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Law and Bills Digest Section

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Date introduced: 13 October 2016

House: House of Representatives

Portfolio: Employment

Commencement: various dates as set out in the body of this Bills Digest

Links: The links to the Seafarers and Other Legislation Amendment Bill 2016, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page.

The links to the Seafarers Safety and Compensation Levies Bill 2016, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page.

The links to the Seafarers Safety and Compensation Levies Collection Bill 2016, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page.

All three Bills can be found through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at April 2017.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
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The Bills Digest at a glance

This Bills Digest relates to three Bills.

Coverage

The primary change proposed in the Seafarers and Other Legislation Amendment Bill 2016 is in relation to the coverage of the Seacare scheme. The changes, which are intended to clarify who is covered by the scheme, are made in response to the decision of the Full Court of the Federal Court in Samson Maritime Pty Ltd v Aucote. The effect of the decision was to expand the coverage of the Seafarers Rehabilitation and Compensation Act 1992, and therefore the Seacare scheme, to seafarers who were employed on a ship registered in Australia by an Australian trading corporation.1

The Seafarers and Other Legislation Amendment Bill provides a new two-tiered test so that the Seafarers Rehabilitation and Compensation Act applies to the employment of an employee on a prescribed vessel provided:

• the vessel is not used wholly or predominantly for intra-State voyages or tasks and
• any of the specified constitutional conditions are satisfied.

Entitlements

In addition, the Seafarers and Other Legislation Amendment Bill 2016 makes changes to entitlements by amending the Seafarers Rehabilitation and Compensation Act to:

• extend the definition of ‘medical treatment’ to include further types of compensable treatment
• reduce the threshold for compensation for a permanent impairment that is a binaural hearing loss from 10 per cent to five per cent
• change the level of contribution of employment to an injury that is a disease from a ‘material’ to a ‘significant degree’ and
• change the coverage of psychological injuries to exclude injuries suffered as a result of ‘reasonable administrative action taken in a reasonable manner’ rather than ‘as a result of reasonable disciplinary action’.

Workplace health and safety

The Seafarers and Other Legislation Amendment Bill 2016 repeals the Occupational Health and Safety (Maritime Industry) Act 1993 and extends the operation of the Work Health and Safety Act 2011 so that it applies to the Seacare scheme.

Levies Bills

The other two Bills in the package are the Seafarers Safety and Compensation Levies Bill 2016 and the Seafarers Safety and Compensation Levies Collection Bill 2016 which replace the existing statutes for the imposition and collection of levies.

The Seafarers Safety and Compensation Levies Bill 2016 imposes two levies—an insurance levy and a cost recovery levy on seafarer berths.

The seafarers insurance levy will support a safety net fund for seafarers where the employer cannot meet its workers compensation obligations because of financial circumstances. The seafarers cost recovery levy is intended to recover the costs of the Safety, Rehabilitation and Compensation Commission, Comcare and the Australian Maritime Safety Authority in performing their respective regulatory functions in relation to the Seacare scheme where these costs are not readily attributable to a specific organisation or individual.

The Seafarers Safety and Compensation Levies Collection Bill 2016 provides for the collection of the proposed levies.

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Purpose of the Bill

This Bills Digest relates to three Bills.

The purpose of the Seafarers and Other Legislation Amendment Bill 2016 (Seafarers Legislation Bill) is to amend the Seafarers Rehabilitation and Compensation Act 1992 (Seafarers Act) to establish a two-tier test to determine who is covered by the Seacare scheme, to update workers’ compensation and work health and safety arrangements which are currently in place and to give effect to recent changes to the Maritime Labour Convention.1

The purpose of Seafarers Safety and Compensation Levies Bill 2016 (Levies Bill) is to impose two levies—being an insurance levy and a cost recovery levy on seafarer berths. The Seafarers Safety and Compensation Levies Collection Bill 2016 (Levies Collection Bill) sets out the procedures associated with the collection of those levies.

Structure of the Bills

The Seafarers Legislation Bill contains three Schedules.


Schedule 2 comprises five Parts:

• Part 1 amends the Seafarers Act to set out new rules about the compensation payable for household services and attendant care services where an employee has suffered a catastrophic injury.

• Part 2 amends the Seafarers Act to implement amendments to the Maritime Labour Convention relating to insurance obligations of employers of seafarers.


• Part 4 amends the SRC Act to insert rules about the compensation payable for household services and attendant care services where an employee has suffered a catastrophic injury in equivalent terms to those which are to be inserted into the Seafarers Act in Part 1.

• Part 5 amends the Work Health and Safety Act so that it will apply to the Seacare scheme (following the repeal of the OHS(MI) Act).

Schedule 3 contains application and transitional provisions to a number of statutes which are relevant to the changes set out above.

The Levies Bill comprises four Parts. Part 2 establishes the seafarers insurance levy, whilst Part 3 establishes the seafarers cost recovery levy. The Levies Collection Bill does not contain separate Parts.

Background

About the Seacare scheme

‘Seacare is a national scheme of occupational health and safety (OHS), rehabilitation and workers’ compensation arrangements which applies to defined seafaring employees and—in relation to OHS—defined third parties.’3 Claims for workers’ compensation are managed by the employee’s employer. This management responsibility is often outsourced to an employer’s insurer or third party with claims management expertise. Premium income from these insurance policies does not contribute to the cost of scheme services, unlike arrangements in centrally-managed schemes.

The Seacare scheme incorporates the Seafarers Safety Net Fund (the Fund) which is a ‘safety net employer’ to stand in place of an employer where there is no employer (usually due to that employer going out of business) against whom a seafarer can make compensation claim. In such circumstances, the Fund determines any claim and may accept liability for any eligible benefits. Where there was a workers’ compensation insurance policy

covering the employee under the *Seafarers Act*, the Fund has the same rights as the insured employer to recover costs from that insurer.

The Fund is maintained through the collection of monies from scheme employers under the *Levy Act* and the *Levy Collection Act*. The Minister determines, in consultation with relevant stakeholders, the appropriate rate of levy payable by employers before making a recommendation to the Governor-General that a regulation be made prescribing the rate. The current levy rate of $15 per berth took effect on 1 April 2008.  

The Seacare scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority) which comprises an independent Chairperson and Deputy Chairperson, the Chief Executive Officer of the Australian Maritime Safety Authority, two employer representatives and two employee representatives.  

**Seacare jurisdictional coverage**

In 1975, the High Court upheld the validity of the *Seas and Submerged Lands Act 1973* (SSL Act) in which the Commonwealth asserted sovereignty over the territorial sea, including the seabed beneath the three nautical miles of waters from the low tide mark commonly described as coastal waters.  

Following this decision, the Commonwealth and the states negotiated the *Offshore Constitutional Settlement* (OCS), in which they agreed to a division of their offshore rights and responsibilities. In accordance with the OCS, the Commonwealth legislated to confer jurisdiction on the states and the Northern Territory over the three nautical miles of the territorial sea adjacent to their respective coastlines. This had the effect of splitting the responsibility for covering seafarers for workers’ compensation and OHS purposes between the states for intrastate voyages and the Commonwealth for most other voyages.

Initially, Seacare scheme coverage was defined by reference to Part II of the *Navigation Act 1912*. However, the decision to repeal and replace the *Navigation Act* with a more modern statute created the impetus for the Seacare Authority to release a discussion paper about Seacare jurisdictional coverage.  

According to Aon Risk Services Australia, the key challenge faced by employers operating in the Seacare scheme is determining whether it applies to their workers. The reasons for this are:

- there is a requirement to reference multiple pieces of legislation (including repealed legislation) and regulatory declarations  
- the composition (that is, Australian resident versus non-resident) of the vessel’s crew needs to be known and this information is not always available to employers who are supplying only some of the crew—for example, catering staff only  
- when assessing whether the vessel is engaged in interstate or intrastate trade, the *Seafarers Act* is silent on whether this relates to only the voyage on which the injury occurred or the vessel’s trading patterns more generally, and if so over what period of time  
- many enterprise agreements stipulate that the scheme is to apply to workers when this is at odds with the legislation (for example on vessels engaged in intrastate trade)  
- recent legal precedents have dramatically shifted the scope of the scheme’s coverage beyond what was commonly understood by industry.

The coverage provisions of the *Seafarers Act* have been described as ‘not readily understood by maritime operators, employers and employees’.

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7. Attorney-General’s Department (AGs), *Offshore constitutional settlement*, AGs website.  
8. The *Navigation Act 1912* was repealed and replaced by the *Navigation Act 2012*.  
Legislative amendment

The legal precedents to which Aon Risk Services Australia alluded were the decision of the Full Court of the Federal Court in *Samson Maritime Pty Ltd v Aucote*12 on appeal from the decision of the Administrative Appeals Tribunal (the AAT) in *Aucote and Samson Maritime Pty Ltd*.13

The practical effect of those decisions was to expand the coverage of the *Seafarers Act*, and therefore the Seacare scheme, to seafarers who were employed on *prescribed ships* which were registered in Australia and were owned by an Australian constitutional corporation.14 This included those engaged in intrastate trade—provided that they satisfied the definition of *prescribed ship*.15 This may, for example, have included those Australian-owned vessels working in the offshore oil and gas industries, harbour tugs, ferries and small work boats of all kinds engaged solely in the waters of one state.

In response, the Government enacted the *Seafarers Rehabilitation and Compensation and Other Legislative Amendments Act 2015* on 14 May 2015 to bring about a return of the status quo that existed before the decisions and to put beyond doubt that the Seacare Scheme does not cover injuries sustained during intrastate voyages from the commencement of the scheme until 26 May 2015.16

As an interim measure, on 24 March 2015, the Seacare Authority granted exemptions from coverage by the *Seafarers Act*.17 The exemptions were reissued for a further period, effective from 21 April 2016.18

The Minister for Employment also made declarations under the *OHS(MI) Act* and the *Seafarers Act* that certain ships were not prescribed for the purposes of those Acts. These declarations are due to sunset two years after they took effect—that is, on 23 June 2017.

The exemptions and declarations together ensure that these ships are not covered by the Seacare scheme and are instead covered by state legislation, as had been understood to be the case prior to the *Samson v Aucote* decision.19

The Seafarers Legislation Bill responds to these ongoing concerns about the complexity of coverage of the Seacare scheme by establishing a new two-tiered coverage test. (See discussion below under the heading ‘Key issue—coverage’.)

