Submission to Seacare Scheme Review

By the Australian Mines & Metals Association (AMMA)

December 2012

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 94 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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AMMA, Australian Mines and Metals Association

GPO Box 2933

Brisbane, QLD, 4001

Email: policy@amma.org.au

Phone: 07 3210 0313

Mobile: 0408 867 575contact number

Website: www.amma.org.au

ABN: 32 004 078 237

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Executive summary

- Seafarers live and work on ships. The shipping industry is global in nature.
- When legislating for a workers' compensation scheme for seafarers and for the workplace safety of seafarers, the Federal Parliament has a range of obligations to which it must have regard. The obligations arise from our Australian federal system of government and under international law.

The two factors above are fundamental to the legislative objectives of a separate workers' compensation scheme for seafarers and may have influenced the design of the *Seafarers' Rehabilitation and Compensation Act 1992* (Cth).

The experience of employers of the operation of the Seacare scheme is that the scheme does not meet effectively its primary objective: the safety and well-being of seafarers, including their rehabilitation and return to work following injury. A decade ago, the Australian Shipowners Association and AMMA made a joint submission which argued strongly, based on comprehensive evidence, that the Seacare scheme required significant reform. This situation remains.

The practical concerns of employers operating under the Seafarers Act include:

- the contemporary effectiveness of the rehabilitation and return to work aspects of the Seacare scheme;
- the need for greater flexibility as to redemptions to respond to particular needs of individual employees;
- the importance of updating the legislation to reflect the nature of the workforce as it is today, such as the overseas principal place of residence of many seafarers; and
- the overall, and potentially unsustainable, costs to employers of participating in the Seacare scheme.

One effective way in which to promote safety, rehabilitation and return to work, and to address practical problems arising from the scheme, might be to abolish the Seacare scheme. Instead, employers could be allowed to opt for coverage under either the Commonwealth scheme or a State scheme, as appropriate. However, as this proposal was not directly raised by the terms of reference for this review, it is suggested that further consultation should be undertaken.

On the other hand, reform is not required to the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth). Since enacted in 1993, the OHS(MI) Act has provided an effective framework for workplace health and safety in the maritime sector. In relation to a question as to consistency with model national workplace health and safety laws, employers stress that, given the unique nature of seafarers' workplaces, such a measure would be likely to jeopardise the safety and well-being of seafarers. In particular, rights of entry should not be provided under the OHS(MI) Act.

The two factors in the first paragraph must acts as the foundation for any legislative reform of the Seacare scheme.

Summary of recommendations

1. **The jurisdictional coverage of the Seacare scheme should:**
   - **enshrine industry practice and be consistent with Australia's domestic and international obligations; and**
   - **not impose a greater regulatory burden on industry; and potential may exist for the regulatory burden on the offshore hydrocarbons sector in particular to decrease.**

2. **The Seafarers Act requires significant amendment to meet the contemporary objectives of a workers' compensation scheme. While one option may be to collapse Seacare, allowing adoption of either the Comcare scheme or a State scheme, AMMA members would like more detailed information before committing to such a reform.**

3. **It is important to the work, health and safety of seafarers that the model WHS laws not be extended offshore. This approach should not be adopted.**

4. **The sustainability of the Seacare scheme is jeopardised by a large number of matters affecting the real costs of the scheme. The comparatively high costs are not matched by better outcomes, such as in relation to rehabilitation and return to work. These matters require a legislative response.**

1 The nature of seafaring

A 'seafarer' may be described as a person who is employed or engaged or works in any capacity on board a vessel, other than a ship of war, ordinarily engaged in maritime navigation.[1] A seafarer lives and works on a ship.

The shipping industry is global in nature and, indeed, there is a long history of seafarers from one country being employed on the ships of another, such as those of the British, French and Dutch registry. In 2010, there were more than 1.2 million seafarers in the world's international merchant fleet.[2]

Seafarers operate in a complex work environment. The scale of the engineering, for example, is huge and problems posed by the operation of vessels require specialist solutions. Accordingly, seafarers work in a unique environment; and activities undertaken are extremely specialised in nature.[3]

2 Legislative history of Seacare scheme and AMMA involvement

2.1 Seafarers Act

The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act) has operated, without substantive amendment, for 20 years.

In 1987, Professor Harold Luntz undertook a review for the Federal Government of the policy basis and the operation of the then *Seamen's Compensation Act 1911* (Cth). In June 1988, the Luntz review report was tabled in the Commonwealth Parliament. The report recommendations were then 'the subject of extensive consultations involving shipowners, the maritime unions and the ACTU'.[4] In his second reading speech to the Seafarers Rehabilitation and Compensation Bill 1992, Mr Snowdon, Parliamentary Secretary to the Minister for Employment, Education and Training, said that the process had found that common law claims against employers were counter-productive to the fundamental objective of helping injured employees rebuild their lives and to make a speedy return to employment. Accordingly, it was said the proposed legislation:[5]

> *... radically moves away from the outmoded compensation regime the Seamen's Compensation Act provides. The new scheme will combine fair, earnings-related benefits with comprehensive rehabilitation requirements and other measures aimed at getting injured employees restored to health and back to work as quickly as possible.*

The scheme was designed to be based on employer liability, in acknowledgment of the fact that:[6]

- individual employers and their insurers already had the necessary infrastructure in place to manage such arrangements; and
- the imposition of a Government fund on such a small industry (at that time with around 6000 employees) would not be cost-effective.

The liability and insurance aspects were described in the following way:[7]

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1 Seafarers' Identity Documents Convention (Revised), 2003, Article 1

2 See further EN Eadie, Employment of Foreign Seafarers on Australian Controlled Ships (2000) 111 *Maritime Studies* 1

3 L Payne, Independent Review of Australian Shipping: What is Australian Shipping? (2003) 129 *Maritime Studies* 24

4 *Hansard*, House of Representatives, 14 October 1992, 2145

5 *Hansard*, House of Representatives, 14 October 1992, 2145

6 *Hansard*, House of Representatives, 14 October 1992, 2145

7 *Hansard*, House of Representatives, 14 October 1992, 2145

In order that employers will be able to meet their liabilities, the Bill requires them to be insured with an insurer authorised under the Insurance Act 1973 or be indemnified by a protection and indemnity association which is a member of the international group of protection and indemnity associations.

There will be a special industry wide 'safety net' fund to provide coverage for industry trainees and for temporarily unemployed seafarers while attending seafarers engagement centres in accordance with industry labour pooling arrangements. Both these categories of persona are employed by the industry as a whole, rather than by individual employers. The safety net fund will also be the nominal insurer. In other words, if the employer or the employer's insurer is unable to meet liabilities because of bankruptcy, for example, the fund will meet those liabilities.

The terms of reference for the Luntz review had required consideration of the desirability of consistency between the seamen's compensation legislation and the proposals being developed at that time for the new Commonwealth employees workers' compensation legislation (subsequently enacted as the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth)). In that respect, Mr Snowdon stated:[8]

The Bill also restores the former nexus with the workers' compensation legislation applicable to Commonwealth employees. This is consistent with the unitary compensation structure applying across public and private sector employment in all the State and Territory workers' compensation schemes.

In 2009, the Seafarers Act was amended to increase (to $421 000) the level of lump sum death benefits payable as a result of injury.

