

Inquiry into Seafarers and Other Legislation  
Amendment Bill 2016, the Seafarers Safety  
and Compensation Levies Bill 2016 and the  
Seafarers Safety and Compensation Levies  
Collection Bill 2016

MIAL Submission to Senate Standing Committee on  
Education and Employment

Submitted on 1 December 2016

MIAL Contact: Isabelle Guaran

(03) 9647 6005 [isabelle.guaran@mial.com.au](mailto:isabelle.guaran@mial.com.au)

## Contents

1	Introduction .....	3
2	Executive Summary.....	3
3	Need for change.....	4
4	Option 2 – Abolish the scheme .....	5
4.1.1	Why does the scheme need to be abolished? .....	5
4.1.2	Consultation on ‘Option 2 – Abolish the scheme’ .....	6
5	Coverage .....	7
5.1	Cost savings.....	9
5.2	Safety Net Fund.....	9
6	Cost Recovery and Fees .....	9
6.1.1	Additional costs.....	10
7	Minimal modernisation.....	11
7.1.1	Union Right of Entry.....	11
7.1.2	Additional licencing requirements and costs.....	12
7.1.3	Compensation arrangements .....	12
8	Scheme Administration.....	13
8.1	Issues with the current proposal .....	13
8.1.1	Lack of mandated industry input .....	14
8.1.2	No ongoing requirement for separate industry scheme .....	14

## 1 Introduction

This submission is made on behalf of Maritime Industry Australia Ltd (MIAL), previously known as the Australian Shipowners Association (ASA). MIAL represents Australian companies which own or operate: international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; utility vessels and ferries.

MIAL also represents employers of Australian and international maritime labour and operators of vessels under Australian and foreign flags.

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

MIAL represents the collective interests of maritime businesses, primarily those operating vessels or facilities from Australia. MIAL is uniquely positioned to provide dedicated maritime expertise and advice, and is driven to promote a sustainable, vibrant and competitive Australian maritime industry and to expand the Australian maritime cluster.

MIAL welcomes the opportunity to provide a submission to the Inquiry into *Seafarers and Other Legislation Amendment Bill 2016*, (Seafarers Bill 2016) the *Seafarers Safety and Compensation Levies Bill 2016* and the *Seafarers Safety and Compensation Levies Collection Bill 2016* (Compensation Bills 2016). MIAL made a previous submission to a Consultation Paper issued by Department of Employment in February of 2016. Parts of that submission are restated here and the full submission is included at [Attachment A](#).

## 2 Executive Summary

The Bills currently under consideration by the Senate Committee are the result of a review process conducted by the Department of Employment (the Department) including the release of a Consultation Paper in December 2015 which considered three options for reform to the *Occupational Health and Safety (Maritime Industry) Act 1993* (OSHMI Act) and the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act), collectively known as the Seacare scheme.

There is no doubt from the maritime employers represented by Maritime Industry Australia Ltd (MIAL) that the Seacare scheme is flawed and requires urgent attention to provide maritime businesses and workers with appropriate, reliable and sustainable workers compensation and WHS coverage. Unfortunately, the proposed Bills do not provide this outcome and, in fact, exacerbate some existing problems and create new ones for the industry.

The reforms included in the Bills attempt to but do not address the significant issue of the complexity and lack of certainty around coverage (and implications of that). In addition they do not address the additional costs incurred to administer a scheme that is already expensive in comparison to that available under other jurisdictions and which make it unsustainable financially for a small and declining industry.

Critical to achieving the objective of providing the industry with an appropriate, reliable and sustainable scheme is the question of coverage of the scheme. There have been longstanding questions regarding Seacare scheme coverage and these have recently been exacerbated by the *Aucote* (2014)<sup>1</sup> decision which dramatically broadened coverage beyond what it had been understood to be. The Department rightly, in our view, has sought to remedy the untenable situation created by the *Aucote* (2014) decision. Unfortunately, their chosen solution of scheme reform is anything but a remedy. The new proposed coverage provisions continue to leave enormous grey areas while extending coverage to some operations previously considered outside

---

<sup>1</sup> Samson Maritime Pty Ltd v Aucote [2014] FCAFC 182

the scheme – thus imposing considerable costs and regulatory imposts on those operators. The simple fact is that it is not possible to provide absolute certainty regarding coverage within the scheme as MIAL noted in our February 2016 submission to the Department.<sup>2</sup> Without this the scheme is, and will remain, unsustainable and a source of continued dispute.