Effectiveness of the Seacare scheme

The coverage of the Seacare scheme has been diminishing over time. According to the Explanatory Memorandum, ‘as of July 2015, the scheme was known to apply to 336 vessels and 6,863 employees’.20

Table 1: employee numbers, full-time equivalent (FTE) employees and hours worked

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Total employees</td>
<td>7,942</td>
<td>8,486</td>
<td>7,541</td>
<td>6,960</td>
<td>5,984</td>
</tr>
<tr>
<td>Total FTE</td>
<td>5,416</td>
<td>5,273</td>
<td>4,727</td>
<td>4,410</td>
<td>3,999</td>
</tr>
<tr>
<td>Total hours worked</td>
<td>22,684,824</td>
<td>22,965,466</td>
<td>21,315,138</td>
<td>19,495,844</td>
<td>17,924,092</td>
</tr>
</tbody>
</table>


The table below provides statistical information about the claims lodged and claims accepted under the Seacare scheme.

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14. That is, a corporation covered by section 51(xx) of the Constitution—a trading corporation or financial corporation formed within the limits of the Commonwealth, or a foreign corporation.
15. For the purposes of the *Seafarers Act*, the term *prescribed ship* means a ship prescribed for the purposes of the *Navigation Act 1912*, which are generally Australian ships or foreign ships with Australian crews.
Table 2: claims data

<table>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Claims lodged</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims accepted</td>
<td>243</td>
<td>225</td>
<td>177</td>
<td>160</td>
<td>97</td>
</tr>
<tr>
<td>Claims rejected</td>
<td>30</td>
<td>13</td>
<td>16</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>Claims pending</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>12</td>
<td>10</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>274</td>
<td>241</td>
<td>200</td>
<td>182</td>
<td>113</td>
</tr>
<tr>
<td><strong>Claims accepted</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims accepted—on duty</td>
<td>229</td>
<td>204</td>
<td>168</td>
<td>153</td>
<td>88</td>
</tr>
<tr>
<td>Claims accepted—off duty</td>
<td>7</td>
<td>13</td>
<td>6</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Journey claims</td>
<td>4</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Claims while studying</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Property claims</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>243</td>
<td>225</td>
<td>117</td>
<td>160</td>
<td>97</td>
</tr>
</tbody>
</table>


Under subsection 78(4) of the *Seafarers Act* an employer must, upon receipt of a written request from an employee for a reconsideration of a claim determination, arrange for an industry panel or a Comcare officer to assist in reconsidering the determination. This review is the first stage of the review process. The Administrative Appeals Tribunal (AAT) is the second tier of review for disputed claims.

Given the low claims rate, the Seacare scheme has a surprisingly high disputation rate as the table below indicates.

Table 3: rejection and disputation rate

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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Claims lodged</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Claims rejected</td>
<td>274</td>
<td>241</td>
<td>200</td>
<td>182</td>
<td>113</td>
</tr>
<tr>
<td>Rejection rate (%)</td>
<td>11.0</td>
<td>5.4</td>
<td>8.0</td>
<td>5.5</td>
<td>5.3</td>
</tr>
<tr>
<td>AAT applications lodged</td>
<td>50</td>
<td>64</td>
<td>85</td>
<td>83</td>
<td>61</td>
</tr>
<tr>
<td>Disputation rate (%)</td>
<td>18.3</td>
<td>26.6</td>
<td>42.5</td>
<td>45.6</td>
<td>54.0</td>
</tr>
</tbody>
</table>


Seacare review

On 16 October 2012, the Minister for Employment and Workplace Relations, Bill Shorten, announced a review of the Seacare scheme stating that the aim of the review was to ‘modernise the federal seafarers workers’ compensation scheme, which has not been reviewed since it was established in 1992, to ensure it is working effectively and efficiently for Australia’s seafarers’. 21 The report of the review (Seacare review) was published on 20 May 2013. 22 According to Mr Shorten:

The legislation underpinning the Seacare Scheme has not kept pace with changes in harmonisation of work health and safety laws, workers’ compensation reforms or maritime industry reforms. This has made the scheme complex and resulted in uncertainties in determining which vessels are covered under the Scheme and which are covered under the various state or territory schemes.

The review conducted by Mr Robin Stewart-Crompton emphasises the complex legislative and administrative structure of the scheme and its relatively poor performance compared to similar schemes.23

In carrying out the Seacare review, Mr Stewart-Crompton had access to a 2005 report by Ernst & Young of an evaluation of the Seacare scheme which has not been published and the recommendations made by Peter Hanks QC24 arising from his review of the SRC Act (Hanks report).25 Many of the amendments in the Seafarers Legislation Bill reflect the recommendations of the Seacare review.

The Government attempted to implement many of the recommendations of the Hanks report when it introduced the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (2015 Bill) into the House of Representatives on 25 March 2015.26 However, the Bill lapsed when the Parliament was prorogued in April 2016. The Seafarers Legislation Bill contains some measures which were also contained in the 2015 Bill. Those measures are discussed as key provisions in the body of this Bills Digest.

Consultation

According to the Regulation Impact Statement (RIS) for the Seafarers Legislation Bill:

The Department held five one-day workshop consultations with stakeholders between May and August 2015 to discuss possible reforms to the Seacare scheme. Workshops were held on coverage, governance, work health and safety and workers’ compensation arrangements, with two workshops held to discuss coverage given the complexity of the matter. These consultations included industry representatives and employers, maritime unions and relevant Commonwealth government agencies (many of the attendees were Seacare Authority members or deputies).27

On 21 December 2015, the Department of Employment released a consultation RIS outlining proposed reforms to the Seacare scheme for public comment.28 Although the RIS indicates that there were 15 submissions, at the time of writing this Bills Digest only ten are available on the Department of Employment website.29

The final form of the RIS is contained in the Explanatory Memorandum to the Seafarers Legislation Bill. It sets out three possible options for change:

- preserve the status quo
- abolish the Seacare scheme
- reform the Seacare scheme.

The first of those options was not considered to be feasible on the grounds that the ongoing lack of clarity over the coverage of the Seacare scheme presents significant issues for Seacare employers and employees and other maritime industry participants.30 The second option—to abolish the scheme—was not the preferred option even

23 B Shorten (Minister for Employment and Workplace Relations, Financial Services and Superannuation), Modernising the Seacare scheme, media release, 20 May 2013.


29 DoE, ‘Seacare scheme reforms: consultation regulation impact statement: list of submissions’, DoE website, [2016].

though it was acknowledged that it could potentially save costs for the government. However, adopting the second option would take time to implement and issues requiring urgent action would not be addressed in the meantime.\(^\text{31}\) The Seafarers Legislation Bill represents the third option. The rationale for adopting this option is that it would provide much-needed certainty to maritime industry employers and employees over the coverage of the Seacare scheme.\(^\text{32}\)

**Committee consideration**

**Selection of Bills Committee**

On 10 November 2016, the Senate referred an inquiry into the package of Bills to the Education and Employment Legislation Committee (Education and Employment Committee) for inquiry and report by 7 February 2017.\(^\text{33}\) The majority report of the Education and Employment Committee was to the effect that the package of Bills should be passed.\(^\text{34}\) The views expressed in the dissenting reports by the Australian Labor Party (ALP) Senators and the Australian Greens (Greens) Senators are set out below.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills published its comments in relation to the Bills on 9 November 2016.\(^\text{35}\) The Committee’s comments and the Minister’s subsequent response to the Committee’s written request for further information are set out under the heading ‘Key issues and provisions’ below.

**Policy position of non-government parties/independents**

**Australian Labor Party**

The ALP Senators on the Education and Employment Committee dissented from the majority, stating that they were opposed to the package of Bills which would ‘radically alter’ the Seacare scheme. The basis for the dissent was:

> ... the Bill would hinder injured seafarers’ ability to return to work after an injury. The Bill would also result in more confusion over the scheme’s coverage, leading to even more costly, time-consuming and unnecessary litigation. Labor is very concerned about this development.\(^\text{36}\)

**Australian Greens**

Similarly, the Greens Senators on the Education and Employment Committee did not support the Bills. Whilst the Greens stated that they ‘support the appropriate integration of the maritime industry into the broader workplace health and safety regime’ they considered:

> ... the Seafarers Safety and Compensation Bills package proposed by the government has not been developed with proper consultation with industry, in particular maritime unions, and will have significant detrimental consequences for workers in the maritime sector.\(^\text{37}\)

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31. Ibid., p. xlvi.
32. Ibid.
33. The terms of reference, submissions to the Education and Employment Committee and the Committee’s report are contained on the inquiry homepage.
37. Ibid., p. 25. However, it should be noted that the Department of Employment strongly denied that this was the case, setting out the timetable of its industry and union stakeholder consultation in Department of Employment, *Supplementary submission* to the Senate Education and Employment Legislation Committee, *Inquiry into the Seafarers and Other Legislation Amendment Bill 2016, the Seafarers Safety and Compensation Levies Bill 2016 and the Seafarers Safety and Compensation Levies Collection Bill 2016*, submission no. 2.1, 19 December 2016, Attachment A.
Position of major interest groups

**Union groups**

The Australian Council of Trade Unions (ACTU) expressed concern that the Australian Government ‘did not develop any of the Bills through consultation with the ACTU and maritime unions’ and specifically opposed some of the proposed amendments.  

The Maritime Union of Australia (MUA) strongly opposes the Seafarers Legislation Bill. In summary, the MUA considers that it:

- attacks maritime workers’ ability to get proper compensation for injuries by introducing a new coverage clause that does not include many vessels currently covered by Seacare
- as a result many seafarers will be pushed into inferior state and territory compensation schemes in a state they do not reside in
- relevant vessels will be pushed to state OHS inspectorates which are not as well-equipped to carry out inspections as AMSA
- a significant reduction in vessel numbers would threaten the future survival of the national Seacare scheme
- the proposed opt-in mechanism for Seacare is restricted to prescribed vessels and this term excludes categories of vessels currently covered by the scheme.

