Australian Shipowners Association

Review of the Seacare Scheme – Report Recommendations and Response from the Australian Shipowners Association.

This feedback document is divided into three sections addressing the Seacare Review Report and its recommendations.

1. Overriding general threshold comments about the report recommendations,
2. Report response to specific issues raised by ASA in its submission; and
3. Other recommendations arising out of the review on which ASA has not previously provided comments.

1. Overriding comments arising out of the recommendations:

1. Scheme to be retained

One of the considerations that should have formed part of the review of the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (OSHMI Act) was the ongoing viability of a niche scheme that as of the last reporting period covered some 7916 employees, by far the smallest scheme in the country. ASA in its submission observed that where a scheme of this nature is not producing good safety performance, the sustainability of the scheme must be questioned. The Report responses are that the scheme ought to be retained and that the regulatory functions of the Seacare Authority ought to be increased.

Some of the critical elements such as jurisdictional reach and coverage do not appear to have been fully addressed, with comments such as the existing coverage should at a minimum be retained. While maintaining coverage provisions within each Act to avoid references to what will be, come 1 July 2013, repealed legislation, is supported, a clear suggestion as to how this would be achieved while retaining the existing coverage was not contained in the recommendations.

ASA supports retention of the exiting jurisdictional footprint/coverage and supports move that coverage provisions are wholly contained within the relevant piece of legislation

2. Funding the scheme

While avoiding a significantly detailed discussion, the recommendations clearly call for an increase in resources to the Seacare Authority in the hope that better scheme performance will be achieved. It is also suggested and will seemingly certainly result in an increase in resources being funded by industry. A further charge is also considered for bolstering AMSA's OHS inspectorate. This will result in significant cost increases to industry to bolster a scheme which, in the reviewer's opinion, is not performing comparative to other Australian industries. There has been no assessment as to what kind of cost impost would be levied on industry from these recommendations and accordingly ASA cannot support any recommendations which would result in an increase in costs of an already expensive scheme.

ASA is concerned that additional costs on operators will make the scheme commercially unviable.

3. Structure of the Authority

The Report makes a number of recommendations which, if implemented, would provide the Authority with decision making powers in a number of areas. These include granting of exemptions (recommendation 2.9), approving higher deductibles (recommendation 6.7) among other decision making powers. It appears the recommendations would broaden the circumstances where the Authority would be expected to make decisions.

In these circumstances it is imperative that the composition of the Authority is such that it is capable of making such decisions within the aims and objectives of the Seacare Scheme and such that sectorial interests do not impede the Authority's ability to function.

4. Alignment proposed

Despite the recommendation bolstering and retaining the niche scheme, a number of recommendations propose an alignment between the Seacare Act and the *Safety, Rehabilitation and Compensation Act* (SRC Act) and the OSHMI Act and the Model Work Health and Safety (WHS) laws (passed by several States and Territories, but not all). This will in some cases mean provisions which have not previously applied under the Seacare Act or OSHMI will be introduced. An example for OSHMI will be union rights of entry which are not currently featured in OSHMI but form part of the WHS laws.

Unfortunately, in a bid to align Seacare with Comcare and in deferring to a number of recommendations made as part of the review of Comcare, there are some recommendations that would in our view be completely inappropriate to be applied in a niche maritime scheme. An example would be the accrual of leave for the first 45 weeks of incapacity, which was a recommendation made in the Comcare/Hanks Report. For a public servant earning 20 days leave per year this ratio seems to be acceptable, but a seafarer earns 1 day of leave for every day worked (as a rule of thumb) which could create a potential 45 week leave liability (this recommendation is discussed later in this paper).

Further, it is difficult to reconcile the recommendation to retain a niche scheme when so many recommendations are aimed at aligning the scheme with other workers compensation and work health and safety schemes.

5. Reintroduction of P&I Club coverage

ASA holds the view that the recommendations in totality will not encourage re-entry of P&I clubs in the Seacare insurance market, which is unfortunate.

2. The extent to which the Seacare Report and Recommendations addresses points made by the ASA Submission to the Review:

A number of the comments and recommendations made by ASA in its submission dated 19 December 2012 have been addressed in the Seacare Report. Additional comments in light of the recommendations from the Report are outlined below.

