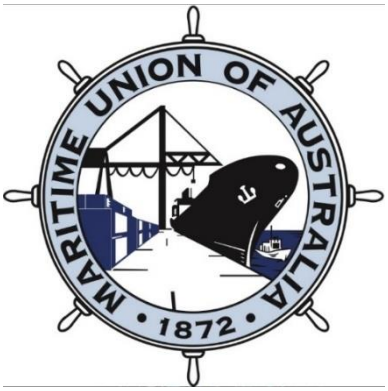
Maritime unions joint submission:

Independent review of Seacare

AMOU
Australian Maritime Officers Union



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Background

This document is a joint submission prepared by the three Australian maritime unions: the Maritime Union of Australia (MUA), the Australian Institute of Marine and Power Engineers (AIMPE), and the Australian Maritime Officers Union (AMOU).

Together these three unions represent virtually all the seafarers covered by the Seacare scheme, and have representatives appointed as Members of the Seacare Authority.

The MUA is a Division of the 120,000-member Construction, Forestry, Maritime, Mining and Energy Union. The MUA represents approximately 13,000 workers in the shipping, offshore oil and gas, stevedoring, port services and commercial diving sectors of the Australian maritime industry. On vessels, the MUA represents ratings and catering workers.

AIMPE is the registered organisation which represents qualified Marine Engineers throughout Australia. AIMPE came together as a national body in 1881 after several years during which local organisations were formed in the various colonies of Australia and New Zealand. AIMPE members operate, maintain and repair marine vessels of all sorts including commercial cargo ships of all types and sizes as well as vessels dedicated to the offshore oil and gas sector, tugboats, dredges, ferries, defence support craft, research vessels and Border Force vessels.

The AMOU is the oldest union continuously registered under the Fair Work Act 2009 and represents the professional and workplace interests of Ship's Masters (Captains) and Deck (Navigating) Officers in the maritime 'blue water', offshore oil and gas, ferry, dredging and tourism sectors, Marine Pilots, Coastal Pilots, tug Masters, bunker (refuelling) tankers, Stevedoring Supervisors, Port Services officers, vessel traffic services (VTS)/harbour control officers and professional/ administration/ supervisory/technical staff of port corporations and maritime authorities.

Executive Summary

Reform of the Seacare workers' compensation scheme and of maritime WHS legislation is needed, but reforms must take into account the practical situation of seafarers and seagoing workplaces.

The national nature of the seagoing industry, both in terms of the mobility of the workplaces and workers, must be reflected in both workers' compensation and WHS. Going back to state workers compensation schemes is a recipe for confusion and disaster for both workers and employers. Seagoing employers relying on state schemes have already found themselves inadvertently uninsured due to the 'state of connection' test being unsuited to maritime workplaces.[1] These problems are detailed in the submission.

A national workers compensation scheme is necessary for seafarers, and such a scheme must reflect the particular challenges of work at sea and for injured workers returning to work at sea. This is the reason for the distinctive benefit structure of the Seacare scheme.

For WHS, a national harmonised scheme has been achieved, and its broad duties and structures are well suited to maritime workplaces. The challenge in harmonising WHS will be ensuring that there is a genuine understanding of tripartism at all levels, from structures to oversee this scheme and its Inspectorate, to good communication between the HSRs and the Inspectorate, to the election and training of HSRs and their ability to exercise their rights in their workplaces.

Securing the future of the Seacare workers compensation scheme will require ending its reliance on private insurers. Either an industry scheme will need to be created, or the scheme will need to be delivered through Comcare. We recommend that the government take action now to indicate its support for the scheme going forwards and to support the creation of an industry scheme. These options are discussed in the submission.

Reforms to workers' compensation will also be needed in the following areas, which are discussed in detail in the submission:

- Removal of damaging and haphazard exemptions undermining the scheme
- End the consideration of state and Seacare workers' compensation schemes as equally appropriate for seafarers
- High insurance deductibles means that many employers are effectively self-insured. This situation must either be prevented or managed properly
- Measures to ensure that Comcare reconsiderations are considered mandatory should be introduced
- Better Return to Work provisions should be made
- The future of the Safety Net Fund needs to be secured
- Coverage of the scheme needs to made sustainable into the future

[1] See *Wall Street Pty Ltd v Workers Compensation Nominal Insurer* NSWWCC [2020]

Recommendations

Recommendation 1: The Australian government should support the creation of an Employers Mutual Indemnity Association to deliver the Seacare scheme, including through the responsible Minister making a statement about its policy support for the future of the scheme, through the repeal of various Directions that have undermined the scheme, and through support for start-up and establishment costs of such a scheme.

Recommendation 2: The Seafarers' Act should be amended to provide that once an effective Employers' Mutual Indemnity Association is set up, participation shall be mandatory for employers after a 12-month transition period, to ensure adequate long-term scale and sustainability. The interests of employers (and workers) will be represented through their representation on the board managing the scheme.

Recommendation 3: For the government to take steps to examine the option of providing Seacare workers' compensation insurance through Comcare, should this be necessary to ensure the continued operation of Seacare as a national scheme.

Recommendation 4: The Minister should make clear that the general principle in administering exemptions from Seacare should be that workers who are ordinarily and appropriately covered by state workers' compensation should be able to continue to be covered by those schemes even if the vessel needs to relocate or temporarily carry out another task. The exemptions should not be administered so as to allow seafarers who would normally be covered by the Seafarers' Act to be semi-permanently shifted to state workers' compensation schemes. Exemptions should not be granted for more than 30 days.

Recommendation 5: The Seafarers Act should be amended to more narrowly define the circumstances and reasons in which the Seacare Authority should issue exemptions from the scheme. The *Seafarers Safety Rehabilitation and Compensation Directions 2006* that permits employers an exemption if they can find cheaper insurance elsewhere should also be repealed. The exemption on the basis that the prescribed ship/s are operating within a Territory only should also be repealed.

Recommendation 6: The relevant maritime unions must be consulted about issuing any exemption.

Recommendation 7: If an Employers Mutual Indemnity Association is approved under the Seafarers Act, the Seacare Authority should be directed to remove the exemption on the basis of lack of insurance.

Recommendation 8: Any exemption granted for longer than a 30-day period must provide benefits equal to Seacare benefits.

Recommendation 9: Amend the Seafarers Act to introduce a maximum deductible to ensure that employers are not effectively self-insuring without sufficient oversight. Proper training and oversight of any organisation handling workers' compensation claims must be maintained.

Recommendation 10: Amend the Seafarers' Act to introduce a penalty for lack of compliance with a reconsideration request made under s.78 of the Act.

Recommendation 11: The potential for assisting seafarers to return to work should be carefully examined.

Recommendation 12: Amend the Seafarers Act to remove the requirement for the Safety Net Fund to hold private insurance. The Fund must be retained, but secured on a basis that does not rely on private insurance coverage.

Recommendation 13: The definition of 'Australia' as a reference to the Territorial Sea for the purposes of coverage of Seacare should be more clearly articulated by the Seacare Authority in its reference materials on scheme coverage.

Recommendation 14: Consideration should be given to defining Seacare coverage as voyaging beyond coastal waters (three nautical miles or 5.5km) to avoid doubt over the coverage of new offshore renewable energy projects. Consideration should also be given to consistency with the Fair Work Act application provisions which extend that Act to ships in the Exclusive Economic Zone which are operated/chartered by an Australian employer or use Australia as a base (s.33).

Recommendation 15: Any reformed Seacare coverage clause must consider the practicalities of vessels, companies and seafarers actually in the scheme, and particularly the structures of work that make returning to work difficult for injured seafarers. A scheme with less restricted coverage would be more sustainable and provide better support for seafarers.

Recommendation 16: Reform of the Seacare scheme must consider that the various State of Connection tests in state workers' compensation schemes do not adequately address the practicalities of seagoing workplaces, and do not resolve coverage for seagoing employers and seafarers. Any shift to relying on state workers' compensation schemes will cause significant risks for employers and workers to be left without appropriate coverage – which is why a national scheme is needed.

Recommendation 17: The Seafarers Act should be amended to allow for the inclusion of latency instead of minimum employment periods in the Specified Diseases list. The Seacare Specified Diseases list should subsequently be amended to rely on latency, to include welding fumes/lung cancer as a cancer exposure pair, to include Legionnaires disease, and to allow for the longer hours that seafarers are exposed to hazards in their workplace.

Recommendation 18: The Seacare Authority could collect information on the vessel flag along with the payment of the berth levy. This could be used to form a list of international-flag majority Australian-crewed vessels to be supplied to the Inspectorate for vessel inspections. AMSA, employers and workers must all have a shared and clear understanding of the application of WHS law to international flag vessels with majority Australian crew.

Recommendation 19: Maritime WHS should be harmonised with the national WHS system, with particular attention paid to ensuring tripartite oversight of the Inspectorate, proper resourcing of the Inspectorate, accessible training for HSRs, and clear lines of

communication between HSRs and the Inspectorate. The Inspectorate must be properly integrated into the national Safe Work Australia system.

Recommendation 20: Steps should be taken to ensure that every vessel has properly elected and trained HSRs. The Inspectorate should be consulting with HSRs on every inspection, and gathering information on the formation of Designated Work Groups and the election of HSRs and feeding this back to the tripartite body. HSRs should have a clear understanding on how to deal with any matters that arise while a vessel is alongside a wharf and within 500m of a platform.

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The future of Seacare workers' compensation

Our unions represent virtually all of the workers covered by the Seacare scheme. Seafarers are a highly mobile and genuinely national workforce and the maintenance of Seacare as a national workers' compensation scheme is of great importance to us.

The scheme is structured so that it relies on private insurance companies to provide policies to employers under the scheme. Most of these insurers are now withdrawing from providing this coverage. From the outset, unions opposed delivery of the scheme in this way as we do not think that the care of injured workers should rely on private for-profit companies. Moreover, this method of delivery fragments a small scheme among multiple providers, none of whom are able to provide the appropriate level of investment, knowledge and resources to ensure best-practice delivery of the scheme.

Reform of Seacare workers' compensation must preserve the following principles:

- Retain a national workers compensation scheme for seafarers. Any re-alignment must preserve tri-partite governance of the scheme and include maritime unions.
- Remove the exposure of Seacare to private insurance companies.
- Repeal of the *Seafarers Safety Rehabilitation and Compensation Directions 2006* that is undermining the Seacare scheme by allowing employers to opt out of the scheme if they can find cheaper insurance elsewhere.
- Clarification of coverage of the Seacare scheme to preserve its future scale and viability.
- Ensure that the benefit structure of the scheme recognises the obstacles that injured seafarers' face in terms of returning to work, in relation to:
    - Passing seafarer medical fitness tests
    - Passing company Fitness for Work tests
    - Living in a workplace that is a constantly moving and unstable platform that may be working hundreds of kms offshore or in international waters.
    - Being at work for 4-6 weeks at a time, with the requirement to be constantly available in the event of an emergency or other urgent situation.

