 per cent of our national workforce, or 1.1 million Australians, are employed as a result of the resource industry.

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[1] Office of the Chief Economist – Resources and Energy quarterly publication

KEY ISSUES AND AMMA'S POSITION

1. AMMA welcomes this opportunity to make a submission to the Senate Education & Employment Legislation Committee on the package of proposed changes to the Seacare scheme.

2. The Seacare scheme is currently comprised of two pieces of legislation – the Seafarers Rehabilitation and Compensation Act 1992 (the Seafarers Act), which regulates workers' compensation issues for the scheme, and the Occupational Health & Safety (Maritime Industry) Act 1993 (the OHS(MI) Act), which regulates WHS issues. The current regulator is the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority).

Overview of the Bills' proposals

3. AMMA notes that the current package of Bills before the federal parliament would not deliver AMMA's preferred outcome of abolishing the Seacare scheme (*see below*) and would retain the scheme.

4. The OHS(MI) Act would be abolished and work health and safety (WHS) coverage would revert to the Commonwealth Work Health & Safety Act with some modifications.

5. The Seafarers Act would be retained for workers' compensation purposes and the Safety, Rehabilitation and Compensation Commission (SRCC), the body that currently oversees the Comcare self-insurance scheme, will administer the scheme.

AMMA's recommendations

6. As detailed in AMMA's February 2016 submission responding to the Seacare scheme consultation paper, our preferred option of the three options circulated at the time, having consulted with our affected membership, was Option 2 – abolishing the Seacare scheme and reverting to state / territory coverage for both WHS and workers' compensation purposes.

7. This remains AMMA's position on behalf of the industry. Seacare should be abolished in favour of reverting to general / community standard WHS and workers' compensation regulation, as apply in the majority of other industries.

8. While this has partly been addressed in the Bills' proposals to move WHS coverage to the Commonwealth WHS Act rather than the Seafarers Act, concerns remain with the package of Bills as a whole.

9. These concerns include:

   a. A continued lack of clarity around coverage by the scheme;

   b. Increased costs for employers as a consequence of the package of Bills as a whole;

   c. Increased levies that would flow from the changes; and

   d. A lack of maritime industry expertise in overseeing the retained scheme.

10. It remains AMMA's view that the Seacare scheme should be abolished as it is financially unsustainable, more so each day. It is also AMMA's view that abolishing the scheme would in no way diminish coverage and protections for maritime employees, who would be clearly covered by state and territory workers' compensation and WHS schemes as are other employees throughout Australia. As indicated, the safety and compensation standards determined to be appropriate to employment generally should be considered equally appropriate to the maritime industry.

11. Existing "state of connection" or "cross-border" workers' compensation arrangements that already exist in each state and territory would make clear which state / territory workers' compensation scheme would cover an injured worker. All states and territories currently have something very similar to the below in their legislation:

    A worker's home jurisdiction is:

    (a) The State in which the worker usually works in their employment; or
    (b) If no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment; or
    (c) If no State or no one State is identified for paragraphs (a) or (b), the State in which the employer's principal place of business in Australia is located.

    If no State is identified in these tests, a worker's employment is then connected with the State that their injury occurred in and the worker is not entitled to compensation for the same matter under the laws of a place outside Australia.

12. In the event of a resultant lack of clarity, an option (d) could be added to the above taking into account specific peculiarities of offshore journeys. This is an implementation consideration that can be fixed relatively easily and quickly.

13. Retaining the Seacare scheme, in AMMA's view, is not financially viable or sustainable given the current performance and outcomes of the scheme coupled with a declining participation base together with increased uncertainty around coverage.

BACKGROUND TO RECENT DEVELOPMENTS

14. The Seafarers Act provides workers' compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry.

15. The Seafarers Act establishes a privately underwritten workers' compensation scheme, with employers covered by that Act required to maintain an insurance policy with an approved insurer to cover workers' compensation claims made under the Act.

16. The Seafarers Act establishes the Seacare Authority, which currently oversees the scheme.

17. Coverage of the Seacare scheme had historically been understood by maritime industry regulators and participants to operate primarily by reference to the form of trade or commence being engaged in by a ship[2].

18. Ships engaged in interstate or international trade or commerce were understood to be covered by the Seacare scheme, while ships engaged in intrastate trade or commerce within a state or territory were understood to be covered by the legislation of the state in which they operated.

The 2014 *Aucote* decision

19. In *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182, the Full Court of the Federal Court held that the provisions of the Seafarers Act operated to apply the Act to seafarers employed by a trading, financial or foreign corporation on a prescribed ship, including ships engaged in intrastate trade. This was substantially broader coverage than had historically been applied and wider than had been understood by maritime industry participants (unions, employers, employees, regulators, etc).