1. Recommendations relating to the coverage of the scheme including key definitions (r2.1-2.10)

Coverage should be "de-linked" from the *Navigation Act* and coverage should be determined within the confines of each piece of legislation. The coverage should reflect, as a minimum, the existing coverage consistent with the interpretation of the Seacare Management Section (which is broader than that considered by AMSA and determined exclusively by Part II of the *Navigation Act 1912*).

ASA supports clarification of the coverage provisions so that industry is clear on which operations fall within the scheme and which do not. ASA also supports retention of the current jurisdictional footprint of the scheme as has been identified in section 1 of this document.

The Report also discussed the ability to opt in and out of the Seacare Scheme. It was recommended that there be further ability for an owner or operator to apply to either AMSA or the Seacare Authority to opt in so that the Act may apply to employment on a vessel, except where the vessel is registered on the AISR.

ASA understands that their currently exists an effective ability to "opt in" to the scheme through declarations under the *Navigation Act 1912*. Given the recommendations propose coverage provisions which operate wholly within the piece of legislation (for both the Seacare Act and the OSHMI Act), it seems that coverage provisions which properly and accurately reflect the industry operations which the scheme intends to cover will render it unnecessary to provide an ability to "opt in" to the scheme.

Exemptions currently operate, in the main, to operations which mainly fall outside the scheme but which for various reasons may be temporarily covered by the scheme. In such circumstances it is highly impracticable to obtain Seacare insurance for an operation limited in duration, when protections will be afforded by an applicable state or territory regime.

The ability to apply for exemptions should be retained, in line with the existing operation of the exemption provisions.

ASA does not support the proposed definition of a seafarer as contained in the recommendations. This definition is likely cause confusion and include classes of individual workers who are appropriately covered by another workers compensation regimes as they operate in predominately land based industries, and it is likely that their employers (who are not usually the operators of a ships) will not hold a Seacare policy meaning that these individuals are uninsured when performing work on a ship. It cannot have been the intention of policy makers when the Seacare Act was introduced that this Act would apply to workers temporarily engaged on board ships for specific tasks who do not meet the industry's understanding of who is a "seafarer". These workers are afforded protection under state and territory regimes.

ASA recommends that the Seacare Act be amended to cover individuals who are required to carry certificates of competency issued under Marine Orders to clearly identify individuals to whom the Act applies which is consistent with the original intent of the creation of the Seacare Act.

ASA strongly opposes any definition which extends coverage of the scheme to workers temporarily employed on a vessel, not employed by the vessel operator who are appropriately covered under the state or territory workers compensation insurance which

will be held by their employer. ASA does not consider that the recommended definition appropriately reflects those individual whom the Seacare Act originally intended to cover.

2. <u>Streamlining Reporting Requirements</u>

ASA submitted that reporting requirements as well as levy payments could be streamlined to ease the administrative burden on operators. Recommendation 7.7 determined that the Seacare Authority should review the reporting requirements under the scheme with a view to reducing any unnecessary requirements as to content and timing.

ASA supports amendments that streamline reporting requirements.

The Review also recommends (recommendation 7.6) that Seacare be given the ability to request information and documents in relation to claims. It is also proposed that the regulations may specify documents to be provided to the Seacare Authority. Given the potentially sensitive nature of some of the information that may be sought, there ought to be very strict specification around what type of information can be sought and who should be privy to that information.

ASA recommends that any additional powers to require provision of documents be accompanied by appropriate safeguards.

3. <u>Disputes and AAT</u>

ASA recommended that compulsory conciliation should be examined prior to challenge at the AAT. The Report contained no recommendation was made with respect to compulsory conciliation prior to a claim being made in the AAT. It was noted in the Report that the AAT does provide for a conciliation process. However, there were a number of recommendations made about the AAT process, including:

- that employees should be able to recover costs from the reconsideration stage;
- ability of the Fair Work Commission to review some decisions;
- disclosure requirement at least 28 days prior to a hearing.
- No costs against an employee.

ASA is somewhat concerned that the employee's ability to recover costs at the reconsideration stage will lead to higher levels of disputation. This is particularly concerning as the counter balance to this recommendation, that employers be able to recover costs in the event an employee does not receive a more favourable outcome from the AAT has not been adopted.

ASA does not support the ability for an employee to recover costs at the reconsideration stage and considers it more likely to further increase disputation. In line with its earlier submission to the Review, ASA considers that an employee who launches unsuccessful action in the AAT with respect to a workers compensation claim ought to be liable for the employer's costs of defending such a complaint at the AAT.

