

# SEACARE SCHEME REVIEW

This discussion paper provides information for interested persons and illustrates the type of matters that they may wish to raise in their written submissions or discussions with the Review.

*Discussion Paper*

# Seacare Scheme Review – Discussion Paper

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## Introduction

1. The Australian Government, with the support of State and Territory governments in relevant areas, is undertaking wide ranging reform of the regulation of the maritime industry. The *Navigation Act 2012* will replace the current *Navigation Act 1912*. The *Stronger Shipping for a Stronger Economy* package has four elements: tax reforms to encourage investment in Australian shipping, an improved coastal trading licensing regime, an Australian international shipping register and a Maritime Workforce Development Forum to deal with issues concerning skills in the industry. The Australian Maritime Safety Authority (AMSA) is becoming the single national regulator for domestic commercial vessel safety in Australia.<sup>1</sup> In 2011, Australia ratified the ILO Maritime Labour Convention 2006.<sup>2</sup> As discussed later, the Government is developing updated safety provisions in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGGS Act).
2. On 16 October 2012, the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, announced a Review of the Seacare Scheme to be undertaken by Mr Robin Stewart-Crompton, assisted by a secretariat from the Department of Education, Employment and Workplace Relations (DEEWR).<sup>3</sup> 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 and workers' compensation schemes for people in the maritime industry. It must provide 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. 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 is not to consider any reduction in existing benefits afforded to workers covered by the Seacare Scheme.
3. Seacare is a national scheme of OHS, rehabilitation and workers' compensation arrangements. It is established under two principal Commonwealth statutes:
  - the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act); and
  - the *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act),and their accompanying regulations.<sup>4</sup>
4. The Seacare scheme applies to:
  - a) defined seafaring employees under both Acts; and
  - b) in relation to the OHS(MI) Act, certain employers and other third parties.
5. The Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority), which is established under the Seafarers Act, oversees the scheme. The Seacare Authority consists of an independent Chairperson and a Deputy Chairperson, the Chief Executive Officer of the Australian Maritime Safety Authority (AMSA), two employer representatives and two employee representatives. The Act sets out the Seacare Authority's functions and powers.

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<sup>1</sup> *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cwth), which is to be applied in the States and Territories.

<sup>2</sup> The Maritime Labour Convention takes effect internationally on 20 August 2013.

<sup>3</sup> <http://ministers.deewr.gov.au/shorten/review-national-compensation-scheme-seafarers>

<sup>4</sup> There are numerous statutes relating to the Seacare scheme. These are set out in the later discussion relating to governance.

## Terms of reference

6. Under its four specific terms of reference (TORs), the review will inquire into and report, by 22 February 2013, on the following matters.

### TOR 1

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).

### TOR 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;
- b) ensuring consistency between the Seafarers Act and the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act);
- c) legislative changes required to the OHS(MI) Act to ensure consistency with the model work health and safety laws.

### TOR 3

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

### TOR 4

The governance arrangements for the Seacare scheme.

## Purpose of this discussion paper

7. The discussion paper provides information for interested persons and illustrates the types of matters that they may wish to raise in their written submissions or discussions with the review. Interested persons are not limited in any way to the issues raised here and are free to address any matters that they consider relevant to the terms of reference. A submission need not address any of the issues mentioned in the discussion paper if they are not of concern to the person making the submission.

## Overview of the maritime industry subject to Australian regulation

8. To illustrate the size, scope and nature of the regulatory task, the following box provides some key facts about the maritime industry that is subject, in various ways, to Australian regulation,

The 2009-10 *Australian Sea Freight Report*, compiled by the Bureau of Infrastructure, Transport and Regional Economics (BITRE), notes the following:

- In 2009-10, 1052.4 m. tonnes of cargo moved across Australian wharves. This represented a 12.2 per cent increase on 2008-09. 81.9 per cent of this cargo was exports; 8.1 per cent was imports; 5.0 per cent was domestic loaded cargo; and 5.0 per cent was domestic unloaded cargo.
- In 2009-10, Australian ports handled 947.6 m. tonnes of international cargo. Compared with 2008-09, there was a 14.4 per cent increase in the total weight of exports and a 4.9 per cent increase in the total weight of imports.
- By value, there was an 11.6 per cent decrease in exports to \$178.9 billion and a 5.5 per cent decrease in imports to \$156.9 billion between 2008-09 and 2009-10.
- Australian ports handled 104.8 m. tonnes of coastal cargo during 2009-10, increasing by 1.6 per cent on 2008-09. The total coastal freight task was 114.8 billion tonne-kilometres in 2009-10, increasing by 6.8 per cent from 2008-09.
- In 2009-10, 2872 voyages on coastal voyage permits were carried out by unlicensed ships to move freight on the Australian coast, a 4.4 per cent increase on 2008-09. Total tonnage moved under permits increased 9.6 per cent to 15.1 m. tonnes, which accounted for 28.9 per cent of all coastal freight. The coastal freight task performed by ships using permits was 43.2 billion tonne-kilometres, which was 37.6 per cent of the coastal freight task.
- In 2009-10, the number of ships involved in international shipping entering Australia rose to 4344, compared to 4171 in 2008-09. Voyages to Australia from overseas ports decreased 1 per cent to 11 392, and the total number of port calls decreased by 5.6 per cent to 25 162 in 2009-10.
- The Australian trading fleet increased in both number of ships and total deadweight tonnage as at 1st July 2010, compared to the previous year. The total number of ships in the fleet increased from 94 to 97 vessels, and the total deadweight tonnage increased by 6.0 per cent to 3.1 m. tonnes.<sup>5</sup>

<sup>5</sup> Bureau of Infrastructure, Transport and Regional Economics, *Australian sea freight 2009-10*, Australia, 2011

BITRE also forecasts Australian maritime activity to 2029-30:

- Australian containerised exports in 2007-08 totalled 1.50 m. TEU<sup>6</sup>. This is forecast to increase to 1.74 m. TEU in 2012-13, and to 6.32 m. TEU by 2029-30.
- Australian containerised imports in 2007-08 totalled 2.46 m. TEU. This is forecast to increase to 2.67 m. TEU in 2012-13, and to 5.17 m. TEU by 2029-30.
- In 2007-08, there were 362 000 TEU transported between Australian ports. This is forecast to increase to 415 000 TEU in 2012-13, and to 824 000 TEU by 2029-30.
- Australian non-containerised exports in 2007-08 totalled 685 m. tonnes. This is forecast to increase to 754 m. tonnes in 2012-13, and to 1.35 billion tonnes by 2029-30.
- Australian non-containerised imports in 2007-08 totalled 61.5 m. tonnes. This is forecast to increase to 63.1 m. tonnes in 2012-13, and to 89.7 m. tonnes by 2029-30.
- In 2007-08 there were 54.6 m. tonnes of non-containerised freight transported between Australian ports. This is forecast to increase to 65.1 m. tonnes in 2012-13 and to 92.7 m. tonnes by 2029-30.<sup>7</sup>