2.2 OHS(MI) Act

The *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) (the OHS(MI) Act) was enacted followed the development of reform proposals by a working group incorporating shipowners, unions and government representatives.

The Act was to provide a modern regime to promote the occupational health and safety of persons employed:

- in the maritime industry and for related purposes;
- on prescribed vessels; and
- on offshore industry mobile units that are engaged in trade or commerce within a Territory, interstate or overseas.

The objects of the OHS(MI) Act are set out in section 3. They are to:

- secure the health, safety and welfare at work of maritime industry employees;
- protect persons at or near workplaces from risks to health and safety arising out of the activities of maritime industry employees at work;
- ensure that expert advice is available on occupational health and safety matters affecting maritime industry operators, maritime industry employees and maritime industry contractors;
- promote an occupational environment for maritime industry employees that is adapted to their health and safety needs; and
- foster a cooperative consultative relationship between maritime industry operators and maritime industry employees on the health, safety and welfare of maritime industry employees at work.

[8] *Hansard*, House of Representatives, 14 October 1992, 2145

2.3 Seacare authority review – 2001

The Seacare authority is established under the Seafarers Act. An AMMA representative is a deputy for one of the two employer representatives on the authority.

In December 2001, the Seacare authority commenced a review of the Seafarers Act and the OHSMI Act. The then Minister for Employment and Workplace Relations had sought advice on any deficiencies in the legislation and about how the efficiency and effectiveness of the Seafarer's scheme could be improved.

The Australian Shipowners Association (ASA) and AMMA made a joint submission to the review. The submission stated that employers were committed to safe workplaces and the rehabilitation of employees injured at work, but that the structure of the Seafarers Act was such that the compensation regime was becoming a non-insurable risk, imposing significant costs on employers. The ASA/AMMA submission recommended that the Seafarers Act be amended to:

- define 'injury' in section 3 as –
  - one in which employment was a 'significant contributing factor';
  - excluding injuries resulting from reasonable disciplinary or suspension action and injuries incurred where seafarers elect not to take up the first available direct flight back to their home port ('journey claims'); and
  - excluding false or fraudulent injuries and diseases;
- increase opportunities for parties to redeem claims, including by –
  - raising the redemption ceiling – to provide employees with greater certainty and to reduce employer costs; and
  - allowing redemption without limitation due to age, time elapsed or level of compensation being paid for weekly payments, medical expenses and rehabilitation;
- incorporate mandatory review after 104 weeks, subject to conditions;
- allow redemption of a claim without any limitation in terms of age or time elapsed since onset of disability or level of compensation;
- alter costs provisions in respect of administrative appeals of decisions made under the Seacare scheme;
- potentially allow insurers, as well as employers, to share liability;
- declare State laws relating to workers' compensation to be excluded in respect of injury, loss or damage occurring after 23 June 1993; and
- replace mandatory rehabilitation requirements with an element of discretion, to allow individual circumstances to be accommodated.

However, the Seacare authority's 2001 review did not lead to substantive amendment of the Seafarers Act or the OSHMI Act.

2.4 Seacare authority review of jurisdictional coverage – 2012

In February 2012, the Seacare authority released a discussion paper regarding the preferred jurisdictional coverage provisions for the Seacare scheme. As one element of a program of Federal Government maritime reform, the *Navigation Act 1912* was being redrafted. Via the discussion paper, and so as to raise with the Federal Minister proposals for redefinition of the Seacare jurisdiction, the Seacare authority sought the views of stakeholders about preferred Seacare coverage provisions.

3 This review

3.1 AMMA participation

AMMA members have been actively involved in the current review, including by:

- engagement with the review taskforce in a number of forums – matters raised in this context addressed each of the terms of reference, as detailed in the body of the submission; and
- providing information about the practical concerns of employers subject to the legislation under review.

A copy of the ASA/AMMA submission to the Seacare authority's 2001 review was provided to the review taskforce.

To ensure that AMMA was able to provide a full response to the review, legal opinion and advice was sought about maritime law principles and has been incorporated into this submission.

AMMA's responses to the review have been discussed with the ASA and the Australian Petroleum Production and Exploration Association (APPEA).

3.1 This submission

This submission represents the views of AMMA's members and should be read consistently with the information provided in meetings during the review.

Generally, the current AMMA submission does not reproduce the content of the earlier ASA/AMMA submission to the Seacare authority's 2001 review. However, the discussion and recommendations contained in the earlier ASA/AMMA submission remain current, as does the detailed evidence and data it contains, which continues to demonstrate a need for significant amendment to, or replacement of, the Seacare scheme.

The practical experiences of AMMA members who are subject to the Seacare scheme are that the maritime sector is very heavily regulated. The powers conferred on Federal Government agencies under the legislation appear to have been put in place in discrete responses to particular circumstances, rather than as part of a well-considered framework. Accordingly, and to assist the review, this submission outlines AMMA's understanding of relevant principles regarding the legislative powers available to the Federal Parliament. It then makes recommendations regarding each term of reference. The essence of the AMMA submission is that:

- reform to the Seafarers Act must occur; and
- that reform must be driven by industry practices and occur within the framework of principles provided by Australia international obligations.

4 Other relevant reviews

4.1 ALRC review of age barriers to work

In November 2012, AMMA made a submission to the Australian Law Reform Commission (ALRC) regarding its review of *Grey Areas – Age Barriers to Work in Commonwealth Laws*. The submission addressed workers' compensation matters raised in the ALRC's discussion paper. In particular, it addressed proposals 3-5 and 3-6 and question 3-1, regarding amendment of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth).

The ALRC examined whether age-based restrictions should be eliminated from Commonwealth workers' compensation legislation and how this might be achieved.

Under ALRC proposals 3-5 and 3-6 respectively, the Seafarers Act would be amended to:

- ensure that retirement provisions are tied to the qualifying age for the age pension; and
- provide that workers who are injured at any age after two years prior to age pension age may receive incapacity payments for up to 104 weeks.

Via question 3-1, the ALRC asked whether the Seafarers Act should be amended to provide that a worker, injured within two years of age pension age, should receive incapacity payments for a period longer than 104 weeks.

AMMA's submission to the ALRC stated that, as AMMA's vision is to grow Australia's economic prosperity to ensure Australia is an attractive place for investment and employment, it supports strongly the objective of removing barriers to mature age workers remaining in, or returning to, the workforce. It further observed that:

- under section 19 of the Seafarers Act, the Act applies to the employment of various categories of employees (defined in section 4 to mean a seafarer, a trainee or a person ordinarily employed or engaged as a seafarer); and
- AMMA's membership includes the range of categories in section 19.