ASA does not consider that a jurisdiction ought to be 'created' for the Fair Work Commission in respect of some decisions made under the Seacare Scheme. This would seem to bring in unnecessarily adversarial elements to what is in the main a 'no fault'

regime. ASA opposes this recommendation and considers it would only serve to increase disputation.

4. **Rehabilitation and Return to Work**

(Recommendations 6.1 -6.4) The Report referenced a number of recommendations from the Hanks report into the SRC Act which can be found at recommendations 4.7-4.10.

The principal recommendation was that early intervention ought to be the primary form of rehabilitation, supported by an appropriate Injury Management and Rehabilitation code of practice. The recommendations also provided for the introduction of a penalty for failing to take all reasonable steps to provide and employee with suitable employment or assist the employee to find such employment.

A key proposal relates to the consideration of a scheme wide job placement program, although it suggested that time be given to the scheme running under Comcare (a recommendation of the Hanks Report) so that lessons can be learnt.

ASA supports the investigation of a scheme wide job placement scheme to assist with achieving return to work outcomes.

5. **Suspension of Compensation Payments when outside Australia for 60 days**

The Report recommends that where an employee is absent from Australia for more than 60 days their entitlement to compensation payments may be suspended, although the suspension would only occur if the Authority thought it was appropriate and the employee did not need to be overseas for work or suitable employment.

ASA considers this period is too long and should be reduced to a shorter period. As has been stated throughout the Report, the principal aim of the scheme is to rehabilitate and return injured employees to work. If an employee is absent from the country this makes it virtually impossible for an employer to comply with their obligations to implement and monitor a suitable rehabilitation program with a view to returning the employee to work. Given that an employer may be liable for a penalty for a failure to meet these obligations, it is imperative to ensure employees are able to be engaged with a rehabilitation program.

ASA recommends that the time absent from Australia at which point payments would be suspended should be less than 60 days, and suggests that 28 days is an appropriate period to ensure that employers and injured employees formulate an appropriate RTW plan in a timely manner.

6. **Redemption of Claims**

ASA recommended that the scheme formally permit the redemption of claims in certain circumstances, which would provide insurers with greater certainty and alleviate potential "long tail" claims.

Consistent with the recommendations of the Hanks Report, the Report recommended the voluntary redemptions of incapacity payments, medical expenses and attendant care expenses be available. This would not affect compensation for dependants, permanent impairment and non-economic loss, nor would it extinguish rehabilitation and suitable employment obligations according to the report text (para 6.112).

This paragraph runs counter to the proposed circumstances where redemption would be able to be made. To ensure that an employee is not disadvantaged, the report suggests that redemptions will only be available where all attempts at rehabilitation have failed and the individual is unfit to return to suitable alternative employment with limited capacity for improvement (see para 6.113). In these circumstances there seems to be no benefit to either party in not being able to make redemptions in respect of each obligation. In fact it is most likely to be in the best interests of all parties that their relationship be extinguished.

ASA supports employers and employees having the ability to redeem claims. Such redemptions should be sufficiently broad to completely finalise the relationship between employee and employer provided certain pre-conditions are met. ASA does not see how a redemption can exist in this context where rehabilitation and return to work obligations remain.

7. <u>Key definitions of injury</u>

The Report has recommended an amendment similar to that which has been recommended in the Hanks Report in that for compensation to be payable for a disease, employment must have contributed to a significant degree. There were also recommendations around providing guidance with respect to determinations involving "disease".

The proposal to exclude compensation in circumstances of "reasonable administrative action" was adopted in the recommendations.

ASA supports clarifying key definitions within the scheme and in particular the requisite nexus between employment and injury and a contribution of a significant degree in order for compensation to be payable.

8. <u>Definition of Trainee:</u>

Recommendation 3.11 was that employment of trainees should reflect current industry arrangements and that reference to the Seafarers Engagement Centre should be removed. Rates payable was for injured trainees were not addressed.

ASA supports updating legislation to reflect current industry practice and recommends further consideration of calculation of compensation payable for trainees still undertaking their training.

9. <u>Compensation Rates</u>

The Report recommends a change in the step down provisions for compensation payments which ASA intends to align with Comcare.

