Attorney General's Department

Submission: GUIDELINES FOR GRANTING EXEMPTIONS UNDER THE SEAFARERS REHABILITATION AND COMPENSATION ACT 1992

About MIAL

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About MIAL

Maritime Industry Australia Ltd (MIAL) is the voice and advocate for the Australian maritime industry. MIAL is at the centre of industry transformation; coordinating and unifying the industry and providing a cohesive voice for change.

MIAL represents Australian companies which own or operate a diverse range of maritime assets from international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; construction and utility vessels and ferries.

We work with all levels of government, local and international stakeholders ensuring that the Australian maritime industry is heard. We provide leadership, advice and assistance to our members spanning topics that include workforce, environment, safety, operations, fiscal and industry structural policy.

MIAL provides a full suite of maritime knowledge and expertise for operators of both Regulated Australian Vessels and Domestic Commercial Vessels. This gives us a unique perspective.

MIAL's vision is for a strong, thriving and sustainable maritime enterprise in the region.

Seafarers Rehabilitation and Compensation Act 1992 Exemption Guidelines

Introduction

1. MIAL appreciates the opportunity to comment on the draft Seacare Authority Exemption Guidelines (Guidelines) which the Authority is considering adopting in determining requests for exemption under the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act).
2. MIAL represents owners operators and employers of seafarers in the Australian maritime industry. Members are variously covered by the scheme and exempted from the scheme (through specified exemptions which they have been granted, and also through the multiple vessel exemptions granted by the Seacare Authority on its own motion, pursuant to s20A of the Seacare Act).

MIAL Response to the proposed guidelines

3. MIAL does not support the changes to the Seacare Authority Guidelines on the basis that the cohort of vessel capable of being granted an exemption pursuant to the guidelines, will be changed and very likely reduced. MIAL's rationale is further outlined below.

The Exemption Regime

4. MIAL has for many years been advocating the abolition of the Seacare scheme which remains the countries smallest, most expensive and least clear in terms of to whom the scheme applies, and when. A clear impediment to an effective work health and safety and workers compensation regime is that lack of clarity around coverage. Maritime industry participants (whether considered to be covered by the scheme or not) have long faced uncertainty about whether the scheme applied and this was amplified significantly by the Full Federal Court Decision in *Samson Maritime v Aucote (Aucote)*[1] decided the coverage provisions in the Seacare Act extended far beyond that ever considered by industry.

5. Despite almost 6 years having passed since that decision, scheme coverage has not been clarified. This is perhaps understandable. Having taken place in every review of coverage of the scheme ever attempted, MIAL has formed the view that it simply not possible to clarify coverage of the scheme while maintaining the understood jurisdictional footprint of it. Employers need to be assured that coverage provides a level of certainty that ensure that their employees and their businesses are fully and properly insured at all times. This is not possible under the premise of the Seacare scheme

[1] *Samson Maritime v Noel Aucote [2014] FCAFC 182*

and radical change is necessary to provide this – hence the MIAL position that the scheme should be abolished and coverage be provided by other existing regimes that cover other workers in the Australian community generally.

6. This lack of clarity in the coverage provisions contained within the Seacare Act means that the only way an operator/employer will know for certain whether the vessel they operate and their employees who work on board are covered by the Seacare Act, is if they are *excluded* from coverage by virtue of an exemption. It is highly likely that Australian flagged ships operating between ports in different states are covered (and it has long been considered that they would be) but the definition of a prescribed ship, taken from the now repealed *Navigation Act 1912* still adds an element of confusion to determining coverage. This is particularly the case where a vessel is foreign flagged. A further Ministerial Direction has needed to be made to try and maintain the status quo[2]. There remains cases in the Administrative Appeals Tribunal that reference an expanded coverage, meaning the jurisdiction continues to have no clarity as to when the scheme does and does not apply.[3]

7. For a vessel whose operator has applied for and been granted an exemption, there is no such uncertainty; the Seacare Act will not apply for the duration of the exemption.

8. Ideally coverage of the scheme would be clear and simple to understand and based on sound rationale as to why the Seacare Act should apply to these vessels. This is because it has overwhelmingly been the case that most seafarers in Australia are covered by State and Territory regimes, which cover the majority of Australian workers regardless of the industry in which they work.

9. In the context of such uncertainty about coverage, where according to the latest published annual report the Seacare Act covers 3885 employees and 157 vessels, any mechanism that clarifies whether a vessel is covered by the scheme or not, ought be welcome. This is especially so considering despite the "known" coverage mentioned above, the Seacare Authority annually of its own motion issues exemptions to some tens of thousands of vessels, on the condition that the vessels listed in the schedule to the vessel were not exempt if they fell within specific definitions of the Seacare Act.[4] However, given there is a level of uncertainty about the effect of these

[2] Seafarers Rehabilitation and Compensation (Prescribed Ship – Intra State Trade) Declaration 2017
[3] See for example Sims and Hayes (Compensation) [2018] AATA 869 (11 April 2018).
[4] https://www.seacare.gov.au/coverage/exemptions_from_coverage/multiple_vessel_exemptions

provisions within the industry, despite these exemptions which are designed to maintain the "status quo" understanding of coverage prior to the *Aucote* decision, exemptions which are sought by and granted to employers separately remain important.