A national scheme tailored to seafarers is needed because:

- Seafarers, especially those with qualifications compliant with the Navigation Act and IMO conventions,[2] are a highly mobile workforce, with many working across multiple states that they do not reside in.
- Most vessels covered under the scheme have workers from multiple states working alongside each other in the same workforce. It is desirable to ensure that they can all get the same level of coverage, receive the same level of benefits and be treated consistently in outcomes arising from any disputes or appeal processes.

[2] There are two qualifications systems for seafarers in Australia. Qualifications issued under the *Navigation Act 2012* are compliant with the International Maritime Organisation's (IMO) Standards of Training Certification and Watchkeeping (STCW) conventions. They are used on large Australian blue water vessels and in the offshore oil and gas industry. Qualifications issued under the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* are not compliant with IMO STCW conventions, and cannot be used internationally. These qualifications tend to be used on smaller vessels, however, some of these vessels do work interstate and in Commonwealth waters.

- Employers have not been willing or able to make adjustments to work requirements for injured seafarers returning to work. 75% of workers in Seacare reported working the same hours when they returned to work, and 72% the same duties, compared to national averages of 59% or workers undertaking the same hours and 40% undertaking the same duties. 54% of workers reported being in persistent pain, compared to a national average of 40%.[3]
- In our experience the state of connection test has not resolved the coverage complications that regularly arise in the maritime industry, and maritime employers relying on this test have been left exposed and uninsured. This is explored in detail later in the submission.
- It can be problematic to receive state compensation from a state you do not reside in.
- Seacare can also provide international coverage for seafarers when vessels travel to international ports, either for their routine work or during dry-docking.

There are a significant number of transport companies that are self-insured under Comcare due to the national consistency this provides. The companies below have national insurance under Comcare, according to the Comcare 2019-20 annual report:

Pacific National Services Pty Ltd (formerly Asciano Services Pty Ltd) (30/06/2025)
Australian Air Express Pty Ltd (30/06/2025)
Ron Finemore Transport Services Pty Ltd (30/06/2025)
StarTrack Express Pty Ltd (30/06/2022)
TNT Australia Pty Ltd (30/06/2022)
Virgin Australia Airlines Pty Ltd (29/09/2024)
Australian Postal Corporation (30/06/2022)
K&S Freighters Pty Limited (30/06/2024)
Linfox Australia Pty Ltd (30/06/2023)
Linfox Armaguard Pty Ltd (30/06/2023)
DHL Express (Australia) Pty Ltd (31/12/2026)
DHL Supply Chain (Australia) Pty Ltd (30/06/2022)

Seacare coverage is provided for in the Enterprise Agreements of 23 of the 24 employers currently paying the berth levy. These obligations are subject to bargaining at each company, and cannot simply be resolved by legislative change. These employers tend to be in the bluewater or offshore oil and gas sectors of the shipping industry, and draw on a national workforce with IMO-compliant qualifications.

Because Seacare coverage is embedded in Enterprise Agreements, any change to coverage of the scheme is quite a complex practical question.

The high union density in the industry is also indicated in the National Return to Work Survey, in which 51% of Seacare claimants reported getting support from their union on the

[3] The Social Research Centre, 2021 National Return to Work Survey Report, February 2022. Prepared for Safe Work Australia, p.34-5, p39

claims process, compared to a national average of 4%. No other jurisdiction had more than 10% of claimants getting advice from their union.[4]

Options for the delivery of Seacare workers' compensation

There are two main options that we can see for the provision of Seacare workers' compensation.

1. The creation of an industry scheme, under s.93 of the *Seafarers Safety Rehabilitation and Compensation Act* (Seafarers Act) which provides for an 'employers mutual indemnity association'.

    - Participation in the scheme should be mandatory for all employers within the coverage provisions.

    OR

2. The provision of Seacare workers' compensation through Comcare.

Self-insurance through Comcare is not an option for the maritime industry as a whole. There are too many companies which are too small to have the required scale. It is also quite common for an international shipping company to have a relatively short contract to work in Australia, and to take on Australian crew for such a contract. It would not be feasible for such companies to go through the process of setting up the necessary systems for self-insurance for a short contract, and this would cause significant problems for the workforce.

From 1911 to 1993, maritime insurers known as P&I Clubs were the sole workers' compensation insurer for seafarers. However this option for delivery is no longer available.

We explore each of these options in detail below.

Creating a Seacare industry scheme

We consider that creating a Seacare industry scheme (group self-insurance) to be the best option for both seafarers and employers at this time.

Group self-insurance would be arranged pursuant to Section 93(1)(c) of the Seafarers Act and would involve the creation of an Employers Mutual Indemnity Association (**EMIA**) which would then be approved by the Authority in writing as contemplated by the Act.

An EMIA can be an APRA approved mutual insurer, discretionary trust or captive insurance arrangement.

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[4] The Social Research Centre, 2021 National Return to Work Survey Report, February 2022. Prepared for Safe Work Australia, p.65

Further consideration would need to be given to which particular group self insurance model would best suit seafarers and maritime employers.

We consider the benefits of the creation of an EMIA are as follows:

- It would allow for continuity of current coverage for workers and employers, which is specified in EAs covering most workers.
- Services for injured workers could be improved through a customised approach, managed by people with direct knowledge of the industry
- Consolidation of claims management from 6 insurance companies to a single provider would provide a considerable advantage of scale, and allow for investment in better systems and services
- Insurance that can be tailored to the requirements of the Seafarers Act.
- Dedicated / specialised claims management by a centralised claims management team.
- An EMIA may implement industry focussed risk prevention programs such as industry WHS education and training and other health and wellbeing solutions.
- An EMIA may facilitate industry focussed rehabilitation / industry wide return to work procedures.
- The ability to resolve disputes in a manner that is commercial to the EMIA and beneficial to seafarers.

In the short-term, we think there is a strong appetite from employers for this option, out of necessity. In the medium term, we believe the EMIA could demonstrate that it is a well-managed, suitable and cost-effective option.

However the sustainability of the EMIA would depend on ensuring it had ongoing scale. For this reason, the similar Coal Services mutual workers' compensation fund has mandatory participation. Legislation should be amended to make participation in the Seacare industry scheme mandatory, with the appropriate safeguards.

Recommendation 1: The Australian government should support the creation of an Employers Mutual Indemnity Association to deliver the Seacare scheme, including through the responsible Minister making a statement about its policy support for the future of the scheme, through the repeal of various Directions that have undermined the scheme, and through support for start-up and establishment costs of such a scheme.

Recommendation 2: The Seafarers' Act should be amended to provide that once an effective Employers' Mutual Indemnity Association is set up, participation shall be mandatory for employers after a 12-month transition period, to ensure adequate long-term

scale and sustainability. The interests of employers (and workers) will be represented through their representation on the board managing the scheme.

Provision through Comcare

A second option to explore is provision of Seacare through Comcare.

Despite the similarities between the Seacare and Comcare schemes, there are also very significant differences in the administration of the two schemes, as follows:

- In our experience, injured workers generally have a poor experience in dealing with Comcare. The approach generally taken by Comcare is to manage claims unsympathetically, and strictly in accordance with the legislation and without any regard to the individual circumstances of the injured worker.

- Comcare is typically slow in attending to treatment approvals and claim reimbursements.

- In our experience Comcare rarely take a commercial approach to the resolution of disputes, and disputes that should be resolved early by negotiation, become long and drawn out.

- In disputed claims, in our experience Comcare are a ruthless opponent with deep pockets and often little common sense. We have been involved in disputes concerning the provision of modest benefits (for example incapacity payments in respect of short periods of time off work or the payment of modest medical expenses) and the approach taken by Comcare has been to incur significant legal costs (well exceeding the value of the disputed entitlements), in an attempt to avoid paying the injured worker.

- The maritime industry is a unique workplace. Comcare have no emotional connection to the industry and no appreciation of the challenges faced by both seafarers and their employers.

- Private insurers in the Seacare scheme have in the past taken a more commercial approach to claims management and parties have been able to resolve disputes. Some disputes are resolved quickly. Others are resolved in a manner that is effective and brings finality to the dispute / claim. The resolution of disputes is of course beneficial to both injured seafarers and often cost effective for employers and their insurers.

  Frequently the resolutions are transacted in a flexible manner and outside the strict provisions of the Act.

- As a statutory insurer strictly subject to the provisions of its Act, Comcare has no ability to resolve claims on a basis that brings finality to the claim for both parties. As a result, the only option for injured workers in the Comcare Scheme is to remain in

the scheme and tied to Comcare until such time as they make a full recovery, reach retirement age, or die.

- For employers, the administration of compensation entitlements by Comcare (because of their significantly restricted ability to resolve disputes) is likely to drive up insurance premiums.

- Under the Seacare scheme as it is currently, employers have some ability to deal with insurers in a commercial setting. This may involve negotiating premiums and / or negotiating the excess / deductible on the employer's policy. Comcare has no commercial insurance experience and is unlikely to offer any such flexibility to employers.

For these reasons, we consider an industry scheme to be a much better option for workers and employers.

Nevertheless, we do see the necessity for a national scheme for seafarers, and if Comcare is the only viable option for this then it should be seriously considered.

We note that Comcare has in the past assumed new liabilities. For example, the *Asbestos-Related Claims (Management of Commonwealth Liabilities) Act* 2005 provided for the transfer of liabilities arising from asbestos-related claims against the Commonwealth government, to Comcare.

However, Comcare is not a commercial insurer.

Provision of Seacare through Comcare would require substantial and potentially complex amendment of the Comcare Act, the circumstances being that Comcare is an Authority specifically created to manage and pay claims under that Act.

There are several different approaches parliament could take in amending the legislation.

We consider the following changes would potentially be required to the Seafarers Act:

- Amendment of S. 93 to remove the current requirements and provide that employers have a policy of insurance or indemnity from Comcare.

- Addition of a new provision conferring on Comcare the function of assuming and managing all liabilities that become liabilities of Comcare as a result of the operation of the Seafarers' Act as amended.

The Comcare Act would require significant amendment to enable Comcare to provide Seacare insurance. The nature of such amendments would depend upon the way in which it is intended to fund Comcare's Seafarers' Act liabilities.

Amendment of the Comcare Act may involve the following:

- An amendment to Section 69 to add as a further Function of Comcare the management of claims under the Seafarers' Act.

