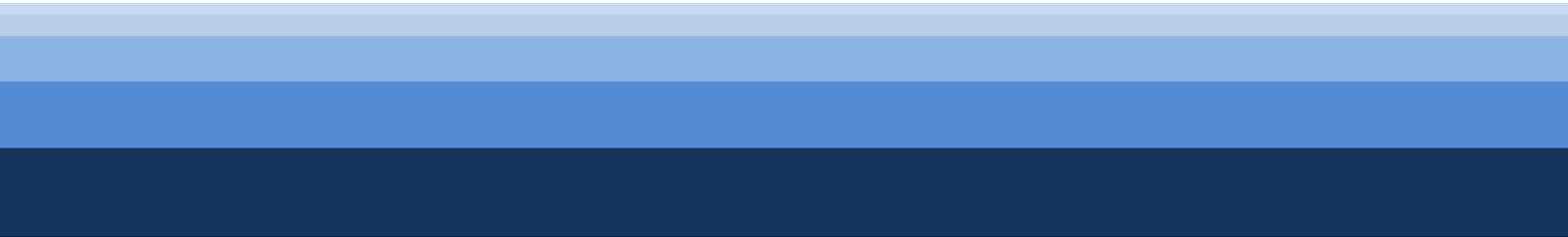




Australian Government

Review of the Seacare Scheme



Report

March 2013

The Hon Bill Shorten MP
Minister for Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Minister,

I am pleased to advise you that I have completed the Seacare Scheme review in accordance with the Terms of Reference.

The report and recommendations follow.

Yours sincerely

A handwritten signature in black ink, appearing to read "Brent Cromber". The signature is fluid and cursive, with a long horizontal stroke at the end.

22 March 2013

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Summary

This report examines the Commonwealth's Seacare scheme, which applies to a defined part of the maritime industry. The scheme has operated for twenty years with a complex legislative and administrative structure. It provides for occupational health and safety regulation, with legislation that has not kept pace with contemporary approaches to protecting work, health and safety. The scheme also has workers' compensation legislation that has established privately underwritten workers' compensation arrangements for the rehabilitation, return to work and compensation for injured employees. That legislation has also not been kept up to date. Although the scheme is supported by the industry stakeholders, they recognise the need for improvements. Performance under each element of the scheme is comparatively poor, for various reasons that include the scope, application and content of the scheme's legislation, the limited resources available for securing compliance, the scheme's complex structure and the limited availability of valid data for measuring scheme performance and guiding decisions about policy and appropriate interventions.

Chapter One provides the report's introduction and outlines the context of and background to the Seacare scheme. The chapter includes information about the scheme's nature, scope and size, as well as a brief history. I also outline the regulatory context (including recent maritime industry regulatory reforms), the scheme's performance in comparison with other jurisdictions, and its governance. That performance in relation to both OHS and workers' compensation is well behind other schemes, including for high risk industries. Relevant issues are discussed in following chapters.

In **Chapter Two**, various issues relating to coverage are considered. The interaction between the OHS(MI) Act and other OHS or WHS regulation is managed through AMSA's MOUs with other regulators and good operational relationships. I refer to the opportunities for improvement by aligning the OHS(MI) Act with the model WHS bill that has so far been the basis for seven of nine jurisdictions (including the Commonwealth) updating their principal WHS laws in a nationally consistent way. The need to reframe the application of the Seacare scheme's application is heightened by changes to other maritime regulation, particularly as a result of the Commonwealth's shipping reforms. A three stage process for addressing this is proposed. First, establishing a legislative base whereby the existing application of the OHS(MI) Act and the Seafarers Act is identified and reformed into stand alone application provisions (delinked from the Navigation Act and with a wider constitutional foundation). Secondly, opting in and opting out mechanisms, in addition to existing arrangements. Thirdly, to support possible longer term change, I recommend initial examination of what would be required to establish a national system for work health and safety regulation in the maritime water transport industry, with the marine safety National Law for commercial domestic vessels as a model. Attention is drawn to the developments whereby enterprise bargaining agreements under the Fair Work Act are used to extend the Seafarers Act's coverage. This appears to provide further justification for a more formal and effective opting in mechanism. Finally, the use and process for exemptions under the Seafarers Act are examined. Making them subject to a more transparent and conventional regulatory approach is recommended, with exemptions being available on application, but provided for in the regulations.

[Chapter Two contains Recommendations 2.1 – 2.10]

Chapter Three and **Chapter Four** look at achieving and maintaining consistency between the Seafarers Act and the SRC Act.

Existing inconsistencies and omissions are identified in **Chapter Three**. I recommend a process for avoiding future inconsistencies and various amendments to improve consistency with the SRC Act.

[Chapter Three contains Recommendations 3.1 – 3.11]

In **Chapter Four**, I consider the recommendations of the recent Hanks Review of the SRC Act. Mr Hanks QC made numerous recommendations to amend the SRC Act. Not all of those recommendations are discussed in this chapter. I examine those that require further examination to confirm whether or not they should be adopted in the Seafarers Act. Appendix F summarises all the Hanks Review recommendations and indicates my view on whether or not they should be adopted by the Seafarers Act. Restructuring the Seafarers Act to be consistent with the SRC Act's proposed revised structure is also recommended.

[Chapter Four contains Recommendations 4.1 – 4.19]

Chapter Five examines the differences between the OHS(MI) Act and the model WHS laws. Recommendations are made for retitling the OHS(MI) Act as the Work Health and Safety (Maritime Industry) Act and aligning its provisions with the model WHS bill, with appropriate adjustments for the maritime industry context. In the first instance, the revised laws would apply to the same persons as are now subject to the OHS(MI) Act. AMSA would continue to provide inspectors. Some key changes are proposed. The objects would have a stronger focus on continuous improvement. Up to date compliance and enforcement provisions are proposed, to support a contemporary approach to graduated enforcement. Rights of entry would be conferred on qualified entry permit holders, subject to the rights and obligations contained in the model WHS bill. The Commonwealth's *Work Health and Safety Act 2011* and Regulations provide useful guidance for the structure of the proposed changes. The question of timing for the commencement of new laws is considered and transitional arrangements are discussed. The revised Act would be reviewed after a foreshadowed review of the implementation of the model WHS laws and in the light of experience with the recent shipping reform initiatives.

[Chapter Five contains Recommendations 5.1 – 5.5]

In **Chapter Six**, the premium arrangements under the Seacare scheme are reviewed. Key issues affecting premiums and the scheme's financial viability are identified. I consider issues about rehabilitation and return to work, and make a number of recommendations, including giving priority to early intervention and examining ways to improve job placement for injured workers. I recommend reforms to claims management and dispute resolution, aligned with proposals made in the Hanks review. I suggest that the provisions for the voluntary redemption of claims be similar to new provisions proposed in the Hanks review, but with Seacare Authority approval of proposed redemptions. To provide better information about excesses (deductibles) I recommend a greater role for the Seacare Authority, including by being able to obtain information, by approving any proposed deductibles that exceed a prescribed amount, and by being able to stipulate conditions for the management of claims that are made within the deductible amount, excesses. I recommend that DEEWR and the Seacare Authority consider options for the introduction of self-insurance by 2015. These would be developed by consultation with scheme participants, industry bodies, insurers and unions. I propose a greater role for the Seacare Authority in providing guidance to insurers under the scheme about expected standards in relation to claims management, rehabilitation and return to work, and the collection and reporting of claims data. The Authority would be able to require the provision of information about performance against those standards. I also discuss factors relating to the re-entry of protection and indemnity (P&I) clubs into the scheme and propose that, if their re-entry appears probable (following the recommended changes), further consideration be given to prudential standards and accountability.

[Chapter Six contains Recommendations 6.1 – 6.11]

Chapter Seven considers the governance arrangements of the Seacare scheme. I identify a range of matters that I consider to be central to understanding how the scheme is governed, and then explore in more detail some the governance elements outlined in Chapter One. These include the roles and responsibilities of the stakeholders who administer and regulate the scheme and

consideration of the measurement and effectiveness of their performance. Some of the successes of the scheme are identified, but gaps are apparent in the scheme's resources (including the Safety Net Fund), its capacity for reporting and data management, and in the coordination of Government actions in a co-regulatory environment. I propose action to address them and a mechanism to strengthen accountability and performance through a statement of ministerial expectations of the Seacare Authority. I conclude the chapter and the report with a discussion of and recommendations for a more coordinated, whole-of-government approach to managing and reviewing strategic planning for work safety and compensation in the maritime industry and I make recommendations about future reviews of the scheme.

[Chapter Seven contains Recommendations 7.1 – 7.11]

Terms of reference

The Australian Government aims to build a stronger, fairer Australia through improved productivity, national security, increased social inclusion and building community resilience.

As a result of major reforms to maritime legislation being undertaken by the Government, the Government's strong support for the development of harmonised model work health and safety legislation, and the complexities of coverage, a comprehensive review of the Seacare scheme is needed in order to clarify scheme coverage in addition to updating the scheme's work health and safety and workers' compensation provisions.

The Australian Government is committed to ensuring that the Seacare scheme provides a rigorous and harmonised work health and safety regime as well as fair and appropriate workers' compensation arrangements for all workers covered by the scheme legislation.

The Australian Government believes that the Seacare scheme should be best practice, and comparable to other Australian work health and safety and workers' compensation schemes for people in the maritime industry.

The review will inquire and report on:

1. The coverage of the Seacare scheme, including:
 - a) The interaction of the Occupational Health and Safety (Maritime Industry) Act 1993 (OHS(MI)) with state and territory schemes and the Offshore Petroleum and Greenhouse Gas Storage Act 2006;
 - b) A legislative framework for the Seacare scheme that identifies the relevant coverage for a particular maritime activity; and
 - c) The availability and scope for exemptions from the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act).
2. The scope and necessity for amending and updating any legislative inconsistencies in the Seacare Scheme, including:
 - a) Any provisions in the legislation which need to be updated; and
 - b) Ensuring consistency between the Seafarers Act and the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).
 - c) Legislative changes required to OHS(MI) to ensure consistency with the model work health and safety laws.
3. The scope for amending the Seafarers Act to help reduce workers' compensation premium costs.
4. The governance arrangements for the Seacare scheme.

The review of the Seacare scheme will report by 22 February 2013.

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

Recommendations

Rec. No.	Recommendation	Chapter and page
Term of Reference 1		
R.2.1	The OHS(MI) Act and the Seafarers Act should provide their own definitions of the vessels covered by the Acts without referring explicitly to definitions in the Navigation Act.	Ch.2, p.31
R.2.2	<p>The terminology under the Seacare scheme's legislation should, where appropriate, be made consistent with the terminology used in the Navigation Act 2012 and the Coastal Trading legislation, to avoid confusion about what is being referred to under the various laws.</p> <p><i>[Example: the Navigation Act uses the term vessel whereas the Seacare scheme's legislation uses the term, ship].</i></p>	Ch.2, p.32
R.2.3	<p>a) The OHS(MI) Act and the Seafarers Act should have application provisions that, as a minimum requirement, reflect the existing application provisions [including the new Ministerial declaration powers to be inserted as s.19(3A) of the Seafarers Act].</p> <p>b) To clarify coverage, it should be made clear that:</p> <ul style="list-style-type: none"> i. for so long as there are references to Part II of the Navigation Act in the Seacare legislation, they are not to be taken to be limited by Part I of that Act; and ii. when there are no such references, any replacement provisions should have at least that wider coverage. <p>c) To ensure that there is a sound constitutional basis for the operation of Seacare legislation, a provision should be included in each Act setting out a full range of relevant other constitutional bases for the valid operation of the legislation [s.333 of the Navigation Act 2012 provides a model].</p>	Ch.2, p.34
R.2.4	<p>a) The OHS(MI) Act should provide for AMSA to be able to consider applications from owners or operators of vessels that the Act apply to a vessel or to a class of vessels or persons.</p> <p>b) The Seafarers Act should provide for the Authority to be able to consider applications from the owner or operator of a vessel that the Act apply to employment on the vessel, except where the vessel is registered on the AISR.</p> <p>c) In each case:</p> <ul style="list-style-type: none"> i. the grounds for applications should be stipulated in the regulations; 	Ch.2, p.36

Rec. No.	Recommendation	Chapter and page
	<ul style="list-style-type: none"> ii. the grounds should be developed with input from industry bodies, owners, operators and unions; iii. a prescribed fee for applications should cover the decision maker's reasonable costs; iv. the decision maker should be able to make a decision without a hearing, if the decision maker considers that it is fair to do so; v. the decision maker should be able to request further information and evidence in support of an application; vi. the decision maker should be able to set conditions on being granted coverage and be able to vary or revoke a decision after giving the affected party a reasonable opportunity to make a submission about the proposed action. <p>d) In the case of an application to opt into coverage under the Seafarers Act, the Seacare Authority should refuse an application if it considered that permitting opting in would have inappropriate consequences for pre-existing workers' compensation coverage in another jurisdiction.</p> <p>e) Decisions should be reviewable.</p>	
R.2.5	<p>a) The Minister should be able to delegate his decision making power in respect of coverage under the Seacare scheme to an officer of AMSA or to the Chair of the Seacare Authority;</p> <p>b) AMSA should be able to consider whether a vessel or class of vessels should be excluded from the application of OHS(MI) Act (the other recommended powers, processes and requirements for an opting in application should apply).</p> <p>[Note: Section 20A of the Seafarers Act deals with exemptions and is dealt with elsewhere].</p>	Ch.2, p.37
R.2.6	<p>The OHS(MI) Act and the Seafarers Act should apply to all seafarers on a vessel and they should be defined as any person who is employed or engaged or works in any capacity (including that of master) on board a vessel on the business of the vessel, other than the following:</p> <ul style="list-style-type: none"> a) a licensed pilot of the vessel (acting as such a pilot); b) an owner of the vessel or a person (except the master) representing the owner; c) law enforcement personnel (in their capacity as law enforcement personnel); 	Ch.2, p.38

Rec. No.	Recommendation	Chapter and page
	<ul style="list-style-type: none"> d) if the vessel is a special purpose vessel—special personnel in relation to the vessel; e) a person temporarily employed on the vessel in port; f) a person prescribed by the regulations. 	
R.2.7	The OHS(MI) Act and the Seafarers Act should each provide that the Act may also apply to prescribed vessels [and, in the case of the OHS(MI) Act, prescribed persons and things] as specified in regulations.	Ch.2, p.38
R.2.8	<p>The Minister for Education, Employment and Workplace Relations should consider approaching the Minister for Transport and Infrastructure to seek agreement on a joint study by their Departments of the feasibility of a national system of work health and safety regulation for water transport in the maritime industry with a view to engaging with the State and Territory Ministers about such a system with AMSA as a single national regulator.</p> <p>[The development of such a proposed system, which is seen as a longer term goal, could be linked to the outcome of the proposed review of the Seacare scheme recommended in Chapter Seven].</p>	Ch.2, p.41
R.2.9	<p>The Seafarers Act should be amended to:</p> <ul style="list-style-type: none"> a) provide for both the grounds for exemptions under s.20A and the requirements for an application to be as prescribed in the regulations; b) require the Minister to seek the advice of the Seacare Authority about the prescribed grounds; c) empower the Seacare Authority to consider applications and to make a decision within a specified time (e.g., 20 business days from receipt of the application), but to be able to request further information (with decision-making time suspended until the additional information is received); d) allow the Seacare Authority to grant exemptions for a specified time and subject to conditions; e) provide for a review of a decision not to grant an exemption or to grant an exemption subject to a condition [Note: this might be achieved by amending s.76 of the Seafarers Act]; f) authorise the Authority to review the grounds for and operation of an exemption periodically; g) for that purpose, the Authority should be empowered to require, by notice in writing, an employer to give it, within such reasonable period as is specified in the notice, such documents or information (or both) as are specified in the notice, being documents or information in the possession or 	Ch.2, p.46

Rec. No.	Recommendation	Chapter and page
	<p>control of the employer that are relevant to a decision under s 20A - non-compliance should be a strict liability offence [note: this could be included in s.106 of the Seafarers Act];</p> <p>h) authorise the Authority to issue written general guidelines on s.20A exemptions;</p> <p>i) provide for a prescribed fee for an application for an exemption (to meet the Authority's costs in dealing with an application).</p>	
R.2.10	The <i>Seafarers Safety Rehabilitation and Compensation Directions 2006 (1)</i> should be repealed.	Ch.2, p.46
Term of Reference 2(a) - Legislative consistency between the Seafarers Act and the SRC Act		
R.3.1	When amendments to the SRC Act or regulations are being considered, the portfolio Department should consult the Seacare Authority at the earliest appropriate stage to assess whether corresponding changes should be made to the Seafarers Act in order to ensure ongoing consistency. Where it is possible and appropriate, steps should be taken to proceed with amendments to both Acts at the same time or as close together in time as practicable.	Ch.3, p.49
R.3.2	The Seafarers Act should be amended to be made consistent with the SRC Act in respect of the subjects and provisions set out in Appendix E.	Ch.3, p.51
R.3.3	The provisions in s.30(2) of the Seafarers Act relating to funeral expenses should be amended to ensure consistency with s.18(4) of the SRC Act.	Ch.3, p.51
R.3.4	The provisions of s.130 of the Seafarers Act should not be amended to be consistent with the provisions of the SRC Act.	Ch.3, p.51
R.3.5	Section 137 of the Seafarers Act should be amended to provide that sick leave and recreation leave entitlements continue to accrue to an employee during the first 45 weeks of compensation leave in accordance with the applicable industrial instrument or National Employment Standards.	Ch.3, p.52
R.3.6	The provisions in ss.42(3) and (3A) of the Seafarers Act relating to the Approved Guide should be amended to ensure compliance with the <i>Legislative Instruments Act 2003</i> (LI Act).	Ch.3, p.52
R.3.7	<p>a) The provisions in s.54 of the Seafarers Act relating to common law actions should be amended by inserting clauses similar to ss.44(3) and (4) of the SRC Act.</p> <p>b) The provisions in s.55 of the Seafarers Act relating to common law actions should be amended by inserting clauses similar to s.45(5) of the SRC Act.</p>	Ch.3, p.53

Rec. No.	Recommendation	Chapter and page
R.3.8	The provisions in ss.56, 57 and 59 of the Seafarers Act relating to common law proceedings should be amended along the lines of ss.46, 47 and 50 in the SRC Act.	Ch.3, p.53
R.3.9	The provisions in s.60(1)(d) of the Seafarers Act should be amended by substituting the term, <i>arising out of a claim made</i> , for the word, <i>instituted</i> .	Ch.3, p.54
R.3.10	Penalties under the Seafarers Act should be the same as in the SRC Act in equivalent provisions.	Ch.3, p.54
R.3.11	The provisions in the Seafarers Act relating to trainees and the Seafarers Engagement Centre should be amended to reflect current industry practice by referring only to a trainee, with a suitable definition, and by omitting references to a Seafarers Engagement Centre.	Ch.3, p.54
Term of reference 2(b) - Legislative consistency between the Seafarers Act and the SRC Act - possible amendments arising from the Hanks Review.		
R.4.1	The Seafarers Act should be amended to include an object and purpose consistent with that proposed in recommendation 3.2 of the Hanks Review.	Ch.4, p.57
R.4.2	The Seafarers Act should be restructured along similar lines to the structure recommended for the SRC Act by the Hanks Review. <i>[Note: an indicative structure is shown in this report].</i>	Ch.4, p.58
R.4.3	a) The Seafarers Act should be amended: <ul style="list-style-type: none"> i. to align s.10 with s.7 of the SRC Act by requiring that, for a seafarer to be entitled to compensation for a disease, the employment contribution be to a significant degree; ii. to include provisions similar to those of s.5B of the SRC Act defining disease, providing guidance on the matters to be taken into consideration when determining whether employment has contributed to a significant degree; iii. to define significant degree along the lines of the SRC Act definition; b) The Hanks Review's recommendation 5.2 for the SRC Act to be amended (to require that an employee's perception of a state of affairs only provides a connection with employment where the perception has a reasonable basis) should, if accepted for the SRC Act, be used in the Seafarers Act.	Ch.4, p.60
R.4.4	a) For clarity and for consistency with the SRC Act, s.3 of the Seafarers Act should be amended along the lines of s.5A(1) of the SRC Act, including the Hanks Review recommendation 5.5, if it is accepted. b) A provision similar to s.5A(2) of the SRC Act should also be inserted in the	Ch.4, p.62

Rec. No.	Recommendation	Chapter and page
	Seafarers Act, together with the Hanks Review recommendation 5.6 (to remove the words <i>and without limiting that subsection</i>), if it is accepted.	
R.4.5	The Seafarers Act should include a new provision based on recommendation 5.3 of the Hanks Review, if it is accepted.	Ch.4, p.63
R.4.6	<p>The Seacare Authority should be requested:</p> <p>a) to consider experience with s.9(2)(e) of the Seafarers Act in circumstances where there has been a delay in, deviation from or interruption of travel to and from work; and</p> <p>b) advise the Minister on whether any amendment is appropriate.</p> <p>[For this purpose, consideration should be given to adapting the provisions of ss.36(2)-(5) of the Queensland <i>Workers Compensation and Rehabilitation Act 2003</i>].</p>	Ch.4, p.65
R.4.7	<p>Further consideration should be given to amending the Seafarers Act to include a system of provisional liability along the lines of that proposed for the SRC Act should occur:</p> <p>a) if provisional liability is provided for under the SRC Act as recommended by Mr Hanks and has had a reasonable period of operation (e.g., at least 12 months);</p> <p>b) the financial implications of provisional liability for the Seacare scheme can be actuarially costed at that time; and</p> <p>c) a meaningful comparison at that time of the respective performances of the arrangements under the Seacare scheme and under the SRC Act shows that the underlying objectives of provisional liability would be met in the Seacare scheme's context.</p>	Ch.4, p.67
R.4.8	<p>For cases where employers either fail to meet their statutory rehabilitation obligations, or cease to exist, the Seafarers Act should be amended to give responsibility for commencing or taking over those obligations to:</p> <p>a) the employer's insurer (where the insurer's liability for the claim has become effective); or</p> <p>b) the Seacare Authority (where the employer's excess is yet to be exceeded).</p>	Ch.4, p.69
R.4.9	<p>If the Hanks Review recommendation 6.20 for the establishment of a Comcare Return to Work Inspectorate is accepted with suitable compliance powers and functions, the Seafarers Act should allow the inspectorate to exercise equivalent powers and to perform equivalent functions under the Seafarers Act.</p> <p>[Note: The Seacare Authority could rely on the resources of Comcare pursuant to</p>	Ch.4, p.70

Rec. No.	Recommendation	Chapter and page
	s.72A of the SRC Act].	
R.4.10	<p>The Seafarers Act should authorise the issuing of improvement notices and the acceptance of enforceable undertakings about rehabilitation as counterpart measures to those recommended by Hanks Review recommendation 6.21 for the SRC Act.</p> <p>[Note: The Seacare Authority could rely on the resources of Comcare pursuant to s.72A of the SRC Act].</p>	Ch.4, p.70
R.4.11	The Seafarers Act should be amended to omit provisions providing for offsetting workers incapacity payments by the amount of superannuation contributions.	Ch.4, p.72
R.4.12	<p>a) The Seafarers Act should be amended so that the cut off age for compensation is the same as the age of eligibility for the age pension.</p> <p>b) The amendments should, for fairness and consistency, be based on those made under the SRC Act as a result of consideration of the relevant recommendations of the Hanks Review.</p> <p>c) If the Hanks recommendation for the payment of incapacity payments for 260 weeks was not considered suitable for the Seacare scheme, the current provisions (52 weeks) should be maintained, with an appropriate adjustment to the age at which such payments may be made (currently 64), so that it is one year before the relevant age of eligibility for the age pension. This could be reviewed after a specified period (e.g., 3 years).</p>	Ch.4, p.74
R.4.13	<p>The Seafarers Act should be amended along the lines of the proposed change to the SRC Act as set out in recommendation 7.17 of the Hanks report so that:</p> <p>a) an injured employee's entitlement to weekly compensation may be suspended during any period of more than 60 days when an employee is absent from Australia unless the employee's employment, or <i>suitable employment</i> undertaken by the employee, required the employee to leave Australia;</p> <p>b) payments could only be suspended where the Seacare Authority was satisfied that the suspension was appropriate in the circumstances; and</p> <p>c) the Seacare Authority could set conditions on any such suspension.</p>	Ch.4, p.75
R.4.14	<p>The Seafarers Act should be amended along similar lines to the Hanks recommendation 7.23 by empowering the Seacare Authority:</p> <p>a) to recognise, accredit and monitor certain medical treatment providers not recognised by the Australian Health Practitioner Regulation Agency;</p> <p>b) to approve overseas medical, surgical, dental and other therapeutic treatment; and</p>	Ch.4, p.76

Rec. No.	Recommendation	Chapter and page
	c) to adopt decisions taken by Comcare under the SRC Act in relation to such matters without considering any further material, if it so chooses.	
R.4.15	<p>a) The Seafarers Act should be amended along similar lines to the amendment to the SRC Act proposed in Hanks Report recommendation 7.28 requiring medical treatment to meet objective standards such as those in the Clinical Framework for the Delivery of Health Services.</p> <p>b) Only the Seacare Authority should be empowered to refer non-conforming practitioners to a professional disciplinary body.</p>	Ch.4, p.77
R.4.16	<p>The Seafarers Act should be amended:</p> <p>a) along similar lines to Hanks recommendation 9.4 so that, for liability to pay compensation for a psychological injury to continue for more than 12 weeks, the diagnosis must be confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to an approved standard (if not initially made by such a practitioner);</p> <p>b) to permit such specialised practitioners recognised by Comcare to be recognised for the purposes of the Seafarers Act; and</p> <p>c) so that the Seacare Authority may vary the time limit where it is not practicable to comply.</p>	Ch.4, p.79
R.4.17	<p>The Seafarers Act should be amended so that:</p> <p>a) information requested under s.67 must be provided within such reasonable time as is specified in the request (as with a notice issued under s.95);</p> <p>b) employers may request information relevant to a claim from parties other than the employee (e.g., the employee's legal practitioners, a previous employer, or an insurer); and</p> <p>c) employers may request information relevant to the administration of liabilities under the Seafarers Act (e.g., information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).</p>	Ch.4, p.80
R.4.18	Section 59 of the Seafarers Act should be amended along similar lines to the Hanks Review recommendation 10.2, to make it clear that any action to recover damages under s.59 includes the power to do all things necessary for the making of a claim, including taking any preliminary steps.	Ch.4, p.81
R.4.19	Section 59 of the Seafarers Act should be amended to make clear that any damages recovered by an employer under s.59(11) are limited to the damages recoverable by the employee.	Ch.4, p.82

Rec. No.	Recommendation	Chapter and page
Term of reference 2(c) - legislative consistency between the OHS(MI) Act and the model WHS laws		
R.5.1	<p>The OHS(MI) Act should be updated on the basis that:</p> <ul style="list-style-type: none"> a) its structure and provisions should be the same as those in the model WHS bill except where another approach is justified in the particular circumstances of the maritime industry as covered by the OHS(MI) Act (see below); b) the OHS(MI) Act should not adopt an approach or provision differing from the model WHS bill if it would result in a less safe work health and safety outcome than would be achieved by using the equivalent provision of the model WHS bill, unless that provision is impractical or inappropriate; c) the assessment of whether and how the model law should be modified should be undertaken through consultation with industry stakeholders, including the relevant unions. 	Ch.5, p.95
R.5.2	The OHS(MI) Act should be retitled as the <i>Work Health and Safety (Maritime Industry) Act</i> .	Ch.5, p.95
R.5.3	<p>Certain changes are required to ensure that the proposed WHS(MI) Act is suited to the maritime sector, including ensuring that:</p> <ul style="list-style-type: none"> a) in the first instance, the WHS(MI) Act should apply to the persons to whom the OHS(MI) applies and with the same jurisdictional scope (see Chapter Two); b) its provisions should be reviewed after the foreshadowed review of the implementation of the model WHS laws and in the light of experience with the shipping reform initiatives. 	Ch.5, p.95
R.5.4	The OHS(MI) regulations should be aligned with the model WHS regulations, so far as they are relevant.	Ch.5, p.95
R.5.5	<p>The new laws should not take effect immediately:</p> <ul style="list-style-type: none"> a) a suitable transition period should be allowed so that the regulatory authorities and industry parties can make suitable preparations for their commencement; b) the transitional principles for the model WHS bill and regulations should be used, subject to any modifications determined by the Seacare Authority. 	Ch.5, p.95
Term of Reference 3		
R.6.1	Subject to the acceptance of Hanks recommendations 6.1 and 6.9, the Seafarers Act should similarly provide for early intervention to be the primary form of	Ch.6, p.103

Rec. No.	Recommendation	Chapter and page
	<p>rehabilitation, supported by an appropriate Injury Management and Rehabilitation code of practice, which could be based on the proposed Comcare scheme code.</p> <p>[Note: an injury management plan and related matters are dealt with in a later recommendation].</p>	
R.6.2	<p>The Seafarers Act should be amended to replace the obligation to have a <i>rehabilitation program</i> with one to have a <i>workplace rehabilitation program</i>, based on the definition proposed in Hanks recommendation 6.3.</p>	Ch.6, p.105
R.6.3	<p>Section 52 of the Seafarers Act should provide a penalty for failing to take all reasonable steps to provide an employee with suitable employment, or to assist the employee to find such employment.</p>	Ch.6, p.105
R.6.4	<p>a) The Seacare Authority should examine the options for establishing a scheme-wide job placement program, appropriate to the particular attributes of the Seacare scheme, along the lines of that proposed for the Comcare scheme. Given funding pressures, the Authority should consult the industry and insurers about an industry run scheme in the first instance.</p> <p>b) If a statutory job placement scheme is to be established, it should allow sufficient time before commencing for lessons to be learned from the operation of the proposed Comcare scheme.</p> <p>c) The Seacare Authority should consider promoting a return to work hierarchy, and measuring outcomes against it, based on the Comcare and Victorian WorkCover models, with certain modifications for the maritime industry context (an example is given in Chapter Four).</p>	Ch.6, p.107
R.6.5	<p>The Seafarers Act should be amended along the lines of the following recommendations made by Mr Hanks in his review of the SRC Act:</p> <p>a) payment of employee's costs at reconsideration stage (Hanks recommendation 9.5);</p> <p>b) all parties to disclose evidence at the AAT at least 28 days before a hearing (Hanks recommendation 9.12);</p> <p>c) the AAT to be able to hear matters not subject to reviewable decision, with consent of the parties (Hanks recommendation 9.13);</p> <p>d) reliance on Fair Work Commission determinations on reasonableness or otherwise of an employer's actions (Hanks recommendation 9.14);</p> <p>e) jurisdiction for Fair Work Commission to review certain reviewable decisions involving workplace issues and rehabilitation programs (Hanks recommendations 9.15 and 9.16).</p>	Ch.6, p.114

Rec. No.	Recommendation	Chapter and page
R.6.6	For reasons of fairness and to maintain legislative consistency with the SRC Act, any update to the s.30 redemption provisions in the SRC Act should be reflected in the s.44 redemption provisions of the Seafarers Act, subject to a requirement that a voluntary redemption must be approved by the Seacare Authority.	Ch.6, p.117
R.6.7	<p>Part 7 of the Seafarers Act (<i>Compulsory insurance and the Fund</i>) should be amended:</p> <p>a) to empower the Seacare Authority:</p> <ul style="list-style-type: none"> i. to request information from employers and their insurers on the deductible amounts under their policies; ii. to issue guidelines governing the arrangements and amount of deductibles under employer insurance policies; iii. to approve any proposed deductibles that exceed a prescribed amount, including by imposing conditions on the management of claims that are made within the deductible amount; <p>b) to amend s.93(2) so that a policy of insurance or indemnity or terms of membership of a P&I club or employers' mutual indemnity association that provides for an employer to be liable for a specified amount under the policy, etc., must not be inconsistent with guidelines issued by the Seacare Authority under Part 7.</p>	Ch.6, p.122
R.6.8	Section 95 of the Seafarers Act should be amended to empower the Seacare Authority to request copies of employer policies of insurance or indemnity and related documents, such as evidence of currency and any variations to a policy.	Ch.6, p.122
R.6.9	<p>a) DEEWR, as the policy department for the Seafarers Act, should work with the Seacare Authority to develop self-insurance options and to assess their potential impact on the scheme and rehabilitation and return to work.</p> <p>b) The options, which should be the subject of consultation with the scheme participants, industry bodies, insurers and unions, should aim for possible introduction of self-insurance provisions by 2015.</p> <p>c) If self-insurance becomes available under the Seacare scheme, the Seacare Authority should be the responsible overseeing body.</p>	Ch.6, p.124
R.6.10	<p>a) The Seafarers Act should be amended to empower the Seacare Authority to issue guidelines to authorised insurers, protection and indemnity associations or employers' mutual indemnity associations.</p> <p>b) The guidelines should set minimum performance standards on (a) claims management and rehabilitation and return to work and (b) the collection and reporting of claims data.</p>	Ch.6, p.126

Rec. No.	Recommendation	Chapter and page
	<p>c) The Seafarers Act should require the provision to the Seacare Authority, upon request or at specified periods, of information about performance measured against those standards.</p> <p>d) If there is a significant performance deficiency, the Seacare Authority should advise the Minister on options for regulatory requirements that secure compliance with those standards.</p>	
R.6.11	If P&I clubs indicate that they propose to resume providing services to employers for scheme purposes, further consideration should be given to the prudential standards and accountability that should apply.	Ch.6, p.127
Term of Reference 4		
R.7.1	The Seacare Authority should continue to be a tripartite body appointed by the Minister.	Ch.7, p.130
R.7.2	<p>The statutory functions of the Seacare Authority and AMSA under the OHS(MI) Act should be amended so that:</p> <p>a) there is greater clarity about the respective responsibilities of the agencies;</p> <p>b) the overall strategic and supervisory roles of the Seacare Authority are clearer;</p> <p>c) the constructive relationship between the Seacare Authority and AMSA is strengthened.</p> <p>[Examples of possible amendments are provided at paragraphs 7.20 and 7.21 of this chapter].</p>	Ch.7, p.136
R.7.3	<p>a) The Seafarers Act should include an objects clause, based on the provision proposed for the SRC Act under Hanks recommendation 3.2, but with the additional elements proposed in the example of an objects clause given in paragraph 7.33 of this Chapter.</p> <p>b) The statutory functions of the Seacare Authority under the Seafarers Act should be amended so that:</p> <p>i. there is greater focus on the purpose of the functions;</p> <p>ii. the overall strategic and supervisory roles of the Seacare Authority are clearer; and</p> <p>iii. duplication between the functions under the Seafarers Act and the OHS(MI) Act is eliminated.</p> <p>[Examples of what amendments could be made are provided at paragraphs 7.35 and 7.37].</p>	Ch.7, p.139

Rec. No.	Recommendation	Chapter and page
R.7.4	<p>a) The Seacare Authority should be requested to develop a detailed set of activities for facilitating the achievement of the objects of the OHS(MI) Act and the Seafarers Act and to develop indicative costs (Comcare may be able to assist, drawing on its own regulatory experience);</p> <p>b) Consideration should then be given to providing for the collection of levies for those purposes (the amounts of levy should be guided by the cost estimates for the proposed activities) and whether a cost recovery impact statement was required;</p> <p>c) AMSA should be requested to consult the Seacare Authority about a more effective OHS inspection regime and to identify the costs of undertaking inspections to achieve the objectives of that regime and of the OHS(MI) Act , as a preliminary step to providing for a regulatory charge for such inspections.</p>	Ch.7, p.143
R.7.5	<p>In relation to the Safety Net Fund:</p> <p>a) DEEWR and the Seacare Authority should seek the assistance of the Department of Finance and Deregulation in putting the Fund in a position where it may earn interest;</p> <p>b) consideration should be given to amending the Seafarers Act to allow the Fund to borrow where it may have insufficient funds to meet claims at a given time, subject to Ministerial approval;</p> <p>c) further consideration should be given to the risk to the fund of claims where a terrorism event occurs (this may be assisted by a review of how other Australian workers' compensation schemes provide for such claims and examination of reinsurance options);</p> <p>d) exemptions under the Seafarers Act and the Levy Act should be aligned so as to exempt ships from the levy to the extent that employees are not covered under the Seafarers Act (this would eliminate the need for debt waivers).</p>	Ch.7, p.145
R.7.6	<p>a) The Seafarers Act should:</p> <p>i. clearly require an insurer, or a rehabilitation or RTW service provider, to provide the Seacare Authority with prescribed information and documents or parts of documents in relation to claims in a prescribed manner, form and at prescribed times, as requested by the Seacare Authority;</p> <p>ii. provide that the regulations may specify the prescribed information and documents or parts of documents to be provided to the Seacare Authority in relation to claims as well as the prescribed manner and form of, and time in which, the information and documents must be provided;</p>	Ch.7, p.148

Rec. No.	Recommendation	Chapter and page
	<p>iii. strengthen s.106 of the Seafarers Act in line with these provisions.</p> <p>b) If there is non-compliance, the Seacare Authority should be empowered to seek orders for the supply of information or documents, as well as financial penalties.</p> <p>c) The Seacare Authority should be able to inspect original documents of this type at a specified place on giving reasonable notice.</p> <p>d) The Seacare Authority and AMSA should consider how the reports to AMSA of notifiable accidents and dangerous occurrences¹ may be better used for strategic and monitoring purposes.</p> <p>[Note: The customary qualifications about legal professional privilege should apply].</p>	
R.7.7	The Seacare Authority should review the reporting requirements under the scheme with a view to reducing any unnecessary requirements as to content and timing.	Ch.7, p.149
R.7.8	The Seacare Authority and AMSA should regularly review the implementation of the compliance policies to ascertain whether the appropriate responses are being taken in relation to non-compliance with the OHS(MI) Act, and in particular, whether legal proceedings may be more frequently warranted for serious breaches.	Ch.7, p.150
R.7.9	<p>a) Section 107 of the Seafarers Act should be revised along the lines of s.647 of the NOPSEMA Act so that it is clear that the Minister may issue binding strategic policy directions to the Seacare Authority and may state expectations about how they are to be achieved (the Seacare Authority would be required to respond with a formal Statement of Intent).</p> <p>b) If recommendation 7.10 for an overarching maritime safety policy is acted upon, the Minister should consider issuing a direction that sets out expectations about working collaboratively with government and non-government stakeholders to achieve the objectives of the strategy.</p>	Ch.7, p.151
R.7.10	<p>Consideration should be given to establishing a Commonwealth cross-portfolio strategy for better regulation of maritime safety strategy, so that there is improved co-ordination, information sharing, data development and mutual support between Commonwealth departments and agencies with responsibility for maritime safety regulation and more effective use of resources.</p> <p>[The strategy would have the features described in the <i>Better co-ordination of regulation affecting maritime safety</i> part of Chapter Seven].</p>	Ch.7, p.155

¹ OHS(MI) Act , s.107 and OHS(MI) Regulations, r.13.

Rec. No.	Recommendation	Chapter and page
R.7.11	<p>a) The Seafarers Act should be amended to provide for reviews of the operation of the Seacare Authority at least once in each 5 year period after the commencement of the amendment. The reviews should be required to consider the Seacare Authority's effectiveness in contributing to improvements in the work health and safety of persons covered by the (proposed) Work Health and Safety (Maritime Industry) Act 2013 and in the operation of the Seafarers Act and other legislation for which the Seacare Authority has administrative responsibility. Reviews should also address such other matters as the Minister directs pertaining to operation of the legislation and the activities of the Seacare Authority.</p> <p>b) The next review of the Seacare scheme should:</p> <ul style="list-style-type: none"> i. be conducted after there has been sufficient time to secure improvements in the data relating to the scheme's operation and for the effect of any changes made as a result of this review to be clear, but in case should be no later than 2018; ii. examine the Seacare scheme's purpose, structure and performance, with a full consideration of and recommendations about alternatives to the current Seacare scheme model. 	Ch.7, p.156

Introduction

The Review of the Seacare scheme

On 16 October 2012, the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, announced a Review of the Seacare scheme.² I was appointed to undertake the review, assisted by a secretariat from the Department of Education, Employment and Workplace Relations (DEEWR). The date for providing the report to the Minister was extended so that I would have time to consider recommendations made by Mr Peter Hanks QC in his review of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).³

The Minister made it clear that the Government believes that the Seacare scheme should be best practice, and comparable to other Australian work health and safety (WHS) and workers' compensation schemes for people in the maritime industry. It must provide a rigorous and harmonised WHS regime, as well as fair and appropriate workers' compensation arrangements for all workers covered by the scheme legislation. There is to be an ongoing effective framework for rehabilitation and compensation support to injured seafarers, as well as practical, clear and consistent occupational health and safety (OHS) guidance provided to maritime operators. The Review was not to consider any reduction in existing benefits afforded to workers covered by the Seacare scheme. I have undertaken the review guided by these general criteria.

The review's specific terms of reference are set out at the start of this report.

Previous reviews

Two previous reviews of the Seacare scheme are particularly relevant.⁴ In 2005, Ernst & Young ABC Pty Limited (Ernst & Young) undertook a review evaluating the Seacare scheme for the then Department of Employment and Workplace Relations. Their report was not made public, but I was given access to it and authorised to refer to its findings and recommendations in my report.

The Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) released a discussion paper in February 2012, the *Seacare Jurisdictional Coverage – discussion paper*. It provides information on existing coverage provisions and problems associated with their operation, some guiding principles proposed to be taken into account in developing coverage provisions and draft provisions on which feedback was sought.⁵ That review was overtaken by the current review. Even so, the work undertaken by the Seacare Authority and the initial responses provided very helpful information and analysis. The Seacare Authority has expressed its strong support for the objectives of this review.⁶

² <http://ministers.deewr.gov.au/shorten/review-national-compensation-scheme-seafarers>.

³ Mr Hanks' review was completed on 22 February 2013. His recommendations are relevant to Term of Reference 2 of my review and are considered in Chapters Four and Six of this report. I had the benefit of a discussion with Mr Hanks during the course of my review. The stakeholders did not have access to the Report of the Hanks Review, so in some instances their views may have been overtaken.

⁴ Other useful more general reviews include those conducted by the Industry Commission in the 1990s (see *Workers' Compensation in Australia*, 1994 and *Work Health and Safety*, 1995) and the Productivity Commission (see *National Workers' Compensation and Occupational Health and Safety Frameworks*, 2004).

⁵ Seacare Authority, *Seacare Jurisdictional Coverage – Discussion Paper*, February 2012, p.4.

⁶ Seacare Authority submission.

More generally, the reports of reviews in recent years of other State workers' compensation schemes have also been useful.⁷

Good sources of performance information relating to the Seacare scheme are the annual editions of Safe Work Australia's *Comparative Performance Monitoring Report* (CPM Report), Safe Work Australia's *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, and the Seacare Authority's Annual Reports. The Annual Reports contain a range of useful performance information and data derived from the Return to Work (RTW) Monitor. I have quoted from these sources, among others, and the references to where they may be found are given in this report.

Scope of this Review

In line with the terms of reference and the Minister's overall guidance, the review has four broad themes relating to the Seacare scheme, namely:

- clarifying what the scheme covers (Chapter Two);
- improving the workers' compensation arrangements, including by strengthening consistency with the Commonwealth's SRC Act, better rehabilitation and return to work regulation and possible action to reduce premiums (Chapters Three, Four and Six);
- updating and strengthening the laws protecting the work health and safety of persons covered by the Seacare scheme, including by maintaining their consistency with the model WHS laws (Chapter Five); and
- better governance arrangements for the Seacare scheme (Chapter Seven).

The Review Process

The review was conducted in three stages:

- the first stage consisted of research, data gathering and a consultative process with key stakeholders, to identify major issues and to refine the scope of the review. I consulted twenty-two stakeholders representing industry participants and government (Appendix B lists the persons and bodies consulted);
- in the second stage, a discussion paper was prepared and released for public comment on 22 November 2012. Written submissions were invited by 19 December 2012. Thirteen written submissions were received (see Appendix C)⁸ and further consultation took place in this period;
- the last stage concentrated on considering the submissions, gathering additional information and preparing my report.⁹

⁷ Clayton, A, *Review of the South Australian Workers' Compensation System*, Bracton Consulting Services Pty Ltd, Price Waterhouse Coopers, December 2007; Clayton, A, *Review of the Tasmanian Workers' Compensation System*, September 2007; Hanks, P, *Victorian Compensation Act Review*, August 2008; Stewart-Crompton, R, *Review of the Structural Review of Institutional and working Arrangements in Queensland's Workers' Compensation scheme*, August 2010.

⁸ To appreciate the views of stakeholders fully, reference should be made to the original submissions, most of which have been published on the Review's website (some were confidential).

⁹ In addition to the information provided by the stakeholders, DEEWR, the Seacare Authority and Safe Work Australia all provided data for the review, which DEEWR analysed for the purposes of the report.

Structure of the Report

The report has seven chapters. Chapter One provides context and background, which are essential for the examination of the issues in later chapters. Each of those chapters deals with specific elements of the terms of reference.

Chapter Two discusses issues that relate to:

- the interaction of Seacare scheme's legislation with other laws covering the maritime industry;
- the scheme's coverage; and
- exemptions under the scheme.

Chapters Three, Four and Five consider the matters of legislative consistency between:

- the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), and the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act); and
- the *Occupational Health and Safety (Maritime Industry) Act 1993* [OHS(MI) Act] and the model Work Health and Safety bill (model WHS bill), which has been the basis for nationally harmonised Work Health and Safety laws in, up to now, seven Australian jurisdictions, including the Commonwealth.

Chapter Six explores issues affecting premiums for employers within the scheme and the challenges it faces in regulating the scheme's insurance arrangements and taking action to reduce premiums.

Chapter Seven considers the scheme's governance arrangements.

There are 67 recommendations (see the earlier table).

Acknowledgements

I am most grateful for the considerable assistance of all the interested persons with whom I discussed the review and those who made formal submissions to the review and provided information and data.

The secretariat played an invaluable role in assisting the review. My thanks go to Daniel Egan, Phil Hartley, Ruth Hunt, Denise Lowe-Carlus, Rosa D'Ortenzio and Seyram Tawia.

Chapter One – Background & Context

Chapter One provides the report's introduction and outlines the context of and background to the Seacare scheme. The chapter includes information about the scheme's nature, scope and size, as well as a brief history. I also outline the regulatory context (including recent maritime industry regulatory reforms), the scheme's performance in comparison with other jurisdictions, and its governance. That performance in relation to both OHS and workers' compensation is well behind other schemes, including for high risk industries. Relevant issues are discussed in following chapters.

The Seacare scheme

- 1.1 The Seacare scheme is a national scheme for a defined part of the maritime industry (see below) regulating:
 - a) occupational health and safety, provided for by the *Occupational Health and Safety (Maritime Industry) Act 1993* [the OHS(MI) Act] and regulations; and
 - b) rehabilitation, return to work and workers' compensation arrangements for injured employees, which are provided for by the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) and regulations.
- 1.2 As explained later, the Seacare scheme is relatively narrowly focused, only applying to employers and employees in a part of the broader maritime industry. Defined employers and seafaring employees are covered in a range of specified circumstances, as well as, in relation to OHS purposes, defined third parties (see Chapter Two). The Seacare scheme is anomalous in the context of Australian workers' compensation arrangements. It is a privately underwritten, industry-specific scheme, applying to a comparatively small number of entities and persons. Seafaring has inherently higher risks compared to most other industry sectors, which partly explains its industry-focused regulation.

Seacare scheme history and developments

- 1.3 Australia's first national workers' compensation scheme for seafarers was established over a century ago under the *Seamen's Compensation Act 1909* (Cwth).¹⁰ Those arrangements were reviewed in 1988,¹¹ ultimately leading to the enactment of the Seafarers Act in 1993. The OHS(MI) Act took effect in 1994. The Seacare Authority began operations in 1993. A deliberate scheme design feature was consistency with the OHS and workers' compensation arrangements for Commonwealth employment. This was seen as necessary to ensure legislative consistency.
- 1.4 Among the significant developments since the Seafarers Act commenced, employment in the industry has changed from industry employment¹² to company employment. The Seafarers Act and OHS(MI) Act have successfully covered both types of employment arrangements.

¹⁰ This was replaced by the *Seamen's Compensation Act 1911*.

¹¹ Luntz, H, *Seamen's Compensation Review*, 1988. Reform of the industry more generally has been a policy focus of successive Australian governments for many years, with many significant changes occurring since the 1980s (when the report of the Crawford Committee on the Revitalisation of Australian Shipping was presented).

¹² Under the former award-based Seafarers Engagement System.

- 1.5 Since the Seacare scheme's commencement, the Australian maritime industry's profile has also changed, which has in part stimulated the Government's maritime reforms. The changes are discussed later in this chapter.

Regulatory context

- 1.6 To consider how to improve the Seacare scheme and its outcomes, the broader regulatory context must be identified. As discussed in various parts of this report, the Seacare scheme is relatively limited in its coverage of the maritime industry for the particular purposes mentioned above. Overall, however, many parts and aspects of the industry are subject to regulation at Commonwealth, State and Territory levels.
- 1.7 The maritime industry is not restricted to a single type of marine activity. Its breadth is demonstrated by the *Index of the marine industry* compiled by the Australian Institute of Marine Science (AIMS).¹³ In the 2012 edition, the index identifies eight marine industry groupings. Each involves activities that are primarily economically dependent on the sea.¹⁴ AIMS has previously noted that there is no single definition of which activities constitute this sector, that is, there is no agreed overall *marine industry* grouping.¹⁵
- 1.8 One of the relevant groupings, *Water Transport and Services to Water Transport*, consists of six sub-sectors for which the Australian Bureau of Statistics (ABS) collects data. Only some of these sub-sectors partially come within the Seacare scheme (namely, international sea transport, coastal water transport, commercial fishing, aquaculture and marine tourism).
- 1.9 To delimit the regulatory context further, this chapter looks at:
- a) national reforms that will affect the scheme;
 - b) the nature and size of the Australian maritime industry to the extent that it involves employment on ships;
 - c) the nature and size of that part of the industry that is covered by the Seacare scheme;
 - d) the number of Australian employees in the industry; and
 - e) the number of Australian employees who are covered by the Seacare scheme.

National maritime reforms

- 1.10 The Australian Government is, with State and Territory Government support, significantly reforming the maritime industry. Implications of the reforms for the review are discussed later.

¹³ Australian Institute of Marine Science, *The AIMS Index of Marine Industry, 2012*.

¹⁴ Australian Institute of Marine Science, AIMS discussion paper, *Valuing the Australian marine industry: assessing the scope, scale and value of the Australian marine industry, 2008*.

¹⁵ Australian Institute of Marine Science, *The AIMS Index of Marine Industry, 2009*, p.1.

- 1.11 The *Stronger Shipping for a Stronger Economy* package, announced by the Minister for Infrastructure and Transport in late 2010, has four elements,¹⁶ as outlined below at paragraphs 1.15-1.18.
- 1.12 The Australian Maritime Safety Authority (AMSA) is becoming the single national regulator for domestic commercial vessel safety in Australia, through the enactment and implementing of the *Marine Safety (Domestic Commercial Vessel) National Law 2012*.¹⁷
- 1.13 In 2011, Australia ratified the ILO *Maritime Labour Convention 2006*. Australian law and practice is in conformity with the Convention,¹⁸ which takes effect internationally on 20 August 2013.
- 1.14 The Government is developing updated safety provisions for the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGGS Act).¹⁹

The Stronger Shipping for a Stronger Economy reforms

The Navigation Act 2012

- 1.15 The *Navigation Act 2012* is replacing the *Navigation Act 1912*. It revises and removes certain provisions from the earlier Navigation Act, including the provisions which underpin the definitions of *prescribed ship* in the Seafarers Act and the OHS(MI) Act. The Navigation Act 2012 is scheduled to commence on 1 July 2013, along with the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, which is outlined below. Further issues regarding the Navigation Act are discussed in Chapter Two.

Coastal trading reforms

- 1.16 The *Coastal Trading (Revitalising Australian Shipping) Act 2012* came into force on 1 July 2012, introducing a new three-tiered licensing system for access to the Australian coastal shipping trade.²⁰ This is discussed further in Chapter Two.

Maritime Workforce Development Forum

- 1.17 The Maritime Workforce Development Forum (the MWD Forum)²¹ is to assist in building a sustainable domestic maritime skills base. It is developing a national aggregated data set on the Australian maritime industry workforce. A census of the maritime workforce has been

¹⁶ Department of Infrastructure and Transport website, <http://www.shipping.infrastructure.gov.au>, accessed on 25 February 2013.

¹⁷ *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cwth), which is to be applied in the States and Territories.

¹⁸ Law and Practice Report – Commonwealth of Australia, International Labour Organisation, Maritime Labour Convention No 186, December 2011.

¹⁹ Offshore Petroleum Safety Regulation Inquiry (June 2009) and Review of the National Offshore Petroleum Safety Authority Operational Activities (March 2008) Government Response, September 2010. <http://www.ret.gov.au/resources/documents/offshore%20petroleum%20safety/govtresponse-nopsareviewsept2010.pdf>, accessed on 25 February 2013.

²⁰ Department of Infrastructure and Transport website, http://www.shipping.infrastructure.gov.au/coastal_trading/index.aspx, accessed on 13 March 2013.

²¹ The Forum was established in 2012 and comprises representatives from across the maritime sector including the “blue water” fleet, offshore, ports and towage. Employers and maritime unions are represented.

undertaken to provide a point-in-time snapshot of the supply of and demand for seafarers in the maritime industry. The data will facilitate a national maritime workforce plan.²²

Tax Incentives

- 1.18 The final, tax reform element of the shipping reform package is intended to promote new investment in Australian shipping assets and operations.²³

Marine Safety (Domestic Commercial Vessel) National Law Act 2012

- 1.19 The *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (the National Law) and the *Marine Safety (Domestic Commercial Vessel) National Law (Consequential Amendments) Act 2012* passed through both Houses of the Commonwealth Parliament and received Royal Assent on 12 August 2012 and is due to commence on 1 July 2013.
- 1.20 The National Law implements the *Intergovernmental Agreement (IGA) on Commercial Vessel Safety Reform* to develop a national approach to the safety regulation of domestic commercial vessels and to establish AMSA as the single national regulator for domestic commercial vessel safety in Australia.²⁴ The national law is not intended to displace the OHS(MI) Act and there are vessels that are covered under both Acts.

The nature and size of the Australian maritime industry

- 1.21 As indicated above, the relevant part of the maritime industry for the purposes of this review relates to water transport. I have found it difficult to obtain definitive data about the size of maritime industry engaged in water transport activities (as defined by the ABS). The data does not appear to be either readily available or consistent.²⁵ Accordingly, I have not attempted to provide such figures in my report. It would be worth paying more attention to these data to support various policy activities. I have more confidence about the data for the Seacare scheme (see below), but, as will be seen, even that is not free of difficulty.²⁶
- 1.22 The Australian trading fleet constitutes a significant part of water transport in the Australian maritime industry, but does not represent all of the vessels within the Seacare scheme. The Bureau of Infrastructure, Transport and Regional Economics (BITRE) defines that fleet as cargo vessels owned and/or operated by Australian companies on trading routes to and from Australia. According to the BITRE, in 2010–11 there were 108 vessels in the Australian trading fleet, with a small increase of three vessels from the 105 vessels in 2005–06. The numbers of Australian registered vessels engaged in coastal trading and international trading fell in that period from 41 to 34. Similarly, Australian registered vessels in the minor trading fleet fell from 18 to 16. The total number of foreign registered vessels in the Australian

²² Department of Infrastructure and Transport website, <http://www.shipping.infrastructure.gov.au/mwdf/index.aspx>, accessed on 25 February 2013.

²³ Department of Infrastructure and Transport website, http://www.shipping.infrastructure.gov.au/tax_incentives/index.aspx, accessed on 10 March 2013.

²⁴ Council of Australian Governments, *Intergovernmental Agreement on Commercial Vessel Safety Reform*, 2011. The IGA also sets out the funding arrangements agreed by the Commonwealth, States and Territories.