In its origin submission ASA highlighted the prevalence of casual arrangements in the seafaring/maritime workforce, which leads to significant distortions of relativities when calculating compensation payments amongst the crew. It does not appear this has been addressed and we would restate the position put in ASA's earlier submission, particularly in light of the recommendation that a maritime specific scheme be retained.

10. <u>Medical expenses and approvals</u>

Recommendations arising out of the Report would provide for a greater level of oversight and audit to ensure that appropriate medical intervention was occurring that there is an

ability to recognise and accredit appropriate medical providers (including overseas based providers) to ensure appropriate standards are achieved.

ASA supports a regime where medical providers are assessed for their suitability to assist workers to achieve a return to work.

11. Journey Claims

Recommendation 4.6 has asked the Seacare Authority to consider the experience of existing s9(2)(e) of the Seacare Act where there has been a delay or interruption from travel to and from work – the Report recommends and examination of the provision that currently exists in the Qld Workers Compensation regime.

ASA supports a regime which allows employees to break their journey to return to their home port or residence provided any injury occurring on such a break will not be a compensable injury under the Seacare Act.

12. Retirement Age

The Report recommends that the cut off age for compensation should be the same age as eligibility for the aged pension. The Hanks review recommended consideration of a longer period of compensation was payable once a certain age was reached (260 weeks). The recommendation states that if this is not deemed appropriate, the existing number (52 weeks) should be maintained.

ASA supports alignment of the "cut off" age for compensation payments with eligibility for the aged pension. However, the Hanks suggestion of a longer period of compensation payable once a certain age is reached is not supported. The current maximum of 52 weeks should be retained.

13. Self-Insurance

The Report recommends that DEEWR work with the Seacare Authority to develop possible self-insurance options with a view to these (if viable) being in place by 2015.

ASA supports the recommendation for investigating self-insurance options.

14. AMSA as the OHS Inspectorate

ASA endorsed AMSA as being the most appropriate agency as an OHS inspectorate for the Seacare scheme and recommended that a more proactive approach be taken to improve scheme performance.

The report recommends that the Seacare Authority should develop a list of activities aimed at achieving the objectives (newly inserted) of the OSHMI and Seacare Act and AMSA and Seacare should consult with a view to achieving a more effective OHS inspection regime. Consideration need to be given to the costs of such a regime with the Report clearly intimating that a levy for employers covered by each of OSHMI and the Seacare Act should be considered.

ASA supports a proactive approach from the OHS inspectorate with a view to achieving better scheme performance. However, any increases on costs that are to be borne by operators are not supported.

15. **Alignment of OSHMI with model WHS laws**

The Report recommended (recommendations 5.1 – 5.5) that the structure of the OSHMI Act should be amended as far as possible to be consistent with the model WHS laws and that changes with the model laws should only be made where adoption of the model laws would result in a less safe workplace. Any modifications to the model laws should be made after consultation with industry. The OSHMI Act should be retitled the *Work Health and Safety (Maritime Industry) Act*. There should be a transition period for introduction of the new laws.

ASA did not make particular representations during the initial review with respect to this proposal, however did urge caution with a simple alignment. If a niche scheme is required for the Maritime industry (and we assume some stakeholders have argued for its retention) then it is necessary to consider where alignment might be appropriate. The report suggests the onus should be on those who support a deviation of from the model laws to justify this. ASA urges caution with this approach in the context of a recommendation that a niche industry scheme be retained.

3. Other Recommendations

1. **Accrual of sick leave and recreation leave**

The Report recommends that an amendment be made to s137 of the Seacare Act to provide for the accrual of leave (sick and recreation) during the first 45 weeks of compensation in accordance with the applicable industrial instrument and the NES, despite this not being prosecuted by any stakeholder making submissions to the Review.

The Report notes that consistency between the Comcare and Seacare regimes is desirable and within the terms of reference (para. 3.28). However, this does not acknowledge the rate at which leave is accrued for seafarer (usually 1/1 and more in the offshore industry) as distinct from a person who would be covered by Comcare (usually 4 weeks per year of work). Further, the roster of leave for seafarers combines more than just sick and recreation leave, it is inclusive of public holidays, weekends, recognition that extended periods will be spent away from family etc. It seems that the recommendation is providing for a situation where a person could earn up to 45 weeks of additional leave, if the leave ratios contained in the Modern Awards (Seagoing Industry Award and Maritime Offshore Oil and Gas Award) and existing enterprise agreements were to be used as the basis on which leave is accrued.