**Employer groups**

The submission by Maritime Industry Australia Ltd (MIAL) (formerly known as the Australian Shipowners Association) to the Government’s consultation paper refers to the three options that were presented. It strongly submitted that option 1 (preserve the status quo) was ‘untenable’ and that option 3 (reform the Seacare scheme) would ‘not achieve the outcome of maintaining a similar jurisdictional footprint’. It opted for option 2—that is, it considered that the best option for industry is the abolition of the Seacare scheme, with work health and safety and workers’ compensation coverage reverting to the state and territory schemes.

Employer group Australian Mines and Metals Association (AMMA) also preferred option 2 stating that 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.’

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights had no comment to make in relation to the Bills.

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38. Australian Council of Trade Unions (ACTU), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Seafarers and Other Legislation Amendment Bill 2016, the Seafarers Safety and Compensation Levies Collection Bill 2016, submission no. 5, November 2016, p. 3.
41. Ibid.
42. Australian Mines and Metals Association (AMMA), Submission to the Department of Employment, Seacare scheme reforms: consultation regulation impact statement: list of submissions, submission no. SSR1500021, February 2016, p. 2.
Seafarers and Other Legislation Amendment Bill

Financial implications
According the Explanatory Memorandum to the Seafarers Legislation Bill its financial impact will be nil.\textsuperscript{45}

Key issue—coverage
As stated above, the effect of the decision in Aucote was to expand the coverage of the Seafarers Act, and therefore the Seacare scheme, to seafarers who were employed on prescribed ships which were registered in Australia and owned by an Australian constitutional corporation.\textsuperscript{46} This included those engaged in intrastate trade—including those Australian owned vessels working in the offshore oil and gas industries, harbour tugs, ferries and small work boats of all kinds engaged solely in the waters of one state. This was a much wider coverage than was originally intended.

Item 84 of Schedule 2 to the Seafarers Legislation Bill inserts proposed Part 1A—Coverage into the Seafarers Act. Proposed Part 1A contains proposed sections 25A–25S.

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<table>
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<tr>
<th>Quick guide to Part 1A</th>
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<tr>
<td>The Seafarers Act applies to the employment of an employee on a prescribed vessel if:</td>
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<tr>
<td>• the vessel is not used wholly or predominantly for intrastate voyages or tasks and</td>
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<tr>
<td>• a constitutional condition is satisfied.</td>
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The Seafarers Act applies to the employment of an employee on a prescribed vessel if:

• the vessel is the subject of an opt-in declaration and
• a constitutional condition is satisfied.

The Seafarers Act applies to the employment of an employee on a vessel if:

• the vessel is the subject of a transitional declaration and
• a constitutional condition is satisfied.

The Safety, Rehabilitation and Compensation Commission (the Commission) may exempt the employment of any or all of the employees on a particular vessel from application of the Seafarers Act.

Within new Part 1A is a two tier test so that the Seafarers Act applies to the employment of an employee on a prescribed vessel and to the employment of a trainee who is undergoing a training course in connection with, or for the purpose of, employment by the employer on a prescribed vessel provided:

• first, the vessel is not used wholly or predominantly for intra-State voyages or tasks and
• second, any of the constitutional conditions are satisfied.\textsuperscript{47}

Prescribed vessel
Currently the Seafarers Act applies to a prescribed ship being a ship prescribed for the purposes of the Navigation Act 1912, which are generally Australian ships or foreign ships with Australian crews. The Seafarers Legislation Bill repeals this term.\textsuperscript{48} In its place item 62 of the Seafarers Legislation inserts the term prescribed vessel which is:\textsuperscript{49}

\textsuperscript{45} Explanatory Memorandum, Seafarers and Other Legislation Amendment Bill 2016, p. i.
\textsuperscript{46} That is, a corporation covered by section 51(xx) of the Constitution—a trading corporation or financial corporation formed within the limits of the Commonwealth, or a foreign corporation.
\textsuperscript{47} Seafarers Act, proposed subsection 25B(1).
\textsuperscript{48} Item 53 of Part 3 in Schedule 2 to the Seafarers Legislation Bill.
\textsuperscript{49} Item 62 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts proposed section 3A into the Seafarers Act.
• a vessel registered, or required to be registered, under the *Shipping Registration Act 1981*

• a foreign vessel of which the majority of the crew are residents of Australia or

• a vessel that is declared to be a prescribed vessel by legislative rules.\(^{50}\)

The term specifically excludes a recreational vessel,\(^{51}\) an inland waterways vessel,\(^{52}\) a fishing vessel and a fishing fleet support vessel,\(^{53}\) an offshore floating storage or production unit,\(^{54}\) and an offshore industry mobile unit,\(^{55}\) a government vessel,\(^{56}\) a local tourism vessel,\(^{57}\) and any a vessel that is declared not to be a prescribed vessel by legislative rules.\(^{58}\) This means that the coverage of the *Seafarers Act* is significantly narrowed from the broad coverage which was extended due to the decision in *Aucote*.

**Stakeholder comment**

Of concern to the MUA is the express exclusion of certain offshore vessels from the definition of *prescribed vessel*—for example, a floating production storage and offloading unit, or an offshore industry mobile unit. The MUA considers that this leaves ‘an unacceptable gap in coverage’. In addition, the MUA believes that there is an inconsistency between the express exclusion of such vessels and the opt-in provisions (set out below). This is because only prescribed vessels are entitled to opt-in.\(^{59}\)

**Intra-state voyages or tasks**

Under the Seafarers Legislation Bill, employees and trainees on a vessel that is used wholly or predominantly for *intra-State voyages or tasks* are not covered by the Seacare scheme. The Seafarers Legislation Bill defines an *intra-State voyage or task* in two ways.\(^{60}\)

First, it is a voyage, or other task, that is wholly within the *designated waters* of a particular state.\(^{61}\) A voyage is taken to be wholly within the *designated waters* of the state if a vessel is proceeding on a voyage between two places in a particular state and in the course of the voyage, the vessel is present in waters beyond the outer limits of the designated waters of the state and the presence of the vessel in waters beyond those outer limits is because it is not reasonably practicable for the vessel to remain within the designated waters of the state.\(^{62}\)

Second, it is a voyage, or other task, that is wholly within the *designated waters* of the Northern Territory. A voyage is taken to be wholly within the designated waters of the Northern Territory if the vessel is proceeding on a voyage between two places in the Northern Territory and in the course of the voyage, the vessel is present in waters beyond the outer limits of the designated waters of the Northern Territory and the presence of the vessel in waters beyond those outer limits is because it is not reasonably practicable for the vessel to remain within the designated waters of the Northern Territory.\(^{63}\)

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51. Item 54 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts the definition of the term *recreational vessel* into section 3 of the *Seafarers Act*.

52. Item 46 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts the definition of the term *inland waterways vessel* into section 3 of the *Seafarers Act*.

53. Item 62 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts proposed section 3B into the *Seafarers Act* to formally define the terms *fishing vessel* and *fishing fleet support vessel*.

54. Item 62 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts proposed section 3D into the *Seafarers Act* to formally define the term *offshore floating storage or production unit*.

55. Item 62 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts proposed section 3C into the *Seafarers Act* to formally define the term *offshore industry mobile unit*.

56. Item 43 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts the definition of the term *government vessel* into section 3 of the *Seafarers Act*.

57. Item 46 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts the definition of the term *local tourism vessel* into section 3 of the *Seafarers Act*.


61. Item 33 of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts the definition of the term *designated waters* into section 3 of the *Seafarers Act*.


Constitutional conditions
As stated above, only one of the constitutional conditions listed below needs to be met:

- either or both the employer and the operator of the vessel are constitutional corporations
- a constitutional corporation holds more than 50% of the legal ownership of the vessel or a constitutional corporation holds more than 50% of the beneficial ownership of the vessel or two or more constitutional corporations hold, in total, more than 50% of the legal ownership of the vessel or two or more constitutional corporations hold, in total, more than 50% of the beneficial ownership of the vessel—however, these conditions do not apply to a constitutional corporation that has no involvement, or negligible involvement, in the overall general control and management of the vessel
- the vessel is engaged in trade or commerce between Australia and places outside Australia or among the states, or within a territory, between a state and a territory or between two territories
- the vessel is not within the limits of a state or territory and
- the vessel is within the limits of a territory. 64

Application to opt-in
Under the Seafarers Legislation Bill an employee or a trainee on a prescribed vessel will be covered by the Seacare scheme if the vessel is the subject of an opt-in declaration which covers the employee or trainee, and any of the constitutional conditions is satisfied. 65

The owner or operator of a vessel or an employer may apply to the Commission for an opt-in declaration that relates to a prescribed vessel and covers the employment on the vessel of all employees, a specified group or groups of employees or a specified employee or employees. 66

The application must be in the manner and form specified in the Seafarers Legislation Bill—in particular it must nominate a number of days as the duration of the declaration, being no more than 1,095 (equivalent to three years). 67 The Seafarers Legislation Bill provides that an application may be made for a renewal of an opt-in declaration. 68

In addition, the application may require the applicant to state that reasonable steps have been taken to inform each registered organisation (if any) that is entitled to represent the interests of employees employed on the vessel and the employees employed on the vessel of the application. 69

Stakeholder comment
The Australian Maritime Officers Union (AMOU) is ‘very concerned’ about the opt-in provisions in proposed section 25E on the grounds that the requirement to only take reasonable steps to inform affected employees and their representatives of the application is insufficient and contrary to the principles of procedural fairness. Citing the example of the requirements of an employer making an enterprise agreement to comply with a section 25L contains an extended meaning of the term owner which applies to opt-in declarations.