²⁵ A Parliamentary Committee inquiring into coastal shipping policy and regulation in 2008 appeared to have similar data difficulties (see House of Representatives Standing Committee on Infrastructure, Transport, Regional Development & Local Government, *Rebuilding Australia's Coastal Shipping Industry* 2008 at p.7, paragraph 1.22).

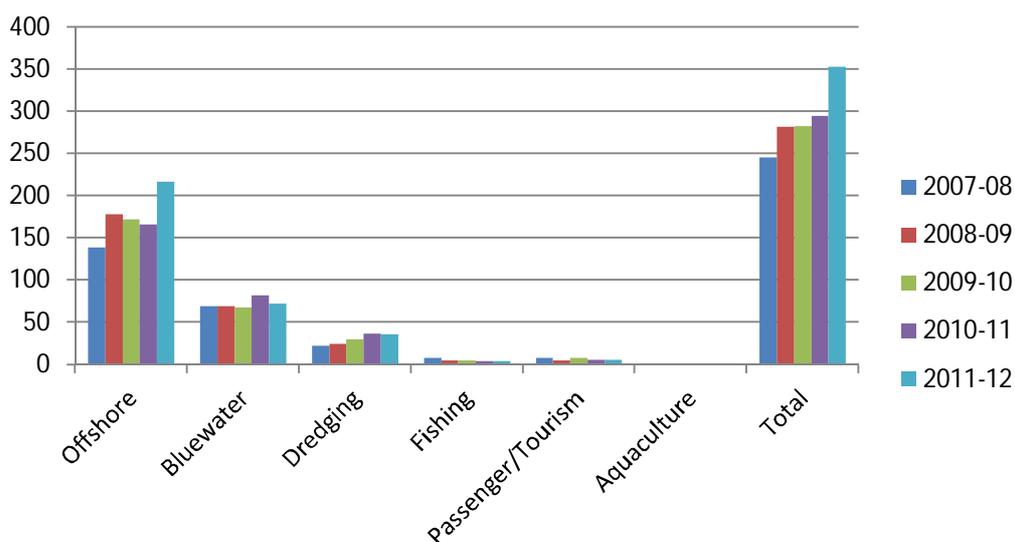
²⁶ I discuss the limitations with the available Seacare scheme data in Chapter Seven.

trading fleet in all three categories rose from 46 in 2005-06 to 58 in 2010-11.²⁷ This supports my conclusion that growth is occurring in the industry, which has implications for the Seacare scheme.

Seacare scheme coverage of the Australian maritime industry

- 1.23 The numbers of vessels within the Seacare scheme have been steadily increasing since 2007-08, as have the numbers of seafarers (see below). As shown below, the largest numbers of vessels are in the offshore and bluewater sectors with only a small number of vessels in the other sub-industry groups. The sharp increase in the offshore sector may be accounted for by growth in that sector nationally.
- 1.24 The offshore sector encompasses those vessels that are either going from a State or Territory port to a place beyond the 12 nautical miles (nm) limit, or between two places beyond the 12nm limit but mostly remain within Commonwealth waters.²⁸
- 1.25 Bluewater operations are constituted by large ocean going vessels which are predominately involved in commercial trading outside a country's near coastal area. Passenger carrying vessels (such as cruise liners and ferries), which are engaged in international, interstate or intrastate travel, are also included in this definition.

Figure 1.1: Number and types of vessels in Seacare scheme since 2007-08²⁹



- 1.26 There were 32 employers of seafarers and 75 operators³⁰ in the Seacare scheme in 2011-12, operating 344 vessels in total.³¹ Table 1.1 below outlines the industry sectors within the

²⁷ BITRE, *Statistical Report: Australian Sea Freight 2010-11*, p.59.

²⁸ Under s.15B of the *Acts Interpretation Act 1901*, Australia includes offshore areas to the outer limit of the territorial sea. The outer limit of the territorial sea was established by proclamation under s.7 of the *Seas and Submerged Lands Act 1973* as 12nm seaward of baselines, also established by proclamation under s.7 of the *Seas and Submerged Lands Act 1973*.

²⁹ Seacare Authority, Employee and Ship Details Survey at 31 December 2012.

³⁰ Under s.3 of the *Seafarers Act*, *operator*, in relation to a prescribed ship or a prescribed unit, means the person who has the management or control of the ship or unit.

³¹ *Seacare Authority Annual Report 2011-12*, p.90.

scheme and the numbers of vessels, berths³² (relevant for the collection of a levy on the employment of seafarers) and seafarers.

Table 1.1: Profile of sectors of maritime industry within the Seacare scheme at 31 December 2012³³

Sector	Vessels	Berths ³⁴	Seafarers
Offshore	233	2285	4414
Bluewater	72	893	2273
Other:			
Dredging	36	303	534
Fishing	4	97	160
Passenger/Tourism	8	230	617
Aquaculture	0	0	0
Total	353	3808	7998

Number of employees in the water transport sub-industry overall and the number covered by the Seacare scheme

- 1.27 The two relevant sub-industries in the maritime industry are *services to water transport*, and *water transport*. The Seacare scheme covers part of the water transport sub-industry, which includes international sea transport, coastal water transport and inland water transport³⁵ (the latter is outside the Seacare scheme).
- 1.28 Data obtained from Safe Work Australia (SWA) show that there were 22,172 full time equivalent³⁶ (FTE) employees in 2011 who were engaged in Australia's water transport sub-industry, with Seacare Authority's data showing that 4,818 of the employees were within the scheme.³⁷ These are not exact figures. The overall number of employees may include some types of employment that falls outside the Seacare scheme and the Seacare figure has had minor revision in 2011-12. Even so, they demonstrate the relative size of the Seacare scheme's coverage compared to that under State and Territory schemes. Figure 1.2 below shows the shares by jurisdiction of total FTE employees in the sub-industry.
- 1.29 According to the SWA data, in 2011 the Seacare scheme covered 22 per cent of all employees in the water transport sub-industry (4,818 FTE employees of a total of 22,172 FTE employees in the sub-industry).

³² Defined in s.3 of the Seafarers Act as a berth on a prescribed ship that is normally used by a seafarer.

³³ Seacare Authority, Employee and Ship Details Survey at 31 December 2012.

³⁴ Seafarer berths are relevant to the Safety Net Fund and the Safety Net Fund Levy. The levy is calculated by reference to the number of berths on board vessels operating on the first of each quarter. The Seacare Authority interprets berths as the average crew complement. Employers are required to pay \$15 per berth for each vessel operating in the Seacare scheme on the first of the quarter. This amount is paid into the Seafarers Safety Net Fund.

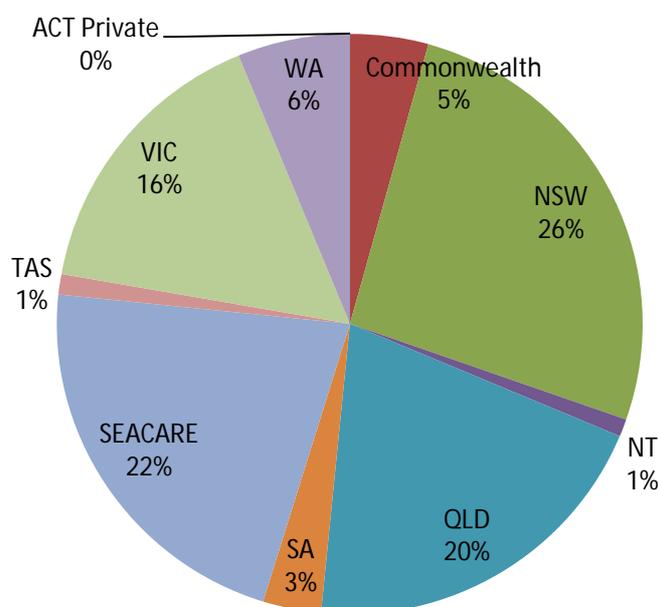
³⁵ ABS Classification Structure – Subdivision 690000 – Transport.

³⁶ This measures the total level of employee resources used. The FTE of a full-time employee equals 1.0. The calculation of FTE for part-time employees is based on the proportion of time worked compared to that worked by full-time employees performing similar duties.

³⁷ This data is derived from the ABS *Labour Force Survey* and the Seacare Annual Report 2010-11.

1.30 Since 2007-08, the growth in the number of employees coming within the Seacare scheme has been steady, and generally similar to the overall growth of employment in the water transport sub-industry. From 2006-07, the growth in the number of FTE employees in the Seacare scheme was 36 per cent and, for the same period, the growth in the water transport sub-industry was 34 per cent.³⁸

Figure 1.2: profile of employees by jurisdiction - water transport sub-industry



1.31 Notwithstanding fluctuations from year to year, when viewed over the two decades of the scheme's operation, the number of employees it covers has grown. Using a head count figure of 4,830³⁹ in 1994-95, employment has increased to almost 8,000⁴⁰ in 2011-12. This is a different type of employee count from the FTE count used above.

1.32 As indicated above, employees in the Seacare scheme are engaged by a relatively small number of employers. The 2011-12 Seacare Annual Report states that during that reporting period there were 32 employers of seafarers within the Seacare scheme.⁴¹

1.33 Each employer may have one or more operators, and each vessel may have more than one operator. An operator is the entity with primary control over the vessel and its crew in an operational sense. Decided cases help to explain the distinction between an employer of a vessel's crew and the entity that operates a particular vessel.⁴²

1.34 In some circumstances where the Seafarers Act applies, the OHS(MI) Act may not apply and vice versa. This reflects the differing application provisions in the Acts (see the tables later in this chapter and the discussion in Chapter Two). The Seafarers Act applies mainly to the employment of employees, whereas the OHS(MI) Act applies to operators, employees,

³⁸ The data is derived from the ABS *Labour Force Survey* and the Seacare Annual Report 2010-11.

³⁹ *Seacare Authority Annual Report 1994-95*.

⁴⁰ *Seacare Authority Annual Report 2011-12*.

⁴¹ *Seacare Authority Annual Report 2011-12*, p.90.

⁴² The concept of operator (defined in s.3 of the Seafarers Act) was examined in *ASP Ship Management Pty Limited v Administrative Appeals Tribunal [2006] FCAFC 23* (10 March 2006).

contractors, and other specified third parties who influence safety on a ship. If an operator of a vessel is not taken to be the employer for the purposes of the Seafarers Act, that Act may not apply to them but the OHS(MI) Act would still apply. However, for the majority of vessels operating under the scheme both Acts apply.⁴³

Performance of the scheme and comparison with other jurisdictions

- 1.35 In this section, the scheme's performance is compared with that in other Australian schemes in relation to:
- a) the relative OHS performance for the maritime industry under the Seacare scheme compared with that in other high risk industries; and
 - b) trends in rehabilitation and RTW of injured employees under the Seacare scheme and in premium rates for injured employees in the Seacare scheme.
- 1.36 The data shown comes from several sources. In each case, improvements can be seen in the Seacare scheme's performance over time, but it remains a relatively poor performer.
- 1.37 In recent years, the Seacare scheme's performance has strengthened:
- a) no workplace fatalities have been recorded since 2007-08;
 - b) the durable RTW rate improved by seven per cent between 2008-09 and 2010-11; and
 - c) the scheme's premium rates have reduced to 3.49 per cent of payroll in 2010-11, down from 5.54 per cent in 2006-07 (see Chapter Six).

Relative OHS performance in the Seacare scheme

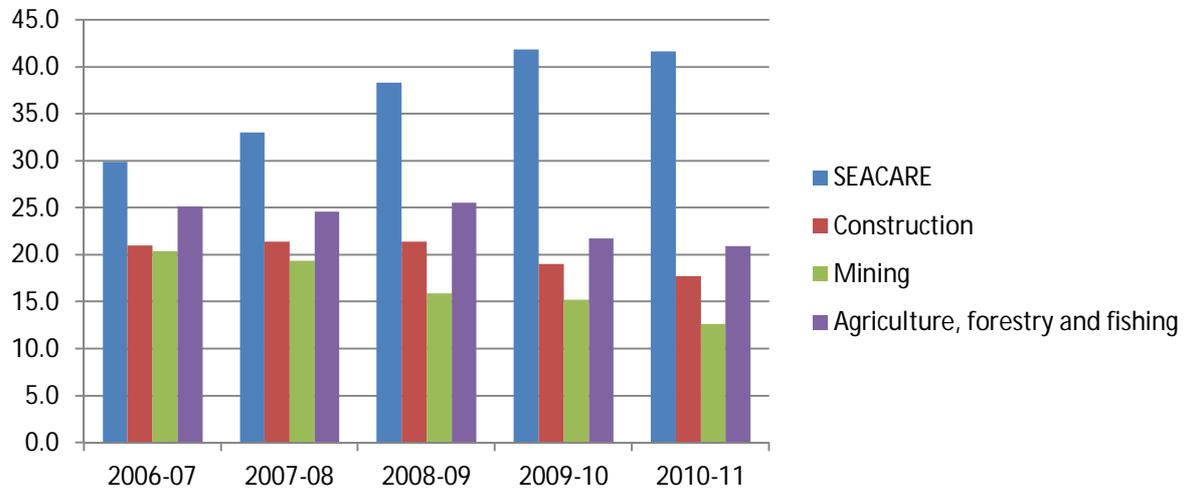
- 1.38 The high risks of working as a seafarer are demonstrated by the injury incidence rates in Figure 1.3. Comparing OHS performance under the Seacare scheme against that in other high risk industries in Australia, such as construction and mining, illustrates the relative risks and suggests that prevention of harm requires considerable attention.
- 1.39 Safe Work Australia's most recent CPM report⁴⁴ compares injury incidence rates in the Seacare Scheme with other Australian jurisdictions from 2006-07 to 2010-11.
- 1.40 Such a comparison should be interpreted with caution. Data for other jurisdictions relate to more industry sectors with far higher numbers of employees. Subject to that qualification, the Seacare scheme nevertheless appears to be the worst performing in critical areas.
- 1.41 The Seacare scheme's trend of OHS performance does not reflect the general trend of improvement across other jurisdictions between 2006-07 and 2010-11. The trend of injury incidence rates in the scheme appears to be much improved in the period 2011-12 (which is not included in the data shown below). However, a review of Seacare reports identified a pattern of a revision of each year's statistics in subsequent annual reporting periods. Some reported figures have been adjusted upward by as much as fifty per cent some years after

⁴³ *Seacare Authority Annual Report 2011-12*, p.90.

⁴⁴ *Ibid.*

being initially reported. Validity of data and adequacy of reporting in the scheme are key challenges explored later in this report.

Figure 1.3: Comparison of Seacare scheme injury incidence with other high risk industries⁴⁵



Durable return to work trends in the Seacare scheme

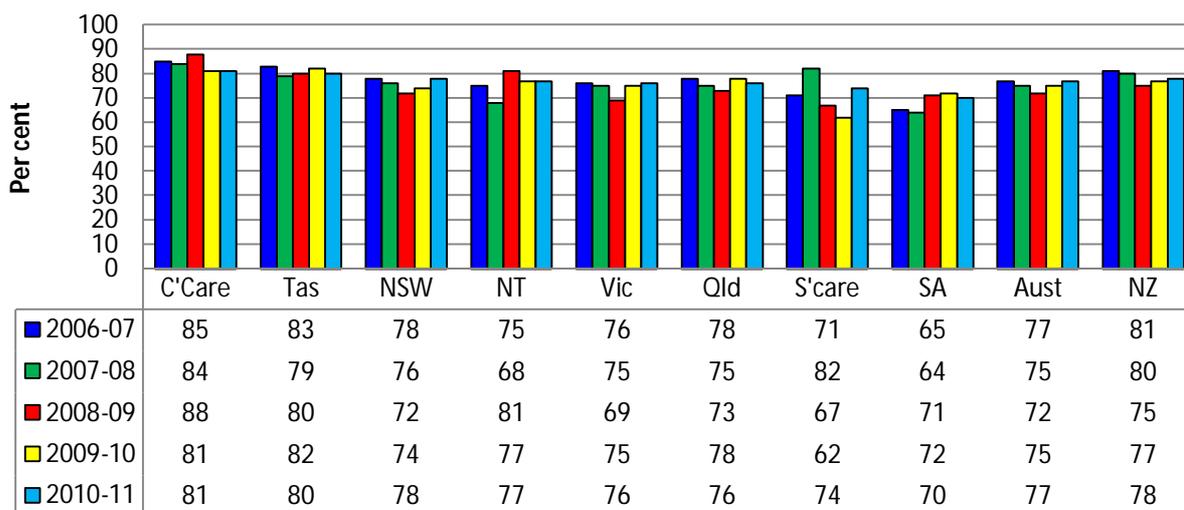
1.42 The durable RTW rate⁴⁶ for the Seacare scheme has also been improving, and is close to its 2007-08 rate. Even so, the most recent CPM Report⁴⁷ shows that the Seacare scheme has a relatively poor RTW rate compared with other Australian jurisdictions in the last five reported years.

⁴⁵ Information provided by Safe Work Australia, extracted from the National Data Set for Compensation Based Statistics. These are based on reported data for workers' compensation claims.

⁴⁶ The Heads of Workers' Compensation Authorities define this as: *13 weeks after the workplace rehabilitation provider determines in agreement with the insurer (agent) the employment placement is likely to be durable, either the provider or insurer will make contact with the worker and/or employer to confirm durability of employment placement. It is at this point the 13 week return to work durability measure is made.*
See: <http://www.hwca.org.au/projects.php>.

⁴⁷ Safe Work Australia, CPM Report, 14th Edition.

Figure 1.4: Durable Return to Work since 2006-07⁴⁸

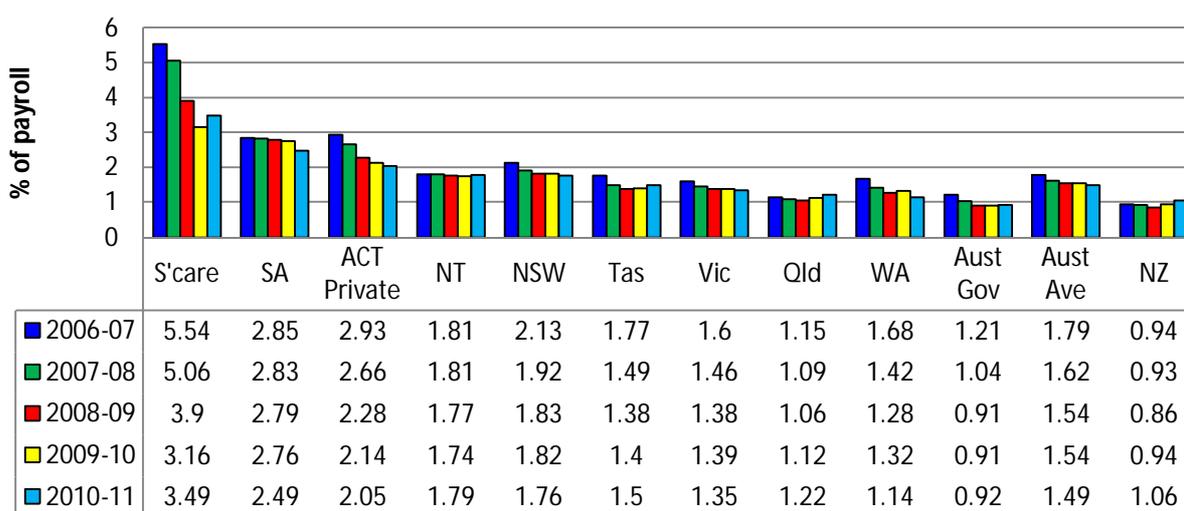


Note: S'Care refers to the Seacare scheme.

Trends in premiums

1.43 The reported premium rates for employers in the Seacare scheme have reduced significantly since 2007-08. Figure 1.5 below compares the trend for premiums under the scheme with the standardised average premium rates in other jurisdictions. A latent impact of OHS performance and premium adjustment commonly exists in a workers' compensation scheme. The significant rate of premium reductions in the Seacare scheme (around 40 per cent improvement over five years) seems at odds with the scheme's reported injury incidence and durable RTW rates.

Figure 1.5: Standardised average premium rates (including insured and self-insured)⁴⁹



[Note: Comcare scheme premiums (excluding ACT Government) are referred to in this figure as Aust Govt.]

⁴⁸ Ibid.

⁴⁹ Safe Work Australia, *Comparative Performance Monitoring Report 14th Edition*, October 2012.

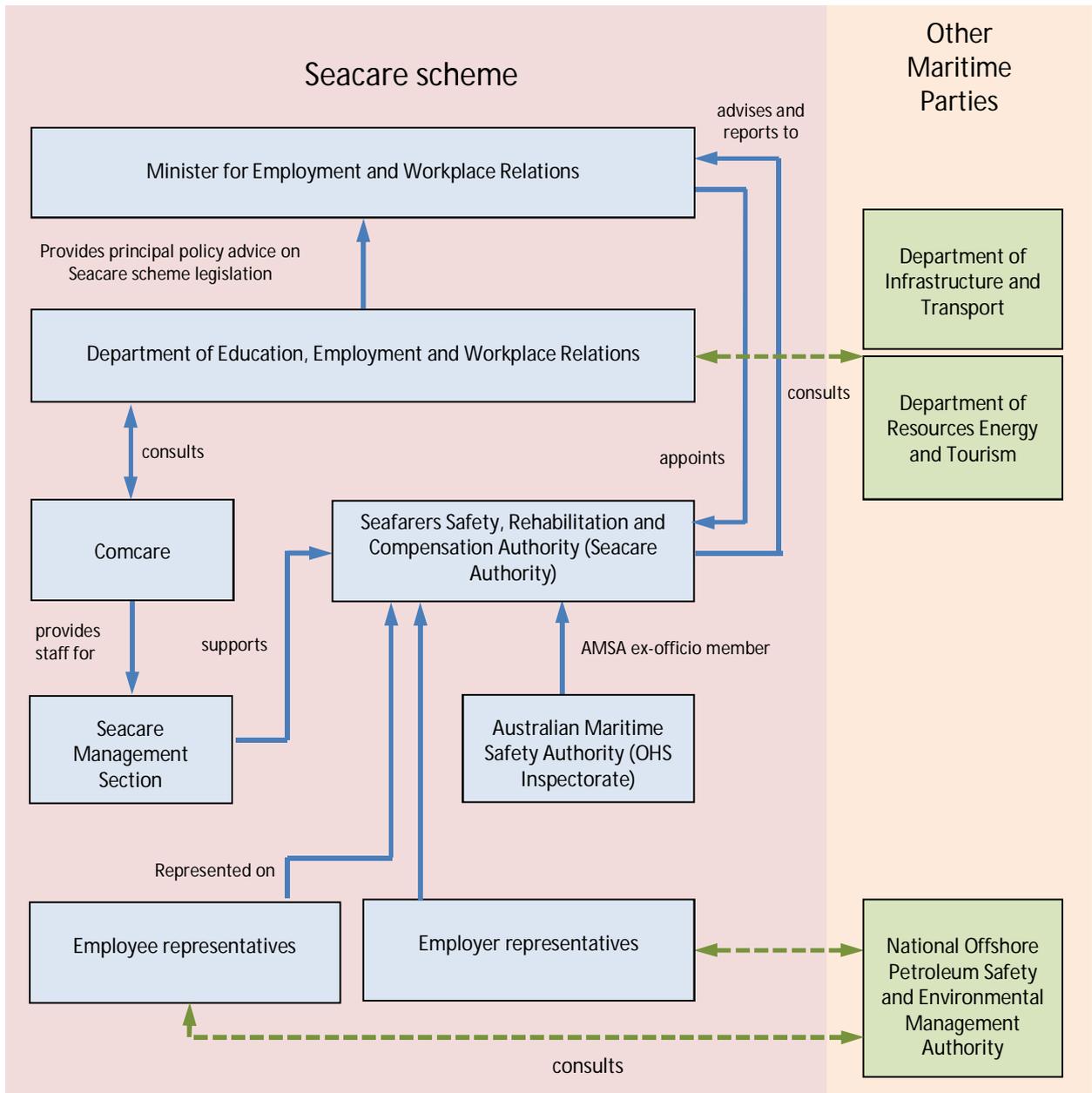
- 1.44 The Seacare Authority's actuary (Taylor Fry) has observed that premium rates are now at levels last experienced in the late 1990s. The Seacare Authority reports that the reductions in premium rates are due in part to changes in claims experience and therefore calculated risk.⁵⁰ The premium reductions must be acknowledged as a positive trend. Even so, the rates remain very high when compared with other jurisdictions. Further, the nature of the insurance model available to scheme participants includes the availability of unregulated deductibles, which in some cases are very high. They may reduce premiums, but with a risk of unreported injuries and poor claims management. This is further discussed in Chapter Six.
- 1.45 By way of comparison, the reported premium rate in a broadly equivalent part of the Queensland maritime sector was 1.925 per cent of payroll in the 2010-11 financial year⁵¹ and the Seacare rate for the same period was 3.49. The Seacare premium rate is consistently much higher than in other jurisdictions, even when compared with a similar industry group. As shown above, trends of reducing premiums are not uncommon in the Australian jurisdictions. While the Seacare scheme's standardised average premiums have been decreasing, the injury frequency rates for the same period have been increasing. This is also considered in Chapter Six.

⁵⁰ *Seacare Authority Annual Report, 2011-12*, p.57.

⁵¹ Information provided by Work Health and Safety Queensland.

Governance of the Seacare scheme

Figure 1.6: Organisation of the Seacare scheme⁵²



1.46 As shown in figure 1.6 above, the Seacare scheme has complex administrative arrangements, with intricate inter-related roles and responsibilities for the administrative stakeholders. This is discussed in greater detail in Chapter Seven. The following briefly describes those roles and responsibilities.

⁵² Seacare Authority Annual Report 2011-12.

Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority)

1.47 The Seacare Authority is constituted by an independent Chairperson and Deputy Chairperson, AMSA's CEO, two employer representatives and two employee representatives. It is created by the Seafarers Act and has oversight of the workers' compensation scheme established by the Seafarers Act, with some regulatory powers in relation to the privately underwritten scheme. It has very limited resources at its disposal. The Authority also has certain responsibilities under the OHS(MI) Act, but depends on AMSA to be the inspectorate under that Act. This is further discussed in Chapter Seven.

Comcare

1.48 Comcare's main activities are to administer the Commonwealth's WHS laws and workers' compensation scheme for Commonwealth Government employees (and certain private companies that are licensed to self-insure under that scheme). Under the Seacare scheme arrangements, Comcare must provide the Seacare Authority with secretariat support and other assistance, making available the services of such members of Comcare's staff as the Authority reasonably requires.⁵³

1.49 The staff of Comcare who support the Seacare function constitute the Seacare Management Section (SMS), which currently has four full-time members. The SMS has access to legal, financial management, communication services and other related corporate support services through Comcare. The SMS assists the Seacare Authority and, as the Authority directs, performs its regulatory functions.⁵⁴

AMSA

1.50 AMSA is a largely self-funded government agency with the role of enhancing efficiency in the delivery of safety and other services to the Australian maritime industry.⁵⁵ AMSA is established under the *Australian Maritime Safety Authority Act 1990*.

1.51 Under the OHS(MI) Act, AMSA is the OHS inspectorate. Its functions and powers are, for these purposes, prescribed under s.82 of that Act and its responsibilities include:

- a) performing inspectorate functions under the OHS(MI) Act;
- b) ensuring compliance with the requirement to report serious personal injuries, deaths, dangerous occurrences and other obligations under the OHS(MI) Act and Regulations;
- c) advising operators, employees or contractors on OHS matters; and
- d) providing the Seacare Authority with information.⁵⁶

Department of Education, Employment and Workplace Relations (DEEWR)

1.52 DEEWR is the portfolio agency with broad policy responsibility for the Seacare scheme and the Comcare scheme. In general terms, DEEWR provides principal policy advice to the

⁵³ *Safety, Rehabilitation and Compensation Act, 1992*, s.72A(2).

⁵⁴ *Seacare Authority Annual Report 2011-12*, p.15.

⁵⁵ Information sourced from the AMSA website, www.amsa.gov.au, accessed on 25 February 2013.

⁵⁶ OHS(MI) Act, s.82.

Government on the Seacare scheme and is responsible for taking action when decisions are made to change the scheme's governing legislation. Among its other responsibilities, DEEWR also provides principal policy advice to the Government on the SRC Act and the *Work Health and Safety Act 2011* (WHS Act). The symbiosis between that legislation and Seacare scheme legislation is discussed later.

- 1.53 The following table provides a broad overview of the links between the responsible entities, their roles and the key legislation.

Table 1.2: Legislative responsibilities for Seacare scheme governance and interaction arrangements

Portfolio	Entity	Role	Legislation
DEEWR	DEEWR	Policy advice on Seacare scheme legislation	SRC Act 1988, Seafarers Act, OHS(MI) Act
DEEWR	Comcare	Secretariat support for Seacare Authority	SRC Act 1988
DEEWR	Seacare Authority	Regulates Seacare scheme, monitors OHS(MI) Act	Seafarers Act, OHS(MI) Act, related seafarers legislation
DIT	Infrastructure	Policy agency for Australian maritime industry	Navigation Act, Coastal Shipping Act
DIT	AMSA	OHS inspectorate for OHS(MI) Act	OHS(MI) Act
DRET	DRET	Policy agency for OPGGS Act	OPGGS Act
DRET	NOPSEMA	Safety regulator for offshore oil and gas industry	OPGGS Act

Improving the Seacare scheme – the Authority's five year strategic plan

- 1.54 The Seacare Authority has developed *Seacare 2015* as its five-year strategic plan and direction for the Seacare scheme.⁵⁷ The priorities in *Seacare 2015* provide the focus of activity for the Seacare Authority to 2015 and relate to three themes: injury prevention, injury management and rehabilitation, and scheme sustainability.
- 1.55 The plan contains key performance indicators (KPIs) and targets to measure progress in its implementation. The Seacare Authority considers and reviews the strategic plan quarterly. It maintains a work plan which documents its activities and key achievements for the year.

⁵⁷ Seacare Authority, *Seacare 2015 - A Five Year Strategic Plan*. This is consistent with its statutory responsibilities and designed to improve scheme performance – see Chapter Seven.

Table 1.3: Strategic Plan KPIs⁵⁸

KPI	Measure	Target
Strategic Priority: Injury Prevention		
Workplace fatalities	Number of Compensable Fatalities	Zero
Incidence of serious injuries	Number of serious claims per 1000 FTE	Reduction on rate for previous five years moving average
Strategic Priority: Injury management and rehabilitation		
Claim determination times	Percentage of claims where actual determination is within statutory time limits	>80%
Disputation rate	Number of Administrative Appeal Tribunal (AAT) applications as a percentage of claims lodged	<15%
Claims continuance rate	Number of claims within 12 weeks or more lost time (excl commuting) per 1000 FTE	Reduction on rate for previous five years moving average
Return to work rate	Durable RTW rate	>70%
Strategic Priority: scheme sustainability		
Premium rates	Premium rates adjusted 5 day deductible	Reduction from previous year
Safety net fund reserves	Available assets in Safety Net Fund over actuarial estimate	Sufficient to meet actuarial assessment

1.56 Various activities support the plan's objectives, including:

- a) a review of data collection for the scheme;
- b) developing a joint OHS plan with AMSA; and
- c) liaison with the MWD Forum.

1.57 These activities are consistent with my proposals in Chapter Seven for improving governance.

1.58 Where possible, events such as the Seacare conference and awards and the Seacare Forum are funded by industry sponsors and attendance fees. Other activities to implement the

⁵⁸ Seacare Authority, *Seacare 2015 - A Five Year Strategic Plan*, 2011, http://www.seacare.gov.au/__data/assets/pdf_file/0005/100589/seacare_2015_strategic_plan.pdf.

strategic priorities are generally undertaken by the Authority's SMS and therefore come within the operating expenses of the support services provided to the Authority.⁵⁹

Operation of the Seacare scheme

1.59 To complete this chapter and to provide background for the discussion in the following chapters, an outline of the elements of the OHS and workers' compensation components of the scheme is provided in the following tables.

Table 1.4: Overview of OHS arrangements

What is provided?	Laws for safeguarding OHS for a defined part of the maritime industry
Legislative framework for the OHS arrangements	<i>Occupational Health and Safety (Maritime Industry) Act 1993</i> <i>Occupational Health and Safety (Maritime Industry) (National Standards) Regulations 2003</i> <i>Occupational Health and Safety (Maritime Industry) Regulations 1995</i>
To what and whom do the OHS arrangements apply? [OHS(MI) Act, s.6]	<p>On a 'prescribed ship' in relation to operators, employees, contractors, manufacturers, suppliers and importers of plant.</p> <p>To an offshore industry vessel in relation to which a declaration under subsection 8A(2) of the <i>Navigation Act 1912</i> is in force.</p> <p>To a trading ship in relation to which a declaration under subsection 8AA(2) of that Act is in force.</p> <p>A vessel that is used to engage in coastal trading under:</p> <ul style="list-style-type: none"> • a general licence; • a temporary licence if the vessel is registered in the Australian International Shipping Register; • an emergency licence if the vessel is registered in the Australian General Shipping Register (AGSR) or the Australian International Shipping Register (AISR). <p>[Note: The Act does not apply when a prescribed ship or unit is controlled by a contractor for construction or repair purposes (s.8).]</p>
When does it apply? [OHS(MI) Act, s.6]	<p>When a 'prescribed ship' is on a voyage engaged in trade or commerce:</p> <ul style="list-style-type: none"> • between Australia and places outside Australia; • between two places outside Australia; • between the States; • within a Territory; • between a State and Territory; or • between two Territories.

⁵⁹ Information provided by the Seacare Management Section.

	When a vessel is declared under ss.8A or 8AA of the Navigation Act 1912 or engaged in coastal trading under a licence described above.
Who has duties of care? [Part 2 of OHS(MI) Act]	Operators and certain other specified persons.
Who is protected? [Part 2 of OHS(MI) Act]	Specified classes of employees and third parties.
Commonwealth government portfolios	Employment and Workplace Relations. Infrastructure and Transport.
Government agencies responsible for policy	Department of Education, Employment and Workplace Relations. Department of Infrastructure and Transport.
Government agencies responsible for regulation	Seacare Authority and AMSA.
Numbers in the scheme ⁶⁰	<ul style="list-style-type: none"> • Berths – 3990⁶¹ • Employers – 33 • Operators – 68 • Vessels – 307
Funding of regulatory activity	<p>The Seacare Authority does not receive any direct funding for OHS activities. Comcare absorbs the OHS education function and provides funding for this role.</p> <p>Funding for AMSA's inspectorate function is met by levies provided by industry participants under AMSA's broader regulatory focus.</p>

Table 1.5: Workers' compensation arrangements

What is provided?	Rehabilitation, return to work and compensation entitlements for injured employees in a defined part of the maritime industry.
Legislative framework for the workers' compensation arrangements.	<p><i>Seafarers Rehabilitation and Compensation Act 1992</i></p> <p><i>Seafarers Rehabilitation and Compensation Regulations 1993</i></p> <p><i>Seafarers Rehabilitation and Compensation Levy Act 1992</i></p> <p><i>Seafarers Rehabilitation and Compensation Levy Regulations 2002</i></p>

⁶⁰ Seacare Authority, Employee and Ship Details Survey at 31 December 2012.

⁶¹ I was advised that it is not possible to get an accurate picture of the number of employees under the OHS(MI) Act, hence the berths figure is used here.

	<p><i>Seafarers Rehabilitation and Compensation Levy Collection Act 1992</i></p> <p><i>Seafarers Rehabilitation and Compensation Levy Collection Regulations 2002</i></p> <p><i>Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992.</i></p>
To what and whom do these arrangements apply? [Seafarers Act, s.19]	The employment of employees on a 'prescribed ship' or certain vessels engaged in coastal trading or a vessel is declared under ss.8A or 8AA of the Navigation Act 1912.
When do the workers' compensation arrangements apply? [Seafarers Act, s.19]	<p>When a 'prescribed ship' is on a voyage engaged in trade or commerce:</p> <ul style="list-style-type: none"> • between Australia and places outside Australia; • between two places outside Australia; • between the States; • within a Territory; • between a State and Territory; or • between two Territories. <p>When vessels are engaged in coastal trading with a general licence or an emergency licence if the vessel is registered on the AGSR or if a vessel is declared under ss.8A or 8AA of the Navigation Act 1912.</p> <p>Does not apply if the prescribed ship is registered on the AISR.</p>
Commonwealth government portfolio	Employment and Workplace Relations.
Government department or agencies responsible for policy	Department of Education, Employment and Workplace Relations.
Government agencies responsible for regulation	The Seacare Authority.
Numbers in the scheme ⁶²	<ul style="list-style-type: none"> • Employees – 7998 • Employers – 31 • Operators – 67 • Vessels – 302
Funding of regulatory activity	<p>The Seacare Authority does not receive any direct funding for workers' compensation activities; Comcare funds its supporting role.</p> <p>Levy is collected in relation to seafarers' employment (based on berths) to support the Safety Net Fund (see Chapter Seven).</p>

⁶² Seacare Authority, Employee and Ship Details Survey at 31 December 2012.

Chapter Two – Coverage

Term of Reference 1

The review will inquire into and report on the coverage of the Seacare scheme, including:

- a) the interaction of the OHS(MI) Act with State and Territory schemes and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*;
- b) a legislative framework for the Seacare scheme that identifies the relevant coverage for a particular maritime activity; and
- c) the availability and scope for exemptions from the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act).

In Chapter Two, various issues relating to coverage are considered. The interaction between the OHS(MI) Act and other OHS or WHS regulation is managed through AMSA's MOUs with other regulators and good operational relationships. I refer to the opportunities for improvement by aligning the OHS(MI) Act with the model WHS bill that has so far been the basis for seven of nine jurisdictions (including the Commonwealth) updating their principal WHS laws in a nationally consistent way. The need to reframe the application of the Seacare scheme's application is heightened by changes to other maritime regulation, particularly as a result of the Commonwealth's shipping reforms. A three stage process for addressing this is proposed. First, establishing a legislative base whereby the existing application of the OHS(MI) Act and the Seafarers Act is identified and reformed into stand alone application provisions (delinked from the Navigation Act and with a wider constitutional foundation). Secondly, opting in and opting out mechanisms are recommended, in addition to existing arrangements. Thirdly, to support possible longer term change, I recommend initial examination of what would be required to establish a national system for work health and safety regulation in the maritime water transport industry, with the marine safety National Law for commercial domestic vessels as a model. Attention is drawn to the developments whereby enterprise bargaining agreements under the Fair Work Act are used to extend the Seafarers Act's coverage. This appears to provide further justification for a more formal and effective opting in mechanism. Finally, the use and process for exemptions under the Seafarers Act are examined. Making them subject to a more transparent and conventional regulatory approach is recommended, with exemptions being available on application, but provided for in the regulations.

Introduction

- 2.1 The Seacare scheme's nature, scope and content are described in Chapter One. Broadly, the scheme has two main elements, namely, (a) the regulation of OHS in that part of the maritime industry that comes within the scheme, and (b) the provision of a compulsory workers' compensation scheme in relation to certain seafaring employees.
- 2.2 In relation to both areas of regulation, the statutory arrangements for coverage are complex for several reasons:
 - a) constitutional responsibility for regulating the maritime industry is shared between the Commonwealth and the States and Territories;

- b) the Commonwealth has chosen not to use its full range of constitutional powers (which may not, in any case, provide complete coverage of the persons and activities in the maritime industry that it now partly covers);
- c) identifying persons, activities and circumstances that attract the relevant Commonwealth regulation depends on the presence of one or more of a range of specified factors, which are identified later;
- d) there are interactions between various pieces of Commonwealth maritime legislation, without the legislation concerned having the same scope and application;
- e) not all key terms are defined and there are differences of view about the interpretation of some relevant provisions;
- f) intrastate and intra-territorial voyages are treated differently;
- g) there may be no coverage when vessels that are not self-propelled are declared by AMSA under s.8A of the Navigation Act or s.8AA of that Act.⁶³

2.3 Good reasons exist for clarifying the scheme's application, including:

- a) duty holders and persons with entitlements will better understand their obligations and rights, which should facilitate the scheme's operation and assist compliance;
- b) regulators would be more certain about their jurisdiction and when to exercise their powers;
- c) cross-jurisdictional and inter-agency issues will be easier to manage with more clarity about who has jurisdictional authority.

2.4 At the outset, it must be recognised that scheme coverage problems will not be completely eliminated. Work and the associated risks do not cease at the boundary between jurisdictions. Legal and practical problems will inevitably arise in determining who has authority when an incident relating to work arises at the point of intersection. Even so, the aim should be to achieve two improvements, (a) easier, simpler and more consistent identification of which laws apply and in what circumstances, and (b) better regulatory outcomes under the laws as a result.

2.5 Changes to the Seacare scheme's legislation made by the shipping reform legislation (see Chapter One) were succinctly summarised by the Seacare Authority (before the changes took effect).⁶⁴ The summary is (with some renumbering and a change in tense) in the following box.

⁶³ These are respectively declarations that (a) an off-shore industry vessel is one to which the Act and regulations apply and (b) that the Act and regulations apply in relation to a ship even when she is proceeding on a voyage other than an overseas voyage or an inter-state voyage.

⁶⁴ Seacare Authority, Notice 06/2012.

Impact of shipping reform laws on Seacare jurisdiction

1. On and from 1 July 2012, Seacare legislation [was] amended by the *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012* to reflect the coastal trading shipping reforms.
2. The coverage provisions of the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) [were] amended to provide that [it] applies to vessels used to engage in coastal trading under a general or an emergency licence if the vessels are registered in the Australian General Shipping Register [new s.19(1AA)]. A general licence for this purpose includes a transitional general licence.
3. The consequential amendments ... also provide that the Seafarers Act does not apply to vessels registered in the AISR that are used to engage in coastal trading.⁶⁵
4. The *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS (MI) Act) [was] amended [new s.6(3A)] to provide that it applies to vessels used to engage in coastal trading under:
 - a) general licences;
 - b) temporary licences if the vessels are registered under the Australian International Shipping Register; and
 - c) emergency licences if the vessels are registered either under the Australian International Shipping Register (AISR) or the Australian General Shipping Register (AGSR).
5. A general licence for this purpose ... include(s) a transitional general licence.
6. The Seafarers Act and the OHS (MI) Act [were] also ... amended to include new definitions to give effect to the reform package.
7. The *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Act 2012* ... also amended section 10 of the Navigation Act 1912 which ... (affected) the definition of a 'prescribed ship' for the purposes of Seacare legislation.

2.6 Effectively, the OHS(MI) Act applies to all Australian registered vessels wherever located.⁶⁶

2.7 The Seafarers Act has more limited application. In particular, it does not apply to vessels on the AISR at any time⁶⁷ and applies to vessels used for coastal trading under a general licence, or under an emergency licence, if registered in the AGSR.⁶⁸

⁶⁵ Section 61AA(b) of the *Shipping Registration Act 1981*.

⁶⁶ *Coastal Trading (Revitalising Australian Shipping) (Consequential Amendments and Transitional Provisions) Bill 2012*, Revised Explanatory Memorandum.

⁶⁷ *Shipping Registration Act 1981* (Cwth), s.61AA(b).

⁶⁸ The legislation requires compulsory insurance for ship owners for compensation in the event of death or long-term disability of a seafarer due to an occupational injury, illness or hazard.

The interaction of the OHS(MI) Act with State and Territory WHS laws

- 2.8 The content and operation of the OHS(MI) Act is considered in greater detail in Chapter Five. In that chapter, the OHS(MI) Act is compared with the model WHS bill. In accordance with a 2008 inter-governmental agreement,⁶⁹ the model law has so far provided the basis for laws in seven of the nine Australian jurisdictions (only Victoria and WA have not yet brought their principal WHS laws into line with the model WHS bill). The gaps between the OHS(MI) Act and the model WHS bill are essentially the same as those between the OHS(MI) Act and most State and Territory laws. In other words, there are problems that arise from different content in the laws, even apart from difficulties of determining whether a vessel and the workers and operations on it are within the Commonwealth law or that of the relevant State or Territory.
- 2.9 Apart from overcoming content differences, the adoption of harmonised laws would also facilitate the cross-appointment of inspectors between a State and Territory and AMSA. This might help to overcome some of the coverage and resource problems.
- 2.10 AMSA has sought to overcome practical, operational issues through MOUs with State or Territory regulators. I have not consulted all regulators about this, but my discussions with AMSA and the Queensland regulator (Work Health and Safety Queensland) suggest that the relationships are working satisfactorily. That should be reinforced as AMSA settles into its role as the national regulator of marine safety.
- 2.11 Another critical element in resolving interaction issues with the States and Territories is to clarify the actual jurisdiction under the Seacare scheme. This is addressed in the following discussion.

Jurisdictional coverage issues

- 2.12 As mentioned earlier, the Government is progressively introducing a range of maritime reforms and changes to the OPGGS regulatory regime.⁷⁰ The changes affect coverage under the OHS(MI) Act and the Seafarers Act. The relevant Government agencies are working constructively together to facilitate a successful transition.
- 2.13 The OHS(MI) Act applies to *prescribed ships* and *prescribed units* engaging in trade or commerce within Australia and between States and Territories and locations external to Australia (s.6). The Seafarers Act applies to *prescribed ships* engaging in such trade and commerce (s.19). As noted, it does not apply if a ship is registered on the AISR. Both Acts apply where certain declarations have been made under the *Navigation Act 1912* or where a vessel is engaged in coastal trading under a certain specified type of licence.⁷¹
- 2.14 Under s.3 of the Seafarers Act and s.4 of the OHS(MI) Act, a *prescribed ship* is defined as any ship to which Part II of the *Navigation Act 1912*⁷² applies, except a Government ship⁷³ (this

⁶⁹ Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, 2008.

⁷⁰ See http://www.infrastructure.gov.au/maritime/shipping_reform/ and

http://www.ret.gov.au/resources/upstream_petroleum/op-regulatory-regime/changes/Pages/changes.aspx.

⁷¹ OHS(MI) Act, s.6; Seafarers Act s.19.

⁷² Part II of the *Navigation Act 1912* is to be replaced by Chapter 2 of the *Navigation Act 2012*, which is to commence from 25 March 2013. There is limited practical effect of this change in relation to the Seafarers Act. References in both the Seafarers Act and OHS(MI) Act will need reconsideration.

definition applies under both Acts) or a vessel to which the OPGGS Act applies [this exclusion only applies under the OHS(MI) Act]. This brings a range of vessels into the scheme, depending on the presence of one or more qualifying factors. They broadly relate to (a) a ship's type of registration, (b) the nature and purpose of a ship's activities, (c) the type of vessel, (d) whether certain declarations have been made which, among other things, actuate the legislation's application, and (e) the type of coastal trading licence held.

- 2.15 Similarly, specified factors must exist for the scheme's legislation to apply to persons. They relate to (a) the type of person, (b) the nature, purpose and location of the person's employment or engagement, (c) whether the person is a specified third party with a duty of care about things that could harm a person on a vessel, and (d) what the person is doing.
- 2.16 The *Navigation Act 2012* resulted in certain changes to the coverage of both the Seafarers Act and the OHS(MI) Act. Under the *Navigation (Consequential Amendments) Act 2012*, both the OHS(MI) Act and the Seafarers Act will continue to apply to those ships (and units) to which they applied immediately before the repeal of the *Navigation Act 1912 Act*. This allows further consideration to be given to the application provisions (this review contributes to that process). The transitional provisions relating to the *Navigation Act 2012* maintain the coverage status quo for both the Seafarers Act and the OHS(MI) Act.⁷⁴
- 2.17 As a result of an amendment to the Seafarers Act,⁷⁵ the Minister will, when it commences, be able to declare a ship as coming within or being outside the definition of a *prescribed ship* for the purposes of the Act.
- 2.18 Generally, vessels will be subject to the requirements of the *Navigation Act 2012* if they are:
- a) foreign vessels conducting activities in Australian waters;
 - b) Australian vessels which cross or leave the Exclusive Economic Zone (EEZ);
 - c) Australian vessels that maintain certification for unrestricted operations under the Navigation Act; or
 - d) vessels which have opted in by successful application to AMSA.⁷⁶
- 2.19 Along with the forthcoming commencement of the *Navigation Act 2012*, the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (National Law) is to commence on 1 July 2013. The National Law establishes the National System for Australian commercial vessels that operate domestically within the EEZ.
- 2.20 This means that AMSA will take over certain powers in relation to the regulation of commercial vessels after the commencement of the National Law (once the States and Territories have transferred their requisite powers).

⁷³ A government ship is defined in s.4 of the OHS(MI) Act and s.3 of the Seafarers Act.

⁷⁴ *Navigation (Consequential Amendments) Act 2012*, Schedule 2, items 40 and 79.

⁷⁵ New s.19(3A) of the Seafarers Act, inserted by item 81 of Schedule 2 of the *Navigation (Consequential Amendments) Act 2012*.

⁷⁶ *Navigation Act 2012*, Chapter 1, Part 3, *Provisions relating to the application of this Act* and Part 5, *Opting in to coverage*, and Chapter 3, *Vessel Safety*.

- 2.21 Under the *Shipping Registration Act 1981* (SRA), Australian ships over 24m, and those undertaking overseas voyages, must be registered (unless exempted under s.13). AMSA is responsible for granting licences.
- 2.22 Under the Coastal Shipping Act, AMSA may grant three types of licence:
- a) a general licence, which may be granted for up to five years;
 - b) a temporary licence, which may be granted for up to 12 months to foreign flagged vessels registered on the AISR; and
 - c) an emergency licence, which may be granted to a foreign flagged vessel registered on the AISR for a specific voyage if she is registered on the AISR to operate in and around Australia.⁷⁷
- 2.23 As mentioned earlier, the Seacare Authority commenced a review in 2012 into jurisdictional coverage, including the release of a discussion paper and calling for submissions.⁷⁸ That review was conducted against the background of ongoing concerns about coverage and the then impending rewriting of the *Navigation Act 1912*. The Seacare Authority's jurisdictional coverage review was overtaken by this wider review, but I have considered the discussion paper and submissions given their relevance to this Term of Reference.

Stakeholders' proposals for change

- 2.24 Stakeholders have advocated various changes, which are discussed below. The proposals are strongly divergent in critical areas.
- 2.25 Submissions were divided on how to resolve the scheme's complexity fairly and effectively.
- 2.26 The Australian Institute of Marine and Power Engineers (AIMPE) proposed that:
- a) the full range of constitutional powers should be used, including the external affairs power (relying on *United Nations Convention on the Law of the Sea*);
 - b) the coverage of the Scheme should be clarified to ensure that all seafarers working on vessels in Australia's Exclusive Economic Zone are covered by both the Seafarers Act and the OHS(MI) Act, including workers on Floating Production Storage and Offloading vessels (FPSO) and Floating Storage and Offloading systems (FSO);
 - c) the Seafarers Act and the OHS(MI) Act should be de-linked from the Navigation Act;
 - d) *seafarers* should be consistently defined (anyone working on commercial vessels in the EEZ);
 - e) related consequential changes were proposed to the objects of the Seafarers Act;

⁷⁷ Further information about the licensing regime may be found on the Department of Infrastructure and Transport's website at www.infrastructure.gov.au/maritime.

⁷⁸ The Seacare Authority set out some useful principles in its jurisdictional review paper for guiding change - see *Jurisdictional coverage – discussion paper*, op. cit., *Guiding Principles*, p.6.

- f) State and Territory laws should continue to apply to persons working on vessels operating entirely within a port.⁷⁹
- 2.27 The Maritime Union of Australia (MUA) and the Australian Maritime Officers Union (AMOU) also proposed that the Seacare scheme's coverage should be extended using the full range of constitutional powers with a wider range of ships brought within the Seacare scheme. These should include mobile workplaces and offshore industry vessels and should extend to intrastate and intra-territorial voyages.
- 2.28 In the view of the MUA and AMOU, the Seacare scheme legislation should have the same geographic application as the *Fair Work Act 2009* (FWA), applying to all seafarers employed on ships that come within that Act.
- 2.29 The unions supported a broader definition of seafarer, to cover all persons who are employed, engaged or work on a ship, with the exclusions permitted by the Navigation Act definition of the term (but any excluded *special personnel* should only be passengers on passenger ships).
- 2.30 The MUA and AMOU considered that coverage should be aligned with that under the FWA,⁸⁰ so that work-related protections were applied consistently.
- 2.31 Like some other stakeholders, the unions supported an opt-in provision, but for both Acts.
- 2.32 The unions also continue to seek clarified disapplication provisions in the OPGGS Act, so that the OHS(MI) Act continues to apply where it is the normal course of a ship's operating pattern (in this respect, note the strong views of NOPSEMA which are mentioned later).
- 2.33 Allianz supported the Seacare scheme's legislation defining its own terms and suggested that certain classes of temporary employees should not be seafarers for scheme purposes. Coverage should extend to certain offshore industry vessels (using a definition from the Coastal Trading legislation), with specified crewing arrangements, but excluding vessels that operate outside Australian waters with foreign crews. In Allianz' view, better coverage of trainees was needed.⁸¹
- 2.34 The Australian Mines & Metals Association (AMMA) suggested other legislative models that could be used to determine appropriate coverage terms. AMMA suggested the *Maritime Powers Bill 2012* be used as a model for any changes to coverage of the Seacare scheme. In particular, AMMA noted s.8 of that Bill provided a relevant definition of *Australia* and provided clarification of extraterritorial application.
- 2.35 Woodside proposed that the Seafarers Act should exclude FPSO facilities from its coverage. This was because FPSOs spend most of their lifecycle as production facilities that extract and process hydrocarbons under the OPGGSA and only disconnect in limited circumstances. In Woodside's opinion, they are quite distinct from trading ships that undertake traditional point to point voyages. Furthermore, all workers on Woodside's FPSOs (including those whose roles include seafaring responsibilities) are already subject to the requirements of State-based workers' compensation regimes. Applying the Seafarers Act in addition to or in place of State based workers' compensation regimes would be inconsistent

⁷⁹ AIMPE submission, pg.3.

⁸⁰ *Fair Work Act 2009*, Part 1-3.

⁸¹ Allianz submission, p.4.

with the intent of the Seafarers Act (to cover employees who did not come within State workers' compensation regimes).

- 2.36 In addition, Woodside stated that the cost of workers' compensation premiums under the Seacare scheme would, according to a quotation it had received, be significantly more expensive than premiums under its State-based scheme. Woodside also noted that this is a primary factor that the Seacare Authority is required to consider in connection with exemption applications under the *Seafarers Safety Rehabilitation and Compensation Directions 2006(1)* issued on 24 August 2006 by the relevant Minister and which was incorporated into the Seacare Exemption Guidelines issued in May 2010.⁸²
- 2.37 Some stakeholders commented on the differing views of the Seacare Authority and AMSA on how to interpret the scheme's OHS coverage in light of its links with Navigation Act provisions (AMSA takes a narrower view – see below). This was seen as justifying de-linking the legislation.

Coverage issues and options

- 2.38 The main issues concern:
- a) the application of the OHS(MI) Act and the Seafarers Act and disapplication under the OPGGS Act;
 - b) statutory linkage with other (non-Seacare scheme) maritime legislation;
 - c) opting in to the scheme;
 - d) what exemptions should be permitted.

Application of the OHS(MI) Act and the Seafarers Act and disapplication of the OHS(MI) Act under the OPGGS Act

- 2.39 As seen in the summary of stakeholder views, a spectrum of opinion exists on how widely the Seacare legislation should apply. The unions take the broadest view, proposing that there should not be limits on using constitutional powers to give the scheme its widest legally possible application, with minimal provision for exemptions. At the other end of the spectrum, industry bodies and employers are far more cautious about the breadth of the legislation's application.
- 2.40 Broadening the scheme's coverage would have implications for State and Territory regulation. Depending on the nature of the change, there might be strong resistance by those governments, as well as from some industry participants. Aside from anything else, the superior OHS and workers' compensation performance in the State and Territory jurisdictions suggests that the Seacare scheme's performance would need to improve markedly before entering into areas of non-Commonwealth regulation could be reasonably contemplated.
- 2.41 A threshold consideration is that, as described earlier, some relevant policy decisions have already been taken and are operating. The Seafarers Act does not apply to vessels

⁸² Woodside made a confidential submission but authorised this description of their views.

registered in the AISR. The Government has already determined that disapplication of the OHS(MI) Act under the OPGGS Act is to be clarified through a process that is already under way. I was informed by the Department of Resources, Energy and Tourism (DRET) that the process was well advanced. I do not consider it appropriate to propose any changes that are inconsistent with settled or imminent government policy decisions.

