

2012

Seacare Jurisdictional Coverage

Discussion Paper



Submission to the Seacare
Authority

Submission by:



30 March 2012

1 Introduction

This submission is made on behalf of the Australian Shipowners Association (**ASA**).

ASA represents Australian companies which own or operate:

- international and domestic trading ships;
- offshore oil and gas support vessels;
- floating storage and offtake vessels;
- cruise ships;
- domestic towage and salvage tugs;
- scientific research vessels; and
- dredges

ASA also represents employers of Australian and international maritime labour and operators of vessels under Australian and foreign flags.

ASA welcomes the opportunity to make a submission on the Seacare Jurisdictional Coverage Discussion Paper (discussion paper) produced and circulated by the Seacare Authority and looks forward to the same opportunity when draft legislation is available for review.

ASA has had cause in recent times to discuss with the Seacare Management Section the current complexities surrounding the application of the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI)) and the interaction with the *Navigation Act 1912* (Nav Act) in order to determine which vessels and employers are covered by the Act.

As is identified in the discussion paper, the re-write of the Nav Act is one of many legislative changes that affect the maritime sector. It is timely that the Authority has taken this opportunity to address concerns about the operation of the legislation for which it has administrative responsibility.

While ASA appreciates that the Seacare Management Section has restricted the feedback it has sought to the contents of the discussion paper, it is ASA's opinion that the current scheme does not reflect Australian community standards and is in urgent need of a comprehensive review to ensure that international P&I insurance coverage is obtainable by the operators that fall within its scope.

2 Executive Summary

ASA supports the Seacare Authority undertaking the necessary consequential amendments to ensure the Seacare and OHS(MI) regimes contain appropriate and relevant coverage provisions in light of the changes to other maritime legislation.

ASA supports the proposal to de-link coverage of the Seacare Act and OHS(MI) from other pieces of maritime legislation. ASA welcomes the opportunity to provide preliminary comments in response to the discussion paper, however will not be in a position to give final comments until we have reviewed draft legislation amending the application provisions of Seacare.

ASA supports the intention of the Seacare Authority not to dramatically change the jurisdictional footprint. However, ASA is concerned that this intention may not be borne out by the provisions as described in the discussion paper which would result in extension of beyond the existing situation.

ASA supports the concept of opting-in to both the Seacare Act and OHS(MI) regimes directly.

ASA welcomes the clarity provided recently by Minister Albanese that the Seacare Act will not apply at any time to AISR vessels.

ASA is very concerned about the move away from the existing 'tests' (provided for by Part II of the Nav Act) to determine coverage, which could be seen as an attempt to extend jurisdictional coverage. This is particularly reflected in the proposals for offshore industry vessels.

ASA has strong concerns regarding Guiding Principle #2 and #9 and asks that the Authority reconsider the appropriateness of these as principles for the Seacare regime.

In the view of ASA, the jurisdictional coverage of the Seacare Act and OHS(MI) regimes should continue to be based on the concepts provided for by the current s19(1) of the Seacare Act and the existing three tests contained in Part II of the Nav Act (and updated as necessary to reflect changes in language):

- a) Australian registered or

- b) engaged in coasting trade or
- c) majority Australian crew AND Australian operator

and ***provide clarification / certainty / consistency regarding the definition of Australian Operator in both the Seacare and OHS(MI) Acts.***

3 Existing Coverage Provisions

Paragraph 14 of the discussion paper clearly articulates the difficulties that have been experienced by maritime operators, employers and employees, and the reasons that these difficulties have been experienced.

Further adding to the confusion from a shipowner/operator and employers perspective is the inconsistent interpretation of the definition provisions between government authorities, which is a product of the linkage between the Seacare Act and OHS(MI) and the Nav Act.

This situation is unsatisfactory for operators and employers, employees and the Authority.

ASA welcomes clarification / certainty / consistency regarding the definition of Australian Operator in both the Seacare and OHS(MI) Acts.

4 Guiding Principals

It is ASA understands that the Authority's intention is not to increase the jurisdictional footprint of the scheme, but provide clarity and certainty to operators, is positive. However, overall the tone of the discussion paper causes ASA concern that this is not actually the case and certainly would not be the result of the coverage provisions as expressed in the paper. These concerns are articulated below.

ASA supports the approach not to increase the jurisdictional footprint of scheme.