The submission noted that a review of the Seacare scheme, established under the Seafarers Act, was being conducted by the Department of Education, Employment and Workplace Relations, and that:

> *As the aim of the review is to modernise the Federal seafarer's workers' compensation scheme to ensure it is working effectively and efficiently for Australia's seafarers, it is likely that that review will examine matters to be addressed by ALRC proposals 3-5 and 3-6.*

AMMA suggested the ALRC not recommend amendment of the Seafarers Act, but refer the relevant matters to the reviewer of the Seacare scheme. The submission stated:

> *When enacted, the Seafarers Rehabilitation and Compensation Act was designed to provide a cost-effective scheme which accommodated the particular circumstances of the industry:*[9]
>
> > The new arrangements will be based on individual employer liability. This acknowledges that the individual employers and their insurers already have the necessary infrastructure in place to manage such arrangements and that the imposition of a Government fund on such a small industry, with around 6,000 employees, would not be cost-effective.
>
> *However, in practice, the premiums for employers participating in Seacare are high when compared with other workers' compensation schemes applying across public and private sector employment in Australia. The higher costs under Seacare include very high deductible amounts before insurance is called upon.*

[9] *Hansard*, House of Representatives, 14 October 1992, 2145

Accordingly, legislative amendment as proposed may:

- *have significant cost implications for employers participating in Seacare;*
- *increase inconsistency between the costs of Seacare and other Australian workers' compensation schemes; and*
- *extend both the period during which workers' compensation is payable and entitlements to workers' compensation under the Seacare scheme.*

As noted above:

- *the Seacare scheme is being examined by a review conducted by Mr Robin Stewart-Crompton for DEEWR; and*
- *the DEEWR review is to consider whether the Seacare scheme continues to work effectively and efficiently for Australia's seafarers.*

AMMA suggests, therefore, that the potential cost implications and scope for inconsistency of the proposed amendments be considered by the DEEWR review.

4.2 Review of the application of the Migration Act to offshore resource workers

On 15 October 2012, the Minister for Immigration and Citizenship, Chris Bowen MP, announced that the Federal Government would legislate to amend the *Migration Act 1958* (Cth) to clarify the situation around workers in offshore maritime zones.

Mr Bowen said that following the Federal Court decision on the *Allseas* case in May 2012, a review was required into how the Migration Act affects and protects workers in offshore maritime zones.

The stated goal of the review by the Department of Immigration and Citizenship is to explore options and determine the most appropriate way to implement legislative change to ensure that workers in the offshore resources industry in Australia's offshore maritime zones come within the ambit of the Migration Act.

The key objectives of the review are to:

- ensure that the right to work in the offshore resources industry by persons who are not Australian citizens is, to the maximum extent permitted by Australia's international obligations, regulated consistently in all areas over which the Australia has jurisdiction;
- create legislative certainty in order to promote continuing investment in offshore industry;
- promote opportunities for Australians to work on Australian resources;
- protect the rights of workers in the offshore resources industry; and
- maintain the integrity in existing, interrelated, border legislation.

AMMA is preparing a submission to the review on behalf of its members.

4.3 Review of the SRC Act

In July 2012, the Minister for Workplace Relations announced a review of *the Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act).

AMMA did not make a submission to the review of the SRC Act prior to the close of submissions on 25 October 2012.

5 Relevant domestic and international obligations

5.1 Overview

The Federal Parliament has wide-ranging powers to legislate for matters offshore. However, it has obligations to exercise these powers consistently with our Federal arrangements and with various international conventions and agreements.

The Commonwealth Constitution confers the Parliament with power to make laws with respect to certain subject matters. Parliament is able to enact a law if there is a connection, 'which is not insubstantial, tenuous or distant', between the law and a subject matter head of power in the Constitution.

However, under international law, the exercise of powers in relation to places geographically external to Australia is limited. Where Australia seeks to assert legislative jurisdiction for matters beyond 12 nautical miles from the relevant boundary (see section 5.3), the basis for it to do so is affected by international law; that is, by agreements it has entered into about those powers.

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) sets out a general legal framework within which all activities in the oceans and seas must be carried out. UNCLOS is the foundation for national, regional and global action and cooperation in the marine sector.

Australia is a signatory to UNCLOS and a number of other relevant international agreements which it has implemented in domestic legislation.

5.2 Federal legislative power to regulate offshore matters

The Commonwealth Constitution confers the Federal Parliament with power to legislate with respect to a range of matters. Accordingly, provided the intention is clear, and a connection exists between the legislation to be passed and the head of power, the Parliament may legislate for matters physically external to 'the Commonwealth'.

In *Smith v ANL Limited* (2000) 176 ALR 449 at [69] – [70], Kirby J provided the following overview of the connection between the Seafarers Act and respective heads of legislative power:

> *The scheme of the Seafarers Act involves the application of its provisions to "employees"[76] who are employed in any capacity on a "prescribed ship"[77] engaged in trade or commerce, relevantly "between Australia and places outside Australia"[78]. There was no dispute that each of these preconditions applied to the present facts. Nor was there any dispute as to the constitutional validity of such provisions. Substantially, such validity rests on the trade and commerce power in the Constitution[79] which is further extended, by specific constitutional provision, "to navigation and shipping"[80]. However, to be absolutely sure, the Seafarers Act is also expressed to have application to the "employees" of corporations to which the Constitution applies[81]. Those subject to the Seafarers Act are obliged: (1) to assess and pay compensation for work-related injuries and illnesses in accordance with the terms of the Act[82]; (2) to arrange assessment of the rehabilitation needs and the provision of rehabilitation programs to injured workers[83]; and (3) to maintain policies of insurance sufficient to meet their obligations to pay compensation under the Act[84].*
>
> *According to the Minister's Second Reading Speech in support of the Bill that became the Seafarers Act, common law claims against employers were "counter-productive to the fundamental objective of helping injured employees rebuild their lives and return to employment as quickly as possible"[85].*

The scope of the Federal Parliament's legislative power as to seafarers' work safety and workers' compensation arrangements under two respective heads of power, the trade and commerce power and the external affairs power, is examined briefly below.

Trade and commerce power

Section 51(i) provides legislative power with respect to trade and commerce with other countries and among the States. Section 98 states that this power extends to navigation and shipping.

In *Re Maritime Union of Australia* (2003) 214 CLR 397, the High Court considered the scope of Federal powers with respect to trade and commerce with other countries and among the States. The judgment of the Court said that what was required was the existence of a connection between the law in question and the constitutional head of power 'which is not insubstantial, tenuous or distant'.[10]

The matters before the High Court included whether section 51(i) of the Constitution provided foundation for section 5(3) of the then *Workplace Relations Act 1996* (Cth) and, in particular, for its application to foreign non-resident seafarers engaged outside of Australia. Section 5(3) detailed the content of an 'industrial issue' and included matters relevant to the relationship between employers and maritime employees, so far as those matters related to trade or commerce between Australia and a place outside Australia, between the States or within a Territory, between a State and Territory or between two Territories. On the facts, the rates of pay and conditions of employment of the foreign crew were fixed by agreement made with the International Transport Federation. They differed from those provided by the then Maritime Industry Seagoing Award 1999.

In relation to section 51(i), the Court stated:

- the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates, with its practical as well as legal operation examined to determine whether there is a sufficient connection between the law and the head of power in section 51(i);[11]
- if a connection exists between the law and the relevant head of power the law will be 'with respect to' that head of power unless the connection is 'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' that head of power;[12]
- in exercise of the trade and commerce power, the Parliament can regulate the conduct of persons employed in those activities which form part of trade and commerce with other countries and among the States;[13]
- a ship journeying for reward is in commerce, those who co-operate in the journeying of the ship are in commerce and the wages of those persons and the conditions of their employment relate to that commerce;[14]
- accordingly, on the facts, the commerce power was attracted by the engagement of the employees in interstate and overseas trade.

