

*Submission to Seacare scheme*

*Reforms to work health and safety and  
workers' compensation*

*February 2016*



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

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

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

The Australian resource industry currently directly generates over 8% of Australia's GDP. In 2014-15, the value of Australian resource exports was \$171.9 billion. This is projected to increase to \$256 billion in 2019-20. It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Over 50% of the value of all Australian exports are from the resource industry.

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

AMMA members across the resource industry are responsible for significant levels of employment in Australia. The resources extraction and services industry directly employs 219,800 people. Adding resource-related construction and manufacturing, the industry directly accounts for four per cent of total employment in Australia.

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

First published in 2016 by

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## KEY ISSUES AND AMMA'S POSITION

1. In response to the consultation paper released by the Department of Employment in December 2015, AMMA welcomes the opportunity to make a submission to this Seacare review on key areas of concern for our members.

### AMMA's preferred option

2. AMMA notes that in presenting three alternative options for reform:
  - a. Option 1 – retain the status quo
  - b. Option 2 – abolish Seacare and revert to state / territory coverage
  - c. Option 3 – reform the scheme

The most detail is provided in the consultation paper regarding Option 3.

3. Having considered the three alternative options, and having consulted with our affected membership, AMMA's preferred option is Option 2 (p17 of the consultation paper), which would see the Seacare scheme abolished. As outlined in the consultation paper:

*“A non-regulatory option is to abolish the scheme by repealing its underpinning legislation and passing responsibility for the sector to the states and territories. Employers and seafarers would be covered by state and territory workers' compensation and work health and safety (WHS) schemes. State and territory governments may need to amend their laws to give effect to this option.”*

4. The abolition of the Seacare scheme would in no way diminish coverage and protections for maritime employees, who would be clearly covered by state and territory workers compensation and WHS schemes as are other employees throughout Australia.
5. Existing “state of connection” or “cross-border” workers' compensation arrangements that already exist in each state and territory would make clear which state / territory workers' compensation scheme an injured worker would be covered by. All states and territories currently have something very similar to the below in their legislation:

A worker's home jurisdiction is:

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

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

6. In the event of a resultant lack of clarity, an option (d) could be added to the above taking into account specific peculiarities of offshore journeys.
7. As for the other two alternative reform options in the consultation paper, in AMMA's view Option 1, retaining the status quo, is not financially viable or sustainable given the current performance and outcomes of the Seacare scheme coupled with a declining coverage base. Option 1 also would not address the current uncertainty about coverage or the huge financial exposure of the fund which is ultimately underwritten by scheme participants.
8. AMMA has also considered in detail Option 3, which would reform the scheme in numerous ways. While not opposed to some measures under Option 3, on balance we do not support the entire package of changes proposed, in either the work health and safety (WHS) or the workers' compensation streams.

## **Background to recent developments**

9. The *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) provides workers' compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry.
10. The Seafarers Act establishes a privately underwritten workers' compensation scheme, with employers that are covered by the Seafarers Act required to maintain an insurance policy with an approved insurer to cover workers' compensation claims made under the Act.
11. The Seafarers Act establishes the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority), which currently oversees the scheme.

12. The Seafarers Act operates in conjunction with the *Occupational Health & Safety (Maritime Industry) Act 1993* (OHSMI Act) to provide a combined work health and safety and workers' compensation scheme known as the "Seacare scheme".
13. Coverage of the scheme had historically been understood by maritime industry regulators and participants to operate primarily by reference to the form of trade or commerce being engaged in by a ship<sup>1</sup>.
14. Ships engaged in interstate or international trade or commerce were understood to be covered by the Seacare scheme, while ships engaged in intrastate trade or commerce within a state or territory were understood to be covered by the legislation of the state in which they operated.