Further, the lack of certainty regarding coverage creates an unacceptably high risk to the Safety Net Fund (the insurer of last resort) as it results in circumstances where businesses who have had no previous interface with the scheme (and potentially no ability to participate in this consultation) will likely remain in ignorance of their obligations, particularly with regard to insurance coverage. This exposes the scheme participants, who are responsible for ensuring the Safety Net Fund can meet such liabilities, to potentially enormous cost burdens.

The Bills also make changes to WHS coverage by removing the OSHMI Act and replacing it with the WHS Act. MIAL members cannot see the rationale for maintaining a separate workers' compensation scheme when the maritime industry does not need a separate WHS scheme. The Department's consultation paper itself conceded that there is no justifiable reason for a separate industry WHS regime and there is nothing in the consultation paper or Explanatory Memorandum which provides a meaningful basis for retaining a separate industry workers' compensation regime.

Finally, the Bills seek to make 'administrative' changes via the abolition of the Seacare Authority and the inevitable increasing of levies associated with the scheme. These changes are not insignificant, as they add further cost and uncertainty to an already unsustainably expensive regime, however they pale in comparison to the substantive issue which is the lack of certainty of scheme coverage and all the issues that arise from that.

Abolishing the scheme and allowing work health and safety (WHS) regulation and workers' compensation coverage to revert to the state and territory schemes is the only way to achieve certainty and provide a sustainable regime for the industry. Employers recognise that to make this transition a solution needs to be found regarding the obligations and potential future exposure to the Safety Net Fund. The employers covered by the scheme are only continuing to decrease and the opportunity to leverage economies of scale to abolish the scheme and develop a solution to the issue posed by Safety Net Fund liability is disappearing. The smaller the scheme becomes, the more the risk to those employers remaining is increased.

Abolishing the Seacare scheme is not just required, it is urgent.

### 3 Need for change

In terms of scheme coverage, the Seacare scheme was introduced in part to provide clarity around the appropriate work health and safety coverage and workers compensation for seafarers when working at sea. Now that state and territory workers' compensation jurisdiction is so clearly defined through the state-of-connection test,<sup>3</sup> there is no longer a risk of seafarers not being covered or so called "forum shopping" by injured workers covered by state and territory schemes. Forum shopping still occurs, of course, by those looking to be covered by the Seacare scheme.

Nevertheless the scheme continues, though its drafting is increasingly out of sync with the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) on which it was originally based; other workers' compensation legislation and national standards such as retirement age. The scheme would require significant updates in order to bring it into line with national standards and ongoing

---

<sup>2</sup> Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation – MIAL Response to Consultation Paper Issues by Department of Employment, 5 February 2016

<sup>3</sup> [https://www.worksafe.vic.gov.au/\\_\\_data/assets/pdf\\_file/0013/131161/State-of-Connection-VWA.pdf](https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0013/131161/State-of-Connection-VWA.pdf)

constant updating thereafter. From the scheme's introduction in 1992 to date this has been a time consuming and not entirely successful process.

The Regulatory Impact Statement (RIS) states that the Bill 'addresses the most urgent problems with the current Seacare scheme.' Though they attempt to do so, MIAL does not believe the Bills address the most urgent problem of all – clarity of coverage (discussed in detail at section 5). The RIS also states that 'The reform option imposes a minimal regulatory cost on Seacare scheme employers, which is largely a one-off cost of transitioning to the WHS Act, while providing overall benefits from improved work health and safety outcomes.'<sup>4</sup> Characterising the reform as 'minimal regulatory cost' is inaccurate when the feedback from industry to date has been that the current costs associated with the Seacare scheme are not sustainable. What the Compensation Bills 2016 do is increase that cost over time. Without true root cause analysis of the high costs of running the scheme, the current outcomes delivered by the scheme or the high insurance premiums (the highest in the country), MIAL cannot support the statement that the reforms will have minimal costs or achieve improved outcomes. Without root cause analysis MIAL cannot see how the proposed reforms will address systemic issues with the Seacare scheme in the way that the RIS suggests.

There are now just 33 employers in the Seacare scheme, the smallest scheme in Australia<sup>5</sup> covering just 6,863 employees in an industry where workforce size has been decreasing since at least 2007.<sup>6</sup> It is expected that future scheme membership numbers would reflect the enduring and severe downturn in the offshore sector and the ongoing decline of the trading ship sector.

The vast majority of the businesses covered by Seacare are not large businesses. Wearing costs and administrative burdens beyond those applicable to the general business community in Australia is unsustainable.