## Performance of the Seacare scheme

9. The following boxes contain some key indicators of the Seacare scheme's performance.

### *Seacare scheme's rehabilitation and RTW performance*

In 2011-12:

- 152 claims lasted for 28 days or more (43 per cent were assessed for a rehabilitation program)
- 81 per cent of claimants who commenced a rehabilitation program returned to work (65 per cent in 2010-11)
- The durable return to work rate was 60 per cent of injured seafarers - that is a decrease from the previous year (74 per cent) and is below the national average (75 per cent)
- The proportion of injured employees returning to work with the same employer was 85 per cent, which is comparable to the national average, and the proportion of employees returning to same duties was 95 per cent, which is higher than the national average
- 29 per cent of injured Seacare scheme employees had a return to work plan, compared with 53 per cent nationally

<sup>6</sup> Twenty Equivalent Units (TEU) is equivalent to 14 metric tonnes

<sup>7</sup> Bureau of Infrastructure, Transport and Regional Economics, *Australian maritime activity to 2029-30 Statistical report*, Australia, 2010

### ***Seacare scheme's compensation performance***

In 2011-12:

- 264 claims for workers compensation were lodged (285 in 2010-11) and 238 claims were accepted in the Seacare jurisdiction (260 in 2010-11)
- The injury incidence rate was 37.54 accepted claims per 1000 FTE employees, a 15 per cent decrease from the previous year
- The injury frequency rate was 8.5 accepted claims per 1 m. hours worked, a 13 per cent decrease from the previous year.
- Accepted claims of one week or more duration were 82 per cent of all accepted claims.
- The incidence rate of accepted claims resulting in 12 weeks or more compensation were 12 accepted claims injuries per 1000 FTE.
- The offshore sector had 57.3 per cent of employees in the scheme and 64.3 per cent of claims.

### ***Trends in premiums***

The Seacare Authority's actuary (Taylor Fry) has found that premium rates have reduced considerably over the five years to 2010-11 and are now at levels experienced in the late 1990s. The reductions in premium rates are due in part to changes in claims experience and therefore calculated risk (Seacare Authority Annual Report 2011-12, p.57).

The full findings as set out in the Annual Report are at Appendix 1.

### ***Seacare scheme's occupational health and safety performance***

In 2011-12:

- No incidents resulted in fatalities (in 2008-09), there were three fatalities that were covered by the scheme – none has occurred since then).
- 65 notifiable incidents were reported under the OHS(MI) Act, a small increase from the previous year (63).
- AMSA conducted 58 reactive investigations (66 in 2010-11).
- AMSA issued four prohibition notices (five in 2010-11) and 29 improvement notices (47 in 2010-11)

## DISCUSSION OF ISSUES UNDER THE TERMS OF REFERENCE

### TOR 1(a) – OHS(MI) Act interaction with the OPGGS Act and State and Territory OHS schemes

10. Under s.640 of the OPGGS Act, the *Navigation Act 1912* and the OHS(MI) Act (and related subordinate legislation) are disapplied in specified circumstances in relation to ship-like petroleum facilities. This occurs where the vessels are stationary and undertaking specific offshore oil and gas industry related activities. Disapplication occurs so that only the OPGGS Act's major hazard OHS regime applies in such circumstances.<sup>8</sup> There has been some uncertainty about when this may commence or cease.<sup>9</sup>
11. The Government has indicated that drafting of amendments to clarify the point of transition between a petroleum facility and a marine vessel would, with suitable stakeholder consultation, occur in 2012.<sup>10</sup>
12. The OHS(MI) Act is paramount in any circumstances where both it and State or Territory OHS laws may apply to a prescribed ship, a prescribed unit or any other vessel that comes within the scope of the OHS(MI) Act.<sup>11</sup> Thus, there are some issues about when the various relevant safety regulatory regimes apply.
13. Improved safety results may be achieved by greater clarity about which safety regime applies to ships and off-shore industry mobile units and the persons working on or near them:
  - a) when in a port to which other OHS laws apply; or
  - b) at a facility covered by the OPGGS Act.
14. AMSA has sought to achieve regulatory clarity at an operational level through MOUs with OHS regulators in various States and Territories.<sup>12</sup>

#### *TOR 1 (a): OHS(MI) Act interaction with the OPGGS Act and State and Territory OHS schemes*

##### *Discussion points*

What practical issues arise in relation to:

- a) disapplying the Navigation Act and OHS(MI) Acts under the OPGGS Act?
- b) the interaction between the OHS(MI) Act and State or Territory OHS laws?

What changes are considered necessary?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

### TOR 1(b) - Coverage of the Seacare scheme – jurisdictional Issues

15. Section 19 of the Seafarers Act and s.6 of the OHS(MI) Act establish the Seacare scheme's jurisdictional coverage. Both Acts refer to employment of employees on 'a prescribed ship' - and, in the case of the OHS(MI) Act, also to 'prescribed units' - engaged in certain specified activities or with particular

<sup>8</sup> <http://www.ret.gov.au/resources/Documents/Offshore%20Petroleum%20Safety/FinalGovt-response.pdf> at p.18

<sup>9</sup> See the report of the Second Triennial Review of the Operational Effectiveness of the National Offshore Petroleum Safety Authority.

<sup>10</sup> See foot note 7.

<sup>11</sup> Constitution, s.109.

<sup>12</sup> [http://www.amsa.gov.au/shipping\\_safety/OHS/OHSMOUs.asp](http://www.amsa.gov.au/shipping_safety/OHS/OHSMOUs.asp)



characteristics. Those terms are respectively defined as a 'ship' and an 'offshore mobile unit' to which Part II of the Navigation Act 1912 applies, with certain exceptions. Appendix 1 to the discussion paper reproduces the application (i.e., coverage) provisions of each Act. The Seacare Authority has issued guidance on the operation of these provisions.<sup>13</sup>

16. As mentioned earlier, the Government is introducing a range of maritime reforms and changes to the OPGGS regulatory regime.<sup>14</sup> These may have implications for the Seacare scheme. A key element of the Government's maritime reform program is the replacement of the *Navigation Act 1912* by the *Navigation Act 2012*. The substantive provisions of the latter Act are expected to commence in 2013. Given that the Seacare scheme's coverage provisions are linked to the current Navigation Act by reference to Part II (section 10), the replacement of the Navigation Act necessitates consideration and possible re-drafting of the Seacare scheme coverage provisions. Particular attention may need to be given to the implications of the new Australian International Shipping Register.
17. The new Navigation Act's transitional provisions will maintain the coverage status quo for both the Seafarers Act and the OHS(MI) Act pending the outcome of this review.<sup>15</sup>
18. The option of de-coupling the Seacare scheme from the Navigation Act could be examined. The aim would be for the scheme's coverage provisions to be clear and defined autonomously. Even so, any such provisions in the Seafarers Act would need to be drafted like to those in the Navigation Act and changes to that Act would need to be monitored for their implications for the Seacare legislation
19. The review will be assisted by interested persons identifying any concerns that they have or improvements that they consider necessary to the Seacare scheme in light of the maritime reforms. For these purposes, attention is drawn to the Seacare Authority's 2012 discussion paper on jurisdictional coverage.<sup>16</sup> The review is considering the submissions made in response to that discussion paper and will consider the views expressed in them. Persons who made those submissions are welcome to indicate whether their views have changed in any respect.