The Proposed Guidelines

10. The Seacare Authority webpage contains a notification that the Guidelines for the granting of exemptions is under review. The website state the reasons for review are

    10.1.1. "As part of an ongoing review of the exercise by the Authority of its functions under the Seafarers Act."

11. The website contains no other information about why the guidelines are being reviewed. The table provided on the website shows the proposed changes to categories of exemptions. It does not summarise how often the exemptions are sought and granted and whether as a result of the changes for to the exemption guidelines, and vessels who were previously eligible under a specific classification will be eligible under a different class of exemption, if a class of exemption is removed. Accordingly it is difficult to assess the impact that this change could have on the jurisdiction.

12. MIAL considers that it is essential to understand which operators may be impacted by the proposed change as an inability for an individual operator to obtain an exemption will, in all likelihood, require the operator to have in place at least two workers compensation insurance policies; at least state or territory policy as well as a Seacare policy.

13. Additionally, the proposed guidelines refer to section 19 of the Seacare Act and an assessment being undertaken as to its application. It is MIAL's experience that understanding of s19 and its associated subsections is far from clear. While MIAL agrees that exemptions should not ordinarily be granted (principally because they are not needed) to vessels who are not covered by the legislation, the fact that there is such uncertainty as to which vessels are or are not covered suggests that the guidelines should err on the side on granting an exemption where sought (and within the guidelines). This is evident from the multi vessel exemption granted by the Authority on its own motion, as it seems unlikely that an individual assessment of each and every vessel listed on those exemptions has taken place.

Removal of existing avenues of exemption

14. The proposed guidelines in effect remove long standing and well understood grounds for exemptions under the Seacare Scheme. According to the table contained on the Seacare Authority consultation website[5] for factors for granting an exemption, the Authority is proposing to amend its guidelines including removing a number of criteria on which exemptions have previously been granted as well as altering other ones. This relates to:

    14.1.1. Existing factor a - The prescribed ship's proposed voyage or voyages do not constitute a regular trading pattern.

    14.1.2. The prescribed ship is under 500GT

15. According to the table, "This factor has been incorporated into the proposed new factor 'a' below." As new factor "a" relates to voyages between two places outside Australia, we assume this reference is to new factor "b" which states that:

    "the prescribed ships proposed voyage does not constitute a regular trading pattern and is incidental to the primary operations of the ship."

16. This is effectively the merger of two existing factors into one. It is unclear if by doing this vessels previously eligible to obtain this exemption would no longer be able to do so. The lack of gap analysis undertaken make this unclear and in the absence of clarity. MIAL does not support the merger of these two factors as it cannot be sure that vessels will not be disadvantaged in having to meet a two limb criteria of both not constituting part of a regular trading pattern and being incidental to primary operations of the vessel. In MIAL's view any action that means a vessel who is clearly not within the scheme will then be subject to uncertainty as to whether they are in the scheme, is undesirable.

17. The Authority is proposing to remove the exemption available to vessels of less than 500GT on the basis that there is no legislative basis for a jurisdiction based on size. Many thousands of vessels of less than 500GT are currently excluded by virtue of an exemption of the Authorities own motion. The Authority has not provided any insights as to the origin of the initial exemption and the basis on which it was introduced. To MIAL's understanding it has been a feature of the scheme for many years and is well understood by industry. MIAL is unsure why the Authority would recommend its removal when it has provided no information regarding its inclusion. As MIAL has repeatedly

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5 https://www.seacare.gov.au/news/news_listing/review-of-exemption-factors-under-the-seafarers-act-invitation-to-make-a-submission

stated, given the high level of uncertainty around coverage, removing access to a situation where coverage is beyond doubt (because a vessel is exempted) creates further confusion and unnecessary exposure on the Safety Net Fund.

18. MIAL notes the comments contained in the table in relation to the current ministerial exemption in place since 2006. Its unclear why the comments are included in the table as this exemption is one determined by the Minister and not the Authority. It is unclear why the Authority has included any reference to this in its table of factors. Vessels who apply for and are granted this exemption are:

    18.1.1. Within a state or territory workers compensation regime which applied to employers of crew operating on such vessels

    18.1.2. Not within the Seacare scheme and do not impose any potential exposure on the Safety Net Fund for the duration of the exemption.

    18.1.3. Likely to reduce their own administrative burden and have clarity and consistency within the workplace by not having in place different insurance arrangements between shore based staff and those working on exempted vessels, nor any duplication of coverage.