## 4 Option 2 – Abolish the scheme

### 4.1.1 Why does the scheme need to be abolished?

Were the Seacare scheme to be abolished, the automatic and logical outcome would mean that the responsibility for the sector currently covered by the scheme would rest with state and territory schemes. These currently cover the overwhelming majority of Australian employers and employees, including the majority of maritime employers and employees.

These schemes are seen by maritime industry employers to be clearer, easier to navigate, easier to find competitive premium rates for, usually provide access to dedicated claims management expertise, have mature and well utilised dispute resolution procedures in place, contained more refined rehabilitation provisions and support for implementation of them, enjoy economies of scale, and have the benefit of state wide public awareness, advertising, safety campaigns and resources.

The justification for maintaining Australia's only industry specific WHS and workers' compensation scheme would be enhanced if the scheme were achieving above average outcomes in safety, rehabilitation, claims management and return to work. Unfortunately this cannot be said for the Seacare scheme, with its performance statistically lagging behind all other schemes. Further, according to the Comparison of Workers' Compensation Arrangements in Australia and New Zealand, the standardised average premium rate is the highest of all Australian jurisdictions.<sup>7</sup>

---

<sup>4</sup> Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

<sup>5</sup> Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, pg. 197.

<sup>6</sup> <http://www.industry.gov.au/Office-of-the-Chief-Economist/Research-Papers/Documents/Research-Paper-5-The-business-size-distribution-in-Australia.pdf> (Fig 2.3)

<sup>7</sup> Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, pg. 197

Maritime operators who operate within one state (traditionally considered not covered by the Seacare scheme) or who have exercised an option available to them under a Ministerial Direction or the Seacare Authority Exemption Guidelines, report that obtaining insurance for maritime operations under state schemes is less expensive than under the Seacare scheme.

The Government has indicated that it intends to transfer the role of the Seacare Authority, the body with industry representation charged with oversight of the scheme, to the Safety Rehabilitation and Compensation Commission (SRCC), the body with oversight for the Comcare scheme. It is strange to remove direct industry oversight of an industry scheme yet maintain the infrastructure of the scheme at a cost to the industry.

It has also been evident that previous attempts at reform since the scheme's introduction in 1992 have, for various reasons, been challenging. This has meant that employers and employees have failed to benefit from contemporary arrangements that are the subject of continuous review as part of the state schemes. By reverting to coverage under these state schemes, employers and employees in the maritime industry will enjoy the same benefits, rights and obligations as all other members of the community engaged in private enterprise.

Employers in the Seacare scheme are also covered by state and workers' compensation schemes for their shore based employees and, in some cases, for workers who work part of the time at sea and part of the time ashore. To revert to state and territory schemes would be a clear and simple process and employees and employers would be covered by a single workers' compensation regime.

In addition, the reform proposed in the Bills for WHS purposes is to repeal the maritime specific WHS legislation (OSHMI Act

) and have seafarers covered by the harmonised Commonwealth WHS laws. Only a separate workers' compensation scheme would remain, failing to meet spirit of the government's objective of Australia-wide harmonisation.<sup>8</sup>

MIAL cannot see any compelling evidence that retaining the scheme provides a benefit to the maritime industry. The reforms in the Bills do not make the costs of the scheme to employers comparable with costs under a state or territory scheme for workers' compensation. This is in the context of the number of ships being covered by the scheme reducing, and further likely to reduce in the immediate future as a result of decreasing activity in the offshore oil and gas sector and trading ships sector.

A potential concern is the status of the Safety Net Fund in the event that the scheme no longer exists. MIAL recognises that this would likely require further consideration as to how the Fund may manage future liabilities but does not consider this to be an insurmountable challenge.

#### 4.1.2 Consultation on 'Option 2 – Abolish the scheme'

The RIS states that 'The Department has engaged in significant consultation with maritime industry employers and unions, insurers and other stakeholders over proposed reform to the Seacare scheme.' It is regretful that consultation has exclusively been on the Department's preferred option of reforming the Seacare Scheme and no consultation has taken place on MIAL and industry's preferred option of removing the scheme. MIAL anticipates that consultation on this option could address issues arising out of stakeholder opposition.

---

<sup>8</sup> Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, Council of Australian Governments (COAG), 3 July 2008.