- 2.42 The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) strongly counselled against allowing elements of a prescriptive safety regime to creep into the objective based offshore petroleum safety regime, given the risks of overlapping safety regimes (as illustrated by the 2010 Macondo/Deepwater Horizon incident).⁸³
- 2.43 The Seacare Authority and AMSA have an unresolved difference of view about the extent to which the *Navigation Act 1912* limits the coverage of ships under the OHS(MI) Act (under s.4 of that Act, a *prescribed ship* is a ship to which Part II of the *Navigation Act 1912* applies).
- 2.44 AMSA considers that the *Navigation Act 1912* must be read as a whole for the purposes of OHS(MI) Act definition, so that the exclusions under Part I of the *Navigation Act 1912* apply to limit the types of prescribed ships coming within the OHS(MI) Act. The Seacare Authority does not consider that the definition of a prescribed ship is so limited. In other words, AMSA does not believe that it has jurisdiction under the OHS(MI) Act over certain vessels that the Seacare Authority considers are within the Act's coverage. This also has implications for the Seafarers Act's scope, which also refers to prescribed vessels under Part II of the *Navigation Act*.
- 2.45 This issue has existed for some years. In 2004, the Commonwealth's Chief General Counsel (Mr Henry Burmester QC) advised the Seacare Authority and AMSA about the interpretation of the legislation.⁸⁴ He supported the Seacare Authority's view, and felt that a court would be more likely to read the definition of *prescribed ship* solely by the application provision in Part II of the *Navigation Act 1912*, without further qualification by applying the limitation set out in Part I. Nonetheless, Mr Burmester concluded that the matter was far from clear and observed that there should be a clear and consistent policy position as to the intended scope of the OHS(MI) Act and the Seafarers Act, with appropriate legislative amendments to give effect to the policy.
- 2.46 The Ernst & Young review addressed this difference of view and noted that the wider interpretation would mean that AMSA would inspect a wider range of vessels. Ernst & Young recommended that the ambiguity be removed. Their preferred approach was a tonnage-based definition for the application of Part II of the *Navigation Act 1912*, but also identified other options (removing the link with the *Navigation Act* or keeping the link but with greater definition of the voyage-based coverage).⁸⁵
- 2.47 There is an opportunity to resolve this issue which should be acted upon. Before considering the scope of the OHS(MI) Act and the Seafarers Act, an important question arises of whether there should continue to be explicit linkage with other legislation to define the scope of the application of those Acts.

⁸³ NOPSEMA submission.

⁸⁴ I was provided with access to Mr Burmester's advice by DEEWR and authorised to refer to its content.

⁸⁵ Ernst & Young review, op. cit., pp.57-60.

- 2.48 There is limited support for continuing with the linkage to the Navigation Act. A disadvantage of such a linkage is that changes to the other legislation may create uncertainty about the application of the OHS(MI) Act or the Seafarers Act or otherwise have unintended consequences. The linkage approach is also complicated by the absence of a definition of a *prescribed vessel* in the *Navigation Act 2012* (the concept of a *regulated Australian vessel* is used with a different definition).
- 2.49 The Navigation (Consequential Amendments) Act provides interim arrangements for the Seafarers Act and the OHS(MI) Act, whereby Part II of the *Navigation Act 1912* is taken not to have been repealed for the purposes of the definition of *prescribed ship*.⁸⁶ This should not continue for any significant period. Aside from anything else, responding to any need to modify a definition adopted by reference from a repealed Act will be difficult.
- 2.50 I propose that there be no explicit linkage with definitions in the Navigation Act. There will be operational and legislative linkages with the licensing regime under the Coastal Trading Act and SRA. Otherwise, the Seacare scheme's legislation should provide its own definitions. This will be simpler for persons who need to refer to the legislation and provides a more stable legislative platform for the scheme's regulation.

Recommendation 2.1

The OHS(MI) Act and the Seafarers Act should provide their own definitions of the vessels covered by the Acts without referring explicitly to definitions in the Navigation Act.

Coverage of vessels

- 2.51 The issue then arises of which vessels should be covered by the Acts and in what circumstances. As noted previously, the existing coverage provisions are complex. The OHS(MI) Act and the Seafarers Act do not have identical application to vessels. Both apply to a *prescribed ship*, which is a ship to which Part II of the *Navigation Act 1912* applies. The OHS(MI) Act includes an offshore industry mobile unit that is not self-propelled and is under tow.⁸⁷ It excludes a ship or off-shore industry mobile unit to which the OPGGS Act applies and government ships (as defined). The Seafarers Act excludes government ships (same definition),⁸⁸ but covers an off-shore industry vessel for which a declaration under subsection 8A(2) of the Navigation Act is in force or a *trading ship* for which a declaration under subsection 8AA(2) of that Act is in force.⁸⁹
- 2.52 The definition of a vessel under the Coastal Trading Act (s.6) is any kind of vessel used in navigation by water, however propelled or moved. The *Navigation Act 2012* uses the same definition, but adds that the definition includes (a) a barge, lighter or other floating craft and (b) an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water. This corresponds with the definition of a ship under the *Navigation Act 1912* (s.6). Similarly, the term *government ship* in that Act has become a *government vessel* in the

⁸⁶ Navigation (Consequential Amendments) Act 2012, Schedule 2, items 37 and 79.

⁸⁷ A new definition of prescribed unit is being inserted by Schedule 2, item 38 of the Navigation (Consequential Amendments) Act 2012. It includes the existing definition but also refers to vessels or structures being declared to be, or not to be, prescribed units under new s.4B of the OHS(MI) Act (this is being inserted in the Act by item 39).

⁸⁸ OHS(MI) Act, s.4 and Seafarers Act, s.3.

⁸⁹ Seafarers Act, s.19.

Navigation Act 2012. The term *ship* under the Seacare legislation appears out of step with terminology in the more general maritime laws and should be changed to avoid confusion.

Recommendation 2.2

The terminology under the Seacare scheme's legislation should, where appropriate, be made consistent with the terminology used in the Navigation Act 2012 and the Coastal Trading legislation, to avoid confusion about what is being referred to under the various laws.

[Example: the Navigation Act uses the term *vessel* whereas the Seacare scheme's legislation uses the term, *ship*].

- 2.53 The Seacare legislation should apply at least to the same classes of vessels as it does now. The difficulty lies in identifying that group of vessels in a way that maintains that existing coverage and clarifies its scope. Part II of the Navigation Act 1912, which underpins the existing coverage (see above), applies as shown in the following box.

Navigation Act 1912

10 Application of Part

Except so far as the contrary intention appears, this Part applies only to:

- a) a ship registered in Australia;
- b) a ship (other than a ship registered in Australia) engaged in the coasting trade; or
- c) a ship (other than a ship registered in Australia or engaged in the coasting trade) of which the majority of the crew are residents of Australia and which is operated by any of the following (whether or not in association with any other person, firm or company, being a person, firm or company of any description), namely:
 - i. a person who is a resident of, or has his or her principal place of business in, Australia;
 - ii. a firm that has its principal place of business in Australia; or
 - iii. a company that is incorporated, or has its principal place of business, in Australia;

and to the owner, master and crew of such a ship.

- 2.54 At a minimum, any changes should result in the same coverage as exists now. Thus, the Seacare legislation should be expressed as applying to vessels and the criteria for coverage should be able to provide at least the same coverage as under section 10 of the *Navigation Act 1912*, without referring to that section. In addition, the new s.6(3A) of the OHS(MI) Act, which applies the Act to vessels used for coastal trading under various licences under the Coastal Trading Act (as well as, in some cases, with registration under the AISR or AGSR), would need to apply. This is outlined in Table 2.1.

Table 2.1: the minimum coverage requirements for the Seacare legislation

OHS(MI) Act	Seafarers Act
<p>Use an adapted s.10 of the Navigation Act 1912 to identify the <i>vessels</i> to be covered.</p> <p>The current exclusions under the current definition of <i>prescribed ship</i> in s.4 of the OHS(MI) Act would apply (a ship or off-shore industry mobile unit to which the OPGGS Act applies and a <i>government ship</i>).</p> <p>Those vessels and <i>prescribed units</i> would then be covered under a suitably redrafted application provision combining the elements in:</p> <ul style="list-style-type: none"> a) new s.4A – Ministerial declarations that a ship is or is not a prescribed ship; b) new s.4B – Ministerial declarations that a vessel or structure is or is not a prescribed unit;⁹⁰ c) existing ss.6(1) and (2) – specified links to constitutional powers; and d) existing s.6(3),⁹¹ but with the declarations about offshore industry vessels and trading ships to be made by AMSA for the application of the OHS(MI) Act, not the Navigation Act; and e) existing s.6(3A) - inserted to cover certain coastal trading licensed vessels; f) existing ss.6(4) to (8); and g) existing s.8 - applies Act to a prescribed ship or a prescribed unit controlled by a contractor for construction or repair purposes. 	<p>Use an adapted s.10 of the Navigation Act 1912 to identify the <i>vessels</i> to be covered.</p> <p>The current exclusion under the current definition of <i>prescribed ship</i> in s.3 of the Seafarers Act would apply (a <i>government ship</i>).</p> <p>The employment of employees on those vessels would then be covered under a suitably redrafted application provision combining the elements in:</p> <ul style="list-style-type: none"> a) new s.3A - Ministerial declarations that a ship is or is not a prescribed ship;⁹² b) existing ss.19(1) - specified links to constitutional powers - and (1AA) - inserted to cover employment on certain coastal trading licensed vessels; and c) existing s.19(1A), but with the declarations about offshore industry vessels and trading ships to be made by the Authority for the application of the Seafarers Act, not the Navigation Act; and d) existing ss.19(2) to (5).

2.55 When s.6(3) of the OHS(MI) Act is replaced by the updated provision, the issue of coverage will remain. This should be resolved on the basis that Part I of the *Navigation Act 1912* does not, for this purpose, qualify Part II. Doing so is not only consistent with the Commonwealth Chief General Counsel's advice (see above), but with the objects of the OHS(MI) Act. As

⁹⁰ New ss.4A and 4B of the OHS(MI) Act are to be inserted by the *Navigation (Consequential Amendments) Act 2012*.

⁹¹ Schedule 2, item 40 of the *Navigation (Consequential Amendments) Act 2012*.

⁹² To be inserted by the *Navigation (Consequential Amendments) Act 2012*.

Ernst & Young noted,⁹³ AMSA would be required to inspect more vessels than it currently does and so may require additional resources and funding (the question of funding is considered in Chapter Seven). Accordingly, this change may need to be phased in.

- 2.56 As noted, the Seacare legislation is not based on the full range of available constitutional powers (it relies on the constitutional trade and commerce power and the corporations power).⁹⁴ This may partly contribute to gaps in and uncertainty about its application. This should be rectified. The availability of other constitutional bases (particularly, the external affairs power) for the valid operation of the legislation does not mean that the powers need to be used to their full extent, but does mean that the substantive provisions are more likely to operate as intended. Section 333 of the *Navigation Act 2012* provides a full range of alternative constitutional bases for that Act's operation (this was apparently included to allow for its continued operation in the event of a successful constitutional challenge).⁹⁵ That section sets out the various constitutional heads of power upon which the Act can rely if its operation were expressly confined to acts or omissions under those constitutional powers. Not all of those heads of power would be needed were a similar provision to be included in the Seacare legislation, but it is a useful model in a maritime regulatory context.

Recommendation 2.3

- a) The OHS(MI) Act and the Seafarers Act should have application provisions that, as a minimum requirement, reflect the existing application provisions [including the new Ministerial declaration powers to be inserted as s.19(3A) of the Seafarers Act].
- b) To clarify coverage, it should be made clear that:
 - i. for so long as there are references to Part II of the Navigation Act in the Seacare legislation, they are not to be taken to be limited by Part I of that Act; and
 - ii. when there are no such references, any replacement provisions should have at least that wider coverage.
- c) To ensure that there is a sound constitutional basis for the operation of Seacare legislation, a provision should be included in each Act setting out a full range of relevant other constitutional bases for the valid operation of the legislation [s.333 of the Navigation Act 2012 provides a model.]

Opting in to coverage

- 2.57 There is a question of whether the OHS(MI) Act and the Seafarers Act should have new opting in provisions. A number of stakeholders support this. In its 2012 jurisdictional coverage discussion paper, the Seacare Authority observed that allowing for opting in reduced jurisdictional churn.⁹⁶
- 2.58 The Minister is to have powers under new ss.4A and 4B of the OHS(MI) Act to include or exclude (by declaration) ships, structures and units in or from the Act's application. This was

⁹³ Ernst & Young review report, op.cit., p.58

⁹⁴ OHS(MI) Act, s.6; Seafarers Act, s.19

⁹⁵ Navigation Bill 2012, Explanatory Memorandum, p.77.

⁹⁶ Op. cit., p.6.

described as building in flexibility and enabling the Minister to clarify the coverage of the OHS(MI) Act as he or she considered necessary and appropriate.⁹⁷ This may provide an avenue for dealing with issues relating to FPSOs.

- 2.59 A similar power is provided to the Minister by s.19(3A) of the Seafarers Act to declare that a ship is or is not a prescribed ship.
- 2.60 Moreover, s.25 of the *Navigation Act 2012* allows for vessels that are not within that Act to opt into coverage by the Act and hence regulation under it. A vessel owner may apply to AMSA for a declaration that the vessel is a regulated Australian vessel. An example is that some vessels regulated by the National Law may choose to opt in to regulation under the Navigation Act, even though they do not undertake overseas voyages. This would be to maintain existing international survey certification which would enable them to undertake such voyages.
- 2.61 The options are for (a) no additional powers to allow opting in under either the OHS(MI) Act or the Seafarers Act or (b) additional powers for AMSA or the Seacare Authority under the OHS(MI) Act and for the Seacare Authority under the Seafarers Act. For the reasons given below, I consider that it would be appropriate to provide for further opting in powers.
- 2.62 The reasons for allowing AMSA rather than the Seacare Authority powers to decide on opting in under the OHS(MI) Act is that an application will generally be for operational reasons and that AMSA would be more familiar with the circumstances that underpin an application. Section 25 of the Navigation Act would provide a model. Grounds for an application could be prescribed by regulation. Provision could also be made for AMSA to set conditions when permitting opting in and to vary or revoke such decisions.⁹⁸ A fee could be prescribed to cover the reasonable cost of dealing with an application.
- 2.63 Conferring such a power on AMSA (or the Authority) would also mean that the Minister need not deal with applications or be liable to challenges to decisions.
- 2.64 Similar reasons warrant giving the Seacare Authority the ability to decide applications for opting in to the Seafarers Act workers' compensations scheme. Among other things, this would allow the Authority the capacity to regularise the application of the Act where its entitlements are provided through an enterprise bargaining agreement (EBA). This type of arrangement is discussed later. Prescribed grounds for an application should be specified and the Authority should be satisfied that opting in does not result in inappropriate consequences for pre-existing workers' compensation coverage in another jurisdiction. The Authority should be empowered to set conditions when permitting opting in and to vary or revoke such decisions. A fee could be prescribed for an application to meet the Authority's reasonable costs in dealing with it.
- 2.65 In both instances, the decision making body should be able to specify what information or evidence an applicant must provide and should publish the reasons for its decision.

⁹⁷ Navigation (Consequential Amendments) Bill 2012, Explanatory Memorandum, p.8.

⁹⁸ A model for variation and revocation of opting in decisions is provided by s.26 of the *Navigation Act 2012*.

Recommendation 2.4

- a) The OHS(MI) Act should provide for AMSA to be able to consider applications from owners or operators of vessels that the Act apply to a vessel or to a class of vessels or persons.
- b) The Seafarers Act should provide for the Authority to be able to consider applications from the owner or operator of a vessel that the Act apply to employment on the vessel, except where the vessel is registered on the AISR.
- c) In each case:
 - i. the grounds for applications should be stipulated in the regulations;
 - ii. the grounds should be developed with input from industry bodies, owners, operators and unions;
 - iii. a prescribed fee for applications should cover the decision maker's reasonable costs;
 - iv. the decision maker should be able to make a decision without a hearing, if the decision maker considers that it is fair to do so;
 - v. the decision maker should be able to request further information and evidence in support of an application; and
 - vi. the decision maker should be able to set conditions on being granted coverage and be able to vary or revoke a decision after giving the affected party a reasonable opportunity to make a submission about the proposed action .
- d) In the case of an application to opt into coverage under the Seafarers Act, the Seacare Authority should refuse an application if it considered that permitting opting in would have inappropriate consequences for pre-existing workers' compensation coverage in another jurisdiction.
- e) Decisions should be reviewable.

Opting out

2.66 Issues have arisen about whether particular vessels (especially in the offshore sector) are within the operation of the Seacare scheme. I have not been able to identify a clear basis for determining legislative criteria to clarify this. The Minister will have powers to declare vessels to be in or out of the two principal Acts. This is a mechanism for addressing the issue. To provide greater flexibility (especially if the application workload is excessive), consideration might be given to providing for the Minister to delegate the decision making or to providing for AMSA or the Seacare Authority or both to be able to take such decisions. This could be built into the opting in provisions recommended above.

Recommendation 2.5

- a) The Minister should be able to delegate his decision making power in respect of coverage under the Seacare scheme to an officer of AMSA or to the Chair of the Seacare Authority.
- b) AMSA should be able to consider whether a vessel or class of vessels should be excluded from the application of OHS(MI) Act (the other recommended powers, processes and requirements for an opting in application should apply).

[Note: Section 20A of the Seafarers Act deals with exemptions and is dealt with elsewhere].

Who is covered by the Seacare legislation

2.67 The definition of *seafarer* and *employee* under both the Seafarers Act and the OHS(MI) Act are crucial for determining coverage. Under the current legislation, a *seafarer* is defined as any person who is employed or engaged or works in any capacity on board a vessel on the business of the vessel, other than those specifically excluded.

2.68 Under the *Navigation Act 2012*, a *seafarer* means any person who is employed or engaged or works in any capacity (including that of master) on board a vessel on the business of the vessel, other than the following:

- a) a licensed pilot of the vessel (acting as such a pilot);
- b) an owner of the vessel or a person (except the master) representing the owner;
- c) law enforcement personnel (in their capacity as law enforcement personnel);
- d) if the vessel is a special purpose vessel—special personnel in relation to the vessel;
- e) a person temporarily employed on the vessel in port;
- f) a person prescribed by the regulations.

2.69 This is a suitable definition. It was supported by Allianz⁹⁹ and the MUA and AMOU.¹⁰⁰ It would provide consistency and it is broad and has flexibility by allowing additional classes of persons to be excluded by regulation. This would be a suitable and speedy way of responding to changed circumstances.

⁹⁹ Allianz submission, p.2.

¹⁰⁰ MUA and AMOU submission, p.39.

Recommendation 2.6

The OHS(MI) Act and the Seafarers Act should apply to all seafarers on a vessel and they should be defined as any person who is employed or engaged or works in any capacity (including that of master) on board a vessel on the business of the vessel, other than the following:

- a) a licensed pilot of the vessel (acting as such a pilot);
- b) an owner of the vessel or a person (except the master) representing the owner;
- c) law enforcement personnel (in their capacity as law enforcement personnel);
- d) if the vessel is a special purpose vessel—special personnel in relation to the vessel;¹⁰¹
- e) a person temporarily employed on the vessel in port;
- f) a person prescribed by the regulations.

2.70 The Seacare Authority has drawn attention to the current situation in which a foreign flagged vessel operating intrastate may be covered by the Seacare scheme where the operator has obtained an s.8AA declaration under the *Navigation Act 1912*. The *Navigation Act 2012* does not have such a provision. This may be an appropriate situation for a declaration.

Capacity to extend or restrict coverage by regulation

2.71 Experience under both Acts indicates that the legislation's coverage may fail to keep up with developments in a dynamic industry. Although amendments to the principal Acts are the most definitive solution, the legislation may have shortcomings for some time before amendments can be made. One mechanism is to allow the application of the Acts to be expanded or limited by regulations. The opting in and declaration provisions are suitable for individual cases, but the regulations would be a better avenue for implementing decisions about classes of vessels, structures or other things or persons that should be covered by the legislation. The regulations would be more accessible, would be disallowable instruments and not liable to administrative review in the way that opting in decisions may be.

Recommendation 2.7

The OHS(MI) Act and the Seafarers Act should each provide that the Act may also apply to prescribed vessels [and, in the case of the OHS(MI) Act, prescribed persons and things] as specified in regulations.

Extending coverage using agreements under the Fair Work Act 2009 (Cwth)

2.72 The application of the Seafarers Act appears to have been extended beyond its statutory scope by the use of agreements under the FWA. Two examples of such clauses appear in the following boxes.

¹⁰¹ The existing definition of special personnel under s.283 of the Navigation Act 1912 is to be replaced by a new definition under s.14 of the Navigation Act 2012.

ASP Ship Management Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Greenfields Agreement 2012¹⁰²

Navigation Act and Seafarers Rehabilitation & Compensation Act.

- 17.1 Nothing in this Agreement shall be construed as limiting the rights of any Employee under the *Navigation Act 1912* (Navigation Act) as amended.
- 17.2 The provisions of Part 2 of the Navigation Act, as amended and Marine Orders, apply to Employees engaged under this Agreement.
- 17.3 The provisions of the *Seafarers Rehabilitation and Compensation Act 1992* and *Regulations* (SRC Act) apply to Employees engaged under this Agreement.
- 17.4 For the purpose of the application of the SRC Act, Employees and the Employer shall carry out all obligations and receive all entitlements in accordance with the Act as if the employment was in connection with a "Prescribed Ship" as defined and applied in the SRC Act, notwithstanding that a declaration under subsection 8A (2) of the Navigation Act is not in force.
- 17.5 The Employer will provide written advice to the Union to the effect that each vessel is insured for the SRC Act requirements whilst engaged in activities covered by this Agreement.

Sea Tow Pty Ltd - Integrated Ratings, Cooks, Caterers and Seafarers Greenfields Agreement 2008¹⁰³

- 19.1 Nothing in this Agreement will be construed as limiting the rights of any employee under the Navigation Act 1912 as amended.
- 19.2 The Navigation Act 1912 as amended and Marine Orders, apply to employees engaged under this Agreement.
- 19.3 The Seafarers Rehabilitation and Compensation Act, 1992, and Regulations made there under apply to employees engaged under this agreement.

- 2.73 I was not able to determine definitively the extent to which this approach has been taken or to identify how many additional employees are covered. DEEWR advised me that it could identify fifty-seven agreements under the FWA that included references to the Seafarers Act.¹⁰⁴ In circumstances where an employee is not otherwise entitled to the benefits of the Seafarers Act, the enforcement mechanisms under that Act would not be available. The enterprise agreement concerned would not activate any powers of the Seacare Authority (which would not be a party to the agreement). Instead, the FWA's

¹⁰² Fair Work Commission, Agreement ID: AE892429.

¹⁰³ Fair Work Commission, Agreement ID: AC321298.

¹⁰⁴ According to DEEWR, of 170 current water transport federal enterprise agreements, 81 contained clauses referring to workers' compensation, with 57 adopting the Seafarers Act by reference. Those agreements are mostly multi-State, cover 1137 employees, with the maritime unions as parties. Some employer parties are not within the Seacare scheme.

compliance provisions would apply. Thus a breach of the agreement might attract a monetary penalty of up to 60 penalty units (\$10,200).¹⁰⁵ Injunctions and orders for compensation may be available under the FWA. Those remedies are not available to employees who are within the Seafarers Act but not subject to such EBA clauses.

- 2.74 The MUA and AMOU proposed that, where an employer and employees agreed in an industrial instrument (presumably one under the FWA) to the application of the Seafarers Act (to the employment concerned), the Seacare Authority should be able to make a declaration of coverage so that the Seafarers Act applied.¹⁰⁶
- 2.75 This MUA and AMOU proposal appears to cover similar ground as proposals for an 'opting in' facility. It has the advantage of bringing the normal Seafarers Act regulatory arrangements into effect, rather than simply relying on the FWA, but the industrial instrument would still operate of its own force and be enforceable under that Act.¹⁰⁷
- 2.76 The MUA and AMOU illustrate the possible operation of the proposal by referring to a ship that is on the AISR but not engaged in international trading. In their view, as the insurance obligation under the SRA (s.61AM) does not extend to other voyages (e.g., coastal or intra-State trading), there needs to be a mechanism for ensuring compensation is available. The unions contend that the right to obtain a declaration of coverage from the Seacare Authority following agreement under an industrial instrument would ensure the availability of compensation.
- 2.77 I consider that the aim of this proposal can be achieved through an opting-in mechanism, which is dealt with elsewhere.

A national system

- 2.78 In the longer term, work related safety and health would be more effectively protected by a national system in the maritime sphere. This has been substantially achieved for commercial domestic vessel safety by the National Law (see above). Just as AMSA has become the single national regulator under that scheme, AMSA might have the same role in respect of work health and safety for virtually all vessels in the water transport industry (some vessels would appropriately remain under existing safety arrangements). This could be achieved under a model based on the National Law for commercial domestic vessel safety.¹⁰⁸
- 2.79 Accordingly, I raise for consideration the possibility of such an arrangement. It may be complex, given the range of portfolios involved at Commonwealth and non-Commonwealth levels, and may require decision making by more than one Ministerial Council. For that reason, I propose that, if this is considered appropriate, the Minister might wish to consult the Minister for Infrastructure and Transport about undertaking, in the first instance, a feasibility study of achieving that goal.

¹⁰⁵ Fair Work Act, s.539.

¹⁰⁶ MUA and AMOU submission, p.8.

¹⁰⁷ Including on application by an employee or employee organisation - Fair Work Act, s.539.

¹⁰⁸ Equally, Australia now has a national system of workplace relations regulation, with considerably wider application of the Fair Work Act in the maritime industry than application of the Seacare scheme legislation in the same industry. The national system was also achieved through a national inter-governmental agreement.

Recommendation 2.8

The Minister for Education, Employment and Workplace Relations should consider approaching the Minister for Transport and Infrastructure to seek agreement on a joint study by their Departments of the feasibility of a national system of work health and safety regulation for water transport in the maritime industry with a view to engaging with the State and Territory Ministers about such a system with AMSA as a single national regulator.

[The development of such a proposed system, which is seen as a longer term goal, could be linked to the outcome of the proposed review of the Seacare scheme recommended in Chapter Seven].

The power to grant exemptions from the Seafarers Act

2.80 Since 1997, the Seacare Authority has had the power under s.20A (set out below) to exempt employees of a particular ship, or particular employees on a ship, from the Act's application.¹⁰⁹ The provision is set out below.

Section 20A: Act not to apply to exempt employment

- (1) The Authority may, in writing, either generally or as otherwise provided in the exemption, exempt the employment on a particular ship of all employees, of a particular group or particular groups of employees, or of a particular employee or particular employees, from the application of this Act.
- (2) An exemption is subject to any conditions set out in the exemption.
- (3) If an exemption is in force in respect of a ship, this Act (other than this section) does not apply, to the extent stated in the exemption, in relation to the employment on the ship of employees to whom the exemption applies so long as any conditions of the exemption are complied with.
- (4) The Authority must not grant an exemption if the proposed exemption would be inconsistent with an obligation of Australia under an international agreement.

2.81 At the time of its introduction, the operation of s.20A was explained as mainly applying where a ship, which normally operated within the confines of a single State or Territory, had to make a one-off interstate or overseas delivery voyage. Without an exemption, such a ship would be covered by the Seafarers Act for the voyage. Under the then Seafarers Act, the vessel would have to have appropriate insurance cover, even though its crew was already covered by a relevant State or Territory compensation scheme, and the employer paid premiums under that scheme. There had been numerous complaints that the short term cover was very difficult to obtain and was prohibitively costly. Insurers had agreed that such cover was often not a normally acceptable commercial risk.¹¹⁰

¹⁰⁹ Section 20A was inserted by the *Marine Personnel Legislation Amendment Act 1997* (the MPLA Act), with effect from 8 March 1997.

¹¹⁰ Marine Personnel Legislation Amendment Bill 1996, Second Reading Speech, Senate, 27 November 1996, p.6076.

- 2.82 The Seacare Authority was expected to determine appropriate conditions before an exemption was granted, such as pre-existing coverage by a State scheme, and to prepare guidelines to advise ship operators of the conditions.¹¹¹
- 2.83 The Seacare Authority has published the *Seacare Authority Exemption Guidelines* (the Exemption Guidelines) which include the factors which the Seacare Authority will consider when deciding whether to grant an exemption. The current factors are set out below.

Factors considered by the Seacare Authority in determining a s.20A exemption application

- a) *Without limiting the circumstances in which the Authority may exempt employment on a particular prescribed ship from the operation of the Seafarers Act, the Authority will consider the following factors:*
- b) *The nature of the operations and the voyage arrangements of the prescribed ship. The Authority may exempt employment on a particular ship from the operations of the Seafarers Act where:*
- i. *the prescribed ship's proposed voyage or voyages do not constitute a regular trading pattern;*
 - ii. *the prescribed ship is expected to voyage between two places outside Australia over a period of 12 months or more, and the majority of crew on the prescribed ship are not residents of Australia; or*
 - iii. *the voyages undertaken by the prescribed ship which make the prescribed ship subject to the operation of the Seafarers Act are incidental to the primary operations of the prescribed ship.*
- For example, If a prescribed ship engaged in a particular industry is required to undertake interstate voyages so that the prescribed ship can engage in and perform those industry operations/activities interstate, then undertaking interstate voyages cannot be considered to be a primary part of or integral to the operations of the ship.***
- c) *The availability of workers' compensation insurance under a State or Territory scheme, at a lower cost than that available under the Seacare scheme. The Authority may exempt employment on a particular prescribed ship from the operation of the Seafarers Act where an employer is able to demonstrate to the Authority that workers' compensation cover is available to its employees under another Australian workers' compensation scheme, at a cost that is below that available under the Seacare scheme.*
- d) *The size of the prescribed ship or ships. The Authority may exempt employment on a particular ship from the operation of the Seafarers Act where the prescribed ship is under 500 gross tonnes.*
- e) *Prescribed ships operating within a Territory only. The Authority may exempt employment from the operation of the Seafarers Act where the prescribed ship voyages within a Territory and does not voyage between a Territory and a place (or places) outside a Territory.¹¹²*

- 2.84 An exemption provision like s.20A is uncommon. Its existence reflects the potential overlap of workers' compensation regimes. The provision is a failsafe for situations where a ship

¹¹¹ Ibid.

¹¹² Section 20A *Request for Exemption from the Application of the Seafarers Rehabilitation and Compensation Act 1992*, Seacare form 10, Attachment A, Seacare Authority Exemption Guidelines, p.5.

only rarely comes within the application of the Seafarers Act. The Seacare Authority has observed that exemptions are usually granted for one-off or out of the ordinary voyages that bring a vessel into the scope of the Seacare scheme.¹¹³ That use of the provision is warranted.

- 2.85 It is more difficult to understand the justification for factor (c), namely, the availability of lower cost workers' compensation insurance under a State or Territory scheme, which could potentially operate to exempt many vessels from the Seafarers Act, even though the vessel was regularly operating beyond the State or Territory concerned.¹¹⁴
- 2.86 Factor (c) was inserted as a result of a Ministerial Direction under s.107 of the Seafarers Act. The *Seafarers Safety Rehabilitation and Compensation Directions 2006 (1)* issued by the then Minister¹¹⁵ directed the Seacare Authority to amend its Exemption Guidelines so that *if workers' compensation insurance is available to a relevant employer under a State or Territory scheme, at a cost lower than that available under the Seacare scheme, then this is a primary factor in determining an application for exemption under section 20A of the Seafarers Act*. Later, I propose that the grounds for exemptions be included in the regulations, so it would be unnecessary for such directions to be given in future.

Use of section 20A exemptions

- 2.87 In 2011-12, the Seacare scheme covered a total of 298 vessels and 7,916 employees. During that same period, exemptions were granted covering:¹¹⁶
- 20 employers;
 - 81 vessels; and
 - 544 employees.
- 2.88 There are currently 34 vessels, used by 9 employers, with exemptions in force. There are no individual employee exemptions currently in place and they are very rare.¹¹⁷
- 2.89 The number of s.20A exemptions appears to have increased in recent years. In 2011-12, the number of vessel exemptions was double that of those granted in 2008-09. The AIMPE¹¹⁸ and the MUA and AMOU¹¹⁹ commented that the Seacare scheme's viability depends on ensuring the continued involvement of sufficient employers to achieve economies of scale. AIMPE commented that the increase in exemptions may have been in part because of a greater awareness among employers of the need to seek an exemption for a vessel undertaking a one-off delivery voyage or relocation voyage.¹²⁰
- 2.90 Figure 2.1 shows the numbers of exemptions granted in each completed financial year since 2008-09 and the reason for granting them. Vessel exemptions are by far the most common

¹¹³ Seacare on line document, *Exemptions from the Seafarers Act*.

¹¹⁴ The MUA and AMOU were strongly critical of the direction (MUA and AMOU submission, p.13) as was the AIMPE.

¹¹⁵ Seafarers Safety, Rehabilitation and Compensation Directions 2006(1). Available at: <http://www.comlaw.gov.au/Details/F2006L02975>.

¹¹⁶ Seacare Authority advice to the review.

¹¹⁷ Seacare Authority advice to the review.

¹¹⁸ AIMPE submission, p.7.

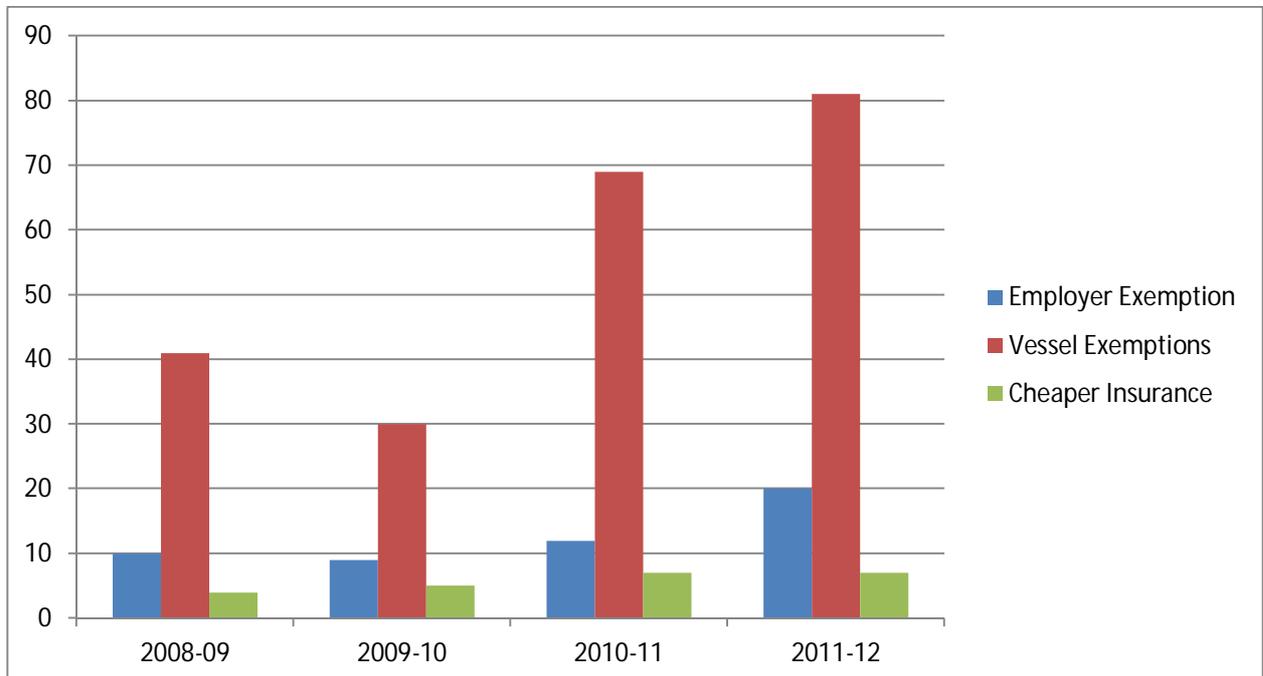
¹¹⁹ MUA and AMOU submission, p.13.

¹²⁰ AIMPE submission, p.7.

type of exemption and primarily they are granted because the vessels in question are operating within particular State or Territory waters or have non-regular trading patterns.

- 2.91 Exemptions are usually granted for the entire crew of the vessel listed in the exemption application and for a set period. The longest exemption period is a year (in circumstances where the reason for the application is that cheaper insurance has been obtained elsewhere). A Certificate of Exemption issued by the Seacare Authority specifies the period. Most employers granted exemptions have no other engagement with the Scheme.¹²¹
- 2.92 A normal exemption prescribes that the specified employees are exempt from the operation of the Seafarers Act, subject to the following limitations and conditions:¹²²
- a) the exemption covers the specified voyage(s) only;
 - b) the exemption operates during the specified period only;
 - c) the exemption will only have effect while the employer holds valid and current workers' compensation insurance under another jurisdiction for the specified operations and for the specified period, and if relevant evidence has been provided to the Seacare Authority;
 - d) the Seacare Authority may terminate the exemption by notifying the employer in writing that the exemption will cease to operate on a specified date.

Figure 2.1: exemptions granted from 2008-09 to 2011-12¹²³



¹²¹ Seacare Authority advice to the review.

¹²² Information provided by the Seacare Authority.

¹²³ Information provided by the Seacare Authority.

- 2.93 The Seacare Authority does not actively monitor compliance with the limitations and conditions for exemptions that it has granted and relies on self-monitoring and reporting to ensure compliance. No exemptions have been rescinded for non-compliance.¹²⁴

Improving the statutory and administrative arrangements for exemptions

- 2.94 There is an ongoing need for s.20A, which gives appropriate flexibility to the scheme. Even so, there are questions of whether the process for developing the exemption criteria is appropriate and whether the right governance and review mechanisms exist.
- 2.95 At present, the Seacare Authority decides on the criteria that are used in the exemption guidelines. The Seafarers Act does not require the Authority to determine criteria and provides no guidance on the process for their development or for their content. No provision is made for the application process or for the review of decisions.¹²⁵ The MUA and AMOU commented that questions of coverage should be determined by the legislation and not by an ad hoc administrative procedure.¹²⁶
- 2.96 It would be more appropriate for the grounds for an exemption under s.20A and the process for applying for an exemption to be provided for in the regulations. This would have the additional benefit of greater scrutiny and avoid the need for directions to be given if the government has a policy preference about the content of the grounds for exemption or the application process. The *Seafarers Safety Rehabilitation and Compensation Directions 2006 (1)* would be repealed.
- 2.97 The regulations should allow the Seacare Authority to set conditions, to specify the period for which an exemption operates, to vary or rescind exemptions and conditions relating to exemptions on application or on its own initiative, after giving the persons affected by the exemption a reasonable opportunity to make a submission about the proposed action, and to publish reasons for granting or refusing an exemption.
- 2.98 The grounds should be based on the current factors, but factor (c), if it is retained, should be revised so that the Seacare Authority may, if it considers that it would not be contrary to the objects of the Act and the purposes of the scheme, grant an exemption where the costs of insurance under the Seafarers scheme would be disproportionate compared to the cost of insurance under another scheme.
- 2.99 Consideration should be given to providing for a fee for an application for an exemption. This should represent the reasonable cost of dealing with an application.
- 2.100 The Seacare Authority should be given stronger powers to scrutinise applications for exemptions and their operation, if granted. For that purpose, the Authority should be able, by notice in writing, to require an employer to give it, within such reasonable period as is specified in the notice, such documents or information (or both) as are specified in the notice, being documents or information in the possession or control of the employer that are relevant to a decision under s 20A. Non-compliance should be a strict liability offence (this could be included in s.106 of the Seafarers Act, *Power to obtain information*).

¹²⁴ Information provided by the Seacare Authority.

¹²⁵ A decision by the Seacare Authority to grant, revoke or amend an exemption may be reviewed under the *Administrative Decisions (Judicial Review) Act 1977*. It is not a merits review.

¹²⁶ MUA and AMOU submission, p.13.

- 2.101 The grounds for exemptions should be periodically reviewed (for example, at least once each five years). The Seacare Authority should be responsible for the process, including seeking the views of interested persons and advising the Minister on any appropriate changes to the exemption regulations.
- 2.102 To make the exemption process more transparent, a decision about an exemption should be a reviewable decision for the purposes of Part 6 of the Seafarers Act, *Reconsideration of determinations and review of decisions by the Administrative Appeals Tribunal*.

Recommendation 2.9

The Seafarers Act should be amended to:

- a) provide for both the grounds for exemptions under s.20A and the requirements for an application to be as prescribed in the regulations;
- b) require the Minister to seek the advice of the Seacare Authority about the prescribed grounds;
- c) empower the Seacare Authority to consider applications and to make a decision within a specified time (e.g., 20 business days from receipt of the application), but to be able to request further information (with decision-making time suspended until the additional information is received);
- d) allow the Seacare Authority to grant exemptions for a specified time and subject to conditions;
- e) provide for a review of a decision not to grant an exemption or to grant an exemption subject to a condition [Note: this might be achieved by amending s.76 of the Seafarers Act];
- f) authorise the Authority to review the grounds for and operation of an exemption periodically;
- g) for that purpose, the Authority should be empowered to require, by notice in writing, an employer to give it, within such reasonable period as is specified in the notice, such documents or information (or both) as are specified in the notice, being documents or information in the possession or control of the employer that are relevant to a decision under s 20A - non-compliance should be a strict liability offence [note: this could be included in s.106 of the Seafarers Act];
- h) authorise the Authority to issue written general guidelines on s.20A exemptions; and
- i) provide for a prescribed fee for an application for an exemption (to meet the Authority's costs in dealing with an application).

Recommendation 2.10

The *Seafarers Safety Rehabilitation and Compensation Directions 2006 (1)* should be repealed.

Chapter Three – Legislative consistency between the Seafarers Act and the SRC Act – Part One

Term of Reference 2(b)

The scope and necessity for amending and updating any legislative inconsistencies in the Seacare scheme, including ... ensuring consistency between the Seafarers Act and the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

Chapters Three and Four look at achieving and maintaining consistency between the Seafarers Act and the Commonwealth's Safety Rehabilitation and Compensation Act (SRC Act).

Existing inconsistencies and omissions are identified in Chapter Three. I recommend a process for avoiding future inconsistencies and various amendments to improve consistency with the SRC Act.

The outcome of previous reviews

The Luntz Review

- 3.1 In 1987 Professor Harold Luntz reviewed the policy basis and operation of the former *Seamen's Compensation Act 1911*. He identified the desirability of consistency between the seamen's compensation legislation and proposals being developed at that time for new Commonwealth employees' workers compensation legislation.
- 3.2 The review's ultimate outcome was the introduction of the Seafarers Act. The Second Reading speech stated that the new scheme would combine fair, earnings-related benefits with comprehensive rehabilitation requirements and other measures aimed at getting injured employees restored to health and back to work as quickly as possible.¹²⁷ The new Act was intended to restore the former nexus with the workers' compensation legislation applicable to Commonwealth employees.¹²⁸

The Ernst & Young Review

- 3.3 As discussed in Chapter One, in 2005 Ernst & Young evaluated the Seacare scheme and made a number of key findings, including that:¹²⁹
 - a) the Seacare scheme had not participated in reforms that many State and Territory schemes had implemented to improve claims outcomes, including improving RTW rates; and
 - b) the definition of injury was inconsistent with that in other workers' compensation schemes.

¹²⁷ The Hon Warren Snowden, Parliamentary Secretary to the Minister for Employment, Education and Training, *Hansard*, House of Representatives, 14 October 1992, at 2145.

¹²⁸ *Ibid.*

¹²⁹ Ernst and Young Report, *op. cit.*, pp. 4-5.

- 3.4 The report made a number of recommendations for legislative change, including some relating to definitions. The report's finding and recommendations, which have not been implemented, are dealt with in other chapters.

Underlying principle of maintaining consistency

- 3.5 Under TOR 2(b), I have identified provisions of the SRC Act that should be reflected, with appropriate modification for context, in the Seafarers Act. Consistency between the provisions of the two Acts has been an underlying principle of the Seacare scheme since its introduction¹³⁰ and should remain so in line with the original intention of Government as long as it is a separate national scheme.
- 3.6 The Seafarers Act has not kept pace with amendments to the SRC Act. In particular, major changes in 2001 and 2007 to the SRC Act's eligibility for compensation provisions have not been adopted by the Seafarers Act. This may be due to other legislative priorities. While not all SRC Act legislative changes are relevant to the Seacare scheme, maintaining consistency is appropriate to ensure that the legislation is up to date and better able to benefit from national initiatives, such as Safe Work Australia's *National Workers' Compensation Action Plan 2010-13*, and its successors.¹³¹
- 3.7 The four groups of potential amendments to the Seafarers Act to address inconsistencies and other gaps that are considered in this chapter and the next are:
- a) amendments to correct defects, such as omissions, internal inconsistencies and out of date provisions;
 - b) provisions that are necessary to re-establish consistency between the Seafarers Act and the existing SRC Act; and
 - c) proposed amendments to the SRC Act recommended by the Hanks Review that, if accepted, should also be made to the Seafarers Act to maintain consistency and improve its operation.
- 3.8 The first two groups are considered in this chapter and the last is considered in the next chapter. The adoption of the Hanks Review's recommendations in the Seafarers Act is recommended, except where that would be either inappropriate (for example, where there is a poor scheme fit) or irrelevant.
- 3.9 The stakeholder submissions addressed various aspects of the Seafarers Act. Most proposals for amendments were on topics that are dealt with in other chapters. Where those views are relevant to matters covered by this chapter, they have been taken into account.
- 3.10 As a general observation, I note that when legislative changes to the SRC Act are being considered, action should normally be taken promptly to assess their suitability for the Seafarers Act. Amendments to both Acts, if required, might proceed together or as closely in time as practicable (background research and consultations might sometimes involve differing processes, stakeholders and timeframes for each Act).

¹³⁰ *Hansard*, House of Representatives, 14 October 1992, 2145.

¹³¹ Available at: <http://www.safeworkaustralia.gov.au>.

- 3.11 Closely aligned processes for amendments to the SRC Act and Seafarers Act would be sound practice. It would be achieved by the portfolio Department always identifying where proposed SRC Act changes could be relevant to the Seafarers Act and consulting the Seacare Authority about these relevant proposed changes at the earliest appropriate stage, and making appropriate recommendations to the Minister. Such an approach should markedly reduce the prospect of the two Acts becoming inconsistent, as they have over recent years.
- 3.12 Similar arrangements should apply to the regulations under each Act.

Recommendation 3.1

When amendments to the SRC Act or regulations are being considered, the portfolio Department should consult the Seacare Authority at the earliest appropriate stage to assess whether corresponding changes should be made to the Seafarers Act in order to ensure ongoing consistency. Where it is possible and appropriate, steps should be taken to proceed with amendments to both Acts at the same time or as close together in time as practicable.

Provisions of the Seafarers Act requiring amendment to correct defects, such as omissions, internal inconsistencies and out of date provisions

Register of proposed amendments

- 3.13 The Seacare Authority provided me with its register of proposed amendments which, for one reason or another, have not yet been addressed. I have used the register to develop a list of provisions that require amending on the grounds mentioned above. I have also referred to submissions and discussions for that purpose. The Seacare Authority's list is at Appendix D.
- 3.14 I support the proposed amendments identified by the Seacare Authority. They should be considered in any legislative change process following this Review, except where they have either been superseded by a Hanks Review recommendation or by my recommendations.

Differences between the Seafarers Act and the SRC Act entitlement provisions

- 3.15 Various differences exist between the current entitlement and benefits provisions of the Seafarers Act and the SRC Act. As noted, one reason may be the absence of ongoing processes for assessing the need for consistency when legislative change is proposed for either Act and for taking action to achieve consistent provisions, when found appropriate. It may also indicate some differences between the scope of the respective schemes, with some of the provisions appropriately reflecting particular industry or scheme profiles.
- 3.16 A number of the entitlement provisions in the Seafarers Act are not consistent with the current SRC Act provisions. These provisions relate to:
- a) the required level of employment contribution to injury;
 - b) exclusionary provisions relating to psychological injuries;
 - c) provisions relating to entitlement to compensation after reaching retirement age;
 - d) the permanent impairment threshold test;

- e) the threshold for industrial deafness claims; and
 - f) funeral expenses payable upon death.
- 3.17 The above provisions (further details provided in Appendix E) show some notable differences between the entitlement and related provisions as currently reflected in the two Acts. They should be made consistent.
- 3.18 Generally, stakeholders support the need for consistency with the SRC Act legislative provisions. AIMPE, for example, submitted that ...*the rights and responsibilities together with the benefits and entitlements should remain broadly similar between the Seafarers scheme and the Commonwealth scheme.*¹³² Similarly, the joint AMOU/MUA submission noted that, *in relation to increased benefits and entitlements which have accrued in the SRC Act, parity between the two statutes should be restored.*¹³³ The Australian Shipowners Association (ASA) on the other hand noted it was unable to comment, as the Hanks Review of the SRC Act was yet to be finalised.¹³⁴
- 3.19 Nevertheless, not all stakeholders agreed on the need for consistency in all cases. For example, AIMPE submitted that, where there are *justifiable distinctions*, consistency should not be applied. It identified journey claims as one area of distinction.¹³⁵
- 3.20 Stakeholders also had differences of view about the hearing loss impairment threshold. The Seafarers Act's threshold is ten per cent, compared to five per cent under the SRC Act. AIMPE observed that hearing loss has been an area of impairment in which seafarers are treated differently from workers covered by the Commonwealth scheme and that the discrepancy should be rectified.¹³⁶
- 3.21 Allianz on the other hand submitted that no change should be made to the provisions for permanent impairment under the Seafarers Act. It did not support a lowering of the permanent impairment threshold or a lower threshold for hearing loss claims as this would have cost implications for the scheme.¹³⁷
- 3.22 Furthermore, the report of the Hanks Review makes some recommendations which would enhance some of the current provisions in the SRC Act that are not, even in their current form, reflected in the Seafarers Act. Other Hanks Review recommendations are for new provisions in the SRC Act. Some are relevant to the Seafarers Act and so should be considered for possible inclusion. They are considered in the next chapter.

¹³² AIMPE submission, p. 8.

¹³³ Joint AMOU/MUA submission, p. 14.

¹³⁴ ASA submission, p. 14.

¹³⁵ AIMPE submission, pp. 8-9. The journey claim provisions are discussed in more detail in Chapter Four, paragraphs 4.27-4.48.

¹³⁶ AIMPE submission, p. 9.

¹³⁷ Allianz submission, pp. 12-13.

Recommendation 3.2

The Seafarers Act should be amended to be made consistent with the SRC Act in respect of the subjects and provisions set out in Appendix E.

Funeral expenses

3.23 In 2007, compensation for funeral expenses under the SRC Act was increased from \$3,500 to \$9,000 (indexed annually). Previous benefits had not kept pace with actual funeral costs and the new figure aligned with the NSW benefit and was also consistent with that payable under the *Military Rehabilitation and Compensation Act 1992* (Cwth). The Explanatory Memorandum¹³⁸ stated the amendment enabled the maximum amount of benefit to be increased by regulation should the indexation adjustments not keep pace with real costs. The regulation-making power can only operate beneficially.

3.24 The amendment has not been reflected in the Seafarers Act.

Recommendation 3.3

The provisions in s.30(2) of the Seafarers Act relating to funeral expenses should be amended to ensure consistency with s.18(4) of the SRC Act.

Payment of compensation

3.25 Under s.130 of the Seafarers Act, an amount of compensation for permanent impairment, death benefits and non-economic loss in respect of permanent impairment must be paid within 30 days after the date of the determination of the amount. Under the SRC Act, however, the requirement is to make payment within 30 days after the date of assessment of the amount, and only applies to payment of permanent impairment compensation.

3.26 Section 130 of the Seafarers Act should not be changed for consistency with the SRC Act. The prompt payment of compensation for death benefits is important to provide support for the family of the deceased. The Seafarers Act provision is to be preferred.

Recommendation 3.4

The provisions of s.130 of the Seafarers Act should not be amended to be consistent with the provisions of the SRC Act.

Employees on compensation leave

3.27 Under s.116(a) of the SRC Act, sick leave and recreation leave entitlements continue to accrue to an employee during the first 45 weeks of compensation leave. The Seafarers Act does not have a similar provision. Stakeholders did not express specific views on the issue.

¹³⁸ Available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2665_ems_2ab78aea-e21a-439b-8703-063e952d9ce0/upload_pdf/306784.pdf;fileType=application/pdf#search=

- 3.28 To include such a provision in the Seafarers Act could have a financial impact on smaller employers. On the other hand, consistency of approach between the Comcare and Seacare scheme provisions is desirable and within the review's terms of reference.
- 3.29 Provisions governing the accrual of sick leave by injured workers while in receipt of compensation differ throughout Australia. The Comcare, Queensland and South Australian schemes provide for the accrual of annual leave while an injured employee is in receipt of workers' compensation payments.¹³⁹ Other States and Territories treat this as an industrial issue governed by specific industrial awards or enterprise agreements.¹⁴⁰
- 3.30 Section 137 of the Seafarers Act currently provides that injured employees continue to accrue long service leave while in receipt of workers' compensation benefits *in accordance with the applicable industrial instrument or National Employment Standards*. This could be extended to cover annual leave accruals. Such a change would recognise current industry practice and impose no additional financial burden on employers.

Recommendation 3.5

Section 137 of the Seafarers Act should be amended to provide that sick leave and recreation leave entitlements continue to accrue to an employee during the first 45 weeks of compensation leave in accordance with the applicable industrial instrument or National Employment Standards.

Permanent impairment – Approved Guide

- 3.31 Under s.42 of the Seafarers Act, the Seacare Authority may prepare a written *Guide to the Assessment of the Degree of Permanent Impairment* (the Approved Guide). The section also sets out the processes for writing, amending or revoking the Approved Guide.
- 3.32 On 13 April 2007, the formal requirements for approving and disallowing the Comcare Approved Guide were brought into line with the legislative instruments scheme established by the *Legislative Instruments Act 2003* (LI Act). Similar amendments are needed to ss.42(3) and (3A) of the Seafarers Act to ensure its compliance with the LI Act. The amendments could be based on those made to ss.28(3) and (3A) of the SRC Act.

Recommendation 3.6

The provisions in ss.42(3) and (3A) of the Seafarers Act relating to the Approved Guide should be amended to ensure compliance with the LI Act.

Actions for damages at common law

- 3.33 In 2001 the SRC Act was amended by inserting ss.44(3) and (4) to clarify that s.44 does not bar dependants of deceased employees suing the Commonwealth or a licensed corporation. The Seafarers Act does not have equivalent provisions. What this means is that the dependants of a deceased seafarer will be unable to sue for common law damages even

¹³⁹ See s.119A of the Queensland Act and s.40 of the South Australia Act.

¹⁴⁰ For a summary of scheme arrangements on this issue, see Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, 2012, p. 39.

though there might be a clear right to sue following the death of a seafarer. This creates an unacceptable inequity between the two Acts which I believe needs to be rectified.

- 3.34 Similarly, s.45(5) of the SRC Act, which was inserted by the *Safety, Rehabilitation and Compensation and other Legislation Amendment Act 2001*, has no counterpart in the Seafarers Act. This amendment to the SRC Act made clear that an employee's election to institute an action or proceeding against the employer did not prevent the employee from taking any other action (prior to or instead of taking formal proceedings) to resolve the claim, e.g., a negotiated settlement before or in place of formal proceedings. This amendment introduces greater flexibility in the management of common law matters and helps avoid unnecessary legal costs.

Recommendation 3.7

- a) The provisions in s.54 of the Seafarers Act relating to common law actions should be amended by inserting clauses similar to ss.44(3) and (4) of the SRC Act.
- b) The provisions in s.55 of the Seafarers Act relating to common law actions should be amended by inserting clauses similar to s.45(5) of the SRC Act.