The opt-in declaration
Where an application for an opt-in declaration has been made, the Commission must either:

- declare in writing that the vessel is an opt-in vessel and state which employees are covered by the declaration or

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64. Ibid., proposed subsection 25B(3).
65. Ibid., proposed section 25C.
66. Ibid., proposed subsection 25E(1). Proposed section 25L contains an extended meaning of the term owner which applies to opt-in declarations.
67. Ibid., proposed paragraph 25E(3)(c) and subsection 25E(4).
68. Ibid., proposed subsections 25E(8) and (9).
69. Ibid., proposed subsection 25E(9).
70. Australian Maritime Officers Union, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Seafarers and Other Legislation Amendment Bill 2016, the Seafarers Safety and Compensation Levies Bill 2016 and the Seafarers Safety and Compensation Levies Collection Bill 2016, submission no. 6, n.d., p. 3.
• refuse to make such a declaration.\textsuperscript{71}

In making its decision, the Commission must have regard to any matters prescribed by the legislative rules and any other matters that the Commission considers relevant.\textsuperscript{72} In addition, the Commission must not make an opt-in declaration if it would be inconsistent with an obligation of Australia under an international agreement.\textsuperscript{73}

Unless it relates to a renewal of an earlier declaration, an opt-in declaration comes into force on the day specified in the declaration and remains in force for the number of days specified in the declaration.\textsuperscript{74} If the application is for a renewal of a declaration, the opt-in declaration comes into force immediately after the expiry of the earlier declaration.\textsuperscript{75}

The Commission must give a copy of an opt-in declaration to the owner and operator of the prescribed vessel to which the declaration relates and to the employer or employers of the employees covered by the declaration. In addition, the Commission must publish the declaration on the Commission’s website.\textsuperscript{76}

If the Commission decides to refuse to make an opt-in declaration, it must give written notice of that decision to the applicant.\textsuperscript{77}

\textbf{Suspension or revocation of opt-in declaration}

The Commission may suspend an opt-in declaration for a specified period or revoke it, by writing.\textsuperscript{78} It may exercise this power on its own initiative or on a written application in the approved form by either the owner or operator of the prescribed vessel to which the declaration relates or the employer of any of the employees covered by the declaration.\textsuperscript{79}

In making a decision to suspend or revoke an opt-in declaration, the Commission must have regard to any matters prescribed by the legislative rules, whether any conditions of an opt-in declaration have been contravened and any other matters that the Commission considers relevant.\textsuperscript{80} In addition, the Commission must publish a notice on its website setting out a draft of the instrument of suspension or revocation and the reasons for it. The Commission must invite persons to make submissions about the draft instrument within seven days after the notice is published and must consider any submissions received within that period.\textsuperscript{81}

The Commission must publish the final form of any instrument of suspension or revocation on the Commission’s website.\textsuperscript{82} Where the Commission decides not to suspend or revoke the declaration it must give written notice of the decision to the applicant.\textsuperscript{83}

\textbf{Exemption of employment}

The Commission may make a written instrument exempting the employment of all employees, a specified group or groups of employees, or a specified employee or employees on a particular vessel from the application of the \textit{Seafarers Act}.\textsuperscript{84}

The Commission may make an instrument of exemption on its own initiative or based on an application in the approved form by the owner or operator of the vessel to which the exemption relates or the employer of the employee or employees covered by the proposed exemption.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{71} Ibid., \textit{proposed subsection 25H(2)}.
\item \textsuperscript{72} Ibid., \textit{proposed subsection 25H(4)}.
\item \textsuperscript{73} Ibid., \textit{proposed subsection 25H(5)}.
\item \textsuperscript{74} Ibid., \textit{proposed subsection 25H(7)}.
\item \textsuperscript{75} Ibid., \textit{proposed subsection 25H(9)}.
\item \textsuperscript{76} Ibid., \textit{proposed subsection 25H(13)}.
\item \textsuperscript{77} Ibid., \textit{proposed subsection 25H(14)}.
\item \textsuperscript{78} Ibid., \textit{proposed subsection 25I(1)}.
\item \textsuperscript{79} Ibid., \textit{proposed subsections 25I(4) and (5)}.
\item \textsuperscript{80} Ibid., \textit{proposed subsection 25I(8)}.
\item \textsuperscript{81} Ibid., \textit{proposed subsection 25I(9)}.
\item \textsuperscript{82} Ibid., \textit{proposed subsection 25I(11)}.
\item \textsuperscript{83} Ibid., \textit{proposed subsection 25I(13)}.
\item \textsuperscript{84} Ibid., \textit{proposed subsection 25M(1)}.
\item \textsuperscript{85} Ibid., \textit{proposed subsection 25M(3)}.
\end{itemize}
The process for the Commission in determining an application for exemption is in similar terms to the process for determining an application for an opt-in declaration, that is:

- in making its decision, the Commission must have regard to any matters prescribed by the legislative rules and any other matters it considers relevant\(^{86}\);  
- the Commission must not make a decision to make an exemption if it would be inconsistent with an obligation of Australia under an international agreement\(^{87}\);  
- an exemption may be subject to conditions\(^{88}\);  
- an instrument of exemption made on the Commission’s own initiative remains in force for one year or a shorter period specified in the instrument\(^{89}\)—although there is scope for a person to apply for a renewal\(^{90}\);  
- before deciding whether to make an instrument of exemption the Commission must engage in a consultation process equivalent to that required for making an opt-in declaration\(^{91}\);  
- within 14 days after making an instrument of exemption the Commission must give a copy of the instrument of exemption to the owner and the operator of the vessel, the employer of any of the employees covered by the exemption and each person who made a submission relating to the exemption.\(^{92}\)

**Scrutiny of Bills Committee**

The Scrutiny of Bills Committee drew attention to the exemptions provided by proposed section 25M which, it says:

> ... is a broad discretionary power with no legislative guidance on how such decisions would be made. The explanatory memorandum does not explain why this provision is considered necessary and does not explain what type of matters the Commission would take into account in making such an instrument. There is also no requirement in the Bill that legislative rules must be made setting out the matters the Commission must have regard to in exercising this discretionary power.\(^{93}\)

As a result, the Scrutiny of Bills Committee sought the Minister’s advice as to why the exemption power is necessary.\(^{94}\)

The Minister’s response to the Scrutiny of Bills Committee was to the effect:

> ... proposed section 25M mirrors the existing absolute discretion of the Seacare Authority to declare vessels exempt from the scheme ... [and that] ... the Seacare Authority has issued exemption guidelines (which are not a legislative instrument) to provide assistance to the industry on when an exemption may be appropriate and the factors to be taken into account by the Seacare Authority.\(^{95}\)

The Scrutiny of Bills Committee noted the Minister’s response but stated:

> The fact that a provision already exists in legislation does not address the Committee’s scrutiny concerns regarding the provision in this Bill. The Committee’s long-standing preference is that there be guidance in the primary legislation as to how broad discretionary powers are to be exercised. The Committee considers that the power to exempt a vessel from the operation of the federal legislative framework regarding seafarers is a significant matter.

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86. Ibid., proposed subsection 25M(5).
87. Ibid., proposed subsection 25M(6).
88. Ibid., proposed subsection 25M(7).
89. Ibid., proposed subsection 25M(8).
90. Ibid., proposed subsections 25P(6) and (7), inserted by item 84 of Schedule 2 to the Seafarers Legislation Bill.
91. Ibid., proposed subsection 25M(14), inserted by item 84 of Schedule 2 to the Seafarers Legislation Bill.
92. Ibid., proposed paragraph 25M(16)(b), inserted by item 84 of Schedule 2 to the Seafarers Legislation Bill.
94. Ibid.
While the SRCC must have regard to the matters prescribed by the legislative rules, there is no legal requirement that rules be in place before the provisions in the Bill become operative.  

Suspension or revocation of exemption

Proposed section 25Q of the Seafarers Act provides that the Commission may suspend an instrument of exemption for a specified period or revoke it, by writing.

The Commission may exercise the power to suspend or revoke an instrument of exemption on its own initiative or on application by the owner or operator of the vessel or the employer of any of the employees covered by the exemption. The process before making a decision to suspend or revoke an instrument of exemption requires the Commission to have regard to any matters prescribed by the legislative rules, any contraventions of the conditions to which the instrument is subject and any other matters the Commission considers relevant. The Seafarers Legislation Bill sets out consultation, notification and publication requirements in similar terms to those relating to opt-in declarations.

Review of decisions

Proposed section 25R allows applications to be made to the Administrative Appeals Tribunal (AAT) for review of a decision of the Commission to:

- make an opt-in declaration or refuse to make such a declaration
- make an opt-in declaration subject to conditions and
- suspend or revoke an opt-in declaration
- make an instrument of exemption or refuse to make such an instrument
- make an instrument of exemption subject to conditions and
- suspend or revoke an instrument of exemption.

Scrutiny of Bills Committee

The Scrutiny of Bills Committee commented on proposed section 25R which provides that an application for review of a decision by the Commission to make an instrument of exemption (under proposed section 25M) can be made to the AAT. The Committee was concerned:

... an application can only be made if the decision to make an instrument of exemption was made following an application to the Commission by the owner of the vessel of the employer. If the Commission on its own initiative decides to make the exemption there is no right to seek merits review of that decision.

Accordingly, the Scrutiny of Bills Committee has sought the Minister’s advice as to why the right to seek merits review of the Commission’s decision to make an instrument exempting the employment of persons on a particular vessel is so restricted.

The Minister responded to the inquiry stating that ‘exemptions are currently issued by the Seacare Authority and the decision is not reviewable by the AAT’ and that such a review would likely be time-consuming and costly.

The Scrutiny of Bills Committee did not consider that time taken to conduct a review or the cost of the review were sufficient to exclude the possibility of merits review. That being the case the Scrutiny of Bills Committee has drawn its concerns to the attention of Senators.

96. Ibid., p. 48.
97. Seafarers Act, proposed subsection 25Q(4).
98. Ibid., proposed subsections 25Q(6)–(8).
99. Ibid., proposed section 25K.
100. Ibid., proposed section 25R.
101. Senate Standing Committee for the Scrutiny of Bills, Alert digest, 8, op. cit., p. 42.
102. Ibid.
103. Senate Standing Committee for the Scrutiny of Bills, Scrutiny digest, 2, op. cit., p. 49.
104. Ibid., p. 50.
Stakeholder comments about coverage

The Australian Maritime Officers Union contends that the proposed amendments ‘will not somehow make clear or clarify coverage; but rather are intended to shrink the number of vessels covered by the scheme’ and that this ‘will result in increased disputation and the demise of the Seacare scheme’.105

In its supplementary submission to the Senate Education and Employment Committee the MUA agrees, stating: There were 219 vessels in the Seacare scheme in 2015–16 ...

While the government has maintained that the coverage of the scheme will remain essentially the same ... the proposed coverage provisions will result in a significant reduction in the number of vessels in the scheme. We are concerned that any reduction in the number of vessels in the Seacare scheme will make it unsustainable.