To date, MIAL has not seen evidence of genuine consideration of Option 2. Indeed, a disproportionately small amount of the consultation paper was devoted to this<sup>9</sup> and the Bills had already been drafted while consultation on the paper was still open. It is in this context that MIAL must take issue with the following statement made in the RIS which comprises the entirety of the government response on abolishing Seacare:

*Option 2 is not preferred. It is not likely to provide any significant actual regulatory benefits to employers because they will be required to comply with state and territory workers' compensation and work health and safety legislation. This option would take time to implement and due to legacy workers' compensation claims the Seafarers Act would still need to be in operation for a number of years. Union stakeholders are strongly opposed to abolishing the Seacare scheme. This option is not preferred at this time given the long time it will take to achieve and stakeholder opposition.<sup>10</sup>*

Contrary to this statement, there would be significant regulatory benefits to employers from abolishing Seacare because, in many cases, instead of being covered by Seacare in addition to the appropriate state and territory schemes, they would only be covered by the latter. This would harmonise workers compensation approaches within each organisation. This observation is made earlier in the RIS: 'Vessels can move in and out of coverage from voyage to voyage. This means vessels need to have insurance cover to meet the state or territory and the national law.'<sup>11</sup> With the changed coverage provisions proposed the kinds of businesses now likely to be covered by the scheme make it increasingly common for workers to undertake both sea-based and shore-based work, where they are covered by the relevant state and territory scheme, and most employers also employ shore-based staff who are also covered by the relevant scheme. Maintaining the Seacare scheme is an unnecessary duplication and costly burden.

As noted in the RIS statement above, it would take time to implement legislative change to revoke the Seacare Scheme and legacy arrangements would need to be made, for example to deal with the Safety Net Fund. The time required is not a reason not to take this much needed step. MIAL members are committed to finding solutions. Additionally, as participation in the scheme continues to dwindle, it will only become even more unsustainable and the ability to leverage off a larger scheme membership to develop an alternative will no longer be an option. MIAL members want to work with government to find the right outcome and not just the fastest one.

Finally, the RIS statement also justifies the proposed Bill with stakeholder (i.e. union) opposition to abolishing the Seacare scheme. MIAL wishes to reiterate that it supports engaging with all interested parties on substantive issues and working to resolve them. This is necessary in order to create an ongoing viable maritime industry. Without understanding what, if any, issues are driving the union opposition to abolishing the scheme and the government's use of this to justify not doing so, MIAL is not in a position to engage with or respond to this crucial point.

## 5 Coverage

MIAL has advocated for the necessity of scheme coverage provisions that are clear, simple for stakeholders to understand and reflect the pool of vessels that had previously been understood to have been covered by the scheme. MIAL opposes any increase to the jurisdictional footprint of the scheme such as that contained in the Seafarers Bill 2016. State and territory laws are capable of

---

<sup>9</sup> Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation – MIAL Response to Consultation Paper Issues by Department of Employment, 5 February 2016

<sup>10</sup> Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

<sup>11</sup> Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

covering workers in the maritime industry and have been doing so without apparent difficulty for many years. Employers who employ people working across multiple jurisdictions across all other Australian industries are able to ensure their workers have appropriate worker's compensation coverage. State and Territory governments have ensured that workers who work in multiple jurisdictions have clear coverage through the "state of connection test".<sup>12</sup>

MIAL sought coverage provisions that:

- Ensured that coverage was consistent (a vessel is either in or it is out and does not chop and change);
- Minimised the need for vessels to apply for exemptions, but facilitated this when necessary;
- Reduced the risk that a vessel/employer who thought they were not covered are found to be covered. This is particularly critical in a privately underwritten scheme.

It is critical that an operator/employer is able to determine whether they are definitely covered (or not) by the scheme. The coverage of the scheme previously was understood to be based on the voyage pattern of the vessel concerned; that is, voyages between states and internationally as described. There was always a level of contention over this interpretation. The risk that an employer did not consider itself covered by the scheme (and did not have in place appropriate insurance) and considered themselves within the state scheme has always existed in the context of this uncertainty. The decision in *Aucote* (2014) exposed a far broader risk that had not been comprehended, but served to further ingrain in the minds of industry participants the need for certainty.