## The Aucote decision

15. In *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182, the Full Court of the Federal Court held that the provisions of the Seafarers Act operated to apply that Act to seafarers employed by a trading, financial or foreign corporation on a prescribed ship, including ships engaged in intrastate trade. This was substantially broader coverage than what had been historically applied and understood.
16. Following *Aucote*, a subsequent declaration was made, the *Seafarers Rehabilitation and Compensation (Prescribed Ship – Intra-State Trade) Declaration 2015*, ensuring the Seafarers Act no longer applied to foreign-flagged ships that meet the definition of "prescribed ship" under the now-repealed Navigation Act 1912.
17. A Section 20A Exemption was also issued by the Seacare Authority specifying ships that are not covered by the Seafarers Act. That exemption is directed at ships that would be covered by paragraph 10(a) of the Navigation Act had it not been amended.
18. The combined effect of the declaration and exemption was that ships that had been understood to be outside the coverage of the Seafarers Act prior to the Federal Court's *Aucote* decision would no longer be covered by the Seafarers Act for the period that those instruments remain in force.
19. As such, the declaration and exemption attempted to re-align the application of the Seafarers Act (and consequently the OHSMI Act) with how it had historically been interpreted.

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<sup>1</sup> Explanatory Statement to F2015L00336

## Amending legislation

20. Also following the *Aucote* decision, amending legislation was tabled in federal parliament and the following amendments were subsequently passed into law.
21. The *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Act* amended the coverage of the Seacare scheme from the commencement of the scheme in 1993 until 26 May 2015 (the date of Royal Assent of the legislation).
22. The Amendment Act confirmed that, generally, the Seacare scheme did not apply to employees on ships engaged in intra-state trade or commerce, as was broadly understood to be the case before the *Aucote* decision.
23. The Amendment Act did not disturb any claims for workers' compensation under the Seacare scheme made before 26 February 2015 (the date the Bill entered parliament). Any employees who provided notice of injury before 26 February 2015, but had not made a claim for workers' compensation by that date, were also not affected so long as the notice of injury was provided for the purpose of making a claim under the Seacare scheme and they had not made a claim for compensation under state legislation.
24. The aim of the legislation was to restore certainty to maritime industry employers and employees regarding past actions and compensation payments received under the Seacare scheme. It also aimed to assist with providing certainty about past actions and compensation payments received under state workers' compensation regimes.
25. The amending legislation, combined with the exemptions and declarations referred to above, meant the Seacare scheme was again, on the face of it, limited to what it was broadly understood to be prior to the *Aucote* decision.
26. However, despite the issuing of these new instruments, AMMA understands the implications and uncertainties created by the *Aucote* decision remain live. A range of vessel operators not previously thought to be in the Seacare scheme could potentially remain subject to the Seafarers Act given the lack of certainty the decision created.
27. The government previously said the Amendment Act was an interim response to the *Aucote* decision and it would continue towards a longer-term solution. The Department's consultation paper is presumably the first step towards that long-term solution although as AMMA discusses later in this submission, there is also mooted legislation already cleared for introduction to federal parliament in this area.

28. AMMA addresses below the current reform proposals put forward by the Department in its consultation paper for this review.

## **Work health and safety reform proposals**

29. The reform option for WHS proposed under Option 3 (page 19 of the consultation paper) is only partially in line with what AMMA would like to see in that area.
30. This option would see the repeal of the Occupational Health & Safety (Maritime Industry) Act 1993 (OHSMI Act), which gives effect to the OHS aspects of the Seacare scheme, with amendments made to the Commonwealth WHS Act to extend its application to the Seacare scheme to the exclusion of state or territory laws.
31. While AMMA can see merit in having operators that are removed from coverage by the OHSMI Act by virtue of its repeal being covered by a single national Act for simplicity's sake, we believe there would be massive problems with trying to amend that national Act so as to define coverage, creating more problems than it solves. A simple reversion to state and territory WHS laws following the repeal of the OHSMI Act would be a simpler way to restore clarity of coverage as well as OHS regulation in line with community expectations. As mentioned, this could happen via "state of connection" rules in each jurisdiction to facilitate clarity of coverage in this area.
32. Maritime employers are used to working within state WHS schemes for other parts of their workforce, so are already familiar with navigating different state and territory requirements. There is also no material difference between the state and Commonwealth WHS Acts in those jurisdictions that are participating in the nationally harmonised WHS system, and where differences have been maintained in some jurisdictions, they are well known and well publicised and capable of being advised upon to employers.
33. Having said that, assuming it were possible to attain sufficient clarity of Commonwealth Act coverage, AMMA would be willing to participate in further consultations on these issues, as complex as they would be.
34. Under AMMA's preferred option, Option 2, responsibility for workplace health and safety and workers' compensation for those currently covered by the Seacare scheme would revert to state and territory laws.