- Appropriate amendments to enable Comcare to determine the premium payable by a Maritime industry employer insured by Comcare under the Seafarers' Act.
- Appropriate amendments to enable Comcare to apply such premiums to its liabilities under the Seafarers' Act and the costs incurred by Comcare in claims management.
- Appropriate amendment (likely to Part VII) to incorporate a new Division dealing with the creation of a fund within Comcare for liabilities conferred upon it by the Seafarers' Act. This would involve complex provisions with respect to the determination of premiums and the matters currently dealt with in Division 4A as they apply to Comcare Act liabilities.

Recommendation 3: For the government to take steps to examine the option of providing Seacare workers' compensation insurance through Comcare, should this be necessary to ensure the continued operation of Seacare as a national scheme.

P&I Club Insurance

Employers who are ship owners may be able to arrange coverage with an existing overseas P&I Club. This is an arrangement permitted under S. 93(1)(b).

We consider most employers will be unable to secure such coverage through overseas P & I Clubs.

We note that P&I Clubs were the sole insurer under the former Act[5]. P&I Clubs ceased insuring employers when the Seafarers' Act was first introduced in 1993, we understand because of the pension based weekly compensation benefits provided for in the new Act and the inability to commute or redeem those liabilities.

We consider that overseas P&I Clubs remain unlikely to have any interest in becoming involved in managing workers compensation claims under a statutory scheme in Australia.

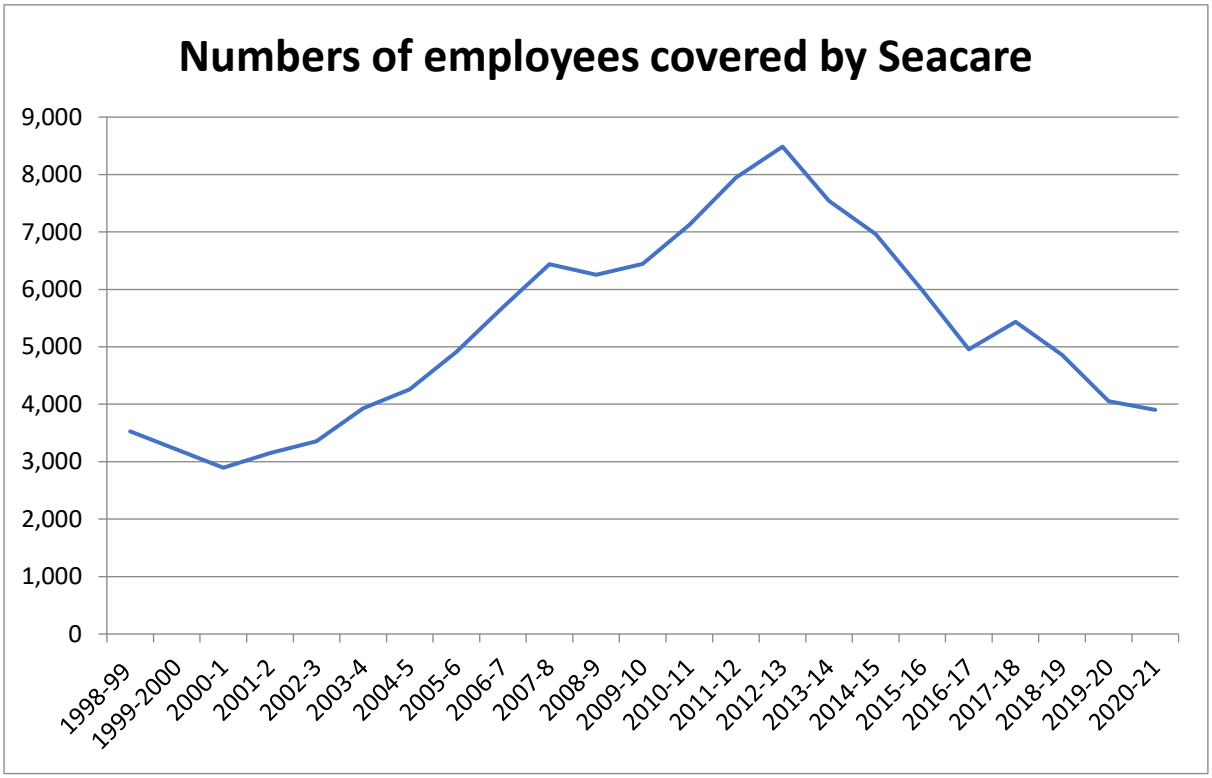
We expect that this approach will not be a viable option for most employers involved in the scheme currently.

[5] *Seamen's Compensation Act* 1911 (Repealed)

Size and future of the Seacare scheme

The size of the scheme has declined from the peak of the offshore oil and gas boom in 2013. However as Figure 1 shows, it has always been quite a small scheme.

Figure 1: Number of employees in the Seacare Scheme.



Source: 1998-99 Seacare annual report p.23, 2004-5 Seacare annual report p.43, 2009-10 Seacare annual report, 2014-15 compendium of Seacare statistics p.6, 1, 2020-21 Seacare scheme data, p. 6

The future of the maritime industry in Australia is quite bright. After a long period of neglect, significant expansion of the maritime industry is underway, in the areas which are covered by the Seacare scheme, as follows:

- There is currently a boom in offshore oil and gas production, driven by high commodity prices. Vessels servicing this industry make up a substantial portion of the current scheme.
- The new government has committed to revitalising the Australia shipping industry, through more effective administration of the *Coastal Trading Act 2012*, which was established to support Australian shipping but very significantly undermined by the previous government.[6]
- There is bipartisan support for taxation measures to support Australian shipping,[7] which will complement the improved administration of the Coastal Trading Act.
- The new government has also pledged to support the creation of an Australian Strategic Fleet of large domestic and internationally trading vessels which would also fall under Seacare coverage.

- Australia is on the cusp of a boom in the construction of offshore renewable energy, especially offshore wind. The *Offshore Electricity Infrastructure Act 2021* allows the construction of such projects. It was passed in December 2021 and commenced on 2 June 2022.
    - Over 12 developers are working on over 20 offshore wind projects around the coast of Australia (a list is supplied in Appendix 1). The Victorian government has announced policy to support the construction of 9GW of offshore wind, which it estimates will generate 3,100 jobs for 15 years of development and construction, and an additional 3,000 permanent jobs for ongoing operations.[8] Victoria currently has 14GW of electricity generation, so it is likely that a very substantial portion of Australia's future electricity will be supplied through offshore wind.

The number of vessels and seafarers to be covered by the Seacare scheme is likely to substantially expand in the next few years.

Reforms to the Seacare workers' compensation scheme

Need to roll back exemptions

The size and viability of the Seacare scheme in recent years has been undermined by multiple exemptions handed out to large corporations who used their political influence with Ministers to get around decisions of the AAT and avoid coverage under the scheme.

The Seafarers Act grants the Authority with an almost unfettered discretion to grant an exemption. The only restriction in the legislation is that a grant of an exemption cannot be inconsistent with an obligation of Australia under international law. (s 20A(4)). This must be changed as follows:

- Exemptions on the basis of lower-cost insurance being available elsewhere should not be allowed. We note the letter from Seacare Authority Chair Barry Sherrif to the Hon Christian Porter on 29 May 2020 seeking the repeal of the Ministerial Direction permitting such an exemption, and fully support the content of this letter.
- Exemptions for vessels on the basis of operation in a Territory should not be allowed.
- Improvements should be made to the process of applying for and being granted an exemption.

The general principle should be that exemptions should allow workers that are ordinarily and appropriately covered by state workers' compensation to continue to be covered by those schemes even if the vessel needs to relocate or temporarily carry out another task.

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[6] ALP, Labor's plan for a Strategic Fleet. Announced January 2022.
[7] MIAL, Bipartisan Shipping Policy now a Reality, 11 May 2022
[8] Victorian Government, Offshore Wind Policy Directions Paper March 2022

The exemptions should not be administered so as to allow seafarers who would normally be covered by the Seafarers' Act to be semi-permanently shifted to state workers' compensation schemes.

The exemption on the basis of lower-cost insurance has been a point of concern to the unions for a number of years, not only because of the weakening of the Scheme by the reduction of the number of participants, but also because in many cases seafarers were thrown onto cheaper State based workers compensation schemes, with often inferior compensation coverage.

Exemptions were introduced into the Seafarers' Act from the passage of the *Marine Personnel Legislation Amendment Act 1996*. The second reading speech noted the intention that exemptions:

> Will mainly have application where a ship which normally operates within the confines of a single state or territory is required to make a one-off interstate or overseas delivery voyage. Currently, such a ship would be covered by the SRC Act for that voyage and thus be required to have appropriate insurance cover, notwithstanding its crew would already be covered by the relevant state or territory compensation scheme, and the employer would be paying premiums under that scheme.
>
> The Seacare Authority has received numerous complaints that this short-term cover is difficult, and often impossible, to obtain and is prohibitively costly. The insurance companies also acknowledge this type of cover is, in many instances, not a normally acceptable commercial risk. The Seacare Authority will determine the appropriate conditions to apply before an exemption is granted, such as pre-existing coverage by a state scheme, and will prepare guidelines to advise ship operators of these conditions.

Before this Act was passed, vessels operating within a single State would ordinarily be covered under a State scheme, but a particular interstate/overseas voyage could potentially attract the operation of the Seafarer's Act. A common example of this is the relocation of a vessel from one port to another. Submissions were made by the employers that they had difficulty in placing appropriate insurance to cover their short term liability under Seacare.

Unfortunately, in subsequent years the Authority's practice of granting exemptions and further Determinations made by the responsible Ministers has gone far beyond what was intended in the *Marine Personnel Legislation Amendment Act 1996*, with a pattern emerging that when employers received a negative AAT decision, the Minister would draft a new Ministerial Declaration offering employers a new sweeping Declaration, with no sunset date. This happened in 2002 and again in 2006.

Exemptions from the scheme should not be allowed if they have the effect of:

- Undermining the integrity and ongoing viability of the Scheme;
- Leaving Seafarers without adequate workers compensation protection.

Exemptions undermine scheme viability

The unions have held concerns that exemptions were being used as an easily accessible means of opting out of the Scheme, and thereby increasing insurance costs for those employers who remained in. It may be appropriate for an exemption to be issued in the case of one-off interstate or overseas voyages which do not constitute a pattern of regular trading voyages, but the analysis prepared by the Authority suggests that reasons of cheaper insurance represent almost 60% of potential revenue lost to the Scheme[9]. Furthermore, exemptions on this basis affected higher numbers of seafarers and lasted for periods of between 6 months to a year in duration.

The Ministerial Direction in relation to cheaper insurance should be repealed. The availability of workers compensation insurance under a State or Territory scheme was never intended to form the basis of an exemption. To permit such exemptions affects the long term viability of the Scheme. As a general proposition, the benefits and obligations imposed by the Scheme should impact all participants. The evidence contained in the Seacare Authority's 2019 Discussion Paper suggests that the practice of granting exemptions because of insurance costs, has been gamed successfully by two main operators; namely Woodside Petroleum and Paspaley Pearls. The Authority's review indicates that Woodside (the only operator that seeks an exemption for FPSO's) was responsible in the 2018-19 financial year for fully 49% of lost potential revenue to the Fund. When combined with Paspaley's 11 vessels, those two operators alone accounted for one third of all exemptions in that year.