The proposed coverage test in the Seafarers Bill 2016 is:

*(1) A vessel must be a prescribed vessel*

*AND*

*(2) The vessel must not be used wholly or predominantly for voyages or other tasks that are within the territorial sea of a particular state or territory.*

Territorial sea is defined as 12 nautical miles when the scheme was previously understood to apply outside 3 nautical miles. Although at first glance the geographical footprint of the scheme appears smaller, MIAL is concerned that the proposed coverage provisions will, in practice, change the specific vessels covered by the scheme and not achieve the stated desired outcome to retain the pool of existing vessels covered. There are operators who operate out of one state who have been participating within state WHS and workers' compensation regimes without difficulty and who may well be captured under the new definition. There is no justification to move these operators to the Seacare scheme. Further, because such operators have never had any interaction with the scheme, there may be many who are unaware of this consultation process and its proposals.

The coverage definition in the Bill considers whether vessels operate *predominantly* in territorial seas. The new concept of "predominantly" introduces ambiguity, presenting questions such as; what percentage of operations are included; is this test only to be applied to the seagoing portion of employment for workers or to all of it; and, is the time period assessed over a year, a month, or a day? The scheme is therefore likely to continue to experience the extraordinarily high levels of disputation (the highest of any scheme in Australia and five times higher than the national rate).

Because previous understanding of scheme coverage had been based on the geographical location of vessel operations, a move away from this is going to see a change in the pool of vessels covered. A lack of consultation with potentially newly captured operators or any attempt to seek them out or

---

<sup>12</sup> [https://www.worksafe.vic.gov.au/\\_\\_data/assets/pdf\\_file/0013/131161/State-of-Connection-VWA.pdf](https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0013/131161/State-of-Connection-VWA.pdf)

communicate with them is deeply concerning to remaining members of the Seacare scheme and exposes the Safety Net Fund to untenable risk. Section 5.2 discusses this further.

Further, the RIS itself states that ‘The doubt over coverage creates incentives for employees to make claims under the Seafarers Act, rather than under state or territory workers’ compensation schemes.’ MIAL considers that this is likely to continue, especially when the generous compensation arrangements under the Seacare scheme remain in place.

MIAL has, in previous submissions, stated that it is incredibly difficult to conceive of a coverage provisions that achieve the two critical outcomes that should be the goal of this reform, 1) retaining the existing participants; and 2) creating coverage and certain to which operations and in, and which are out of scheme coverage. MIAL has reached the conclusion that no coverage provisions will provide the clarity so urgently needed in this sector and that without this, the scheme must be abolished. It is clear that the existing legislation is deficient, and has operated on the basis of the assumptions of operators within the scheme. It is the opinion of MIAL that the State of Connection test would offer clarity regarding coverage.

### 5.1 Cost savings

Although the RIS states that ‘clarifying the coverage of the Seacare scheme is expected to provide a benefit by reducing administration costs for Seacare scheme employers,’ MIAL unfortunately sees no evidence for this view. A change in coverage definition that does not provide full clarity is likely to result in increased disputation and other actions, not to mention increased costs. This is to say nothing of the sudden nature of the cost increases for employers caught in the scheme who were not previously captured by it.

### 5.2 Safety Net Fund

In addition to the highest average premiums across all schemes, Seacare scheme participants are also required to contribute to the maintenance of a Safety Net Fund, which acts as a default employer where a seafarer is injured under the Seacare Act and no employer can be found. This money is collected through a levy.

Without full clarity of coverage there is an increased risk of operators being unaware that they are covered by the scheme and operating without insurance. Most operators are small and an uninsured claim could bankrupt them, thus leaving the Safety Net Fund responsible for the claim. As a result, employers currently covered by Seacare will also bear the risk of increased exposure to the Safety Net Fund from operators who have not been contributing to the fund because they are unaware that they fall under the scheme.

It is MIAL’s position that no new coverage definition can fully replicate the current coverage which reflects industry understanding of coverage prior to the *Aucote* (2014) decision. As the RIS notes, ‘Vessels can move in and out of coverage from voyage to voyage. This means vessels need to have insurance cover to meet the state or territory and the national law.’<sup>13</sup> The most logical way of dealing with this absence of certainty is therefore to abolish the scheme and let coverage revert to the far more effective and financially viable state and territory worker’s compensation schemes.

## 6 Cost Recovery and Fees

MIAL has previously submitted that it is unreasonable to require employers to subscribe to a high-cost, low-outcome scheme where the Safety Net Fund is exposed to unknown risk because of poor scheme coverage definitions that result in employers not knowing they are part of the scheme. For this reason MIAL does not support levy increases. That fact that these have not been stipulated

---

<sup>13</sup> Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

clearly in the *Seafarers Safety and Compensation Levies Bill 2016* or the *Seafarers Safety and Compensation Levies Collection Bill 2016* does not change the fact that they are inevitable under the proposal. The Australian Government Cost Recovery Guidelines (the Guidelines) referenced by the government in the justification of cost-recovery only stipulate that in a scenario such as the Seacare Scheme “where appropriate, nongovernment recipients of specific government activities should be charged some or all of the costs of those activities.” The Guidelines do not require full cost-recovery. Additionally, the Guidelines require that consideration be given to “the impact of cost recovery on competition, innovation or the financial viability of those who may need to pay charges.”