- 3.35 Sections 56, 57 and 59 of the Seafarers Act need updating to reflect ss.46, 47 and 50 of the SRC Act. The SRC Act was amended in 2001 by changing references to *proceedings* to *claims*. This amendment was made in order to enable the negotiation and possible resolution of common law matters where a claim for damages has been made, whether or not formal proceedings have been instituted.

- 3.36 Without this amendment, a common law matter could not be negotiated and possibly settled where formal legal proceedings had not commenced. The amendments now enable possible resolution of common law actions prior to commencement of formal legal proceedings thereby providing more flexibility and reducing unnecessary legal costs.

- 3.37 These amendments are in addition to those recommended to s.50 of the SRC Act in the Hanks Review (Hanks recommendations 10.2 and 10.3).

Recommendation 3.8

The provisions in ss.56, 57 and 59 of the Seafarers Act relating to common law proceedings should be amended along the lines of ss.46, 47 and 50 in the SRC Act.

- 3.38 Consequential amendments would also be required to s.60(1)(d) of the Seafarers Act by replacing the word *instituted* with *arising out of a claim made*. This would make the section consistent with the SRC Act [s.51(d)] (which was amended by the *Safety, Rehabilitation and Compensation and other Legislation Amendment Act 2001*) and ensure consistency with recommendations above to amend other sections of the Seafarers Act to refer to *claims* rather than *proceedings*.

Recommendation 3.9

The provisions in s.60(1)(d) of the Seafarers Act should be amended by substituting the term, *arising out of a claim made*, for the word, *instituted*.

Penalty provisions for non-compliance with legislative obligations

- 3.39 Where both the SRC Act and the Seafarers Act contain similar provisions that have penalties for non-compliance, the penalties should be the same. It is inappropriate for the same conduct to be treated differentially merely as a result of a failure to maintain consistency.

Recommendation 3.10

Penalties under the Seafarers Act should be the same as in the SRC Act in equivalent provisions.

Provisions relating to industry employment arrangements

- 3.40 When the Seafarers Act was enacted, the concept of industry employment was a feature of the industry arrangements, with trainees who were being trained to become seafarers not actually employed by a specific employer. Since the 1998 waterfront dispute however, industry employment no longer exists in the seafaring industry with all seafarers being employed (and trained) by specific employers.
- 3.41 *Employee* is defined in s.4 of the Seafarers Act. It means a seafarer or trainee or a person (other than a trainee) who, although ordinarily employed or engaged as a seafarer, is not so employed or engaged, but is required under an award to attend a Seafarers Engagement Centre for the purposes of registering availability for employment or engagement on a prescribed ship. Seafarers Engagement Centres were phased out in 1988.
- 3.42 The Seafarers Act contains provisions relating to *industry trainee* and *company trainee* (s.4). Both terms were included when there were industry trainees, as well as employer trainees. Industry changes make references to the two types of trainees redundant. The word *trainee* should replace those terms. A definition should be included in s.3.
- 3.43 The reference in s.4(2)(a) to an approved industry training course should be omitted.
- 3.44 With the end of industry employment, Seafarers Engagement Centres do not exist and the Seafarers Act should no longer refer to them [see ss.4(1)(c), 9(2)(d) and 13(3)].¹⁴¹

Recommendation 3.11

The provisions in the Seafarers Act relating to trainees and the Seafarers Engagement Centre should be amended to reflect current industry practice by referring only to a trainee, with a suitable definition, and by omitting references to a Seafarers Engagement Centre.

¹⁴¹ A major feature of the seafaring industry prior to 1998 was that seafarers, in the case of ratings (but not officers), were employed through an industry pool. Ratings did not have an employer, but were assigned to ships through the pool.

Chapter Four – Legislative consistency between the Seafarers Act and the SRC Act – Part Two – possible amendments arising from the Hanks Review

Term of Reference 2(b)

The scope and necessity for amending and updating any legislative inconsistencies in the Seacare scheme, including ... ensuring consistency between the Seafarers Act and the Safety, Rehabilitation and Compensation Act 1988 (SRC Act).

In Chapter Four, I consider the recommendations of the recent Hanks Review of the SRC Act. Mr Hanks QC made numerous recommendations to amend the SRC Act. Not all of those recommendations are discussed in this chapter. I examine those that require further examination to confirm whether or not they should be adopted in the Seafarers Act. Appendix F summarises all the Hanks Review recommendations and indicates my view on whether or not they should be adopted by the Seafarers Act. Restructuring the Seafarers Act to be consistent with the SRC Act's proposed revised structure is also recommended.

Consideration of Hanks recommendations in this Chapter

4.1 The Hanks Review of the SRC Act made 104 recommendations, with the majority recommending amendments to the SRC Act. If the Seafarers Act and SRC Act are to remain consistent, many of the Hanks Review recommendations should be adopted, with suitable modifications, for the Seafarers Act. In this chapter I discuss those recommendations that require further examination to weigh up whether they should be adopted in the Seafarers Act. A complete list of the recommendations, with my assessment on their suitability for the Seafarers Act, is at Appendix F. The Hanks recommendations that warrant closer examination are considered below. I deal with them in seven groups of recommendations that are relevant to the following aspects of the Seafarers Act:

- a) its structure;
- b) the scope of the Act's coverage;
- c) improving rehabilitation and RTW;
- d) securing compliance under the Seafarers Act;
- e) benefits under the SRC Act;
- f) determinations of claims, reconsideration and review;
- g) statutory obligations.

Hanks recommendations relevant to the Seafarers Act's structure

- 4.2 In this part, I consider the relevance for the Seafarers Act of a group of Hanks Review recommendations relating to the SRC Act's structure and terminology.

Hanks recommendation 3.2 (statement of the Act's Objects and Purpose)

The Hanks recommendation 3.2 is: *I recommend that the SRC Act include a statement of the Act's objects and a purpose.*

- 4.3 The Hanks Review report recommends making the purpose and objects of the SRC Act explicit. This would express the SRC Act's focus on employee capacity for work, rather than incapacity.
- 4.4 Like the SRC Act, the Seafarers Act lacks an objects section. A similar clause in the Seafarers Act to that recommended in the Hanks Review is needed for the same reasons, that is, to enshrine the focus on rehabilitation and capacity for work in the Seafarers Act. Using the clause recommended by Mr Hanks as a model, a provision along the following lines should be included in the Seafarers Act. There are minor variations from the provision proposed by Mr Hanks. (I discuss this further in Chapter Seven, paragraphs 7.29 – 7.33).

Example of a new main object for the Seafarers Act

[Based on the statement of objects and purpose recommended by the Hanks Review for the SRC Act]

The main object of this Act is:

- (a) to assist in protecting the health, safety and wellbeing of employees;*
- (b) to enhance the work capacity of employees; and*
- (c) to secure the economic position of employees;*

through the establishment and regulation of a prompt, fair, effective, responsive and financially viable system for:

- (d) rehabilitating employees injured at work so that their capacity for work can be fully restored;*
- (e) providing medical treatment to employees injured at work;*
- (f) compensating employees for losses caused by injuries at work;*
- (g) resolving disputes about rehabilitation and compensation; and*
- (h) providing insurance and other financial arrangements in order to cover the cost of rehabilitation, treatment, compensation and administration of the system.*

Recommendation 4.1

The Seafarers Act should be amended to include an object and purpose consistent with that proposed in recommendation 3.2 of the Hanks Review.

[See also Recommendation 7.3].

Hanks recommendation 3.3 (a new structure for the SRC Act)

The Hanks recommendation 3.3 is: *I recommend that the SRC Act be redesigned with a more rational structure that reflects the priority to be given to rehabilitation, follows the typical course of a claim and then deals with structural aspects – or scheme governance.*

- 4.5 Mr Hanks recommends a more rational structure for the SRC Act. His comments on the disjointed, hard to follow flow of the SRC Act's various parts could also be made about the Seafarers Act, since it is structured in a broadly similar way.
- 4.6 I propose that the Seafarers Act should also be restructured in a way that would be broadly similar to that proposed for the SRC Act, with appropriate modifications to reflect differences in the Act's focus and the administrative arrangements for the Seacare scheme. The updated structure would also be consistent with my recommendations more generally, providing a stronger focus on prevention and RTW (discussed in Chapter Six of this report). The proposed restructure would also facilitate maintaining consistency with the SRC Act.

Proposed new structure of the Seafarers Act

Note: This is a broad outline and is not intended to be comprehensive

Part 1 – Preliminary [See Part 1 of the current Seafarers Act, *Preliminary*, and s.139A, *Exclusion of State Laws relating to workers' compensation*]

- Object
- Interpretation
- Scope (including exclusion of State laws)

Part 2 – Claims for compensation [See Part 5 of the current Seafarers Act, *Notices and Claims*]

- Injury notification, claims
- Provisional liability
- Power to request information, power to require medical examination

Part 3 – Rehabilitation [See Part 3 of the current Seafarers Act, *Rehabilitation*]

- Early intervention
- The ongoing rehabilitation obligation, including:
 - suitable employment
 - rehabilitation programs

Part 4 – Compensation [See Part 2 of the current Seafarers Act, *Compensation*]

- Basic liability/eligibility
- Eligibility for different heads of compensation

Proposed new structure of the Seafarers Act

Note: This is a broad outline and is not intended to be comprehensive

- Redemption

Part 5 – Determinations, reconsiderations and review [See Part 6 of the current Seafarers Act, *Reconsideration of determinations and review of decisions by the AAT*]

- Making determinations on claims, including timing
- Reconsideration, including timing and employees' costs
- External review (AAT or Fair Work Commission)

Part 6 – Liabilities arising apart from this Act [See Part 4 of the current Seafarers Act, *Liabilities arising apart from this Act*]

- No action for damages against the employer, etc.
- Election to sue for non-economic loss
- Relationship between compensation and damages against third parties

Part 7 – Compulsory insurance and the Fund [See Part 7 of the current Seafarers Act, *Compulsory insurance and the Fund*]

- Compulsory insurance
- The Safety Net Fund
- Reserve function of the Authority

Part 8 – Administration [See Part 8 of the current Seafarers Act, *Administration*]

- The Seafarers Safety, Rehabilitation and Compensation Authority
- Functions and powers
- Directions by the Minister
- Constitution and meetings
- Miscellaneous

Part 9 – Miscellaneous [See Part 9 of the current Seafarers Act, *Miscellaneous*]

- Regulations

Recommendation 4.2

The Seafarers Act should be restructured along similar lines to the structure recommended for the SRC Act by the Hanks Review.

[Note: an indicative structure is shown in this report].

Hanks recommendations relevant to the coverage of the Seafarers Act

- 4.7 In this part, consideration is given to the relevance for the Seafarers Act of a group of Hanks recommendations relating to coverage of injuries under the SRC Act. Not all of his recommendations are discussed (see Appendix F for my assessment of the suitability of all of the Hanks recommendations for adoption for the Seafarers Act).

Hanks Recommendation 5.2 (perception must have a reasonable basis in order to provide connection with employment)

The Hanks recommendation 5.2 is: *I recommend that the effect of the Federal Court's judgment in Wiegand v Comcare should be negated so that an employee's perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis.*

- 4.8 This proposed amendment, which aims to negate the outcome of the Federal Court decision in the matter of *Weigand v Comcare*, is to a provision in the SRC Act that is currently not reflected in the Seafarers Act. Until April 2007, both the Seafarers Act and the SRC Act required that, in order for a seafarer or an employee to be entitled to compensation for a disease, employment must have contributed *to a material degree* to the development of the disease. On 13 April 2007,¹⁴² the SRC Act was amended to require employment to have contributed *to a significant degree* to the development of a disease for an employee to be entitled to compensation. No equivalent amendment was made to the Seafarers Act.
- 4.9 The amendment of the SRC Act met the Government's concerns about the legal interpretation of the material degree test. The Explanatory Memorandum to the amending bill stated: *Since the enactment of the SRC Act in 1988, 'material degree' has been interpreted in court and tribunal decisions so as to erode significantly the extent to which employment must have contributed to the contraction or aggravation of the disease for it to be compensable.*¹⁴³
- 4.10 The term *significant degree* is defined in the SRC Act [s.5B(3)] as a degree that is *substantially more than material*. A new s.5B(2) was also inserted into the SRC Act, with a non-exhaustive list of matters to be taken into consideration when applying the test.
- 4.11 The *significant degree* test is more stringent than the previous *material degree* test. By maintaining the *material degree* test, the Seafarers Act has a lower threshold for access to compensation benefits than the SRC Act.
- 4.12 The material degree test is little used in current workers' compensation legislation.¹⁴⁴ Only the Northern Territory uses a *material* contribution test for the employment contribution to a compensable disease.¹⁴⁵ Of the other non-Commonwealth jurisdictions, three use a *substantial contributing factor* test, two use a *significant contributing factor* test, one uses a *substantial degree* test and another provides for compensation for a disability (including injury and disease) if it arises from employment. Nonetheless, under that law, employment must be a substantial cause of a psychiatric disability for compensation to be payable.¹⁴⁶

¹⁴² The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007*.

¹⁴³ *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill, 2006*, Explanatory Memorandum.

¹⁴⁴ Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand, 2012*, p.18.

¹⁴⁵ *Workers Rehabilitation and Compensation Act (NT)*, s.4(6).

¹⁴⁶ *Workers Rehabilitation and Compensation Act 1984 (SA)*, s.30.

- 4.13 Some stakeholders supported amending the Seafarers Act to introduce a stricter test. The ASA proposed using a *significant contributing factor test* for the definitions of *injury* and *disease*.¹⁴⁷ AMMA and P&O Maritime Services hold the same view.¹⁴⁸
- 4.14 On the other hand, the MUA and AMOU oppose change. In their view, stricter provisions have not added clarity in the jurisdictions that use them, have not had a strong effect and have been implemented as a result of concerns about psychiatric disorders, which are rare in the maritime industry.¹⁴⁹
- 4.15 The Hanks Review report discusses the jurisprudence since the 2007 SRC Act amendments and recommends a further amendment so that an employee's perception of a state of affairs would only provide a connection with employment where that perception has a reasonable basis. Mr Hanks observed that it is an unfair burden on employers to make them liable to pay compensation for a psychological injury that is caused by an employee's fantasising rather than by any aspect of employment.¹⁵⁰
- 4.16 Similar amendments should be made to the Seafarers Act for consistency with the SRC Act and because these tests reflect the dominant current legislative standard.

Recommendation 4.3

- a) The Seafarers Act should be amended:
- i. to align s.10 with s.7 of the SRC Act by requiring that, for a seafarer to be entitled to compensation for a disease, the employment contribution should be to a *significant degree*;
 - ii. to include provisions similar to those of s.5B of the SRC Act defining *disease*, providing guidance on the matters to be taken into consideration when determining whether employment has contributed to a significant degree;
 - iii. to define *significant degree* along the lines of the SRC Act definition;
- b) The Hanks Review's recommendation 5.2 for the SRC Act to be amended (to require that an employee's perception of a state of affairs only provides a connection with employment where the perception has a reasonable basis) should, if accepted for the SRC Act, be used in the Seafarers Act.

¹⁴⁷ ASA submission, p.16.

¹⁴⁸ AMMA submission, p.5; P&O Maritime Services submission, p.3.

¹⁴⁹ MUA and AMOU submission, pp.31 and 32.

¹⁵⁰ Hanks Review Report, paragraphs 5.46-5.65.

Hanks recommendations 5.5 and 5.6 (exclusionary provisions – psychological injuries)

The Hanks recommendation 5.5 is: *I recommend that the SRC Act be amended so that the reasonable administrative action exclusion in s 5A(1) operates only where the reasonable administrative action taken in a reasonable manner in respect of the employee's employment has contributed, to a significant degree, to the disease, injury or aggravation.*

The Hanks recommendation 5.6 is: *I recommend that s 5A(2) be amended by removing the words "and without limiting that subsection", so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be "reasonable administrative action".*

- 4.17 These two Hanks Review recommendations propose further changes to be made to the exclusionary provisions for psychological injuries in the SRC Act. These provisions are not currently contained in the Seafarers Act, which reflects the position in the SRC Act before it was amended in 2007 by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (SRCOLA 2007).
- 4.18 The then exclusionary provisions (still used in the Seafarers Act in the s.3 definition of *injury*) relating to *reasonable disciplinary action* and *failure to obtain a benefit or promotion* were replaced in the SRC Act. A broader test of *reasonable administrative action taken in a reasonable manner in relation to the employee's employment* was inserted.¹⁵¹
- 4.19 A new s.5A(2) was also added to the SRC Act, providing a non-exhaustive list of the kinds of actions constituting *reasonable administrative action*.
- 4.20 The ASA and Allianz supported using that test in the Seafarers Act.¹⁵²
- 4.21 The MUA and AMOU saw no benefit in a change to the existing provision.¹⁵³
- 4.22 The Hanks Review recommends further amendment to the provisions of ss.5A(1) and (2) of the SRC Act to make them more effective. This would be by clarifying the degree of contribution that *reasonable administrative action* must make to the development of a disease before it can be applied to deny liability by determining authorities. The words *and without limiting that subsection* would be omitted from s.5A(2) of the SRC Act. By making the list in s.5A(2) of the SRC Act exhaustive, rather than non-exhaustive as it currently is, Mr Hanks meant to limit any uncertainty as to how far the exclusionary provisions extended, particularly in light of the Full Federal Court's decision in the Reeve case¹⁵⁴ (which drew a distinction between administrative action and operational action).
- 4.23 The 2007 amendment in relation to this issue and the further amendments recommended by the Hanks Review should also be made to the Seafarers Act for clarity and consistency.

¹⁵¹ SRC Act, s.5A(1).

¹⁵² ASA submission, p.17; Allianz submission, p.11.

¹⁵³ MUA and AMOU submission, p.32.

¹⁵⁴ The Full Federal Court judgement in *Commonwealth Bank of Australia v Reeve* ([2012] FCAFC 21; (2012) 199 FCR 463) concluded that weekly teleconferences held by the Commonwealth Bank to discuss the performance of the Bank's Perth branches, were operational actions, not an assessment of the performance of branch managers (including Mr Reeve).

Recommendation 4.4

- a) For clarity and for consistency with the SRC Act, s.3 of the Seafarers Act should be amended along the lines of s.5A(1) of the SRC Act, including the Hanks Review recommendation 5.5, if it is accepted.
- b) A provision similar to s.5A(2) of the SRC Act should also be inserted in the Seafarers Act, together with the Hanks Review recommendation 5.6 (to remove the words *and without limiting that subsection*), if it is accepted.

Hanks recommendation 5.3 (heart attacks, strokes and similar injuries)

The Hanks recommendation 5.3 is: *I recommend that the SRC Act be amended so that incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, caused by degenerative disease and similar phenomena) will be covered for workers compensation purposes on the same basis as a "disease" – that is, where the incident was contributed to, to a significant degree, by the employee's employment.*

- 4.24 Recommendation 5.3 of the Hanks Review proposes a new provision in the SRC Act so that heart attacks, strokes and similar injuries would be subject to the same eligibility test as disease claims, i.e., the *significant contribution* test. As stated by Mr Hanks:

Originally, Comcare and other determining authorities did not accept liability under the SRC Act for heart attacks and strokes that occurred at the workplace unless employment contributed to the underlying disease. A heart attack or a stroke was treated as a manifestation of a "disease" rather than an "injury other than a disease", and liability to pay compensation was only accepted where employment had contributed to the disease (or its aggravation) to a material degree. If the incident had been treated "as an injury other than a disease", it would have been compensable if the injury arose in the course of employment (a temporal relationship), as well as if it arose out of employment (a causal relationship).

In 1998, that position was rejected by the Full Federal Court, which followed a High Court decision from 1996, dealing with equivalent provisions in the 1987 NSW Act. The High Court held that a cerebral haemorrhage was an "injury", not a "disease", under the NSW legislation; and the Full Federal Court held that a heart attack was an "injury", not a "disease", under the SRC Act.

On that analysis, if those "injuries" occur at the workplace (and therefore "in the course of employment"), the employer is liable to pay compensation under the SRC Act, regardless of whether employment contributed to the "injuries".¹⁵⁵

- 4.25 Mr Hanks concluded that there was little justification for employers having to fund the costs of heart attacks, strokes and similar incidents that were manifestations of an underlying genetic or lifestyle-based disease process, where the only connection to employment was the incidents occurring at the workplace. Accordingly, the SRC Act should be amended so

¹⁵⁵ Hanks Review Report, paragraphs 5.66-5.68.

that all incidents that were a manifestation of an underlying disease would be covered for workers' compensation purposes on the same basis as a *disease*.

- 4.26 As discussed above, the Seafarers Act has a *material contribution* test for compensable injuries.
- 4.27 For reasons of consistency and for the reasons identified in the Hanks report, the Seafarers Act should be amended along similar lines as the SRC Act, including the amendments proposed in recommendation 5.3 of that report, if they are accepted. This change would not reduce benefits, but would clarify when an injury may be compensated.

Recommendation 4.5

The Seafarers Act should include a new provision based on recommendation 5.3 of the Hanks Review, if it is accepted.

Hanks recommendation 5.7 (employees "on-call" to be covered by the Act)

The Hanks recommendation 5.7 is: *I recommend that where an employee is "on-call", the employee should be covered by workers compensation. However, there should be a requirement that the journey must only include travel between home, or the place where the employee receives the message to attend work, and the place of work itself.*

- 4.28 Section 9 of the Seafarers Act reflects s.6 of the SRC Act as it was prior to the SRCOLA 2007 amendments that inserted s.6(1C) into the SRC Act. That section effectively removed coverage for travel between an employee's residence and her or his usual place of work. As a consequence, on-call employees travelling from their place of residence to their usual place of work when responding to a call out were no longer covered if they were injured while travelling. The Seafarers Act was not updated to reflect this change.
- 4.29 Generally, the approach taken in Australian workers' compensation legislation is that travel claims to and from the worker's place of residence and his or her place of employment are not compensable, other than in respect of *in the course of employment* injuries.¹⁵⁶ Some non-Commonwealth jurisdictions have compensation coverage during such travel¹⁵⁷, but most do not.
- 4.30 In the past five years, 1196 claims were received under the Seafarers Act. Of those, 19 were journey claims (1.6 per cent). Thirteen of the claims were for injuries while travelling to or from a ship, two for injuries while travelling to or from training and the four other claims may involve a journey to or from work but cannot be confirmed as the data collected by the Seacare Authority does not record this level of detail.¹⁵⁸
- 4.31 AIMPE contended that the different approaches in the Seafarers Act and the SRC Act were justified as seafarers had to join and leave their workplace at many times and places,

¹⁵⁶ This policy was recommended by the Heads of Workers' Compensation Authorities in their 1997 *Promoting Excellence* report to the then Labour Ministers Council (at p.13).

¹⁵⁷ ACT, NT, Queensland.

¹⁵⁸ Data provided by the Seacare Authority

including many different wharves and sometimes at anchor or offshore. This usually entailed climbing gangways, but could also require launch transfers, helicopter transfers, crane basket transfers, scheduled commercial flights and charter flights. As AIMPE notes, this differs from workers travelling from home to the same workplace each day.¹⁵⁹

- 4.32 The ASA did not oppose coverage under the Seafarers Act for injuries occurring while an employee was travelling to and from work, engaged in work related travel and undertaking breaks 'off-site'. The ASA commented that owing to the nature of seafaring and the operation of swings in the industry, seafarers would usually be required to catch a flight to be returned to their home ports. Sometimes, for personal reasons, seafarers may wish to elect not to catch the first available flight. The ASA considered that this would unreasonably expose a seafarer's employer to liability until the return to the seafarer's place of residence. The ASA stated that, for this reason, employers were reluctant to grant such requests.
- 4.33 In the ASA's view, the Seafarers Act should make clear that where an employee elected, for personal or recreational purposes, to forego the first available transport back to the employee's residence, any injury that occurred while the employee was away from the place of residence and not on duty would not be an injury arising out of or in the course of employment. The ASA added that it was for the company and its employee to agree whether the employee could forego the first available transport back to the employee's residence.¹⁶⁰ AMMA agreed.¹⁶¹
- 4.34 Allianz proposed that the Seafarers Act exclude journeys to and from home, as the employer had little to no control over managing this risk. This would, Allianz noted, be consistent with the general move away from compensation for journey claims.¹⁶²
- 4.35 There was generally little support from the stakeholders for removing compensation for journey claims. Allianz pointed out that the move has increasingly been away from providing for such compensation, but the Seacare scheme is not alone in so providing. Some particular aspects of employment by seafarers justify such coverage, but the justification may be stronger where longer voyages and travel to and from more distant ports are involved. In any event, the removal of such compensation would infringe the requirement for the outcome of the review that there be no reduction in benefits.
- 4.36 Another question concerns clarifying access to compensation by excluding periods where the employee concerned has, for non-work related reasons, chosen to delay returning to the employee's normal place of residence. Although there may be grounds for developing such a provision (as this involves both a voluntary disconnection from employment-related activity and a concomitant absence of employer's control over risk of harm), no evidence was advanced about the incidence of such events or compensable harm resulting during such periods.
- 4.37 Furthermore, it appears that the provisions in s.9(3)(b) excluding journeys from coverage where the travel *was interrupted in a way that substantially increased the risk of sustaining an injury* could be used to assess on a case by case basis whether or not injuries sustained during such periods of travel are covered by the Seafarers Act provisions. The test proposed by stakeholders (obligation to take first available transport) appears too strict. A more

¹⁵⁹ AIMPE submission, pp. 8-9

¹⁶⁰ ASA submission, p.19

¹⁶¹ AMMA submission, p.5

¹⁶² Allianz submission, p.12.

nuanced model is provided by ss.36(2)-(5) of the Queensland *Workers Compensation and Rehabilitation Act 2003*.

- 4.38 In the circumstances, there is no need to adopt Hanks recommendation 5.7, however in order to address other issues that arise as a result of the current travel provision in the legislation I propose that the matter be referred to the Seacare Authority for further analysis and consideration of clarifying the availability of compensation where there has been a delay in, deviation from or interruption of travel to and from work.

Recommendation 4.6

The Seacare Authority should be requested:

- a) to consider experience with s.9(2)(e) of the Seafarers Act in circumstances where there has been a delay in, deviation from or interruption of travel to and from work; and
- b) advise the Minister on whether any amendment is appropriate.

[For this purpose, consideration should be given to adapting the provisions of ss.36(2)-(5) of the Queensland *Workers Compensation and Rehabilitation Act 2003*].

Hanks recommendations relevant to improving rehabilitation and RTW

- 4.39 In this part, consideration is given to the relevance for the Seafarers Act of a group of Hanks recommendations relating to improving rehabilitation and return to work. Other Hanks recommendations to improve rehabilitation and return to work that are not discussed below are discussed in Chapter Six in relation to steps employers can take in order to reduce premiums (see also Appendix F for my assessment of the suitability of all of the Hanks recommendations for adoption for the Seafarers Act).

Hanks Recommendation 6.2 (provisional liability)

The Hanks recommendation 6.2 is: *I recommend that the SRC Act be amended to include a system of provisional liability that allows an injured employee access to a maximum of 12 weeks of incapacity payments, and medical costs of up to \$3,000.*

- 4.40 After detailed analysis and careful reasoning, Mr Hanks recommends introducing provisional liability to the Comcare scheme.
- 4.41 It is not necessary to repeat the Hanks Review discussion in full here. Consideration needs to be given, however, to whether such arrangements are appropriate for the Seacare scheme.
- 4.42 Unlike the Comcare scheme, which is made up of different employers from varying industries covering both public and private sector employees, the Seacare scheme is for part of a single sub-industry for which provisional liability might not be suitable.

- 4.43 Provisional liability aims to encourage early claim intervention and early decision making. It enables an injured worker to start receiving compensation and to receive medical and rehabilitation services soon after claim lodgement without having to wait for a liability determination to be made. This is seen to increase the likelihood of successful rehabilitation and of reducing the overall cost of a claim.¹⁶³
- 4.44 Such arrangements are considered to work best where there are no time limits for initial liability determinations to be made, or where the time limits are fairly long. They can also provide an employer (or determining authority) with an incentive to make formal determinations on claims received as soon as practicable. This is especially so where the provisional liability payment is for an extended period.
- 4.45 Unlike the SRC Act which currently has no time limits for determining liability, the Seafarers Act requires employers to make a liability determination within twelve days of receiving a claim for compensation (s.73). This time frame relates to incapacity payments, medical payments and loss of or damage to property. On the other hand, the time limit for decisions about liability for a permanent impairment claim is thirty days (s.73A) and sixty days for death claims (s.72).
- 4.46 Mr Hanks noted that many Australian workers' compensation schemes had introduced mechanisms facilitating early intervention through early access to compensation and encouraging timely decision-making. Those mechanisms include commencement of provisional compensation payments, if the decision-making time period is exceeded, or general provisional payment of income replacement and medical expenses.
- 4.47 Four Australian workers' compensation schemes provide for provisional liability (ACT, NSW, SA and Tasmania). In June 2009, the then Victorian government rejected a proposal that provisional liability should be provided in that State's scheme, as it was considered likely to put the Victorian scheme's financial viability at risk.¹⁶⁴ The State government considered that improving injury notification would achieve many of the same benefits.
- 4.48 In Mr Hanks' opinion, to support all aspects of early intervention properly, a provisional liability model should provide access to compensation for medical expenses, as well as compensation for income maintenance. He preferred a system with a defined limit, so that both employees and determining authorities would be aware of the extent of the liability and benefit.
- 4.49 Accordingly, Mr Hanks recommended that, to support early intervention, the SRC Act should be amended to include a system of provisional liability that gives an injured employee access to a maximum of 12 weeks of incapacity payments, and medical costs of up to \$3,000. Provisional liability would be determined on the following basis:
- a) upon receipt of an injury notification the determining authority would have seven days either to commence provisional liability payments or to provide a reasonable excuse (as prescribed) not to commence them; and

¹⁶³ Productivity Commission inquiry report, 2004, op. cit., p.371.

¹⁶⁴ http://www.compensationreview.vic.gov.au/__data/assets/pdf_file/0003/24672/Government-Response.pdf.

- b) if no reasonable excuse were provided, provisional liability payments would have to commence within seven days of the determining authority receiving the injury notification.
- 4.50 Although the Seafarers Act provides time limits (after which a claim is deemed to be rejected), it has a feature in common with the SRC Act. A determination of liability is a precondition to taking action under the Act in relation to a claim. This includes medical treatment and payments of compensation. Provisional liability in the Seafarers Act would help to avoid delay and would, if it were accepted for the SRC Act, maintain consistency.
- 4.51 On the other hand, stakeholders did not raise provisional liability during consultations or in their submissions. Further, the implications of provisional liability have not been actuarially costed for the Seacare scheme (the current shortcomings in scheme data discussed in Chapter Seven might make that problematic).
- 4.52 The underlying objectives of introducing provisional liability (speedier decision making, fairness, and better rehabilitation and RTW results) must be strongly supported. In the circumstances, however, further consideration of the introduction of provisional liability in the Seacare scheme should only occur if provisional liability is provided for under the SRC Act as recommended by Mr Hanks and has had a reasonable period of operation (e.g., at least 12 months). The financial implications of provisional liability for the Seacare scheme should be actuarially costed at that time. There should also be a meaningful comparison made of the respective performances of the arrangements under the Seacare scheme and under the SRC Act to ascertain whether the underlying objectives of provisional liability would be met in the Seacare scheme's context. A decision should be made in the light of that experience and assessment.

Recommendation 4.7

Further consideration should be given to amending the Seafarers Act to include a system of provisional liability along the lines of that proposed for the SRC Act should occur:

- a) if provisional liability is provided for under the SRC Act as recommended by Mr Hanks and has had a reasonable period of operation (e.g., at least 12 months);
- b) the financial implications of provisional liability for the Seacare scheme can be actuarially costed at that time; and
- c) a meaningful comparison at that time of the respective performances of the arrangements under the Seacare scheme and under the SRC Act shows that the underlying objectives of provisional liability would be met in the Seacare scheme's context.

Hanks recommendation 6.8 (rehabilitation assistance where not provided by an employer)

The Hanks recommendation 6.8 is: *I recommend that the SRC Act be amended to provide Comcare with an ultimate power to commence and/or take over rehabilitation when the liable employer fails to meet its obligations, or ceases to exist.*

- 4.53 Mr Hanks examined concerns about not providing rehabilitation assistance to an injured employee because the liable employer fails or refuses to meet its legal obligations to do so, or ceases to exist. To address this, Mr Hanks recommends amendments to the SRC Act to empower Comcare to commence or take over rehabilitation in such circumstances.
- 4.54 The circumstances described in the Hanks report could occur in the Seacare scheme. Although under the Seafarers Act, the employer at the time of an injury is at all times responsible for the rehabilitation of the injured employee,¹⁶⁵ the employer could fail or refuse to take the required action or cease to exist. Accordingly similar amendments to those recommended in the Hanks report should be made to the Seafarers Act so that a third party becomes responsible for providing rehabilitation support to the injured worker in such cases.
- 4.55 All employers under the Seacare scheme must hold a policy of insurance with an insurance company.¹⁶⁶ The employer's insurer could therefore be authorised to assume rehabilitation responsibility in the circumstances described above. However, because s.93(2) of the Seafarers Act permits employers to be responsible for an excess amount per claim under their policies, insurers are unlikely to become aware of an employer's refusal to meet the rehabilitation responsibilities before the agreed excess amount has been reached. Even if an insurer were to become aware, the insurer may not be legally able to intervene as the insurer would not be a party to the claim. To address such cases, the Seacare Authority could be given the rehabilitation responsibility.
- 4.56 In summary, where an employer fails or refuses to meet the statutory rehabilitation obligations, or ceases to exist, the Seafarers Act should be amended to give the obligations to:
- a) the employer's insurer (where the insurer's liability for the claim has become effective);
or
 - b) the Seacare Authority (where the employer's excess is yet to be exceeded).
- 4.57 As discussed in Chapter Seven, the Safety Net Fund¹⁶⁷ is a safety net employer which stands in the place of an employer if a *default event* occurs,¹⁶⁸ thus enabling injured seafarers to make a claim against the Fund when there is no employer against whom a claim can be made.
- 4.58 When a default event occurs, the Fund is substituted as the employer and will determine the claim and pay any benefits from the Fund. The Fund would assume the defaulting employer's rehabilitation responsibilities. Where a workers' compensation insurance policy covered the employee under the Seafarers Act, the Fund has the same rights as the employer who took out the policy to recover benefits from the policy.¹⁶⁹

¹⁶⁵ Seafarers Act, s.50.

¹⁶⁶ Seafarers Act, s.93.

¹⁶⁷ Seafarers Act, Part 7, Division 2.

¹⁶⁸ Seafarers Act, s.4(3). A *default event* is defined in s.3, covering bankruptcy, insolvency, winding up or ceasing to exist, ceasing to engage in trade or commerce in Australia and not being able to meet its liabilities under the Act.

¹⁶⁹ Seafarers Act, s.129.

- 4.59 Given the Safety Net Fund assumes a defaulting employer's responsibilities in specified cases, there is no need for the proposed amendments to apply to the Fund.

Recommendation 4.8

For cases where employers either fail to meet their statutory rehabilitation obligations, or cease to exist, the Seafarers Act should be amended to give responsibility for commencing or taking over those obligations to:

- a) the employer's insurer (where the insurer's liability for the claim has become effective); or
- b) the Seacare Authority (where the employer's excess is yet to be exceeded).

Hanks recommendations relevant to ensuring compliance

- 4.60 In this part, consideration is given to the relevance for the Seafarers Act of a group of Hanks recommendations relating to securing compliance with rehabilitation obligations under the SRC Act.

Hanks recommendation 6.20 (establishment of a RTW Inspectorate)

The Hanks recommendation 6.20 is: *I recommend that an inspectorate be developed within Comcare with a supervisory function and information-gathering and sanctioning powers in relation to the activities of employers with rehabilitation obligations, to ensure compliance with those obligations, namely:*

- a) to provide suitable employment;*
- b) to comply with the duties outlined in s.37; and*
- c) to comply with the IMR code of practice.*

In addition, the inspectorate can also ensure compliance of approved rehabilitation providers with outcome and service delivery standards.

- 4.61 Mr Hanks recommends that Comcare establish a Return to Work Inspectorate, with a supervisory function as well as information-gathering and sanctioning powers in relation to employers with rehabilitation obligations. The aim is to ensure compliance and the return to work experience of injured employees thus leading to improved return to work outcomes for the scheme as a whole.
- 4.62 I have recommended the adoption of most of the Hanks recommendations on rehabilitation (see Appendix F). Establishing a RTW Inspectorate is an appropriate step in ensuring the new obligations and responsibilities are effectively implemented and monitored.
- 4.63 Given the size of the Seacare scheme however, establishing a separate RTW Inspectorate would be costly and difficult to justify. Within the current model of the Seacare scheme, the

Seacare Authority should rely on either AMSA or Comcare to undertake these functions on its behalf.

- 4.64 The Hanks Review recommendation envisages the establishment of a specialised RTW Inspectorate to carry out this function within Comcare. As Comcare would establish the Inspectorate for the Comcare scheme, the Seacare Authority should rely on Comcare's resources to support implementation under the Seacare scheme. Giving this responsibility to AMSA would be unnecessary and costly (and involve action in another portfolio).
- 4.65 Relying on Comcare would come within s.72A of the SRC Act. There is a separate question of funding. It is outside the scope of the review to make final recommendations on this point.

Recommendation 4.9

If the Hanks Review recommendation 6.20 for the establishment of a Comcare Return to Work Inspectorate is accepted with suitable compliance powers and functions, the Seafarers Act should allow the inspectorate to exercise equivalent powers and to perform equivalent functions under the Seafarers Act.

[Note: The Seacare Authority could rely on the resources of Comcare pursuant to s.72A of the SRC Act].

Hanks recommendation 6.21 (power to issue improvement notices and accept enforceable undertakings)

The Hanks recommendation 6.21 is: *I recommend that the SRC Act be amended to provide Comcare with the power to issue improvement notices and to accept undertakings from employers in relation to contravention of employer rehabilitation obligations, including the duty to provide suitable employment. RTW inspectors should be provided with similar information-gathering powers to those provided to the regulator under s 155 of the WHS Act.*

- 4.66 Under this Hanks recommendation, Comcare would be empowered to issue improvement notices and to accept undertakings from employers about contraventions of their rehabilitation obligations. The duty to provide suitable employment would be subject to this compliance regime. Return to Work Inspectors would have similar information gathering powers to those that Comcare has under s.155 of the *Work, Health and Safety Act 2011* (Cwth).
- 4.67 Similar arrangements should be provided under the Seafarers Act. As with Hanks recommendation 6.20 (see above), the Seacare Authority should rely on the resources of Comcare under s.72A of the SRC Act for the exercise of these powers.

Recommendation 4.10

The Seafarers Act should authorise the issuing improvement notices and the acceptance of enforceable undertakings about rehabilitation as counterpart measures to those recommended by Hanks Review recommendation 6.21 for the SRC Act.

[Note: The Seacare Authority could rely on the resources of Comcare pursuant to s.72A of the SRC Act].

Hanks recommendations relevant to benefits under the SRC Act

4.68 In this part, consideration is given to the relevance for the Seafarers Act of a group of Hanks recommendations relating to benefits under the SRC Act.

Hanks recommendation 7.5 – 7.9 (treatment of superannuation benefits)

The Hanks recommendation 7.5 is: *I recommend that ss.20, 21 and 21A be repealed in their entirety. If those sections are repealed, ss.114A and 114B will no longer be relevant and should also be repealed.*

The Hanks recommendation 7.6 is: *If Recommendation 7.5 is not implemented, I recommend that, as an absolute minimum, the deduction of “5% of the employee’s normal weekly earnings” should be removed from the formula in each of ss.20(3), 21(3) and 21A(3).*

The Hanks recommendation 7.7 is: *Further, if Recommendation 7.5 is not implemented, in addition to Recommendation 7.6, I recommend that:*

- a) *the term “retired” should be removed from ss.20, 21 and 21A; the application of ss.20, 21 and 21A should be enlivened by the employee ceasing employment with the employer, reaching preservation age and being eligible to receive superannuation from the employee’s superannuation fund, OR when an employee ceases employment for invalidity reasons and becomes eligible to access superannuation, regardless of whether or not the employee has reached the preservation age; and*
- b) *the powers in s 114B should be amended to include consequences for non-compliance similar to those contained in the Health and Other Services (Compensation) Act 1995.*

The Hanks recommendation 7.8 is: *Further, if Recommendation 7.5 is not implemented, in addition to Recommendation 7.6 and Recommendation 7.7, I recommend that:*

- a) *the mechanism for taking into account deemed income on a lump sum, in ss.21(3) and 21A(3) of the SRC Act, should be based on the post-tax value of the lump sum (if income tax was paid on the lump sum benefit); and*
- b) *the rate at which employees are deemed to earn income on any lump sum should reflect the interest that an employee can realistically expect to earn.*

The Hanks recommendation 7.9 is: *I recommend that immediate consideration be given to amending the Superannuation Guarantee (Administration) Act 1992 so that compensation payments made pursuant to s 19 of the SRC Act are deemed to be “ordinary time earnings” for the purposes of the Superannuation Guarantee (Administration) Act 1992.*

- 4.69 The Hanks Review makes a number of recommendations about the treatment of superannuation benefits of injured employees under the SRC Act. There are similar provisions in the Seafarers Act.
- 4.70 The current provisions in the Seafarers Act (s.33) were criticised by the MUA and AMOU, who commented that offsetting incapacity payments by the seafarer's receipt of superannuation benefits was unjustified.¹⁷⁰
- 4.71 Mr Hanks is similarly critical of the offsetting provisions of the SRC Act and recommends their removal. Among other things, Mr Hanks found that they created an administrative burden on determining authorities and reduced their ability to focus on more important aspects of claims management, such as rehabilitation and RTW. The application of the provisions could create significant debts for older Australians who no longer have the earning capacity to repay those debts.¹⁷¹ Non-Commonwealth workers' compensation laws do not include such provisions.
- 4.72 Even if the Hanks recommendation were not accepted, the counterpart provisions in the Seafarers Act (s.33) should be omitted as inappropriate for the jurisdiction.

Recommendation 4.11

The Seafarers Act should be amended to omit provisions providing for offsetting workers incapacity payments by the amount of superannuation contributions.

Hanks recommendation 7.16 (the age limit on the payment of compensation)

The Hanks recommendation 7.16 is: *I recommend that the SRC Act [ss. 23(1) and (1A)] be amended so that:*

- a) *the cut off age beyond which incapacity payments cease would be tied to the qualifying age for the age pension; and*
- b) *employees who were injured at any time after five years before the age pension qualifying age would receive incapacity payments for a period of 260 weeks.*

- 4.73 Unlike the SRC Act, the Seafarers Act does not permit the payment of compensation to anyone who has reached 65 years of age.¹⁷² Instead, an employee who has reached the age of 64 is eligible for compensation for up to 12 months from the date of the injury concerned. This reflects a policy position that workers' compensation payments should cease when an employee reaches 'normal' retirement age.
- 4.74 This is out of step with changes to the qualifying age for eligibility for the age pension which is increasing progressively to 67 years on 1 July 2023.¹⁷³ There is a potential income hiatus

¹⁷⁰ MUA and AMOU submission, p.34.

¹⁷¹ Hanks Report, paragraph 7.126

¹⁷² Seafarers Act, s.38(1); SRC Act, s.23(1)

¹⁷³ See: <http://www.humanservices.gov.au/customer/enablers/centrelink/age-pension/eligibility-for-age-pension>

for injured workers under the Seafarers Act. They will cease to receive workers' compensation payments at 65 but not be eligible for the age pension until the age of 67.

- 4.75 This problem has been identified and discussed by the Australian Law Reform Commission (ALRC).¹⁷⁴ The ALRC supports the removal of all age-based restrictions in Commonwealth workers' compensation legislation, but accepts that there are difficulties and cost implications. To address this, the ALRC proposed three options for consideration:
- a) retirement provisions should be legislatively tied to the age of eligibility for the age pension;
 - b) the incapacity payment period could be extended (to 104 weeks for the Seacare scheme);
 - c) injured workers over the age pension eligibility age who could prove that, but for their injury, they would have kept working should potentially receive a supplementary payment.¹⁷⁵
- 4.76 These matters were considered in depth in the Hanks Review (see Chapter 7 of the Hanks report). The discussion need not be repeated here.
- 4.77 As was the case in the Hanks Review, some stakeholders supported linking the eligibility for workers' compensation payments with the age of eligibility for the age pension.¹⁷⁶
- 4.78 Mr Hanks did not consider that all age restrictions should be removed, given the complexities involved and the likely cost implications. Instead, Mr Hanks recommended that the SRC Act be amended to link the cut off age beyond which incapacity payments cease to the qualifying age for the age pension; and so that employees who were injured at any time after five years before the age pension qualifying age would receive incapacity payments for a period of 260 weeks.
- 4.79 I agree with Mr Hanks' findings. I also consider that action which is taken in relation to the compensation cut off arrangements for the SRC Act should be reflected in the Seafarers Act. This would, of course, be subject to the final overall policy decisions taken by the Government in respect of the ALRC proposals.
- 4.80 If Mr Hanks' recommendation for the payment of incapacity payments for 260 weeks was not considered suitable for the Seacare scheme, the current provisions (52 weeks) could be maintained, with an appropriate adjustment to the age at which they are payable (currently 64) so that it is one year before the age of eligibility for the age pension.
- 4.81 This proposal has not been actuarially costed for the Seacare scheme, but was for the scheme under the SRC Act (Hanks report, Chapter 2). That assessment suggested that the changes proposed by Mr Hanks, using assumptions identified in Chapter 2 of the Hanks report, may result in some increase in outstanding claims liabilities, but not premiums.

¹⁷⁴ Australian Law Reform Commission, *Grey Areas – Age Barriers to Work in Commonwealth Laws*, Discussion Paper, 2012.

¹⁷⁵ *Ibid*, p 82.

¹⁷⁶ ASA submission, p.20.

- 4.82 On the other hand, Allianz in its submission to this review opposed a proposal of the ALRC in its discussion paper to expand a seafarer's entitlement, under s.38(2) of the Seafarers Act, to receive incapacity payments for up to 104 weeks.¹⁷⁷ Allianz considered that the Seafarers Act's incapacity benefits were already exceedingly generous, compared to the other State-based schemes (e.g., 75 per cent reduction at 45 weeks incapacity versus 26 weeks in other State laws).
- 4.83 In Allianz' view, an expansion from 52 to 104 weeks would add to the increasing costs of the Seacare workers' compensation scheme and employer premiums, owing to the scheme's long-tail nature. I infer that Allianz would have similar objections to the Hanks Review proposal.

Recommendation 4.12

- a) The Seafarers Act should be amended so that the cut off age for compensation is the same as the age of eligibility for the age pension.
- b) The amendments should, for fairness and consistency, be based on those made under the SRC Act as a result of consideration of the relevant recommendations of the Hanks Review.
- c) If the Hanks recommendation for the payment of incapacity payments for 260 weeks was not considered suitable for the Seacare scheme, the current provisions (52 weeks) should be maintained, with an appropriate adjustment to the age at which such payments may be made (currently 64), so that it is one year before the relevant age of eligibility for the age pension. This could be reviewed after a specified period (e.g., 3 years).

Hanks recommendation 7.17 (consequences for compensation of injured person's absence from Australia)

The Hanks recommendation 7.17 is: *I recommend that the SRC Act be amended so that:*

- a) *entitlement to weekly compensation is suspended during of any period of more than 60 days when an employee is absent from Australia – subject to exceptions where the employee's employment with the Commonwealth or a licensee or "suitable employment" undertaken by the employee require the employee to leave Australia; and*
- b) *employees be obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.*

- 4.84 The Hanks Review considered what limits should apply to the payment of compensation to an injured employee who is absent from Australia.
- 4.85 Under the SRC Act, although there are some obligations on a person who is receiving compensation, such as notifying Comcare of the person's whereabouts, there is no effect on the payment of compensation. Mr Hanks noted that the prospect of effective assessment of an employee's continuing incapacity for work, of the amount that the employee can earn in

¹⁷⁷ Allianz submission, p.14.

suitable employment and of the efficacy of medical treatment is very much diminished if the employee is outside Australia. Also, real participation in an effective rehabilitation program is not possible while the employee is outside Australia.¹⁷⁸

- 4.86 Against that background, Mr Hanks proposed restricting payment of incapacity payments when an employee is absent from Australia for more than 60 days. Even so, he observed that such a restriction would need to accommodate employees required to move overseas in connection with their employment or in connection with suitable employment undertaken by the employee as part of a RTW program. Employees would have to notify the relevant determining authority of any absence from Australia that exceeded 60 days.
- 4.87 The reasons for the proposal apply equally to employees under the Seafarers Act. Although some employees within the scheme would be covered by the exceptions, many seafarers are not required to be absent from Australia for employment reasons. The Seafarers Act places an obligation on a person to whom compensation payments are being made to give the employer concerned notice of the person's intention to leave Australia or of having left. If absent for more than 3 months, the person must give details about the person's residential address. As is the case for the SRC Act, there are no implications for compensation under the Seafarers Act.
- 4.88 For the reasons identified by Mr Hanks, and for similar reasons given by Allianz in its submission,¹⁷⁹ there should be an appropriately modified provision in the Seafarers Act along the lines of that recommended for the SRC Act (the exception is more significant in the maritime context). Given scheme differences, the Seacare Authority should approve a suspension.

Recommendation 4.13

The Seafarers Act should be amended along the lines of the proposed change to the SRC Act as set out in recommendation 7.17 of the Hanks report so that:

- a) an injured employee's entitlement to weekly compensation may be suspended during any period of more than 60 days when an employee is absent from Australia unless the employee's employment, or *suitable employment* undertaken by the employee, required the employee to leave Australia;
- b) payments could only be suspended where the Seacare Authority was satisfied that the suspension was appropriate in the circumstances; and
- c) the Seacare Authority could set conditions on any such suspension.

¹⁷⁸ Hanks Report, paragraph 7.230.

¹⁷⁹ Allianz submission, p.9. Among other things, Allianz observes that an inequitable position exists whereby injured workers residing in Australia are required to undertake appropriate rehabilitation in order to continue to receive weekly benefits, whilst injured workers residing outside Australia may have no access to appropriate rehabilitation or no oversight is available around the rehabilitation being provided yet they continue to receive weekly benefits.

Hanks recommendation 7.23 (accreditation of some treatment providers and approval of overseas medical expenses)

The Hanks recommendation 7.23 is: *I recommend that s 69 of the SRC Act be amended to insert new paragraphs to include, as the functions of Comcare:*

- a) *the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and*
- b) *the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.*

4.89 Mr Hanks recommended a new provision for the SRC Act empowering Comcare to recognise, accredit and monitor certain medical treatment providers not recognised by the Australian Health Practitioner Regulation Agency (AHPRA). He also recommended that Comcare be able to approve medical, surgical, dental and other therapeutic treatment for employees who sought such medical and like services outside Australia.

4.90 This is appropriate for the Seafarers Act, especially for overseas treatments as it is more likely that some injured seafarers covered by that Act may be domiciled outside Australia.

4.91 The Seacare Authority should be able to use Comcare's decisions as a basis for regulating these matters under the Seacare scheme.

Recommendation 4.14

The Seafarers Act should be amended along similar lines to the Hanks recommendation 7.23 by empowering the Seacare Authority:

- a) to recognise, accredit and monitor certain medical treatment providers not recognised by the Australian Health Practitioner Regulation Agency;
- b) to approve overseas medical, surgical, dental and other therapeutic treatment; and
- c) to adopt decisions taken by Comcare under the SRC Act in relation to such matters without considering any further material, if it so chooses.

Hanks recommendation 7.28 (medical treatment must meet objective standards)

The Hanks recommendation 7.28 is: *I recommend that the SRC Act be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.*

4.92 Mr Hanks has recommended amending the SRC Act to require that, to be compensable, medical treatment must meet objective standards such as those in the *Clinical Framework*

for the Delivery of Health Services (the Clinical Framework).¹⁸⁰ The Clinical Framework is based on a document published in 2005 by WorkSafe Victoria and the Victorian Transport Accident Commission. All State and Territory workers' compensation systems, as well as Comcare and the Seacare Authority, endorsed the framework in 2012.¹⁸¹

- 4.93 The amendment was proposed because of strong evidence that, apart from individual injury characteristics and compensation system features, there was a considerable variation in health and RTW outcomes. This was attributable to the quality and focus of the treatment provided.¹⁸² Moreover, services provided by unregistered health practitioners and over-servicing, by both registered and unregistered health practitioners, could put injured employees at risk. The proposed amendment was seen as a simple and effective means of enhancing the quality and efficacy of medical treatment, including therapeutic treatment.
- 4.94 A similar amendment to the Seafarers Act would have like benefits. A difference, however, is that under the SRC Act, Comcare can take action where treatment does not conform to the Clinical Framework standards (e.g., by referring a practitioner to a professional disciplinary body). Variation in the assessment of standards could arise without a single decision maker. Accordingly, employers or insurers should be able to advise the Seacare Authority of their concerns about a health professional's conduct, so that the Seacare Authority may decide whether to refer the conduct to a relevant professional disciplinary body.

Recommendation 4.15

- a) The Seafarers Act should be amended along similar lines to the amendment to the SRC Act proposed in Hanks Report recommendation 7.28 requiring medical treatment to meet objective standards such as those in the Clinical Framework for the Delivery of Health Services.
- b) Only the Seacare Authority should be empowered to refer non-conforming practitioners to a professional disciplinary body.

Hanks recommendations relevant to determinations, reconsideration and review

- 4.95 In this part, consideration is given to the relevance for the Seafarers Act of a group of Hanks recommendations relating to determinations of claims, reconsideration and review under the SRC Act.

¹⁸⁰ The Clinical Framework is an evidence-based policy framework with five guiding principles for the delivery of allied health services to injured employees. It is available at: <http://www.tac.vic.gov.au/upload/clinical-framework-single.pdf>.

¹⁸¹ The Clinical Framework is regarded as reflecting the most contemporary approach to treatment. It incorporates recent developments in evidence-based practice and the use of objective outcome measures in clinical practice (Hanks Report, paragraph 7.326).

¹⁸² *Ibid.*, paragraph 7.312.

Hanks recommendation 9.3 (statutory time frames for liability determinations)

The Hanks recommendation 9.3 is: *I recommend that the SRC Act be amended to include statutory time frames for the determination of claims and that, on a failure to meet those time frames, the claim be deemed to be rejected.*

The determining authority must determine the claim:

- a) *within 30 days for injury;*
- b) *within 60 days for disease; or*
- c) *if provisional liability is being met as a result of a previously lodged injury notification, by the end of the provisional liability period;*

whichever is the longer.

- 4.96 The Hanks report recommends statutory time frames for the determination of claims and for claims to be deemed rejected if the time frames are not met. The SRC Act lacks such time limits.
- 4.97 The Seafarers Act already has time frames for decision-making and for claims to be deemed to be disallowed (i.e., rejected) at the expiry of the specified time frame (see ss.73 and 73A). The time limits for determinations to be made under the Seafarers Act are 12 days for most claims, 30 days for permanent impairment claims (s.73A) and 60 days for death claims (s.72). These are shorter than the periods proposed by the Hanks Review.¹⁸³
- 4.98 No concerns were expressed by stakeholders during consultation about the current provisions in the Seafarers Act. No change is needed.

Hanks recommendation 9.4 (diagnosis of psychological injury claims after 12 weeks)

The Hanks recommendation 9.4 is: *I recommend that the SRC Act be amended so that, for liability to pay compensation to continue in respect of a psychological injury after 12 weeks from the date of a claim, the diagnosis must be confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare – if not initially made by such a practitioner.*

- 4.99 The SRC Act allows compensation for psychological injuries to be paid on the basis of a GP's report, and may be paid for significant periods of time, without any confirmation of that diagnosis by a specialised practitioner.
- 4.100 Mr Hanks recognises that diagnosis by a non-specialist practitioner is sufficient for the initial diagnosis to allow the determination of eligibility for compensation. He recommends,

¹⁸³ Mr Hanks recommends decision making periods of 30 days for claims for injuries and 60 days for claims for diseases. Under the Seafarers Act, the Seacare Authority may extend the decision making periods on application by an employer.

however, that, if the diagnosis of a psychological injury claim was not made by a suitably qualified practitioner, and compensation is to continue for more than 12 weeks, the initial diagnosis should be confirmed by an expert (a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare). This should occur after 12 weeks from the date of the claim.