It is not simply a matter of considering the costs foregone to the Fund which needs to be considered. The lost premium revenue is likely to exert an upward pressure on insurance costs for those employers remaining in the Scheme. Unless steps are taken to redress that matter, the problem is only likely to get worse.

Woodside's FPSO's are clearly prescribed ships within the meaning of the Seafarer's Act. This was found by the Administrative Appeals Tribunal in 2005 and in 2006 when John Frame, employed on the Woodside FPSO *Cossack Pioneer*, was injured and made a claim for compensation under the Seafarers' Act.[10] Woodside asserted that the *Cossack Pioneer* was not covered by the Seafarers' Act, but the Tribunal found against them, twice. Instead of accepting the decision of the AAT, Woodside used its influence with the Howard government and the relevant Minister issued the *Seafarers Safety Rehabilitation and Compensation Directions 2006* that grants employers an exemption if they can find cheaper insurance elsewhere.[11] These Directions were issued on 24 August 2006, 10 months after the first decision against Woodside, and 6 days after the second hearing, which again resulted in a decision against Woodside.

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[9] Seacare Scheme Discussion Paper – Seacare Authority 21 October 2019 ("**Discussion Paper**")

[10] *Frame and Woodside Energy Ltd* [2005] AATA 997 (6 October 2006). This decision upheld the initial decision on 11 October 2005.

[11] The Directions were issued on 24 August 2006, and the hearing for *Frame and Woodside Energy Ltd* [2005] AATA 997 was held on 18 August 2006.

Since 2006, Woodside has been one of the main users of this exemption on the basis of cheaper insurance, while other FPSOs have remained covered by the Seacare scheme. However, the existence of this broad reason for exemption continues to undermine the operation of the scheme, and has now been used by a number of other employers. Unlike virtually all other instruments under the Seafarers' Act, these Directions are exempt from sunsetting. These Directions must be repealed.

Seafarers left without adequate workers compensation protections

The unions argue that is not sufficient for an exemption to be granted simply because there may be access to a State or Territory compensation scheme.

The origins of the Seafarer's Act arise out of the Seamen's Compensation Review conducted by the late Professor Luntz in 1988. His review recognised the importance of maintaining a nationally based scheme to cover all Australian seafarers. He recommended the adoption of the existing Comcare legislation (now the *Safety Rehabilitation & Compensation Act* 1992) as a model for the new Seacare legislation. There has been broad parity in terms of benefits under both schemes since 1992.

Merely pointing to the availability of coverage under a State or Territory scheme does not necessarily mean that any compensation will be paid, or if the claim is accepted, that the level of benefits available will be adequate.

None of the state compensation statutes are identical, and all have significant differences in relation to employment connection tests. A claim which might well be accepted under the Seafarer's Act could fail under the State Act counterpart.

The substitution of national compensation standards with often inferior State standards should not be permitted. For example, seafarers employed by Woodside Petroleum on their FPSOs (which are currently the subject of rolling exemptions) will likely be covered by the *Workers Compensation & Injury Management Act* 1981 (WA). That legislation, as at 1 July 2020, provides a cap on incapacity payments of $235,971.00; a maximum entitlement to medical and hospital expenses of $70,791.00; and a maximum entitlement for vocational rehabilitation expenses of $16,518.00. Further amounts above these prescribed maxima may be ordered, but only in very limited circumstances. There are no caps on weekly payments, medical expenses or rehabilitation costs under the Seacare Scheme, just as there are none under Comcare.

What exemption factors should apply?

The unions' primary submission is that employers should not be permitted to forum shop on the basis of cheaper workers compensation insurance.

In the unions' submission, the basis for exemption should be confined to the cases as originally intended at the time of passage of the *Marine Personnel Legislation Amendment*

Bill 1996. That is, to cases involving short term exemptions for predominantly intrastate vessels who engage in one-off interstate or overseas voyages for an incidental purpose.

The criterion which should warrant an exemption is the inability to find short term insurance cover, not the availability of cheaper insurance cover.

The unions oppose the exemption factor for ships operating within a Territory only. This provision was implemented through a Ministerial Direction, which is entirely inconsistent with the Act itself[12]. The Direction was introduced in May 2002 following the decision of the Federal Court in the *Tiwi Barge* case[13].

Whether a workers' compensation policy is "suitable," as provided in the Seacare Exemption Guidelines,[14] will require some determination by the Authority that it provides coverage to injured employees commensurate with the coverage available under the Seafarer's Act. If the policy did not, then it could not be said to be suitable, and therefore an exemption should not be permitted.

The Seafarers Act scheme is a scheme for bluewater and offshore seafarers, which offers benefits appropriate to the circumstances of these workers and their workplace and qualifications. State workers' compensation schemes are not designed for these workers or workplaces.

The purpose of an exemption should be to allow workers who are normally and appropriately covered by state workers' compensation schemes to continue to be covered by these schemes.

It is not appropriate for an exemption to allow an employer to permanently shift bluewater and offshore seafarers from the Seacare scheme to a state scheme. This undermines the intent of Parliament in creating the scheme, the benefits of injured workers in the scheme, and the viability of the scheme itself.

Administering exemptions

As a general proposition, the unions submit that all exemptions should be limited to a finite period. In our submission, an exemption should only be granted for a period of no more than 30 days. Except in the case of exemptions for vessels voyaging outside Australia for periods over 12 months, it could be anticipated that one month would generally be sufficient.

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[12] "*This Act applies to the employment of employees on a prescribed ship that is engaged in trade or commerce:*

(a) …

(b) …

(c) within a Territory, between a State and a Territory or between two Territories. S.19(1)

[13] *Tiwi Barge Services Pty Limited v Julie Anne Stark* [1997] 874

[14] As required by paragraph 1(b) of the exemption guidelines – February 2022

The declaration attached to the current application is not required to be sworn. The declaration vouches that the employer has made enquiries about insurance, but does not call for proof that such enquiries were made. This information should be supplied. As the consequences of an exemption are significant, and the Authority is reliant on the evidence submitted by the employer, it would be appropriate to require that the application be accompanied by a sworn declaration.

Furthermore, at the very least, the declaration should put the applicant on notice that it is under a continuing obligation to notify the Authority in the event that any workers compensation policy lapses or is cancelled during the term of the exemption. We suggest also that the application contain an authority authorising any insurer to supply whatever information might be required by the Authority for the purposes of verifying the insurance.

Similarly, for those employers seeking an exemption on the basis that they are approved as a self-insurer under a State/Territory scheme, the declaration to the application should explicitly put the employer on notice that it is under a continuing obligation to notify the Authority in the event that the self-insurance license lapses or is cancelled.
In the unions' submission, entire fleet exemptions should not be permitted. The Authority's task is to determine the criteria on a vessel by vessel basis.

In the unions' submission, all employees likely to be affected by a change in insurance arrangements should be notified of that fact, and informed of the period of the exemption and the name of the relevant insurer. The requirement to notify all employees should be a condition of any exemption. Furthermore, in view of the high union coverage in the maritime industry, it should also be a condition that the employer notify the three maritime unions of an application for an exemption. This would be helpful to the Authority in order to ensure oversight that the terms of any exemption application are being complied with.

Recommendation 4: The Minister should make clear that the general principle in administering exemptions from Seacare should be that workers who are ordinarily and appropriately covered by state workers' compensation should be able to continue to be covered by those schemes even if the vessel needs to relocate or temporarily carry out another task. The exemptions should not be administered so as to allow seafarers who would normally be covered by the Seafarers' Act to be semi-permanently shifted to state workers' compensation schemes. Exemptions should not be granted for more than 30 days.

Recommendation 5: The Seafarers Act should be amended to more narrowly define the circumstances and reasons in which the Seacare Authority should issue exemptions from the scheme. The *Seafarers Safety Rehabilitation and Compensation Directions 2006* that permits employers an exemption if they can find cheaper insurance elsewhere should also be repealed. The exemption on the basis that the prescribed ship/s are operating within a Territory only should also be repealed.

Recommendation 6: The relevant maritime unions must be consulted about issuing any exemption.

Recommendation 7: If an Employers Mutual Indemnity Association is approved under the Seafarers Act, the Seacare Authority should be directed to remove the exemption on the basis of lack of insurance.

Recommendation 8: Any exemption granted for longer than a 30-day period must provide benefits equal to Seacare benefits.

Effective Self-Insurance

Currently three companies with 238 berths (as of January 2022) are effectively self-insuring. This is 18% of vessel berths in the scheme.

This is because they have taken out an insurance policy through Liberty, which means (according to the insurance broker Aon) the insurer:

- Only offers cover on excess of loss basis with a deductible of $750,000.
- Has no "ground up" claims management capacity leaving employers to "self manage" below deductible claims.

It is quite likely that other employers have high deductibles, and are also self-managing injuries.

There appears to be no restriction on this kind of insurance in the Seafarers' Act.

There are no processes for management of this situation at the Seacare Authority – there is guidance on claims management on the website but nothing like the high level of scrutiny required for employers that self-insure under the Comcare scheme.

Recommendation 9: Amend the Seafarers Act to introduce a maximum deductible to ensure that employers are not effectively self-insuring without sufficient oversight. Proper training and oversight of any organisation handling workers' compensation claims must be maintained.

Reconsiderations

A provision in the Seacare legislation allow workers to request that their employer or insurer send their claim to Comcare for review and reconsideration (s.78).

However, there is no penalty in the legislation for employers who ignore this request, and workers were finding that this occurred regularly. This frequently disadvantaged injured workers, both in the treatment of their claim, and in forcing them to go to the AAT for matters where this could have potentially been avoided. The AAT in turn has exceedingly long wait times.

The Seacare Authority undertook some work in this area to remind employers of their obligations. In 2015-16, there were 12 requests for reconsideration, and this increased to 38 in 2019-20. The original decision by the employer/insurer was only supported about 50% of the time with a number of cases just asking the employer to reconsider the evidence before them.

Fifteen of the 38 requests for reconsiderations were workers employed by companies that are effectively self-insuring, indicating a need for better training and oversight of companies that are self-insuring.

Recommendation 10: Amend the Seafarers' Act to introduce a penalty for lack of compliance with a reconsideration request made under s.78 of the Act.