#### *TOR 1(b) - Coverage of the Seacare Scheme – Jurisdictional Issues*

##### *Discussion points*

Should the Seacare scheme be legislatively independent of the Navigation Act?

Does the legislation include anyone who should not be covered or exclude anyone who should be covered?

What other issues are there with the scheme's current coverage provisions?

What are the implications for the Seacare scheme in the current and proposed maritime reforms and changes to offshore petroleum and greenhouse gas storage regulatory regime?

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#### **TOR 1(c) - Exemptions from the Seacare scheme and declarations under the Navigation Act**

20. Under s.20A of the Seafarers Act, the Authority may grant exemptions from the Act. The provision was introduced in 1997, due partly to the significant costs associated with obtaining insurance cover under the Act for one-off voyages. The section does not specify the grounds for granting exemptions.

<sup>13</sup> [http://www.seacare.gov.au/data/assets/pdf\\_file/0004/64444/guidance-notes-coverage-under-seafarers-rehabilitation-compensation-act.pdf](http://www.seacare.gov.au/data/assets/pdf_file/0004/64444/guidance-notes-coverage-under-seafarers-rehabilitation-compensation-act.pdf)

<sup>14</sup> See [http://www.infrastructure.gov.au/maritime/shipping\\_reform/](http://www.infrastructure.gov.au/maritime/shipping_reform/) and [http://www.ret.gov.au/resources/upstream\\_petroleum/op-regulatory-regime/changes/Pages/changes.aspx](http://www.ret.gov.au/resources/upstream_petroleum/op-regulatory-regime/changes/Pages/changes.aspx)

<sup>15</sup> *Navigation (Consequential Amendments) Act 2012*

<sup>16</sup> [http://www.seacare.gov.au/news/features\\_listing/seacare\\_jurisdictional\\_coveragediscussion\\_paper](http://www.seacare.gov.au/news/features_listing/seacare_jurisdictional_coveragediscussion_paper)

21. The Authority has published guidelines on the circumstances under which it may consider exemptions,<sup>17</sup> namely:
  - a. the prescribed ship's proposed voyage or voyages do not constitute a regular trading pattern;
  - b. 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;
  - c. the voyages undertaken by the prescribed ship which make it subject to the operation of the Seafarers Act are incidental to the ship's primary operations.
22. The Authority may also exempt employment on a particular prescribed ship where:
  - a. an employer can 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; or
  - b. the prescribed ship is under 500 gross tonnes.
23. Further, the Authority may exempt employment from the Act's operation where a prescribed ship voyages within a Territory and does not voyage between a Territory and a place outside a Territory. In October 2012, 14 exemptions applied to different vessels under the Act. They range from ships with a 'non-regular' trading pattern to cases where lower cost workers' compensation insurance is available
24. Although the Seacare scheme has no declaration provisions, certain vessels can be brought into the scheme where AMSA makes declarations under ss.8A, 8AA and 8AB of the Navigation Act 1912.
25. The review will examine whether exemptions should be further clarified in the Seafarers Act or associated Regulations. This would not operate to exempt operators from OHS(MI) Act obligations.

*TOR 1(c) - Seacare scheme exemptions and directions and declarations under the Scheme*

*Discussion points*

Should the Seafarers Act continue to provide for exemptions?

If so:

- what should they be?
- should limitations apply to such exemptions and directions?
- should the exemption categories and powers be spelled out in the legislation?

Are there satisfactory arrangements for the review of decisions on exemptions?

Should there be any new or changed powers to declare that vessels come within the scheme?

Are there any classes of vessels or types of operations that are now excluded from the scheme that should be brought within it?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

## **TOR 2(a) - provisions in the legislation which need to be updated**

26. The Seafarers Act was enacted in 1992 and has not been comprehensively reviewed or updated since then. Changes to the Seacare legislation may be needed to bring it up to date in terms of references, drafting approaches and other technical issues.

<sup>17</sup> [http://www.seacare.gov.au/compensation/coverage/exemption\\_from\\_the\\_seafarers\\_act](http://www.seacare.gov.au/compensation/coverage/exemption_from_the_seafarers_act)

27. The Seacare Authority, Comcare and DEEWR are being asked to identify what changes are required. Other stakeholders and interested persons are invited to identify any areas, whether technical or not, that should be considered for updating. Some of these may be covered by other terms of reference, but any person making a submission is welcome to draw attention to such matters in commenting on this term of reference or in any other part of a submission.

*TOR 2(a) – provisions in the legislation that may need updating*

*Discussion points*

Do any provisions in the Seacare scheme's legislation require updating?

If so, why and what change should be made?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

**TOR 2(b) - legislative changes required to the OHS(MI) Act to ensure consistency with the model work health and safety laws.**

28. The national work health and safety harmonisation process is still underway. Even so, seven States and Territories have enacted legislation based on the model Work Health and Safety Act.<sup>18</sup>
29. When it was drafted, the OHS(MI) Act was based on the Commonwealth's *Occupational Health and Safety Act 1991* (OHS Act), which has been replaced by the Commonwealth's *Work Health and Safety Act 2011* (WHS Act). The review is required to examine what changes should be made to align the OHS(MI) Act with the model WHS Act. Safe Work Australia has prepared guidance on the model Act.<sup>19</sup>
30. Appendix 3 sets out key differences between the OHS(MI) Act and the model WHS Act.
31. Coverage under the OHS(MI) Act and the Seafarers Act is linked to the Navigation Act. Amendments to the OHS(MI) Act may require appropriate consistency of application and coverage with the other Acts.

*TOR 2(b) - amendments to the OHS(MI) Act to ensure consistency with the model WHS laws*

*Discussion points*

What changes are necessary to align the OHS(MI) Act with the Commonwealth's *Work Health and Safety Act*?

Are there any considerations that would require a different approach in any area?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

**TOR 2(c) - Consistency with the Safety, Rehabilitation and Compensation Act**

32. A related review of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) was announced by the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, on 24 July 2012. The terms of reference for the review of the Seacare Scheme indicate that the Seafarers Act should be consistent with the wording and application of the SRC Act.

<sup>18</sup> The model WHS Act was developed by Safe Work Australia under the Council of Australian Governments *Intergovernmental Agreement for Regulatory and Operational Reform in OHS* (2008).