The Compensation Bills 2016 introduce a cost recovery levy and fees for the Seacare scheme to cover the costs of the Safety Rehabilitation and Compensation Commission (SRCC), Comcare and the Australian Maritime Safety Authority (AMSA) undertaking their regulatory functions. This will add additional costs to a scheme that is already the most expensive in the country and produces poor safety, rehabilitation and return to work outcomes comparative with state and territory schemes.

The RIS identifies that it is estimated that the combined unfunded costs to Comcare and AMSA in managing the Seacare scheme under the current arrangements are around \$1.6 million. This lack of resources for the Seacare Authority (and Comcare to assist the Authority) and AMSA limits their ability to ensure the effective operation of Seacare workers’ compensation and work health and safety arrangements and enforce work health and safety laws. MIAL supports additional funding but can see no reason to recover this from employers when they are being forced to be part of a costly scheme and the simpler option of abolishing the scheme is open to the Government.

Furthermore, based on information received from the Department, there are various ways and means that contributions to scheme administration are collected in the state schemes – in some cases such as in Victoria the cost of regulation provided through Worksafe Victoria is factored in to the premium paid for insurance while independent statutory agency Safework Australia, the cost of operating is directly funded by government. Even in states where the costs of regulation are incorporated within the insurance premium, these premiums remain lower than under the Seacare scheme, with no proportion of the premium being attributed to the regulatory costs.

#### 6.1.1 Additional costs

MIAL does not support the Compensation Bills 2016 as they will add an additional cost to the Australian shipping sector, which is already struggling to be competitive with other ships who are not burdened with the same costs in the global market is facing the most prolonged and challenging economic climate in half a century. Imposing additional costs on Australian operators will further expand the existing cost differential with international operators, creating a disincentive to operate Australian ships and employ Australian seafarers.

The Department's consultation paper stated that phasing in of cost recovery will alleviate employer concerns about affordability. MIAL does not agree that it alleviates concerns, it merely has the effect of delaying the impact of the additional financial burden. The increase in costs recovered from employers in the scheme will broaden the gap between what employers in the maritime industry pay and what other employers generally pay. It is difficult to see how the government can justify retaining a separate industry scheme in these circumstances.

MIAL notes the statement in the RIS that ‘While the lack of clarity over coverage creates administrative burden and other potential costs for employers, these are not understood to be significant enough to affect overall employment or business activity in the maritime industry.’ This is simply not true and MIAL has consistently advocated the opposite – it is apparent that the lack of clarity in coverage contributes to the high level of disputation and corresponding high premiums. The costs of the Seacare scheme are already burdensome and in the industry climate they are unsustainable. Furthermore, for the RIS to make this statement after industry consultation where

stakeholders clearly articulated the significant cost impact on their business is misleading.<sup>14</sup> It is also unclear whether any effort has been made to assess the impact that the high insurance premiums are having on decisions by potential operators to enter the Australian market.

## 7 Minimal modernisation

Notwithstanding MIALs overarching strong opposition to the Bills as they don't meet the overall objectives laid out in the Department of Education's consultation paper, MIAL has reviewed the proposed WHS and workers compensation changes, noting that since consultation further efforts have been made to predict the impact of these changes on industry.

The remaining elements of the Seafarers Bill 2016 include minimal steps towards modernisation of language in the Acts to align them more closely with the Work Health and Safety Act (WHS Act) and the SRC Act, and to revoke the OSHMI Act and tie the national WHS Act to the scheme. MIAL notes that the major issues with the drafting of the legislation that were causing its unsustainability and burdensome nature have not been addressed. MIAL and its members broadly support a modern WHS and worker's compensation scheme for seafarers. However, MIAL does not agree with the piecemeal approach that has been taken to reform. The proposed changes in the Bill only increase disparity between the maritime industry and other private enterprises. Finally, if an industry specific WHS scheme is not required then MIAL must ask how the Seacare Act itself is justified.<sup>15</sup>

MIAL has reviewed the proposed changes and notes that by our assessment the overwhelming majority of them do not effectively result in substantive change to the operation of the legislation. For example, section 55 clarifies that election by an employee to institute an action or proceeding against their employer or another employee for non-economic loss does not prevent the employee from doing any other thing that constitutes an action for non-economic loss. This is not precluded in the current legislation. Similarly, section 54 clarifies that dependents of deceased employees have access to common law remedies against the employer but the existing legislation does not preclude dependents from pursuing common law remedies in this scenario. A table of the changes and their minimal impact has been compiled at [Attachment B](#).