- 4.101 This recommendation may be appropriate for adoption in the Seafarers Act, but there are some issues to consider. The availability of qualified psychiatrists and psychologists to confirm a diagnosis could present difficulties, especially where seafarers could be located anywhere in Australia or overseas.¹⁸⁴ In many cases, however, injured seafarers would be consulting the same psychiatrists and psychologists as employees under the Comcare scheme.
- 4.102 If this approach is adopted for the SRC Act, it should be used in the Seafarers Act with a modification. The specialised practitioners recognised by Comcare should be taken to be recognised for the purposes of the Seafarers Act. The Seacare Authority should be able to vary the time limit where it is not practicable to comply, either generally or for a particular case.

Recommendation 4.16

The Seafarers Act should be amended:

- a) along similar lines to Hanks recommendation 9.4 so that, for liability to pay compensation for a psychological injury to continue for more than 12 weeks, the diagnosis must be confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to an approved standard (if not initially made by such a practitioner);
- b) to permit such specialised practitioners recognised by Comcare to be recognised for the purposes of the Seafarers Act; and
- c) so that the Seacare Authority may vary the time limit where it is not practicable to comply.

Hanks recommendations relevant to obligations under the Seafarers Act

- 4.103 In this part, consideration is given to the relevance for the Seafarers Act of a group of Hanks recommendations relating to certain obligations under the SRC Act.

¹⁸⁴ The Hanks Review recommendation 7.23 which is supported by this Review deals with overseas arrangements

Hanks recommendation 9.17 (provision of information)

The Hanks recommendation 9.17 is: *I recommend that the SRC Act be amended so that:*

- a) *information requested (from a claimant) under s.58 must be provided within the period specified in the request (as with a notice issued under s.71);*
- b) *penalties are prescribed for a failure to comply with a s.71 notice (requiring information to be provided by a Department, government authority or licensee within a specified period);*
- c) *determining authorities (i.e., Comcare and licensees) have the power to request information relevant to a claim from parties other than the employer and the employee (e.g., the employee's medical practitioners, a previous employer, or an insurer); and*
- d) *determining authorities should be empowered to request information relevant to the administration of liabilities under the SRC Act (for example, information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).*

4.104 The counterpart to s.58 of the SRC Act in the Seafarers Act is s.67. The issues discussed by Mr Hanks generally apply to claims under the Seafarers Act and a similar amendment should be made to s.67.

4.105 The equivalent provision to s.71 of the SRC Act in the Seafarers Act is s.95. This section already provides a penalty for non-compliance, unlike s.71 of the SRC Act.

4.106 Paragraphs (c) and (d) of the Hanks recommendation 9.17 would require new provisions to be inserted into the SRC Act. Their aim is to assist the administration of claims and the scheme as a whole by facilitating information gathering from third parties. Like provisions should be added to the Seafarers Act.

Recommendation 4.17

The Seafarers Act should be amended so that:

- a) information requested under s.67 must be provided within such reasonable time as is specified in the request (as with a notice issued under s.95);
- b) employers may request information relevant to a claim from parties other than the employee (e.g., the employee's legal practitioners, a previous employer, or an insurer); and
- c) employers may request information relevant to the administration of liabilities under the Seafarers Act (e.g., information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).

Hanks recommendation 10.1 (Comcare to have right of recovery)

The Hanks recommendation 10.1 is: *I recommend that the SRC Act be amended to give Comcare and licensees a statutory right of recovery, similar to the right in s.151Z of the 1987 NSW Act.*

- 4.107 The Hanks Review notes that under the SRC Act, Comcare (or a licensed insurer) has no right of recovery against a third party (if the third party has contributed to the injured employee's injury through its negligence) in the absence of proceedings being instituted by (or in the name of) the injured worker against a liable third party. In short, Comcare cannot institute recovery action against a third party without the injured employee's consent.
- 4.108 Section 59 of the Seafarers Act allows an employer to institute or take over recovery proceedings even where the employee (or a dependant) does not consent. Accordingly, it is unnecessary to amend the Seafarers Act along the lines of the Hanks recommendation.

Hanks recommendation 10.2 (power to do all things necessary)

The Hanks recommendation 10.2 is: *I recommend that the SRC Act be amended to confirm that s 50 includes the power to do all things necessary for the making of a claim, including the taking of any preliminary steps.*

- 4.109 Mr Hanks has recommended the insertion of words into s.50 of the SRC Act (dealing with Comcare or a licensed insurer instituted recovery actions) to make it clear that any action to recover damages under this section includes the power to do all things necessary for the making of a claim, including the taking of any preliminary steps.
- 4.110 Similar wording should be included in s.59 of the Seafarers Act.

Recommendation 4.18

Section 59 of the Seafarers Act should be amended along similar lines to the Hanks Review recommendation 10.2, to make it clear that any action to recover damages under s.59 includes the power to do all things necessary for the making of a claim, including taking any preliminary steps.

Hanks recommendation 10.3 (recovery of compensation from damages payment)

The Hanks recommendation 10.3 is: *I recommend that the SRC Act be amended to ensure any damages recovered by Comcare pursuant to s 50 are limited to the damages recoverable by the employee.*

- 4.111 This Hanks recommendation would rectify an anomaly in ss.48(3) and 50(7) of the SRC Act which could result in the recovery from the injured worker of a greater amount than the injured worker has actually received.

4.112 The Seafarers Act has like provisions in ss.58(3) and 59(11) and should also be amended to rectify the anomaly.

Recommendation 4.19

Section 59 of the Seafarers Act should be amended to make clear that any damages recovered by an employer under s.59(11) are limited to the damages recoverable by the employee.

Chapter Five – Legislative consistency between the OHS(MI) Act and the model WHS laws

Term of Reference 2(c)

The review will inquire and report on the scope and necessity for amending and updating any legislative inconsistencies in the Seacare scheme, including legislative changes required to the OHS(MI) Act to ensure consistency with the model work health and safety laws.

Chapter Five examines the differences between the OHS(MI) Act and the model WHS laws. Recommendations are made for retitling the OHS(MI) Act as the Work Health and Safety (Maritime Industry) Act and aligning its provisions with the model WHS bill, with appropriate adjustments for the maritime industry context. In the first instance, the revised laws would apply to the same persons as are now subject to the OHS(MI) Act. AMSA would continue to provide inspectors. Some key changes are proposed. The objects would have a stronger focus on continuous improvement. Up to date compliance and enforcement provisions are proposed, to support a contemporary approach to graduated enforcement. Rights of entry would be conferred on qualified entry permit holders, subject to the rights and obligations contained in the model WHS bill. The Commonwealth's WHS Act 2011 and Regulations provide useful guidance for the structure of the proposed changes. The question of timing for the commencement of new laws is considered and transitional arrangements are discussed. The revised Act would be reviewed after a foreshadowed review of the implementation of the model WHS laws and in the light of experience with the recent shipping reform initiatives.

Maintaining consistency

- 5.1 The OHS(MI) Act was enacted in 1993 and took effect in 1994. The arrangements set out in the legislation were intentionally based on the *Occupational Health and Safety (Commonwealth Employment) Act 1991* [OHS (CE) Act] and were similar to the arrangements provided under the OHS laws at that time of the Australian States and Territories.¹⁸⁵
- 5.2 In 2012, the Commonwealth's *Occupational Health and Safety Act 1991*¹⁸⁶ was replaced by the *Work Health and Safety Act 2011* (WHS Act). That Act gives effect to the model WHS bill agreed to nationally in 2009 by the then Workplace Relations Minister's Council (WRMC). The OHS (MI) Act was not similarly amended or replaced, resulting in many differences between the two Acts. The WHS Act also includes certain specific changes (as authorised by the national agreement for the development and implementation of the model legislation) for its Commonwealth application, such as adapting the legislation to reflect the *Criminal Code*.¹⁸⁷ There are now marked differences between the OHS(MI) Act and the principal Commonwealth WHS legislation.
- 5.3 There are sound reasons for maintaining consistency between the OHS(MI) Act and the principal Commonwealth WHS legislation (viz., the WHS Act):

¹⁸⁵ Commonwealth, *Parliamentary Debates*, Senate, Second Reading Speech, 29 September 1993, p.1408.

¹⁸⁶ The OHS(CE) Act was retitled by Act No 98 of 2006.

¹⁸⁷ *Criminal Code Act 1995*.

- a) the 2008-09 *National Review into Model Occupational Health and Safety Laws* (which ultimately led to the model WHS bill) commented that having various OHS laws with materially different scope operating within and between jurisdictions would, at a minimum, *create an imbalance in the harmonised laws ... This (would) flow on to affect duty holders who operate in more than one State or Territory and who may find themselves having to comply with a different range of laws and obligations depending on the jurisdiction in which they are operating their business or undertaking*;¹⁸⁸
- b) when duty holders must comply with OHS obligations that are significantly different depending on whether they are operating in the Commonwealth's jurisdiction or that of a State or Territory, there may be unnecessary red tape costs and reduced workforce mobility, inequitable outcomes, and issues of confusion, errors and distraction from the desirable focus of developing a company-wide culture of preventing injury and disease;¹⁸⁹
- c) the Seacare scheme regulators do not have access to the more graduated and up-to-date compliance mechanisms that are provided under modern WHS laws (the Commonwealth's WHS Act reflects the model WHS bill and, like the corresponding laws of several other States and Territories that have adopted the model laws, contains a comprehensive set of graduated regulatory tools – see discussion later);
- d) where the Seacare scheme regulators may need to use expert WHS inspectors or auditors from another regulator, there would be obvious benefits for the outside experts being easily cross-appointed and able to operate in a familiar regulatory framework rather than adjust to a materially different one.

5.4 When considering the reports of the National Review, the then WRMC agreed¹⁹⁰ that:

- a) in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws, (including where they form part of an Act that has other purposes) for particular hazards or high risk industries that are within the responsibility of the Ministers, should only continue where they have been objectively justified;
- b) even where that justification is established, there should be an on-going, legislative and administrative interrelationship between the laws and, if there are different regulators, between those regulators;
- c) as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws;
- d) where the continuation of the separate legislation is not justified, it should be replaced by the model Act within an agreed time frame;

¹⁸⁸ National Review into Model Occupational Health and Safety Laws, Second Report, 2009, p.13, paragraph 20.65.

¹⁸⁹ Access Economics, *Decision Regulation Impact Statement for a Model Occupational Health and Safety Act*, Report for Safe Work Australia, 2009, pp.12, 13.

¹⁹⁰ WRMC, Communique, 26 May 2009, *Response to Recommendations of the National Review into Model OHS Laws*, p.17.

- e) where specific provisions are necessary, they should normally be provided by regulations under the model Act, with specific provision in the model Act relating to the matters previously regulated by the separate legislation kept to a minimum; and
- f) this approach should be recommended to COAG so that, subject to COAG agreement, it is extended within a reasonable timeframe to other legislation that pertains to OHS but which is within the responsibilities of other Ministers.¹⁹¹

5.5 Completely replacing the OHS(MI) Act with the Commonwealth's WHS Act, supported by discrete regulations, would be a direct way to apply the model law. That option is not further examined here. In line with the Review's terms of reference, the OHS(MI) Act should be made consistent with the WHS Act, not replaced by it. That approach allows the legislation to be framed to suit the circumstances of the industry.

Differences between the OHS(MI) Act and the WHS Act and their respective subordinate legislation

- 5.6 Gaps and inconsistencies between the OHS(MI) Act and the model WHS bill are set out in Appendix G. Broadly put, the OHS(MI) Act differs from the model WHS bill in various material ways. The OHS(MI) Act has more specific application, its objects are more operationally directed than aimed at continuously improving safety, its definitions and duties of care have narrower scope, and many of the arrangements and responsibilities for workplace consultation and representation are narrower. The OHS(MI) Act lacks modern graduated measures for securing compliance. Penalties are significantly out of date and sentencing options are more limited.
- 5.7 The model WHS regulations are far more extensive than the OHS(MI) regulations (the former have over seven hundred regulations, and the latter only sixteen). The case for aligning the subordinate legislation is less clear. The extent to which the model WHS regulations would potentially be adapted for the Seacare scheme depends on several factors, including the extent to which the model WHS bill is adapted, the relevance of its provisions for the maritime context, whether there are other regulatory measures that must be implemented instead or are to be preferred (such as international maritime obligations, other Australian maritime legislation and marine orders), and whether the appropriate regulatory levels in the Commonwealth maritime context would for, various purposes, be regulation, code of practice or guidance material. I have not reached definitive conclusions on this point because decisions about aligning the primary legislation must be taken first.

Views of stakeholders

- 5.8 The ASA commented that completely aligning the OHS(MI) Act with the model laws would not meet the maritime industry's OHS requirements. Even so, the ASA recognised that there might be benefit in having aligned OHS laws across all Australian industries. The potential alignment of the OHS(MI) Act with the model laws was, in the ASA's view, a matter that required careful consideration by industry stakeholders and may need to be considered separately from the current review. Accordingly, the industry should have more time for a thorough analysis.¹⁹²

¹⁹¹ National Review, op. cit., recommendation 76.

¹⁹² ASA submission, pp. 23,24.

- 5.9 P&O Maritime Services submitted that an industry-tailored Act should remain. Although the OHS(MI) Act needed to be amended and updated to be in line with the WHS Act, the OHS(MI) Act must remain aligned with the Navigation Act. Accordingly, many current definitions should remain. The gap analysis in the review's discussion paper was seen as a good basis for strengthening and updating the OHS(MI) Act. Nonetheless, many of the OHS(MI) Act's definitions (*operator, worker, workplace*) and several areas that it covers already correspond to the WHS Act but are maritime industry specific. Careful consideration should be given before they were altered.¹⁹³
- 5.10 AMMA observed that, while the aim of the model WHS laws is to provide all workers in Australia with the same standard of health and safety protection regardless of the work they do or where they work, the model laws have not been adopted in all jurisdictions at this stage.
- 5.11 Further, AMMA contended that it is important for seafarers' WHS that the model laws are not extended offshore. AMMA noted that seafarers operate in a complex and highly specialised work environment, as reflected in s.3 of the OHS(MI) Act. Rather than ensuring safety, extending the model WHS legislation offshore would be inconsistent with:
- a) industry practices, such as those relating to the 'internal economy of the ship';
 - b) current domestic and international law obligations, such as port state control and UNCLOS; and
 - c) the complexity of the existing overlapping legislative framework which imposes a heavy regulatory burden on industry offshore (in relation to the offshore petroleum sector, for example, these matters were considered in the Australian Government's *Final Government Response to the Montara Commission of Inquiry*).¹⁹⁴
- 5.12 For industry, rights of entry are a vitally important difference. AMMA commented that the *Maritime Powers Bill 2012* appeared to adopt a carefully considered model on the conferral and exercise of powers offshore, providing very limited rights of entry by Commonwealth officials.
- 5.13 In the view of AMMA members, AMSA appropriately regulates safety where it has jurisdiction. The nature of the equipment and work environment on vessels requires that the number of people who may enter should be limited, wherever possible. AMSA inspectors are considered to have an appropriate level of independence and expertise, so that the exercise of their powers does not jeopardise workplace health and safety.¹⁹⁵
- 5.14 The MUA and AMOU advocate the complete rewriting of the OHS(MI) Act to ensure conformity with the WHS Act, with some variations to ensure that the OHS(MI) Act

¹⁹³ P & O Maritime Services Pty Ltd, submission p.3.

¹⁹⁴ AMMA submission, p.24.

¹⁹⁵ The Maritime Powers Bill is before the Australian Parliament. It would consolidate and harmonise the Commonwealth's maritime enforcement regime by bringing together powers now available under several separate Acts in one Act. The powers under the Bill could be used to enforce various Australian maritime laws, including in relation to illegal foreign fishing, customs, migration, quarantine and drug trafficking, as well as international agreements and arrangements at sea. It would not, however, affect or replace the OHS(MI) Act regime.

maintains its shipping industry focus.¹⁹⁶ In particular, the unions propose the retention of the term *operator*, rather than the use of the wider term PCBU and the inclusion of a new provision requiring the Seacare Authority to maintain and publish a list of HSRs.¹⁹⁷

- 5.15 The ACTU endorsed the MUA and AMOU position, submitting that the model WHS laws, as endorsed by the former WRMC, should represent the minimum legislative standard in all Commonwealth jurisdictions, including the Seacare scheme. Further, since ships and other vessels are for most of the time in remote locations, modifications would be required to the right of entry provisions of the model WHS bill.¹⁹⁸

Previous reviews

- 5.16 The 2005 Ernst & Young Review recommended that the functions of AMSA and the Seacare Authority with regard to OHS should be clarified to reinforce the positions of each party. The Seacare Authority should clearly be the workers' compensation and OHS regulator and provider of policy and regulatory advice with respect to OHS. AMSA (in its capacity as the Inspectorate) should be the provider of practical advice on OHS.¹⁹⁹
- 5.17 The views of the 2008-09 *National Review into Model Occupational Health and Safety Laws* are described earlier in this chapter.

Discussion

- 5.18 Modern WHS legislation provides for powers and functions and rights and obligations in various areas. The degree of support differs among stakeholders for the use of those legislative elements in the maritime safety context. The nine key elements are:
- a) the purpose of the legislation;
 - b) the structure of legislation;
 - c) the title of the Act;
 - d) its scope and application;
 - e) definitions;
 - f) duties of care;
 - g) other obligations;
 - h) workplace consultation, participation and representation; and
 - i) compliance and enforcement.

¹⁹⁶ MUA and AMOU submission, p.20.

¹⁹⁷ Section 74 of the model WHS bill requires a PCBU to maintain and display a current list of HSRs for each work group at the relevant workplaces.

¹⁹⁸ Model WHS bill, Part 7, *Workplace entry by WHS entry permit holders*.

¹⁹⁹ Ernst & Young review 2005, op cit., p.7.

- 5.19 To facilitate the consideration of possible changes to the OHS(MI) Act, each of those areas will now be examined in turn.

Purpose of the legislation

- 5.20 The purpose of the legislation is reflected in the objects. Broadly, in an objects section, the Parliament provides guidance on how the Act is intended to apply and operate. The provision aids interpretation and guides decision-makers about what is to be taken into account when they exercise powers or perform functions under the Act.²⁰⁰
- 5.21 The objects of the OHS(MI) Act are narrower than the principal object of the model WHS bill. In part, this reflects the WHS Act's wider scope. Even so, the WHS Act's principal object includes aims of promoting continuous improvement, eliminating and minimizing risks, providing WHS education and training, and securing compliance. The WHS Act's principal object also explicitly recognises the roles of representative bodies (industry associations and unions) in securing better WHS outcomes. The respective objects are set out in Appendix I.
- 5.22 The OHS(MI) Act would be better focused on improving WHS outcomes by aligning its objects with the WHS Act's principal object.

Structure of legislation

- 5.23 The OHS(MI) Act is much shorter than the model WHS bill.²⁰¹ Nonetheless, it has a broadly similar structure. If it is accepted that there should be a high level of consistency between the Acts, there would be advantages in adopting, so far as it is appropriate for the OHS(MI) Act, the same structure, titles and numbering protocol. There would be clear benefits for persons who operate in more than one jurisdiction in being able to locate equivalent provisions easily.

Provisions that are missing from the OHS(MI) Act

- 5.24 Apart from its differences from the model WHS bill in scope, application, definitions, structure of duties of care and compliance measures, in some significant areas the OHS(MI) Act has no equivalent provisions to those in the model WHS bill, including:
- a) general principles that apply to all duties of care [model WHS bill, Part 2, *Health and Safety Duties*, ss.13-17];
 - b) a specific positive duty of due diligence on *officers* [model WHS bill, s.27];
 - c) obligations for consultation, co-operation and co-ordination between duty holders [model WHS bill, Part 5];
 - d) provisions for the resolution of health and safety issues [model WHS bill, ss.80-82];
 - e) the prohibition of discriminatory, coercive or misleading conduct [model WHS bill, Part 6];

²⁰⁰ Under s.15AA of the *Acts Interpretation Act 1901*, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

²⁰¹ The OHS(MI) Act has 121 provisions in 68 pages; the model WHS bill has 276 provisions in 186 pages.

- f) workplace entry by WHS entry permit holders [model WHS bill, Part 7] ;
- g) enforceable undertakings [model WHS bill, Part 11];
- h) on-the-spot fines [model WHS bill, s.243].

Title

- 5.25 For reasons of consistency with the model WHS bill and the several Acts implementing it in seven Australian jurisdictions (including the Commonwealth), the OHS(MI) Act might be retitled as the *Work Health and Safety (Maritime Industry) Act*.

Scope and application

- 5.26 In discussions with stakeholders and as indicated in some submissions, there was general support for the OHS(MI) Act to have a clear maritime industry focus. This must be considered within the context of the overall maritime industry reform process and the regulatory model should be consistent with that process. This is considered in the earlier discussion in Chapter Two of coverage issues under TOR 1.

Definitions

- 5.27 To some extent, the definitions in the OHS(MI) Act and the model WHS bill reflect their content and their respective scope and application (for the OHS(MI) Act, work by specified types of workers in part of the maritime industry and, for the model WHS bill, all workers undertaking all types of work in all workplaces, irrespective of industry).
- 5.28 To the extent that the OHS(MI) Act becomes aligned with the model WHS bill, the definitions used in the bill should be used, except where there were terms specifically needed for an Act that is focused on health and safety in the maritime industry (which is the approach favoured by many stakeholders).
- 5.29 To illustrate the need for particular terms to be used in the OHS(MI) legislation, however retitled and restructured, the following table sets out some key terms now defined in the OHS(MI) Act that would have to be used with their current meaning, however it may be expressed.

Table 5.1: Examples of terms that would need to be specifically defined for a revised OHS(MI) Act

<i>Australian General Shipping Register</i>
<i>Australian International Shipping Register</i>
<i>Authority (i.e., Seafarers Safety, Rehabilitation and Compensation Authority)</i>
<i>Coastal trading</i>
<i>Contractor</i>
<i>Emergency licence</i>
<i>Employee</i>
<i>General licence</i>
<i>Government ship</i>
<i>Inspectorate (i.e., AMSA)</i>
<i>Off-shore industry mobile unit</i>

<i>Australian General Shipping Register</i>
<i>Operator</i>
<i>Own</i>
<i>Person in command</i>
<i>Prescribed ship</i>
<i>Prescribed unit</i>
<i>Reviewing authority (i.e., Fair Work Commission)</i>
<i>Shipboard management committee</i>
<i>Supervisor</i>
<i>Temporary licence</i>
<i>Workplace</i>

Duties

- 5.30 In common with the contemporary approach to the protection of OHS, the model WHS bill and the OHS(MI) Act both provide for duties of care. The model bill takes a much wider approach to primary duty holders, providing for a person conducting a business or undertaking (PCBU) to have a duty of care to workers and other persons to ensure, so far as is reasonably practicable, their health and safety in relation to work at the business or undertaking. The terms PCBU and worker have wide definitions. The OHS(MI) Act is more narrowly expressed, with an operator of a prescribed ship or unit having to take all reasonable steps to protect the health and safety at work of employees.
- 5.31 Duties are owed under both the Act and the model bill by and to various other persons (see Appendix G), including by employees [OHS(MI) Act] and workers (model WHS bill).
- 5.32 Under the model WHS bill, where a PCBU has a duty or obligation, an officer, as defined, must exercise due diligence (as defined) to ensure that the PCBU complies with the duty or obligation (s.27). There is not an equivalent provision in the OHS(MI) Act, but it would be a valuable addition to ensure that the officers of certain operators had a positive duty to secure safety on the operator's vessel.
- 5.33 An important difference between the OHS(MI) Act and the model WHS bill is that the latter includes a set of principles that apply to all duties (ss.13-17), which make it clear that duties cannot be transferred, a person may simultaneously have more than one duty and more than one person may hold the same duty concurrently and duty holders must eliminate risks to health and safety as far as reasonably practicable, or if that cannot occur, minimise them as far as reasonably practicable. These principles are suitable for the OHS(MI) Act.
- 5.34 Further, the model WHS bill requires all persons with a duty in relation to the same matter to consult, co-operate and co-ordinate activities with the other duty holders (s.46). This is also suitable for the OHS(MI) Act.
- 5.35 The model WHS bill has higher penalties for breaches of duties of care and more options (see later) to secure compliance.
- 5.36 Any consideration of changes to duties (and the range of duty holders) should follow the principle outlined in recommendation 5.1, so that changes would be made where a higher standard would be achieved.

Other obligations

- 5.37 Both the OHS(MI) Act and regulations and model WHS bill and model WHS regulations provide for a range of other obligations, including incident notification. Protection is given by each of the pieces of legislation to employees and workers respectively against discrimination and other prejudicial conduct. The remedies are stronger under the model WHS bill.

Workplace consultation, participation and representation

- 5.38 The OHS(MI) Act and the model WHS bill both provide for health and safety representatives (HSRs), health and safety committees and various consultation obligations. HSRs have similar statutory rights and obligations, but a HSR under the model WHS bill may only exercise powers (e.g., issue a provisional improvement notice) after being trained.

Workplace entry by WHS entry permit holders

- 5.39 The OHS(MI) Act differs from most current OHS legislation by not providing a right of entry for an authorised union official. Appendix H outlines the provisions of the various current applicable pieces of legislation at Commonwealth, State and Territory levels. In brief, all States and both Territories include right of entry provisions in their WHS or OHS legislation (WA does so for OHS purposes in its *Industrial Relations Act 1984*). Of these, four States and both Territories base their legislation on the model WHS bill, as does the Commonwealth. Victoria includes a right of entry provision in its *Occupational Health and Safety Act 2004*, which differs in some respects from the model WHS bill provision.
- 5.40 The OHS(MI) Act and the OPGGS Act do not include such a provision. Instead there are provisions allowing a HSR to be assisted by a 'consultant', who could be a union official. Permission is required for the consultant to be able to attend.²⁰²
- 5.41 Under laws implementing the model WHS bill, right of entry is conferred on a union official who is a WHS permit holder. There are various preconditions to being issued a permit. The applicant must be an office holder or employee of a union and must hold an entry permit under the FWA or a State or Territory industrial law. Permits are issued by a relevant *authorising authority*. The Fair Work Commission is the authority under the Commonwealth's WHS Act.²⁰³
- 5.42 There are controls for securing the proper exercise of the right of entry powers by permit holders. Under the model WHS bill, a permit holder may only exercise the right during usual working hours (s.126), is limited in where the right may be exercised (s.127), must comply with reasonable requests by the PCBU concerned or the person with management or control of the workplace to comply with a WHS requirement or other statutory obligation for the workplace (s.128), and must have completed relevant training (s.133). The authorising authority may impose conditions on a permit (s.135) and may, on application, revoke a permit on various grounds, including its improper use and intentionally obstructing or hindering a PCBU or workers (s.138). In any case, the normal term of a permit is three years.

²⁰² OHS(MI) Act, s.54; OPGGS Act, Schedule 3, item 35.

²⁰³ Minister Shorten has announced that, to address employer concerns about excessive right of entry visits, the Fair Work Commission will be provided with greater power to resolve disputes relating to the frequency of such visits for discussion purposes [Media Release, the Hon Bill Shorten, 8 March 2013].

- 5.43 Numerous permits have been issued. For example, in the first six months of operation of the Commonwealth's WHS Act, the Fair Work Commission received 17 applications for permits²⁰⁴ and has now issued 91 permits.²⁰⁵ In Queensland, the register of current WHS permit holders under that State's WHS Act lists about 300 current permits.²⁰⁶ In NSW, 232 current permit holders appear on the register under the NSW WHS Act.²⁰⁷
- 5.44 Entry (with notice) to a workplace²⁰⁸ is permitted for two purposes. The first is to inquire into suspected contraventions of the WHS legislation (prior notice is not required but must be given as soon as is reasonably practicable after entry). The second is to consult and advise workers on WHS matters and risks (at least 24 hours' notice is required, but no more than 14 days).
- 5.45 Stakeholders have opposing views about rights of entry in a maritime context. Industry bodies are opposed and question the practicality of such a right, given the mobility of vessels and the sometimes limited time that a vessel may be in a port. On the other hand, the ACTU and the seagoing unions strongly support there being a right of entry based on the model WHS bill.
- 5.46 As the comparative table at Appendix H shows, there are already rights of entry for vessels under State and Territory regimes. No significant difficulties were identified. This may be because the permit holder has no enforcement powers. Where a problem is identified that cannot be rectified, a permit holder may contact the regulator.
- 5.47 Despite the right of entry a permit holder may have under the relevant legislation, there are still security requirements at ports and offshore facilities that need to be adhered to. The *Maritime Transport and Offshore Facilities Security Act 2003* places strict restrictions on entry into port and offshore facilities which include security considerations. The Maritime Security Act established a scheme called the Maritime Security Identification Card (MISC) scheme. The MISC is a nationally consistent identification card used to identify a person who has been the subject of a background check. It shows the holder of the MISC has met the minimum security requirements and needs to work unescorted or unmonitored in a maritime security zone.²⁰⁹
- 5.48 Other local security restrictions may also be in place and restrict the access of a right of entry permit holder on a case-by-case basis. Discrete solutions for these scenarios are a matter for the MISC issuer (usually a port authority).
- 5.49 Given the objectives of harmonisation, the widespread existence of rights of entry and the controls on permits, it is difficult to see why the system should not apply under the

²⁰⁴ Fair Work Australia, Annual Report 2011-2012, p.89.

²⁰⁵ As at 14 March 2013. A list of all permit holders can be found at:

<http://www.fwc.gov.au/index.cfm?pagename=entryhsfind>.

²⁰⁶ <http://www.qirc.qld.gov.au/resources/pdf/whs/register.pdf>.

²⁰⁷ As at 27 February 2013. A list of all permit holders can be found at:

http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_procedures_legislation_indorg_whf_register

²⁰⁸ Under s.8, a workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. Place includes: (a) a vehicle, vessel, aircraft or other mobile structure; and (b) any waters and any installation on land, on the bed of any waters or floating on any waters.

²⁰⁹ Department of Infrastructure and Transport website,

<https://www.infrastructure.gov.au/transport/security/maritime/msics/index.aspx>, accessed on 13 March 2013.

OHS(MI) Act. There is a question of who should be the authorising authority. The Fair Work Commission has that role for entry permits under the FWA and could be given the same role for the purposes of entry permits under the OHS(MI) Act (however titled).

Compliance and enforcement

5.50 The OHS(MI) Act has a narrower range of compliance powers (see table below). On the other hand, the model WHS bill not only has a wider range of means for securing compliance, but states its aim of *securing compliance with this Act through effective and appropriate compliance and enforcement measures* [s.3(1)(e)]. This provides the setting for graduated compliance and enforcement. The model bill has more measures available to secure compliance than are found in the OHS(MI) Act. They are more consistent with the modern, responsive approach to seeking regulatory compliance.²¹⁰ The model WHS bill has civil and criminal sanctions available.

Table 5.2: Comparison of compliance measures in the OHS(MI) Act and the model WHS bill

Compliance measure	Model WHS bill	OHS(MI) Act
Graduated enforcement object	Yes [s.3(1)(e)]	No. The Seacare Authority must ensure that obligations under the Act and regulations are complied with [s.9(a)]
Information, advice and education	Yes – functions of regulator (s.152) and inspectors (s.160)	Yes – additional functions of Seacare Authority (s.9) and inspectors (s.82)
PINs	Yes (ss.90-102)	Yes (ss.57-62)
Improvement notices	Yes (ss.191-194)	Yes (s.98)
Prohibition notices	Yes (ss.195-197)	Yes (s.93)
Non-disturbance notices	Yes (ss.198-201)	Yes (s.92)
Infringement notices	Yes (s.243)	No
Enforceable undertakings	Yes (Part 11 and s.239)	No
Fines	Yes (breaches of duties and various other contraventions)	Yes (breaches of duties and various other contraventions)

²¹⁰ See the HWSA *National Occupational Health and Safety (OHS) Compliance and Enforcement Policy*, 2008 at http://www.hwsa.org.au/files/documents/Compliance_and_Enforcement_policy.pdf.

Compliance measure	Model WHS bill	OHS(MI) Act
Imprisonment	Yes [serious breach (<i>category 1 offence</i>) of a primary duty of care (s.31) and assaulting, etc., an inspector (s.190)]	Yes [failure to assist inspector (s.90); interfering with a notice (s.105); and interference with safety equipment (s.111)]
Injunctions	Yes [civil proceedings relating to discriminatory or coercive conduct (s.112); for non-compliance with a notice (s.215); for offences against the Act or regulations (s.240); and for breach of a WHS civil penalty provision (s.259)]	No
Adverse publicity orders	Yes (s.236)	No
Remedial orders	Yes (s.237)	No
Training orders	Yes (s.241)	No
Criminal proceedings	Yes	Yes
Civil proceedings	Yes (ss.254-266)	No

Timing of possible changes

5.51 Aside from the issue of whether the OHS(MI) Act should be amended or replaced, there is a question of what amount of time may be required to develop and implement the changes. On the assumption that some change will occur, there are several factors to consider:

- a) there are practical issues in developing a regulatory package, which would involve amendments to the OHS(MI) Act and associated regulation, as well as codes, guidance material and so on; and
- b) transitional arrangements would have to be developed and used, there may be training requirements for regulators and stakeholders and the administrative relationships between regulators (particularly the Seacare Authority and AMSA) would need revision.

5.52 If there were to be a staged approach to amending the legislation, some changes should be made forthwith. In particular, the compliance measures should be aligned with those in the model WHS bill (apart from penalties, which should be adjusted at the same time as any changes are made to duties and other obligations). It would be possible to add provisions that do not currently exist in the OHS(MI) Act at that time, but it may be more practical for drafting and preparation purposes to introduce the other changes together. This is a matter that may depend on the availability of drafting and implementation resources and is a matter for decision by the Government.

Recommendations

Recommendation 5.1

The OHS(MI) Act should be updated on the basis that:

- a) its structure and provisions should be the same as those in the model WHS bill except where another approach is justified in the particular circumstances of the maritime industry as covered by the OHS(MI) Act (see below);
- b) the OHS(MI) Act should not adopt an approach or provision differing from the model WHS bill if it would result in a less safe work health and safety outcome than would be achieved by using the equivalent provision of the model WHS bill, unless that provision is impractical or inappropriate;
- c) the assessment of whether and how the model law should be modified should be undertaken through consultation with industry stakeholders, including the relevant unions.

Recommendation 5.2

The OHS(MI) Act should be retitled as the *Work Health and Safety (Maritime Industry) Act*.

Recommendation 5.3

Certain changes are required to ensure that the proposed WHS(MI) Act is suited to the maritime sector, including ensuring that:

- a) in the first instance, the WHS(MI) Act should apply to the persons to whom the OHS(MI) applies and with the same jurisdictional scope (see Chapter Two);
- b) its provisions should be reviewed after the foreshadowed review of the implementation of the model WHS laws and in the light of experience with the shipping reform initiatives.

Recommendation 5.4

The OHS(MI) regulations should be aligned with the model WHS regulations, so far as they are relevant.

Recommendation 5.5

The new laws should not take effect immediately:

- a) a suitable transition period should be allowed so that the regulatory authorities and industry parties can make suitable preparations for their commencement;
- b) the transitional principles for the model WHS bill and regulations should be used, subject to any modifications determined by the Seacare Authority.

Chapter Six – Achieving lower premiums

Term of Reference 3

The scope for amending the Seafarers Act to help reduce workers' compensation premium costs.

In Chapter Six, the premium arrangements under Seacare scheme are reviewed. Key issues affecting premiums and the scheme's financial viability are identified. I consider issues about rehabilitation and return to work, and make a number of recommendations, including giving priority to early intervention and examining ways to improve job placement for injured workers. I recommend reforms to claims management and dispute resolution, aligned with proposals made in the Hanks review. I suggest that the provisions for the voluntary redemption of claims be similar to new provisions proposed in the Hanks review, but with Seacare Authority approval of proposed redemptions. To provide better information about excesses (deductibles) I recommend a greater role for the Seacare Authority, including by being able to obtain information, by approving any proposed deductibles that exceed a prescribed amount, and by being able to stipulate conditions for the management of claims that are made within the deductible amount and/or excesses. I recommend that DEEWR and the Seacare Authority consider options for the introduction of self-insurance by 2015. These would be developed by consultation with scheme participants, industry bodies, insurers and unions. I propose a greater role for the Seacare Authority in providing guidance to insurers under the scheme about expected standards in relation claims management, rehabilitation and return to work, and the collection and reporting of claims data. The Authority would be able to require the provision of information about performance against those standards. I also discuss factors relating to the re-entry of protection and indemnity (P&I) clubs into the scheme and propose that, if their re-entry appears probable (following the recommended changes), further consideration be given to prudential standards and accountability.

Background

- 6.1 The 2005 Ernst & Young report found that *the transparency of the performance of the scheme is limited by a number of factors including high excesses on insurance policies and inadequate data collection.*²¹¹ Ernst & Young went on to state, *there is a possibility that the Seacare scheme may not be viable if the scheme was fully transparent and the processes were aligned to scheme objectives.*²¹²
- 6.2 Since then the Seacare scheme has not materially changed in its structure and its overall performance remains comparatively poor. Premiums and employer excesses remain high, the OHS of employees also remain comparatively poor and the return to work and rehabilitation of injured seafarers appears persistently difficult. The data needed to establish clearly the scheme's performance are inadequate. Without valid data (on claim incidence, the real cost of claims and rehabilitation outcomes across the scheme), making good policy decisions is problematic.
- 6.3 In short, various actions are necessary to assist in reducing premium costs, but the ultimate responsibility for better prevention, and therefore fewer claims, lies with employers as the primary duty holders.

²¹¹ Ernst & Young, *Evaluation of the Seacare scheme*, 2005, p 45.

²¹² *Ibid*, p 45.

- 6.4 Under s.93 of the Seafarers Act, employers must:
- a) have a policy of insurance in place from an authorised insurer;²¹³ or
 - b) be a member of the P&I club that is a member of the International Group of Protection and Indemnity Associations and is approved by the Seacare Authority (as discussed later, no P&I clubs offer this type of cover in Australia); or
 - c) be a member of an employers' mutual indemnity association that is approved in writing by the Authority (there are none).
- 6.5 Currently five insurers provide insurance coverage to employers in the Seacare scheme. Of the five insurers, one insurer covers more than 50 per cent of the scheme.
- 6.6 Stakeholders generally agreed on the primary factors that have contributed to the high premiums in the Seacare scheme. In summary, they include:
- a) the size of the part of the maritime industry that is regulated under the Seacare scheme;²¹⁴
 - b) the industry's risk profile and safety performance;²¹⁵ and
 - c) the difficulties in the rehabilitation and RTW arrangements for injured workers under the scheme.²¹⁶
- 6.7 As outlined in Chapter One, premiums under the Seacare scheme are among the highest in Australia and New Zealand, with a premium rate at 3.49 per cent of payroll in 2010-11.²¹⁷ The CPM Report indicates Seacare's premiums are high owing to the industry's high risk nature. Nonetheless, for reasons that are considered later in this chapter, the true cost of insurance under the Seacare scheme is difficult to quantify and some features of the scheme mask the cost of claims. That said, there has been a discernible downwards trend in premiums in the last five years with the payroll rate reducing from 5.54 per cent in 2006-07 to 3.49 per cent in 2010-11.²¹⁸
- 6.8 The lower premium rates should be seen in context. According to the most recent CPM report, premium rates for all Australian industries have decreased in the five years since 2006-07. The communication services industry had the largest percentage fall (48 per cent). The electricity, gas and water supply industry had the second largest percentage decrease (33 per cent), followed by the mining and construction industries, each with a 28 per cent decrease over the five year period.²¹⁹

²¹³ Under s.3 of the Seafarers Act, an *authorised insurer* is a general insurer or Lloyd's underwriter under the *Insurance Act 1973* or an insurer that carries on State insurance (whether or not the State insurance extends beyond the limits of the State concerned).

²¹⁴ ASA submission, p.20.

²¹⁵ AIMPE submission, p 10, Allianz, submission, p.16, ASA submission, p.20, MUA and AMOU submission, p.20.

²¹⁶ AIMPE submission, p 11, AMMA submission, p.25.

²¹⁷ Safe Work Australia, CPM Report, 14th ed., op. cit., p.21.

²¹⁸ Ibid., p.21.

²¹⁹ Ibid., p.39.

- 6.9 However, with the current data, it is not possible to determine how much the reduction in the average Seacare scheme premium rate results from:
- a) improved performance in OHS, rehabilitation, RTW and claims management; or
 - b) employers taking out large deductibles on their premiums.²²⁰
- 6.10 As the Seacare scheme applies to part of a single industry, its premium levels should be compared with those for employers in other high risk industries. According to the most recent CPM report,²²¹ in 2010-11, the highest average premium rate by industry of 3.7 per cent was for the agriculture, forestry and fishing industry, but the next four highest average premium rates (other than under the Seacare scheme) were between 2.3 and 2.5 per cent (for the transport and storage, personal and other services, manufacturing and construction industries). The Australian average is under 2 per cent.
- 6.11 In other words, once allowance is made for the effect of deductibles (employer excesses), the scheme probably has the highest average premiums in Australia and New Zealand.
- 6.12 To improve performance and facilitate lower premiums, urgent attention must be given to:
- a) better prevention (see Chapters Five and Seven);
 - b) scheme design and operation (see this chapter and Chapter Seven); and
 - c) more effective rehabilitation and RTW processes (later in this chapter).

Rehabilitation and return to work

- 6.13 Part III of the Seafarers Act contains the rehabilitation provisions and sets out the rehabilitation process. The provision of a rehabilitation program depends on liability being accepted.
- 6.14 For employees who sustain an injury that lasts, or is expected to last, 28 days and which results in an incapacity or impairment for work, the employee's employer must, within 28 days, arrange for the assessment of the employee's capability of undertaking a rehabilitation program (s.49).
- 6.15 If an employee is assessed as capable of undertaking a rehabilitation program, the employer must make arrangements with an approved program provider for the provision of an appropriate rehabilitation program. The employer must consult with the employee about:
- a) the selection of an approved program provider, and
 - b) the development of an appropriate rehabilitation program by an approved program provider.

²²⁰ I further discuss deductibles later in this chapter.

²²¹ Safe Work Australia, CPM Report, op. cit., p.39.

- 6.16 Where an employee refuses to undergo, or obstructs, a medical examination, without reasonable excuse, the employee's rights to compensation are suspended until the examination takes place [s.49(4)].
- 6.17 Similarly, if, without reasonable excuse, an employee does not undertake a rehabilitation program the employee's rights to compensation are suspended until the employee starts to undertake the program [s.50(5)].
- 6.18 For seafarers, the return to work process has added complications, as the Seacare Authority recognises in *A Best Practice Guide (2nd Edition) Seafarers Rehabilitation and Return to Work:*

*Rehabilitation and return to work are important issues for the Australian maritime industry. Not only because of the potentially high-risk and high-injury nature of the work, but also because of the structural difficulties associated with rehabilitation and returning to work for injured seafarers and their employers. The often 24-hour nature of employment; the moving platform that is the workplace; exposure to the elements; the distance of ships from land and therefore the full range of medical attention; and rigorous fitness for sea duty requirements, all combine to make injury prevention and return to work especially challenging.*²²²

- 6.19 Similarly, the MUA and AMOU stated:²²³

The application and outcomes from the rehabilitation provisions have not been as successful as was anticipated. The unions acknowledge that the nature of the industry, characterised by long periods at sea and away from access to medical and paramedical assistance has created particular challenges for the industry. The opportunity and availability of alternative duties and graduated return to work options which have had success in other industries has not been as readily applicable to the maritime industry.

...

One reason for the very low levels of graduated return to work opportunities being made available to injured employees by maritime industry employers results from the requirement for seafarers to be declared fit in accordance with the Fitness for Duty provisions set out in AMSA Marine Orders 9, Medical Fitness, to enable a resumption of seagoing duties.

- 6.20 *Marine Orders Part 9 Health – Medical Fitness*²²⁴ states that a person must not perform duties as a seafarer, or be taken into employment to perform duties as a seafarer, on a ship to which Part II of the Navigation Act applies unless that person is medically fit to perform those duties.²²⁵ The Marine Orders are designed to ensure that personnel are fit to deal with all foreseeable conditions which may arise during voyages. However, they also complicate the provision of suitable employment to injured seafarers while they are still recovering.
- 6.21 In its medical examination guidelines, AMSA considers the need for seafarers to be medically fit and emphasises their work environment (an extract is provided in the box below).

²²² Seacare Authority, *A Best Practice Guide (2nd Edition) Seafarers Rehabilitation and Return to Work*, 2007, p.1.

²²³ MUA and AMOU submission, p.16.

²²⁴ Marine Orders, Part 9, Health – Medical Fitness, Issue 6, Order No. 1 of 2010, pursuant to subsection 425(1AA) of the *Navigation Act 1912*. Available at: <http://www.comlaw.gov.au/Details/F2010L00116>

²²⁵ The same provision in the Marine Orders also applies to a sea-going vessel registered in Australia that is not a ship to which Part II of the Navigation Act applies.

AMSA Guidelines for the medical examination of seafarers and coastal pilots²²⁶

[Paragraphs 1.2.5 to 1.2.7]

Seafarers should be medically fit and able to perform their normal on-board work tasks and duties, which might include manual handling, machine operation, cleaning and maintenance and also be able to respond to and assist with emergency situations such as fire fighting, using fire hoses, fire extinguishers and related equipment and respond to emergency situations which require evacuation, lowering lifeboats, assisting passengers and operation of safety and emergency equipment. All ship crew members need to be able to assist in fire-fighting...

Seafarers should be able to adjust to the often violent motions of the ship, to be able to live and work in sometimes cramped spaces, to be able to climb ladders, to lift heavy weights and to be able to withstand exposure to harsh weather conditions on deck or excessive heat in the machinery spaces. Seafarers whose work requires travel to distant ports or workplaces by air should not suffer from conditions which are exacerbated by air travel.

Seafarers should be able to live and work closely with the same people for weeks and perhaps months on end and under occasionally stressful conditions. They should be capable of dealing effectively with isolation from family and friends and, in some cases, from persons of their own cultural background.

- 6.22 The scheme, although it has improved, continues to under-perform in its RTW outcomes in comparison with most schemes (see figure 1.4 in Chapter One). In 2011-12, in five²²⁷ of ten outcome measures under the Return to Work Monitor, seafarers had poorer RTW outcomes than the national average.²²⁸ Given the scheme's profile, the year on year results are always likely to be a volatile.
- 6.23 According to Comcare's *Rehabilitation Handbook*, two key factors in successful rehabilitation are *flexibility in return to work options by providing suitable duties* and *flexibility in accommodating injured employees with persistent or recurring symptoms*.²²⁹ Graduated RTW programs are often used to facilitate return to work for injured employees as they allow them to return to work on reduced hours or limited duties when they cannot undertake their full pre-injury hours or duties. Graduated RTW is effective because (a) it builds up injured employees physical or psychological ability, or both, to manage work by using their actual work tasks, (b) helps the employee maintain work habits, interacting with co-workers and keeping pace with changes and developments in the workplace.²³⁰
- 6.24 The nature of seafaring impedes graduated RTW and limits employers' ability to provide suitable duties and accommodate injured employees with persistent or recurring symptoms.
- 6.25 The Seacare scheme's partial RTW rates are low by comparison with the national average for all workers' compensation schemes, although the full RTW rates appear to be in line with

²²⁶ AMSA, *Guidelines for the medical examination of seafarers and coastal pilots*, 2012, p 2.

²²⁷ The 5 measures are: RTW rate; durable RTW rate; mean length of durable RTW; full RTW; non-durable/ no RTW.

²²⁸ *Seacare Annual Report 2011-12*, Table 20.

²²⁹ Comcare: *Rehabilitation Handbook, Understanding rehabilitation and return to work under the Safety, Rehabilitation and Compensation Act 1988*, p.21.

²³⁰ Comcare: *First Steps Back, A guide to suitable employment for rehabilitation case managers*, PUB78, p.31.

other schemes. Various barriers to partial RTW exist in the industry on top of needing to be fully fit. They include but are not limited to:

- a) limited availability of on-shore positions, particularly for employees of small employers; and
- b) difficulty in rehabilitating injured seafarers owing to their remote places of work.

6.26 The MUA and AMOU²³¹ suggested that vocational retraining (into non-seafaring roles) and the provision of supernumerary positions²³² for suitable duties, would improve the situation.

6.27 The main arguments that have been put against on board supernumerary positions are:

- a) lack of room to accommodate injured workers in the currently tight competitive operations for most employers; and
- b) problems may arise in ship emergencies if injured seafarers cannot respond in the most appropriate manner, thereby putting other lives at risk.

6.28 As to redeployment, the ASA stated:²³³

There are inherent difficulties in attempting to rehabilitate a seafarer into land based employment if they have worked on board a vessel all their working lives. The skills required to perform seafaring roles in many cases have limited transferability. Different hours of work and considerable less remuneration are key considerations for seafarers and obtaining alternate roles or retraining will often not be able to meet their expectations.

6.29 A further complication is that a seafarer who is able to return to work may have to wait for the next available tour of duty to return to the sea and therefore employment.²³⁴

6.30 The ASA suggested that the rehabilitation model needed to be considered in the context of the industry where the ability for effective rehabilitation and gradual return to work was reduced because of factors associated with the location of the workplace or vessel; a seafarer's place of residence; the employer; the rehabilitation provider; the doctor and any rehabilitation opportunity. Potentially, all could be in different geographical locations.²³⁵

6.31 Despite some significant barriers in the rehabilitation and RTW of seafarers, the barriers should not obviate an employer's responsibility. The rehabilitation of injured seafarer's should be the primary goal of any employer or insurer under the Seacare scheme. As discussed above, rehabilitating injured seafarers helps employers by, among other things, premium reductions. Mr Hanks reached a like conclusion and, to support improved RTW

²³¹ MUA and AMOU, submission, p.4.

²³² The Seacare Authority defines a supernumerary position as *a short term additional berth/position, funded by the employer/insurer, to enable a seafarer to return to work at sea on a graduated basis, at an earlier stage than might normally be the case, as part of the rehabilitation program: A Best Practice Guide (2nd Edition). Seafarers Rehabilitation and Return to Work, Seacare Authority, 2007, p 3.*

²³³ ASA submission, p.11.

²³⁴ Seacare Authority, *2015 Strategic Plan, Issues paper*, 2012, p.18.

²³⁵ ASA submission, pp.10-11.

outcomes in the Comcare scheme, he recommended many changes to the SRC Act's rehabilitation provisions.²³⁶

- 6.32 I have discussed some of Mr Hanks' recommendations in Chapter Four. In the context of improving rehabilitation outcomes and reducing premiums in the Seacare scheme, I address other relevant recommendations in this chapter.

Early intervention

- 6.33 Early recovery from injury has benefits for injured seafarers and their employers. Seafarers can recover from injury more quickly and return to work and active life. For employers, early rehabilitation means that the investment in existing seafarers is not lost, productivity and ship morale are improved and compensation costs (in the form of premiums) are lowered.

- 6.34 Some key factors identified as contributing to good rehabilitation and early recovery are:²³⁷

- a) early intervention in treating the injury or disease;
- b) early workplace-based rehabilitation;
- c) effective claims management; and
- d) well-designed and properly targeted benefits and dispute-resolution structures.

- 6.35 Comcare has identified key elements of effective early intervention, which include:²³⁸

- a) clear policy or guidelines on supporting employees exhibiting early warning signs of not coping at work (the support need not be contingent on the employee submitting a claim, or a claim being accepted);
- b) early contact with the employee to offer assistance;
- c) early and expert assessment to identify employee needs;
- d) employee and employer involvement in developing an agreed plan to enable the employee to remain at work or return to work;
- e) if there is a psychological condition, access to effective medical treatment and evidence-based therapeutic interventions; and
- f) flexible workplace solutions to support the employee at work.

- 6.36 As mentioned, the provision of a rehabilitation program under the Seacare scheme depends on liability being accepted. Although s.49 of the Seafarers Act stipulates the circumstances and timeframes in which a rehabilitation program should commence, the timeframes do not reflect best practice for successful and durable rehabilitation and return to work.²³⁹

²³⁶ Hanks Review, Report op. cit., Chapter 6, pp.54-82.

²³⁷ Productivity Commission Report 2004, op cit., p.191.

²³⁸ See: http://www.comcare.gov.au/injury_management/early_intervention/benefits_of_early_intervention.

²³⁹ See Seacare Authority, *A Best Practice Guide: Seafarers Rehabilitation and Return to Work*, 2007.

- 6.37 Accordingly, the Seafarers Act should be updated. This should be in line with Mr Hanks' recommendation 6.1 for the SRC Act to provide explicitly that early intervention is the primary form of rehabilitation. Mr Hanks strengthened this by recommending (Hanks recommendation 6.9) that the SRC Act authorise the issuing of a binding *Injury Management and Rehabilitation Code of Practice*, setting out expected standards for vocational rehabilitation and injury management. The code of practice would have to be followed, unless another solution that achieved the same or a better standard was available.²⁴⁰

Recommendation 6.1

Subject to the acceptance of Hanks recommendations 6.1 and 6.9, the Seafarers Act should similarly provide for early intervention to be the primary form of rehabilitation, supported by an appropriate Injury Management and Rehabilitation code of practice, which could be based on the proposed Comcare scheme code.

[Note: an injury management plan and related matters are dealt with in a later recommendation].

Rehabilitation framework

- 6.38 An effective rehabilitation framework is an integral part of any workers' compensation scheme and provides support for a seafarer suffering long term incapacity. Payments for incapacity are the most significant contribution to premium costs and the best way to limit them, when harm has occurred, is to return seafarers to employment.
- 6.39 The Seafarers Act's rehabilitation framework is based on that in the SRC Act. This framework, while representing best practice when introduced has not kept pace with reforms made since then. AMMA raised this issue, stating that the contemporary effectiveness of the rehabilitation and return to work aspects of the Seacare scheme was one of the practical concerns of employers operating under the Seafarers Act.²⁴¹ The ASA considered that rehabilitation provisions should be sufficiently flexible to allow a case by case assessment for an approach that best meets a seafarer's rehabilitation requirements.²⁴²
- 6.40 To address the need for better rehabilitation, Mr Hanks proposes (in his recommendation 6.3) that the term *rehabilitation program* in the SRC Act be changed to *workplace rehabilitation plan*, with a new definition emphasising the vocational nature of the services to be provided and without referring to other treatment forms. The services, as shown in the following box, would be aimed at maintaining employees in, or returning them to, suitable employment.

²⁴⁰ This uses a regulatory approach already used under WHS laws.

²⁴¹ AMMA submission, p.1.

²⁴² ASA submission, p.11.

Types of services to be provided under the workplace rehabilitation plan proposed by Mr Hanks

- (a) initial rehabilitation assessment;
- (b) functional assessment;
- (c) workplace assessment;
- (d) job analysis;
- (e) advice concerning job modification;
- (f) occupational rehabilitation counselling;
- (g) vocational assessment;
- (h) advice or assistance concerning job seeking;
- (i) vocational re-education;
- (j) advice or assistance in arranging vocational re-education;
- (k) advice or assistance in return to work planning;
- (l) the provision of aids, appliances, apparatus or other material likely to facilitate the return to work of a worker after an injury;
- (m) modification to a work station or equipment used by a worker that is likely to facilitate the return to work of the worker after the injury; and
- (n) any other service authorised by Comcare.