The Court observed that, in relation to the commerce clause in the United States Constitution, the United States Supreme Court had settled the law to the same effect a century earlier. In *Patterson v Bark Eudora* that Court said of a federal law protecting the payment of the wages of seafarers:[15]

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10 At [39].

11 *Grain Pool of Western Australia v The Commonwealth (2000) 202 CLR 479 at 492 [16]; cf at 515 [89].*

12 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369. See *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J.

13 *Australian Steamships Limited v Malcolm* (1914) 19 CLR 298 at 329-330; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 138, 152.

14 cf the argument of Sir Garfield Barwick QC in *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 264.

15 190 US 169 (1903)

We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation, and that our courts are bound to enforce those provisions in respect to foreign equally with domestic vessels.

External affairs power

Section 51(xxix) confers the Federal Parliament with legislative power regarding external affairs. It allows the Federal Parliament to legislate:

- with respect to persons, places, matters or things external to Australia; and
- to implement Australia's international obligations.

In *Polyhukovich v The Commonwealth* (1991) 172 CLR 501 at 599, Deane J described the scope of the external affairs power:

The first thing to be stressed about s.51(xxix) of the Constitution for the purposes of the present case is that its reference to "External affairs" is unqualified. The paragraph does not refer to "Australia's external affairs". Nor does it limit the subject matter of the grant of power to external affairs which have some special connection with Australia. The word "external" means "outside". As a matter of language, it carries no implication beyond that of location. The word "affairs" has a wide and indefinite meaning. It is appropriate to refer to relations, matters or things. Used without qualification or limitation, the phrase "external affairs" is appropriate, in a constitutional grant of legislative power, to encompass both relationships and things: relationships with or between foreign States and foreign or international organizations or other entities; matters and things which are territorially external to Australia regardless of whether they have some identified connection with Australia or whether they be the subject matter of international treaties, dealings, rights or obligations. Such a construction of the phrase "External affairs" in s.51(xxix) is supported by the settled principle of constitutional construction which requires that, subject to any express or implied general constitutional limitations and any overriding restrictions flowing from express or implied constitutional guarantees, the grants of legislative power contained in s.51 be construed with all the generality which the words used admit and be given their full force and effect.

Deane J stated that the view that a law with respect to matters or things which are territorially outside Australia is a law with respect to 'external affairs' for the purposes of section 51(xxix) was supported by numerous statements in cases in the High Court. Deane J referred to *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 360 where Barwick CJ expressed the view that the legislative power with respect to external affairs extended 'to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole.' In *New South Wales v The Commonwealth*, the High Court had held that the external affairs power allowed the Federal Parliament to enact legislation with respect to the territorial sea and its solum (seabed and subsoil layers).

Laws of the Federal Parliament founded on the external affairs power may also implement treaty obligations. This is because, in addition to matters geographically external to Australia, 'external affairs' is interpreted as referring to Australia's international relations.

In *Victoria v Commonwealth* (1996) 138 ALR 129 at 144, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ indicated that in this context the phrase 'external affairs' should again be given a wide, general meaning:

[A] consequence of the closer connection between the nations of the world (which has been partly brought about by the modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement.

5.3 Domestic and international obligations and Federal legislative power

Australian domestic obligations

Under the federal system of government in Australia, the power to make laws is shared among the Federal Parliament and the State Parliaments (with the latter delegating some legislative power to local governments). As outlined above, it is section 51 which enumerates many of the legislative powers of the Federal Parliament. On the other hand, the States have plenary power to make laws for the 'peace, welfare and good government' (or similar wording) for their States. Thus, State legislative powers on many matters are concurrent with the powers of the Commonwealth.

Where Federal and State legislative power is concurrent, the Federal Parliament:

- will have legislative supremacy (due to the operation of section 109 of the Commonwealth Constitution); but
- may choose to allow State laws to operate rather than enacting its own Federal laws.

An illustration, of interest in the present context, is provided by *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, in which the High Court heard a challenge to compensation for 'boilermaker's deafness' awarded under the *Workers' Compensation Act 1926* (NSW). The Court held that the New South Wales Parliament possessed 'plenary' power; however, to the extent the New South Wales Act was inconsistent with the *Seamen's Compensation Act 1911* (Cth), it was invalid by reason of section 109 of the Commonwealth Constitution.

The Federal nature of our system of government gives rise to complex arrangements offshore. However, the Offshore Constitutional Settlement 1979 was designed to promote some clarity.

Offshore Constitutional Settlement

Under the Offshore Constitutional Settlement, an agreement between the Commonwealth and the States, the Commonwealth undertook to allow the States and the Northern Territory jurisdiction over the sea in the three nautical miles offshore from the low-water mark or the State historic boundaries, and for each to have a say about matters in the 'adjacent area'.[16] One reason for this was that the States and Territory were in a better position to deal with local issues close to their shores.

The other major relevant effects of the Offshore Constitutional Settlement, in summary, are that:

- the Commonwealth would give each State the same powers with respect to the territorial sea adjacent to its coasts as it would have if the waters were within the limits of the State;

16 When the Commonwealth Parliament passed the *Seas and Submerged Lands Act 1973* the Act asserted Commonwealth sovereignty from, in effect, the low-water mark or recognised historic closing lines in reliance on the terms of the Convention on the Territorial Sea and the Contiguous Zone 1958 ([1963] ATS 12). This claim from the low-water mark directly challenged the traditional understanding of the States that it was they who had jurisdiction from the low water mark. In *New South Wales v The Commonwealth* (1975) 135 CLR 337, a majority of the High Court upheld the Commonwealth claims and so the court decision awarded the Commonwealth jurisdiction over the sea offshore from the low-water mark or the State historic boundaries.

- the Commonwealth would pass legislation to vest in each State powers and proprietary rights and title in respect of the seabed of the adjacent territorial sea, with reservations to the Commonwealth for national purposes such as defence;
- the State powers and rights were limited to three nautical miles' breadth, and would stay at three miles if, as subsequently occurred, the Commonwealth extended the territorial sea out to 12 miles;
- the Offshore Petroleum Agreement 1967 was confirmed –
  - the States would legislate for and regulate the petroleum industry area out to three miles of the low water mark or historic boundaries;
  - the Commonwealth would legislate outside that area;
  - a statutory Joint Authority would operate for each State's adjacent waters;
  - special conditions were agreed for Queensland and Western Australia because of some complexities unique to them; and
  - the proceeds of royalties would be shared between the Federal and State Governments on an agreed basis;
- in relation to ship-sourced marine pollution, it was agreed that the arrangements that existed after *New South Wales v Commonwealth* should continue, with the Commonwealth legislation having a savings clause to allow the States to legislate to implement marine pollution conventions if they should wish to do so; and
- the Northern Territory, which was just entering into self-government, was to be treated as a State for the purposes of offshore jurisdiction.