<sup>19</sup> Safe Work Australia, *Guide to the Model Work Health and Safety Act*, October 2012 – available at <http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/717/Guide-to-the-WHS-Act.pdf>

33. The review of the SRC Act issued its issues paper in September 2012. Submissions have been published on that review's web page.<sup>20</sup> It will be necessary to be mindful of any accepted recommendations for changes to the SRC Act that might flow through to the Seafarers Act and associated legislation. This could include issues about the coverage of injuries and eligibility for compensation.
34. One particular issue that requires attention relates to the age at which such eligibility ceases. As the issues paper for the SRC Act notes<sup>21</sup>, most Australian workers' compensation schemes (apart from Queensland and Western Australia) remove the entitlement to weekly incapacity benefits for injured employees when they reach the age of 65.
35. This includes the Seacare scheme [see s 38(1) of the Seafarers Act]. For employees who are injured at the age of 64 or over, s.38(2) provides for the payment of weekly incapacity benefits for a maximum period of 12 months. However, medical and rehabilitation costs, and lump sum payments for permanent impairment, are paid irrespective of age.
36. Age cut-offs in workers' compensation laws are based on employees retiring at age 65 with access to other means of financial support, e.g., the age pension and superannuation. Between 2017 and 2023, the eligibility age for the age pension is to be progressively increased from 65 to 67.<sup>22</sup> Accordingly, an injured employee who is ineligible for incapacity benefits at age 65 will not have access to the age pension until he or she is 67.
37. Australian employees are already increasingly continuing in employment after the age of 65. A higher eligibility age for the age pension is likely to increase the number of employees who do so.
38. Nonetheless, while the workforce is ageing, most employees still retire before age 65.<sup>23</sup> In 2007, the House of Representatives Standing Committee on Legal and Constitutional Affairs released its report: *Older People and the Law*.<sup>24</sup> Recommendation 42 (R.42) was for the Australian Government, in cooperation with State and Territory governments, to review the application of workers' compensation legislation to ensure that older employees were not disadvantaged.
39. The Australian Government referred R.42 to the former Workplace Relations Ministers Council, which asked Safe Work Australia to consider it. Safe Work Australia has included the matter in the 2012 work program of the Strategic Issues Group on Workers' Compensation.
40. The Australian Law Reform Commission (ALRC) is currently undertaking the 'Age Barriers to Work inquiry'. It was initiated as part of the Australian Government's response to population ageing. The ALRC was asked to consider Commonwealth legislation and related legal frameworks that either directly, or indirectly, impose limitations or barriers that could discourage older persons from participating, or continuing to participate, in the workforce or other productive work.
41. The ALRC released a discussion paper, *Grey Areas: Age Barriers to Work in Commonwealth Laws* on 2 October 2012.<sup>25</sup> Relevant proposals include the two shown in the following box.

<sup>20</sup> <http://www.deewr.gov.au/WorkplaceRelations/Policies/Pages/SRCActReview.aspx>

<sup>21</sup> Ibid, pp. 24,25.

<sup>22</sup> See: <http://www.humanservices.gov.au/customer/enablers/centrelink/age-pension/eligibility-for-age-pension>. The eligibility ages for men and women will be aligned at age 65 from 1 July 2013.

<sup>23</sup> The Australian Bureau of Statistics *Survey of Employment Arrangements, Retirement and Superannuation 2007* indicates that the average age at retirement is currently 52 years (58 years for men and 47 years for women).

<sup>24</sup> Available at:

[http://www.apf.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=laca/olderpeople/report.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/olderpeople/report.htm)

<sup>25</sup> <http://www.alrc.gov.au/publications/grey-areas%E2%80%94age-barriers-work-commonwealth-laws-dp-78>

*ALRC proposal 3–5*

The Seafarers Act and certain other laws (including the SRC Act) should be amended to ensure that retirement provisions are tied to the qualifying age for the Age Pension.

*ALRC proposal 3–6*

The Seafarers Act and certain other laws (including the SRC Act) should be amended to provide that workers who are injured at any age after two years prior to the eligibility age for the age pension may receive incapacity payments for up to 104 weeks.

42. The ALRC also asked (*ALRC question 3–1*) whether the Seafarers Act and certain other Acts should be amended to provide that, where a worker is injured after two years before the eligibility age for the age pension, the worker should receive incapacity payments for more than 104 weeks.

*TOR 2(c) - Consistency with the SRC Act*

*Discussion points*

What contemporary workers' compensation considerations should be considered in the review of the Seafarers Act?

Aside from coverage, are there any aspects of the Seafarers Act's rehabilitation and compensation scheme that should be different from what is provided under the SRC Act?

Are there issues of age discrimination that should be addressed and, if so, are the proposals of the ALRC (see above) for the consistent amendment of Seafarers Act and the SRC Act appropriate?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

### TOR 3 - Workers' Compensation Premium Issues

43. The Seacare Authority has sought to achieve best practice within the existing scheme by administrative improvements, including by providing guidance to employers and insurers. Even so, any such strategy is constrained by the nature, scope and design of the scheme.
44. The Seacare scheme uses a privately underwritten scheme funding model. Under this model, a small number of private sector insurance companies provide cover for workers' compensation liabilities to employers in the scheme. Claims management and rehabilitation functions are performed by the employers themselves or contracted out to insurers or specialist providers.
45. Other funding models used in Australian workers' compensation schemes include:
- centrally funded schemes, which have a single public sector insurer providing insurance services, underwriting the workers' compensation liabilities and centralised claims management services;
  - hybrid schemes, which usually operate with a public sector insurer underwriting the scheme and contracting out claims management services to approved agents.

46. Under all three scheme funding models, self-insurance arrangements may be available, subject to meeting various prudential and other requirements.
47. Unlike the SRC Act, however, self-insurance arrangements are not provided for under the Seacare scheme. Nonetheless, to reduce insurance premiums, some employers have very high claims excesses on their insurance policies, thereby operating as de facto self-insurers up to the limit of the excess.
48. Owing to the small number of employers in the scheme and the small number of insurers providing insurance and claims services, the scheme could be susceptible to diseconomies of scale and inefficiencies. Alternative funding (centralised funding, self-insurance) and service delivery models (centralised claims management services) might provide an opportunity to improve services to injured seafarers, improve efficiencies and reduce costs to employers.
49. Premium costs may be positively influenced by more efficient and effective rehabilitation and durable return to work. Consideration could be given to improving the legislation (in this regard, the findings of the separate review of the SRC Act will be of particular interest) and the approach taken by all interested parties to rehabilitation and return to work.
50. The Seacare scheme operates in an industry where insurance has traditionally been provided through Protection and Indemnity Associations (P&I Clubs). The P&I Clubs typically provide cover for all aspects of the vessels operations (hull, cargo, environmental, service and crew protection). Currently no P&I Clubs are willing to provide workers' compensation cover for Seafarers Act benefits, requiring the employer/operator to take out separate workers' compensation cover from private insurers. P&I Clubs may be unwilling to provide cover due to the long tail nature of incapacity benefits and the limitations on settling claims through cash redemptions under the Seafarers Act. There is a question of whether P&I Clubs would have a beneficial effect for the scheme and, if so, how they might become involved.