The principles articulated in paragraph 17 of the discussion paper are generally appropriate to take into account when considering the jurisdiction coverage provisions, however ASA has strong concerns regarding dot points 2 and 9.

4.1 Para 17, dot point 2

“the coverage provision should ensure that the same conditions extend to all operators and employers in the same maritime industry sector”

This seems to be heading toward the concept of a commercial ‘level playing field’ since the reference is to the operators and employers, not the employees. In ASA’s view the matter of

commercial operations / competitiveness is well beyond the role of the Authority and the Seacare regime.

ASA does not support this as a Guiding Principle.

4.2 Para 17, dot point 9

“the coverage provisions should result in scheme of sufficient size to remain viable to scheme participants”

This seems to imply that in order for the scheme to ‘remain viable’ it may be necessary to ‘broaden’ the coverage provisions. This is fundamentally an inappropriate approach to determine scheme coverage. Coverage ought to be determined on the merits of vessels/employees/employers/operators concerned, not with the view of maintaining a scheme for the scheme’s sake.

ASA does not support this as a Guiding Principle.

5 Draft Coverage Provisions - General

ASA notes that at the time this discussion paper was released, the Department of Infrastructure had not yet released the Australian International Shipping Register Bill.

At the time of ASA’s response the Bill had been released and tabled in Parliament with the accompanying speech by Minister Albanese that stated that the Seacare Act will not apply to International Register vessels. OHS(MI) will apply to these vessels.

ASA welcomes these decisions by the Government.

The discussion paper itself provides an overview of the intended direction of the new coverage provisions. It will in our view be beneficial to industry if stakeholders are provided the opportunity to comment on draft legislation once it is formulated.

ASA recommends that draft coverage provisions be circulated to industry for comment at the earliest available opportunity.

6 Draft Coverage Provisions – Seacare

6.1 *Employment of seafarers*

ASA is very concerned with the language/statement contained in this dot point that says: “A seafarer is defined as.....”. This sounds as though a decision has been made.

The definition of Seafarer is “an individual employed or engaged in the *business* of the ship, excluding pilots and persons temporarily employed on the vessel while the vessel is in port”. The meaning of ‘business of the ship’ has the potential, in ASA’s view, to be unclear. Is the business of the ship limited purely to the operational sense (i.e. traditional seafaring departments) or does this include any person engaged in a ship in any position whatsoever (i.e. on a cruise ship, entertainers are employed on board the vessel but not to ensure the operation of the ship itself, but to contribute to the business of the vessel - entertaining passengers).

This definition appears far too broad and goes beyond the existing coverage which provides for traditional seafaring occupations. An administratively convenient way to ensure that coverage relates to ‘traditional’ seafaring occupations would be to reference the classifications contained in the Seagoing Industry Modern Award 2010.

ASA recommends that the definition of seafarer should not be expanded to include new categories of employees and those who may only be temporarily engaged on a vessel and not necessarily for its safe operation. ASA also recommends that the meaning of ‘business of a ship’ be clearly defined as its safe operation.

6.2 *Declaration by Seacare Authority*

The ability for an operator to request a declaration of coverage would create certainty for that particular operator.

It appears that this declaration is intended to cover all vessels in an operator’s fleet, with the stated intention being to allow for the operators fleet to avoid jurisdictional churn on cost efficiency grounds. This would only be permissible under certain circumstances. This provision does not appear to accommodate a declaration of a single vessel by an operator (who may operate more than one vessel).

ASA recommends that a declaration be able to be sought by an operator on a vessel by vessel basis

In any event, the ability for Seacare to make a declaration as envisaged needs to be accompanied by a legislative provision which determines that while such a declaration applies, the operation of any other workers compensation legislation regime under state/territory or commonwealth law is excluded.

We note the list of circumstances when a declaration would be made would be listed in the Regulations. Examples of what these might be would be useful to industry to determine whether these would be appropriate (noting that they must fall within constitutional powers).

6.3 Australian registered commercial vessels

This is consistent application of jurisdiction with the existing regime – (as determined by Nav Act, Part II s.1 (a) – a ship registered in Australia), and is supported by ASA.

6.4 Australian registered commercial vessels that ‘opt-in’ to the Nav Act

This is consistent application of jurisdiction with the existing regime – (as determined by Nav Act, Part II s.1 (a) – a ship registered in Australia), and is supported by ASA.