The Offshore Constitutional Settlement has been given effect in legislation passed by the States under section 51(xxxviii) of the Commonwealth Constitution. That section allows States to request and consent to Commonwealth legislation.[17] The Federal Parliament passed two Acts, one relating to the States' powers and the other to States' titles over the area. The Federal Parliament also amended a number of other related acts.[18]

Offshore jurisdictional arrangements under the OSC

The phrases **coastal waters** and **coastal waters of a State** derive from the Offshore Constitutional Settlement 1979 and are the waters adjacent to each of the respective States. In other words, this area is from the baselines out to three miles of the sea which is adjacent to any particular State. Further in relation to the relevant terminology, the Commonwealth proclaims:

- 'sovereignty' over the territorial sea (12 miles from the baseline);
- rights of 'control' over the contiguous zone (12-24 miles from the baseline); and

17 The State Acts requesting this were the *Constitutional Powers (Coastal Waters) Act 1979* (NSW), *Constitutional Powers (Coastal Waters) Act 1980* (Qld), *Constitutional Powers (Coastal Waters) Act 1980* (Vic), *Constitutional Powers (Coastal Waters) Act 1979* (Tas), *Constitutional Powers (Coastal Waters) Act 1979* (SA) and *the Constitutional Powers (Coastal Waters) Act 1979* (WA). There was no need for a similar request by the Northern Territory as it was a territory and the Commonwealth had the power, and did pass legislation to the same effect as that of the States.

18 The Commonwealth Acts were the *Seas and Submerged Lands Amendment Act 1980*; *Petroleum (Submerged Lands) Amendment Act 1980*; *Petroleum (Submerged Lands) (Royalty) Amendment Act 1980*; *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980*; *Petroleum (Submerged Lands) (Pipeline Licence Fees); Crimes at Sea Act 1979*.

- 'sovereign rights' over the exclusive economic zone (EEZ) (24-200 miles) and the outer continental shelf.[19]

In relation to the **territorial sea**, under section 7 of *Seas and Submerged Lands Act 1973* (Cth) as passed, the Governor-General was given power, pursuant to the Convention on the Territorial Sea and the Contiguous Zone 1958, to declare the outer limits of the territorial sea. In November 1991, the Federal Government declared the outer limit of the territorial sea extended to 12 miles.[20] As agreed under the Offshore Constitutional Settlement, this did not extend the jurisdiction of the States beyond the three mile limit.[21]

The **contiguous zone** and the **EEZ** are also claimed by the Commonwealth under the *Seas and Submerged Lands Act*.[22]

To provide a practical example of these agreed arrangements, the the effect of the Offshore Constitutional Settlement on legislative powers in respect of shipping has been described as follows:[23]

> *The High Court held in* New South Wales v Commonwealth *[1975] HCA 58; (1976) 135 CLR 337 that the Commonwealth had sovereignty over the territorial sea. The Offshore Constitutional Settlement of 29 June 1979 followed this decision. It was described at the time as a milestone in cooperative federalism. The Commonwealth, the States and the Northern Territory agreed to enact legislation implementing arrangements relating to shipping under which the States and Territories would be responsible for:*
>
> - *trading vessels except those proceeding on an interstate or an overseas voyage;*
> - *all Australian commercial fishing vessels except those going on an overseas voyage;*
> - *all vessels whose operations are confined to rivers, lakes and other inland water ways (with New South Wales responsible for all vessels operating on the River Murray upstream from the South Australian boarder); and*
> - *pleasure craft, and vessels used for pleasure on a hire and drive basis.*
>
> *The Commonwealth on the other hand took responsibility for trading vessels on interstate or overseas voyages, the navigation and marine aspects of offshore industry mobile units and offshore industry vessels other than those confined to one State and Territory. The Commonwealth and the States also developed a Uniform Shipping Laws Code which was adopted by the Australian Transport Council. The Code was to be used as the basis for uniform Commonwealth, State and Northern Territory legislation for the survey and manning of commercial vessels, including fishing vessels. It provides safety standards for the design, construction and operation of domestic commercial vessels.*

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19 The phrases quoted are taken from the long title to the *Seas and Submerged Lands Act 1973*, as amended. The Preamble expands on these claims and then the Act itself sets out the detail about them.

20 Statement by the Minister for Foreign Affairs and Trade and the Attorney-General, reproduced in [1991] *Australian International Law News* 168.

21 Some of the Torres Strait Island continue to have a three nm territorial sea and these include Deliverance, Talbot Islands, Turnagain, Sabai, Dauan, Kerr and Turu Cay.

22 Section 10a.

23 Justice R French, The Incredible Shrinking Federation – Voyage to a Singular State? University of Queensland and Law Council of Australia European Focus Group, *The Future of Federalism*, Brisbane, July 2008

International obligations

International law, formed by the agreement of nations to take common action in pursuit of a common objective, provides the framework for Australia as a nation to assert its jurisdiction offshore. Australia's agreement to a particular international instrument, and its incorporation into domestic law, imposes obligations upon Australia to act in a manner consistent with the agreement.

Australia and most countries in the world are parties to UNCLOS. The Federal Parliament has passed legislation to claim its rights under UNCLOS and its zones are given legislative effect in the *Seas and Submerged Lands Act*.

History of Australia becoming a signatory to UNCLOS

Until the middle of the twentieth century, the oceans were subject to a freedom of-the-seas doctrine. Developed in the seventeenth century, the doctrine essentially limited national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas were proclaimed to be free to all and belonging to none.[24]

UNCLOS was developed due to escalating tensions about maritime activities and from a recognised need to update the freedom-of-the-seas doctrine to take into account the technological changes that had altered man's relationship to the oceans.[25] A constitution for the seas, it represented agreement by representatives of more than 160 sovereign States.

Australia became a founding member of UNCLOS in 1994, shortly before it came into force.

UNCLOS has wide-ranging provisions and it was preceded by four conventions which were agreed in 1958[26] at the first of three UNCLOS conferences giving rise to the eventual convention; which conferences are known as UNCLOS I, II and III.

During the years of debate over which UNCLOS III was held (1973-1982), a number of important new features emerged, including new offshore zones, archipelagic seas and major new provisions for the protection and preservation of the marine environment. It was a further 12 years until UNCLOS came into force. The main reason for the delay was the opposition by the main shipping and sea-power States to Pt XI, which dealt with the 'Area' and its resources being for the 'common heritage of mankind'.[27]

The Area was the seabed and ocean floor and subsoil beyond the 'limits of national jurisdiction'.[28] In effect, the major States objected to having to expend huge sums of money to develop technology to exploit the deep seabed resources and then have to share the profits with other States. This opposition was eventually resolved by a separate agreement altering the terms of Pt XI prior to UNCLOS coming into force.[29] Under its terms the State parties were to implement Pt XI in accordance with the Agreement and they both should be interpreted and applied together as a single instrument

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24 www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm

25 www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm

26 Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, Geneva Convention on the High Seas 1958, Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas 1958 and Geneva Convention on the Continental Shelf 1958.

27 Article 136.

28 Article 1.

29 'Agreement Relating to the Implementation of Pt XI of the United Nations Convention on the Law of the Sea of 10 December 1982' done at New York on 28 July 1994 under the auspices of the UN.

with, in event of any inconsistency, the Agreement prevailing.[30] Many of the terms of Pt XI that were objected to were altered in the Agreement (in its Annex).

During the period from 1982 to 1994, the International Maritime Organisation (IMO) conventions on shipping and the marine environment were steadily being agreed, entered into force and often amended. There was no direct connection between the two sources of conventions about the marine environment, although those with the expertise were alert to the overlap and tried to ensure conformity.

It is the introduction of the extended offshore zonal system which is important under UNCLOS.[31] Under these zones the coastal State has decreasing rights and obligations as the distance offshore increases.