We believe that 68 vessels (31%) that are currently covered are likely not to be included in the new coverage provisions of the Seacare scheme. There are only 45 vessels that we can say with confidence will remain a part of the scheme.106

Key issue—changes to entitlements

Definition of catastrophic injury

Item 1 of Part 1 in Schedule 2 to the Seafarers Legislation Bill amends the Seafarers Act to insert a new definition of catastrophic injury—being an injury where the conditions specified in the legislative rules are satisfied.107

Item 6 inserts proposed section 144 into the Seafarers Act to empower the Minister, by legislative instrument, to make such legislative rules.108

Section 43 of the Seafarers Act currently provides for the payment of compensation for household services and attendant care services. The amendments in items 2–4 operate so as to distinguish between those employees who have suffered a catastrophic injury, and those who have not, in relation to the provision of household and attendant care services.

Item 4 inserts proposed section 43A into the Seafarers Act to set out the conditions under which compensation for household services and attendant care services can be paid in respect of catastrophic injury. If an employee obtains household services and/or attendant care services as a result of a catastrophic injury and those services are reasonably required by the employee the compensation payable is such amount per week as is considered reasonable in the circumstances.109 The Seafarers Legislation Bill contains a list of the things that must be taken into account when determining whether household services are reasonably required. This includes but is not limited to:

• the number of persons living with the employee as members of his or her household, their ages and their need for household services and

• the extent to which the persons living with the employee as members of his or her household, or any other members of the employee’s family, might reasonably be expected to provide household services for themselves and for the employee after the catastrophic injury.110

This is consistent with the view of the Federal Court in Lander v Comcare in which the Court considered the extent to which members of an employee’s family might reasonably be expected to provide household services for themselves and the employee.111 In particular, the Federal Court noted:

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105. Australian Maritime Officers Union, Submission to the Senate Education and Employment Legislation Committee, op. cit., p. 5.
107. Seafarers Act, section 3.
108. Section 42 of the Legislation Act 2003 provides that a legislative instrument can be subject to disallowance if either a Senator, or Member of the House of Representatives, moves a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled in the relevant House of the Parliament.
109. Seafarers Act, proposed subsections 43A(1) and (3).
110. Ibid., proposed subsections 43A(2).
... the household services envisaged are those provided by the household members themselves. They are not services for which those members make provision for the injured employee through the agency of third party providers.112

Commencement and application
The provisions about catastrophic injury commence on the day after Royal Assent. Part 2 of Schedule 3 to the Seafarers Legislation Bill operates so that the amendment will apply in relation to compensation in respect of a week beginning after the commencement of the first legislative rules which define the term catastrophic injury.113

Definitions of injury and disease
Definition of injury
Section 3 of the Seafarers Act provides that the term injury means:

• a disease suffered by an employee

• an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee’s employment or

• an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee’s employment), that is an aggravation that arose out of, or in the course of, that employment.

Section 25 of the Seafarers Act provides that compensation in respect of an injury must be paid in full by an employer whose employment has made a material contribution to the injury. However, a disease, injury or aggravation suffered as a result of reasonable disciplinary action taken against the employee, or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment is specifically excluded from the definition.114

Items 34 and 45 of Schedule 2 to the Seafarers Legislation Bill repeal the definitions of disease and injury respectively from current section 3 of the Seafarers Act.

New definitions of those terms are inserted by item 71 of Schedule 2 to the Seafarers Legislation Bill. In particular, proposed section 5A of the Seafarers Act relates to what constitutes an injury. References to the term reasonable disciplinary action are replaced by references to reasonable administrative action taken in a reasonable manner. Matters which are indicative of the conduct which would be reasonable administrative action are listed in the Seafarers Legislation Bill.115

Definition of disease
At present, section 3 of the Seafarers Act defines disease as an ailment suffered by an employee (or an aggravation of such an ailment) that was contributed to, to a material degree, by the employee’s employment. An ailment is defined as any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development.

The Seafarers Legislation Bill substantially changes what constitutes a disease by requiring the employee’s employment to have contributed to the ailment to a significant degree. This is a higher standard than the current standard of material degree. In addition the Seafarers Legislation Bill sets out those matters that may be taken into account in determining whether an ailment or aggravation was contributed to, to a significant degree, by the employee’s employment:

112. Ibid., paragraph 10.
113. Subitem 2(1), Part 2 of Schedule 3 to the Seafarers Legislation Bill.
114. Seafarers Act, section 3.
115. Ibid., proposed subsection 5A(2).
• the duration of the employment
• the nature of, and particular tasks involved in, the employment
• any predisposition of the employee to the ailment or aggravation
• any activities of the employee not related to the employment and
• any other matters affecting the employee’s health.

### Journey claims

Currently section 9 of the Seafarers Act provides that an injury to an employee may be treated as having arisen out of, or in the course of his or her employment in specified circumstances including while the employee was travelling between one place and another—unless the travel was by a route that substantially increased the risk of sustaining an injury when compared with a more direct route, or was interrupted in a way that substantially increased the risk of sustaining an injury.

**Item 79** of the Seafarers Legislation Bill inserts proposed subsections 9(3A)–(3C) into the Seafarers Act to create further restrictions on the circumstances in which an injury sustained on a journey will be accepted.

**First**, the Seafarers Act will not apply to travel by an employee if the travel was from the employee’s place of work, the employee delayed commencing the travel and the reason for the delay was private or domestic. The exception to this rule is where the delay is beyond the control of the employee or both the delay is 72 hours or less and the employer has given written agreement to the delay.

**Second**, the Seafarers Act will not apply to travel by an employee if the travel was by a route that was not direct having regard to the means of transport used and the reason for taking the route was private or domestic. The exception to this rule is where taking the route is due to circumstances beyond the control of the employee.

**Third**, the Seafarers Act will not apply to travel by an employee if there was an interruption of the travel and the reason for the interruption was private or domestic. The exception to this rule is where the interruption is due to circumstances beyond the control of the employee or both the interruption is 72 hours or less and the employer has given written agreement to the interruption.

### Statement of Compatibility with Human Rights

According the Statement of Compatibility with Human Rights:

> The provision clarifies when a seafarer will be covered by the Seacare scheme, facilitating flexibility for seafarers to have a short break on return with agreement of their employer, although potentially reducing the number of situations where a seafarer will be entitled to claim workers’ compensation ... The limitation recognises that workers’ compensation is intended to provide compensation for injuries that are work-related and not intended to cover situations where the safety of the employee is largely beyond the employer’s control or in situations that are appropriately covered by other types of compensation for example, travel insurance.

### Stakeholder comment

The Australian Maritime Officers Union does not agree that the rationale for removing journey claims from coverage under the Seafarers Act is appropriate given that seafarers ‘have unique journey arrangements and usually live a considerable distance from their places of engagement. Furthermore, the nature of the seafarer’s

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116. Ibid., proposed paragraph 5B(2)(a).
117. Ibid., proposed paragraph 5B(2)(b).
118. Ibid., proposed paragraph 5B(2)(c).
119. Ibid., proposed paragraph 5B(2)(d).
120. Ibid., proposed paragraph 5B(2)(e).
121. Ibid., subsection 9(3).
122. Ibid., proposed subsection 9(3A).
123. Ibid., proposed subsection 9(3B).
124. Ibid., proposed subsection 9(3C).
125. Explanatory Memorandum, Seafarers and Other Legislation Amendment Bill 2016, p. x.
roster means that there are very few work journeys as these will only occur at a minimum of four weeks or so’.

**Compensation for hearing loss**

Currently, section 39 of the *Seafarers Act* provides that an amount of compensation is not payable in respect of permanent impairment where the degree of permanent impairment is less than 10 percent. The Seafarers Legislation Bill amends that provision so that where an employee has a permanent impairment being hearing loss, compensation is not payable if the binaural hearing loss suffered is less than five percent.

**Aligning the cut-off provisions with the age pension**

Under existing section 38 of the *Seafarers Act*, weekly compensation is not payable to an employee who has reached 65. In addition, where an employee who has reached 64 suffers an injury, compensation is not payable in respect of the injury after the period of 12 months starting on the day on which the injury happened.

The Seafarers Legislation Bill amends section 38 of the *Seafarers Act* to align these cut-offs to the qualifying age for age pension as set out in the *Social Security Act 1991*. To be eligible for Age Pension you must be 65 years or older. From 1 July 2017, the qualifying age for Age Pension will increase from 65 years to 65 years and six months. The qualifying age will then increase by six months every two years, reaching 67 years by 1 July 2023.

**Table 4: age rules**

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<thead>
<tr>
<th>Date of birth</th>
<th>Qualifying age</th>
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<tr>
<td>1 January 1954 to 30 June 1955</td>
<td>65 years and 6 months</td>
</tr>
<tr>
<td>1 January 1954 to 30 June 1955</td>
<td>66 years</td>
</tr>
<tr>
<td>1 July 1955 to 31 December 1956</td>
<td>66 years and 6 months</td>
</tr>
<tr>
<td>From 1 January 1957</td>
<td>67 years</td>
</tr>
</tbody>
</table>

Source: Department of Human Services (DHS), *Age pension: eligibility basics*, DHS website, 12 April 2017.

**Redemption of compensation**

A redemption payment is a payment to an injured employee of a lump sum to finalise ongoing and future entitlements to income maintenance and/or medical expenses. The method of calculating redemption payments, and their scope, differs across jurisdictions.

Broadly speaking, redemption payments have three features. They comprise a lump sum payment based on an estimation of the injured employee’s future needs. They represent a compromise between the positions of the claimant and the insurer or employer, so that neither party gets exactly what they want. They are problematic because they typically involve a full release of the insurer from liability in circumstances where the future course of disability and medical treatment may deviate from what was assumed in making the calculation. What might seem to be a reasonable ‘compromise’ today may turn out to be inadequate (or excessive) in just a few years.

Redemption does not extinguish an employer’s liability to resume incapacity payments to the employee if the injury later incapacitates him or her to the extent that the employee cannot engage in suitable employment, and the injury is likely to last indefinitely.