Return to work issues

The National Return to Work Survey showed that Seacare has the lowest return to work rate of any workers' compensation scheme. Only 66% of injured seafarers in Seacare returned to work, compared to the national average of almost 92%.[15]

On the one hand, this is understandable due to the nature of the work. Seafarers cannot return to sea without a medical, and their work is remote with limited medical access. The rostering system means that working reduced hours is virtually impossible, and as a result, 75% of workers in Seacare reported working the same hours when they returned to work, and 72% the same duties, compared to national averages of 59% or workers undertaking the same hours and 40% undertaking the same duties. 54% of workers reported being in persistent pain (national average of 40%).[16]

This is one important reason why a long-tail scheme is appropriate for seafarers, and why seafarers should not be shifted to state schemes which do not account for these considerable obstacles to returning to work.

However, we have complaints from multiple members who wanted to return to work, but faced significant obstacles in doing so. Only 57% of injured workers in Seacare had a Return to Work plan.[17]

Recommendation 11: The potential for assisting seafarers to return to work should be carefully examined.

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[15] The Social Research Centre, 2021 National Return to Work Survey Report, February 2022. Prepared for Safe Work Australia, p.25

[16] The Social Research Centre, 2021 National Return to Work Survey Report, February 2022. Prepared for Safe Work Australia, p.34-5, p39

[17] The Social Research Centre, 2021 National Return to Work Survey Report, February 2022. Prepared for Safe Work Australia, p.47

The Safety Net Fund

The Safety Net Fund plays an important role in covering injured seafarers whose employers have gone bankrupt, meaning they will otherwise not be properly covered for their injuries.

The exit of multiple private insurers from the excess of loss insurance market means that it is now almost impossible to secure insurance for the Fund, as is required by the Seafarers Act.

The future delivery of the Safety Net Fund needs to be considered. The Fund should be delivered in such as way that it does not rely on the private insurance market. It is likely that the Commonwealth will need to take on this responsibility, and this is appropriate.

Recommendation 12: Amend the Seafarers Act to remove the requirement for the Safety Net Fund to hold private insurance. The Fund must be retained, but secured on a basis that does not rely on private insurance coverage.

Seacare coverage: what is a voyage outside of Australia?

Section 19 of the Seafarers Act deals with employment of seafarers on a prescribed ship *"that is engaged in trade or commerce:*

(a) between Australia and places outside Australia; or

(aa) between 2 places outside Australia; or

(b) among the States; or

(c) within a Territory, between a State and a Territory or between 2 Territories.

"Australia" is defined by reference to the *Seas and Submerged Land Act* 1973 as a reference to the Territorial Sea which extends for 12 nautical miles (22km). A voyage from a port to an area outside the Territorial Sea limit, provided it was undertaken in "trade or commerce", would in general terms satisfy the requirements of the legislation assuming that the vessel was a "prescribed ship" and was either an offshore industry vessel or a trading ship, and not subject to any declaration excluding the operation of the Act.

Consideration should also be given to defining coverage as voyaging beyond coastal waters (three nautical miles or 5.5km) to avoid doubt over the coverage of new offshore renewable energy. These will be established under the Offshore Electricity Infrastructure Act 2021, which applies from 3 nautical miles offshore.

Consideration should also be given to consistency with the Fair Work Act application provisions which extend that Act to ships in the Exclusive Economic Zone which are operated/chartered by an Australian employer or use Australia as a base (s.33).

Recommendation 13: The definition of 'Australia' as a reference to the Territorial Sea for the purposes of coverage of Seacare should be more clearly articulated by the Seacare Authority in its reference materials on scheme coverage.

Recommendation 14: Consideration should be given to defining Seacare coverage as voyaging beyond coastal waters (three nautical miles or 5.5km) to avoid doubt over the coverage of new offshore renewable energy projects. Consideration should also be given to consistency with the Fair Work Act application provisions which extend that Act to ships in the Exclusive Economic Zone which are operated/chartered by an Australian employer or use Australia as a base (s.33).

The future of Seacare coverage

There are two key options for Seacare coverage going forwards.

1. To accept the Aucote decision and have the Seacare scheme provide coverage for seafarers more generally.

2. To define the coverage of the scheme more tightly, as was explored by the Department in 2016-17.

Both options are explored below.

Accepting the Aucote decision

The Full Federal Court's Aucote decision[18] is undoubtedly correct and clearly reflected Parliament's intention. No appeal was brought from it. The reasoning of the Court clearly supported its conclusion that the Act applied independently of S.19(1). The Authority's and employers' main objection to the *Aucote* decision appears to be that they were taken by surprise and employers had structured their insurance arrangements on the basis that S.19(2) of the Seafarers Act had no application.

We set out below the relevant parts of the provision:

> **Application of Act**
>
> (1) This Act applies to the employment of employees on a prescribed ship that is engaged in trade or commerce:
>
> (a) between Australia and places outside Australia; or
>
> (aa) between 2 places outside Australia; or

[18] *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182

(b) among the States; or

(c) within a Territory, between a State and a Territory or between 2 Territories.

…

(2) This Act also has the effect it would have if:

(a) a reference to an employer were limited to a reference to a trading corporation formed within the limits of the Commonwealth; and

(b) a reference to an employee were limited to a reference to an employee employed by a trading corporation formed within the limits of the Commonwealth.

…

The Court rejected the employer's submission that S.19(2) was subservient to S.19(1), and did not operate outside the scope, or independently of S.19(1). In essence, the employer submitted that S.19(2) limited the operation of S.19(1) to a person who was an employee of a trading corporation on a vessel that was engaged in international or interstate trade and commerce.

The Court rejected this view, and held:

> "Each subsection of Section 19, except Section 19(5), had an independent operation. The purpose of each of those subsections was to rely upon different heads of the legislative power of the parliament under Section 51 of the Constitution. … The evident purpose of Section 19(2)-(4) is to extend the application of the SRCA beyond regulating activities, relationships and persons in reliance on the (trade or commerce power) in Section 51 of the Constitution as Sections 19(1) and (1A) do by using the nexus in the corporations power in Section 51(xx)."

The Court noted that the explanatory memorandum for the Bill explained that S. 19 ensured that the Act would be within the parliament's legislative power, saying:

> "The primary, although not exclusive, bases of power are the trade and commerce power, and the Commonwealth powers to make laws with respect to foreign corporations and trading and financial corporations."

After the Aucote decision, there was a policy decision by government and the Authority that the decision was incorrect and that it did not reflect actual scheme coverage. Legislation and declarations to remove the effect of the decision and to attempt to codify and legislate a more restricted coverage definition going forwards were made in the *Seafarers and Other Legislation Amendment Bill* 2016, which ultimately lapsed. Our submissions at the time was that there were many seagoing workplaces which did have Seacare coverage, and would have been excluded by the new attempts to restrict coverage.

It is worth considering what Seacare coverage would be if the Aucote decision was accepted. The effect of accepting Aucote and the independent operation of S. 19(1) and 19(2) of the Seafarers Act could be summarised as follows:

1. An “employee” for the purposes of S.19(2) is a “seafarer”.

2. S.3 defines “seafarer” as a “person who is employed in any capacity on a prescribed ship”.

3. S.3 defines “prescribed ship” as a ship to which Part II of the former *Navigation Act* 1912 applies, or a ship declared to be a prescribed ship under S.3A(1).

4. S.10 of the former *Navigation Act* defines a “prescribed ship” as:

   (a) A ship registered in Australia;

   (b) A ship (other than a ship registered in Australia) engaged in the coastal trade; or

   (c) A ship (other than a ship registered in Australia or engaged in the coastal trade) of which the majority of the crew are residents of Australia and which is operated by any person or corporation having a principal place of business or incorporation in Australia.

The advantages in reinstating the Act in the form intended by parliament are as follows:

1. It would make redundant all of the current sterile arguments about the voyaging patterns of a vessel, and whether they constituted voyages in trade or commerce;

2. It would considerably remove doubts as to the extent of coverage;

3. It would considerably simplify the matters to be considered when determining coverage;

4. It would expand the area of operation of the legislation, which would no doubt considerably improve the viability of the scheme;

5. It would ensure a truly uniform law for the provision of compensation benefits to seafarers and their dependents.

Restricting Seacare coverage and rejecting the Aucote decision

The other option for Seacare coverage going forward is to follow the path taken by the *Seafarers and Other Legislation Amendment Bill 2016* and attempt to define a restricted set of coverage provisions. There was a lengthy discussion of this between stakeholders and the responsible Department in 2016-2017, which ended abruptly in December 2017 and has not been revived.

Appendix 2 includes the coverage provision arrived at by December 2017, which was agreed by stakeholders, with the exception of the clause 1AAA highlighted in yellow.

The Department was determined to introduce a ‘voyage’ requirement that restricted the application of the Act to “a voyage by the vessel:

(e) between a place in Australia and a place outside Australia; or
(f) between a place outside Australia and another place outside Australia; or
(g) between a place in a State and a place in another State; or
(h) between a place in a Territory and a place in that Territory; or
(i) between a place in a Territory and a place in a State; or
(j) between a place in a Territory and a place in another Territory."

We objected to introducing the concept of 'voyage' into the Act as it was a new requirement that was not previously part of the legislation. Our advice at the time was:

> "The concept of a vessel being on a voyage in interstate or overseas trade was never a relevant matter for determining coverage under the SRCA or its predecessor, the Seaman's Compensation Act 1911. Both statues required the ship be engaged in interstate or overseas trade. The original drafter realised, no doubt, that pinning coverage on "voyages" was not a sound basis for the legislation, and that seafarers work on vessels frequently in situations when no voyage is being conducted."

The discussion in 2016-17 was about finding a legal definition of coverage which the Department claimed would match what was commonly understood in the industry. However, introducing a voyage limitation would substantially restrict coverage by excluding seafarers in the following quite routine scenarios:

1. A seafarer employed on a vessel as a watchkeeper which is laid up for any period
2. A seafarer employed on a vessel which is awaiting a spot contract and is not undertaking any voyage at all
3. A seafarer employed on a vessel which is drydocked (see Finestone case, with a vessel drydocked in Hong Kong).
4. A seafarer employed on a vessel which is alongside a wharf or at anchor but then commences a voyage to respond to a search and rescue request
5. A seafarer employed on a vessel which is alongside a wharf or at anchor, and commences a voyage to run from a cyclone.

The clause in yellow (1AAA) was the alternative we suggested, which sought to exclude vessels doing shore and harbour work from coverage without creating the gaps outlined above.

The Department rejected our proposed 1AAA on the basis that it did not conform to "principles-based drafting". However, we believe there is a strong case that principles-based drafting is not actually appropriate for this situation. We examined the OPC's advice on this issue, in both their 'Plain English Manual' and their 'Guide for Reducing Complexity in Legislation'. Both documents discuss the limitations of principles-based drafting.