Offshore jurisdictional zones under UNCLOS

The zonal system under UNCLOS is measured from the baselines, which are drawn according to lengthy provisions in UNCLOS.[32] Where the shore is simple, the normal baseline is the low water line.

The **internal waters** are those waters on the landward side of the baselines.[33] In these waters the coastal State has the same sovereign rights as on land but, of course, the laws relating to these areas are over water so there are some differences. The outermost parts of ports are considered as part of the baseline so the ports usually come within internal waters.[34]

The **territorial sea** is that area 12 nautical miles offshore from the baselines.[35] The coastal State may, subject to innocent passage, pass laws in the territorial sea which passing shipping are bound to obey. Innocent passage through the territorial sea is the exception and it is granted to all States and their ships[36] but it only occurs where a foreign ship is traversing through territorial sea waters whether from one EEZ to another or to or from a port or a roadstead.[37] Coastal States are not to hamper the innocent passage of foreign ships by imposing requirements that have this practical effect and nor are they to impose levies on them just for passing through.[38]

This status is lost as soon as a foreign ship engages in almost any activity not having a direct bearing on continuous passage.[39] The areas and activities of which the coastal State may pass laws is wide and it includes for the protection of cables and pipelines, although in relation to them the laws may not apply to the design, construction, manning or equipment unless they are generally accepted

30 Articles 1, 2.

31 Before UNCLOS, the territorial sea was the main zone, frequently of only three nm width, but after 1994 there were four zones and the territorial sea was usually 12 nm unless stated to the contrary.

32 Articles 5-15.

33 Article 8.

34 Article 11.

35 Article 3. Mmeasurements are all nautical miles, which for lay purposes can be taken as a land mile plus about 200 metres. It is about one minute of arc of latitude measured along any meridian, or about one minute of arc of longitude at the equator. By international agreement, it is 1,852 metres (approximately 6,076 feet). In practical terms, one reads the distances off the side of the chart (not the top or the bottom), which is where one minute equals one nm.

36 Article 17.

37 Article 18.

38 Articles 24,25.

39 Article 19.

international rules or standards.[40] Ships in the territorial sea may also be required to obey laws about keeping to sea lanes and separation schemes.[41]

Coastal States have a right to enforce their laws in the territorial sea and internal waters including ports.[42] That does not extend to their criminal laws on board the ship except where the criminality extends to affect the coastal State or assistance to deal with it has been requested,[43] and they have no right to stop or divert foreign ships in relation to the exercise of civil jurisdiction except where the ship has incurred some liability while in internal waters and is passing through the territorial sea after leaving them.[44]

In the **contiguous zone**, up to 24 miles from the baselines or 12 miles to seaward of the territorial sea, the coastal State may exercise jurisdiction only to prevent infringement of its customs, fiscal, immigration and sanitary laws. It may only seek to enforce its laws for an infringement of laws about those four topics which are committed within its territory or territorial sea.[45] In other words, if a foreign ship or person on it commits some offence in relation to customs, fiscal, immigration or sanitary laws, the offence must have occurred in the territorial sea but the coastal State may still take enforcement action in the contiguous zone (without a necessity for hot pursuit).

The **exclusive economic zone (EEZ)** extends for 200 nautical miles from the baselines and the coastal State and has sovereign rights for exploration and exploitation natural resources, living and non-living in the water, the seabed and the subsoil.[46] Other States have the freedom of navigation and these include the right to lay submarine pipelines.[47] Coastal States have rights over installations relating to oil and gas as they are a natural resource, including immigration laws relating to the installations, and they also have the right to establish safety zones around them up to 500 metres.[48]

The outer or **extended continental shelf** provisions give coastal States a right to claim the continental shelf beyond the EEZ, where it is part of the coastal States' natural prolongation of its land territory to the outer edge of the continental margin, subject to a fairly complex formula laid down in UNCLOS.[49] Despite that complexity, the outer limit must not exceed 350 nautical miles.[50] The coastal State rights are limited to seabed and subsoil; that is, crabs and such on the seabed, and oil and gas in the subsoil.

The Continental Shelf was established pursuant to the Convention on the Continental Shelf 1958 and it was and is derived from a geographical concept of the sea shelf extending offshore and contiguous with the coastal state land territory. The *Seas and Submerged Lands Act* proclaims Australia's rights in the outer continental shelf.[51] UNCLOS established a Commission on the Limits of the Continental Shelf (CLCS) to receive, comment and make recommendations on coastal States' claims to the outer continental shelf.[52] In 2004, Australia lodged a claim which was approved in large part.[53]

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40 Article 21.

41 Article 22.

42 Article 25.

43 Article 27.

44 Article 28.

45 Article 33.

46 Articles 56, 57.

47 Article 58.

48 Article 60.

49 Article 76.

50 Article 76.

51 Section 11.

52 UNCLOS Art 76, Annex II and the Statement of Understanding adopted on 29 August 1980; see the UN Division of Ocean Affairs and Law of the Sea website; <www.un.org/Depts/los/index.htm>.

Offshore jurisdictional arrangements under UNCLOS

The history of UNCLOS states:[54]

> *Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a more unique feature, a binding procedure for settlement of disputes between States - these are among the important features of the treaty. In short, the Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life.*
>
> *"Possibly the most significant legal instrument of this century" is how the United Nations Secretary-General described the treaty after its signing. The Convention was adopted as a "Package deal", to be accepted as a whole in all its parts without reservation on any aspect. The signature of the Convention by Governments carries the undertaking not to take any action that might defeat its objects and purposes. Ratification of, or accession to, the Convention expresses the consent of a State to be bound by its provisions.*

Australia, a coastal State under UNCLOS, has sovereign rights in its ports and internal waters (waters inside of the baselines). It also has sovereign rights in the territorial sea except over vessels on innocent passage as they pass through the territorial sea. If these vessels do almost anything, except in emergency, they lose the innocent passage status. The rights in these areas include rights over the seabed, sub-soil, water column, sea surface and air space above it.

Australia's rights in the contiguous zone relate to enforcing customs, fiscal, immigration or sanitary laws within its territory or the territorial sea relating to infringements within the territorial sea.[55]

In the EEZ, Australia has sovereign rights over exploring and exploiting, conserving and managing the natural resources, whether living or non-living.[56] In effect, this means it can legislate for fisheries[57] and for oil and gas. This also extends to other matters, such as controlling artificial islands and installations and protecting the marine environment. Australia must, however, have due regard to the rights and duties of other States and act within the provisions of UNCLOS. Foreign States have freedom of the seas.

In the extended continental shelf, Australia only has sovereign rights for the purpose of exploring and exploiting its natural resources on the seabed and in the subsoil and this includes drilling on the shelf.[58] The natural resources are defined as mineral and other non-living resources together with living sedentary species on our under the seabed.[59] These rights do not extend to the waters or air space and they cannot be exercised so as to infringe on the navigation and other rights of the freedoms of other States.[60] The rights also extend to artificial islands, installations and structures.[61]

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53 The CSC website has full details, see <www.un.org/Depts.los/clcs_new/clcs_ home.htm>.