**Current legislation**

Under existing section 44 of the *Seafarers Act*, where an employee is in receipt of a weekly payment which is less than $62.99 and the employer is satisfied that the degree of the employee’s incapacity is unlikely to change, the

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127. *Seafarers Act*, proposed subsections 39(7) and (7A), inserted by item 91 of Schedule 2 to the Seafarers Legislation Bill.

128. Ibid., proposed subsections 38(1) and (2), inserted by item 90 of Schedule 2 to the Seafarers Legislation Bill. *Item 49* of Part 3 in Schedule 2 to the Seafarers Legislation Bill inserts the definition of the term *pension age* into section 3 of the *Seafarers Act*.

129. Department of Human Services (DHS), ‘*Age pension: eligibility basics*’, DHS website, 12 April 2017.


employer must make a determination that its liability to make further payments of weekly compensation to the employee is to be redeemed by the payment to the employee of a lump sum. The redemption amount is calculated in accordance with the formula set out in subsection 44(2).

Item 99 of Schedule 2 to the Seafarers Legislation Bill amends that formula so that the calculation takes into account the number of years between the date of the injury and the person’s pension age.132

Key issue—updating liability provisions

The Seafarers Act provides that, as a general rule, an employee is not entitled to make a claim for compensation for injury or loss of, or damage to, property against his or her employer, or an employee of the employer.133 In the alternative, an employee can elect to bring an action or proceeding against his, or her, employer or another employee for damages for any non-economic loss suffered by the employee because of the injury. Such an election is irrevocable and if successful, damages for non-economic loss are limited to $138,570.52.134

Item 101 of Schedule 2 to the Seafarers Legislation Bill inserts proposed subsections 54(4) and (5) into the Seafarers Act with the effect that where an employee has suffered a compensable injury which resulted in the employee’s death, a dependent of the employee is not prevented from bringing an action against the employer, or another employee in respect of the death. This will be the case whether or not the deceased employee had made an election before his or her death.

Common law claims against third parties

Existing section 59 of the Seafarers Act provides that an employer can institute proceedings on behalf of an employee or dependent of the employee to recover damages from a liable third party. This may occur with, or without the consent of the employee or dependant.135 The Seafarers Legislation Bill updates references in the Seafarers Act to ‘make a claim’, rather than ‘institute proceedings’.136

In addition, item 126 of Schedule 2 to the Seafarers Legislation Bill repeals and replaces existing subsections 59(4)–(9) of the Seafarers Act to require an employer who makes a claim or takes over the conduct of an existing claim to, amongst other things:

- conduct the claim in the interests of the person in whose name the claim was made137
- pay all costs of, or incidental to, any claim taken over by it, being costs payable by the plaintiff in that claim138
- take whatever steps are appropriate to bring the claim to a conclusion and to settle the proceedings, either with or without obtaining judgment139 and
- take any steps that are necessary to enforce a judgment where judgment has been obtained.140

The Seafarers Legislation Bill also sets out requirements with which an employee or dependant must comply where a claim has been made, or taken over, by the employer.141

Comcare and the Seacare Advisory Group

Existing Part 7 of the Seafarers Act establishes the Seacare Authority. Its primary functions are:

- to monitor the operation of the Seafarers Act
- to promote high operational standards of claims management and effective rehabilitation procedures by employers
- to co-operate with other bodies or persons with the aim of reducing the incidence of injuries to employees

132. Ibid., proposed new definition of \( t \text{t} \) in subsection 44(2).
133. Ibid., subsection 54(1).
134. Ibid., section 55.
135. Ibid., section 59.
137. Seafarers Act, proposed subsection 59(4).
138. Ibid., proposed subsection 59(5).
139. Ibid., proposed paragraphs 59(6)(a) and (b).
140. Ibid., proposed paragraphs 59(6)(c).
141. Ibid., proposed subsections 59(8) and (9).
• to publish material relating to the functions of the Authority and
• to advise the Minister for Employment regarding the Authority’s functions and powers and other matters relating to the compensation and rehabilitation of employees.\(^{142}\)

**Item 175** of Schedule 2 to the Seafarers Legislation Bill repeals Divisions 2 and 3 of Part 7 with the effect that the Seacare Authority is abolished. Consequently the Seafarers Legislation Bill:

• splits the functions of the Seacare Authority between Comcare and the Safety, Rehabilitation and Compensation Commission (the Commission)\(^{143}\)
• establishes the Seacare Advisory Group to provide support and industry expertise to the Commission and Comcare as required and
• makes multiple amendments to change references to the Authority to references to Comcare.\(^{144}\)

**Seacare Advisory Group**

Currently, section 68 of the *SRC Act* establishes a body called Comcare which has a range of functions and responsibilities under the *SRC Act*, the *WHS Act* and the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*. Amongst other things, Comcare provides advice and services to the Seacare Authority.

**Functions**

**Item 17** of Schedule 2 to the Seafarers Legislation Bill inserts *proposed section 89RA* into the *SRC Act* to establish the Seacare Advisory Group. Under the Bill, the main function of the Seacare Advisory Group is to assist the Commission in the performance of its functions, and the exercise of its powers, under the *Seafarers Rehabilitation and Compensation Act 1992* and subsection 274(2B) of the *WHS Act*.\(^{145}\) In performing its functions, or exercising its powers, the Commission must have regard to any relevant advice or information given to it by the Seacare Advisory Group.\(^{146}\)

In addition, the Seacare Advisory Group is to give advice or information to Comcare about a matter that relates to compliance with section 93 of the *Seafarers Rehabilitation and Compensation Act 1992*\(^{147}\) and any other matter that relates to the *Seafarers Rehabilitation and Compensation Act 1992*, either on request by Comcare or on its own initiative.\(^{148}\) In performing its functions, or exercising its powers, Comcare must have regard to any relevant advice or information given to it by the Seacare Advisory Group.\(^{149}\)

**Members**

The Seafarers Legislation Bill does not specify the number of persons to comprise the Seacare Advisory Group. However, it requires that at least one member is a person appointed on the nomination of an organisation or organisations that represents the interests of employers of employees\(^{150}\) and at least one member is a person appointed on the nomination of an organisation or organisations that represents the interests of employees.\(^{151}\) All the members are appointed by the Chairperson of the Commission\(^{152}\) and the Chairperson may terminate the appointment of a member of the Seacare Advisory Group.\(^{153}\)

**Item 18** of Schedule 2 to the Seafarers Legislation Bill inserts *proposed subsections 89S(3) and (4)* into the *SRC Act* setting out the relevant annual report requirements of the Seacare Advisory Group.

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142. Seafarers Safety, Rehabilitation and Compensation Authority (SSRCA), *About us*, SSRCA website.
143. The Commission’s role is set out in *proposed Part 8* of the *Seafarers Act* which is inserted by *Item 176* of Part 3 in Schedule 2 to the Seafarers Legislation Bill.
144. For example, *items 136–143*, *145, 147, 150–151 and 153* of the Seafarers Legislation Bill.
145. *SRC Act*, *proposed paragraph 89RA(2)(a)*.
146. *ibid., proposed subsection 89RA(3)*.
147. *ibid., proposed paragraph 89RA(2)(c)*. Section 93 of the *Seafarers Act* sets out compulsory insurance requirements for employers.
148. *ibid., proposed paragraph 89RA(2)(d)*.
149. *ibid., proposed subsection 89RA(5)*.
150. *ibid., proposed subsection 89RA(11)*.
151. *ibid., proposed subsection 89RA(12)*.
152. *ibid., proposed subsection 89RA(10)*.
153. *ibid., proposed subsection 89RA(17)*.
Reconsideration of decisions

One of the consequences of the abolition of the Seacare Authority is the manner in which claim determinations will be reconsidered. Essentially, the current decision making process flows as follows:

- the employer makes a determination about whether to accept or reject a claim for seafarers compensation\(^{154}\)
- the employer may on its own initiative reconsider a determination it has made or may reconsider the determination upon a request in writing from the claimant\(^{155}\)
- on the receipt of a request for reconsideration the employer must seek assistance from either:
  - Comcare or
  - if the employer is party to a collective agreement or a pre-reform certified agreement that relates to industry panels—an industry panel.\(^{156}\)

The Seafarers Legislation Bill removes references to an industry panel so that an employer may arrange with Comcare for a Comcare officer to assist in the reconsideration.\(^{157}\)

Key issue—compulsory insurance

Implementing the Maritime Labour Convention

The provisions of Part 2 of Schedule 2 to the Seafarers Legislation Bill commence on the later of the 28th day after Royal Assent, and 1 January 2017.

The *Maritime Labour Convention (MLC)* entered into force on 20 August 2013.\(^{158}\) In April 2014 the International Labour Organisation (ILO) agreed to several amendments which entered into force on 18 January 2017.

Ships that are subject to the MLC will, after this date, be required to display certificates issued by an insurer or other financial security provider confirming that insurance or other financial security is in place to ensure compensation to seafarers and their families in the event of abandonment, death or long-term disability of seafarers due to an occupational injury, illness or hazard.\(^{159}\)

Key provisions

Existing subsection 93(1) of the *Seafarers Act* requires an employer to:

- maintain a policy of insurance or indemnity
- be a member of a protection and indemnity Association that is approved by the Seacare Authority or
- be a member of an employers’ mutual indemnity association that is approved by the Seacare Authority.

The Seafarers Legislation Bill replaces references to the Authority in this section with references to Comcare.\(^{160}\)

Item 7 of Schedule 2 to the Seafarers Legislation Bill inserts proposed subsections 93(5) and (6) into the *Seafarers Act* to require that, when making an application for membership of a protection and indemnity association or on employers’ mutual indemnity association, an employer must give a full and correct statement of all the salaries and wages paid, or other remuneration provided, to their employees for the period relevant to working out the membership fee.