## **Union access to workplaces**

35. AMMA's preferred Option 2 would, in the absence of any specific exemptions, bring transferring businesses under state and territory right of entry laws pursuant to the Work Health & Safety Act in the relevant state or territory. This would provide

permit holders with the ability to enter vessels and other sites currently covered by the Seacare scheme for the first time under WHS laws.

36. Union permit holders currently have the ability to enter Seacare-covered premises and vessels under the auspices of the Fair Work Act, provided they give at least 24 hours' notice.
37. If reverting to state, territory or Commonwealth WHS laws, that 24 hours' notice could be waived in certain circumstances.
38. AMMA believes the current right of entry provisions covering vessels / premises under Seacare are appropriate and have worked well. If there was an appetite for making a maritime-specific amendment to WHS laws to retain the status quo in terms of right of entry, AMMA would be happy to provide further input as to how that might work.
39. Having said that, the prospect of falling under state right of entry laws, while raising some concerns in terms of operational impacts, would not outweigh the benefits of AMMA member companies being excised from the Seacare scheme (if it was abolished as AMMA suggests) and reverting to state / territory rules.
40. Maritime employers would also be willing to participate in discussions with state and territory regulators regarding any unique considerations for offshore inspection and union entry with a view to possible agreed approaches or protocols.

## **Workers' compensation reform proposals**

41. AMMA notes that a key reform option proposed in the consultation paper under Option 3 is to retain the Seafarers Act but make it consistent with the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), except where the particular circumstances of the maritime industry justify a different approach.
42. While again AMMA's overall preference is Option 2 (repeal the Seafarers Act and revert to state and territory workers' compensation laws), AMMA notes that one of the Department's proposed changes under Option 3 is to amend the calculation of compensation for injured workers (p37 of the consultation paper).

### **Calculation of compensation**

43. In AMMA's view, the Seacare scheme as it currently operates is financially unsustainable and imposes a significant and unjustifiable cost burden on employers from a workers' compensation perspective, both in terms of the premiums paid as well as payments to injured workers.



44. That cost burden occurs in part because of the extended length of time an injured employee receives 100% of their weekly earnings under Seacare compared to state workers' compensation laws (a comparison of what employers are required to pay under the Seacare scheme versus the various state workers' compensation schemes is included at Appendix A of this submission).
45. Proposed new "step down" provisions under Option 3 would provide structured tapering of the amount of weekly compensation payments that an injured seafarer would receive, consistent with long-standing practice under state and territory workers' compensation laws. New compensation entitlements would start at 100% of weekly earnings for the first 13 weeks and taper off from there, as opposed to the 100% of weekly earnings received for the first 45 weeks under Seacare before tapering off.
46. There are very sound policy reasons for the tapering of workers' compensation payments, for employers, employees and the overall integrity and sustainability of workers' compensation schemes. This is why all state and territory schemes provide for the tapering of payments at earlier points, and the current Seacare approach is unsustainable and outdated.
47. Employees benefit from tapering payments through incentives for a return to work on full duties, for rehabilitation, and for a return through a transitional period of modified duties. Where employees cannot return to work, tapering of payments is also a driver of transition onto other forms of payment or benefits that will apply in the longer term.
48. While on the face of it moving to tapering payments earlier under state workers' compensation schemes could be characterised as an improvement in terms of the financial impost on employers, AMMA notes that on p46 of the consultation paper it is estimated that the combined package of WHS and workers' compensation reform proposals would only deliver net financial benefits to employers of up to \$17,000 a year.
49. AMMA does not see these financial benefits (were they guaranteed to be achieved) as substantial for employers in comparison with the greater benefits that would flow from being covered by state and territory workers' compensation schemes.
50. It should also be noted that the cost burden for employers under the Seafarers Act has increased significantly in the past two decades given large increases in wages in the sector during that time. Given that the expense of the scheme for employers comes largely from the length of time injured workers are entitled to be paid 100% of their weekly earnings coupled with high weekly salaries, the impost of the scheme on employers is much greater now than when the scheme was first introduced.