54 www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm

55 Article 33.

56 Article 56.

57 There are extensive provisions about preserving the living resources, which means fish stocks. See Articles 61-68.

58 Articles 77, 81.

59 Article 77(4).

60 Article 78.

61 Article 80.

Other relevant international obligations

A further key convention to which Australia is a signatory is the Maritime Labour Convention, 2006.

The Maritime Labour Convention, 2006 (MLC 2006) was agreed with the cooperation of many bodies, but particularly the International Labour Organisation and the International Maritime Organisation. Australia ratified the convention in December 2011 and it will come into force internationally, and for Australia on 21 August 2013.[62] This is the first convention to bind State parties to a minimum level of living conditions, standards of employment conditions, hours for rest, workplace health and safety, managing seafarers complaints, social security and standards of catering. When introduced into Australian law, the MLC 2006 will require foreign flagged ships to apply the minimum provisions to the employment of seafarers on their ships

Australia is also a party, for example, to the:

- Biosecurity Convention 1992, to be given force by the (exposure draft) Biosecurity Bill 2012 (Cth);[63]
- IMO Convention on the Facilitation of International Maritime Traffic 1965,[64] for which the main objectives are to prevent unnecessary delays in maritime traffic, to aid co-operation between governments and to secure a degree of uniformity in formalities and other procedures - in particular, the Convention reduces the number of declarations which can be required by public authorities;
- Convention on Maritime Ports 1923[65] which provides for equality of treatment between all parties of their ships, cargoes and passengers - its objective is to prevent port state regulation being used as an instrument to harass or otherwise disadvantage ships of competing maritime powers, but this does not prevent special treatment for the ships of other State parties under a treaty or convention, or for enforcement by a State of importation of people or things forbidden by law.[66]

Finally, there are numerous regional agreements under which maritime countries exchange information and support each other in their efforts to enforce international standards on ships entering their ports. Australia is a party to the Tokyo Agreement and the Indian Ocean MOU.[67]

62 Not yet in force for Australia at time of writing; [2010] ATNIF 44.

63 Convention on Biological Diversity, 1992 [2003] ATS 32.

64 [1986] ATS 12.

65 Convention on the International Regime of Maritime Ports, 1923 [1926] ATS 24.

66 Articles 15,17.

67 Asia-Pacific Regional Cooperation on Port State Control; Memorandum of Understanding on Port State Control in the Indian Ocean Region 1998.

6 TOR 1 – the jurisdictional coverage of the scheme

Recommendation 1

The jurisdictional coverage of the Seacare scheme should:

- **enshrine industry practice and be consistent with Australia's domestic and international obligations; and**
- **not impose a greater regulatory burden on industry; and potential may exist for the regulatory burden on the offshore hydrocarbons sector in particular to decrease.**

6.1 TOR 1(a) - OHS(MI) Act interaction with other legislation

For employers, the safety and well-being of maritime employees, contractors and third parties, is and will always be, the most important priority.

Since enacted in 1993, the OHS(MI) Act has provided an effective framework for workplace health and safety in the maritime sector. Research for this submission indicates that the Act itself does not appear to have given rise to substantive proceedings in the courts or before the Fair Work Commission.

Industry practice and principles arising from Australia's domestic and international obligations should frame a response to questions regarding OHS(MI) Act interaction with work health and safety legislation operating in other jurisdictions.

AMMA members advise that, in practice, it is reasonably clear which jurisdiction applies, including as to the interaction between the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGS Act) and the OHS(MI) Act. In practice, National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) has been able to provide advice about the application of the OPGGSA and the NOPSEMA jurisdiction to regulate safety.

In relation to domestic and international obligations, the information provided in section 5 above is relevant to the respective operation of the:

- OSH(MI) Act;
- State and Territory WHS schemes; and
- the OPGGS Act.

Further, it must be noted that the regulatory burden on industry is significant. In particular, the framework formed by the overlapping jurisdictions is one of the factors contributing to the particular regulatory burden to which offshore oil and gas sector is subjected. In 2008, the Council of Australian Governments identified the upstream petroleum sector as a 'hotspot' area where overlapping and inconsistent regulation threatens to impede economic activity. The Productivity Commission undertook a review and various reforms were implemented as a result,[68] as were reforms following the Australian Government's, *Final Government Response to the Report of the Montara Commission of Inquiry.*

68 Productivity Commission (2009), *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector - Research report*

The practical difficulties are demonstrated by offshore industry vehicles. Due to the overlapping jurisdictions, some offshore industry vessels can be both:

- a 'facility' for the purposes of the OPGGS Act, requiring observance of the safety case regime operating under that Act; and
- a vessel capable of navigation and self-propulsion, and therefore subject to the Navigation Act.

The nature of these vessels was considered in *Re Frame and Woodside Energy Ltd* [2005] AATA 997, where reference was made to *Addison and Ors v Denholm Ship Management (UK)* [1997] ICR 770 and *Perks v Clark (Inspector of Taxes)* [2001] 2 Lloyd's Rep 431.

For these offshore industry vessels, the regulatory burden would be significantly reduced if one Act and one regulator applied.

In other sectors, AMMA members advised that the Australian Maritime Safety Authority (AMSA) inspectors provided an appropriate mechanism for the inspection of vessels. For safety and operational reasons, it is important to limit the number of people inspecting ships and AMSA inspectors are regarded as having an appropriate level of independence and expertise.

6.2 TOR 1(b) – Coverage of the Seacare scheme – jurisdictional issues

Section 18 of the Seafarers Act states that the Act extends to all places outside Australia. This includes the external Territories. Section 19 provides for the application of the Act.

It is recommended again that coverage of the Seacare scheme should be based on industry practice and the relevant principles, as stated in section 5 of this submission.

One model to which attention is drawn is the Maritime Powers Bill 2012 (Cth). The bill appears to have been drafted with some precision as to coverage, and to be based on practical industry experience, relevant Australian obligations under international law, and geographical limits of Australian domestic law.

Section 8, for example defines 'Australia', when used in a geographical sense, to mean:

> (a) the external Territories; and
>
> (b) the territorial seas of Australia and the external Territories; and
>
> (c) any installation attached to:
>
> (i) the continental shelf of Australia or an external Territory; or
>
> (ii) the seabed within the exclusive economic zone of Australia or an external Territory; and
>
> (d) the safety zone around any such installation; and
>
> (e) the airspace above Australia (including the airspace above the areas covered by paragraphs (a) to (d)).

Further, the extraterritorial application of the Maritime Powers Bill is that it would apply in 'Australia', defined as extending to the limits of the territorial sea, to offshore installations in the EEZ or continental shelf and the safety zones around them, and the airspace above these areas.[69] It extends to the external Territories and outside Australia within the limits.[70] It is expressed not to limit the executive power of the Commonwealth, is in addition to other laws and is not intended to exclude or

69 Section 8.

70 Section 4.

limit concurrent State or Territory laws,[71] except of course where they offend under section 109 of the Commonwealth Constitution.

In relation to foreign vessels, the Act provides that it does not authorize exercise of powers unless the foreign vessel is:

- in internal waters;
- in the territorial sea but not on innocent passage;
- requested or agreed by the flag state to act; or
- the action is to ensure the safety of some person.[72]

In relation to the exercise by Commonwealth officers of these powers in Australian State and internal Territory waters,[73] they may only be exercised in the event of continuous exercise of powers (hot pursuit) in relation to conduct outside of them, or Commonwealth navigable waters, or to ensure the safety of some person.[74]

It is suggested that the Maritime Powers Bill 2012 provides a model for any changes to coverage of the Seacare scheme.