#### *TOR 3 - Workers' Compensation Premium Issues*

##### *Discussion points*

What is the appropriate funding model for the Seacare scheme?

Are there any changes to the existing arrangements that would be likely to reduce premiums?

Should self-insurance options be available under the Seafarers Act and, if so, what rules should apply to them?

Should limitations be placed on employers operating with very high claims excesses on their insurance policies?

How could rehabilitation and return to work be improved in ways that would be fair to all parties and have a meaningful effect on reducing premium costs?

Should P&I Clubs be encouraged to operate in the scheme?

If so, how?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

#### **TOR 4 - Governance Issues**

51. The Seacare Authority is a Commonwealth statutory authority established under section 103 of the Seafarers Act. As mentioned earlier, it consists of an independent Chairperson, a deputy Chairperson, two employer representatives, two employee representatives and the CEO of AMSA. The Minister appoints six of the seven members (in the case of the Chairperson and Deputy Chairperson, for five



year terms; other members have three year terms). The CEO of AMSA is an ex officio member.<sup>26</sup> The Authority reports to the Minister and advises the Minister about anything relating to its functions and powers and other matters relating to the compensation and rehabilitation of employees under the scheme. The Authority also advises the Minister on certain matters under the OHS(MI) Act - see details below. The Minister's Department gives the principal policy advice to the Minister on the scheme.

52. While the Seacare Authority is a separate statutory authority, it has no budget and does not employ any staff. Under s.72A of the *Safety Compensation and Rehabilitation Act 1988*, Comcare, which is the Commonwealth's WHS and workers' compensation regulator, must give the Authority such secretarial and other assistance, as well as provide resources, including staff, as it reasonably requests. Under these arrangements, Comcare provides staff for the Seacare Management Section and performs various functions on delegation from the Authority.<sup>27</sup>
53. The Minister may give the Authority written directions about the performance of its functions and the exercise of its powers, but may not give such directions about particular cases.<sup>28</sup>
54. The Seacare Authority is responsible for administering the following Commonwealth legislation:
  - *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act)
  - *Seafarers Rehabilitation and Compensation Regulations 1993*
  - *Seafarers Rehabilitation and Compensation Levy Act 1992* (Levy Act)
  - *Seafarers Rehabilitation and Compensation Levy Regulations 2002*
  - *Seafarers Rehabilitation and Compensation Levy Collection Act 1992* (Levy Collection Act)
  - *Seafarers Rehabilitation and Compensation Levy Collection Regulations 2002*
  - *Seafarers Rehabilitation and Compensation(Transitional Provisions and Consequential Amendments)Act 1992* (Transitional Act)
  - *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act)
  - *Occupational Health and Safety (Maritime Industry) (National Standards) Regulations 2003*
  - *Occupational Health and Safety (Maritime Industry) Regulations 1995*
55. Under the OHS(MI) Act (s.9), the Seacare Authority has the following functions:
  - a) to ensure compliance with obligations under the OHS(MI) Act and regulations;
  - b) to advise operators, employees and contractors on OHS matters;
  - c) to collect, interpret and report information relating to OHS;
  - d) to formulate policies and strategies relating to the OHS of employees;
  - e) to accredit OHS training courses;
  - f) to liaise with other bodies concerned with OHS; and
  - g) to advise the Minister on:
    - i. the most effective means of giving effect to the objects of the Act
    - ii. the making of regulations under the Act, and
    - iii. the approval of codes of practice.

<sup>26</sup> Seafarers Act, ss.109-111

<sup>27</sup> Ibid, s.125

<sup>28</sup> Ibid, s.107. Similarly, under s.73 of the SRC Act, the Minister may give similar directions to Comcare.

56. Under the Seafarers Act (s.104), the Seacare Authority has the following functions:
- to monitor the Act's operations;
  - to promote high operational standards of claims management and effective rehabilitation procedures by employers;
  - to co-operate with other bodies or persons to reduce the incidence of injuries to employees;
  - to publish material relating to these functions;
  - to formulate policies and strategies relating to the OHS of employees;
  - to accredit OHS training courses; and
  - 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.
57. The Seacare Authority has regulatory oversight of the scheme but relies on Comcare to assist in performing its functions and on AMSA for OHS Inspections. AMSA's functions and powers are, for these purposes, prescribed under s.82 of the OHS(MI) Act. The Administrative Appeals Tribunal (the AAT) can review compensation decisions.<sup>29</sup>
58. Regulatory charges are not met by the participants in the Seacare scheme who are being regulated. The scheme is unique in the Australian context in that its participants do not pay directly for regulatory administration. Scheme regulatory costs are met from consolidated revenue and by Comcare. In the case of AMSA's OHS inspectorate costs, costs are met by AMSA levy payers.<sup>30</sup> Dispute resolution costs are met from the AAT's appropriation.
59. The Seafarers Act provides for a Seafarers Safety Net Fund (the Fund).<sup>31</sup> The Fund is a default 'employer' for the purposes of the Act if there ceases to be an 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.<sup>32</sup> 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. Typically the amounts are relatively small.
60. The Seacare authority, supported by Comcare, administers the Fund. On actuarial advice, the Fund maintains a reserve of at least \$906,000. As required by the Act, the fund has a reinsurance policy.<sup>33</sup>

#### *TOR 4 – governance issues*

##### *Discussion points*

Do the governance arrangements maximise the Authority's efficiency and effectiveness?

What changes, if any, should be made?

Are there any changes that would improve accountability under the Seacare scheme and the transparency and review of decision making within the scheme?

Should there be any change to how the cost of regulation is met?

Should any changes be made in relation to the Safety Net Fund?

*These discussion points are intended to assist contributions to the examination of the issues within the review's terms of reference – they are not exhaustive and if you wish to make a submission you may choose to address all or any of these discussion points or different issues that are of concern to you.*

<sup>29</sup> Seafarers Act, Part 6.

<sup>30</sup> *Marine Navigation (Regulatory Functions) Levy Act 1991*.

<sup>31</sup> Seafarers Act, Part 7, Division 2

<sup>32</sup> The levy is imposed on seafarer berths on prescribed ships

<sup>33</sup> Ibid, s.102.



## How to make a submission

61. The Review would be pleased to receive your submission on those matters raised in the Discussion Paper on which you wish to comment, as well as in relation to any other issues that are not discussed here that are of concern to you. In addressing any discussion points in the Paper and in making any other comments or responses, the review would be assisted if you can detail the problems you have experienced or identified with the Seacare Scheme. The Review would also be assisted by references to relevant cases and (where appropriate) factual scenarios. The Review also encourages you to propose any potential solutions you might have thought about.
62. The Review will be receiving submissions, in writing only, until close of business on 19 December 2012. Submissions can be provided by email (preferred), fax or post as follows:

<b>Email</b>	<a href="mailto:WorkersCompensationPolicy@deewr.gov.au">WorkersCompensationPolicy@deewr.gov.au</a>
<b>Fax</b>	02 6123 7592
<b>Post</b>	Seacare Review Secretariat Workplace Relations Implementation and Safety Group Department of Education, Employment and Workplace Relations Location code: C50MA1 GPO Box 9880 CANBERRA ACT 2601

All submissions should be in Microsoft Word (.docx) format.