51. As the consultation paper acknowledges at p36:

*“Since the Seafarers Act was enacted, the employment conditions of seafarers covered by the scheme have changed. However, provisions for the calculation of weekly incapacity payments have not.”*

52. In light of that, AMMA's preference is not to reform the existing workers' compensation legislation for Seacare but to repeal it as a whole, delivering substantially greater benefits for industry, injured employees and better reflecting community-wide practices in workers' compensation by moving to state and territory schemes.

### **Uncertainty around coverage**

53. In the wake of the 2015 *Aucote* decision, there remains a concerning lack of clarity around exactly who is covered by the scheme. The interpretation of the application of the Seacare scheme in that decision found coverage to be much broader than was historically understood by all involved.
54. Despite amending legislation in the form of the *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Act 2015* (Commonwealth), which took effect in May 2015, and accompanying determinations and exemptions required to restore the scheme's historical coverage in the interim, AMMA believes there remains a lack of certainty around coverage, and this remains a significant concern that should be addressed.
55. Clarity of coverage is essential if the Seacare scheme is to remain (which as discussed is not AMMA's preference). However, the consultation paper's proposed reform to coverage at p49 is to “clarify” that coverage of the Seacare scheme is limited to those vessels operating outside a three nautical mile boundary. On the face of it, this risks extending the coverage of the scheme rather than clarifying its historical limitations. This will not fix ambiguity on the coverage of the scheme.
56. For this reason, AMMA does not support the proposal in relation to coverage outlined on p49 of the consultation paper. This proposal could, for example, bring in vessels operating in the Great Barrier Reef that are not currently covered by Seacare. Under the proposed changes, they would be subject to amended Commonwealth WHS and workers' compensation laws according to the reform proposals, but may well want to remain covered by Queensland state WHS and workers' compensation laws.
57. The consultation paper's coverage proposal would arguably bring in more than just tourism operators that currently consider themselves out of the scheme. Inshore operators are an obvious example who come in and out of one state. Those operators have had no previous interaction with the scheme and may not

even know this review is happening. Those operators have never contributed to the Safety Net Fund, which would be incredibly exposed if coverage were to proceed in the way proposed.

58. It is AMMA's very strong position that if the Seacare scheme remains, even if only in relation to workers' compensation as the Department's proposals under reform Option 3 suggest, it must revert back to the historical interpretation of coverage – namely, vessels involved in interstate or international trade or commerce – and under no circumstances should coverage be expanded, unwittingly or otherwise.

### **Industrial issues**

59. While technically companies can remove themselves from the Seacare scheme under certain circumstances, from an industrial relations perspective this is not a viable alternative for operators given the almost 100% union coverage on most vessels.
60. However, those adverse industrial consequences for affected employers would be removed if the scheme was abolished altogether and employers were therefore not seen as “opting out” but were, as an entire industry, made subject to community-wide approaches to workers compensation and WHS.

### **Imposition of an extra levy**

61. The proposed imposition of an additional “cost recovery” levy and fees to cover expenditure incurred by the regulators, as canvassed in the consultation paper at p.47 (and potentially included in legislation that will shortly be tabled in federal parliament) is not supported by AMMA.
62. This would be an additional cost impost on affected employers on top of the already inflated costs of being in the Seacare scheme.

### **Disease threshold test**

63. While not supporting Option 3 which canvasses a range of reforms, AMMA would like to make some comments on the disease threshold issue.
64. At p.33 of the consultation paper, it is proposed that under the workers' compensation reforms, the test for whether a physical or mental injury, or aggravation of an injury, is compensable be changed from an injury that is contributed to in a “material” degree by the person's employment (under the Seacare scheme) to one contributed to by a “significant” degree. This appears to create a higher threshold for an “injury” to be compensable under the scheme. AMMA in principle supports such a change although, as mentioned, does not support the wider suite of proposed reforms to which it is attached.