The RIS notes that 'Two independent reviews of the Seacare scheme (the "Ernst & Young Actuarial Business Consultants Pty Ltd Evaluation of the Seacare Scheme") (EY Review), conducted in 2005, and the "Review of the Seacare Scheme by Mr Robin Stewart-Crompton" (Stewart-Crompton Review), conducted in 2012- 13) have highlighted that it needs widespread reform.'<sup>16</sup> Widespread reform is not what is contained in the tabled Bills. If the goal is to align the workers' compensation provisions that apply to seafarers with those that apply to other Australian employees, then MIAL supports this and this should include the standard workers' compensation arrangements and their associated benefits for employers and employees. However, the re-drafting of parts of the Acts does not achieve this necessary widespread reform or the spirit of the harmonisation that Australian governments agreed to.<sup>17</sup>

### 7.1.1 Union Right of Entry

The OSHMI Act does not contain right of entry for union officials. To the best of our knowledge this has not resulted in any disadvantage to employees while operating under the OSHMI Act. MIAL does

---

<sup>14</sup> Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation – MIAL Response to Consultation Paper Issues by Department of Employment, 5 February 2016

<sup>15</sup> Comparison of workers compensation arrangements in Australia and New Zealand, 2013-2014, Table 2.12, pg. 39.

<sup>16</sup> Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

<sup>17</sup> Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, Council of Australian Governments (COAG), 3 July 2008

not consider that it is necessary to create this additional right which has not previously existed in the industry. The Seafarers Bill 2016 would create an additional union right, which employers would be required to manage even though there has been no deficiency identified in current arrangements.

While right of entry already exists under the *Fair Work Act 2009*, the inclusion of this in WHS legislation that applies to the maritime industry creates additional avenues to allow trade union access on board ships. The notice requirements and the reasons for entry may be different. This represents the potential for further disruptions to business, where the timeliness of operational movements can be critical.

The investigation of safety concerns is rightly the domain of the safety regulator AMSA. Right of entry that currently exists under the *Fair Work Act 2009* is the appropriate avenue.

#### 7.1.2 Additional licencing requirements and costs

The existing WHS regime contains additional licencing requirements for persons performing certain types of work. Current licencing arrangements on board vessels covered by the OSHMI Act are found in Marine Orders. For vessels carrying international certificates, this is based on the international convention *Standards of Training Certification and Watchkeeping for Seafarers (STCW)* which are minimum training standards developed by the International Maritime Organisation (IMO).

Currently AMSA does not require any additional licences to be held other than those required under the marine orders. It is likely that high risk licences would be required for certain work under the WHS Act. Currently there is an overriding obligation on employers to ensure that persons performing work are suitably trained and competent in the work they are required to perform. Having systems in place ensuring that persons performing certain work are competent to do so is, in MIAL's view, an effective way for an employer to meet their WHS obligations. This need not necessarily be achieved through a requirement to hold a specific licence.

It is not clear to MIAL that the introduction of shore based licensing arrangements for certain types of work will result in better health and safety outcomes for the industry. It will result in an increase in costs and regulatory burden. MIAL suggests further discussions need to be entered into with industry concerning the unique working arrangement in the maritime industry and what if any equivalent licencing arrangements would need to be developed. To simply require seafarers to obtain "high risk" or crane licences which have been developed for the land based construction industry would be ineffective in ensuring safety within the maritime industry.

MIAL notes the PwC analysis conducted to inform the December 2015 consultation with respect to costs that may be incurred by industry. It seems that the analysis principally relates to the costs of applying for and being issued a licence. It is unclear whether to obtain such licences would require additional training for industry participants and whether any such costs are included in the analysis.

#### 7.1.3 Compensation arrangements

Compensation paid pursuant to a workers' compensation scheme is one of the key drivers (along with claims history and return to work outcomes experiences) in determining premiums set for employers. MIAL (as ASA) has previously maintained the position that compensation arrangements for maritime industry participants should be in line with the rest of the Australian community. Seacare Scheme coverage entitles employees to 45 weeks off at 100% of weekly payments, and 75% thereafter. Entitlements under State based schemes vary but by way of example, NSW and Victoria allow for 13 weeks at 95%, then 80% and then stops after 5 years unless impairment is greater than 20%.