The OPC describe principles-based drafting as "the style used when you deliberately state the law in general principles and leave the details to be filled in by the courts, by delegated legislation or in some other way. It has one big advantage: it's very easy to read, and the general purpose of the law is easy to understand. But it has a big disadvantage: the precise

meaning is uncertain."[19] The Plain English Manual even refers to 'general principles drafting' as 'fuzzy law'.[20] This is just not desirable.

With Seacare, we are not creating a new scheme and asking for the detail to be filled in by the courts. The drafting challenge with Seacare is that we are trying to draft clauses to deal with over 100 years of case precedent. The difficulty that the Department has found in trying to find principles-based legislation that addresses the issues is evidence that these general principles do not actually exist. Instead, we have a complex situation that has evolved over time to cover practical situations. It is these practical situations that need to be addressed. As the OPC cautions:

> "before adopting such an approach, drafters and instructors need to weigh up whether the simplicity gained by using coherent principles drafting is worth the loss of precision that results."[21]

The advantages of principles drafting can "come at the expense of certainty as to exactly what the principle covers."[22] Further, the OPC explains:

> "the policy instructors must decide whether you use the simple form or the detailed one. They have to weigh up the political and practical results of having a law that might not cover some of the alternatives."[23]

The history outlined above demonstrates the complexity of trying to legally define the current practical coverage situation.

Recommendation 15: Any reformed Seacare coverage clause must consider the practicalities of vessels, companies and seafarers actually in the scheme, and particularly the structures of work that make returning to work difficult for injured seafarers. A scheme with less restricted coverage would be more sustainable and provide better support for seafarers.

Problems with the 'state of connection' test

There are some who advocate that the Seacare scheme should be wound up and workers transferred to the various state schemes. They argue that the "state of connection test" has solved all confusion over Seacare coverage between states. However, we do not believe this is the case.

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[19] OPC, 1993, Plain English Manual, p.7, also quoted in OPC, 2016, Reducing complexity in legislation version 2.1, p, 3.
[20] OPC, 1993, Plain English Manual, p.7
[21] OPC, 1993, Plain English Manual, p.7.
[22] OPC, 2016, Reducing complexity in legislation version 2.1, p.14
[23] OPC, 2016, Reducing complexity in legislation version 2.1, p, 3.

The so-called "State of Connection test" is an attempt "to define the relevant connection between employment and the State necessary to attract liability to pay compensation under the Workers Compensation Act"[24].

All State and Territory jurisdictions have implemented similar provisions to New South Wales[25].

The various provisions are similar, but not identical. Why this should be so is unclear if the purpose was to provide a comprehensive national scheme. There are at least two areas of difference.

The Victoria, Western Australia, Tasmania, ACT and Northern Territory legislation provide that in deciding whether a worker usually works in a state, regard must be had to the worker's work history with the employer over the previous 12 months. The NSW and Queensland legislation refers to the need to have regard to the work history with the employer over an unlimited period.

This dichotomy is noted "*Australian Workers Compensation Guide*" (CCH) Vol. 1. At 49-800 the commentator observes that the importance of the requirement to have regard to a work history is to ensure that courts in different jurisdictions apply standard tests to avoid the situation where one court may decide the matter by having regard to the whole period of employment, while another court may consider a more recent history. Given the differences in the wording, the legislation clearly does not apply a standard test in this regard.

Other dichotomies appear to exist in the Northern Territory legislation. Section 53AA(5) of the *Work Health Act* (NT) provides a test for determining whether a worker is "usually based" in a particular jurisdiction, and sets out four matters to be had regard to in considering that question. Also, Section 53AA(6) of the Northern Territory legislation provides a further test for determining where the principal place of business of an employer is located.

These provisions do not appear in the legislation of the other States and the ACT. This is a serious anomaly.

All of the provisions stipulate at the outset that the fact that a worker is outside a particular State when the injury occurs does not prevent compensation from being payable under that State's legislation. All the provisions adopt a series of cascading tests for determining the State to which the employment is connected.

The cascading series of tests can be briefly stated as follows:

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[24] *Ballantyne v Workcover Authority of NSW* [2007] NSWCA 239; per Basten JA at [65]

[25] The various references are as follows: *Workers Compensation Act* 1987 (NSW) – S.9AA; *Accident Compensation Act* 1985 (Vic) – S.80; *Workers Compensation & Rehabilitation Act* 2003 (Qld) – S.113 & 114; *Workers Compensation & Injury Management Act* 1981 (WA) – S.20 & S23C; *Workers Rehabilitation & Compensation Act* 1988 (Tas) – S.31A; *Workers Compensation Act* 1951 (ACT) – S.36A & S.36B; *Work Health Act* 1986 (NT) – S.53AA.

(a) The State in which the worker usually works in that employment; or

(b) If no State is identified by the above, the State in which the worker is usually based for the purposes of that employment; or

(c) If no State is identified by paragraphs (a) or (b) above, the State in which the employer's principal place of business is located;

(d) In the case of a worker working on a ship, if no State is identified by paragraphs (a), (b) and (c) above, the worker's employment is, while working on a ship, connected with the State in which the ship is registered or (if the ship is registered in more than one State), the state in which the ship most recently became registered;

(e) If none of the above are applicable, the worker's employment is connected with a State where the injury happens, and provided there is no place outside Australia under the legislation of which the worker may be entitled to compensation.

All of the provisions require a court or tribunal (and we interpolate, an employer attempting to determine where he should place his insurance) to consider each step in sequence. It is only necessary to consider a following step if the earlier test does not result in a State being identified.

This mechanism attempts to avoid conflicts by giving primacy firstly to the place where the worker "usually works"; secondly, to the place where the worker is "usually based"[26]; thirdly, to where the employer's "principal place of business" is located; and so on.

From the outset, it should be observed that these provisions more aptly apply to shore-based employment, and not to employment on a ship. A seafarers workplace (and where he is based) is the vessel, and accordingly its geographical location will change frequently. The relatively stationery location of the employer's place of business ranks only third on the list. It is likely therefore that most cases will be decided on the basis of tests (a) or (b), and without any need to consider the location of the employer's principal place of business under test (c). An employer who enters into his insurance arrangements only on the basis of where he considers his principal place of business is located will be at risk of being left uninsured.

This is important because State or Territory based workers compensation policies are statutory policies and respond only in the event of a claim being made under the applicable and relevant State or Territory law.

Paragraph (d) above refers specifically to a "worker" working on a ship. It will only have application if none of the preceding tests resolve the issue. The paragraph refers to a connection with the State "in which the ship is registered". Whether this refers to the geographic place where the registration was affected, or the legislation under which it is registered, is not specified. The primary legislation governing ship registration in Australia is the *Shipping Registration Act* 1981 (Cth) (**SRA**). In general, all Australian owned commercial

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[26] Usually based for the purposes of the employment.

ships of 24 metres or more in tonnage length, and capable of navigating the high seas must be registered[27]. All other craft need not be registered but may be if the owners desire[28]. The information recorded under the registration includes information as to a home port. In addition, all of the State and Territory jurisdictions have enacted laws requiring registration of vessels of certain types, which are likely to remain in the State for more than 3 months[29].

In our view, the reference to "the State in which the ship is registered" refers to the legislation under which it is registered, rather than a particular geographic location where registration took place. If it was intended to refer to the geographic location, for instance by reference to a home port, it would have been simple enough to say so explicitly. It may be that in most cases the two places will coincide.

"Usually works" and "Usually based" – Tests (a) and (b)

"Usually" means "*habitual or customary"* or "*in a regular manner*"[30]. It does not necessarily mean where a person works for a majority of the time[31].

Determining a State in which a worker usually works, or where he is usually based, may be a simple matter when considering shore-based employment (but nevertheless still produces significant disputation in the various workers compensation tribunals). For workers employed on vessels, this issue will be more complicated. "State" and "Territory" receive a definition adopting the relevant "adjacent area" as defined in Schedule 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006. For present purposes the adjacent areas extend from the State's land boundary to the outer limit of the Continental Shelf. For a seafarer engaged to work on board a vessel which operates within the "adjacent area" of only one State, the matter would be satisfied reasonably easily, by reference to either test (a) or (b).

As discussed above, the work history of the worker must be considered when determining where a worker usually works under test (a). In some jurisdictions the history need only be considered for 12 months; in other jurisdictions there is no limit.

For a seafarer employed on a trading vessel which regularly voyages between states, the task of determining the State where the worker usually works, or is usually based, may well prove to be more difficult. It would require an analysis of all the voyage movements possibly over a lengthy period in order determine whether there were voyages inside or outside a State or its "adjacent area" and a comparison would have to be made with voyages made inside or outside of any other State traversed during the voyages.

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27 Sections 12 and 13 SRA.

28 Sections 13 and 14 SRA.

29 e.g. *Marine Safety Act* (NSW) 1981

30 *Martin v RJ Hibbens Pty* Ltd [2010] NSWWCCPD 83 at [61]-[77].

31 *Workers Compensation Nominal Insurer v O'Donohue* [2014] NSWWCCPD 1

For a seafarer employed on a vessel which travels regularly between Australia and places outside of Australia, and which spends most of its time outside Australian territorial waters, the facts may well establish that neither (a) nor (b) apply which then requires determining whether test (c) is applicable (the state where the employer's principal place of business is located).

"Principal Place of Business" – Test (c)

Where the employer's principal place of business is located may resolve the issue, but that would have to be determined on the individual facts of each individual case. In the case of a large national employer conducting business in various states there could well not be one principal place of business. In such situations the place of registration recorded with ASIC under the *Corporations Act* will not necessarily be the principal place of business for the purpose of the State of Connection Test[32]. Apart from the Northern Territory legislation discussed above, none of the other provisions seem to attempt to provide assistance as to how a principal place of business may be defined. Cases involving an interaction between the Northern Territory and one of the other states could well be problematic because of the additional material contained in that territory's provision.

Changes in Voyage Patterns and Place of Business, and Intentions of the Parties

Any change in a vessel's voyaging patterns will have a significant impact on tests (a) and (b); similarly, any change in the location of the employer's principal place of business could also potentially significantly impact the matter. This will require an employer to make decisions about future insurance cover, and factor in a constant need to review that insurance cover in the light of these changes. If an employer makes the wrong decision, it will be left uninsured.

In determining whether a worker usually works in a State, the legislation also requires considering the intentions of the worker and employer.

This is highlighted in a NSW workers compensation case heard in 2020[33]. This case involved the employment of a Master of a privately owned motor yacht. The yacht was not a prescribed vessel within the meaning of the Seafarers Act. The Master worked on the vessel entirely in NSW waters during the period of employment, which extended over several months up until his accident. The vessel spent a good deal of each year laid up in Melbourne, but periodically moved to New South Wales where it would be located for several months, and also to Queensland where it would also be located for extensive periods. The worker resided in New South Sales and was present in NSW when he had his injury. The principal place of business of the vessel, the employer argued, was located in Melbourne. The worker argued that his intention was only to serve on board the vessel

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[32] See *Tamboritha Consultants Pty Ltd v Knight* [2008] WADC 78 at [91]; *Martin v RJ Hibbens Pty Ltd* [2010] NSWWCCPD 83.

