MIAL Response to Finity Draft Report on Independent Review into Seacare

29 July 2020

Response to Draft Report of Finity Consulting regarding the Seacare Scheme

1. Summary comments

1.1. Maritime Industry Australia Ltd (MIAL) thanks Finity Consulting for the work undertaken to produce the draft report titled " Independent review of the Seacare Scheme". As discussed, MIAL does intend to provide its feedback on the draft under the five general topic headings that Finity requested, however some of the feedback traverses multiple categories. Regrettably MIAL was not made aware of the opportunity to provide written submissions as part of this process, notwithstanding other stakeholders availed themselves of the opportunity. Throughout the report notes the reviewers had difficulty obtaining data related to the scheme. MAL is certainly aware of the difficulties in obtaining data, notwithstanding that employers covered by the scheme are required to report regularly. We invite the reviewer to contact MIAL directly if they identify specific information from employers that we may be in a position to assist with obtaining. Similarly we would invite departmental representatives to identify any further information to assist them in making a decision which we would hope and expect to reflect the best decision in light of the review findings.

2. Factual Corrections or Queries Regarding the History and Description of the Current Status of the Scheme

2.1. *Terms and conditions contained in Enterprise Bargaining Agreements*

2.1.1. Throughout the report repeated references made to Enterprise Bargaining Agreements (EBAs) which we assume to mean Enterprise Agreements (EAs) made under the *Fair Work Act 2009* (FW Act). Reference to these agreements feature heavily in the joint maritime union submission along with several (unverified) claims about the prevalence and precise number of clauses relating to benefits under the Seacare scheme contained in scheme participant EAs.

2.1.2. There is a statement that the practice of referencing Seacare scheme benefits is a risk to the scheme and means an employer is effectively a self insurer. We don't accept that statement or that the practice of referencing scheme benefits is of relevance to the scheme at all. If an employer is covered by the scheme they are covered by the scheme, irrespective of what an EA might say. These are of course practical considerations and impacts for employers and employees.

2.1.3. If employers are not covered by the Seacare Scheme this is for a reason; either they are not captured by the jurisdictional descriptors in the *Seafarers Rehabilitation and Compensation Act 1992* (Seacare Act), or an exemption operates in relation to them that has been granted by the Seacare Authority. In either case they are covered by, and must be insured pursuant, to state (or territory) workers compensation scheme, with employees being entitled to those benefits in the unfortunate instance of a compensable injury.

2.1.4. An EA, an agreement between employer and employees. can refer to anything that is authorized by the FW Act to be contained in such an agreement. It does not "confer" coverage of a workers compensation scheme. It could obligate an employer to provide

whatever the terms of the agreement provide for, which is what it is designed to do. If the employer and employee have bargained such that the worker receives a greater benefit (usually in financial terms) than the compensation scheme that applies by legislation, then that is for the employer and employee and does not impact a scheme which may be referenced in such a bilaterally negotiated agreement. Nor does it mean an employer is effectively a self insurer for workers compensation. A scheme applies to it and it must be insured under it (or be an authorized self insurer).

2.1.5. Paragraph 5.3.6 states that most seafarers who are covered by Seacare are covered by EAs that require the employer to provide benefits even if there is no Seacare insurance. Our experience is that most employers who reference the benefits under the legislation in EAs do hold a policy and have not applied for an exemption. The issue will be the inability to get insurance, particularly if the scheme does continue to exist. We suspect it is a very small number of employers who reference the scheme and don't hold insurance for it at this point in time, although those numbers would likely increase. We would expect that that if employers are not able to obtain a policy they would seek an exemption from the scheme (and obtain appropriate state scheme insurance). It would then be a question of whether there is an obligation to provide more generous benefits than the employee receives under the state scheme by virtue of the provisions of an EA, and whether that additional liability (being the difference between a benefit payable under the state scheme, which must insured, and a Seacare benefit, the equivalent financial amount of which may not be insured) is insured.