## APPENDIX 1 – Trends in premiums under the Seacare scheme

### Findings by the Seacare Authority's actuary on Seacare scheme insurance arrangements in 2010–11 *Extract from the Seacare Authority's Annual Report 2011-12, pp.56,57*

In 2010-11, \$19.7 m. in premiums was paid by scheme employers to insurers against declared total remuneration of \$863.5 m., yielding an effective average premium rate of 2.28 per cent. The premium income and rate include the employers' deductibles which vary considerably from policy to policy.

Standardising the level of deductibles to the equivalent of approximately five days incapacity (\$2300) would have the effect of requiring a combined premium income of some \$32.4 m., or a premium rate of 3.76 per cent.

Seacare insurance premium rates

	2006-07	2007-08	2008-09	2009-10	2010-11
Premium collected, or premium income (unadjusted premium income) (\$million)	\$14.29	\$15.48	\$15.47	\$18.19	\$19.68
Average raw premium (unadjusted premium rate)	3.39%	3.27%	2.62%	2.55%	2.28%
Average five day deductible premium income (adjusted premium Income) (\$million)	\$24.78	\$24.23	\$24.55	\$27.60	\$32.43
Average five day deductible premium equivalent rate (adjusted premium rate)	5.88%	5.12%	4.16%	3.87%	3.76%
Wages pool (remuneration) (\$million)	\$421.85	\$472.89	\$590.63	\$713.29	\$863.51

*Source: Taylor Fry*

Although premiums and remuneration increased between 2009–10 and 2010–11, premium incomes increased at a slower rate resulting in a reduction of 10.6 per cent in the unadjusted premium rate.

The adjusted premium rate for 2010–11 has also reduced considerably from the rate calculated for 2009–10. The effect of standardising the premium rate has resulted in an increase in the adjusted premium rate for 2010–11 of 165 per cent (2.28 per cent to 3.76 per cent), the corresponding ratio for 2009–10 being 152 per cent (2.55 per cent to 3.87 per cent).

Premium rates have reduced considerably over the past five years to 2010–11 and are now at levels experienced in the late 1990s. The reductions in premium rates are due in part to changes in claims experience and therefore calculated risk.

## APPENDIX 2 – Application provisions of the Seafarers Act and the OHS(MI) Act

This Appendix sets out key provisions from the application provisions in these Acts. For a complete appreciation of the provisions, please refer to the full original sections and associated definitions in the Acts.

### ***Seafarers Rehabilitation and Compensation Act 1992***

Extract from s.19, *Application of Act*

(1) This Act applies to the employment of employees on a prescribed ship that is engaged in trade or commerce:

- (a) between Australia and places outside Australia; or
- (aa) between 2 places outside Australia; or
- (b) among the States; or
- (c) within a Territory, between a State and a Territory or between 2 Territories.

Note: This Act does not apply if a prescribed ship is a ship registered in the Australian International Shipping Register, see paragraph 61AA(b) of the *Shipping Registration Act 1981*.

(1AA) This Act also applies to the employment of employees on:

- (a) a vessel that is used to engage in coastal trading under a general licence; or
- (b) a vessel that is used to engage in coastal trading under an emergency licence if the vessel is registered in the Australian General Shipping Register.

(1A) This Act also applies to the employment of employees on any prescribed ship that is:

- (a) an off-shore industry vessel in relation to which a declaration under subsection 8A(2) of the Navigation Act is in force; or
- (b) a trading ship in relation to which a declaration under subsection 8AA(2) of that Act is in force.

### ***Occupational Health and Safety (Maritime Industry) Act 1993***

Extract from s.6, *Application of Act*

(1) This Act applies in relation to a prescribed ship or prescribed unit that is engaged in trade or commerce:

- (a) between Australia and places outside Australia; or
- (aa) between 2 places outside Australia; or
- (b) between the States; or
- (c) within a Territory, between a State and a Territory or between 2 Territories.

(2) Without limiting the operation of subsection (1), this Act applies to:

- (a) the operator of a prescribed ship or prescribed unit described in subsection (1); and
- (b) employees employed on a prescribed ship or prescribed unit described in subsection (1); and

(c) contractors and other persons working on a prescribed ship or prescribed unit described in subsection (1); and

(d) manufacturers, suppliers and importers of plant used, or substances used or handled, on a prescribed ship or prescribed unit described in subsection (1).

(3) This Act also applies in relation to:

(a) an offshore industry vessel in relation to which a declaration under subsection 8A(2) of the *Navigation Act 1912* is in force; and

(b) a trading ship in relation to which a declaration under subsection 8AA(2) of that Act is in force.

(3A) This Act also applies to:

(a) a vessel that is used to engage in coastal trading under a general licence; and

(b) a vessel that is used to engage in coastal trading under a temporary licence if the vessel is registered in the Australian International Shipping Register; and

(c) a vessel that is used to engage in coastal trading under an emergency licence if the vessel is registered in the Australian General Shipping Register or the Australian International Shipping Register.

(4) Without limiting the operation of subsection (3) or (3A), this Act applies to:

(a) the operator of a vessel or ship described in subsection (3) or (3A); and

(b) employees employed on a vessel or ship described in subsection (3) or (3A); and

(c) contractors and other persons working on a vessel or ship described in subsection (3) or (3A); and

(d) manufacturers, suppliers and importers of plant used, or substances used or handled on, a vessel or ship described in subsection (3) or (3A).

### APPENDIX 3 – Main differences between the OHS(MI) Act and the model WHS Act

<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
<b>Objects</b>	<p>The objects (s.3) are focused on the maritime industry and cover:</p> <ul style="list-style-type: none"> <li>• securing the health safety and welfare (HSW) of maritime industry employees;</li> <li>• protecting persons at or near workplaces from risks arising out of the work of maritime industry employees;</li> <li>• ensuring expert advice is available on matters relating to maritime industry participants;</li> <li>• promoting a safe occupational environment;</li> <li>• fostering operators and employees cooperation on HSW at work.</li> </ul>	<p>The objects (s.3), which are not focused on a particular industry, have similar elements to the OHS(MI) Act but <b>also</b> relate to:</p> <ul style="list-style-type: none"> <li>• eliminating and minimising risks);</li> <li>• the roles of unions and industry associations;</li> <li>• the provision of education and training on work health and safety;</li> <li>• securing compliance;</li> <li>• the review of regulatory decisions;</li> <li>• continuous improvement of work health and safety standards;</li> <li>• achieving the 'the highest level of protection as reasonably practicable'</li> </ul>
<b>Risk Management</b>	<p>An object of the OHS(MI) Act is to protect persons from risks to health and safety. The OHS(MI) Act generally prescribes duties relating to OHS to achieve this.</p> <p>The OHS(MI)(NS) Regulations impose obligations to perform risk assessments in prescribed circumstances.</p>	<p>The model WHS Act includes an object [s.1(a)] that aims to protect people by the <i>elimination or minimisation of risks arising from work</i>.</p> <p>Section 17 expressly applies that process to duties of care. The regulations provide for risk assessments.</p>
<b>Primary duty of care</b>	<p>[Part 2, Division 1, General Duties]</p> <p>The OHS(MI) Act assigns the primary duty of care to an 'operator' of a prescribed ship or prescribed unit, who must take <i>reasonable steps</i> to protect the health and safety at work of employees.</p> <p><i>Operator</i> is (s.4) a person with the management or control of the ship or unit</p> <p><i>Reasonable steps</i> are not defined.</p>	<p>[Part 2, Health and Safety Duties]</p> <p>The model WHS Act assigns the primary duty of care to a <i>person conducting a business or undertaking</i>, who 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> <p><i>Person conducting a business or undertaking</i> is defined (s.5).</p> <p><i>Reasonably practicable</i> is explained in the model Act (s.18).</p> <p>The model WHS Act imposes a specific duty on persons with management or control of a workplace (s.20)</p>