6.3 TOR 1(c) – Exemptions from the Seacare scheme and declarations under the Navigation Act

Section 20A of the Seafarers Act provides that the Act does not apply to 'exempt employment'. That section allows the authority to exempt from the application of the Act the employment:

- on a particular ship of all employees;
- of a particular group or groups of employees; or
- of a particular employee or employees.

While it is noted that this arrangement for exemption from the application of the Seafarers Act may not accord with contemporary legislative drafting techniques, AMMA members advise that it does not present general practical difficulties.

71 Sections 4-6.

72 Section 45.

73 Obviously the Commonwealth has powers in the areas in and around offshore territories, but the Offshore Constitutional Settlement 1979 and its derivative powers come into play for the States and the two self-governing Territories; see White *Australian Offshore Laws*, Chapters 2 and following.

74 Section 46. Similar provision is made about aircraft; s.47.

7 TOR 2 – the legislative scheme

Recommendation 2
The Seafarers Act requires significant amendment to meet the contemporary objectives of a workers' compensation scheme. While one option may be to collapse Seacare, allowing adoption of either the Comcare scheme or a State scheme, AMMA members would like more detailed information before committing to such a reform.
Recommendation 3
It is important to the work, health and safety of seafarers that the model WHS laws not be extended offshore. This approach should not be adopted.

7.1 Provisions in the legislation which need updating

In 1992, the Seafarers Act was enacted to moves away from an 'outmoded compensation regime' and to 'combine fair, earnings-related benefits with comprehensive rehabilitation requirements and other measures aimed at getting injured employees restored to health and back to work as quickly as possible'. However, the Act no longer does so.

In the past 20 years, other workers' compensation schemes in Australian jurisdictions have undergone reform and review, often on a number of occasions. Accordingly, it is now the Seacare scheme which is 'outmoded' and it does not meet the rehabilitation and return to work objectives as effectively and efficiently as other schemes. A *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* published by Safe Work Australia provides compelling evidence in this respect.

AMMA members expressed concern about the noted increase in the regulation of industry since 1992 and suggested that this factor be taken into account when consideration is given to the updating of the legislation.

The ASA/AMMA submission to the Seacare authority a decade ago identified a number of provisions in the Seafarers Act which required updating, such as the definition of 'injury'. These identified amendments are required still; for example, the definition of 'injury' under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) is quite different in scope. Again, the Safe Work Australia publication demonstrates that the specific provisions of Seafarers Act have not kept up with contemporary legislative provision for workers' compensation in Australia and New Zealand. The data in the Safe Work Australia publication is consistent also with matters raised by AMMA members:

- provision as to workers living overseas and, in particular in relation to rehabilitation and return to work;
- apparent differences between payments to permanent and casual employees respectively; and
- 'journey claims', when seafarers elect not to take up the first available avenue of return to the home port.

7.2 Consistency with model WHS laws

While the aim of the 'model' Work Health and Safety Act (model WHS laws) developed by Safe Work Australia is to provide all workers in Australia with the same standard of health and safety protection regardless of the work they do or where they work, the model laws have not been adopted in all jurisdictions at this stage.

It is important to the work, health and safety of seafarers that they are not extended offshore.

As described in section 1, seafarers operate in a complex and highly specialised work environment, as reflected in section 3 of the OHS(MI) Act.

Rather than ensuring safety, extension of model WHS legislation offshore would be inconsistent with:

- industry practices, such as those relating to the 'internal economy of the ship';
- current domestic and international law obligations, such as port state control and UNCLOS; and
- the complexity of the existing overlapping legislative framework which imposes a heavy regulatory burden on industry offshore – in relation to the offshore petroleum sector, for example, these matters were considered in the Australian Government's *Final Government Response to the Montara Commission of Inquiry*.

For industry, rights of entry are a vitally important difference. As discussed above, the Maritime Powers Bill 2012 appears to adopt a carefully considered model as to the conferral and exercise of powers offshore. It provides, however, for very limited rights of entry by Commonwealth Government officers.

Safety is, in the view of AMMA members, regulated appropriately by AMSA where jurisdiction appropriately exists. The nature of the equipment and work environment on vessels require that the number people able to enter be limited wherever possible. AMSA inspectors, however, have an appropriate level of independence and expertise to the specific powers they must exercise do not jeopardise workplace health and safety.

7.3 Consistency with the SRC Act

The *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* provides detailed information about the substantive differences between the SRC Act and the Seafarers Act.

In section 2.1 above, the extracts from the explanatory notes to the Seafarers Bill 1992 indicate that it was thought that the benefits of a niche scheme, specific to the needs of seafarers, would outweigh the potential for increased scheme costs. However, in the intervening period, the participation in the Seacare scheme has not increased. Moreover, the contemporary evidence (such as in the Safe Work Australia publication) shows that a larger scheme, such as the Comcare scheme, is likely to provide appreciably greater rehabilitation and return to work opportunities than a niche scheme.

In section 4.3 above, it is noted that the SRC Act is under review currently. AMMA members have indicated that detailed information would be welcomed about the effects of collapsing the Seacare scheme into either the Comcare scheme, or allowing employers to opt for the Commonwealth or a State workers' compensation scheme. With further information, and an opportunity to examine the recommendations of the review of the SRC Act, AMMA members may communicate further with the review taskforce about this term of reference.

8 TOR 3 – premium issues

Recommendation 4

The sustainability of the Seacare scheme is jeopardised by a large number of matters affecting the real costs of the scheme. The comparatively high costs are not matched by better outcomes, such as in relation to rehabilitation and return to work. These matters require a legislative response.

8.1 Industry concerns

The Media Release which announced the review of the Seacare scheme stated that:

> *It is the Government's intention that the review will not consider any reduction in existing benefits afforded to workers covered by the Seacare scheme.*

This objective seems to be inconsistent with TOR 3 which seeks information about the potential to reduce premiums.

AMMA members provided information and raised matters of concern about premium costs:

- the wide definition of 'injury' in section 3 of the Seafarers Act is of direct relevance to premium costs;
- given the high level of self-insurance by industry, the premiums should not be examined in isolation from other costs to employers;
- reluctance by insurers to provide coverage (and refusal by protection and indemnity association, not envisaged at enactment of the Seafarers Act) results in comparatively large excesses;
- the reduction in size of the sector is a contributing factor; and
- far greater flexibility is required for redemptions as an option to serve the best interests of both employee and employer.

Together with further concerns identified in the past ASA/AMMA submission, these matters have long required a legislative response. They contribute directly to the sustainability of the Seacare scheme.

The past ASA/AMMA submission provided much useful evidence of relevance to this term of reference.

9 TOR 4 – governance arrangements

9.1 Administration and accountability

AMMA members expressed concern about past failures to update the governance arrangements for the Seacare scheme.

The legislative provision in part 8 for administration does not reflect contemporary principles regarding the delegation of administrative power; for example, in relation to accountability for administrative decisions and the ability to sub-delegate.

Part 8 of the Seafarers Act is drawn to the attention of the review taskforce, but no specific recommendations are made in relation to this term of reference.