2.1.6. It appears that the report conflates the ready ability to access more generous entitlements negotiated in an EA (relevant to employees and employers) and the safety net coverage of workers compensation entitlements that apply, at law, to employees (relevant to the applicable scheme). MIAL appreciates that a number of its members refer to the Seacare Act in EAs and while the regime continues to exist this exposes those employers to liabilities that, on the current market, will likely be uninsurable. As stated previously, these employers would of course be able to access a state workers compensation insurance policy and employees would be entitled to the benefits under that legislated scheme, and for a short to medium term inability to work the financial difference in benefits would be negligible if anything.

2.1.7. It is a *practical* consideration, the relevance of which will turn on a) what happens with the legislation (i.e. retained or repealed) and b) how any particular clause is drafted. We note the observation about the unions position on page 19 of the report. While this is a legitimate stakeholder position, our inspection of a sample of EA clauses is that they vary, and their application in the event of the repeal of legislation referenced is a matter for the courts.

2.2. Operation of Exemptions

2.2.1. One thing that is not immediately obvious in the Report is a detailed analysis of the exemptions and how they operate. For our purposed MIAL refers to the exemptions in the following categories:

- Limited time exemptions where a vessel which otherwise operates within a state based scheme would temporarily fall within the scheme's remit but for the exemption;
- Exemptions issued by the Seacare Authority to restore the "pre Aucote" understanding of coverage;
- Exemptions sought by individual employers from the scheme on the basis of the Ministerial Direction or an inability to obtain insurance, which apply to a vessel, multiple vessels or employees of an employer working on a vessel.

2.2.2. There does not appear to be any interrogation of which exemptions ought be retained (the suggestion that there be no exemptions would appear to expose the scheme significantly for those who would ordinarily obtain exemption under category 1 described above). Either these exemptions need to be retained or coverage substantially re-written (a task unable to be achieved despite repeated concerted efforts) or there is a high risk that incorrect insurance will be in place for a period of time, and the Safety Net Fund would be exposed (as well as an almost impossible task of obtaining insurance for the purpose of conducting a time limited voyage). If the recommendation is adopted this would likely created thousands of circumstances per year where people working on ships are temporarily uninsured for the scheme, which at a point in time, applies to them.

2.2.3. The other thing not examined is the certainty provided through the exemption process. If an employer or vessel is exempt, employees provide no risk to the safety net fund or the scheme. Workers compensation arrangements should they need to be accessed are done through the relevant state or territory schemes.

2.2.4. In MIAL's view the inability to clearly articulate who is covered by the scheme, who is not and whether vessel operations may alter that outcome has necessitated that exemptions exist. These operate to clearly articulate that a vessel and/or those working on it are not covered by the scheme. MIAL strongly suspects that there are vessels who operate predominately under state schemes who would rarely undertake a voyage that enacts the voyage description under the scheme who currently do not obtain exemptions who probably should.

2.3. *Historical Review and Scheme Reform Attempt*

2.3.1. The Finity review is not the first review conducted on the scheme. Reviews have been conducted variously by consultants and government departments, and despite this no substantial reform has been achieved to resolve the problems identified throughout the draft report. Previous reviews of the Seacare scheme have been conducted over the years, and while we do not suggest the findings of such reviews would still stand, there has been very limited reference to them. From MIAL's perspective the key differences between the circumstances now and those which existed under the previous review is:

- the broad terms of reference provided to the reviewers (the most recent independent review conducted by Robin Stewart Crompton came with severely limiting terms of reference); and

- the complete withdrawal of insurers from the market of providing policies under the Seacare scheme.

2.3.2. The chronology of previous reviews may provide important contextual history to the report and the quite reasonable conclusion drawn on page 2 of the Executive Summary which was "We quickly concluded that leaving the scheme unchanged was not an option". Leaving the scheme unchanged despite several reviews and attempts at reform is exactly what successive governments have done.

2.4. *Text Box Fitness for duty provisions*

2.4.1. This should reference Marine Order 76 as well as that the guidelines were updated in 2020.

2.5. *Scheme needs a more effective and empowered Regulator*

2.5.1. MIAL agrees that an empowered and effective regulator (and inspectorate) is critical to an effective WHS and workers compensation scheme. This requires the legislation empowering the regulator and inspectorate to give sufficient capacity to undertake the regulatory tasks within their purview. Additionally the regulator and inspectorate need the appropriate resources to undertake these tasks.