<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
<b>Definition of worker</b>	<p>Under the OHS(MI) Act the primary duty of care is owed to <i>employees</i>.</p> <p>An employee is (s.4) a person employed by an operator on a prescribed ship or prescribed unit; or a person engaged on a prescribed ship or prescribed unit under articles of agreement.</p> <p>An operator also has a duty of care to contractors (s.13) in relation to matters over which the operator has control (or would be expected to have control).</p>	<p>The model WHS Act has a broad definition of <i>worker</i> (s.7). It extends beyond the traditional employment relationship to include any person who works, in any capacity, in or as part of the business or undertaking.</p> <p><i>Worker</i> includes an employee, a contractor, sub-contractor (or an employee of either), an employee of a labour hire company who has been assigned to work in the person's business or undertaking, an outworker, an apprentice or trainee, a work experience student, a volunteer and persons in a prescribed class.</p>
<b>Definition of workplace</b>	<p>The OHS(MI) Act limits (s.4) a <i>workplace</i> to anywhere on board a prescribed ship or prescribed unit: where an employee or contractor works; or which is under the control of the operator to which an employee or contractor has access.</p>	<p>The model WHS Act provides(s.8) that a <i>workplace</i> 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.</p> <p>A 'place' includes a vessel and any waters and any installation on land, on the bed of any waters or floating on any waters.</p>
<b>Principles about duties</b>	<p>The OHS(MI) Act does not set out any general principles relating to duties of care.</p>	<p>The model WHS Act sets out (ss.13-17) the principles applying to all duties under the Act.</p> <p>They are that duties cannot be transferred; a person may have more than one duty at the same time; more than one person may concurrently have the same duty; and a duty holder must, so far as is reasonably practicable, eliminate risks to health and safety or that is not possible, minimise them so far as is reasonably practicable.</p>
<b>Duties on officers</b>	<p>Various provisions of the OHS(MI) Act place duties on the <i>person in command</i> who is (s.4) <i>the master, or in the absence of the master, the person on board responsible, as agent for the operator, for the operation of the ship</i> (there is a similar provision for a prescribed unit).</p>	<p>Under s.27, an <i>officer</i> (defined in s.4) of a PCBU must exercise <i>due diligence</i> [defined in s.27(5)] to ensure that the PCBU complies with its health and safety duties. This positive duty placed on an officer relates to strategic, structural, policy and key resourcing decisions.</p>
<b>Duties on designers and other roles</b>	<p>The OHS(MI) Act also places duties on manufacturers, importers, suppliers, and persons erecting, installing, repairing and maintaining plant in a workplace.</p> <p>There is no specific duty on a designer.</p> <p>Manufacturers, importers and suppliers in</p>	<p>Under the model WHS Act, PCBUs who:</p> <ul style="list-style-type: none"> <li>are designers, manufacturers, importers, or suppliers of plant, substances and structures; or</li> <li>who install, construct or commission plant or structures, for use at workplaces, must ensure that the</li> </ul>

<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
	relation to plant and substances must ensure they are designed and constructed to be safe when used properly.	plant, substances and structures are without risks to the health and safety of persons who deal with it at a workplace.
<b>Duties of employees and workers</b>	<p>Employees must (s.27) ensure that they do not create a risk, or increase an existing risk (whether by doing something or failing to do something), to their own health or safety or to that of other persons (whether employees or not) at or near the workplace.</p> <p>Employees must cooperate with operators and other duty holders and safely and properly use any equipment supplied by an operator.</p>	<p>While at work, workers must (s.28) take reasonable care for their own health and safety and that of others who may be affected by their actions or omissions. They must also:</p> <ul style="list-style-type: none"> <li>• comply, so far as they are reasonably able, with any reasonable instruction given by the PCBU to allow the PCBU to comply with the Act; and</li> <li>• cooperate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.</li> </ul>
<b>Duties of third parties</b>	The OHS(MI) Act places (s.14) a duty of care on operators in regard to third parties but does not place a duty on third parties.	<p>The model WHS Act places (s.29) duties of care on other persons at the workplace (e.g., visitors) to take reasonable care:</p> <ul style="list-style-type: none"> <li>• of their own health and safety; and</li> <li>• not to do anything that could adversely affect that of anyone else,</li> </ul> <p>and to comply, as far as they can reasonably do so, with a PCBU's reasonable instructions.</p>
<b>OHS offences – breaches of duties of care</b>	<p>Under the OHS(MI) Act, all breaches of duties are criminal offences.</p> <p>There are no civil penalties.</p>	<p>Under the model WHS Act, the 3 categories of offences for breaches of WHS duties are:</p> <ul style="list-style-type: none"> <li>• Category 1: a duty holder, without reasonable excuse, engages in conduct that recklessly exposes a person to a risk of death or serious injury or illness</li> <li>• Category 2: a duty holder fails to comply with a health and safety duty that exposes a person to risk of death or serious injury or illness.</li> <li>• Category 3: a duty holder fails to comply with a health and safety duty.</li> </ul> <p>Maximum penalties (see below) depend on the category of the offence and whether the offender is a corporate entity or a natural person.</p> <p>Civil penalties are available for certain other contraventions of the model WHS Act</p>