The Seafarers Legislation Bill inserts three strict liability offence provisions\(^{161}\) into the *Seafarers Act* where an employer has a policy of insurance or indemnity or is a member of a protection and indemnity association or an employers’ mutual indemnity association:

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155. Ibid., subsections 78(1) and (2).
156. Ibid., subsection 78(4).
157. Ibid., proposed subsection 78(4), inserted by item 148 of Schedule 2 to the Seafarers Legislation Bill.
160. Items 162 and 163 of Part 3 in Schedule 2 to the Seafarers Legislation Bill.
161. The imposition of strict liability means that a fault element does not need to be satisfied, but the offence will not criminalise honest errors and a person cannot be held liable if he, or she, had an honest and reasonable belief that they were complying with relevant obligations.
• **first**, an employer must, within 14 days, notify the Seacare Authority if there is a change, cancellation or termination of the policy or in their membership of a relevant association. A person commits an offence of strict liability if he, or she, fails to comply with the notification requirement.\(^{162}\)

• **second**, an employer must notify each of his, or her, employees if it is proposed to cancel or terminate the policy or membership of a relevant association. A person commits an offence of strict liability if he, or she, fails to comply with this requirement as soon as practicable after becoming aware of the proposed termination or cancellation and before that action occurs\(^{163}\)

• **third**, if an employer is the **operator** of a vessel\(^{164}\) that is registered under the *Shipping Registration Act 1981* on which one or more employees are employed, the employer must ensure that a certificate of insurance and information statement are displayed on board the vessel in a conspicuous position that is readily accessible to each of those employees at all times. Where a person is subject to these requirements, he or she commits an offence of strict liability if the certificate of insurance and information statement are not displayed as required.\(^{165}\)

In each of the above circumstances the maximum penalty is 20 penalty units which is currently equivalent to $3,600.

**Scrutiny of Bills Committee**

The Scrutiny of Bills Committee commented on the offence provisions and the fact that the Explanatory Memorandum provides no justification as to why the offences are subject to strict liability. That being the case, the Committee has sought a detailed justification from the Minister for each proposed strict liability offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.\(^{166}\)

The Minister’s advice to the Scrutiny of Bills Committee was:

… the offences arise in a regulatory context where the employer can reasonably be expected to know what the requirements of the law are; strict liability is justified in the interest of ensuring the regulatory scheme is observed; and the offences are not punishable by imprisonment and have a relatively low maximum [financial] penalty.\(^{167}\)

The Committee therefore requested that this information be included in the Explanatory Memorandum.\(^{168}\)

**Commencement**

These provisions are to commence on the later of the 28th day after the Act receives Royal Assent, or 1 January 2017.

When the provisions of Part 3 of Schedule 2 to the Seafarers Legislation Bill commence on 1 July 2017 the references above to the Seacare Authority will automatically become references to Comcare.\(^{169}\)

**Default fund**

**Existing fund**

Currently, section 96 of the *Seafarers Act* empowers the Minister to approve a trading corporation to be the Fund for the purposes of the Act. Accordingly, the Seafarers Safety Net Fund (the Fund) is a safety net ‘employer’ which stands in place of an employer where there is no employer (usually due to that employer going out of business) against whom a seafarer can make compensation claim.

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162. *Seafarers Act*, proposed section 94A, inserted by *item 8* of Schedule 2 to the Seafarers Legislation Bill.

163. ibid., proposed section 95A, inserted by *item 9* of Schedule 2 to the Seafarers Legislation Bill.

164. Proposed subsection 95B(7) defines the term **operator** of the vessel as (a) a person with overall general control and management of the vessel; or (b) a person who has assumed responsibility for the vessel from a person with overall general control and management of the vessel or a person who has a legal or beneficial interest in the vessel.

165. *Seafarers Act*, proposed section 95B, inserted by *item 9* of Schedule 2 to the Seafarers Legislation Bill.


168. ibid., p. 46

169. *items 4 and 5* of the table in section 2 of the Bill.
The Seafarers Legislation Bill repeals Division 2 of Part 7 of the *Seafarers Act* which establishes the Fund.  

**Administration**

Item 176 of the Seafarers Legislation Bill inserts proposed Part 8—Administration into the *Seafarers Act* to set out a range of administrative matters.

### Quick guide to Part 8

The Commission's functions include:
- monitoring the operation of the *Seafarers Act*
- promoting higher operational standards of claims management, and effective rehabilitation procedures, by employers and
- advising the Minister about the operation of the *Seafarers Act*.

The Commission may obtain information from an employer if the information is relevant to the compilation of statistics for injury prevention purposes.

Comcare may obtain information from an employer if the information is relevant to a claim made by an employee of the employer.

The Seafarers Rehabilitation and Compensation Account continues in existence as a special account under the *Seafarers Act*.

In particular proposed Part 8 contains the changed functions of the Commission being:
- monitoring the operation of the *Seafarers Act*
- promoting high operational standards of claims management, and effective rehabilitation procedures, by employers and
- advising the Minister about the operation of the Act.  

In addition, proposed section 107 of the *Seafarers Act* renames the special account which was established by the Financial Management and Accountability (Establishment of Special Account) Determination 2002/06 as the Seafarers Rehabilitation and Compensation Special Account.

**Basis of a special account**

Under section 81 of the *Constitution* all moneys raised or received by the Commonwealth form part of the Consolidated Revenue Fund (CRF). Furthermore, section 83 of the *Constitution* provides that no money may be drawn from the Treasury of the Commonwealth without a legal appropriation authority. The CRF in section 81 of the *Constitution* is synonymous with the Treasury in section 83.

Under subsection 80(1) of the *Public Governance, Performance and Accountability Act 2013* if an Act establishes a special account and identifies the purposes of the special account, then the CRF is appropriated for expenditure for those purposes, up to the balance for the time being of the special account.

**Purpose of the special account**

Proposed section 109 which is contained in proposed Part 8 of the *Seafarers Act* sets out the various purposes of the Seafarers Rehabilitation and Compensation Special Account. According to the Explanatory Memorandum to the Seafarers Legislation Bill the ‘Special Account will fund any liabilities incurred by Comcare as a default employer’.  

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170. Item 175 in Part 3 of Schedule 2 to the Seafarers Legislation Bill.
171. *Seafarers Act, proposed section 104*.
To that end item 69 of Schedule 2 to the Seafarers Legislation Bill inserts proposed section 4A into the **Seafarers Act** to define a **default event** as occurring when Comcare declares in writing that it is satisfied that a specific employer is unable to meet the employer’s liabilities under the **Seafarers Act**. Comcare must not make such a declaration unless:

- if the employer is a corporation—it is being wound-up or ceases to exist
- if the employer is an individual—the employer becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with the employer’s creditors or makes an assignment of the employer’s property for the benefit of the employer’s creditors.\(^{175}\)

### Other provisions

**Amending the Work Health and Safety Act**

When the **OHS(MI) Act** was enacted in 1993, the arrangements set out in the legislation were intentionally based on the **Occupational Health and Safety (Commonwealth Employment) Act 1991** and were similar to the arrangements provided under the OHS laws at that time of the Australian states and territories. In 2012, the **Occupational Health and Safety (Commonwealth Employment) Act** was replaced by the **WHS Act** which gives effect to the model WHS Bill agreed to nationally in 2009. The **OHS(MI) Act** was not similarly amended or replaced, leading to inconsistencies and differences between the two Acts.\(^{176}\)

The **WHS Act** and **Work, Health and Safety Regulations 2011** (WHS Regulations) provide a framework to secure the health and safety of workers and workplaces by protecting workers and other persons against harm to their health, safety and welfare through the elimination of risks arising from work. The **WHS Act** and WHS Regulations promote continuous improvement and progressively higher standards of work health and safety.\(^{177}\)

The **WHS Act** requires that a **person who conducts a business or undertaking** (PCBU) ensures the health and safety of workers engaged by the PCBU while the workers are at work in the business or undertaking, so far as is reasonably practicable. The **WHS Act** imposes a duty on a PCBU to:

- eliminate risks to health and safety so far as is reasonably practicable and
- if elimination is not reasonably practicable, to minimise the risks so far as is reasonably practicable.\(^{178}\)

The **WHS Act** imposes other duties on PCBUs and other persons in relation to workers and workplaces. In addition, it provides for consultation, representation and participation to further the objects of the Act. This includes workplace arrangements like work groups, health and safety representatives and health and safety committees.\(^{179}\)

**Items 190 and 191** of Part 3 in Schedule 2 to the Seafarers Legislation Bill amend the **WHS Act** so that where the **Seafarers Act** applies to the employment of an employee on a vessel, the **WHS Act** applies to:

- a person who is conducting a business or undertaking on the vessel
- a worker who is carrying out work on the vessel in any capacity for a business or undertaking and
- a vessel on which work is carried out for a business or undertaking.\(^{180}\)

In that case the Australian Maritime Safety Authority (AMSA) is the regulator.\(^{181}\)

**Item 199** of Part 3 of Schedule 2 to the Seafarers Legislation Bill inserts **proposed Part 5—Miscellaneous** into Schedule 2 to the **WHS Act** setting out the functions and powers of AMSA and AMSA inspectors. In addition, it allows for AMSA and Comcare to share information which is relevant to the application of the **WHS Act** to employees who are covered by the **Seafarers Act**.

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175. *Seafarers Act*, proposed section 4A.
180. *WHS Act*, proposed subsection 12(8A), inserted by item 191 of Schedule 2 to the Seafarers Legislation Bill.
181. Ibid., new definition of ‘regulator’ to be inserted in section 4 by item 190 of Schedule 2 to the Seafarers Legislation Bill.
Stakeholder comment
The MUA fundamentally disagrees with the proposed repeal of the OHS(MI) Act and the amendment of the WHS Act.

Coverage under the WHS Act exists if the [Seafarers Act] applies to the employment of an employee on the vessel. Therefore, the WHS Act would impose the same requirement of establishing employment of a prescribed vessel which is not used wholly or predominantly for intrastate voyages or tasks.  

Essentially then, the MUA believes that the Seafarers Legislation Bill does not achieve its stated purpose of clarifying who is covered by the Seafarers Act and that this problem will create consequential questions about coverage under the WHS Act.

Amending the SRC Act
Catastrophic injuries
As stated above the Government introduced the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (2015 Bill) into the House of Representatives on 25 March 2015. However, the 2015 Bill lapsed when the Parliament was prorogued in April 2016. Schedule 6 of the 2015 Bill contained amendments which, if enacted, would have inserted a new definition of catastrophic injury into the SRC Act and established clearer rules for the payment of household care services and attendant care services for persons who sustain catastrophic or non-catastrophic injuries.