Para 3.30 of the Report suggests that the amendment which would extend the additional right to accrue long service leave to the right to accrue other leave in accordance industrial instruments would recognise current industry practice and would impose no additional financial burden. ASA does not think that this will be the case and that such a change (which was not sought by any stakeholder according to the report) would in fact impose a huge financial burden in terms of additional leave liability on the employer.

ASA opposes this recommendation, as it has the potential to have enormous cost implications which will be borne directly by employers. Further, it does not take into account the unique leave and rostering arrangement prevalent in the maritime industry.

ASA also notes that the overwhelming majority of state and territory jurisdictions do not contain leave accrual provisions in their workers compensation legislation.[1]

2. **Provisional Liability**

   Another recommendation from the Report was consideration of provisional liability, which, if adopted, could enable the commencement of rehabilitation programs as soon as possible however this was not a definitive recommendation. It was noted that timeframes were currently in place meaning determinations needed to be made in a timely fashion in any event, as distinct from the Comcare scheme where no time limits are in place.

   ASA does not support the recommendation for provisional liability provisions.

3. **Limits on deductibles and greater monitoring and ability of Seacare to require information to be provided.**

   The Report recommends a more substantive level of oversight by the Seacare Authority with respect to Seacare compensation arrangements put in place by those who are covered by the scheme.

   ASA has reservations about amendments which would grant the Seacare Authority with expended powers to "compel" the provision of information that may be commercially sensitive without a more comprehensive understanding about how these powers will improve the performance of the scheme or reduce exposure of the Fund.

4. **Current entitlements/provisions under the *Seacare Act* be made consistent with the *Safety Rehabilitation and Compensation Act*** (see Appendix E of the Report for full details).

   - Level of contribution of employment to injury **– *This is supported and it is consistent with not only Comcare but other state and territory regimes which require employment nexus to be 'significant'.***
   - Exclusionary provisions for psychological injuries **– *This is supported.***
   - Retirement provisions (***as discussed above***).
   - Permanent impairment threshold (this will see a decrease in the threshold of binaural hearing loss from 10% to 5%). ***This has the potential to have significant costs consequences as well as creating a potential cause of action against a claim that has already been rejected as not meeting the threshold being "enlivened". There would need to be some fairly stringent parameters to any changes in the threshold and to what injuries would be compensable on the basis of the new threshold.***
   - Industrial deafness (see thresholds above)
   - Death benefits/ funeral expenses (increase in maximum amount) – ***This will add further to premium costs for employers.***

[1] See Comparison of Workers' Compensation Arrangements in Australia and New Zealand 2010.

- Common law actions (see recommendation 3.7)

- Penalties for breach. **Penalty provisions need to consider the nature of the injury and (particularly with respect to return to work) the regulatory requirements for seafarers under legislation administered by the Australian Maritime Safety Authority and consistent with Australia's obligations under international conventions. See requirements of Marine Order Part 9 for medical requirements to work on board ships.**

5. **<u>Creation of a Return to Work Inspectorate as part of the regime</u>** (following from a recommendation of the Hanks Review) This inspectorate is to have a range of powers. This is likely to come at a cost to industry so would need to be directed at improving the performance of the scheme.

   ASA supports consideration of how this may operate in light of the experiences of Comcare.

6. **<u>Employer to be given the ability to request information relevant to a claim from persons other than the employee</u>**
   This recommendation is supported.

7. **<u>Penalty for failing to take all reasonable steps to provide an employee with suitable employment of assist the employee to find such employment</u>**
   See discussion above related to the alignment with Comcare.
   The Report does discuss an industry wide job placement program and if such a program were viable this could alleviate come of the concerns identified above. ASA supports further investigation to see if this proposal is feasible.

8. **<u>Insertion of objectives of the Seacare Act as well as clarifying the statutory functions of the Seacare Authority and AMSA and the relationship between those organisations is strengthened.</u>**
   Clarifying roles and responsibilities, focusing on meeting the objectives of the regime and strengthening co-ordination and operation between the two responsible agencies for workplace safety is supported.

   ASA does note that suggestions around identifying activities designed to improved scheme performance will come at a cost to industry. See comments in Part 1 with respect to the increased costs.

9. **<u>Reviews of the Scheme to occur every 5 years</u>**

   ASA supports this recommendation. This could help ensure that the performance of the scheme and its effectiveness is being constantly monitored.