[33] *Wall Street Pty Ltd v Workers Compensation Nominal Insurer* NSWWCC [2020]

during the period that it was based in and around Sydney Harbour. The employer disputed this and argued that it was always its intention to take the vessel, including the worker, up to Queensland. This was a significant point of conflict in the evidence.

The worker made a claim under the NSW legislation. There was no NSW workers compensation insurance held by the employer, but there was a policy issued under the Victorian Act. The NSW uninsured liability scheme accepted the worker's claim and subsequently brought proceedings in the Workers Compensation Commission seeking an order that the employer refund payments made under the NSW Act. As the employer's Victorian insurance did not respond to the claim the company was left uninsured, and defended the proceedings on the basis that the relevant test was paragraph (c) quoted above, namely where the principal place of business for the vessel was located. The Workers Compensation Commission did not agree and said that the relevant test was where the Master worked, which was NSW. The Arbitrator found that, on the evidence, the relevant intention was only that the employment would extend to the period during which the vessel was based in NSW waters. The employer was ordered to reimburse the NSW uninsured liability scheme.

This case is a clear example demonstrating the type of problem likely to be encountered if seafarers were excluded from the Seafarers Act, and forced to rely upon State based workers compensation laws. Due to the legislative primacy given to the Seafarers Act there are only a few examples of how seafarer's cases would have to operate under the State of Connection Test embodied in the State and Territory legislation. The *Wall Street* case is an example of problems which are likely to arise, both for employees and employers.

Another matter of concern is that the Seafarers Act provides coverage for those people who would not qualify as employees under the State and Territory workers compensation Acts. The Seafarers Act provides coverage for an industry trainee, who although not a direct seafarer employee at the time of injury, is undertaking an approved industry training course[34]. Trainees are deemed employees of the Fund constituted under Section 96 of the Act. Furthermore, similar provision is made for persons attending a seafarers' engagement centre. No similar provision exists under the state legislation.

Although the States provide similar types of benefits, there are differences as to the extent of the benefits. Some jurisdictions provide more generous cover than others[35]. Access to common law claims have different threshold tests, and the caps on payments differ. Equally, there are no doubt differences in premiums between jurisdictions. The level of available benefits, the cost of the premiums and the State in which the insurance cover is held, will all be factors which will undoubtedly invite disputation and litigation.

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34 Section 3 SRCA

35 For example, in WA in most cases, the current monetary limit on incapacity and impairment payments is only $239,179.00, medical costs is $71,754.00 and rehabilitation $16,743.00. These limits see many workers exiting the scheme after only 2 or 3 years of support.

All of the State schemes have their own differences in relation to the delivery of benefits and available rehabilitation supports. A worker who is based in a different State will not have the same ready access to those supports as an ordinary State based worker.

If the Seafarers' Act was repealed, or left to wither on the vine, it is highly likely that there would be numerous challenges mounted both by seafarers and employers in various State jurisdictions, arguing about which jurisdiction had the relevant connection to the employment.

Recommendation 16: Reform of the Seacare scheme must consider that the various State of Connection tests in state workers' compensation schemes do not adequately address the practicalities of seagoing workplaces, and do not resolve coverage for seagoing employers and seafarers. Any shift to relying on state workers' compensation schemes will cause significant risks for employers and workers to be left without appropriate coverage – which is why a national scheme is needed.

Specified diseases under the Seacare Scheme

In 2021, the government aligned the specified diseases instrument under the Seacare scheme with the Comcare instrument, with a few exceptions.[36] Specified diseases are those where it is assumed that the disease is caused by employment, so an individual worker does not need to prove an employment link. The list makes it easier for a sick worker to get the compensation they deserve.

Unfortunately both the Comcare and Seacare instruments now rely on a 'minimum employment period' but this is a different concept than the latency period which is supported by research and incorporated into the Safe Work *Australia Deemed Diseases in Australia* report, with which both are supposedly aligned. During the review the Government committed to moving away from the use of the 'minimum employment period', but said that this would require legislative change that could not be completed before the sunset period of the old instrument.

The Minister Michaelia Cash wrote to the MUA National Secretary Paddy Crumlin on 25 August 2021 committing to develop the legislative amendments to the Seafarers Act which would allow the use of latency periods instead of minimum employment periods. In recognition of this, the sunset period for the instrument is 5 years instead of 10 years.

The updated instrument was based on a review of seafarers' diseases the Department commissioned in 2020, but they refused to share this report with unions until after the instrument was made. The report says that welding fumes are Class 1 carcinogen, but justifies not adding welding fumes/lung cancer as a cancer exposure pair in the Seacare

[36] The Seacare instrument has a minimum employment period for mesothelioma of 3 months instead of 12 months. Malaria was added as an occupational disease, as well as new Class 1 carcinogens.

Specified Diseases list because it is not on the Comcare list and 'it is not an exposure that a seafarer could reasonably be expected to experience in the course of their work'.[37] This is simply untrue as seafarers regularly perform welding tasks to repair the vessels they work on.

Unions also pointed out that seafarers spend double or triple more hours in their workplace than other workers because they live in their workplace, and therefore are more exposed to work-related hazards. This argument was misrepresented in the report.

> **Hours of workplace exposure per year**
>
> Worker working 38 hours per week for 48 weeks: 1,824 hours of exposure
>
> Seafarer on a 1:1 roster (on a vessel for 6 months of the year): 4,368 hours of exposure
>
> Seafarer on a vessel 9 months of the year: 6,552 hours of exposure

Unions also argued that Legionnaire's Disease should be included in the list.

Recommendation 17: The Seafarers Act should be amended to allow for the inclusion of latency instead of minimum employment periods in the Specified Diseases list. The Seacare Specified Diseases list should subsequently be amended to rely on latency, to include welding fumes/lung cancer as a cancer exposure pair, to include Legionnaires disease, and to allow for the longer hours that seafarers are exposed to hazards in their workplace.

WHS coverage for seafarers

Seafarers are currently subject to an array of confusing legislation with different coverage provisions.

In contrast, shore-based WHS legislation has generally been harmonised across states and Commonwealth legislation. The harmonised WHS system is based on the Robens model, in which the participation of workers is a key aspect, and it is carefully balanced to ensure workers' participation in ensuring compliance and reducing risk. Key aspects of the system include:

- Individual workers having the right to stop unsafe work.

[37] Tim Driscoll, Information to support the review of specified diseases and employment for the purposes of the Seafarers Rehabilitation and Compensation Act 1992: Final report, March 2021, p.11

- Workers being elected to become Health and Safety Representatives (HSRs), with formal training that gives them rights and powers under the Act.

- Workers and HSRs having access to support from their unions when they wish, and particularly in the event of incidents, disputes, and investigations.

- Tripartite systems of WHS governance at a workplace level, with the creation of workplace safety committees, and at governance level that involves unions, employers and government.

- Structures and practices in place so that the government safety inspectorate and regulator can have effective communication with worker Health and Safety Representatives.

Unions support the objective of harmonisation. While the OHS(MI) Act is structured on the Robens principles outlined above, it is a different Act that is not harmonised with onshore safety regimes. It has extremely complex coverage positions which rely on legislation that is no longer in force (the *Navigation Act 1912*). There are also appear to be disagreements between the Australian Maritime Safety Authority and the Department of Employment as to the interpretation of coverage, with AMSA considering coverage to apply only very narrowly.[38] State WHS Acts (which are largely harmonised) will apply to vessels when on voyages in state waters and in ports.

While the Seacare Authority provides a good tripartite forum, it has no resources. AMSA, as the Inspectorate, is in direct contact with seafarers on vessels but as an organisation it does not have a tripartite structure. The Seacare Authority is the main place for tripartite discussions of WHS matters but these are often curtailed by a lack of information. Unions have made some efforts to try to bridge these gaps but there are currently no effective structures in place for communication between the OHS(MI) inspectorate and HSRs.

The confusion over OHS(MI) coverage contributes to these issues. HSR training for state WHS Acts and the OHS(MI) Act are different 5-day courses. Each of the Acts has a slightly different process for the formation of Designated Work Groups and the election of HSRs. The AMSA inspectorate has insisted that it is unable to engage with HSRs unless they are elected through properly formed Designated Work Groups, and have told us at the Authority that the vessels it inspects do not have properly formed Designated Work Groups. An action item to jointly examine the formation of Designated Work Groups has been agreed at the Authority, but delayed due to the insurance issues.

The *Offshore Electricity Infrastructure Act* was passed in December 2021 to regulate all aspects of offshore renewable energy in Commonwealth waters. This work will almost entirely take place from vessels, as workers do not generally live on offshore wind turbines. The OEI Act creates a new WHS jurisdiction based on the Commonwealth WHS Act, but modifies almost one-third of the Act and potentially all of the Regulations under the Act. The current OEI Act limits its WHS coverage to what it defines as Regulated Offshore

[38] Based on correspondence the MUA received from the Department of Employment during the 2016 and 2017 consultations into the Seafarers and Other Legislation Amendment Bill 2016.

Activities, and defines ships on voyages outside of these activities as not being covered by the WHS Act (s. 230, amending Section 12 of the WHS Act). It specifically removes vessels from being covered before and after carrying out regulated offshore activities, in such a way as to exclude ships on voyages between ports and the shore. These provisions mean a project's vessels are also likely to be covered by the OHS(MI) Act while voyaging in Commonwealth waters, and the state WHS Act while in port. This will create significant uncertainty.

Harmonisation of the OHS(MI) Act with the national WHS system should include consideration of how to harmonise the OEI Act WHS jurisdiction, in order to create one seamless WHS system for vessels regardless of where they are working.

WHS on international flag vessels

In November 2021 we estimated there were about 60 international-flag vessels that are majority Australian crewed, part of the Seacare scheme and paying a berth levy. Virtually all offshore oil and gas industry vessels are international flag.

However, there is confusion over the application of OHS(MI) to international flag vessels vessels, and AMSA's role as an inspectorate on these vessels. Our understanding is that OHS(MI) covers international flag vessels. However, it appears to be AMSA's position that they do not. AMSA reports to the Seacare Authority on safety incidents only on Australian flag vessels. AMSA representatives to the Authority have at different times said that OHS(MI) does or does not apply to international flag vessels.

Particular attention needs to be paid to clarifying WHS coverage and the role of the inspectorate on the international-flag majority Australian crewed vessels.

While the Seacare Authority keeps tracks of names of vessels paying berth levies, it does not keep track of their flag. An action item to examine this issue of WHS coverage on international flag vessels has been agreed at the Authority, but delayed in the course of dealing with the Authority's insurance challenges.