6.5 Foreign registered vessels operating with Transitional Licence

The application of the Seacare regime to these vessels is not questioned however we ask that clarification be provided on what basis these ships would be included.

The existing coverage is provided by virtue of the Nav Act Part II s. 1 (b) – engaged in coasting trade.

6.6 Offshore Industry Vessels

ASA is very concerned with the language/statement contained in the final dot point of paragraphs 22: “The definition of domiciled operator is sufficiently broad to capture operators that have a place of business in Australia”. This sounds as though a decision has been made.

Since the interpretation of “operator” has been determined differently by AMSA and Seacare for some time, and indeed been subject to legal action and determination (albeit non-specific) it would seem appropriate that any proposed definition be provided to stakeholders for consideration and review.

ASA would question that capturing operators that have a place of business in Australia is appropriate coverage for the scheme. These operators might be operating ships entirely

unconnected with Australia or Australian seafarers. This definition, as described, seems inappropriate to the scheme.

Further, this coverage provision would change the jurisdictional footprint of the existing scheme.

The existing coverage provisions require a majority Australian crew *and* an Australian operator. The new coverage position must clearly demonstrate:

- When an operator is “domiciled” in Australia – this test should be capable of objective determination as far as possible so that it is clear;
- An Australian operator should be an Australian registered company with responsibility for management of the vessel (crew management, technical management would be relevant);
- Whether the nationality of the crew is relevant;
- Whether there are any geographical limitations of this definition.

ASA recommends that the current tests for coverage should be maintained and as far as possible clarified, in line with the above considerations for an objective test and paragraph 9 titled ‘Recommendation’ of this submission.

6.7 Those not captured - Paragraph 23

ASA suggests that the legislation should specify these vessels or types of operations as far as possible so that those not covered are clear, and take the appropriate steps to ensure they comply with the appropriate workers compensation regime for their vessel/operation. For example, harbour towage operations are covered by the relevant state workers’ compensation regime and not the Seacare Act and this will continue under proposed changes to the application provisions.

In line with the Minister’s speech introducing the various shipping reform Bills into Parliament, AISR vessels and all vessels operating under Temporary Licence should be included in this list.

7 Draft Coverage Provisions - (OSH(MI) Act)

7.1 Declaration by AMSA

See comments under Seacare section of this submission.

7.2 Australian registered commercial vessels

This is consistent application of jurisdiction with the existing regime – (as determined by Nav Act, Part II s.1 (a) – a ship registered in Australia), and is supported by ASA.

7.3 Australian registered commercial vessels that 'opt-in' to the Nav Act

This is consistent application of jurisdiction with the existing regime – (as determined by Nav Act, Part II s.1 (a) – a ship registered in Australia), and is supported by ASA.

7.4 Vessels registered on AISR

ASA supports vessels on the AISR being covered by OHS(MI).

7.5 Offshore Industry Vessels

See comments under Seacare section of this submission.

8 Exemptions

The proposed circumstances where an exemption can be applied for seem appropriate. ASA assumes each of the criteria set out in paragraph 31 would individually be grounds for exemptions (although the Authority need not grant an exemption).

Consideration might usefully be given to the appropriateness of the Authority restricting their ability to grant exemptions to issues contained in this specific list. It is possible that a situation / circumstance could arise that might fall outside of the criteria listed that would warrant an exemption being provided. One possible example would be the instance of foreign nationals employed on board a covered vessel where appropriate compensation coverage is provided for that seafarer (i.e. though P&I coverage).

9 Recommendation

In the view of ASA, the jurisdictional coverage of Seacare and OHS(MI) regimes should continue to be based on the concepts provided for in the current s19(1) of the Seacare Act and by the existing three tests contained in Part II of the Nav Act:

- a) Australian registered or
- b) engaged in coasting trade or
- c) majority Australian crew AND Australian operator

and provide clarification / certainty/ consistency regarding the definition of **Australian Operator** in both the Seacare and OHS(MI) Acts.

We note that as a result of the Nav Act and *Shipping Registration Act 1981* changes the following consequential changes would be necessary in new language adopted by the Seacare Act to describe the coverage provisions:

- 1) Reference to Australian General Register ships only for Seacare Act;
- 2) For OHS(MI) reference to General Register ships and AISR ships;
- 3) Engaged in coasting trade to reflect General Licences