## Legislative developments

65. AMMA notes that legislation has been cleared for introduction to federal parliament which is said to be aimed at modernising the Seacare scheme at the same time this review is on foot. While legislation has not yet been tabled, AMMA assumes the government is moving ahead with previously proposed reforms which AMMA does not necessarily entirely support.
66. AMMA notes that four Bills have been cleared for introduction into federal parliament, with the stated aim of creating new Acts to “modernise” and improve the Seacare scheme and create a levy to support the government’s administration of the scheme.
67. The Bills, according to the limited information available, will also seek to clarify the scheme’s coverage and align its workers’ compensation and work health and safety provisions with the Comcare scheme.
68. The Bills, mooted to be tabled in the current session of parliament, are:
  - a. *The Seafarers Rehabilitation and Compensation Bill;*
  - b. *The Seafarers Rehabilitation and Compensation Levy Bill;*
  - c. *The Seafarers Safety, Rehabilitation and Compensation Levy Collection Bill;*  
and
  - d. *The Seafarers Legislation Amendment Bill.*
69. AMMA would welcome further clarity as to the interaction / overlap between the outcomes of this current review and the pending Bills expected to shortly be tabled in federal parliament.

## Conclusion

70. As a matter of sound policy and regulation, Seacare is not working; it is not working for employers, employees, the industry, nor the wider community. The scheme rests on financially unsafe and underfunded foundations, and delivers worse policy and protective outcomes than prevailing state and territory regulation covering employees generally across the wider workforce.
71. From an operator’s point of view, significant cost savings and certainty would flow from the abolition of the Seacare scheme and reversion to state and territory workers’ compensation and WHS laws as AMMA recommends in support of Option 2.

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

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

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

	SEACARE	STATE BY STATE WORKERS' COMPENSATION AUTHORITY AND LEGISLATION
<b>Costs per employer</b>	If maintained, on average \$48,000 annually to recover costs.	Only premiums.
<b>Premiums</b>	Highest premium of all workers' compensation schemes.  Deductions can be chosen by the company to vary the premium.	Due to high-risk industry, premiums will be higher than other industries, however, lower than the Seacare scheme.  No room to alter excess of claims.
<b>Claims management</b>	Company determines liability of claim (in theory, operators should consult with their insurer before accepting a claim).  Claimant entitled to 45 weeks of 100% weekly payments and then capped at 75% payments.  Journey claims included.	Insurer determines liability of claim (in conjunction with company's assistance).  Different jurisdictions have different entitlement periods: <ul style="list-style-type: none"> <li>• <b>Vic</b> – 95% of pre-injury earnings up to 13 weeks, then 14-130 weeks @ 80%.</li> <li>• <b>Qld</b> – 85% of weekly earnings up to 26 weeks, then 75% for two years.</li> </ul>

	SEACARE	STATE BY STATE WORKERS' COMPENSATION AUTHORITY AND LEGISLATION
	Relies on insurer and lawyers for common law coordination.	<ul style="list-style-type: none"> <li>• <b>NSW</b> – 95% of pre-injury earnings up to 13 weeks, then 80% for 14-130 weeks.</li> <li>• <b>Tas</b> – 100% of pre-injury earnings up to 13 weeks, then 85% for 13-78 weeks, then 80% for 78 weeks to 9 years.</li> <li>• <b>WA</b> – 100% of pre-injury earnings up to 13 weeks, then 85% from 14 weeks.</li> <li>• <b>SA</b> – 100% of pre-injury earnings up to 52 weeks, then 80% thereafter.</li> </ul> <p>For most of the above, the company will have to pay the first two weeks of compensation, then the insurer kicks in.</p> <p>State jurisdictions do not include journey claims.</p> <p>Greater coordination for common law claims and insurer/legal/dispute resolution officer resolution of claims (less company involvement).</p>
<b>Injury management</b>	Internal medical management / return to vessel plans, internal liaison with treating practitioners and placement of seafarers based on suitability of vessel.	<p>Streamlined approach to return to work, insurers have their own bonus incentives to return the worker back to work.</p> <p>Third party correspondence organising certain medical appointments.</p>
<b>Union involvement</b>	<p>Unions are in favour of the Seacare scheme.</p> <p>Internally formulated decisions and claims outcomes (although in theory operators should be consulting with their insurer before accepting a claim).</p> <p>Perceived fewer breaches of confidentiality and privacy.</p>	<p>Aligns entitlements for seafarers with all other private sector workers in the Australian community. In some cases this is a reduction in potential entitlements (weekly payments); in other cases an increase (statutory permanent impairment claims).</p> <p>Seafarers will be considered based on their jurisdiction as opposed to their type of employment.</p>

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