Recommendation 18: The Seacare Authority could collect information on the vessel flag along with the payment of the berth levy. This could be used to form a list of international-flag majority Australian-crewed vessels to be supplied to the Inspectorate for vessel inspections. AMSA, employers and workers must all have a shared and clear understanding of the application of WHS law to international flag vessels with majority Australian crew.

Recommendation 19: Maritime WHS should be harmonised with the national WHS system, with particular attention paid to ensuring tripartite oversight of the Inspectorate, proper resourcing of the Inspectorate, accessible training for HSRs, and clear lines of communication between HSRs and the Inspectorate. The Inspectorate must be properly integrated into the national Safe Work Australia system.

Recommendation 20: Steps should be taken to ensure that every vessel has properly elected and trained HSRs. The Inspectorate should be consulting with HSRs on every inspection, and gathering information on the formation of Designated Work Groups and the election of HSRs and feeding this back to the tripartite body. HSRs should have a clear understanding on how to deal with any matters that arise while a vessel is alongside a wharf and within 500m of a platform.

Appendix 1: Offshore wind projects under development in Australia

Developer	Location	Capacity
Star of the South	Gippsland, Vic	2.2 GW
Energy Estate and Bluefloat	Hunter Coast, NSW	1.4 GW
	Wollongong, NSW	1.6 GW
	Greater Gippsland, Vic	1.3 GW
	Other sites in Victoria, South Australia and Tasmania are under assessment	
Green Energy Partners	Wollongong/Port Kembla, NSW	3 GW grid
		5 GW hydrogen
	Bass Strait, Victoria	4 GW
	Western Victoria	500 MW – 1 GW
	South of Perth, WA	1 GW
	Southern Queensland	2 GW
Newcastle Offshore Wind (20% owned by Green Energy Partners)	Newcastle, NSW	3 GW first stage
Oceanex	Newcastle, NSW	1.8 GW
	Wollongong, NSW	2 GW
	Bunbury, WA	2 GW
	Ulladulla, NSW	1.8 GW
	Eden, NSW	1.8 GW
Flotation Energy	Seadragon (Gippsland, Vic)	1.5 GW
	Portland, Vic	750MW
	Perth, WA	500 MW

Macquarie Green Investment Group	Great Southern Offshore Wind Farm (Bass Coast, Vic)	1 GW
Pilot Energy and Triangle Energy	Geraldton, WA	1.1 GW
Copenhagen Energy	Leeuwin Offshore Wind, Bunbury WA	3 GW
Nexsphere	Bass Offshore Wind Energy (Bell Bay, Tas)	0.5-1 GW
Australis Energy **/Warwick Energy**	Bunbury, WA (state waters) Portland, Vic (state waters) Kington, SA (state waters)	300 MW 495 MW 600 MW
Alinta Energy **with Portland Aluminium** (55% Alcoa)	Spinifex Offshore Wind (Portland, Vic)	1 GW

Appendix 2: Seacare proposed 2017 coverage definition

Proposal for re-drafted Seacare coverage clause and associated definitions arrived at in December 2017.

19 Application of Act

(1) This Act applies to the employment of employees on a prescribed vessel that is engaged in trade or commerce:

(a) between Australia and places outside Australia; or

(b) between 2 places outside Australia; or

(c) among the States; or

(d) within a Territory, between a State and a Territory or between 2 Territories.

Note 1: This Act does not apply if a prescribed vessel is a ship registered in the Australian International Shipping Register—see paragraph 61AA(b) of the *Shipping Registration Act 1981*.

(1AAA) "Subsection (1) shall not apply to a prescribed vessel which is engaged in any activity involving the construction or maintenance of shore based infrastructure unless the activity requires the vessel to carry out a voyage to any of the locations referred to Sub-section (1)(a) to (d)."

(1AA) This Act also applies to the employment of employees on:

(a) a vessel that is used to engage in coastal trading under a general licence; or

(b) a vessel that is used to engage in coastal trading under an emergency licence if the vessel is registered in the Australian General Shipping Register.

(1A) This Act also applies to the employment of employees on any prescribed vessel that:

(a) would be an off-shore industry vessel within the meaning of the *Navigation Act 1912* if that Act had not been repealed and either:

(i) was, immediately before the repeal of that Act, covered by a declaration in force under subsection 8A(2) of that Act; or

(ii) is covered by a declaration in force under subsection (1C) of this section; or

(b) would be a trading ship within the meaning of the *Navigation Act 1912* if that Act had not been repealed and either:

(i) was, immediately before the repeal of that Act, covered by a declaration in force under subsection 8AA(2) of that Act; or

(ii) is covered by a declaration in force under subsection (1C) of this section.

(1B) However, this Act does not apply because of subsection (1A) to a prescribed vessel that is covered by a declaration in force under subsection (1D).

(1C) The Authority may declare in writing that this Act applies to a prescribed vessel that would be an off-shore industry vessel, or a trading ship.

(1D) The Authority may declare in writing that this Act does not apply because of subsection (1A) to a prescribed vessel that would be an off-shore industry vessel, or a trading ship.

(1E) A declaration made under subsection (1C) or (1D) is not a legislative instrument.

Relevant definitions of the Seafarers Act (as amended by the Seafarers and Other Legislation Bill 2016 and proposed further amendments)

Australia, when used in a geographical sense, includes the external Territories.

Australian General Shipping Register has the same meaning as in the *Shipping Registration Act 1981*.

Australian International Shipping Register has the same meaning as in the *Shipping Registration Act 1981*.

coastal trading has the same meaning as in the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

emergency licence has the same meaning as in the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

fish includes turtles, dugong, crustacea, molluscs and any other living resources of the sea or of the seabed.

fishing fleet support vessel has the meaning given by section 3B.

fishing operations means:

(a) the taking, catching or capturing of fish for trading or manufacturing purposes; or

(b) the processing or carrying of the fish that are taken, caught or captured.

fishing vessel has the meaning given by section 3B.

general licence has the same meaning as in the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

government vessel means a vessel:

(a) that belongs to the Commonwealth or a State or Territory; or

(b) the beneficial interest in which is vested in the Commonwealth or a State or Territory; or

(c) that is for the time being demised or sub-demised to, or in the exclusive possession of, the Commonwealth or a State or Territory;

and includes a vessel that belongs to an arm of the Defence Force, but does not include a vessel:

(d) that belongs to a trading corporation that is an authority or agency of the Commonwealth or of a State or a Territory; or

(e) the beneficial interest in which is vested in such a trading corporation; or

(f) that is for the time being demised or sub-demised to, or in the exclusive possession of, such a trading corporation; or

(g) that is operated by seafarers supplied (directly or indirectly) by a corporation under a contract with the Commonwealth or a State or Territory.

harbour means a natural or artificial harbour, and includes:

(a) a navigable estuary, river, creek or channel; and

(b) a haven, roadstead, dock, pier or jetty; and

(c) any other place in or at which vessels can obtain shelter or load and unload goods or embark and disembark passengers.

inland waterways vessel means a vessel that is used wholly in waters other than waters of the sea.

local tourism vessel means a vessel that is wholly or predominantly engaged in tourism, other than tourism that involves a voyage by the vessel:

(a) between Australia and a foreign country; or

(b) between 2 States; or

(c) between 2 Territories, neither of which is the Coral Sea Islands Territory; or

(d) between a State and a Territory (other than the Coral Sea Islands Territory).

port includes a harbour.

prescribed ship means a prescribed vessel.

prescribed vessel has the meaning given by section 3A.

recreational vessel has the same meaning as in the *Navigation Act 2012*.

sea includes any waters within the ebb and flow of the tide.

vessel means any kind of vessel used in navigation by water, however propelled or moved, and includes:

(a) a barge, lighter or other floating vessel; and

(b) an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water.

3A Prescribed vessel

(1) In this Act:

prescribed vessel means:

(a) a vessel registered, or required to be registered, under the *Shipping Registration Act 1981*; or

(b) a ship that is used to engage in coastal trading under a general licence; or

(ba) a ship of which the majority of the crew are residents of Australia and which is operated by any of the following (whether or not in association with any other person, firm or company):

(i) a person who is a resident of, or has his or her principal place of business in, Australia;

(ii) a firm that has its principal place of business in Australia;

(iii) a company that is incorporated, or has its principal place of business, in Australia; or

(c) a vessel that is declared under subsection (2) to be a prescribed vessel;

but does not include:

(d) a recreational vessel; or

(e) an inland waterways vessel; or

(f) a fishing vessel (other than a vessel proceeding on an overseas voyage); or

(g) a fishing fleet support vessel; or

(j) a government vessel; or
(k) a local tourism vessel; or
(l) a vessel that is declared under subsection (3) not to be a prescribed vessel.

(1A) A reference in paragraph (1)(ba) to a person, firm or company is a reference to a person, firm or company of any description.

(2) The legislative rules may declare a vessel to be a prescribed vessel.

(3) The legislative rules may declare a vessel not to be a prescribed vessel.

(3A) If:
(a) a vessel is used to engage in coastal trading under a general licence; or
(b) a vessel is:
(i) used to engage in coastal trading under an emergency licence; and
(ii) registered in the Australian General Shipping Register;

the vessel is taken to be a ***prescribed vessel*** for the purposes of this Act (other than section 19).

(5) For the purposes of this section, ***overseas voyage***, in relation to a vessel, means a voyage in the course of which the vessel travels between:
(a) a port in Australia and a port outside Australia; or
(b) a port in Australia and a place in the waters of the sea above the continental shelf of a country other than Australia; or
(c) a port outside Australia and a place in the waters of the sea above the continental shelf of Australia; or
(d) a place in the waters of the sea above the continental shelf of Australia and a place in the waters of the sea above the continental shelf of a country other than Australia; or
(e) ports outside Australia; or
(f) places beyond the continental shelf of Australia;

whether or not the vessel travels between 2 or more ports in Australia in the course of the voyage.

3B Fishing vessels

(1) In this Act:

fishing fleet support vessel means a vessel that is used wholly or primarily in activities in support of the fishing operations of a fishing vessel or vessels, but does not include an inland waterways vessel.

fishing vessel means a vessel:
(a) that is used wholly or primarily for fishing operations; and
(b) that:
(i) is registered, or entitled to be registered, under the *Shipping Registration Act 1981*; or
(ii) is covered by an instrument in force under subsection 4(2) of the *Fisheries Management Act 1991*;

but does not include an inland waterways vessel.

(2) For the purposes of this Act, activities in support of the fishing operations of a fishing vessel include:
(a) the storage and transport of fish taken, caught or captured by the fishing vessel; and

(b) the provision of food, fuel and other supplies to the fishing vessel while it is engaged in fishing operations; and

(c) the transport of crew members to and from the fishing vessel while it is engaged in fishing operations.