6.41 The Seafarers Act also uses the term *rehabilitation program*, with the same definition as that currently in the SRC Act.²⁴³

6.42 Returning an incapacitated or impaired seafarer to work following injury presents significant challenges, given the nature of seafaring work and the work environment. The 1988 Luntz Review commented: *In some instances there may be an opportunity, given the nature of the residual permanent incapacity and the background of the disabled seafarer, for retraining into a different area within the industry. In many more cases, however, this retraining will need to be oriented to future employment outside the seagoing maritime industry.*

6.43 The medical restrictions in force in the seafaring industry are unlikely to change materially in the near future. Because of this, as Professor Luntz recognised twenty five years ago, re-training and re-deployment will continue to be the primary means available to employers to return injured seafarers to suitable employment.

²⁴³ Under s.3 of the Seafarers Act, a rehabilitation program includes medical, dental, psychiatric and hospital services (whether on an in-patient or out-patient basis), physical training and exercise, physiotherapy, occupational therapy and vocational training.

- 6.44 The definition of *suitable employment* in the Seafarers Act recognises this fact and for that reason, it is unnecessary to adopt Mr Hanks' recommendation to amend that definition.²⁴⁴ Nonetheless, his recommendation to replace the term *rehabilitation program* with *workplace rehabilitation plan*, in conjunction with its new definition, would help employers to return injured seafarers to suitable employment.
- 6.45 *Workplace rehabilitation program* should be defined to include the provision of services such as (a) occupational rehabilitation counselling; (b) vocational assessment; (c) advice or assistance concerning job seeking; and (d) vocational re-education. This would guide and facilitate rehabilitation and RTW for injured seafarers under the Seacare scheme, particularly given the necessary focus on re-training and re-deployment.

Recommendation 6.2

The Seafarers Act should be amended to replace the obligation to have a *rehabilitation program* with one to have a *workplace rehabilitation program*, based on the definition proposed in Hanks recommendation 6.3.

- 6.46 The provision of *suitable employment* by employers in the Seacare scheme is at the heart of rehabilitation. Under s.52 of the Seafarers Act, an employer must take all reasonable steps to provide an employee with suitable employment, or to assist the employee to find such employment. No penalty applies for an employer's failure to do so.
- 6.47 Mr Hanks recommended (Hanks recommendation 6.17) that there be a penalty under the SRC Act for a failure to provide suitable duties (s.40). A similar provision would add to the effectiveness of the equivalent obligation under the Seafarers Act (s.52).

Recommendation 6.3

Section 52 of the Seafarers Act should provide a penalty for failing to take all reasonable steps to provide an employee with suitable employment, or to assist the employee to find such employment.

- 6.48 Employers find it hard to provide suitable employment in the Seacare scheme, for the reasons of required level of fitness and capacity of injured seafarers previously discussed. Using supernumerary positions is excellent in principle. For it to become general practice, the Seacare Authority and AMSA would have to consider, in consultation with the industry and unions, how it could be achieved in light of Marine Order 9. In addition, there may also need to be some incentive for ship owners to create supernumerary positions and possibly a safeguard to limit new claims where an aggravation of an injury occurred while the injured employee was working in a supernumerary capacity.
- 6.49 Redeployment is another recognised RTW strategy. The Seacare scheme does not provide support for a return to work with a different employer. Job placement schemes, such as the WISE scheme in Victoria²⁴⁵ and the RISE scheme in South Australia,²⁴⁶ allow employers to register job vacancies with a network of rehabilitation providers, who then identify whether

²⁴⁴ Hanks review, recommendation 6.16.

²⁴⁵ See: <http://www.worksafe.vic.gov.au/return-to-work/worksafe-incentive-scheme-for-employers-wise>.

²⁴⁶ See: <http://www.workcover.com/health-provider/workplace-rehabilitation/rise-re-employment-incentive-scheme-for-employers>.

they have a client who would be suitable for a vacancy. A rehabilitation provider gives practical support to the employer who takes on an employee through the scheme and the scheme provides financial support to the employer.

- 6.50 The financial support provided by job placement schemes such as WISE includes an initial placement fee; a contribution towards wages for the first 52 weeks of employment; and some insurance protection in case the employee suffers another injury.
- 6.51 WorkCover Queensland also has a similar scheme. If an injured worker has a capacity for work, but no suitable duties are available, WorkCover will develop and oversee a Host Program with a host employer. WorkCover pays the injured workers' wages while they participate in a program that lasts between 3-6 weeks. There is no obligation to employ the injured worker at the end of the program and, if an injured worker is injured while participating in the program, WorkCover covers the cost of the claim and the injury is not registered against the host employer's policy.²⁴⁷
- 6.52 In his report, Mr Hanks recommended that the SRC Act provide for a scheme-wide job placement program, appropriate to the particular attributes of the Comcare scheme, including a preference for placement with another scheme employer before looking outside the scheme. Mr Hanks recommended that once developed, the specific details of the job placement scheme should be prescribed in regulations.²⁴⁸
- 6.53 Like the persons covered by the Comcare scheme, participants in the Seacare scheme differ from those in the South Australian and Victorian schemes, both in the number of employers and in the scheme's geographic spread. For that reason a job placement scheme for the Seacare scheme might need job placement incentives for employers who are outside the scheme. However, I consider that any arrangement of this type should encourage placement with another scheme employer, or, if that were not available, placement with another employer engaged in the industry, before looking to employment possibilities outside the scheme.
- 6.54 In addition to a job placement scheme, Mr Hanks also recommended that employers improve their injury management practices by encouraging workers to play an active role in their own rehabilitation and return to work by providing the employee with an initial opportunity to propose the duties that would make up *suitable employment*.
- 6.55 Given the nature of a seafarer's duties, seafarers may not be able to propose duties that would make up *suitable employment*. Even so, they should be encouraged to take an active role in their rehabilitation. Therefore, where a seafarer is unlikely to be medically able to return to seafaring duties, the employer should engage with the seafarer about alternative *suitable employment* options for which the employee would be fit.
- 6.56 The Seacare Authority has recognised problems in rehabilitation and RTW in the industry.²⁴⁹ It proposes, as part of its current Strategic Plan, to take a number of administrative actions to improve rehabilitation and RTW performance. These are directed to improving:
- a) injury management practices (by using guidance material and support);

²⁴⁷ See: <http://www.workcoverqld.com.au/rehab-and-claims/stay-at-work-return-to-work/how-to-return-to-work/host-placement>.

²⁴⁸ Hanks Review Report, op. cit., paragraph 6.184.

²⁴⁹ Seacare Authority, *2015 Strategic Plan, Issues paper*, 2012, p 18.

- b) decision making on claims (by ensuring compliance with legislative requirements, promotion of better decision making and promotion of alternative dispute resolution (ADR); and
- c) rehabilitation and return to work outcomes (by collaborating with health providers and experts and examining RTW options).²⁵⁰

6.57 While none of those approaches addresses structural issues or legislative obstacles and shortcomings, each would be likely to assist in better performance in the Seacare scheme.

6.58 Both Comcare and WorkSafe Victoria recommend employers use a voluntary RTW hierarchy when considering suitable duties for injured employees.²⁵¹ The hierarchy, which goes from top to bottom, would be useful for the Seacare scheme with some amendments.

Comcare & WorkSafe Victoria RTW hierarchy	Possible Seacare scheme RTW hierarchy
Same employer/same job	Same employer/same job
Same employer/similar job	Same employer/similar job
Same employer/different job	Same employer/different job
Different employer/same job	Same industry/same job
Different employer/similar job	Same industry/similar job
Different employer/different job	Same industry/different job
	Different employer/different job

Recommendation 6.4

- a) The Seacare Authority should examine the options for establishing a scheme-wide job placement program, appropriate to the particular attributes of the Seacare scheme, along the lines of that proposed for the Comcare scheme. Given funding pressures, the Authority should consult the industry and insurers about an industry run scheme in the first instance.
- b) If a statutory job placement scheme is to be established, it should allow sufficient time before commencing for lessons to be learned from the operation of the proposed Comcare scheme.
- c) The Seacare Authority should consider promoting a return to work hierarchy, and measuring outcomes against it, based on the Comcare and Victorian WorkCover models, with certain modifications for the maritime industry context (an example is given in Chapter Four).

Regulation of the Rehabilitation Process

²⁵⁰ Seacare Authority, *Seacare 2015 – a Five Year Strategic Plan*.

²⁵¹ The Victorian WorkCover Claims Manual, Chapter 8, Return to Work. Return to work – information for employers, Comcare.

- 6.59 Another area for improvement in the Seacare scheme is tighter regulation of the rehabilitation process. Apart from a reference to an *approved program provider* (with the same meaning as in the SRC Act), the Seafarers Act has no regulatory provisions for rehabilitation.
- 6.60 In its submission, P&O Maritime Services Pty Ltd suggested that return to work should have tighter time frames and stronger case management. This would *allow employers to make the best possible business decisions and allow employees to find more meaningful work or move on as compared to staying reliant on compensation payment for many years.*²⁵²

Effective claims management and dispute resolution

- 6.61 As stated above, two key factors contributing to good rehabilitation and early recovery of injured workers are:
- a) effective claims management; and
 - b) well-designed and properly targeted benefits and dispute resolution structure.
- 6.62 Non-medical factors, such as administrative delays and the barriers created by compensation and RTW systems, can contribute to *needless disability*.²⁵³ Effective claims administration lessens the risk of needless disability by ensuring that claims are dealt with promptly. That helps injured employees' rehabilitation and potentially reduces premiums.
- 6.63 In its 2004 report, the Productivity Commission cited the Royal Australian College of Physicians as having identified four factors as potentially delaying recovery:
- a) the initial response to claimants by insurers (for example, acting as though claimants are automatically assumed to be fraudulent);
 - b) the handling of case management by insurers (for example, not developing appropriate return to work programs nor monitoring these, not providing claimants with good information about the effects of long-term sick leave);
 - c) the handling of case management by treating doctors, including specialists (for example, not reviewing treatment by service providers and continuing treatment which is not helping, providing unnecessary treatment, not giving early referral to pain management programs, not addressing psychological problems such as depression);
 - d) the number and type of medical examinations required...the effect of these appears to be twofold: to entrench illness behaviours and to prejudice the claimant further against the insurance company.²⁵⁴
- 6.64 As discussed in Chapter Seven, the Seacare Authority is required²⁵⁵ to monitor the Act's operations, to promote high operational standards of claims management and effective

²⁵² P&O Maritime Services Pty Ltd submission, p.4.

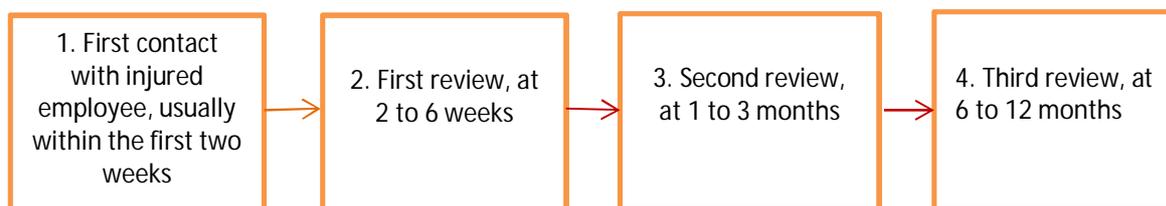
²⁵³ American College of Occupational and Environmental Medicine, *Preventing Needless Work Disability by Helping People Stay Employed*, 2006. Available at: <http://www.acoem.org/PreventingNeedlessWorkDisability.aspx>

²⁵⁴ Productivity Commission Report 2004, op. cit., p.197.

²⁵⁵ Seafarers Act, s.104.

rehabilitation procedures by employers and to publish material relating to these functions. In this respect, the Seacare Authority's *Best Practice Guide: Claims Management* (the Best Practice Guide) was published in 2010.²⁵⁶

- 6.65 The Best Practice Guide recommends employers develop a claims management policy stating, *effective claims management policies may lead to improved injury outcomes, a reduction in compensation claim payments and a potential reduction in insurance premiums.*
- 6.66 These should be seen as minimum claims management standards for the Seacare scheme. However, as discussed elsewhere in this report, the Seacare Authority has limited oversight of employer and insurer claims management practices and the scheme's poor return to work outcomes indicate that more work should be done in this area.
- 6.67 To help address similar issues, Mr Hanks' recommended an injury management plan,²⁵⁷ which I have recommended be adopted. Factors that lead to needless disability include administrative delays in medical treatment and specialty referral, a lack of transitional work, ineffective communication, and the barriers created by compensation and return to work systems, such as how many participants are involved in the rehabilitation process.²⁵⁸
- 6.68 The NSW, Tasmanian and the ACT schemes have recognised that vocational rehabilitation must be supported by an injury management plan that runs parallel to any rehabilitation plan. The injury management plan outlines all services required to return the injured employee to work, (such as medical treatment and rehabilitation goals), and includes the actions required by the employee, employer, treating doctor, rehabilitation provider and determining authority.²⁵⁹
- 6.69 Mr Hanks considered that the injury management plan should focus on avoiding needless disability. In his view, relevant factors include administrative delays in treatment and specialty referral, a lack of transitional work, ineffective communication, and the barriers created by compensation and RTW systems. Accordingly, Mr Hanks proposed that an injury management plan should operate for the entire period during which a seriously injured employee is incapacitated for work, with more plan components for longer term incapacitated employees.²⁶⁰
- 6.70 Mr Hanks also provided a framework for better managing claims, as set out below.²⁶¹



²⁵⁶ Available at:

http://www.seacare.gov.au/__data/assets/pdf_file/0015/70044/Seacare_Best_Practice_Guide_Claims_Management.pdf.

²⁵⁷ Hanks Review Report, op. cit., pp.69-72.

²⁵⁸ Ibid., p.69.

²⁵⁹ Safe Work Australia, CPM Report 14th ed., op. cit., Table 5.2b, at pp.109–112.

²⁶⁰ Hanks Report, op. cit., p.70.

²⁶¹ Ibid, p70.

- 6.71 To support stage 1, Mr Hanks recommended amending the SRC Act to require employers to forward claims received to the determining authority within three days of receiving the claim from the employee.²⁶² The nature of the Seacare scheme makes this recommendation problematic. Therefore, I do not propose that it be adopted in that form. Even so, to be effective, workers' compensation schemes should have time frames for claim lodgement with determining authorities.
- 6.72 Given the prevalence of deductibles (discussed elsewhere in this report) and the potential for claims to go unreported, I propose that a similar arrangement be established under the Seafarers Act and be enforced by the Seacare Authority by a claims management audit process.
- 6.73 An employer would be required to contact any seafarer who submits a claim for compensation within a prescribed period of time from when the claim is submitted. The employer should also advise the relevant insurer within a prescribed period of time from when the claim is submitted that it has been received, even if the claim would be under the deductible amount.
- 6.74 Stage 2 of this model and, to some extent stage 1, are supported by another proposed amendment (see Recommendation 6.1 above) explicitly providing for early intervention to be the primary form of rehabilitation.
- 6.75 Stages 3 and 4 of the model would be supported by mandatory reviews at 12 and 52 weeks. As Mr Hanks explains, the first review should occur 12 weeks after the date of injury or the date when the claim itself is accepted. It should be tailored to the individual circumstances of a claim and examine all elements of the claim [e.g., (a) the clinical pathway; (b) the injured employee's functional capacity; and (c) the provision by the employer of suitable duties]. The information gathered in the first review would ultimately be part of the injury management plan.
- 6.76 The second review should be conducted at 52 weeks after the date of injury. For claims where claim lodgement has been delayed for over 45 weeks after the date of injury, there should be no need to undertake the 12 week review; only the 52 week review would be required.
- 6.77 Continued adherence to an injury management plan could be used to maintain and improve the employability of an injured employee whose incapacity exceeded 52 weeks. Ongoing incapacity benefits could be linked to continued participation in a work connection program.
- 6.78 An injured employee who has received benefits for 52 weeks and who has some capacity to work could have an injury management plan that requires activities to be undertaken such as a specified number of job contacts to be made each week; a work experience activity; and regular meetings with the rehabilitation provider.
- 6.79 Given the long tail nature of the Seacare scheme, the difficulties associated with returning seafarers to work and the high premiums in the Seacare scheme, any legislative change to promote early return to work and good claims management is warranted. Accordingly, the Seafarers Act should be amended to provide for the development of an injury management

²⁶² Hanks Review Report, p.163, recommendation 9.2.

plan that is developed by the employer or the insurer for each injured employee who is incapacitated for 28 days or more (with either total or partial incapacity).²⁶³

- 6.80 The Seafarers Act should also require an insurer or the employer to conduct a review of each active claim at 12 and 52 weeks.
- 6.81 Claims that are managed ineffectively may result in what the Productivity Commission referred to as artificial disputes. Such disputes can extend the duration of claims for compensation, degrade relationships between employees and employers and result in higher claim costs.²⁶⁴
- 6.82 The Productivity Commission described a second category of disputes as genuine disputes, that is, the parties have shared all available information, but continue to disagree on the outcome and require mediation by a third party.²⁶⁵ Disputes in no-fault compensation schemes generally centre of questions of access to, and extent of, coverage.
- 6.83 The Seafarers Act has a three stage dispute resolution process:
- a) internal review (reconsideration undertaken by a Comcare officer or an industry panel);
 - b) external review of reviewable decisions by the AAT; and
 - c) judicial review of the AAT's decisions on questions of law by the Federal Court or the Federal Magistrates Court.
- 6.84 As there is no industry panel in place, Comcare currently conducts all reviews. In 2011-12, 41 determinations were reviewed on behalf of 24 employers. Comcare recommended varying or revoking the determinations in 16 cases.²⁶⁶
- 6.85 According to the CPM Report, in 2010-11, 26 per cent of claims made by seafarers resulted in an application to the AAT for review. This was a 44 per cent increase from the previous year, but was lower than the rate in 2006-07. In 2010-11, 72 applications were lodged with the AAT. That was much higher than in the previous year. Of the applications finalised in 2010-11, 63 per cent were finalised by consent of parties, with no matters proceeding to a hearing, compared to 86 per cent in the previous year.²⁶⁷
- 6.86 In 2011-12, 50 applications were lodged with the AAT. Of these, only one proceeded to hearing and the employer's decision was set aside. The majority of the remaining decisions were affirmed during conciliation.²⁶⁸
- 6.87 The ASA in its submission observed that there may be a number of reasons why the determination of an employer is disputed. The ASA considers that it may go to the entitlement to compensation as a threshold issue or to the total compensation that ought to be payable. Presently, the avenue for seafarers who dispute an employer's determination

²⁶³ Recommendation 6.11 of the Hanks Review Report supports the concept of an injury management plan.

²⁶⁴ Artificial disputes are defined as disputes generated by the handling of claims, including mistakes and misunderstandings. See: Productivity Commission Report, 2004, op. cit., p.366.

²⁶⁵ Ibid.

²⁶⁶ *Seacare Annual Report, 2011-12*, p.60.

²⁶⁷ Safe Work Australia, CPM Report, 14th Edition, op. cit., p.35.

²⁶⁸ *Seacare Annual Report 2011-12*, p.61.

and reconsideration of a claim is to challenge it in the AAT. The ASA cites the statistics as demonstrating that this process is not efficient or effective. One option is that, prior to a seafarer challenging the determination, the parties should be required to attend conciliation in a bid to resolve the dispute.

6.88 As the ASA pointed out, disputes in no fault compensation schemes, such as the Seacare scheme, centre on questions of access to, or the extent of coverage. In these circumstances, there is limited opportunity for using ADR processes.

6.89 The AAT advised in its submission²⁶⁹ that it aims to finalise applications within 12 months of lodgement. The Tribunal has set a target that it will finalise 75 per cent of workers' compensation applications within that timeframe.²⁷⁰

6.90 The AAT commented that the pace at which applications progress to finalisation is influenced by a range of factors. These include:

- a) the time the parties require to gather and lodge additional evidence;
- b) the need to wait for further reviewable decisions to be made on related matters where it is appropriate to deal with all matters together; and
- c) engagement in ADR processes.²⁷¹

6.91 In response to these issues, and taking into account other submissions, Mr Hanks made the following recommendations, which I support for inclusion in the Seafarers Act:

- a) payment of employee's costs at reconsideration stage (Hanks recommendation 9.5);
- b) all parties to disclose evidence at the AAT at least 28 days before a hearing (Hanks recommendation 9.12);
- c) AAT to hear matters not subject to reviewable decision, with consent of the parties (Hanks recommendation 9.13);
- d) reliance on Fair Work Commission determinations on reasonableness or otherwise of an employer's actions (Hanks recommendation 9.14);
- e) jurisdiction for Fair Work Commission to review certain reviewable decisions involving workplace issues and rehabilitation programs (Hanks recommendations 9.15 and 9.16).

6.92 The recommendations proposed by Mr Hanks are intended to speed up the review process. While I note the ASA's recommendation that all parties involved in parties be required to attend conciliation in a bid to resolve the dispute, that is addressed by the AAT's mandatory conciliation processes prior to proceeding to hearing.

6.93 Payment of costs associated with appeals to the AAT was also raised by the ASA and Allianz in their submissions to the Review. Allianz suggested that: *sections 91 and 92 (Costs of proceedings before AAT) are similar to those detailed in section 67 of the SRC Act in that the*

²⁶⁹ The AAT's submission identified similar issues to those it identified in its submission to the Hanks Review.

²⁷⁰ AAT submission, p.5.

²⁷¹ Ibid, p.6.

AAT can order costs against the employer for proceedings in the AAT whether or not the applicant is successful. This is an additional layer of claim expenses that an employer must bear, regardless of the outcome.

The application of these sections in the Seafarers legislation is contradictory to the State-based legislations. The Seafarers scheme is privately underwritten and should not aligned with government aided/self-funded Comcare scheme in this regard. It is proposed that under the Seafarers Act, the AAT be granted with the ability to order costs against an unsuccessful applicant, especially if the matter is considered to be frivolous or vexatious by the Tribunal.²⁷²

6.94 The ASA's submission was along the same lines:

The AAT effectively provides a claimant with a risk free opportunity to challenge a compensation decision. If a seafarer obtains a decision from the AAT which is more favourable than the determination under review he/she is entitled to costs. On the other hand, if the employer successfully defends the application there is no order as to costs with each party bearing their own costs.

An amendment to sections 91 and 92 of the Seafarers Act should be made to require a seafarer to make a contribution to the employer's costs (to be determined by the AAT) where the seafarer fails to obtain a decision from the AAT which is more favourable than the original determination, and also where a seafarer withdraws or discontinues an application immediately prior to the hearing of the claim.²⁷³

6.95 Allianz suggested that as the Seacare scheme is privately underwritten, it should not be aligned with the Comcare scheme. This is not without merit. At the same time, I note that the Comcare scheme includes many self-insurers whose circumstances are analogous to employers under the Seacare scheme.

6.96 As discussed above, workers' compensation disputes typically concern questions of access to, and extent of, coverage. Workers' compensation is designed to be beneficial. Amending the legislation to allow the AAT to award costs against an employee who has been unsuccessful in an application made in good faith is not appropriate.

6.97 The changes that I am recommending be made to the Seafarers Act in line with Mr Hanks' recommendations have the potential to reduce the number of appeals made to the AAT. The Seacare scheme should continue to be aligned with the SRC Act in relation to costs payable at the AAT stage. The position should be reviewed if there is evidence of abuse.

²⁷² Allianz submission, p.13.

²⁷³ ASA submission, p.10.

Recommendation 6.5

The Seafarers Act should be amended along the lines of the following recommendations made by Mr Hanks in his review of the SRC Act:

- a) payment of employee's costs at reconsideration stage (Hanks recommendation 9.5);
- b) all parties to disclose evidence at the AAT at least 28 days before a hearing (Hanks recommendation 9.12);
- c) the AAT to be able to hear matters not subject to reviewable decision, with consent of the parties (Hanks recommendation 9.13);
- d) reliance on Fair Work Commission determinations on reasonableness or otherwise of an employer's actions (Hanks recommendation 9.14);
- e) jurisdiction for Fair Work Commission to review certain reviewable decisions involving workplace issues and rehabilitation programs (Hanks recommendations 9.15 and 9.16).

Redemptions

- 6.98 Some stakeholders pointed to the long tail nature of the scheme as a major cause of the high premiums. As discussed above, the nature of seafaring work makes it more difficult to rehabilitate injured seafarers and return them to work on suitable duties. Seafarers are required to be fully fit before they are permitted to work at sea.²⁷⁴
- 6.99 The limited availability of redemptions as a means of settling claims, especially where a RTW is not possible, was said to be a major contributor to the poor performance of the scheme. Injured seafarers may continue to receive incapacity and other payments until retirement age, even though there is no prospect of them ever returning to work as a seafarer.
- 6.100 AMMA identified factors that it believes have contributed to high employer premiums and suggested that far greater flexibility is required for redemptions as an option to serve the best interests of both employee and employer.²⁷⁵
- 6.101 The ASA notes that P&I Clubs have withdrawn from the Seacare insurance market primarily because of an inability to finalise claims under the Seafarers Act. It submitted that: *allowing for redemption of claims and clearly identifying when the compensation provisions are enacted (for example, refining the definition of injury) will assist employers and insurers to estimate with greater certainty the extent of their liability. This should in turn result in premium rates that are truly reflective of that risk and will encourage other insurers to enter the insurance market for provision of policies under the Seafarers Act.*²⁷⁶
- 6.102 The MUA and AMOU noted that employers would benefit from a significant reduction in costs if redemptions were available, since the uncertainties associated with continuing weekly benefit payments, medical expenses and rehabilitation costs could potentially be

²⁷⁴ Marine Order 9.

²⁷⁵ AMMA submission, p.28.

²⁷⁶ ASA submission, p.21.

terminated.²⁷⁷ They also noted that there was an emerging practice in the industry whereby redemptions were occurring contrary to legislative requirements.²⁷⁸

- 6.103 The AIMPE believes that the Marine Orders make it difficult to achieve effective RTW for some categories of claims and that in such cases a redemption of benefits was sometimes considered by employers in the industry to resolve such claims. It however notes that the current redemption provisions are quite limiting and recommends that the maximum weekly benefit amount that can be the subject of redemption (currently \$105.42) be raised. It notes that as the SRC Act contains similar provisions, it might be appropriate to do this in a manner consistent with both Acts.²⁷⁹
- 6.104 Redemption of compensation involves the payment of a lump sum amount to an employee in lieu of an employee's ongoing weekly incapacity payments. The Seafarers Act limits redemption to compensation payments for incapacity for injured employees whose incapacity payments are equal to or less than the specified indexed rate.²⁸⁰
- 6.105 Where there is a liability to make weekly incapacity payments to an employee, and (a) an employee's weekly payments are equal to or less than the specified rate; and (b) the employee's degree of incapacity is unlikely to change, the employer must make a determination that any liability to make further payments to the employee be redeemed by the payment to the employee of a lump sum [Seafarers Act, s.44(1)].
- 6.106 The quantum of that lump sum is calculated by a formula specified in s.44(2) and does not include compensation for the cost of medical expenses that is payable under s.28.
- 6.107 Redemption does not extinguish an employer's liability to resume incapacity payments to the employee if the injury later incapacitates the employee to the extent that the employee cannot engage in suitable employment, and the injury is likely to last indefinitely: s.45(1).
- 6.108 The maximum weekly rate of incapacity payments that can be redeemed under s.44 of the Seafarers Act means that very few claims qualify for redemption. The availability of redemptions was identified by many stakeholders as a way of reducing premiums. The long tail nature of the scheme, coupled with the difficulties with returning injured seafarers back to work when they are not fully recovered, adds to premiums.
- 6.109 Redemptions must be considered in the context of ensuring that the rights and interests of injured seafarers are well looked after. Redemption should be only considered where all rehabilitation and RTW attempts have failed and the process must include clear requirements to ensure injured seafarers' rights and future entitlements are protected.
- 6.110 The MUA and the AMOU stated that: *typically in certain circumstances employers are advising seafarers not to lodge a workers' compensation claim under the Seafarers Act, assuring them that they will be looked after. Following the elapse of a variable period of time, the employer is apparently then offering the seafarer a lump sum on condition of the*

²⁷⁷ MUA and AMOU submission, p.22.

²⁷⁸ Ibid.

²⁷⁹ AIMPE submission, p.12.

²⁸⁰ As at 1 July 2012, pursuant to s 44(1)(b), See:

http://www.seacare.gov.au/__data/assets/pdf_file/0017/110456/Seacare_notice_05-2012.pdf.

*signing of a Deed of Release or similar instrument which purports to bind the seafarer to make no further compensation claims against the employer.*²⁸¹

- 6.111 The Hanks Review examined the issue of redemptions in the Comcare scheme. Mr Hanks recommended amending the SRC Act to allow an employee to redeem her or his entitlement to compensation payments on a voluntary basis. He proposed that voluntary redemption payments would be in addition to the current involuntary redemption payments currently available in the Comcare scheme.²⁸² Voluntary redemptions would apply to:
- a) incapacity payments under s.19 of the SRC Act (or ss.20, 21 or 21A if retained and applicable);
 - b) compensation for the cost of medical treatment under s.16 of the SRC Act (including travel costs); and
 - c) compensation for attendant care services and household services under s.29 of the SRC Act.
- 6.112 Voluntary redemptions would not apply to, and would therefore not extinguish liability with respect to:
- a) compensation for dependants of an employee whose injury results in death, and for funeral expenses, under ss.17 and 18 of the SRC Act;
 - b) compensation for permanent impairment and non-economic loss under ss.24 and 27 of the SRC Act; and
 - c) the obligations of the relevant authority and the employer relating to rehabilitation and the provision of suitable employment under Part III Division 3 of the SRC Act.
- 6.113 Voluntary redemptions would only be possible if the following pre-conditions were met:
- a) 2 years had elapsed since the employee's first claim for weekly incapacity payments was accepted;
 - b) the employee's entitlement to compensation for permanent impairment and non-economic loss under ss.24 and 27 of the SRC Act had been determined;
 - c) the employee had been assessed as:
 - i. having exhausted all rehabilitation options—that is, the employee has demonstrated a sustained return to work (at whatever level) with limited capacity for improvement; or
 - ii. unfit to return to suitable employment with limited capacity for improvement; and
 - d) the employee had an existing and continuing entitlement to incapacity payments (whether the employee's incapacity is partial or total).

²⁸¹ MUA and AMOU submission, p.22.

²⁸² Section 30 of the SRC Act sets out the redemption provisions in the SRC Act for current employees. Section 44 of the Seafarers Act is modelled on redemption provisions in s.30 of the SRC Act.

- 6.114 In order to receive a voluntary redemption, the employee would have to request the determining authority to make a redemption offer and then accept that offer. At the time of accepting the offer, the employee would have to advise the determining authority in writing that he or she had received and understood independent legal and financial advice on the impact receiving a redemption would have on the employee's legal and financial position and sign a redemption agreement.
- 6.115 The voluntary redemption amount offered by the determining authority would be based on an estimate of the employee's future incapacity payments, medical treatment and attendant care and household services. The amount offered would not be a determination under the SRC Act and would therefore not be reviewable.
- 6.116 Under the Hanks recommendations, if the employee accepted a voluntary redemption no further compensation would be payable to the employee for the compensable injury.
- 6.117 As to involuntary redemptions, as currently provided under the SRC Act, Mr Hanks recommended that the provisions be retained and the threshold increased to \$150 per week, indexed by reference to the CPI.
- 6.118 As various stakeholders suggested, the ability to redeem and close a claim may result in considerable financial gains and a subsequent reductions in premiums. The voluntary redemption criteria outlined in the Hanks Review represents best practice in terms of protecting the interests of employees and balancing the needs of employees with the needs of the scheme.
- 6.119 A further requirement would be appropriate for the Seacare scheme. I propose that the Seafarers Act should be amended to reflect any update to the s.30 redemption provisions in the SRC Act, but with provision for oversight by the Seacare Authority.

Recommendation 6.6

For reasons of fairness and to maintain legislative consistency with the SRC Act, any update to the s.30 redemption provisions in the SRC Act should be reflected in the s.44 redemption provisions of the Seafarers Act, subject to a requirement that a voluntary redemption must be approved by the Seacare Authority.

Deductibles

- 6.120 Section 93(2) of the Seafarers Act provides: *A policy of insurance or indemnity, or the terms of membership of a protection and indemnity association or of an employers' mutual indemnity association, may require that an employer be liable in respect of an amount specified in the policy or terms of membership ...*
- 6.121 The provision operates so that employers may carry a deductible amount per claim on their insurance arrangements. As discussed above, the excess requires that employers pay for and manage all claims under the excess. Any claims under the excess are not referred to the insurer and therefore do not become part of the premium calculation. A high deductible is therefore likely to reduce an employer's premium and skew reporting data. Some

employers carry much larger deductibles than are permitted as excesses under other Australian workers' compensation legislation.²⁸³

- 6.122 The Act does not limit the deductible arrangement or amounts that employers can have. The 2005 Ernst & Young Report commented:²⁸⁴

Large policies typically have excesses of \$50,000 or more. One policy has an excess of \$250,000. All the excesses apply to each and every claim. In comparison, most State and Territory schemes on average have excesses of about one week's (five working days') wages.

The high excesses affect:

- *financial performance of the scheme*
- *best practice processes for claims management*
- *the potential risk to the Safety Net Fund from large under-excess claims if an employer fails.*

- 6.123 The 2005 Ernst and Young report stated that excesses ranged, at that time, from \$5,000 to over \$100,000. The majority of policies were said to have excesses in the \$10,000 to \$25,000 range. Larger policies, which comprised the bulk of the scheme, had deductibles in the range of \$75,000. One deductible at the time of the 2005 report was \$250,000. The Seacare Authority has advised me that there are currently nine policies with deductibles in excess of \$100,000. During consultation, I was advised that at least one deductible is about \$750,000. Such an excess might mean that an employer may rarely, if ever, need to make a claim on the insurer and poses a significant risk to business operations if a claim, or multiple claims arising out of a single incident, were made requiring a large payment under the deductible.

- 6.124 The 2004 Productivity Commission report observed that having employer excesses (deductibles) in premium arrangements could be an advantage as it created an incentive for employers to deal directly with small claims. This provided a more timely cost feedback for employers on their workplace safety as well as assisting them to build a closer relationship with their workers.²⁸⁵

- 6.125 The Productivity Commission also noted possible disadvantages:²⁸⁶

- a) cost-shifting might result if an employer tried to avoid paying an excess, noting that excesses on medical costs were particularly open to cost-shifting, given ease of access to the Medicare system;

²⁸³ Excesses under other Commonwealth, State and Territory workers' compensation laws range from no excess permitted (Comcare and Western Australia) up to first four weekly payments (Tasmania) and first two weeks of the period of incapacity (South Australia) [Source: *Comparison of Workers' compensation Arrangements in Australia and New Zealand*, op. cit.]

²⁸⁴ Ernst & Young 2005, p.38.

²⁸⁵ Productivity Commission Report, 2004, op. cit., p.302.

²⁸⁶ Ibid, pp.302-303.

- b) there might be an incentive for employers not to report small claims within their excess, as this could convey information about their safety to their insurer, with possible adverse ramifications for their premiums;
- c) employers with little claim administration experience may provide poor service to workers.

6.126 To address some of these disadvantages, the Productivity Commission recommended various measures, including:

- a) restricting excesses;
- b) imposing penalties on employers who failed to report claims; and
- c) ensuring appropriate claims management systems were applied for excess claims.

6.127 WorkSafe Victoria is currently investigating ways of improving the premium system for its jurisdiction. In October 2012, WorkSafe Victoria released a discussion paper noting:²⁸⁷

All employers currently have their rateable remuneration reduced by \$15,500 each year. This feature was introduced in 1993 as a temporary measure to ease the transition for employers from the Bonus & Penalty Pricing system to the Experience Rated Pricing system. This remuneration deductible is uncommon amongst schemes and is not seen as being best practice as it creates inequity and distorts premium signals to small employers.

6.128 The paper goes on to state: *The deductible creates no financial incentives for improved health and safety outcomes and it does not provide appropriate recognition to employers in better performing industries.*²⁸⁸

6.129 The ASA addressed issues surrounding deductibles in its submission stating:²⁸⁹

Due to the size of the Scheme and elements of its structure, only a small number of insurers currently provide insurance coverage for the Scheme in a meaningful sense...

This fact, combined presumably with the high risk nature of the industry, results in costs to employers in terms of premiums that are disproportionately high comparative to other schemes in other Australian jurisdictions. These statistics while indicative, also fail to take into account the high deductibles that employers carry on their policies to try and reduce the amount of the premiums. The risk that is absorbed by employers is considerably higher than employers in other industries, however, employers choose to accept this risk and the reduced premiums in exchange for a high deductible is seen as an acceptable operating model. This in turn can affect the claims management process significantly as an insurer will only become involved once the deductible has been expended.

6.130 In contrast, Allianz considered that: *insurers offer policy holders under Seacare efficient and effective insurance coverages afforded because of their national capabilities...The cost of premiums is a function of the cost of claims.*

²⁸⁷ *Improving WorkSafe Victoria's Injury Insurance Premium System: Discussion Paper*, October 2012, WorkSafe Victoria, p.5.

²⁸⁸ *Ibid*, p 6.

²⁸⁹ ASA submission, pp. 20-21.

As noted in the discussion paper, there is currently a form of de facto self-insurance in place for some employers who have a high claims excess in place. The use of high claims excesses has been a method adopted by a number of employers for many years to amongst other things reduce premium costs, although the cost of the workplace accident is still borne [sic] by the employer.

One potential issue with carrying high excesses, where claims matters are managed internally by an employer, is the availability of suitably qualified staff to effectively manage all elements of a workers claim in accordance with legislation and regulations.

If an employer wishes to carry a high level of self-insurance then it should be permissible but within a framework of a regulated self-insurance structure.²⁹⁰

- 6.131 The MUA and AMOU recommended that the Seafarers Act should: *include new provisions which outlaw the current practice whereby employers negotiate high excesses as a means to reduce premium costs.*²⁹¹
- 6.132 The current arrangements where employers can choose the level of deductible that they are willing to carry in an attempt to reduce their workers' compensation premiums is unsatisfactory. All other schemes have legislative controls over the level of deductibles (or employer excesses) or, in the case of the Comcare scheme, no employer deductibles.
- 6.133 The Tasmanian *Workers Rehabilitation and Compensation Act 1988* (the Tasmanian WRC Act) provides an example of legislative control over employer deductibles. Section 97 of the Tasmanian WRC Act provides:
- (1A) *Subject to subsection (1C), an employer is not to insure against liability arising from claims for compensation under this Act for weekly payments in respect of the first weekly payment payable under section 69(1) and the first \$200 of any other benefits payable under this Act in respect of an injury suffered by a worker.*
- (1B) *For the purposes of subsection (1A), an employer may increase up to a maximum of 4 the number of weekly payments in respect of which the employer is not to insure against liability arising from claims for compensation under this Act.*
- 6.134 The arrangements under the Seafarers Act are tantamount to employers self-insuring their liabilities, without the usual regulatory safeguards. All other workers' compensation schemes only permit self-insurance subject to employers meeting stringent prudential and other regulatory requirements. It is not only the scheme which faces significant risks under the current arrangements, but the employees whose claims for compensation are potentially not being adequately managed.
- 6.135 Any attempt to limit immediately the level of deductibles employers can carry under their premium policies might initially result in significant premium increases across the scheme as many employers may not be adequately insured. While improving the regulatory controls for deductibles is highly desirable, a necessary immediate step is to collect more accurate data on current arrangements. That would allow evidence-based options to be developed and analysed before a final decision is made.

²⁹⁰ Allianz submission, p.16.

²⁹¹ MUA and AMOU submission, p.23.

- 6.136 The Seacare Authority should have the power to improve the ongoing management of current arrangements permitting employers to have deductibles on their premiums. As a minimum, the Authority should be able to collect more information and supporting data from employers and their insurers about their insurance arrangements and the deductibles for each policy.
- 6.137 In this regard, under s.95 of the Seafarers Act, the Authority may require an employer to provide evidence of a policy of insurance or membership of a protection and indemnity association or an employers' mutual indemnity association. It does not specifically provide for the Authority to request the details of the policy or indemnity. Sections 105 and 106 provide for requests by the Authority for documents and information *relevant to the compilation of statistics for injury prevention purposes*.
- 6.138 Longer term, the Seacare Authority should be able to regulate and monitor employer deductibles to ensure that employers have sufficient financial backing to support the levels of deductibles under their policies.
- 6.139 Steps should be taken forthwith to collect data that provide a better understanding of this issue. The Seacare Authority should be empowered to collect information from employers and insurers about their premium arrangements, including the level of deductibles and the employer's experience of compensating injured workers with those excesses. Employers could provide this information when they provide the information required under s.94(1). Regulatory supervision of insurers is dealt with later in this chapter.
- 6.140 With these additional data, the Seacare Authority would be better able to identify the actual costs of insurance and the levels of risk to the scheme, as well as to develop processes for supervising premium deductibles. The Seafarers Act should be amended to give the Seacare Authority such a supervisory role, including the power to determine whether a proposed deductible over a prescribed threshold should be permitted (e.g., no more than four weekly payments of compensation to the injured seafarer).
- 6.141 These arrangements should be seen as a precursor to moving to a more conventional system of suitably regulated self-insurance. That is discussed below.

Recommendation 6.7

Part 7 of the Seafarers Act (*Compulsory insurance and the Fund*) should be amended:

- a) to empower the Seacare Authority:
 - i. to request information from employers and their insurers on the deductible amounts under their policies;
 - ii. to issue guidelines governing the arrangements and amount of deductibles under employer insurance policies;
 - iii. to approve any proposed deductibles that exceed a prescribed amount, including by imposing conditions on the management of claims that are made within the deductible amount;
- b) to amend s.93(2) so that a policy of insurance or indemnity or terms of membership of a P&I club or employers' mutual indemnity association that provides for an employer to be liable for a specified amount under the policy, etc., must not be inconsistent with guidelines issued by the Seacare Authority under Part 7.

Recommendation 6.8

Section 95 of the Seafarers Act should be amended to empower the Seacare Authority to request copies of employer policies of insurance or indemnity and related documents, such as evidence of currency and any variations to a policy.

Self-insurance

- 6.142 As discussed above, the current arrangements with deductibles have introduced an element of self-insurance into the scheme, but without appropriate regulation.
- 6.143 Under self-insurance, employers are responsible for handling and paying for all their employees' claims for work-related fatality, injury and illness, rather than paying premiums to insurers to take on those responsibilities.²⁹²
- 6.144 In all other Australian schemes where self-insurance is permitted, effective regulatory controls exist to ensure that injured workers' rights and benefits are protected and that self-insurers have the appropriate financial arrangements in place to meet their outstanding liabilities. There are also other prudential and governance requirements placed on self-insurers.
- 6.145 Several stakeholders expressed a view on self-insuring under the Seacare scheme, many in the context of employers taking out high deductibles. The ASA considered that the carrying of high deductibles by employers to reduce their premiums was a form of largely unregulated self-insurance. The ASA submitted that self-insurance should be available to

²⁹² Productivity Commission Report 2004, op. cit., p.345.

those employers who were able to satisfy the Seacare Authority of their financial security to meet their potential liabilities under the Scheme.²⁹³

- 6.146 The MUA and the AMOU proposed that the Seafarers Act should include new provisions to outlaw the practice of employers negotiating high excesses to reduce premium costs, and instead provide for a regulated system of self-insurance, similar to that existing in the SRC Act.²⁹⁴
- 6.147 By contrast, Charles Taylor & Co Ltd stated that self-insurance should not be an option under the Seacare scheme without extremely secure financial security being provided by the employer. Limitations should be placed on employers operating with high excesses, noting that seafarers would be better protected if excesses were kept at modest levels.²⁹⁵
- 6.148 P&O Maritime Services Pty Ltd felt that self-insurance should only be available under the scheme if an employer had adequate resources and an in-depth knowledge of the scheme.²⁹⁶
- 6.149 Allianz Australia submitted that self-insurance should be permitted in the Seacare scheme (as is the case in most other schemes), but subject to strict criteria being met. Allianz suggested the following possible criteria:²⁹⁷
- a) an employer's financial strength and viability;
 - b) the size of workforce (self-insurance is not feasible for small employers);
 - c) demonstrating satisfactory occupational and health safety performance;
 - d) demonstrating adequate resources to manage claims;
 - e) appropriate workplace rehabilitation policy and procedures; and
 - f) acceptable reinsurance cover to provide protection for large losses over a certain limit.
- 6.150 The practice of employers taking out high deductibles and effectively self-insuring without regulation poses an uncontrolled risk to the scheme as a whole. In light of the issues with deductibles and given the expressions of support for self-insuring under the Seacare scheme, consideration should be given to a system of self-insurance under the Seafarers Act.
- 6.151 Part VIII of the SRC Act provides a model that could be considered (there are some recommendations for changes to that Part in the Hanks review report). This is a well-established system, with suitable regulatory controls. Moreover, under that scheme Comcare actively supports the Safety, Rehabilitation and Compensation Commission (SRCC)

²⁹³ ASA submission, p 21.

²⁹⁴ MUA and AMOU submission, p 23. The unions have also proposed a variation to the usual model of self-insurance to encourage the return of P&I clubs. see earlier).

²⁹⁵ Charles Taylor & Co Ltd submission, p 1.

²⁹⁶ P&O Maritime submission, p.4.

²⁹⁷ Allianz submission, p 16.

under the SRC Act in regulating self-insurer arrangements and manage all subsequent aspects of the licensing arrangements, including reporting to the SRCC.²⁹⁸

- 6.152 To facilitate this, I propose that DEEWR, as the policy department for the Seafarers Act, work with the Seacare Authority to develop self-insurance options and to assess their potential impact on the scheme and RRTW. They should be discussed with the industry and unions, with a view to possible introduction by 2015. Both the framework and the legislation should be circulated within the Seacare jurisdiction for comment and feedback prior to being adopted.
- 6.153 If self-insurance is introduced, the Seacare Authority should have overall regulatory responsibility for the operation of the arrangements.

Recommendation 6.9

- a) DEEWR, as the policy department for the Seafarers Act, should work with the Seacare Authority to develop self-insurance options and to assess their potential impact on the scheme and rehabilitation and return to work.
- b) The options, which should be the subject of consultation with the scheme participants, industry bodies, insurers and unions, should aim for possible introduction of self-insurance provisions by 2015.
- c) If self-insurance becomes available under the Seacare scheme, the Seacare Authority should be the responsible overseeing body.

Regulatory oversight of insurers

- 6.154 Under s.93(1)(a) of the Seafarers Act, an employer must have a policy of insurance or indemnity from an authorised insurer. An authorised insurer is: *a general insurer or Lloyd's underwriter under the Insurance Act 1973 or an insurer that carries on State insurance (whether or not the State insurance extends beyond the limits of the State concerned)*.²⁹⁹
- 6.155 Insurers must comply with all necessary prudential and other regulatory requirements under the *Insurance Act 1973* (Cwth). Accordingly, the Seacare Authority does not need to exercise any regulatory controls over insurers in respect of prudential and other regulatory requirements under that Act.³⁰⁰ The Authority should, however, have some regulatory oversight of insurers' rehabilitation and claims management performance and processes.
- 6.156 The 2004 Productivity Commission report made a strong case for monitoring premium systems, both private and public. It noted that in privately underwritten schemes, a lack of an independent regulatory monitoring regime could lead to insurers charging premiums not based on factors relating to risks.³⁰¹

²⁹⁸ Details of the self-insurance regulatory framework and licence conditions and performance standards are available at <http://www.comcare.gov.au/>.

²⁹⁹ Seafarers Act, s.3(1).

³⁰⁰ This was acknowledged by the Productivity Commission in its 2004 report (op. cit.) at p.333.

³⁰¹ Productivity Commission Report, 2004, pp.305-306.

- 6.157 Currently the Seacare Authority does not regulate the activities of insurers operating in the scheme. Under the Seafarers Act, the Authority is empowered under s.106 to obtain documents or information from employers that are relevant to the compilation of statistics for injury prevention purposes. No equivalent provision relates to insurers.
- 6.158 The absence of any regulatory oversight or monitoring system places the system at some risk, especially in an environment with high employer deductibles. In their 2005 Report, Ernst & Young recommended that insurers should be required to provide individual claims and policy data to the Seacare Authority regularly, to facilitate monitoring of scheme performance.³⁰²
- 6.159 The lack of scheme transparency impedes performance monitoring and policy decision-making. Moreover, without relevant valid data, actuaries cannot make meaningful projections, and the insurance costs for operators receive inadequate scrutiny.
- 6.160 The Seacare Authority is not required to approve insurers who are qualified under the Seafarers Act to issue policies to employers in the jurisdiction. However, any P&I Club or employers' mutual indemnity association wishing to provide insurance cover must be approved in writing by the Seacare Authority.³⁰³ The Seafarers Act is silent on whether or not additional obligations can be placed on a P&I Club or an employers' mutual indemnity association as part of the approval process. Even if this were the case, placing additional obligations on P&I Clubs or employers' mutual indemnity associations might only lead to further inconsistencies in the scheme.
- 6.161 Under the privately underwritten Tasmanian workers' compensation scheme, insurers are licensed. Licence conditions include requirements for the provision of various types of information and documents (such as relevant financial information), as well as obligations about premium setting, claims management, injury management programs and dispute handling.³⁰⁴
- 6.162 The Seacare scheme need not provide for licensing of insurers, but consideration should be given to exercising greater regulatory control over the management of claims and related matters. A first step is to gain better information about performance to identify whether any additional regulation is required. Effective monitoring and regulation of claims performance is not achievable without valid, relevant data. Accordingly, the provision of claims data and injury management information by insurers would be an important element in improving the Seacare Authority's regulation of the scheme.
- 6.163 I have made recommendations on the provision of data in Chapter Seven. They complement the following recommendation.

³⁰² Ernst & Young review, 2005, p.6.

³⁰³ Seafarers Act, s.93.

³⁰⁴ Division 2, Part IX of the *Workers Rehabilitation and Compensation Act 1988* (Tas) provides for licensing insurers who wish to insure employers against liability to their workers under the Act. Licence conditions are available at:
http://www.workcover.tas.gov.au/__data/assets/pdf_file/0009/164619/Licence_Conditions_Version_3_January_2011.pdf.

Recommendation 6.10

- a) The Seafarers Act should be amended to empower the Seacare Authority to issue guidelines to authorised insurers, protection and indemnity associations or employers' mutual indemnity associations.
- b) The guidelines should set minimum performance standards on (a) claims management and rehabilitation and return to work and (b) the collection and reporting of claims data.
- c) The Seafarers Act should require the provision to the Seacare Authority, upon request or at specified periods, of information about performance measured against those standards.
- d) If there is a significant performance deficiency, the Seacare Authority should advise the Minister on options for regulatory requirements that secure compliance with those standards.

P&I Clubs

- 6.164 Under s.93 of the Seafarers Act, an employer may meet the statutory workers compensation obligations by being a member of a P&I club or an employers' mutual indemnity association.
- 6.165 For some years, no P&I Club has provided workers' compensation insurance coverage to employers under the Seacare scheme. Some stakeholders suggested that P&I Clubs withdrew from the scheme in its current form owing to its long tail nature and the inability to settle or fully resolve claims.³⁰⁵ An issue is whether the return of P&I Clubs (if there were changes to the scheme benefits arrangements) would be a decisive factor in achieving and maintaining reduced premiums. This seems debatable as it would be difficult to draw distinction between the changes in the scheme's design and operation that would result in a lower cost scheme and the identity of the insurers.
- 6.166 Charles Taylor & Co Ltd considered that, because P&I Clubs operate on a not-for-profit basis for the benefit of the shipping industry, they provide the most effective, sustainable and cost effective way for shipowners to obtain liability insurance. However, P&I Clubs do not operate in the current Seacare scheme because of the inability to settle claims by way of a capital sum or cash redemption. Charles Taylor & Co Ltd explained the reasoning behind this as follows:³⁰⁶

P&I Clubs are mutuals in two senses. First, they are owned by the insured members so that the members have a proprietary interest in a club's ultimate financial results. Second, premiums are said to be mutual as they are not fixed, but are variable depending on the results of a policy year, so members can be asked to contribute additional premiums or supplementary calls on an unlimited basis to make good a policy year's financial results. A year is normally kept 'open' for premium-calling purposes for three years, following which it is 'closed', and after which any deterioration on the year has to be made good from reserves or from premiums levied on future years' members.

Clubs are therefore member-year based, so that, in principle, the members of a particular year are responsible for the funding required for that year. Although clubs' members often

³⁰⁵ See ASA submission, p.20.

³⁰⁶ Charles Taylor & Co. submission, p.2.

remain in the club for many years, clubs' memberships develop to some extent from year to year and clubs allocate income and expenditure to individual policy years. While this principle is significantly modified by the need to maintain solvency and prudential reserves, and by the desire to smooth results from one year to the next, and, as stated above, by the potential risk of making good closed year shortfalls, in principle members of a club do not expect significantly to assume liabilities emanating from past years.

So, claims which by their nature cannot be capitalised early on in their life, and which remain adjustable and payable for many years, are unattractive for P&I clubs to assume, as current and potential members will shy away from assuming financial responsibility for past unfunded and open-ended liabilities.

- 6.167 According to Charles Taylor & Co Ltd, one way to encourage P&I Clubs to operate in the scheme would be to establish a specialist mutual risk insurance association (i.e., a P&I type vehicle) dedicated to the Seacare risk.³⁰⁷
- 6.168 The MUA and the AMOU proposed that the Seafarers Act should be re-written in order to facilitate a return of P&I Clubs into the scheme. They suggest two options:³⁰⁸
- a) providing a form of self-insurance to enable an employer to self-insure for all liabilities that occur at the back end of the claim process or life (that is, the reverse of the current practice whereby employers secure large excesses, essentially guaranteeing payment of all the front end costs of a claim). In other words, the P&I Club would insure all the expected liabilities in each P&I Club cycle (usually annual and which are quantifiable), while the employer commits to self-funding (under a regulated self-insurance model – see later) all obligations not covered by the P&I Club policy, i.e., to self-insure the back end of claim liabilities; or
 - b) allowing redemptions, with appropriate safeguards.
- 6.169 Even if P&I Clubs were prepared to re-enter the scheme, there are questions about their regulation. They are not regulated by the Australian Prudential Regulation Authority (APRA). The 2005 Ernst & Young report observed that this created a risk to the Australian Government and to the community.³⁰⁹ That report proposed requiring all insurers including P&I Clubs to be licensed by APRA.³¹⁰
- 6.170 There does not appear to be any need to facilitate the re-entry of P&I clubs as insurers into the Seacare scheme through specific legislative change or regulation. Their re-entry will be a commercial decision for them in light of any changes made to the Seafarers Act, whether the changes resulted from decisions on my recommendations or otherwise.

Recommendation 6.11

If P&I clubs indicate that they propose to resume providing services to employers for scheme purposes, further consideration should be given to the prudential standards and accountability that should apply.

³⁰⁷ Ibid, pages 1-2.

³⁰⁸ MUA and AMOU submission, pp.21-22.

³⁰⁹ Ernst & Young Report 2005, op. cit., p.37.

³¹⁰ Ibid., p.46.

Chapter Seven – Governance

Term of Reference 4

The review will inquire and report on the governance arrangements for the Seacare scheme.

Chapter Seven considers the governance arrangements of the Seacare scheme. I identify a range of matters that I consider to be central to understanding how the scheme is governed, and then explore in more detail some of the governance elements outlined in Chapter One. These include the roles and responsibilities of the stakeholders who administer and regulate the scheme and consideration of the measurement and effectiveness of their performance. Some of the successes of the scheme are identified, but gaps are apparent in the scheme's resources (including the Safety Net Fund), its capacity for reporting and data management, and in the coordination of Government actions in a co-regulatory environment. I propose action to address them and a mechanism to strengthen accountability and performance through a statement of ministerial expectations of the Seacare Authority. I conclude the chapter and the report with a discussion of and recommendations for a more coordinated, whole-of-government approach to managing and reviewing strategic planning for work safety and compensation in the maritime industry and I make recommendations about future reviews of the scheme.