MIAL is aware that there are a number of studies which support step downs in compensation entitlements as having a positive impact on rehabilitation and return to work outcomes by providing

incentives to employees to actively pursue these outcomes,<sup>18</sup> as well as providing fairness between the rights of employers and the rights of employees in a compensation regime that does not attribute fault.

This RIS concedes that the current compensation arrangements have a negative impact on employees. ‘There are significant barriers preventing effective return to work for seafarers under the Seacare scheme, in particular the limited opportunities for graduated return to work or alternative duties. Incentives for return to work in the Seacare scheme are limited, with weekly benefits for total incapacity paid at 100 per cent for the first 45 weeks of incapacity.’ The Seafarers Bill 2016 fails to address this.

MIAL supports step-down workers’ compensation provisions more in line with Australian community standards as provided by other compensation regimes rather than those contained in the current legislation. These also provide appropriate incentives for workers to engage in effective return to work programs. The Bills do not include these provisions.

Instead, the Bills increase the age at which payments can be made beyond the age of 65 to align with the increased national standard for retirement age which is likely to increase costs for employers and insurers, increasing premiums.

## 8 Scheme Administration

### 8.1 Issues with the current proposal

The proposed Seafarers Bill 2016 includes provisions for the transfer of the functions of the Seacare Authority to the SRCC. MIAL acknowledges that the composition of the Seacare Authority does, at times, make it difficult for the Authority to act as a purely regulatory body exercising statutory functions. It has not in the past functioned as well as it could have. However, the proposal is to retain a separate workers’ compensation scheme for the maritime industry. The government’s proposal to disband the Seacare Authority and transfer the power to a body responsible for administering a compensation scheme for commonwealth public servants makes MIAL wonder why a separate scheme is necessary when a separate Authority comprising of industry representatives is not required to administer it.

The RIS states that ‘The Seacare Authority will be abolished and the functions split between Comcare and the SRCC. Industry representation will be maintained by enabling the Chairperson of the SRCC to appoint an advisory group, constituted of employee and employer representative(s), to provide support and industry expertise to the SRCC and Comcare, as required.’<sup>19</sup> Leaving it to the discretion of one individual (the SRCC Chair) to decide if and when industry will be involved creates increased risk to an already dangerously overexposed scheme.

Where a separate industry scheme is to be maintained it defies logic not to retain industry expertise for the administration of it. Employers who will likely be paying more than they would under a state scheme will then lose a voice on the body administering the scheme. If a body that does not have industry representation on it is tasked with administration of an industry specific scheme, then that body must be obliged to consider industry advice as part of that administration.

---

<sup>18</sup> Productivity Commission 2004, National Workers’ Compensation and Occupational Health and Safety Frameworks, Report No. 27, Canberra, March. Pg. 263-264

<sup>19</sup> Seafarers and Other Legislation Amendment Bill 2016, House of Representatives, Regulation Impact Statement

That a body that has no industry representative potentially has the power to determine costs that may be imposed on such participants (i.e. the amount of the levy which under the Bills will be determined in part by the SRCC) is completely unsatisfactory from MIAL's perspective.

#### 8.1.1 Lack of mandated industry input

It is counterintuitive to oblige maritime employers to be part of a costly and ineffective scheme and remove control of any decision making from maritime employers. This is what the Seafarers Bill 2016 does. The advantage offered by the Seacare Authority is industry expertise and knowledge. Without input from maritime employer's claims could be made against the Safety Net fund when in fact the employer is still traceable. If the Safety, Rehabilitation and Compensation Commission (the SRCC, a Commonwealth body) appropriately uses maritime expertise this risk may be minimised. The preference of maritime employers is for the Seacare scheme to be removed altogether so that worker's compensation and WHS can be administered by a body that is an expert across a range of industries.

#### 8.1.2 No ongoing requirement for separate industry scheme

The proposal to disband the Seacare Authority and transfer the power to a body responsible for administrating a compensation scheme for commonwealth public servants makes MIAL question why a separate scheme for seafarers is necessary when a separate authority comprising of industry representatives is not required to administer it. Employers propose that if there is no need for specialist management of this ever-shrinking scheme then it should be removed in its entirety.