20. Following *Aucote*, a declaration was made, the *Seafarers Rehabilitation and Compensation (Prescribed Ship – Intra-State Trade) Declaration 2015*, seeking to ensure the Seafarers Act no longer applied to foreign-flagged ships that met the definition of "prescribed ship" under the now-repealed Navigation Act 1912.

21. The Seacare Authority also issued a Section 20A Exemption specifying the types of ships that were not covered by the Seafarers Act. That exemption was directed at ships that would be covered by paragraph 10(a) of the Navigation Act had it not been amended.

[2] Explanatory Statement to F2015L00336

22. The combined effect of the declaration and exemption was that ships that had been understood to be outside the coverage of the Seafarers Act prior to the Federal Court's *Aucote* decision would no longer be covered by the Seafarers Act for the period that those instruments remained in force.

23. As such, the declaration and exemption attempted to re-align the application of the Seafarers Act (and consequently the OHS(MI) Act) with how it had historically been interpreted.

24. AMMA supported this clarification, and the intention and impact of the declaration and exemption, although we consistently emphasised throughout that the superior course remained deletion of the Seacare scheme.

Amending legislation

25. Also following the *Aucote* decision, amending legislation was tabled in federal parliament and the below amendments were subsequently passed into law.

26. The *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Act 2015* amended the coverage of the Seacare scheme from the commencement of the scheme in 1993 until 26 May 2015 (the date of Royal Assent of the legislation).

27. The Amendment Act confirmed that, generally speaking, the Seacare scheme did not apply to employees on ships engaged in intra-state trade or commerce, as was broadly understood to be the case prior to the *Aucote* decision.

28. The Amendment Act did not disturb any claims for workers' compensation under the Seacare scheme that were made before 26 February 2015 (the date the Bill entered parliament). Any employees who provided notice of injury before 26 February 2015, but had not made a claim for workers' compensation by that date, were also not affected so long as the notice of injury was provided for the purpose of making a claim under the scheme and they had not made a claim for compensation under state legislation.

29. The aim of the legislation was to restore certainty to maritime industry employers and employees regarding past actions and compensation payments received under the Seacare scheme. It also aimed to assist with providing certainty about past actions and compensation payments received under state workers' compensation regimes.

30. The amending legislation, combined with the exemptions and declarations referred to above, meant the Seacare scheme was again, on the face of it, limited to what it was broadly understood to be prior to *Aucote*.

31. However, the Federal Government said at the time that the 2015 Amendment Act was an interim response to *Aucote* and it would continue towards a longer-term solution. It then issued a consultation paper in 2015 laying out three alternative options, followed by further consultation with industry over draft legislation, which finally resulted in the Bills currently before parliament being tabled.

32. However, in AMMA's view, despite the issuing of the above new instruments, the Amendment Act, and the proposals in the current package of Bills, the implications and uncertainties created by *Aucote* remain live.

33. A range of vessel operators not previously thought to be in the Seacare scheme could potentially remain subject to the Seafarers Act given the lack of certainty the *Aucote* decision created.

34. This will remain the case even if the current package of Bills, as drafted, is passed and enacted into law given that, in AMMA's view, the proposed new two-tiered coverage definition does not provide full clarity.

WORK HEALTH AND SAFETY REFORM PROPOSALS

35. The reforms proposed in the current package of Bills would see the repeal of the OHS(MI) Act, which gives effect to the OHS aspects of the Seacare scheme, and make amendments to the Commonwealth WHS Act to extend its application to Seacare to the exclusion of state or territory laws.

36. While AMMA can see merit in having operators that are removed from coverage by the OHS(MI) Act by its repeal being covered by a single national Act for simplicity's sake, we believe there would be massive problems with trying to amend that national Act so as to define coverage. This threatens to create more problems than it solves.

37. A simple reversion to state and territory WHS laws following the repeal of the OHS(MI) Act would be a simpler way to restore clarity of coverage as well as OHS regulation in line with community expectations. As mentioned, this could happen via "state of connection" rules in each jurisdiction to facilitate clarity of coverage.

38. Maritime employers are used to working within state WHS schemes for other parts of their workforce, so are already familiar with navigating different state and territory requirements.

39. AMMA's lead position remains for responsibility for WHS and workers' compensation for those currently covered by the Seacare scheme to revert to state and territory laws.