Governance

- 7.1 The nature, scope, structure, effectiveness and efficiency of governance are integral factors in the Seacare scheme's performance. In short, if there are shortcomings in the scheme's governance, its objectives will not be fully achieved.
- 7.2 Many definitions of governance exist and they should be used in their appropriate contexts.³¹¹ For the purposes of this Term of Reference, a useful definition of governance in the public sector context is ...the set of responsibilities and practices, policies and procedures, exercised by an agency's executive to provide strategic direction, ensure objectives are achieved, manage risks and use resources responsibly and with accountability.³¹²
- 7.3 The Australian National Audit Office (ANAO) considers that corporate governance generally refers to the processes by which organisations are directed, controlled and held to account. The term encompasses authority, accountability, stewardship, leadership, direction, and control exercised in the organisation. The ANAO considers that key elements of corporate governance include:³¹³
- a) transparent corporate structures and operations;
 - b) implementing effective risk management and internal control systems;

³¹¹ Uhrig, J, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, June 2003, noted that there is no universally accepted definition of corporate governance, or agreement on the structures and practices that are required to achieve good governance (p.2).

³¹² Edwards M et al: *Public sector governance in Australia*, ANU E press, 2012, p.17.

³¹³ ANAO *Corporate Governance in Commonwealth Authorities and Companies – Principles and Better Practices* Discussion Paper 1997.

- c) the accountability of the relevant board to stakeholders through, for example, clear and timely disclosure; and
 - d) social responsibility.
- 7.4 To analyse the quality, efficiency and effectiveness of the scheme's governance, the following elements are considered:
- a) functions, powers and inter-relationship of the key agencies within the scheme;
 - b) resources;
 - c) accountability; and
 - d) strategic planning.

Previous reviews

- 7.5 The 2003 Uhrig review³¹⁴ identified key elements for the governance of public and private sector entities:
- a) those in control of an entity must be clear about what it is to achieve and communicate that effectively to management - this involves establishing a clear sense of purpose and developing clear performance expectations;
 - b) the entity must be organised with a structure that facilitates governance;
 - c) executives in the entity must be empowered to develop strategy and direction for higher level approval;
 - d) all who are within the governance framework must have a clear understanding of their roles and responsibilities, including their personal accountability;
 - e) those who are responsible for performance must understand what outcomes they have to achieve and have the capacity to achieve them; and
 - f) a robust governance framework must, through its transparency and accountability mechanisms, link power and responsibility to performance and review.
- 7.6 Although the elements identified by the Uhrig review are of a general nature, they are useful when considering the Seacare scheme's governance and I have been guided by them in considering the scheme.
- 7.7 The 2005 Ernst & Young review of the Seacare scheme examined its governance and found that:
- a) the Seacare Authority's structure appeared appropriate according to the Uhrig review's criteria, but it required more powers to be an effective regulator;

³¹⁴ Uhrig, J, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, June 2003, pp.3-4.

- b) some areas of the scheme's regulation and governance fell short of the standards adopted by State and Territory workers' compensation schemes;
- c) the restricted nature of resources and powers limited the Authority's ability to act as a truly effective regulator of workers' compensation for seafarers; and
- d) the Safety Net Fund was exposed to risks posed by (i) large excesses in the Seacare scheme, (ii) the absence of bank guarantees for employers' portion of the coverage of employee workers' compensation entitlements, and (iii) the lack of terrorism coverage.³¹⁵

Nature of the Seacare Authority

7.8 The Authority is not a board. As the Ernst & Young report observed, it has more in common with an executive management group, albeit a part time one. There is no CEO and it is supported by only a small number of staff made available by Comcare (as required by the SRC Act). Its functions are broad but largely facilitative. It has strategic, policy and monitoring roles (see below), but lacks complete data about the scheme's performance to support those roles.³¹⁶ The Authority does not have a meaningful compliance role (AMSA has OHS compliance powers and insurers respond to employer performance through setting premiums, the price effects of which may be considerably reduced by large excesses). It has no substantive budget.

Composition of the Seacare Authority

7.9 As discussed in Chapter One, the Authority is tripartite, having two members who represent employers, two members who represent employees, an independent Chair and Deputy Chair and a Commonwealth official (the CEO of Comcare).³¹⁷ That model is supported by stakeholders, although with a preference that the Authority's capacity to perform its role be stronger.

7.10 The AIMPE, MUA and AMOU supported the retention of the Seacare Authority. In particular, the MUA and AMOU expressed their view that it should be retained with the current governance structure, stating that they believe: *the Seacare Authority has a positive track record as an independent regulator... One of the strengths of the current Seacare scheme workers' compensation model is that employers at the enterprise level have responsibility for key aspects of the scheme.*³¹⁸

Recommendation 7.1

The Seacare Authority should continue to be a tripartite body appointed by the Minister.

³¹⁵ Ernst & Young review 2005, op. cit., p.68.

³¹⁶ The Seacare Authority may require an employer to provide documents or information relevant to the compilation of statistics for injury prevention purposes or in relation to a particular claim (Seafarers Act, s.106). AMSA, as the inspectorate under the OHS(MI) Act, must provide the Authority with such information as it requests [OHS(MI) Act, s.82].

³¹⁷ Seafarers Act, s.109.

³¹⁸ MUA and AMOU submission, p.24.

Functions, powers and interrelationships affecting Seacare scheme governance

- 7.11 The Seacare scheme's governance is complex. As previously discussed, the scheme's operation involves, directly or indirectly, three Commonwealth departments (DEEWR, DIT and DRET) and four Commonwealth agencies (the Seacare Authority, Comcare, AMSA and NOPSEMA) across three portfolios. The agencies are accountable to their respective portfolio ministers. Five pieces of legislation (with accompanying regulations) determine or affect the scheme's scope and operation. In addition, the underpinning financial arrangements are also intricate and not completely transparent (see below).
- 7.12 Figure 1.6 in Chapter One outlines the relationships between these entities, and Table 1.2 sets out their respective legislative responsibilities and functions.

Occupational health and safety responsibilities

- 7.13 A question that often arose during the review relates to the reason for and management of the overlapping OHS responsibilities of the Seacare Authority and AMSA. The starting point is the purpose of the statutory protection of OHS. The OHS(MI) Act's objects, which identify the aims of that part of the scheme, are shown in the following box.

Objects of the OHS(MI) Act

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

- 7.14 Under the existing arrangements, the Seacare Authority and AMSA have complementary roles in achieving the objects, with separate but interdependent functions. The Seacare Authority and AMSA have a memorandum of understanding governing their operational relationship.³¹⁹

³¹⁹ *Memorandum of Understanding relating to the administration and operation of the Occupational Health and Safety (Maritime Industry) Act 1991 between the Seafarers Safety Rehabilitation and Compensation Authority and the Australian Maritime Safety Authority, May 2012.*

- 7.15 The relationship between the Seacare Authority and AMSA requires a high level of mutual support and cooperation which should be reflected in the legislation and in practice. The statutory functions expressed in the Act should be consistent with that principle. Those conferred on the Seacare Authority and AMSA, as the inspectorate for the purposes of the OHS(MI) Act, under ss.9 and 82, respectively, do not fully reflect that aim. There should also be a common understanding of the nature and scope of the jurisdiction, which, in some respects, does not exist (see the discussion of coverage in Chapter Two).
- 7.16 An unusual feature of the OHS(MI) Act is the specification of some identical functions for the Seacare Authority and for AMSA [under ss.9(a), 9(b), 82(a) and 82(b) respectively].

Table 7.1: Comparison of existing functions of Seacare Authority and AMSA inspectorate under the OHS(MI) Act

Seacare Authority	AMSA
<i>OHS(MI) Act, s.9</i>	<i>OHS(MI) Act, ss.82, 83</i>
The following additional functions are conferred on the Authority:	[Section 82] The Inspectorate has the following functions:
a) to ensure, in accordance with this Act and the regulations, that the obligations imposed by or under this Act and the regulations are complied with;	a) to ensure, in accordance with this Act and the regulations, that the obligations imposed by or under this Act or the regulations are complied with;
b) to advise operators, employees or contractors, either on its own initiative or on being asked, on occupational health and safety matters;	b) to advise operators, employees or contractors, whether of its own motion or on being asked, on occupational health and safety matters affecting such operators, employees or contractors;
c) to collect, interpret and report information relating to occupational health and safety;	c) to provide the Authority with such information as is asked for by the Authority.
d) to formulate policies and strategies relating to the occupational health and safety of employees;	[Section 83] If the Inspectorate has been asked to advise an operator, employee or contractor about an occupational health and safety matter, it may, in the exercise of its function to provide that advice, refer the operator, employee or contractor to a person who has special knowledge or experience relevant to the request.
e) to accredit occupational health and safety training courses for the purposes of section 47;	
f) to liaise with other bodies concerned with occupational health and safety;	
g) to advise the Minister:	
i. on the most effective means of giving effect to the objects of this Act; and	
ii. on the making of regulations under this Act; and	

Seacare Authority	AMSA
<p>iii. on the approval of codes of practice under subsection 109(1).</p> <p>[Note: Under the 2012 Administrative Arrangements Order, the Minister administering the OHS(MI) Act is the Minister for Education, Employment and Workplace Relations]</p>	<p>[Note: Under the OHS(MI) Act, AMSA is the <i>Inspectorate</i> (s.4) and is empowered (s.84) to appoint AMSA staff who have had relevant OHS training as inspectors. Under the 2012 Administrative Arrangements Order, the Minister for Infrastructure and Transport administers the <i>Australian Maritime Safety Authority Act 1990</i> which establishes AMSA.]</p>

7.17 Some stakeholders queried these overlapping responsibilities.

7.18 The MUA and AMOU stated that: ... *the Seafarers and OHS(MI) Acts both require amendment to make it clear that the Seacare Authority is the sole regulator of workers' compensation and OHS. The unions believe the current structure of the legislation creates ambiguity in that the Authority and the OHS inspectorate (AMSA in the current Act) are given some identical functions. This appears ... to create a situation where neither agency has clear responsibility and is able to perform functions effectively.*³²⁰

7.19 In their 2005 review, Ernst & Young also commented about the overlap of functions:

Both the Seacare Authority and AMSA share the functions of ensuring compliance with the OHS(MI) Act and providing advice on OHS matters. These functions are the first two on each of the lists of functions of AMSA and the Seacare Authority the overlap of functions creates scope for duplication, conflicts or gaps in functions carried out, and ambiguity about which agency has responsibility for regulation and OHS advice.

*As the Seacare Authority is the regulator of workers' compensation and OHS for the maritime industry, it would be appropriate for this Authority to have responsibility for compliance with the OHS(MI) Act. It would be appropriate for the Seacare Authority to have responsibility for the provision of advice on OHS if this advice relates to regulation and policy, but for the Inspectorate to have responsibility for advice where this is of a practical nature.*³²¹

7.20 Within the existing structure, the respective functions of the Seacare Authority and AMSA should be clearer. This could be achieved by changes to s.9 like those proposed as an example in the following box. Their purpose is to reduce any confusion about the respective roles of the Seacare Authority and AMSA. If my recommendations in Chapter Five about the OHS(MI) Act are accepted, proposed s.9 would need to be revised suitably.

³²⁰ MUA and AMOU submission, p.26.

³²¹ Ernst & Young review, 2005, pp.71-72.

Example of how s.9 of the OHS(MI) Act could be revised

- 1) The functions of the Authority under this Act are:
 - a) to ensure that advice in relation to occupational health and safety matters is available to persons who have obligations under this Act or who are otherwise covered by this Act;
 - b) to formulate and implement policies and strategies relating to improving the occupational health and safety of employees;
 - c) to keep compliance and enforcement under this Act under review and to report on performance in relation to them in the annual report and directly to the Minister on a particular matter relating to compliance or enforcement, if the Authority considers that the matter is sufficiently urgent;
 - d) to collect, interpret and report information relating to occupational health and safety and to develop and implement improvements to the validity, timeliness, collection, interpretation and reporting of such information;
 - e) to accredit occupational health and safety training courses for the purposes of section 47;
 - f) to liaise with other bodies concerned with occupational health and safety, including to facilitate the implementation of national strategies for improving occupational health and safety that are relevant to the maritime industry;
 - g) to advise the Minister on:
 - i. the most effective means of giving effect to the objects of this Act; and
 - ii. the making of regulations under this Act; and
 - iii. the approval of codes of practice under subsection 109(1).
- 2) The Authority must perform its functions under this Act in a way that advances the objects of the Act.

- 7.21 To reinforce the cooperative relationship between the Seacare Authority and AMSA, the Act should also require the inspectorate:
- a) to consult the Seacare Authority periodically about how the inspectorate's powers may be exercised and its functions performed under this Act in ways that will help to achieve the objects of this Act; and
 - b) to take account of the views of the Seacare Authority in making decisions about the use of the inspectorate's resources for the purposes of this Act.

[Note: this should be located near the specification of the inspectorate's functions].

- 7.22 Although not within the terms of reference, the question was raised whether AMSA should be given sole responsibility for maritime OHS. AMSA already has broader responsibility for maritime safety, has expertise in OHS in the maritime context and has recently been given wider responsibilities as the single national regulator for domestic commercial vessel safety.³²² Lines of accountability would be simpler with a single regulator and the exercise of its OHS regulatory functions would not materially change. Under that model, options for the regulatory administration of the Seacare scheme's workers' compensation function would be to leave it with the Seacare Authority, transfer it to the SRCC and Comcare (effectively abolishing the Seacare Authority), or return it to State and Territory responsibility.
- 7.23 On the other hand, such an arrangement may result in a more operational focus to OHS regulation and lose the advantages of one entity being responsible for regulation of both OHS and workers' compensation (albeit with statutory devolution of the inspectorate function to AMSA). Most stakeholders favour the retention of the Seacare Authority and do not support change to the structure of the existing scheme.
- 7.24 Whilst the majority of stakeholders supported the retention of the Seacare Authority, the MUA and AMOU in particular advocated some changes: *... the unions consider there is a need for the Seafarers Act to provide for appointment of a chief executive officer that is responsible to the board (and a member of the board). The current loose arrangement whereby the host agency providing support to the Seacare function provides staff to perform support functions, without the head of that support unit having any defined responsibilities in relation to the board is out-dated and unsatisfactory, and does not meet any reasonable test of good governance.*³²³
- 7.25 Another proposal raised during the review was to give Comcare responsibility for OHS inspectorate functions (Comcare has some maritime compliance functions in relation to Defence Force and Australian Customs and Border Protection Service vessels).³²⁴ The SRCC and Comcare are also familiar with the WHS Act (Cwth) and would easily adapt to updated versions of the OHS(MI) Act and regulations that were more aligned to the WHS Act.
- 7.26 As the ASA commented, however, the advantages of having AMSA perform the OHS inspectorate functions include its industry specific knowledge and expertise; its existing relationships with Australian operators; and AMSA already performs a range of inspectorate functions for Australian maritime industry participants.³²⁵
- 7.27 Regardless of whether the OHS(MI) Act is brought into line with the model WHS bill (as recommended in Chapter Five), AMSA should remain responsible for compliance with the OHS(MI) Act. It has the particular maritime expertise that is required for the Seacare scheme and is already engaged in a range of maritime safety compliance activities. To have Comcare undertake OHS safety compliance activities would result in some unnecessary duplication (and add a new layer of complexity).

³²² Under the 2011 Intergovernmental Agreement on Commercial Vessel Safety Reform, governments agreed that maritime workers' compensation and OHS arrangements fall outside the national system. Consideration of matters related to those arrangements is to take place in the context of separate processes.

³²³ MUA and AMOU submission, p.24.

³²⁴ The Commonwealth WHS Act applies to all Government entities and public authorities of the Commonwealth at s.12(1); the OHS(MI) Act specifically excludes Government ships at s.4.

³²⁵ ASA submission, p.23.

Recommendation 7.2

The statutory functions of the Seacare Authority and AMSA under the OHS(MI) Act should be amended so that:

- a) there is greater clarity about the respective responsibilities of the agencies;
- b) the overall strategic and supervisory roles of the Seacare Authority are clearer; and
- c) the constructive relationship between the Seacare Authority and AMSA is strengthened.

[Examples of possible amendments are provided at paragraphs 7.20 and 7.21 of this chapter].

Workers' compensation, rehabilitation and return to work regulatory responsibilities under the Seacare scheme

7.28 As discussed in earlier chapters, under the Seafarers Act, the Seacare Authority has particular responsibilities for the workers' compensation, rehabilitation and return to work aspects of the Seacare scheme. This arrangement should be maintained.

Need for objects in the Seafarers Act

7.29 Before considering the functions conferred on the Authority, I note that the Seafarers Act is unusual among Australian workers' compensation statutes in not containing an objects clause.³²⁶ As discussed in Chapter Four, objects provide guidance on how an Act is intended to apply and operate, including for decision makers under the legislation concerned.

7.30 The SRC Act similarly does not provide for objects. The Hanks review recommended that this be rectified.³²⁷ Mr Hanks commented that the objects and purpose of the SRC Act should aim to articulate the desirable outcomes that are expected from the legislative provisions, as well as setting out the desirable objectives of the SRC Act with regard to the governance arrangements and the scheme's long term financial viability.

7.31 Those observations are equally applicable to the Seafarers Act and in Chapter Four I recommend the inclusion of an objects clause in the Seafarers Act (see recommendation 4.1). In line with the objective of maintaining consistency between the Seafarers Act and the SRC Act, the clause proposed for the SRC Act by Mr Hanks provides a basis for a similar provision in the Seafarers Act. For ease of reference, the object proposed for the SRC Act is set out in the following box.

³²⁶ See ACT *Workers Compensation Act 1951*, s.85 (object of Chapter 5 of Act, *Injury Management Process*); NT *Workers Rehabilitation and Compensation Act*, s.75 (purpose of Division 4, *Rehabilitation and Compensation*, of Part 5 *Workers Compensation and Rehabilitation*); Old *Workers Rehabilitation and Compensation Act 2003*, Part 2, *Objects*; South Australian *Workers Rehabilitation and Compensation Act 1986*, s.2; Tasmanian *Workers Rehabilitation and Compensation Act 1988*, s.2A; Victorian *Accident Compensation Act 1985*, s.3. The Commonwealth, NSW and WA Acts do not provide for objects.

³²⁷ Hanks recommendation 3.2.

Hanks review: purpose and objects proposed for the SRC Act

The main purpose of this (SRC) Act is:

a) to assist in protecting the health, safety and wellbeing;

b) to enhance the work capacity; and

c) to secure the economic position;

of employees through the establishment and regulation of a prompt, fair, responsive and financially viable system for:

d) rehabilitating employees injured at work so that their capacity for work can be fully restored;

e) the provision of medical treatment to employees injured at work;

f) compensating employees for losses caused by injuries at work;

g) resolving disputes about rehabilitation and compensation; and

h) collecting premiums and other contributions from Commonwealth agencies and licensees in order to cover the cost of rehabilitation, treatment, compensation and administration of the system.

7.32 Given the scheme design differences (see earlier discussion), some changes would be needed, for example, proposed paragraph (h) would be omitted.

7.33 Subject to the decisions taken on various recommendations in this report, consideration might also be given to including some other objectives. These are shown with underlining in the example of a possible objects clause for the Seafarers Act in the following box.

Example of a possible objects clause for the Seafarers Act

[Based on Hanks recommendation 3.2]

The main purpose of this (Seafarers) Act is:

- a) to assist in protecting the health, safety and wellbeing;*
- b) to reduce the incidence of work related injury and disease;*
- c) to enhance the work capacity; and*
- d) to secure the economic position;*

of employees through the establishment and regulation of a prompt, fair, responsive, transparent and financially viable system, with due recognition of the legitimate interests of employers and employees, for:

- e) rehabilitating employees injured at work so that their capacity for work can be fully restored;*
- f) facilitating the durable return to work employees injured at work without unnecessary delay;*
- g) the provision of medical treatment to employees injured at work;*
- h) compensating employees for losses caused by injuries at work;*
- i) resolving disputes about rehabilitation and compensation;*
- j) providing for a fair and efficient system of redemptions of claims, in appropriate cases; and*
- k) compensating dependants of employees in appropriate cases.*

The Seacare Authority's functions under the Seafarers Act

7.34 Section 104 of the Seafarers Act confers the functions shown below on the Seacare Authority. The existing enumerated functions do not convey any meaningful expectation of continuous improvement or any responsibilities in relation to the performance of insurers.

Functions of the Seacare Authority under s.104 of the Seafarers Act

Subject to this Act, the Authority has the following functions:

- (a) to monitor the operation of this Act;
- (b) to promote high operational standards of claims management and effective rehabilitation procedures by employers;
- (c) to co-operate with other bodies or persons with the aim of reducing the incidence of injuries to employees;
- (d) to publish material relating to the functions referred to in paragraphs (a), (b) and (c);
- (e) to formulate policies and strategies relating to the occupational health and safety of employees;
- (f) to accredit occupational health and safety training courses for the purposes of section 47 of the Occupational Health and Safety (Maritime Industry) Act 1993;
- (g) to advise the Minister about anything relating to the Authority's functions and powers and other matters relating to the compensation and rehabilitation of employees; and
- (h) such other functions as are conferred on the Authority by this Act or any other Act.

7.35 A better approach would be to strengthen the functions by better alignment with the proposed functions under the OHS(MI) Act and the proposed objects of the Seafarers Act (see above). This would be achieved by referring expressly to the purpose of the functions under the Seafarers Act as well as the activity to which they relate. Accordingly, the Seacare Authority's functions would be expressed to include the following additional (underlined) elements:

- a) monitor the Act's operation to identify how well it is achieving its objects and to identify possible improvements [s104(a)];
- b) develop and implement strategies to improve the rehabilitation of injured employees and to facilitate their return to work without undue delay [new];
- c) to collect, interpret and report information relating to workers' compensation, rehabilitation and return to work performance under this Act and to develop and implement improvements to the validity, timeliness, collection, interpretation and reporting of such information [new];
- d) co-operate with other bodies or persons with the aim of reducing the incidence and severity of injuries to employees and improving compliance with this Act [s.104(c)];
- e) to liaise with other bodies concerned with workers' compensation, rehabilitation and return to work, including to facilitate the implementation of national strategies for improving those matters to the extent that they are relevant to the maritime industry [new]; and

- f) to advise the Minister about anything relating to the Authority's functions and powers and other matters relating to the compensation and rehabilitation of employees, including the most effective means of giving effect to the objects of this Act [s.104(g)].

7.36 No change is proposed to the functions in paragraphs (b), (d) and (h) of s.104. Existing paragraphs (e) and (f) of s.104 appear redundant, as they duplicate functions under s.9 of the OHS(MI) Act. Accordingly, they could be omitted.

7.37 The introductory words in s.104 could also be revised along the following lines (new element underlined): *Subject to this Act and for the purpose of achieving the objects of this Act, the Authority has the following functions.*

Recommendation 7.3

- a) The Seafarers Act should include an objects clause, based on the provision proposed for the SRC Act under Hanks recommendation 3.2, but with the additional elements proposed in the example of an objects clause given in paragraph 7.33 of this Chapter (see also Recommendation 4.1).
- b) The statutory functions of the Seacare Authority under the Seafarers Act should be amended so that:
- i. there is greater focus on the purpose of the functions;
 - ii. the overall strategic and supervisory roles of the Seacare Authority are clearer; and
 - iii. duplication between the functions under the Seafarers Act and the OHS(MI) Act is eliminated.

[Examples of what amendments could be made are provided at paragraphs 7.35 and 7.37].

Resources

7.38 The Seacare Authority does not receive a budget appropriation to carry out its functions. The ANAO meets the cost for its auditing services and Comcare carries the cost of services that it provides to the Seacare Authority (\$11,600 and \$1,163,719 respectively in 2011-12).³²⁸ Costs of the levy collection and levy data functions (see discussion of the Safety Net Fund below) are deducted from the levies collected.

7.39 AMSA does not receive any additional appropriation to carry out its functions under the OHS(MI) Act. This means that AMSA must meet the cost of carrying out OHS inspections either from its own Government appropriation or through other revenue or levy collection sources.

7.40 It is difficult to identify parallels between the Seacare Authority and other regulatory bodies in Australia; most State and Territory workers' compensation and WHS regulators have much wider responsibilities and far more resources.

³²⁸ Seacare Annual Report, 2011-12, p.79.

- 7.41 The scheme is unusual in the Australian context in that its participants do not pay directly for regulatory administration. Two main issues are: (a) the true cost of work health and safety and workers' compensation regulation is not being met by the affected employers within the Seacare scheme, and (b) the amount of funding that is available is likely to limit regulatory activities that would improve performance under the scheme. If the principles of safe work, rehabilitation, RTW and compensation which underpin the scheme are to be achieved, funding of scheme administration costs should be full, appropriate and transparent.
- 7.42 Stakeholders questioned how effective the Seacare Authority can be with its limited resources. The ASA pointed out that OHS performance fell short of the Authority's own targets and queried the extent to which AMSA was able to undertake OHS inspections.³²⁹ One stakeholder in particular noted that the funding of AMSA theoretically comes from industry employers outside the scope of the Seacare scheme. Thus, levies raised by AMSA in performing its other functions pay for its role as an inspectorate under the OHS(MI) Act.
- 7.43 In their 2005 report, Ernst & Young identified the funding issues and recommended:
- a) increasing the Seacare Authority's funding and resources to allow it to regulate and manage the Scheme more effectively, and to recruit additional appropriately skilled and experienced staff; and
 - b) funding the Seacare Authority from a regulatory levy on employers, either directly or from premiums charged by insurers (or notional premiums for self-insurers).³³⁰
- 7.44 The MUA and AMOU supported retaining discrete OHS and workers' compensation arrangements for the maritime industry. They endorsed the workers' compensation scheme's continuing to be industry managed, as opposed to centrally managed or government managed.³³¹ AIMPE observed that in a privately insured scheme, the participants should carry at least some of the cost of the fund administration, possibly through amendments to the Levy Act and the Levy Collection Act.³³²
- 7.45 While supporting the retention of the Seacare Authority, the unions suggested some changes to improve its performance capabilities. They proposed that:
- a) the Seafarers Act provide for the appointment of a CEO responsible to the board (sic);
 - b) the senior staff member of the SMS should not be accountable to a member of the Authority (the CEO of Comcare) whom the unions consider represents the Minister;
 - c) the statutory body should be a body corporate so that it can operate commercially (by entering into contracts and so on);
 - d) there should be a budget appropriation for the Authority, which would strengthen its accountability to the Parliament and would meet the full administration costs for the Seacare Authority and support OHS information, education and assistance;

³²⁹ ASA submission, pp.25, 26.

³³⁰ Ernst & Young review, 2005.

³³¹ MUA and AMOU submission, p.24.

³³² AIMPE submission, p.11.

- e) provision should be made for a levy to support OHS inspections, with coverage linked to the OHS(MI) Act's application.³³³
- 7.46 In relation to those proposals, I note that the Seacare Authority, which is created by s.103 of the Seafarers Act:
- a) is constituted by its members (s.109);
 - b) is a prescribed agency under the FMA Act and regulations (the Chair of the Authority is the Chief Executive under that legislation);
 - c) has the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions (s.105); and
 - d) may, by resolution, delegate all or any of its functions and powers to the Chief Executive Officer of Comcare (s.125).
- 7.47 These arrangements, although uncommon, do not of themselves warrant re-establishing the Seacare Authority at this stage as a more conventional statutory body, with its own staff, and so on. The current arrangements are workable, but need a number of actions (which I recommend later) to be more effective. I also propose later that the future of the Seacare scheme and the Seacare Authority should be subject to a complete review when better information is available to decide which regulatory options should be adopted.
- 7.48 The question of additional resources is more problematic. Ernst & Young recommended that the Authority's funding and resources be increased to allow it to regulate and manage the Scheme more effectively, and to recruit additional appropriately skilled and experienced staff.³³⁴ The funds would come from a regulatory levy on employers, either directly or from premiums charged by insurers (or notional premiums for self-insurers). No detailed model was proposed.
- 7.49 Having a regulatory levy to pay for work related safety purposes is not uncommon. Three examples are given in the following box. Each relates to a specific industry.

³³³ Ibid., pp.24, 25.

³³⁴ Ernst & Young review, op cit., p.69.

Examples of regulatory safety levies in Australian industry sectors

Commonwealth

The Commonwealth *Offshore Petroleum (Safety Levies) Act 2003* imposes a safety investigation levy on the operator of an offshore facility in relation to a safety investigation by NOPSEMA of an accident or dangerous occurrence at that facility (there is a threshold before the levy applies).

Queensland

The *Queensland Mining and Quarrying Industry Safety and Health Levy* is a fee charged by the Queensland Government for safety and health services provided by the State to mining, quarrying and explosives operations across Queensland. The levy is charged to industry on a cost recovery basis.

Western Australia

The WA *Mines Safety and Inspection Levy* applies to all mining operations (including exploration) regulated by the *Mines Safety and Inspection Act 1994*, with the levy payable in specified circumstances (based on hours worked over a period, but operations with hours equal to or less than the specified total hours are not required to pay the levy).

- 7.50 There are three broad options for increasing the funding available to the Seacare Authority and AMSA for safety initiatives under the Seacare scheme, namely, greater cross-subsidisation, budget supplementation, or a levy or a fee or other charge.³³⁵
- a) cross subsidisation (the current model) should be seen as unacceptable for its lack of transparency, its effect on persons who do not gain the benefit of the initiatives and the opportunity costs (fewer resources for other activities in the areas from which the cross-subsidisation comes);
 - b) budget supplementation is feasible but may only be appropriate in relation to activities that could be characterised as not directly related or integral to the regulatory tasks, e.g., some policy and parliamentary servicing functions (in other words, even assuming some funds were available, they would be unlikely to cover the full cost of the activities);
 - c) a levy would require legislation, an appropriate group from whom it may be collected and an appropriate formula which was based on good knowledge of the persons who would be subject to the levy and their activities.
- 7.51 Under the Commonwealth's cost recovery guidelines, agencies should set charges to recover all the costs of products or services where it is efficient to do so, with partial cost recovery to apply only where new arrangements are phased in, where there are government endorsed community service obligations, or for explicit government policy purposes. Any charges should be imposed on a fee-for-service basis or, where efficient, as a levy.³³⁶

³³⁵ Under s.47 of the AMSA Act, a determination may be made by AMSA fixing fees and charges for certain purposes which do not extend to the OHS(MI) Act.

³³⁶ Department of Finance and Administration, Finance Circular No. 2005/09.

- 7.52 There was not enough information available during the review to develop a model for funding additional activities by the Seacare Authority to improve safety under the Seacare scheme. It is likely that legislation would be required, a formula for imposing levy (if that were agreed) would need to be settled, a cost recovery impact statement may be needed and the grounds, if any, for partial cost recovery considered.
- 7.53 On the other hand, the Seacare Authority could develop a program of additional activities under its strategic plan, with indicative costs. This would help to crystallise the amounts that may be needed on an ongoing basis. At that time, the option of levies should be further considered. This could entail two levies, one for employers under the OHS(MI) Act and one for employers under the Seafarers Act, with each designed to support activities by the Seacare Authority that are relevant to the objects of the respective Acts. There is a separate question of the recovery of the costs of inspections by AMSA under the OHS(MI) Act. Consideration could be given to appropriate changes to existing levy legislation (e.g., the *Marine Navigation Levy Act 1989*) although discrete legislation may be more suitable.

Recommendation 7.4

- a) The Seacare Authority should be requested to develop a detailed set of activities for facilitating the achievement of the objects of the OHS(MI) Act and the Seafarers Act and to develop indicative costs (Comcare may be able to assist, drawing on its own regulatory experience);
- b) Consideration should then be given to providing for the collection of levies for those purposes (the amounts of levy should be guided by the cost estimates for the proposed activities) and whether a cost recovery impact statement was required;
- c) AMSA should be requested to consult the Seacare Authority about a more effective OHS inspection regime and to identify the costs of undertaking inspections to achieve the objectives of that regime and of the OHS(MI) Act, as a preliminary step to having a regulatory charge for such inspections.

The Safety Net Fund – issues of adequacy

- 7.54 The Seafarers Act provides for a Seafarers Safety Net Fund (the Fund).³³⁷ The Fund is a default ‘employer’ for the purposes of the Act if there is no longer any employer against whom an injured seafarer may claim (for example, if the employer is bankrupt or ceases to exist and cannot meet liabilities under the Act). The Fund is supported by a levy on employers under the Levy Act.³³⁸ Employers with exemptions under the Seafarers Act (s.20A) must pay the levy unless granted a ministerial exemption (by the Commonwealth Special Minister of State) as a waiver of a debt. In 2011-12, the debt waivers were in the order of \$6,150.³³⁹
- 7.55 The Seacare Authority, supported by Comcare, administers the Fund. Until 2002, it was managed by the Australian Maritime Industry Compensation Agency (AMICA). The management of the Fund reverted to the Seacare Authority when AMICA was not able to secure necessary reinsurance.

³³⁷ Seafarers Act, Part 7, Division 2.

³³⁸ The levy is imposed on seafarer berths on prescribed ships.

³³⁹ *Seacare Authority Annual Report 2011-12*, p.38.

- 7.56 On actuarial advice, the Fund has a reserve of at least \$906,000. The Seacare Authority's 2011-12 Annual Report reported that the Fund held \$1,338,782.³⁴⁰ The fund has a reinsurance policy.³⁴¹
- 7.57 The Fund itself does not attract interest from any external source, which was criticised by a number of stakeholders. There was also a suggestion that interest might reduce levies.
- 7.58 When AMICA managed the Fund, interest was earned on revenue collected. However, when the Fund's management reverted to the Authority in 2002, a Special Account for the Fund was established under the Commonwealth FMA Act. This did not provide for the payment of interest on the monies held in the Fund as it was intended to be a temporary measure until AMICA could obtain the requisite insurance. This has not occurred.
- 7.59 There is considerable industry support for the Fund to earn interest again. This appears to be a matter for the Seacare Authority and DEEWR to explore with the Department of Finance and Deregulation.
- 7.60 In their 2005 report, Ernst & Young found that the Safety Net Fund faced various serious exposures, for failed or ceased employers, including:
- a) funding payments for below excess claims;
 - b) funding of terrorism event claims;³⁴²
 - c) funding of latent claims (where the condition concerned emerges long after the employer has ceased to operate);
 - d) claims in the event of insurer failure.
- 7.61 According to Ernst & Young, relative to other Australian schemes, these risks for the Seacare scheme were probably significantly greater than for those other schemes. It noted that a substantial claim might not only exhaust the Fund, but also result in an excessive rate of levy.
- 7.62 Further, Ernst & Young considered that, to allow the Fund to function effectively (particularly in the event of very large claims), it should have powers to borrow.
- 7.63 Those risks remain and reinforce the need to improve the operation of the scheme, including by action that reduces the inherent risks of very large excesses, including by a self-insurance option. This is discussed in Chapter Six.
- 7.64 Another related issue that was present at the time of the 2005 Ernst & Young review still exists. There is an inconsistency between exempt ships not being covered under the Seacare scheme yet still being required to pay the Safety Net Levy. Exemptions under the

³⁴⁰ Ibid, p.80.

³⁴¹ Seafarers Act, s.102.

³⁴² The *Terrorism Insurance Act 2003* (Cwth) establishes a scheme for replacement terrorism insurance coverage for commercial property and associated business interruption and public liability claims. It deems terrorism risk cover into eligible insurance contracts. The Regulations exclude contracts of insurance for certain other matters, including workers' compensation insurance.

Seafarers Act and the Levy Act should be aligned so as to exempt ships from the levy to the extent that employees are not covered under the Seafarers Act.

Recommendation 7.5

In relation to the Safety Net Fund:

- a) DEEWR and the Seacare Authority should seek the assistance of the Department of Finance and Deregulation in putting the Fund in a position where it may earn interest;
- b) consideration should be given to amending the Seafarers Act to allow the Fund to borrow where it may have insufficient funds to meet claims at a given time, subject to Ministerial approval;
- c) further consideration should be given to the risk to the fund of claims where a terrorism event occurs (this may be assisted by a review of how other Australian workers' compensation schemes provide for such claims and examination of reinsurance options);
- d) exemptions under the Seafarers Act and the Levy Act should be aligned so as to exempt ships from the levy to the extent that employees are not covered under the Seafarers Act (this would eliminate the need for debt waivers).

Capacity of the Seacare Authority to perform its functions

7.65 As discussed in this report, there are various impediments to the Seacare Authority's being a fully effective regulator. It has limited resources, it operates on a part time basis, and it has few regulatory powers in relation to its statutory OHS, rehabilitation and RTW and workers' compensation functions. Moreover, some aspects of safety, rehabilitation and RTW and workers' compensation performance in the scheme are not easily monitored.

7.66 Against that, what the Seacare Authority does undertake appears to be well performed and effective. That is recognised by stakeholders. The Authority will not be able to perform more effectively as a regulator without additional resources, better organisation of the cross portfolio relationships and more regulatory tools. I discuss the question of resources above and cross-portfolio issues later. I consider that the main regulatory tools that are needed involve better data and powers to obtain more information about scheme performance.

Data

7.67 The Seacare Authority has certain statutory functions in relation to data:

- a) under s.9(c) of the OHS(MI) Act, the Authority is to collect, interpret and report information relating to occupational health and safety;
- b) under s.104 of the Seafarers Act, the Authority is to monitor the operation of the Act and regulations.

7.68 The absence of an explicit data function in the Seafarers Act is anomalous. Earlier in this chapter, I proposed the inclusion of a new function (*to collect, interpret and report information relating to workers' compensation, rehabilitation and return to work performance under this Act and to develop and implement improvements to the validity,*

timeliness, collection, interpretation and reporting of such information) which would correct the gap and place the Authority in a far stronger position to formulate strategies and policies, assess performance and decide on programs, activities and interventions. I have also proposed s.9(c) of the OHS(MI) Act be similarly revised.

- 7.69 At the time of the 2005 Ernst & Young review, workers' compensation scheme data were reported voluntarily through AMICA.³⁴³ Since then, the Seacare Authority has taken a more central role. Even so, some of the data shortcomings identified by Ernst & Young still exist. Among other things, that review noted inadequate data collection and recommended:
- a) requiring insurers to provide individual claims and policy data to the Seacare Authority on a regular basis, so that the Authority could monitor scheme performance;
 - b) requiring all claims to be reported to the insurer and requiring insurers to provide individual claims and policies data to the Authority;
 - c) enforce reporting of all claims by employers to Seacare Authority including under-excess claims (for complete transparency this was to include Navigation Act claims).
- 7.70 The Seacare Authority now collects and records workers' compensation data from duplicate copies of claim forms³⁴⁴ provided by employers. Scheme employers must forward to the Authority a duplicate copy of every claim lodged by an employee (using the approved claim forms). As part of the claims data gathering process, the Authority seeks updated claims history information from employers through a six-monthly claim update report.³⁴⁵
- 7.71 On the other hand, the Seacare Authority informed me that it relies upon employers to provide accurate and timely reports which are not always forthcoming (this may be due to various reasons including limited employer resources, staff turnover and limited knowledge about the scheme and confusion regarding its application). The Authority is also limited in its scope to enforce employer reporting obligations, but has a notice and compliance procedure to attempt to address employer non-compliance which affects data consistency. An employer may be contacted to resolve any inconsistency identified in the data. Unresolved issues may be escalated to the Chairperson and then referred to the Commonwealth Director of Public Prosecutions.
- 7.72 I was also informed by the Seacare Authority that its data collection and reporting methods and activities are being reviewed to ensure that it obtains accurate and useful information from employers and undertakes effective analysis and reporting of the information to perform its legislative functions effectively. A number of improvements are to be made, including a variety of new reports.
- 7.73 To enhance the capacity of the Seacare Authority and AMSA to reduce injury incidence rates within the scheme, the review of data and reporting should give more consideration to an ongoing data strategy and to the most useful areas for data collection and analysis. Continuous improvement should underpin any initiatives in this area.

³⁴³ Australian Maritime Industry Compensation Agency.

³⁴⁴ The Seacare Authority updated its claim forms in 2012, removing all information considered superfluous to Seacare's research and analytical needs.

³⁴⁵ *Seacare Annual Report 2011-12*, p.23.

- 7.74 The Seacare Authority has examined scheme performance reports produced by national and international workers' compensation and WHS jurisdictions as part of the data review. This is intended to ensure that the Seacare Authority's performance indicator reports are compatible with and comparable to those of other jurisdictions. Thus, Seacare scheme performance will be more readily compared with outcomes in other jurisdictions. It will also facilitate the Seacare Authority's support for the Australian WHS Strategy 2012-2022.
- 7.75 These improvements should be strongly supported. They would be assisted by strengthening the Seafarers Act to provide that the regulations may specify the information and documents that an insurer and person who provides rehabilitation or return to work services (RRTW provider) must provide to the Seacare Authority. These would be in relation to claims, including matters relating to a claim that concern rehabilitation or return to work, and the form and time in which the information and documents must be provided. The Seacare Authority should be authorised to seek orders for the supply of information if the obligation is not met, as well as financial penalties. The Seacare Authority or its delegates should also be authorised to inspect (with reasonable notice) original documents, where that is necessary.
- 7.76 These provisions would complement the existing provisions of ss.105 and 106 of the Seafarers Act, which allow for claims information to be requested from an employer. There is a relatively small penalty for non-compliance (20 penalty units or \$3,400). Those provisions could be strengthened as recommended above.
- 7.77 AMSA provides OHS data to the Authority, which has indicated that the data provided are satisfactory, although it noted that information about data trends would also be useful. AMSA currently reports data on OHS(MI) Act compliance and enforcement.

Recommendation 7.6

- a) The Seafarers Act should:
- i. clearly require an insurer, or a rehabilitation or RTW service provider, to provide the Seacare Authority with prescribed information and documents or parts of documents in relation to claims in a prescribed manner, form and at prescribed times, as requested by the Seacare Authority;
 - ii. provide that the regulations may specify the prescribed information and documents or parts of documents to be provided to the Seacare Authority in relation to claims as well as the prescribed manner and form of, and time in which, the information and documents must be provided;
 - iii. strengthen s.106 of the Seafarers Act in line with these provisions.
- b) If there is non-compliance, the Seacare Authority should be empowered to seek orders for the supply of information or documents, as well as financial penalties.
- c) The Seacare Authority should be able to inspect original documents of this type at a specified place on giving reasonable notice.
- d) The Seacare Authority and AMSA should consider how the reports to AMSA of notifiable accidents and dangerous occurrences³⁴⁶ may be better used for strategic and monitoring purposes.

[Note: The customary qualifications about legal professional privilege should apply].

Reporting

- 7.78 The Seafarers Act provides that the Authority may request certain information to be provided by employers, such as claim details, injury details and details of insurance policies.³⁴⁷
- 7.79 As mentioned above, the Authority requires employers to report details of employee numbers, hours worked, and details of ships operating under the scheme on a six-monthly basis. Every year, employers are required to report on employees by age range and employees by occupational group.³⁴⁸
- 7.80 Some stakeholders considered that the reporting of claims required by the Authority was sometimes unnecessarily difficult. Generally, an employer has to provide details of an injury or workers' compensation to the insurer but must also send the same information to the Authority. The Authority seeks updated claims information from all employers via a six-monthly Claim Update Report. The SMS has an online reporting tool to make it easier for employers to provide such data.

³⁴⁶ OHS(MI) Act, s.107 and OHS(MI) Regulations, r.13.

³⁴⁷ Seafarers Act, ss.95 and 106.

³⁴⁸ Seafarers Act, s.106.

- 7.81 In addition, employers must provide details of insurance policies within 14 days of being issued with a policy or renewing a policy with an authorised insurer.³⁴⁹ This also applies in the case of P&I clubs.
- 7.82 The Authority has created a number of forms that employers must submit when a workers' compensation claim is lodged. This requirement is in addition to any form that must be submitted to an insurer, so there may be significant degrees of overlap.
- 7.83 Some stakeholders found the reporting regime to be too onerous and suggested that it should be made easier. The ASA observed³⁵⁰ that the scheme imposed a significant administrative burden on operators in terms of the timing of levy payments (quarterly), claims reporting (every six months)³⁵¹ and providing employer returns³⁵² (14 days after the start of each quarter). The ASA commented that any changes to the scheme that would streamline reporting and levy payment obligations and minimise administrative obligations would be welcomed by industry.

Recommendation 7.7

The Seacare Authority should review the reporting requirements under the scheme with a view to reducing any unnecessary requirements as to content and timing.

Securing compliance in relation to OHS

- 7.84 There appears to be a comparative weakness in AMSA's compliance and enforcement approach. In the five year period 2006-07 to 2010-11, 2,398 legal proceedings under the main Australian OHS laws in all Australian jurisdictions were finalised.³⁵³ Only three of these were under the Seacare scheme and all were in a single year (2008-09). In other words, in four out of those five years, no enforcement action had resulted in completed legal proceedings. Even allowing for the small size of the Seacare scheme, this is perplexing. No other jurisdiction had any year in that period without completed legal proceedings. The Seacare Authority and AMSA Annual reports for 2011-12 indicate that there were no prosecutions for contraventions of the OHS(MI) Act in that year.
- 7.85 The incidence rate of injury in the maritime industry within the Seacare scheme suggests that risk is not being well managed, so it appears unlikely that the absence of proceedings in that period could be explained by a high level of compliance with OHS duties of care. This is an area where the Seacare Authority and AMSA should regularly review the application of the compliance and enforcement policies.³⁵⁴ This could occur under the auspices of the MOU between the Seacare Authority and AMSA (which provides for a joint OHS plan). The proposed alignment of the OHS(MI) Act with the model WHS bill would make it much easier to find the appropriate graduated response for non-compliance, but it must be applied.

³⁴⁹ Ibid., s.95.

³⁵⁰ ASA submission, p.7.

³⁵¹ *Employer's guide to workers compensation*, Seafarers Safety Rehabilitation and Compensation Authority.

³⁵² *Seafarers Rehabilitation and Compensation Levy Collection Act 1992*, s.6.

³⁵³ CPM Report 14th ed, op. cit., p.20.

³⁵⁴ AMSA adopted an updated compliance and enforcement policy in 2012, and there is an accompanying compliance and enforcement protocol for the OHS(MI) Act.

Recommendation 7.8

The Seacare Authority and AMSA should regularly review the implementation of the compliance policies to ascertain whether the appropriate responses are being taken in relation to non-compliance with the OHS(MI) Act, and in particular, whether legal proceedings may be more frequently warranted for serious breaches.

Accountability

- 7.86 The Seacare Authority has appropriate statutory accountability obligations under the Seafarers Act and the FMA Act. It reports to the Minister and publishes an Annual Report, which suitably acknowledges the role and activities of AMSA.
- 7.87 I see no need for changes in this area, apart from my later recommendations about a Ministerial Statement of Regulatory Expectations and, in response, a Seacare Authority Statement of Intent.
- 7.88 The issue of the review of decisions taken by the Seacare Authority (or its delegate) is considered in Chapter Four dealing with consistency with the SRC Act.

Strategic Planning

- 7.89 In 2012, the Seacare Authority engaged in a highly consultative process to develop a broad strategic plan for the period 2013-2015. The Strategic Plan is focused on injury prevention, injury management and rehabilitation and scheme sustainability. These are described both as themes and priorities, but appropriately correspond with the regulatory objectives of the scheme (see Chapter One).
- 7.90 The Seacare Authority's Strategic Plan 2015 sets out several objectives including:
- a) to prevent workplace deaths and reduce the incidence of workplace injury and disease in the Australian maritime industry;
 - b) to ensure best practice outcomes through effective regulation of how seafarers are supported in their recovery, RTW and compensation following workplace injury; and
 - c) to contribute to a strong, viable Australian maritime industry by ensuring a fair, efficient and effective system of OHS and workers' compensation.
- 7.91 It is noted that the achievement of the goals in the Seacare Strategic Plan rests not only with the Seacare Authority, but also with its Government partners (AMSA and Comcare for example) and with the operators in the industry more generally. Nonetheless, the Seacare Authority is far more likely to achieve its strategic goals if its powers and resources are improved as recommended in this report.

Statement of Minister's expectations

- 7.92 Under s.107 of the Seafarers Act, the Minister may, by notice in writing given to the Chairperson of the Seacare Authority, give a direction to the Seacare Authority with respect to the performance of its functions or the exercise of its powers (but not in relation to a

particular case). The Authority must comply. The only example of a direction, which related to exemptions from the scheme (Chapter Two), was in 2006.

- 7.93 Other Commonwealth legislation enables the responsible minister to give the relevant statutory board or agency a statement of the Minister's expectations about how the entity will exercise its powers or perform its functions.³⁵⁵ Typically, such a statement, however described, is about the entity's policy focus and approach to performing its functions.
- 7.94 Under s.647 of the NOPSEMA Act, the Minister may give written policy principles to NOPSEMA about the performance of its functions. NOPSEMA must comply with the principles. The Minister's current statement of expectations (issued to NOPSEMA's advisory board) is available on line.³⁵⁶ The statement reinforces the role of the advisory board, indicates priority areas for attention and emphasises active engagement with stakeholders.
- 7.95 The *Transport Safety Investigation Act 2003* provides another example. Under s.12AE, the Minister may notify the Australian Transport Safety Bureau (ATSB) of the Minister's views on the appropriate strategic direction for the ATSB. The ATSB must have regard to the notification.³⁵⁷ The current Ministerial statement of expectations is also available on-line.³⁵⁸ Among other things, it refers to working collaboratively with various government stakeholders.
- 7.96 This is a useful model which allows high level policy and operational direction to be given. The NOPSEMA experience suggests that it is particularly useful where the relevant board or agency has a broad mandate but limited resources and depends on another entity for administrative support. That feature is common to the Seacare Authority and the NOPSEMA Advisory Board. Similarly, such a statement reinforces working collaboratively where that is essential for the best strategic results, as is essential for the Seacare Authority's work.

Recommendation 7.9

- a) Section 107 of the Seafarers Act should be revised along the lines of s.647 of the NOPSEMA Act so that it is clear that the Minister may issue binding strategic policy directions to the Seacare Authority and may state expectations about how they are to be achieved (the Seacare Authority would be required to respond with a formal Statement of Intent).
- b) If recommendation 7.10 for an overarching maritime safety policy is acted upon, the Minister should consider issuing a direction that sets out expectations about working collaboratively with government and non-government stakeholders to achieve the objectives of the strategy.

³⁵⁵ The capacity to do so was recommended in the Uhrig review (op. cit.). The Statement was to outline relevant government policies, including the Government's current objectives relevant to the authority and any expectations the Government may have on how the authority should conduct its operations. A statutory authority would respond by outlining how it proposes to meet the expectations of government in a Statement of Intent, including the identification of key performance indicators agreed with the relevant Minister.

³⁵⁶ <http://www.nopsema.gov.au/about/nopsema-advisory-board/>.

³⁵⁷ The ATSB cannot, with limited exceptions, be subject to direction about the exercise of its powers or the performance of its functions – s.12AB.

³⁵⁸ http://www.atsb.gov.au/about_atSB/ministers-expectations/ministers-statement-of-expectations.aspx.

Better co-ordination of Commonwealth regulation affecting maritime safety

- 7.97 As discussed in Chapter One, major national regulatory reforms have been undertaken or are being implemented in various parts of the maritime seagoing industry (for example, the changes to the OPGGS Act and the *Stronger Shipping for a Stronger Economy changes*). The reforms affect maritime safety regulation in various ways, including with direct effects [the imminent implementation of the arrangements for a single national regulator under the *Marine Safety (Domestic Commercial Vessels) National Law Act 2012* is a good example].
- 7.98 As previously outlined, the regulatory framework that relates to the seagoing parts of the maritime industry is complex. Within and across the Commonwealth portfolios, various constructive arrangements exist to facilitate co-ordination, avoid inconsistencies, share information and provide mutual assistance. The arrangements range from those required by legislation through to those that are subject to formal agreements (such as MOUs) or ad hoc informal arrangements. Even so, there is an important gap because no ongoing overarching strategy exists for managing the regulation of maritime safety in a coordinated way.
- 7.99 At the Ministerial level, COAG standing councils provide high level contact and a framework for cross-jurisdiction relationships and co-ordination. In a maritime safety context, the effectiveness of those arrangements is somewhat reduced because various aspects of seagoing maritime safety are in three Commonwealth portfolios and the Ministers belong to different COAG select councils.³⁵⁹
- 7.100 Although the Commonwealth Ministers have well established relationships through those COAG select councils with their State and Territory counterparts, the Commonwealth Ministers do not have a formal standing relationship between themselves in relation to maritime safety. Significantly, no overarching Commonwealth strategic framework exists for maritime safety or standing arrangements for the responsible departments and the relevant regulators in their portfolios to work together against a single set of maritime safety goals. Likewise, no protocols exist for becoming aware of one another's key issues, initiatives and needs (there are some statutory and operational links between some agencies, such as the Seacare Authority and AMSA, but not between all of the listed entities).
- 7.101 Opportunities may be lost for the more effective use of resources and for mutually reinforcing activities. Data development and sharing could be significantly improved (and duplication of effort reduced) under such arrangements. Regulated persons would benefit from greater co-ordination between regulators.
- 7.102 The following table outlines relevant maritime safety regulatory across the Commonwealth portfolios (DEEWR, DIT, and DRET).

³⁵⁹ This discussion does not extend to Defence or customs maritime issues. They could be included for policy co-ordination purposes, from time to time, if appropriate.

Table 7.2: Shared or complementary maritime safety interests of relevant Commonwealth portfolios

Portfolio	Department or agency	Key legislation with maritime safety focus	Maritime safety interests
Workplace Relations	DEEWR	<ul style="list-style-type: none"> • WHS Act • Seafarers Act 	Policy relating to legislation, safety performance and use of resources
Workplace Relations	Seacare Authority	<ul style="list-style-type: none"> • Seafarers Act • OHS(MI) Act 	<p>Safeguarding and improving OHS in defined part of maritime industry</p> <p>Successful workers' compensation system, including viability, compliance, good rehabilitation and RTW results, sound decision making and accountability</p>
Workplace Relations	Comcare	<ul style="list-style-type: none"> • Seafarers Act 	Support for Seacare Authority
Workplace Relations	Safe Work Australia	<ul style="list-style-type: none"> • Safe Work Australia Act 	Fostering achievement of agreed national WHS and WC strategic objectives
Resources	DRET	<ul style="list-style-type: none"> • OPGGS Act 	Policy relating to safety aspects of offshore petroleum and greenhouse gas regime
Resources	NOPSEMA	<ul style="list-style-type: none"> • OPGGS Act 	Compliance with safety aspects of offshore petroleum and greenhouse gas regime
Transport	DIT	<ul style="list-style-type: none"> • OHS(MI) Act • AMSA Act • Marine Safety (Domestic Commercial Vessels) National Law Act • Navigation Act 	Policy relating to safety aspects of <i>Stronger Shipping for a Stronger Economy, and other national and international maritime safety issues</i>
Transport	AMSA	<ul style="list-style-type: none"> • OHS(MI) Act • AMSA Act • Marine Safety (Domestic Commercial Vessels) National Law Act • Navigation Act 	Safety aspects of working on vessels
Transport	MWDF	N/A	Safety aspects of skills development for domestic maritime industry

Portfolio	Department or agency	Key legislation with maritime safety focus	Maritime safety interests
Transport	ATSB	<ul style="list-style-type: none"> Transport Safety Investigation Act 	Independent investigation of transport accidents and other safety occurrences, safety data recording, analysis and research; and fostering safety awareness, knowledge and action.

7.103 Against that background, consideration should be given to a formal Commonwealth cross-portfolio strategy for better regulation of maritime safety. Less formal arrangements could be used, but that option would have a less transparent structure and might result in weaker accountability. Even so, either option would be consistent with best practice cross-portfolio co-operation promoted in recent years by the ANAO³⁶⁰ and the Advisory Group on Reform of Australian Government Administration.³⁶¹

7.104 The proposed Commonwealth cross-portfolio strategy would build on existing arrangements, good will and common interest in improved maritime safety and would have the following key elements:

- a) the responsible Ministers would endorse the cross-portfolio strategy, with the participating Departments and agencies having joint accountability to the Ministers for delivery of the strategy's goals;
- b) the strategy would complement and not cut across the responsibility of the Departments and agencies to their portfolio Ministers.