<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
<b>Enforceable undertakings</b>	The OHS(MI) Act does not provide for enforceable undertakings	<p>Under the model WHS Act (Part 11), a person may give the regulator an undertaking about a contravention or alleged contravention of the model WHS Act by the person, other than a Category 1 offence.</p> <p>If it is accepted by the regulator, no enforcement proceedings may be brought (or continued) against a person in relation to a matter covered in a WHS undertaking, providing the undertaking has been completely discharged.</p> <p>The giving of a WHS undertaking is not to be considered to be an admission of guilt.</p>
<b>Prosecution limitation period</b>	The OHS(MI) Act does not specify a time period during which a prosecution may be brought.	<p>The model WHS Act provides (s.232) that an offence against the Act may be brought:</p> <ul style="list-style-type: none"> <li>• within 2 years after the offence was committed or the regulator becomes aware the offence was committed; or</li> <li>• within 1 year after a finding in a coronial or an official inquiry that the offence has occurred.</li> </ul> <p>Where an enforceable undertaking is breached, a prosecution must (s.232) be brought within 6 months of the contravention, or the regulator becomes aware of the contravention or has agreed to the withdrawal of the undertaking.</p> <p>Proceedings for a contravention of a WHS civil penalty provision may be brought within 2 years after the contravention first comes to the notice of the regulator (s.261)</p>
<b>Penalties</b>	The OHS(MI) Act provides for 6 months imprisonment for serious breaches and a maximum penalty of \$110,000.	<p>Penalties for breaches are set out in ss.30-34.</p> <p>For the most serious breaches (Category 1 offences), the model WHS Act provides for a maximum fine for a corporation of \$3 million, \$600,000 for an officer and \$300,000 for a worker or other person, as well as imprisonment for up to 5 years.</p>
<b>Infringement notices (on-the-spot fines)</b>	The OHS(MI) Act does not provide for infringement notices.	The model WHS Act provides (s.243) for infringement notices for minor offences.
<b>Sentencing options</b>	The OHS(MI) Act only provides for imposition of a fine or imprisonment.	In addition to fines and custodial sentences, the model WHS Act provides (Part 13) for remedial orders, adverse publicity orders,



<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
		orders to undertake WOHS projects, training orders, injunctions and compensation orders. There may be a court-ordered WHS undertaking (similar to a voluntary enforceable undertaking – see above).
<b>Review of non-prosecution</b>	No provision	<p>Under s.231, if an individual considers that a Category 1 or 2 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 investigation's status and, if complete, whether a prosecution has been or 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>
<b>Consultation</b>	<p>Under s.12 of 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 objects include - s.3(e) - fostering a cooperative consultative relationship on OHS between operators and employees]</p>	<p>The model WHS Act (s.46) requires duty holders who have duties in relation to the same matter must consult, cooperate and coordinate activities with each other.</p> <p>A PCBU must (s.47) consult the relevant workers about WHS. The nature and timing of consultation are specified in ss.48,49.</p> <p>The WHS Act does not specifically require the development of a general WHS policy document (a safety policy is required under the Regulations for a major hazard facility).</p> <p>[The WHS Act's main object includes - s.3(1)(b) - ... <i>fair and effective workplace representation, consultation, co-operation and issue resolution</i> in relation to WHS]</p>
<b>Establishment of work groups</b>	Under Part 3, a Designated Work Group consists of employees of an operator who are employed on a prescribed ship or unit.	<p>Part 5 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. (s.73).</p>

<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
<b>Health and Safety Representatives (HSRs)</b>	<p>Under s.41, only one HSR may be elected for a DWG.</p> <p>The term of office is 2 years [s.46(2)].</p>	<p>The number of HSRs to be elected is to be determined as part of work group negotiations (s.51).</p> <p>The term of office is 3 years [s.64(1)].</p>
<b>Provisional Improvement Notices (PINs) and directions to stop unsafe work</b>	<p>An HSR may issue a PIN to a person in command (ss.52, 58) and direct the cessation of unsafe work (s.80).</p> <p>HSRs must be trained (s.47) but they may exercise these powers before undertaking the training.</p>	<p>HSRs may direct the cessation of unsafe work (s.85) and issue PINs (s.90), but only after completing the relevant training [ss.85(6) and 90(4)].</p>
<b>Training of HSRs</b>	<p>The OHS(MI) Act provides (s.47) that:</p> <ul style="list-style-type: none"> <li>• a HSR must attend training that is accredited by the Seacare Authority; and</li> <li>• an operator must allow the HSR time off work, without loss of remuneration and other entitlements to undertake the training..</li> </ul>	<p>Under s.72, an HSR must be allowed to attend a WHS training that is:</p> <ul style="list-style-type: none"> <li>• approved by the regulator,</li> <li>• a course the HSR is entitled to attend under the regulations; and</li> <li>• is chosen by the HSR in consultation with the PCBU.</li> </ul> <p>The PCBU must pay course fees and reasonable costs associated with the training.</p> <p>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.</p>
<b>Cessation of unsafe work</b>	<p>HSRs may direct that unsafe work cease (s.80).</p>	<p>The model WHS Act provides that HSRs may direct that unsafe work cease (s.85)</p> <p>Under s. 84, 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.</p>
<b>Health and Safety Committees (HSCs)</b>	<p>An HSC must (s.73) be established for employees on a prescribed ship or unit if:</p> <ul style="list-style-type: none"> <li>• the employees are in one or more designated work groups, and</li> <li>• the operator is requested to establish the committee by the HSR or an involved union .</li> </ul>	<p>A PCBU must (s.75) 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"> <li>• an HSR for that workplace; or</li> <li>• 5 or more workers at that workplace.</li> </ul>

<b>Subject</b>	<b>Current OHS(MI) Act provisions</b>	<b>Model WHS Act</b>
<b>Issue resolution</b>	No provision.	<p>The <i>parties</i> (s.80) to an issue about WHS at a workplace must (s.81) 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 have been taken, a party may refer the issue to the regulator to appoint an inspector to attend the workplace to assist in resolving the issue (s.82). The inspector may exercise compliance powers.</p>
<b>Union right of entry</b>	There is no union right of entry.	<p>Under Part 7, 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 Fair Work Act 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 (ss.117-130):</p> <ul style="list-style-type: none"> <li>• to inquire into suspected contraventions of the WHS Act or regulations;</li> <li>• to consult and advise workers on WHS matters and risks.</li> </ul>
<b>Protection against coercion or discrimination</b>	<p>An operator may not (s.115) 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.</p> <p>There is a reverse onus of proof and a financial penalty.</p>	<p>The WHS Act (Part 6) gives wider protection against coercive and discriminatory conduct.</p> <p>A person must not directly or indirectly engage in or assist discriminatory conduct for a prohibited reason.</p> <p>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.</p> <p>A prohibited reason includes a person's being or proposing to be an HSR; exercising or</p>

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		<p>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).</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, the court or tribunal may order an injunction, compensation, reinstatement or re-employment, or any other order considered fit.</p>
<b>Serious/Notifiable Incidents</b>	Operators must (s.107) report certain accidents and dangerous occurrences to AMSA and keep records of them.	Under Part 3 of the model WHS Act, 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).
<b>Inspector powers</b>	The OHS(MI) Act confers a number of functions and powers on investigators but these may only be exercised in connection with the conduct of an investigation.	Part 8 of the model WHS Act confers a wide range of powers and functions on inspectors. These are not limited to the conduct of an investigation.
<b>Internal review of statutory notices</b>	The OHS(MI) Act does not provide for internal review. Appeals on specified matters may be made to Fair Work Australia.	Under Part 12, 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.