40. According to the Explanatory Memorandum to the Seafarers & Other Legislation Amendment Bill 2016:

> *"The Seacare Review recommended that the model WHS laws should be specifically adapted for the maritime industry … Retaining industry-specific WHS legislation covering the sector of the maritime industry covered by the scheme is no longer necessary. The sector is not so significantly different from other industries which fall under generally applying Commonwealth, state or territory WHS laws as to justify the continuation of separate WHS arrangements."*

41. Under the Bill, the OHS(MI) Act would be repealed and the Commonwealth WHS Act extended to apply to the Seacare scheme with some sector-specific amendments including:

    a. **Making** technical amendments to s12 of the WHS Act to clarify it applies to 'upstream duty holders' where the activity gives rise to a potential risk to workers cover by the WHS Act;

b. **Removing** the requirement on businesses to provide Comcare with an up to date list of health and safety representatives (HSRs);

c. **Replacing** the reference to giving 'directions' in a Provisional Improvement Notice with giving 'recommendations'; and

d. **Clarifying** that judges and heads of mission are not 'officers' for the purpose of the WHS Act.

42. It is AMMA's view that the proposed WHS amendments will create / fail to alleviate significant areas of uncertainty around who is covered by the new Commonwealth WHS Act and it would be much clearer to simply revert to state WHS coverage.

Union access to workplaces

43. The proposal that WHS coverage revert from the OHS(MI) Act to the Commonwealth WHS Act means that right of entry laws pursuant to the WHS Act would apply.

44. Maritime unions currently do not have rights of entry under the OSH(MI) Act to enter vessels, which has worked well for all concerned. The proposed change of legislative instrument would provide permit holders with the ability to enter vessels and other sites currently covered by the Seacare scheme for the first time under WHS laws (ie entry powers which may override the opposition of the owner or person in charge of the vessel).

45. While affected AMMA members would have been willing to engage with any request for entry arrangements if the Seacare scheme itself were abolished, we can see no justification for changing existing right of entry laws where our members continue to be covered by the Seacare scheme.

46. It is worth noting that union permit holders currently have the ability to enter Seacare-covered premises and vessels under the Fair Work Act, provided they give at least 24 hours' notice.

47. If reverting to Commonwealth WHS laws, that 24 hours' notice could be waived in a number of circumstances, which is of concern.

48. AMMA believes the current right of entry provisions covering vessels / premises under Seacare are appropriate and have worked well. If there is an appetite for making a maritime-specific amendment to WHS laws to retain the status quo in terms of unions' "right of entry" powers, AMMA would be happy to provide further input as to how that might work.

WORKERS' COMPENSATION REFORM PROPOSALS

49. AMMA notes the Bills propose to retain the Seafarers Act but to make it consistent with the Safety, Rehabilitation and Compensation Act 1988 (SRC Act), except where the particular circumstances of the maritime industry (are thought to) justify a different approach.

50. Again, AMMA sees the only viable alternative as being to repeal the Seafarers Act and revert to state and territory workers' compensation laws.

51. In relation to workers' compensation, the Bill seeks to update the Seafarers Act to:

    a. **Extend** the definition of 'medical treatment' to include further types of compensable treatment;

    b. **Reduce** the threshold for compensation for a permanent impairment based on binaural hearing loss from 10% to 5%;

    c. **Change** the level of contribution of employment to a compensable injury that is a disease from a 'material' to a 'significant' degree; and

    d. **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'.

52. While some of those proposals will be of benefit to employers covered by the scheme, they do little to address the lack of incentives to return to work that is a current feature of the workers' compensation scheme, and one of the major concerns of AMMA members with Seacare.

53. At Appendix A, AMMA has included a table that compares state workers' compensation schemes and the current Seacare scheme to highlight differences in costs, premiums and injury management, issues which will only be peripherally addressed by the changes proposed in the current Bills.

INDUSTRIAL ISSUES

54. While technically companies can currently remove themselves from the Seacare scheme under certain circumstances, the fact is that in practice, from an industrial relations perspective, this is not a viable option for operators given the almost 100% union coverage on most vessels.

55. Adverse industrial consequences that would apply to affected employers seeking to exit the scheme currently would be removed if the scheme was abolished altogether and employers were not seen as "opting out" but were, as an industry, made subject to community-wide approaches to workers compensation and WHS, as are almost all other industries.

56. Having said that, it is worth keeping the current "opt out" provisions as a potential option which AMMA understands will no longer apply under the proposed new system.

57. It is also worth pointing out by way of industrial issues, that unions are attempting to prop up the scheme because it is small, costly and inefficient by using enterprise agreements to require employers that are not covered by the scheme to come under it.

58. Another issue arises for some vessel operators under their EBAs, which require them to continue to pay employees as per the Seafarers Rehabilitation & Compensation Act (the SRC Act), regardless of whether that Act is still in place.

59. Some EBAs state that, if for any reason neither the SRC Act nor any other workers' compensation scheme applies to the employee's employment, the employer and employees should still carry out all obligations and the employer shall be entirely responsible for all entitlements in accordance with the SRC Act as if that Act continued to apply to the employment.

60. In the event that the government implements AMMA's recommendation to abolish the Seacare scheme, and consequently the SRC Act, AMMA would welcome further consultation about how such EBA clauses should be treated going forward.