7.105 Participating departments and agencies should develop details, but the proposed Commonwealth cross-portfolio strategy for better maritime safety regulation should include:

- a) the parties should agree on its particular scope and purpose, which should be refreshed annually;
- b) a joint commitment to developing and implementing work plans under the strategy for improving the nature, performance and coordination of maritime safety regulation at the Commonwealth level, with initial priority on improving information sharing and data relating to maritime safety;
- c) ongoing analysis of material links and overlaps between the relevant Commonwealth portfolios and agencies should occur, with action taken to address serious problems;
- d) there should be ongoing identification of regulatory issues, mutual consultation on possible responses, including using resources more effectively;

³⁶⁰ ANAO, *Innovation in the Public Sector: Enabling Better Performance, Driving New Directions – Better Practice Guide* 2009.

³⁶¹ *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* Commonwealth of Australia 2010.

- e) there should be constructive use, where appropriate, of the relationships of each participating department or agency with other interested persons (e.g., industry contacts or counterpart State and Territory bodies) to support the aims of the strategy;
- f) formal meetings should be held at least twice each year, with each portfolio successively providing a chairperson (however described) for one year;
- g) an annual report should be provided to the Ministers on the strategy's operation, with advice about any improvements that have been achieved or difficulties that may require action beyond that which could be taken under the strategy;
- h) industry stakeholders should be consulted about proposed actions under the strategy;
- i) the strategy should run for three years, with its ongoing operation reviewed in the final year.

Recommendation 7.10

Consideration should be given to establishing a Commonwealth cross-portfolio strategy for better regulation of maritime safety strategy, so that there is improved co-ordination, information sharing, data development and mutual support between Commonwealth departments and agencies with responsibility for maritime safety regulation and more effective use of resources.

[The strategy would have the features described in the *Better co-ordination of regulation affecting maritime safety* part of this Chapter of the report].

Future reviews of the Seacare scheme

- 7.106 In this report, I have examined the strengths and weaknesses of the Commonwealth's regulatory model which is intended to provide fair and effective protection of seafarers' health and safety at work, as well as ensuring the availability of a high standard of rehabilitation and return to work arrangements and fair compensation for seafarers who are harmed as a result of their work. The examination has been limited by gaps in data about the industry and the scheme. Nonetheless, sufficient information is available to conclude that the scheme is viable, but various improvements are needed. These are discussed in earlier chapters, with necessary changes recommended.
- 7.107 The scheme relates to part of a vital national industry, which has a high risk of injury to the people who work in it. There is no equivalent set of regulatory arrangements for the State and Territory parts of the same industry, so it is difficult to find directly relevant benchmarks for measuring the efficiency and effectiveness of the Seacare scheme at the operational level. In the few reviews that have been previously undertaken, the scheme's administrative performance at the time of those reviews has essentially been measured against its past performance. Even that is constrained, because data about scheme outcomes are, as discussed elsewhere, incomplete or not available. If the improvements discussed in the report are made, measuring scheme performance will be considerably facilitated.
- 7.108 The scheme's importance warrants a regular cycle of reviews. Consideration should be given to amending the Seafarers Act to provide for periodic reviews of the operations of the Seacare Authority. A model is provided by s.695 of the OPGGS Act which stipulates that the

responsible Commonwealth Minister must cause reviews of the operation of NOPSEMA to be conducted. The review of NOPSEMA must include an assessment of NOPSEMA's effectiveness in bringing about improvements in, among other things, the OHS of persons engaged in offshore petroleum operations or offshore greenhouse gas storage operations. The normal cycle of the reviews under s.695 is specified as five years.³⁶² Section 695 requires reports of the reviews to be presented to the Parliament.

- 7.109 A similar provision in the Seafarers Act would strengthen accountability, drive data improvements, provide a focus for strategic planning, and allow for periodic objective third party assessments of the effectiveness of the Seacare scheme.
- 7.110 A complete Seacare scheme review (whether or not the Act is amended to provide for reviews) would be warranted when there has been sufficient experience with the proposed changes and of the other recent reforms affecting the maritime industry to discern meaningful trends in performance. Accordingly, the next review should be undertaken within the next five years. It should be a fundamental review of the Seacare scheme's purpose, structure and performance, with a full consideration of alternatives to the current Seacare scheme model.
- 7.111 The next review should have much better information available and, depending on its timing, would be able to draw on the research undertaken for and the results of forthcoming reviews of the national WHS laws,³⁶³ the Australian WHS Strategy 2012-22,³⁶⁴ the foreshadowed Safe Work Australia *National Workers Compensation Action Plan 2013-2015*,³⁶⁵ and the 2015 review of the operation of NOPSEMA.³⁶⁶ The effects of the *Stronger Shipping for a Stronger Economy* reforms (see Chapter One) will also be clear.

³⁶² The first review is to cover NOPSEMA's first 3 years of operation – s.695(6) of the OPGGS Act 2006.

³⁶³ An operational review is expected for 2014. A more fundamental review is expected to be conducted by 2018.

³⁶⁴ The *Australian Work Health and Safety Strategy 2012-22*, is to be reviewed in 2017 (ibid, p.18).

³⁶⁵ This would be likely to be reviewed in 2015.

³⁶⁶ As required under s.695 of the OPGGS Act 2006.

Recommendation 7.11

- a) The Seafarers Act should be amended to provide for reviews of the operation of the Seacare Authority at least once in each five year period after the commencement of the amendment. The reviews should be required to consider the Seacare Authority's effectiveness in contributing to improvements in the work health and safety of persons covered by the (proposed) *Work Health and Safety (Maritime Industry) Act* and in the operation of the Seafarers Act and other legislation for which the Seacare Authority has administrative responsibility. Reviews should also address such other matters as the Minister directs pertaining to operation of the legislation and the activities of the Seacare Authority.
- b) The next review of the Seacare scheme should:
 - i. be conducted after there has been sufficient time to secure improvements in the data relating to the scheme's operation and for the effect of any changes made as a result of this review to be clear, but in any case should be no later than 2018;
 - ii. examine the Seacare scheme's purpose, structure and performance, with a full consideration of and recommendations about alternatives to the current Seacare scheme model.

Appendices

Appendix A: Abbreviations and Defined Terms

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
ADR	Alternative Dispute Resolution
AGSR	Australian General Shipping Register
AHPRA	Australian Health Practitioner Regulation Agency
AIMS	Australian Institute Marine Science
AISR	Australian International Shipping Register
ALRC	Australian Law Reform Commission
AMICA	Australian Maritime Industry Compensation Agency
AMSA	Australian Maritime Safety Authority
AMOU	Australian Maritime Officers Union
ANAO	Australian National Audit Office
Approved Guide	Guide to the Assessment of the Degree of Permanent Impairment
ASA	Australian Shipowners Association
ATSB	Australian Transport Safety Bureau
Best Practice Guide	Seacare Authority Best Practice Guide Claims Management
BITRE	Bureau of Infrastructure, Transport and Regional Economics
Clinical Framework	Clinical Framework for the Delivery of Health Services
COAG	Council of Australian Governments
CPM Report	Comparative Performance Monitoring Report
DAKPIs	Determining Authority Key Performance Indicators
DEEWR	Department of Education, Employment and Workplace Relations
DIT	Department of Industry and Transport
DRET	Department of Resources, Energy and Tourism
DWG	Designated Work Group

AAT	Administrative Appeals Tribunal
EEZ	Exclusive Economic Zone
Exemption Guidelines	Seacare Authority Exemption Guidelines
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FTE	Full-time Equivalent
Fund	Safety Net Fund
FWA	<i>Fair Work Act 2009</i> (Cwth)
IGA	Intergovernmental Agreement
Hanks Review	Review of the <i>Safety Rehabilitation and Compensation Act 1988</i> by Mr Peter Hanks QC
HSC	Health and Safety Committee
HSR	Health and Safety Representative
KPIs	Key performance indicators
Levy Collection Act	<i>Seafarers Rehabilitation and Compensation Levy Collection Act 1992</i>
Levy Act	<i>Seafarers Rehabilitation and Compensation Levy Act 1992</i>
LI Act	<i>Legislative Instruments Act 2003</i>
LIP	Licensee Improvement Program
MISC	Maritime Security Identification Card
Model laws	Model Work Health and Safety bill and Model Work Health and Safety Regulations as approved by the WRMC
MUA	Maritime Union of Australia
MWD Forum	Maritime Workforce Development Forum
National Law	<i>Marine Safety (Domestic Commercial Vessel) National Law Act 2012</i>
Nav Act 1912	<i>Navigation Act 1912</i>
NCEP	National Compliance and Enforcement Policy
NLCF	National Legislative Compliance Framework
NOPSA	National Offshore Petroleum Safety Authority
NOPSEMA	National Offshore Petroleum Safety and Environmental Management Authority
OHS	Occupational Health and Safety
OHS(CE) Act	<i>Occupational Health and Safety (Commonwealth Employment) Act 1991</i>

AAT	Administrative Appeals Tribunal
OHS(MI) Act	<i>Occupational Health and Safety (Maritime Industry) Act 1993</i>
OPGGS Act	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
PCBU	Person Conducting a Business or Undertaking
P&I Club	Protection and Indemnity Association
PIN	Provisional Improvement Notice
RTW	Return to work
Seacare Authority	Seafarers Safety, Rehabilitation and Compensation Authority
Seafarers Act	<i>Seafarers Safety, Rehabilitation and Compensation Authority Act 1992</i>
SMS	Seacare Management Section
SRC Act	<i>Safety, Rehabilitation and Compensation Act 1988</i>
SRCC	Safety, Rehabilitation & Compensation Commission
SRCOLA	<i>Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007</i>
SWA	Safe Work Australia
TAC	Victorian Transport Accident Commission
Transitional Act	<i>Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992</i>
UNCLOS	United Nations Convention on the Law of the Sea
WHS	Work Health and Safety
WHS Act	Work Health and Safety Act
WHSQ	Work Health and Safety QLD
WRMC	Workplace Relations Ministers' Council

Appendix B: Stakeholder Consultations

Date	Location	Stakeholder
5 November 2012	VIC	Australian Shipowners Association
13 November 2012	ACT	Australian Maritime Safety Authority
14 November 2012	ACT	Department of Resources, Energy and Tourism
15 November 2012	ACT	Safe Work Australia
19 November 2012	NSW	Allianz Insurance
		Australian Law Reform Commission
		Australian Maritime Officers Union
20 November 2012	NSW	Australian Institute of Marine and Power Engineers
21 November 2012	NSW	Maritime Union of Australia
23 November 2012	VIC	Seacare Authority
26 November 2012	VIC	TT Line
28 November 2012	WA	Woodside
		Swire Pacific
		AMMA
		NOPSEMA
6 December 2012	QLD	QLD Government roundtable
		AMMA
7 December 2012	VIC	ACTU
13 December 2012	VIC	Taylor Fry
		Farstad Shipping
9 January 2013	VIC	Holman, Fenwick and Willan
15 January 2013	ACT	Australian Maritime Safety Authority
		Department of Infrastructure and Transport
		Department of Resources, Energy and Tourism
6 February 2013	ACT	Comcare
18 February 2013	ACT	Australian Maritime Safety Authority
		Department of Resources, Energy and Tourism
		Seacare Management Section

Appendix C: List of Review Submissions

Person or body making submission	Type of entity
Administrative Appeals Tribunal	Tribunal
Australian Council of Trade Unions	Union peak body
Australian Institute of Marine and Power Engineers	Union
Allianz Insurance Group	Insurer
The Australian Mines and Metals Association	Industry association
Australian Shipowners Association	Industry association
Charles Taylor plc	Insurance management company
Joint submission by the Maritime Union of Australia and the Australian Maritime Officers Union (confidential submission)	Unions
National Offshore Petroleum Safety and Environmental Management Agency	Government agency
P&O Maritime Services Pty Ltd	Company
Seafarers Safety, Rehabilitation and Compensation Authority	Government authority
Suncorp Group	Insurer
Woodside (confidential submission)	Company

Appendix D: Seacare Authority Register of inconsistencies with the current Safety Rehabilitation and Compensation Act 1988

Section	Possible Amendment	SRC Act section	Comment
Section 3 – Definitions 'action for non-economic loss'	Insert a definition consistent with the SRC Act <i>action for non-economic loss</i> <i>means any action (whether or not it involves the formal institution of a proceeding) to recover an amount for damages for non-economic loss sustained by an employee as a result of an injury suffered by that employee:</i> <i>(a) that is taken by the employee against the employer, whether it is the Commonwealth, a Commonwealth authority or a licensed corporation, or against another employee; and</i> <i>(b) that follows an election made by the first-mentioned employee under subsection 45(1).</i>	Section 4 – Interpretation	The EM explains that this definition was inserted into the SRC Act to “Clarify that an action for non-economic loss is not restricted to formal institution of proceedings but can include process like settlement negotiations and consultations.”
Section 3 – Definitions 'medical treatment'	Insert further provision: <i>“or (i) any other form of treatment that is prescribed for the purposes of this definition”</i>	Section 4 – Interpretation	This was added to the SRC Act to enable a wider range of medical treatment to be reimbursed without the need for referral by a medical practitioner.
Section 3 – Definitions 'superannuation scheme'	Insert reference to “ <i>or, retirement saving account</i> ” in definition.	Section 4 – Interpretation	The EM to the amending Act notes “ <i>The range of what is now thought of as superannuation funds has extended greatly over the last few years and in particular financial institutions have started to offer retirement savings accounts as an alternative to traditional superannuation.</i> <i>The proposed amendment will extend the definition of superannuation scheme to include retirement savings accounts. The relevant retirement savings account has</i>

Section	Possible Amendment	SRC Act section	Comment
			<i>to be one to which the employer also made contributions, as it is only the employer's contributions that are taken into account for the purposes of sections 20, 21 and 21A."</i>
Section 28 – Compensation for medical related expenses	<p>Omit 28(4)(a) <i>"to, or in accordance with the directions of, the employee;"</i> and substitute <i>"(a) if the employee has paid the cost of the medical treatment—to, or in accordance with the directions of, the employee; or"</i> consistent with the SRC Act</p> <p>Omit 28(4)(c) <i>"if that cost has not been paid and the employee, or the legal personal representative of the employee, does not make a claim for the compensation—to the person to whom that cost is payable."</i> And substitute <i>"(c) in any other case—to the person to whom the cost is payable."</i></p>	Section 16 – Compensation in respect of medical expenses etc.	EM for amending Act notes that these amendments enable, in the SRC Act's case, Comcare, to reimburse the costs at the direction of the employee where the employee has paid the account or to make direct payments to the providers of medical treatment as the "majority of medical accounts" were lodged directly with Comcare without any specific direction from the employee.
Sections 33-36 Receipt of superannuation and lump sum benefits	<p>Replace references to superannuation contributions in the formulas with <i>"5% of the employee's normal weekly earning"</i></p> <p>Remove the deemed interest rate of 10% that applies in sections 34, and 35 (the reference to Superannuation amount/520) and replace with <i>"weekly interest on the lump sum"</i>.</p> <p>Note weekly interest on the lump sum is defined in the Act as being set by legislative instrument.</p>	Sections 20, 21 and 21A	<p>The EM to the amending Act notes that changes have been made to reflect the different arrangements that now exist in superannuation and in acknowledgement that the deemed interest rate of 10% was too high. Refer to EM for details and to Act for the full text of changes.</p> <p>While the Seafarers Act sections 33 and 34 are consistent with the SRC Act sections 20 and 21, the Seafarers Act also has section 35 <i>Compensation for injuries resulting in incapacity where employee rolled-over part of a lump sum benefit</i> and section 36 <i>Compensation for injuries resulting in incapacity where employee rolled-over the whole of a lump sum benefit</i> while the SRC Act only has 21A <i>Compensation for injuries resulting in incapacity if employee is in receipt of a</i></p>

Section	Possible Amendment	SRC Act section	Comment
			<i>superannuation pension and a lump sum benefit.</i>
Section 38 – Compensation for incapacity not payable in certain circumstances	Replace time restriction of 12 months after aged 64 with 104 weeks after aged 63	Section 23 – Compensation for incapacity not payable in certain cases	
Section 39 – Compensation for injuries resulting in permanent impairment	<p>Reduce the PI for hearing loss from 10% to 5% binaural.</p> <p>Repeal section 39(7) and substitute a new provision consistent with section 24 of the SRC Act</p> <p><i>Repeal the subsection, substitute:</i></p> <p><i>(7)Subject to section 25, if:</i></p> <p><i>(a)the employee has a permanent impairment other than a hearing loss; and</i></p> <p><i>(b)Comcare determines that the degree of permanent impairment is less than 10%; an amount of compensation is not payable to the employee under this section.</i></p> <p><i>(7A)Subject to section 25, if:</i></p> <p><i>(a)the employee has a permanent impairment that is a hearing loss; and</i></p> <p><i>(b)Comcare determines that the binaural hearing loss suffered by the employee is less than 5%; an amount of compensation is not payable to the employee under this section.</i></p>	Section 24 – Compensation for injuries resulting in permanent impairment	EM to the amending Act notes that these changes were made due to findings that the previous provisions in regard to hearing loss were too high compared to other jurisdictions and expert advice.
Section 40 – Interim payment of compensation	<p>Reduce permanent impairment for hearing loss from 10% to 5% binaural.</p> <p>Consistent with the amendment proposed above insert in section 40 (4) consistent with 25(4) of the SRC Act</p>	Section 25 – Interim payment of compensation	As above

Section	Possible Amendment	SRC Act section	Comment
	<p><i>After “permanent impairment of an employee”, insert “(other than a hearing loss)”.</i></p> <p>Also insert a new provision at the end of section 40 consistent with 25(5) of the SRC Act:</p> <p><i>(5) If Comcare has made a final assessment of the degree of permanent impairment of an employee constituted by a hearing loss, no further amounts of compensation are payable to the employee in respect of a subsequent increase in the hearing loss, unless the subsequent increase in the degree of binaural hearing loss is 5% or more</i></p>		
Section 41 – Compensation for non-economic loss	<p>Add the following subsection:</p> <p><i>(3) This section does not apply in relation to a permanent impairment commencing before 1 December 1988 unless an application for compensation for non-economic loss in relation to that impairment has been made before the date of introduction of the Bill for the Act that inserted this subsection.</i></p>	Section 27 – Compensation for non-economic loss	<p>To clarify treatment of ‘Schlenert’ type payments.</p> <p>That is, to clarify that employees with PI which arose prior to the commencement of the Seacare scheme should not be entitled to receive compensation for NEL as they would not be entitled to receive compensation for NEL under the Seamen’s Compensation Act.</p>
Section 42 – Approved Guide	<p>Amend to reflect requirements of the Legislative Instruments Act 2003 which commenced on 1 January 2005 by repealing (3) and introducing a new provision consistent with section 28 of the SRC Act:</p> <p><i>(3) A Guide prepared under subsection (1), and a variation or revocation under subsection (2) of such a Guide, must be approved by the Minister.</i></p> <p><i>(3A) A Guide prepared under subsection (1), and a variation or</i></p>	Section 28 – Approved Guide	The Seafarers Act has not been amended to reflect the commencement of the Legislative Instruments Act 2003

Section	Possible Amendment	SRC Act section	Comment
	<p><i>revocation under subsection (2) of such a Guide, is a legislative instrument made by the Minister on the day on which the Guide, or variation or revocation, is approved by the Minister.</i></p>		
<p>Section 54 – Employee not to have right to bring action for damages against employer etc. in certain cases</p>	<p>Amend section 54 by adding (3) and (4):</p> <p><i>(3)If:</i></p> <p><i>(a)an employee has suffered an injury in the course of his or her employment; and</i></p> <p><i>(b)that injury results in that employee’s death;</i></p> <p><i>subsection (1) does not prevent a dependant of that employee bringing an action against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee in respect of the death of the first-mentioned employee.</i></p> <p><i>(4)Subsection (3) applies whether or not the deceased employee, before his or her death, had made an election under subsection 45(1).</i></p>	<p>Section 44 – Action for damages not to lie against Commonwealth etc. in certain cases</p>	<p>This will clarify that dependents of deceased employees have access to common law remedies against the employer of the deceased</p>
<p>Section 55 – Actions for damages – election by employees</p>	<p>Insert an additional provision at the end section 55:</p> <p><i>(5) The election by an employee under this section to institute an action or proceeding against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee does not prevent the employee, before, or instead of, formally instituting such action or proceeding, doing any other thing that constitutes an action for non-economic loss.</i></p>	<p>Section 45 – Actions for damages – election by employees</p>	<p>The EM to the Act amending the SRC Act notes:</p> <p><i>“This item adds an extra subsection ... which provides that an employee’s election to institute an action or proceeding against [their employer] does not prevent the employee from instituting any other action which constitutes an action for non-economic loss. The item clarifies that once an employer has made an election ... they are not confined to taking formal proceeding against the [employer]. An employee who had made such an election can take other action (e.g. settlement</i></p>

Section	Possible Amendment	SRC Act section	Comment
			<i>negotiated before or in place of formal proceedings).</i> "
Section 56 – Notice of proceedings against third party and Section 57 – Notice of proceedings against employer	Consider amending to reflect the language of the SRC Act which refers to “common law claims” rather than proceedings	Sections 46 and 47	The EM to the amending Act notes that the use of the language of claims rather than proceedings “ <i>is to allow the negotiation of common law matters where a claim for damages has been made, whether or not formal proceedings have been instituted.</i> ”
Section 58 – Compensation not payable if damages recovered	<ol style="list-style-type: none"> 1. Consider amending to reflect the language of the SRC Act which refers to “claims” rather than proceedings. 2. Consider revising language in title and 58(1) from “if” to “where” as for SRC Act section 48. 3. 58(3) insert “for the benefit of” after “paid to” consistent with amendments made to section 48(3) of SRC Act 	Section 48 – Compensation not payable if damages recovered	<ol style="list-style-type: none"> 1. See note above. Question: is the intent of section 58(5) of Seafarers Act “<i>Subsection (3) does not apply if the damages were recovered in proceedings instituted by the employee as a result of an election by the employee under section 55, or by way of a settlement of such proceedings</i>” match that of section 4A of the SRC Act. Section 4A was introduced as part of 2001 amendments and provides “<i>Subsection (3) does not apply if the damages were recovered in an action for non-economic loss or by way of a settlement of such an action.</i>” 2. Note this language difference arises in a number of parts of the Act. 3. EM to amending Act notes that this allows payments that may have been made direct to medical providers to be recovered – currently only payments made direct to the employee can be recovered.
Section 59 - Proceedings against third parties	1. Consider amending to reflect the language of the SRC Act which refers to “claims” rather than proceedings.	Section 50 – Common law claims against third parties	<ol style="list-style-type: none"> 1. See note above 2. EM to amending Act notes that this allows payments

Section	Possible Amendment	SRC Act section	Comment
	2. 59(11)(a) insert "for the benefit of" after "paid to" consistent with amendments made to section 50(7) of SRC Act		that may have been made direct to medical providers to be recovered. Note these sections of the SRC Act and Seafarers Act are differently structured – a comprehensive analysis of the effect of these differences has not been undertaken.
Section 60 – Payment of damages by persons to employer	Omit "instituted" and substitute "arising out of a claim made" – amendment consequential to move to language of "claims"	Section 51 – Payment of damages by persons to Comcare	See above
Section 130 – Payment of Compensation	Consistency of timeframes for payment of compensation compared with SRC Act – Seafarers Act requires payment within 30 days for permanent impairment, death benefits and non-economic loss in respect of permanent impairment (sections 29, 39, 40 or 41) whilst section 26 of SRC Act only provides for payment within 30 days for permanent impairment (sections 24 or 25)	Section 26 – Payment of compensation	Appears to be no basis for difference between the jurisdictions in this regard.
Section 137 – Employees on compensation leave	Expand to provide that sick leave entitlements accrue for the first 45 weeks during which an employee is on post-determination compensation leave consistent with section 116 of the SRC Act.	Section 116 – Employees on compensation leave	Previous advice has emphasised that, as the Seafarers Act was silent on the accrual of sick leave, " <i>a beneficial interpretation should be adopted</i> " and accrual occur on the same basis as for the SRC Act. Amending the Seafarers Act would ensure that there was consistency between the Acts and put the accrual of sick leave beyond doubt or interpretation.

Appendix E: Current entitlement provisions in the Seafarers Act that should be made consistent with the SRC Act provisions.

Subject	SRC Act Provision	Seafarers Act Provision
<i>Level of contribution of employment to injury</i>	To a significant degree (for diseases) - s.5B. The matters to be taken into consideration are set out in a non-exhaustive list in s.5B(2) Sub-section 5B(3) defines <i>significant degree</i> to be <i>substantially more than material</i> .	To a material degree (for diseases) - s.10(1)
<i>Exclusionary provisions – psychological injuries</i>	Compensation is not payable in respect of an injury (being a disease) if the injury is due to reasonable administrative action taken in a reasonable manner in respect of the employee’s employment – s.5A(1). A non-exhaustive list of what might be taken to be “reasonable administrative action” is included at s.5A(2)	Compensation is not payable in respect of an injury (including a disease), if the injury is 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 – s.3 (definition of <i>injury</i>)
<i>Retirement provisions</i>	Compensation is not payable to an employee who has reached 65, however if an employee who has reached 63 suffers an injury, compensation is payable for up to 104 weeks (whether consecutive or not) during the period of the employee’s incapacity -s.23.	If an employee suffers an injury before reaching 64, compensation is not payable for the injury after the person reaches 65. If an employee suffers an injury after 64, compensation is payable for 12 months after the date of injury – s.38
<i>Permanent impairment threshold test</i>	10% Whole Person Impairment (WPI) 5% binaural hearing >0% finger/toe, taste/smell Must qualify for PI to qualify for non-economic loss	10% Whole Person Impairment (WPI) 10% hearing >0% finger/toe, taste/smell Must qualify for PI to qualify for non-economic loss
<i>Industrial deafness</i>	Binaural hearing loss of less than 5% impairment not payable – s.24(7A)	Hearing loss impairment of less than 10% not payable – s.39(7)

<i>Subject</i>	<i>SRC Act Provision</i>	<i>Seafarers Act Provision</i>
<i>Death benefits</i>	Funeral expenses Reasonable funeral expenses not exceeding \$10,735.29 – s.18(4)(a)	Funeral expenses Reasonable funeral expenses not exceeding \$5,838.09 – s.30(2)

Appendix F: Summary of Hanks Review recommendations

Total number of Hanks Review recommendations	104
Total number of Hanks Review recommendations which, if accepted, should be used as the basis of changes to the Seafarers Act.	73
Total number of Hanks Review recommendations not considered suitable or relevant to the Seafarers Act, or deferred.	31

Item	Rec. No.	Issue	Adopt for Seafarers Act?
Hanks report, Chapter 3			
Recommendations about the structure of the SRC Act			
1	3.1	Use of the terms, "Comcare" and "Determining Authority"	No
2	3.2	Insert Objects and a purpose clause in the Act	Yes
3	3.3	Structure of the Act	Yes
Hanks report, Chapter 4			
The Hawke Recommendations			
4	4.1	Secretariat and other support to the SRCC	No
5	4.2	SRCC oversight over determining authorities	No
6	4.3	SRCC membership	No
7	4.4	Eligibility for self-insurance	No
8	4.5	Repeal of s.100(1) (a), (b) and (c) re Ministerial declaration of eligibility for self-insurance licence	No
9	4.6	Definition of "national employer"	No
10	4.7	Declaration of premium payers as determining authorities	No
11	4.8	Transparency in relation to Comcare's management of claims	No
Hanks report, Chapter 5			
Recommendations about eligibility for compensation			
12	5.1	Definition of "employee" to introduce a deeming provision	No
13	5.2	Perception must have a reasonable basis to provide connection with employment	Yes
14	5.3	Heart attacks, strokes, etc., to satisfy "significant contributory factor" eligibility test	Yes
15	5.4	DEEWR and DVA examine allowing ADF claims under Part XI	No
16	5.5	Amendments to "reasonable administrative action"	Yes
17	5.6	Amendment to s.5A(2) re actions to be considered as "reasonable administrative action"	Yes
18	5.7	Employees "on-call" to be covered by the Act	No
Hanks report, Chapter 6			
Recommendations about rehabilitation			
19	6.1	SRC Act to expressly provide for early intervention	Yes
20	6.2	Provisional liability	Defer
21	6.3	Amendment of "rehabilitation program" to "workplace rehabilitation plan"	Yes
22	6.4	Amend language of Part III to reflect focus on occupational/vocational rehabilitation providers	Yes
23	6.5	Removal of role of rehab authority and replace with concept of liable employer	No

Item	Rec. No.	Issue	Adopt for Seafarers Act?
24	6.6	Person responsible for rehabilitation management to undertake training	Yes
25	6.7	Responsibility for rehabilitation where an employer moves between employers	No
26	6.8	Comcare to have power to take over/commence employee rehabilitation	Yes
27	6.9	Comcare to issue "injury management and rehabilitation code of practice"	Yes
28	6.10	Amend SRC Act to provide for development of "injury management plan"	Yes
29	6.11	SRC Act amendment to provide for preparation and implementation of injury management plans	Yes
30	6.12	Review of claims at 12 and 52 weeks	Yes
31	6.13	Repeal of s.36 of SRC Act (as redundant)	Yes
32	6.14	Removal and replacement of s.37(3) re core return to work requirements for an employer	Yes
33	6.15	Provisions relating to who can undertake a s.57 medical examination	Yes
34	6.16	Amendment of the definition of "suitable employment"	No
35	6.17	Employer penalties for non-compliance with obligation re suitable duties	Yes
36	6.18	Establishment of scheme-wide job placement program	Yes
37	6.19	Employees to be able to propose their suitable duties; to be included in rehabilitation code of practice	Yes
38	6.20	Establishment of Return to Work Inspectorate in Comcare	Yes
39	6.21	Comcare to have power to issue improvement notices and accept employer undertakings	Yes
Hanks report, Chapter 7			
Recommendations about compensation for injuries and diseases			
40	7.1	Normal Weekly Earnings to be renamed "average remuneration"	No
41	7.2	Determination of average remuneration, re "relevant period" as per s.9	No
42	7.3	Annual indexation of employee's average remuneration	No
43	7.4	Section 19(6) not to apply if employee deemed to have ability to earn	Yes
44	7.5	Sections 20, 21, and 21A to be repealed (superannuation offset provisions)	Yes
45	7.6	Deduction of 5 per cent of employee's normal weekly earnings provision removed	Yes
46	7.7	If ss.20, 21 and 21A retained, removal of the term "retired" and replacement with different provisions	Yes
47	7.8	Amendments to the mechanism for taking into account deemed income on lump sum	Yes
48	7.9	Amend the <i>Superannuation Guarantee (Administration) Act</i> to deem s.19 payments "ordinary time earnings"	Yes
49	7.10	Amendment to the intro in s.8(10) to include "from time to time"	No
50	7.11	Suspended employees continue to be employed for purposes of s.8(10)	No
51	7.12	Repeal of s.37(5)	Yes
52	7.13	Changes to incapacity step-down provisions	Yes
53	7.14	Deletion of reference to "adjustment percentage" when calculating compensation	Yes

Item	Rec. No.	Issue	Adopt for Seafarers Act?
54	7.15	Calculation of step-down periods	Yes
55	7.16	Provide for compensation just before and after retirement age	Yes
56	7.17	Compensation while outside Australia	Yes
57	7.18	Voluntary redemptions	Yes
58	7.19	Increase of threshold amount for compulsory redemptions	Yes
59	7.20	Definition of "legally qualified dentist" and "legally qualified medical practitioner"	Yes
60	7.21	Definition of medical treatment	Yes
61	7.22	Provisions for medical treatment provided outside Australia	Yes
62	7.23	Comcare powers re recognition, accreditation, approval, etc., of medical treatment provided	Yes
63	7.24	Definition of medical treatment to include nursing home treatment	Yes
64	7.25	Restriction in the definition of "medicines" provided as part of medical treatment	Yes
65	7.26	Restriction of compensation for Schedule 8 medications	Yes
66	7.27	"Nurse" and "nursing care" to be defined	Yes
67	7.28	Medical treatment to meet objective standards such as the Clinical Framework	Yes
68	7.29	Referral of treating practitioners to professional regulatory bodies in certain circumstances	Yes
69	7.30	Comcare to prepare and issue table of medical rates to apply in the scheme	Yes
70	7.31	Impact of changes to medical expenses on ADF claimants	No
71	7.32	Definition of "severe injury"	Yes
72	7.33	New tiered system of services and support provided in the home	Yes
73	7.34	Capping of amount payable for ongoing services for the severely injured	Yes
74	7.35	Establishment of a formal process to assess need for services provided in the home	Yes
75	7.36	Assessment of household assistance and attendant care services by an independent party	Yes
76	7.37	List of approved/registered attendant care providers be issued as a legislative instrument	Yes
Hanks report, Chapter 8			
Recommendations about compensation for permanent impairment			
77	8.1	Adoption of proposed National guide as the Approved Guide	Yes
78	8.2	Separate impairments from single injury to be combined	Yes
79	8.3	Reduction in threshold for additional payment as a result of worsening of original condition	Yes
80	8.4	Maximum benefit payable to be the same as lump sum payment for death	Yes
81	8.5	Introduction of algorithmic method for calculating impairment compensation	Yes
Hanks report, Chapter 9			
Recommendations about claim determination, reconsideration and review			
82	9.1	Electronic notification of injury and lodgement of claim forms	Yes
83	9.2	Forwarding of claims within three days	No
84	9.3	Introduction of statutory time frames for initial claim decision making	No

Item	Rec. No.	Issue	Adopt for Seafarers Act?
85	9.4	Diagnosis of psychological injuries after 12 weeks from date of claim	Yes
86	9.5	Payment of employee's costs at reconsideration stage	Yes
87	9.6	Regulation prescribing the time frame for making a decision on requests for reconsideration	No
88	9.7	Determination of SRC Act claims managed by the MRCC	No
89	9.8	AAT to explore ways to reduce time taken to resolve disputes	No
90	9.9	Licensees to follow model litigant guidelines	No
91	9.10	Determining authorities to work closely with Comcare in proceedings before the Courts	No
92	9.11	Ability for Comcare to settle cases on a limited commercial basis	No
93	9.12	All parties to disclose evidence at the AAT at least 28 days before hearing	Yes
94	9.13	AAT to hear matters not subject to reviewable decision, with consent of the parties	Yes
95	9.14	Reliance on Fair Work Commission determinations on reasonableness or otherwise of an employer's actions	Yes
96	9.15	Jurisdiction for Fair Work Commission to review some reviewable decisions	Yes
97	9.16	Give Fair Work Commission review jurisdiction on decisions relating to rehabilitation programs	Yes
98	9.17	Provisions relating to time frames for compliance with various requests under the SRC Act	Yes
99	9.18	Obligation to provide information of change of circumstances	Yes
100	9.19	Comcare to recover overpayments made to an employer	No
101	9.20	Compensation to injured workers for financial detriment caused by defective administration	No
Hanks report, Chapter 10			
Recommendations about liabilities arising apart from the SRC Act			
102	10.1	Comcare and licensees to have a statutory right to recovery	No
103	10.2	Section 50 to be amended to make clear it includes power for Comcare to do all things necessary for making a claim	Yes
104	10.3	Damages recovered by Comcare pursuant to s.50 limited to damages recoverable by the employee	Yes

Appendix G: Summary of key differences between the OHS(MI) Act and the model WHS bill

Subject of provision	Difference
Objects	The model WHS bill has a wider range of objects with a greater focus on continuous improvement, e.g., eliminating and minimising risks, continuous improvement of work health and safety standards and achieving the 'the highest level of protection as reasonably practicable'
Risk management	The model WHS bill expressly applies an obligation of 'eliminating and minimising risks' to duties of care (s.17)
Definitions	<p>The OHS(MI) Act focuses on the duties of <i>operators</i> to their <i>employees</i>. The definitions provide detail of the persons who, in the maritime context, come within the definitions.</p> <p>The model WHS bill uses broader terms. A <i>person conducting a business or undertaking</i> (PCBU) has a duty of care to <i>workers</i> and other persons who may be affected by work carried out as part of the conduct of the business or undertaking. These terms are far wider than <i>employers</i> and <i>employees</i>.</p> <p>Many definitions are broader in scope under the model WHS bill, reflecting its deliberately wider reach in covering duty holders, work and the location of work, as well as the fact that the model legislation is not industry specific.</p>
Primary duty of care	<p>The model WHS bill applies to a wider group of primary duty holders and extends their duty of care to a wider group of persons,</p> <p>Under the OHS(MI) Act, an 'operator' of a prescribed ship or prescribed unit, must take <i>all reasonable steps</i> to protect the health and safety at work of employees and contractors.</p> <p>Under the model WHS bill, a PCBU has the primary duty of care. A PCBU must ensure, <i>so far as is reasonably practicable</i>, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.</p>
Other duties of care	<p>Both Acts impose duties of care on other persons.</p> <p>Under the OHS(MI) Act, these are:</p> <ul style="list-style-type: none"> • the person in command, • manufacturers, importers, suppliers, and persons erecting, installing, repairing and maintaining plant in a workplace, • a person who constructs, modifies or repairs a structure on a prescribed ship or prescribed unit; • a person who is engaged in loading or unloading a prescribed ship or

Subject of provision	Difference
	<p>prescribed unit; and</p> <ul style="list-style-type: none"> employees. <p>The model WHS bill imposes duties of care on PCBUs who:</p> <ul style="list-style-type: none"> are designers, manufacturers, importers, or suppliers of plant, substances and structures; or install, construct or commission plant or structures, for use at workplaces.³⁶⁷ <p>Further, under the model WHS bill:</p> <ul style="list-style-type: none"> officers of a PCBU (the term includes officers of corporations, partners and senior public officials) have a wide positive duty to exercise <i>due diligence</i> (as defined) to ensure that the PCBU complies with its health and safety duties; workers must take reasonable care for their own health and safety and that of others who may be affected by their actions or omissions; other persons at the workplace (e.g., visitors) to take reasonable care of their own health and safety and not to do anything that could adversely affect that of anyone else.
Breaches of duties of care	<p>Under the OHS(MI) Act, all breaches of duties are criminal offences.</p> <p>Breaches of duties under the model WHS bill are criminal offences but civil penalties are also available as an alternative sanction for all but the most serious breaches. Also, as identified elsewhere, under the model WHS bill a regulator has a wider range of ways to ensure compliance.</p>
Enforceable undertakings	<p>The OHS(MI) Act does not provide for enforceable undertakings.</p> <p>Two types of enforceable undertaking exist in the model WHS bill, one that is voluntarily given to a regulator and a court ordered WHS undertaking.</p>
Infringement notices	<p>Unlike the OHS(MI) Act, the model WHS bill provides for on-the-spot fines (infringement notices).</p>
Prosecution – limitation period	<p>The OHS(MI) Act does not limit the time for bringing a prosecution. The <i>Crimes Act 1904</i> (Cwth) limitation period applies [one year after the commission of the offence - s.15B(1)(b)].</p>

³⁶⁷ The duties under the WHS Act have wider application than the equivalent duties under the OHS(MI) Act. For example, the duties of PCBUs who install, construct or commission plant or structures extend to safeguarding the safety and health of persons carrying out any reasonably foreseeable activity at a workplace in relation to the proper use, decommissioning or dismantling of the plant or demolition or disposal of the structure. There are similar provisions for PCBUs who are designers, manufacturers, importers and suppliers.

Subject of provision	Difference
	<p>Under the model WHS bill, an offence against the Act may be brought:</p> <ul style="list-style-type: none"> • within two years after the offence was committed or the regulator becomes aware the offence was committed; or • within one year after a finding in a coronial or an official inquiry that the offence has occurred.
Penalties	<p>Under the OHS(MI) Act, the maximum monetary penalty is 1000 penalty units (currently, \$170,000). The maximum period of imprisonment (for specified breaches) is 6 months, but does not relate to a serious breach of a duty of care.³⁶⁸</p> <p>The model WHS bill provides for differential penalties depending on the type of offence and the person committing it. Breaches of duties are criminal offences but civil penalties are available for all but the most serious breaches.</p> <p>Monetary penalties are up to \$3,000,000 for corporations and \$600,000 for individuals. The maximum period of imprisonment (for the most serious breach of the Act) is five years.</p>
Sentencing options	<p>The OHS(MI) Act only provides for a fine or, in some instances, imprisonment.</p> <p>In addition to fines and custodial sentences, the model WHS bill provides (in Part 13) for remedial orders, adverse publicity orders, orders to undertake WHS projects, training orders, injunctions and compensation orders. There may be a court-ordered WHS undertaking.</p>
Review of non-prosecution	<p>Under the OHS(MI) Act, if proceedings for an offence have not begun within 6 months after the relevant act or omission occurred, an HSR or involved union may, in writing, ask the Inspectorate to begin such proceedings. The Inspectorate must, within 3 months after receiving the request, advise the HSR or the involved union whether proceedings have been commenced or will be, and, if not, give reasons.</p> <p>Under the model WHS bill, if an individual considers that a serious offence has occurred but there has been no prosecution in the 6 to 12 months after the alleged offence, the person may ask the regulator in writing to prosecute.</p> <p>The regulator must reply within 3 months advising on the relevant investigation's status and, if complete, whether a prosecution has been or</p>

³⁶⁸ The OHS(MI) Act provides maximum penalties of 6 months imprisonment for (a) failure to give reasonable assistance to an inspector when requested, and not answering an inspector's questions or producing requested documents reasonably connected with the conduct of an investigation (s.90), (b) tampering with or removing notices issued by an inspector (s.105), and (c) interfering with or rendering ineffective protective equipment or a safety device provided for the health, safety or welfare of employees or contractors at work (s.111).

Subject of provision	Difference
	<p>will be brought. The alleged offender must also be advised.</p> <p>If there is no prosecution, the individual may ask the regulator to refer the matter to the DPP. The DPP must consider the matter and advise the regulator within 1 month whether a prosecution should be brought. If the regulator does not act on advice to prosecute, written reasons must be given.</p>
Consultation	<p>Under the OHS(MI) Act, an operator of a prescribed ship or unit must develop an OHS policy in consultation with involved unions and other persons the operator considers appropriate.</p> <p>The model WHS bill requires duty holders who have duties in relation to the same matter to consult, cooperate and coordinate activities with each other.</p> <p>A PCBU must consult the relevant workers about WHS. The nature and timing of consultation are specified.</p> <p>The model WHS bill does not specifically require a general WHS policy document (the regulations require a safety policy for a major hazard facility).</p>
Work Groups	<p>Under the OHS(MI) Act, a Designated Work Group consists of employees of an operator who are employed on a prescribed ship or unit.</p> <p>The model WHS bill provides for work groups. A work group may relate to workers in one PCBU, and, if agreed, to workers from multiple businesses.</p> <p>The costs of an HSR who represents workers in more than one PCBU are shared equally between the PCBUs unless otherwise agreed.</p>
HSRs	<p>Under the OHS(MI) Act, only one HSR may be elected for a DWG for two years.</p> <p>Under the model WHS bill, the number of HSRs to be elected is determined as part of work group negotiations. The term of office is three years.</p>
Training of HSRs	<p>The OHS(MI) Act provides that:</p> <ul style="list-style-type: none"> • an HSR must attend training that is accredited by the Seacare Authority; • an operator must allow the HSR time off work, without loss of remuneration and other entitlements to undertake the training. <p>Under the model WHS bill, an HSR must be allowed to attend WHS training:</p> <ul style="list-style-type: none"> • approved by the regulator; • that is a course the HSR is entitled to attend under the regulations; and • which is chosen by the HSR in consultation with the PCBU.

Subject of provision	Difference
	The PCBU must pay course fees and reasonable costs associated with the training. Any time that the HSR is given off work to attend the training must be with the pay the HSR would receive for performing the HSR's normal work duties during that period.
PINs	<p>Under the OHS(MI) Act, an HSR may issue a PIN to a person in command and direct the cessation of unsafe work. HSRs must be trained but may exercise these powers before undertaking the training.</p> <p>Under the model WHS bill, HSRs may direct the cessation of unsafe work and issue PINs, but only after completing the relevant training.</p>
Directions to stop unsafe work	<p>The OHS(MI) Act authorises HSRs to direct that unsafe work cease.</p> <p>Under the model WHS bill, HSRs may direct that unsafe work cease.</p>
Cessation of unsafe work	Under the model WHS bill , workers may cease, or refuse to carry out, work if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.
HSCs	<p>Under the OHS(MI) Act, a HSC must be established for employees on a prescribed ship or unit if:</p> <ul style="list-style-type: none"> • the employees are in one or more designated work groups; and • the HSR or an involved union asks the operator. <p>The model WHS bill requires a PCBU to establish an HSC for the business or undertaking at the workplace, or part of it, within 2 months of a request by:</p> <ul style="list-style-type: none"> • an HSR for that workplace; or • five or more workers at that workplace.
Issue resolution	<p>The OHS(MI) Act does not provide for issue resolution.</p> <p>Under the model WHS bill, the <i>parties</i> (as defined) to an issue about WHS at a workplace must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with an agreed procedure or, if there is no agreed procedure, the default procedure prescribed in the regulations.</p> <p>Where an issue cannot be resolved after reasonable efforts, a party may refer the issue to the regulator to appoint an inspector to attend the workplace to assist in resolving the issue. The inspector may exercise compliance powers.</p>

Subject of provision	Difference
Union right of entry	<p>There is no union right of entry under the OHS(MI) Act.</p> <p>The model WHS bill provides that WHS entry permit holders may enter a workplace for specified purposes and subject to certain conditions.</p> <p>A WHS permit holder must be an office holder or employee of a union and must hold an entry permit under the <i>Fair Work Act</i> or a State or Territory industrial law. Permits are issued by a relevant authorising authority. Fair Work Australia is the authority under the Commonwealth's WHS Act.</p> <p>Entry (with notice) is permitted:</p> <ul style="list-style-type: none"> • to inquire into suspected contraventions of the WHS Act or regulations; or • to consult and advise workers on WHS matters and risks. <p><i>[This is discussed further below]</i></p>
Protection against coercion or discrimination	<p>Under the OHS(MI) Act, an operator may not dismiss an employee, harm the employee in relation to his or her employment or threaten to do so because the employee has complained about OHS, assisted an OHS investigation, ceased work in accordance with a valid direction by an HSR. There is a reverse onus of proof and a financial penalty.</p> <p>The model WHS bill gives wider protection against coercive and discriminatory conduct. A person must not directly or indirectly engage in or assist discriminatory conduct for a prohibited reason.³⁶⁹</p> <p>Criminal or civil enforcement action may be taken. There is a reverse onus of proof in relation to the reason for the conduct (in the case of criminal proceedings, the reason must be the dominant reason; in civil proceedings, it must be a substantial reason).</p> <p>In a criminal proceeding, there is a financial penalty (\$100,000 for a corporation) and a court may order compensation, reinstatement or re-employment or employment in the position applied for or a similar position.</p> <p>In civil proceedings, a court or tribunal may order an injunction, compensation, reinstatement or re-employment, or any other order considered fit.</p>

³⁶⁹ *Discriminatory conduct* includes dismissal of a worker, termination of a contract for services, harm in relation a worker's employment or engagement, refusal to employ or engage a potential worker and the refusal to enter into a commercial arrangement or the termination of such an arrangement or threatening to engage in such conduct. A *prohibited reason* includes a person's being or proposing to be an HSR; exercising or proposing to exercise a power or to perform a function as an HSR or a member of an HSC; assisting in the exercise of a power or the performance of a function under the Act; being involved in resolving a WHS issue; seeking compliance with the Act or regulations; raising WHS concerns with a relevant person (a PCBU, an HSR, a WHS entry permit holder, an HSC member, another worker, an inspector).

Subject of provision	Difference
Notifiable incidents	<p>The OHS(MI) Act requires operators to report certain accidents and dangerous occurrences to AMSA and keep records of them.</p> <p>Under the model WHS bill, a PCBU must notify the regulator of specified notifiable incidents (the death of a person; a specified serious injury or illness of a person; or a specified dangerous incident).</p>
Inspectors	<p>The OHS(MI) Act confers various functions and powers on investigators which may only be exercised in connection with the conduct of an investigation.</p> <p>Inspectors have a wider range of powers and functions under the model WHS bill. These are not limited to the conduct of an investigation.</p>
Review of statutory notices	<p>The OHS(MI) Act does not provide for internal review. Appeals on specified matters may be made to Fair Work Australia.</p> <p>Under the model WHS bill, there is a two-stage review process for specified decisions, starting with internal review, followed by external review. A decision may be stayed while under review.</p>
Authorisation	<p>The OHS(MI) Act</p> <p>Under the model WHS bill, the regulations may require certain work, or classes of work, to be carried out only by or on behalf of a person who is authorised. Offences are committed in various specified circumstances if such work is not carried out or supervised by an authorised person.</p> <p>The model WHS regulations (a) require persons carrying out classes of high risk work to be licensed; (b) identify relevant qualifications for an applicant for a high risk work licence; (c) establish the licensing process and process for review of licensing decisions; and (d) provide for accreditation of competency assessors. There are certain exceptions.</p>
Codes of Practice	<p>Under the OHS(MI) Act, the Minister may approve codes of practice to provide practical guidance to operators. Non-compliance with a code may be taken as evidence of a breach of the Act or regulations in relation to a matter covered by the code, unless compliance is established by a person using other means.</p> <p>Under the model WHS bill and regulations, codes of practice are admissible in legal proceedings as evidence of whether or not a duty under the WHS laws has been met. They can also be referred to by an inspector when issuing an improvement or prohibition notice.</p> <p>Compliance with codes of practice is not mandatory under the model WHS bill, provided that any other method used gives an equivalent or higher standard of work health and safety than suggested by the code.</p>

Appendix H: Comparison of right of entry provisions in Australian OHS laws

Legislation	Provision
OHS(MI) Act	<p>Under s.54, an HSR may be assisted by a 'consultant'. A consultant may only:</p> <ul style="list-style-type: none"> • assist an HSR at a workplace; or • have access to information given to the HSR by an operator, <p>if the operator agrees in writing.</p> <p>A consultant may only be present with an HSR at an interview between an employee and an inspector or an operator or the person in command or operator's representative if the employee consents.</p>
WHS Act (Cwth)	<p>Part 7 of the model WHS bill provides that WHS entry permit holders may enter a workplace for specified purposes and subject to certain conditions.</p> <p>A WHS permit holder must be an office holder or employee of a union and must hold an entry permit under the <i>Fair Work Act</i> or a State or Territory industrial law. Permits are issued by a relevant <i>authorising authority</i>. Fair Work Australia is the authority under the Commonwealth's WHS Act.</p> <p>Entry (with notice) is permitted:</p> <ul style="list-style-type: none"> • to inquire into suspected contraventions of the WHS Act or regulations (prior notice is not required but must be given as soon as is reasonably practicable after entry); • to consult and advise workers on WHS matters and risks (at least 24 hours' notice is required, but no more than 14 days).
OPGGs Act	<p>Under s.35 of Schedule 3 of the OPGGS Act, an HSR may be assisted by a consultant at a workplace at which work is performed or give the consultant information provided to the HSR by an operator or employer, if the operator or NOPSEMA has, in writing, agreed to the assistance being provided at that workplace or to the provision of the information.</p>
Fair Work Act	<p>Under ss. 481-521 of the <i>Fair Work Act 2009</i>, an organisation official who has a right of entry permit (called a permit holder) may enter premises, and exercise rights whilst on the premises, for the purpose of investigating a contravention of the <i>Fair Work Act 2009</i>, the former <i>Workplace Relations Act 1996</i>, or a Fair Work instrument. The permit holder must have reasonable grounds for suspecting a contravention has occurred or is occurring.</p> <p>The permit holder may only exercise these rights if all the following are met:</p> <ul style="list-style-type: none"> • the suspected contravention relates to or affects at least one member of the permit holder's organisation;

Legislation	Provision
	<ul style="list-style-type: none"> • the organisation is entitled to represent the member's industrial interests; • the member performs work on the premises; • unless the Fair Work Commission has issued an exemption certificate, written notice of entry is given to the occupier of the premises and any affected employer, during working hours at least 24 hours, but no more than 14 days, before entry. <p>An organisation official may not remain at premises if the official does not:</p> <ul style="list-style-type: none"> • produce the permit holder's authority documents for inspection when asked to do so by the occupier of the premises or an affected employer, or when seeking records; • comply with any reasonable request by the occupier of the premises to: <ul style="list-style-type: none"> ○ comply with an applicable OHS requirement; ○ conduct interviews in a particular room or area of the premises; ○ take a particular route to reach a particular room or area. <p>An organisation official who is a permit holder may enter premises to hold discussions with 1 or more employees:</p> <ul style="list-style-type: none"> • who perform work there; • whose industrial interests the permit holder's organisation is entitled to represent; • who wish to participate in the discussions. <p>A permit holder:</p> <ul style="list-style-type: none"> • must provide an entry notice to the occupier providing at least 24 hours' notice, but no more than 14 days' notice, before entering premises to hold discussions; • may only enter premises during working hours and hold discussions during mealtimes or other breaks. <p>A permit holder must not:</p> <ul style="list-style-type: none"> • intentionally hinder or obstruct anyone or otherwise act improperly; • intentionally or recklessly give the impression the permit holder is authorised to do unauthorised things.

Legislation	Provision
	<p>An employer (or other person) must not:</p> <ul style="list-style-type: none"> • refuse or unduly delay entry premises; • refuse or not comply with a permit holder's request for records or documents or access to them; • intentionally hinder or obstruct a permit holder exercising a right of entry; • intentionally or recklessly give the impression that the employer or other person is authorised to do unauthorised things. <p>The FWC may deal with a right of entry dispute, including by arbitration, and may make any order it considers appropriate, including by:</p> <ul style="list-style-type: none"> • suspending or revoking an entry permit; • placing conditions on entry permits; • ruling on the future issue of entry permits to one or more persons.
WHS Act (ACT)	Part 7 – right of entry provisions consistent with model WHS bill
WHS Act (NSW)	Part 7 – right of entry provisions consistent with model WHS bill
WHS Act (NT)	Part 7 – right of entry provisions consistent with model WHS bill
WHS Act (Qld)	Part 7 – right of entry provisions consistent with model WHS bill
WHS Act (SA)	Part 7 – right of entry provisions consistent with model WHS bill
WHS Act (Tas)	Part 7 – right of entry provisions consistent with model WHS bill
OHS Act (Vic)	<p>Part 8 - <i>Authorised Representatives of Registered Employee Organisations</i></p> <p>Similar to model WHS bill</p>
OHS Act (WA)	<p>In WA, right of entry for OHS purposes is provided for under the <i>Industrial Relations Act 1979</i> as part of the overall right of entry rules.</p> <p>Under s.49H of the <i>Industrial Relations Act 1979</i>, authorised (union) representatives may enter premises with 24 hours' notice to consult members or employees who are eligible for membership. Under s.49I, authorised representatives may enter such premises during working hours to investigate a suspected breach of any of a range of specified work-related Acts, including the <i>WA Occupational Safety and Health Act 1984</i>. Notice is required if documents are required to be produced.</p>

Appendix I: Comparison of the objects of the OHS(MI) Act and the model WHS bill

[Items in bold do not have an equivalent in the OHS(MI) Act]

<i>Section 3 of the OHS(MI) Act</i>	<i>Section 3 of the WHS model bill</i>
<p>The objects of this Act are:</p> <ul style="list-style-type: none"> a) to secure the health, safety and welfare at work of maritime industry employees; and b) to protect persons at or near workplaces from risks to health and safety arising out of the activities of maritime industry employees at work; and c) to ensure that expert advice is available on occupational health and safety matters affecting maritime industry operators, maritime industry employees and maritime industry contractors; and d) to promote an occupational environment for maritime industry employees that is adapted to their health and safety needs; and e) to foster a cooperative consultative relationship between maritime industry operators and maritime industry employees on the health, safety and welfare of maritime industry employees at work. 	<ul style="list-style-type: none"> (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by: <ul style="list-style-type: none"> a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work [or from specified types of substances or plant]; and b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety; and c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and d) promoting the provision of advice, information, education and training in relation to work health and safety; and e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction. (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work [or from specified types of substances or plant] as is reasonably practicable.