Item 200 of Part 4 of Schedule 2 to the Seafarers Legislation Bill amends the SRC Act to insert a new definition of catastrophic injury—being an injury where the conditions specified in the legislative rules are satisfied.

Item 205 inserts proposed section 122A into the SRC Act to empower the Minister, by legislative instrument, to make such legislative rules.

Item 203 of Schedule 2 to the Seafarers Legislation Bill inserts proposed section 29A into the SRC Act to provide compensation for household services and attendant care services obtained as a result of a catastrophic injury. This section is in equivalent terms to proposed section 43A of the Seafarers Act which is inserted by item 4 of Part 1 of Schedule 2 as discussed above.

Commencement and application
The provisions about catastrophic injury commence on the day after Royal Assent. Part 9 of Schedule 3 to the Seafarers Legislation Bill operates so that the amendment to the SRC Act will apply in relation to compensation in respect of a week beginning after the commencement of the first legislative rules which define the term catastrophic injury.

Aligning pension age
Items 206–211 amend the SRC Act so that compensation is not payable to an employee who has reached pension age. As with the amendments to the Seafarers Act, above, the term pension age has been linked to the Social Security Act.

Amending the Offshore Petroleum and Greenhouse Gas Storage Act
The Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act) sets up a system for regulating various activities in offshore areas. Those activities are:

- exploration for, and recovery of, petroleum

182. Maritime Union of Australia (MUA), Submission to the Senate Education and Employment Legislation Committee, op. cit., p. 31.
184. SRC Act, subsection 4(1).
185. Section 42 of the Legislation Act 2003 provides that a legislative instrument can be subject to disallowance if either a Senator, or Member of the House of Representatives, moves a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled in the relevant House of the Parliament.
186. Subitem 61(2), Part 9 of Schedule 3 to the Seafarers Legislation Bill.
• construction and operation of infrastructure facilities relating to, and pipelines for conveying, petroleum or greenhouse gas substances
• exploration for potential greenhouse gas storage formations
• injection and storage of greenhouse gas substances.  

Currently, section 640 of the OPGGS Act defines the term Commonwealth maritime legislation as the Navigation Act 2012, the Occupational Health and Safety (Maritime Industry) Act 1993 (OHS(MI) Act) and any subordinate legislation under either of those Acts. Commonwealth maritime legislation does not apply in relation to:
• a facility located in the offshore area of a state or territory
• a person at such a facility
• a person near such a facility, to the extent to which the person is affected by such a facility or activities that take place at such a facility or
• activities that take place at such a facility.  

As the OHS(MI) Act is repealed by Schedule 1 of the Seafarers Legislation Bill, item 10 of Schedule 2 to the Seafarers Legislation Bill amends paragraph 640(3)(b) of the OPGGS Act to substitute the reference to the OHS(MI) Act with a reference to the Work Health and Safety Act 2011 (WHS Act), in so far as it applies to the maritime sector in the definition of Commonwealth maritime legislation.

The Explanatory Memorandum to the Seafarers Legislation Bill describes the provision as ‘a consequential amendment’ ... ‘to maintain the current exclusion of maritime WHS legislation to facilities subject to the OPGGS Act’.  

Levies Bills

Repeals

Schedule 1 of the Seafarers Legislation Bill repeals the following statutes with effect from 1 July 2017:
• the Seafarers Rehabilitation and Compensation Levy Act 1992 (Levy Act) and
• the Seafarers Rehabilitation and Compensation Levy Collection Act 1992 (Levy Collection Act).

The current Levy Act imposes a levy calculated on the basis of seafarer berths, which is payable by an employer who employs or engages seafarers on a prescribed ship. The proceeds of the levy are used for the Seafarers Safety Net Fund which is a ‘safety net employer’ if a default event occurs.

The Levy Collection Act provides for the collection of the levy as a debt due to the Commonwealth.

Part 5 of Schedule 3 to the Seafarers Legislation Bill provides for the winding up of the old levy scheme so that despite the repeals of the Levy Act and the Levy Collection Act those Acts continue to apply in relation to matters before the transition time which is 1 July 2017.  

Seafarers Safety and Compensation Levies Bill

Commencement

Sections 1 and 2 commence on Royal Assent. Section 14 commences on the day after Royal Assent. Sections 3–13 and section 15 commence on 1 July 2017.

Financial implications

According to the Explanatory Memorandum to the Levies Bill its financial impact will be nil.
**Key provisions**

The Levies Bill imposes two levies—an insurance levy and cost recovery levy—on seafarer berths.

**Insurance levy**

The key features of the insurance levy are:

- the levy is imposed on seafarer berths on a particular prescribed vessel where the seafarer berths are normally used by seafarers who are employed by a particular employer

- the levy is called the *seafarers insurance levy*

- the amount of the seafarers insurance levy is $15 or an amount declared by regulation for each seafarer berth—however, that regulation must not be made unless the designated actuary has made a recommendation about the actuarial component and the amount prescribed in the regulation is less than or equal to the amount specified in the most recent recommendation of the designated actuary

- the seafarers insurance levy is imposed on seafarer berths and payable by the employer who employs the seafarers who normally use those berths

- the seafarers insurance levy may be comprised of an actuarial component and administrative component.

According to the Explanatory Memorandum to the Levies Bill 'this component of the levy is unchanged from the levy collected under the ... Levy Act'.

**Cost recovery levy**

The purpose of the cost recovery levy is to 'recover the costs of the Commission, Comcare and AMSA in performing their respective regulatory functions in relation to the Seacare Scheme where these costs are not readily attributable to a specific organisation or individual'.

The features of the cost recovery levy are:

- the levy is imposed on seafarer berths on a particular prescribed vessel where the seafarer berths are normally used by seafarers who are employed by a particular employer

- the levy is called the *seafarers cost recovery levy*

- the amount of the seafarers cost recovery levy is worked out using the formula: 

  \[ \text{number of seafarer berths} \times \text{cost recovery amount} \]

- the amount of the seafarers cost recovery levy is $0 or some other amount prescribed by regulation

- the seafarers insurance levy is imposed on seafarer berths and payable by the employer who employs the seafarers who normally use those berths.

**Seafarers Safety and Compensation Levies Collection Bill**

**Commencement**

Sections 1 and 2 commence on Royal Assent. Sections 3–23 commence on 1 July 2017.

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192. Clause 5 of the Levies Bill.
193. Clause 6 of the Levies Bill.
194. Clause 9 of the Levies Bill.
195. Subclause 6(3) of the Levies Bill.
196. Clause 7 of the Levies Bill.
197. Clauses 9 and 10 of the Levies Bill.
199. Ibid.
200. Clause 11 of the Levies Bill.
201. Subclause 12(1) of the Levies Bill.
202. Subclause 12(2) of the Levies Bill.
203. Clause 13 of the Levies Bill.
Financial implications
According to the Explanatory Memorandum to the Levies Collection Bill its financial impact will be nil.204

Key provisions
The Levies Collection Bill defines the term quarter for the purposes of its operation as being a period of three months beginning on 1 January, 1 April, 1 July or 1 October.205

The Levies Collection Bill requires an employer to give quarterly returns about seafarer berths to the Commission if on the first day of a quarter the seafarer berths are on a particular prescribed vessel and the seafarer berths are normally used by seafarers who are employed by a particular employer.206 The return must comply with the manner and form set out in the Levies Collection Bill. The return is due within 14 days after the start of the quarter.207

A person who fails to lodge the return as required commits an offence of strict liability.208 The maximum penalty for the offence is five penalty units, being equivalent to $900.209

Where a seafarers insurance levy or a seafarers cost recovery levy is imposed on seafarer berths on a prescribed vessel on the first day of a quarter, then the levy is due for payment at the end of the period of 14 days after the start of the quarter.210

If an amount of the levy payable by a person remains unpaid after the time it became due for payment, a late payment penalty amount is calculated at the rate of 20 percent per annum, or such lower rate as is specified by the regulations on the amount unpaid.211

An amount of levy and an amount of late payment penalty may be recovered as a debt due to the Commonwealth in a court of competent jurisdiction.212

The Commonwealth must pay Comcare an amount equal to the amount of seafarers cost recovery levy and late payment penalty relating to that levy, received by the Commonwealth. The Consolidated Revenue Fund is appropriated for the purpose of making those payments.213

Key issues—cost to business
MIAL was strongly against the cost recovery levy and fees which are introduced by the package of Bills on the grounds that ‘this will add additional costs to a scheme that is already the most expensive in the country and produces poor safety, rehabilitation and return to work outcomes comparative with state and territory schemes’.

According to MIAL the cost recovery levy and fees:

... will add an additional cost to Australian shipping, which is already struggling to be competitive with other ships who are not burdened with the same costs in the global market. Imposing additional costs on Australian operators will further expand the existing cost differential with international operators, creating a disincentive to operate Australian ships and employ Australian seafarers.214

Concluding comments
This Bill does not appear to have satisfied either employer groups or employee groups.

205. Clause 4 of the Levies Collection Bill.
206. Clause 9 of the Levies Collection Bill.
207. Subclause 9(1) of the Levies Collection Bill.
208. The imposition of strict liability will not criminalise honest errors and no person can be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations.
209. Clause 9 of the Levies Collection Bill.
210. Clause 6 of the Levies Collection Bill.
211. Clause 7 of the Levies Collection Bill. Note that the Commission may remit the whole or part of a late payment penalty in certain circumstances.
212. Clause 8 of the Levies Collection Bill.
213. Clause 22 of the Levies Collection Bill.
For employers, the Seafarers Legislation Bill does not go far enough—they would prefer to see the repeal of the Seafarers Act and employee coverage for workers’ compensation and work health and safety in the hands of the states and territories. This would certainly simplify the question of coverage but the unions are correct in pointing out that two adverse outcomes could arise from such a move:

- the entitlements under the state and territory schemes may be less than those currently payable under the Seacare scheme and
- an injured employee who is, for instance, domiciled in North Queensland may find that the insurer is located in Western Australia with all the attendant difficulties associated with communication and finding an appropriate rehabilitation provider.

On the other hand, employees are also not pleased with the Seafarers Legislation Bill, arguing that the question of coverage has not been clarified and that the effect of the Bill is to significantly limit the number of vessels that are subject to the Seacare scheme—with the attendant concern that this may make the scheme unviable.