CONCLUSION

61. Seacare is simply not working. It is not working for employers, employees, the industry, nor the wider community. The scheme rests on financially unsafe and underfunded foundations, and delivers significantly worse policy and protective outcomes than prevailing state and territory regulation covering employees generally across the wider workforce.

62. From an operator's point of view, significant cost savings and certainty would flow from the complete abolition of the Seacare scheme and reversion to state and territory workers' compensation and WHS laws.

63. Employees will gain a more sustainable compensation framework, and real incentives and tools for rehabilitation and return to work, whilst provision is made to ensure the current fund can cover its liabilities.

64. While some of the reforms proposed in the Bills would create some improvements for scheme-covered employers, they would on balance risk adding further detriments for those remaining in the scheme.

65. In AMMA's view, this package of Bills is not a viable long-term solution to the problem. The superior course of action remains abolishing the Seacare scheme and reintegrating maritime employment into mainstream WHS and workers' compensation arrangements.

APPENDIX A: COMPARISON OF SEACARE SCHEME V STATE WORKERS' COMPENSATION SCHEMES

The expense of the current scheme for employers covered by Seacare is in part due to the length of time a worker can stay on workers' compensation at full pay, compared with what is a generally accepted community standard under state workers' compensation laws.

The following table provides a comparison of what the Seacare scheme looks like in relation to state workers' compensation schemes on a number of indices.

	SEACARE	STATE BY STATE WORKERS' COMPENSATION AUTHORITY AND LEGISLATION
Costs per employer	If maintained, on average $48,000 annually to recover costs.	Only premiums.
Premiums	Highest premium of all workers' compensation schemes. Deductions can be chosen by the company to vary the premium.	Due to high-risk industry, premiums will be higher than other industries, however, lower than the Seacare scheme. No room to alter excess of claims.
Claims management	Company determines liability of claim (in theory, operators should consult with their insurer before accepting a claim). Claimant entitled to 45 weeks of 100% weekly payments and then capped at 75% payments until employee is deemed fit to resume pre injury duties. Journey claims included.	Insurer determines liability of claim (in conjunction with company's assistance). Different jurisdictions have different entitlement periods: • **Vic** – 95% of pre-injury earnings up to 13 weeks, then 14-130 weeks @ 80%. • **Qld** – 85% of weekly earnings up to 26 weeks, then 75% for two years.

	SEACARE	STATE BY STATE WORKERS' COMPENSATION AUTHORITY AND LEGISLATION
	Relies on insurer and lawyers for common law coordination.	• **NSW** – 95% of pre-injury earnings up to 13 weeks, then 80% for 14-130 weeks. • **Tas** – 100% of pre-injury earnings up to 13 weeks, then 85% for 13-78 weeks, then 80% for 78 weeks to 9 years. • **WA** – 100% of pre-injury earnings up to 13 weeks, then 85% from 14 weeks. • **SA** – 100% of pre-injury earnings up to 52 weeks, then 80% thereafter. For most of the above, the company will have to pay the first two weeks of compensation, then the insurer kicks in. State jurisdictions do not include journey claims. Greater coordination for common law claims and insurer/legal/dispute resolution officer resolution of claims (less company involvement).
Injury management	Internal medical management / return to vessel plans, internal liaison with treating practitioners and placement of seafarers based on suitability of vessel.	Streamlined approach to return to work, insurers have their own bonus incentives to return the worker back to work. Third party correspondence organising certain medical appointments.
Union involvement	Unions are in favour of the Seacare scheme. Internally formulated decisions and claims outcomes (although in theory operators should be consulting with their insurer before accepting a claim). Perceived fewer breaches of confidentiality and privacy.	Aligns entitlements for seafarers with all other private sector workers in the Australian community. In some cases this is a reduction in potential entitlements (weekly payments); in other cases an increase (statutory permanent impairment claims). Seafarers will be considered based on their jurisdiction as opposed to their type of employment.

	SEACARE	STATE BY STATE WORKERS' COMPENSATION AUTHORITY AND LEGISLATION
		External insurer liaison and third party to enforce claim outcomes and decisions.
Permanent impairment	Lower settlements and benefits.	Higher maximums and settlement figures.
Protection and indemnity claims	No avenue to resolve claims through Seacare legislation.	Ability to redeem claims of compensation, noting the safeguards in place for redemptions in various jurisdictions.
Legislation	Seafarers Rehabilitation & Compensation Act 1992 (Seafarers Act). Occupational Health & Safety (Maritime Industry) Act 1992 (OHSMI Act).	State derived workers' compensation legislation (every state has their own workers' compensation Act). Nationally harmonised WHS legislation in the form of Work Health & Safety Acts in all states and territories excluding Vic and WA at this point.