2.5.2. The report makes comments throughout regarding the necessary scale of the scheme (among necessary reforms) for a sufficiently large market to exist to make insurance viable. The report does not outline what scale would be required to appropriately resource and effectively empower the regulator or how such a regulator would be funded. MIAL suggests that this is critical, particularly as previous attempts to reform the scheme (notably in 2015 by the then Department of Employment) have sought to introduce a cost recovery levy. We suggest the department be asked to furnish the particulars of this levy. MIAL participated in the consultation around that time and our recollection is that a proposal to increase the berth levy from $15 (as it was then, it has been increased to $65 since) to $250, to sustain the Authority in its current guise.[1] The report does not go into what it estimates the costs would be to properly resource the regulator and inspectorate, and how this cost should be borne (i.e. from industry or from government). MIAL's position is that this information is needed to properly inform government about the true costs of the option to reform the current scheme.

2.6. *Premiums, Deductibles and Claims Management*

2.6.1. The report identifies that insurers are now unwilling to hold high deductibles unless employers have claims management experience . Over many years we are aware of employer holding very high deductibles in a bid to reduce premiums. This has on occasions made a true "like for like" comparison with an insurance policy under a state scheme very hard to assess. We note the report has spoken to 2 employers and some insurers, but we are unclear if this covers all insurers who issue policies under the scheme. If it does, presumably the reviewers have a good understanding of the range of

[1] We have located a consultation document from the Department of employment which discusses cost recovery by does no quantify the additional charges – the document is dated December 2015 and title Seacare Scheme – Reforms to Work Health and Safety and Workers Compensation

deductibles held by employers under the scheme. If it doesn't, we suggest that the review be clear on where there are gaps in its knowledge on deductibles.

2.6.2. We note that as part of the review process the reviewers spoke with 2 participant employers who provided their views. MIAL members who are scheme participants have consistently advised about the relative expense and poor customer service/claims management assistance they have received when claims are managed under the Seacare scheme as distinct from state and or territory schemes. One member who holds a policy under the Seacare scheme as well as policies in multiple state jurisdictions commented that the service is like chalk and cheese, in reference to the far superior service that is received by both employer and employee under state schemes (in this example seafarers who are covered by state schemes). The communications with employer representatives and the employee undertaking rehabilitation is significantly better under states schemes, as is the level of proactivity form a claims management perspective.

3. Finity analysis and Tables

3.1. *Table 1.1*

3.1.1. Exemptions and EA's are a conflation of issues, one is an issue about employer and employee entitlements (EA's) one is an issue and one is a scheme issue. Table 1.1 is very confusing in it suggests that EA's are relevant to scheme benefits, when it is legislation that determines what scheme benefits apply. In the fold into state and territory scheme then exemptions are not required (because the scheme which would apply if you sought an exemption from Seacare already applies) and the statement that EBAs (or EAs as they are called under the *FW Act*) cannot be able to guarantee Seacare benefits makes no sense. Thiis column should refer only to exemptions and the middle column should be green as no exemptions will be necessary. If Finity is of the view that EA's are of practical importance to employees and employers (MIAL is not sure how they are relevant to the respective scheme options themselves) this explanation, along with Finity assessment of EA clauses, should be made separately.

3.1.2. The report identifies the lack of scale as "maybe" being resolved under option 1 but identifies that this would only be the case if it is expanded to 3 times the size. There is nothing in the terms of reference that suggests an expansion of the scheme is an option for reform. This should read "no" as the maybe is premised on a substantial change in the size of the scheme.

3.1.3. Under poor scheme performance option, one is red and option 3 is yellow with the same text. This might be an error.

3.1.4. Under practical difficulties of seafarers how can it be assumed that reforming the scheme would ensure appropriate supports available when the existing measure is that it's the worst performing scheme for rehabilitation. The other schemes have much more scale to provide these services.

3.2. *Table 1.2*

3.2.1. The overlap/duplication row contains a different outcome under options 1 and 3 and we suggest they should be the same.

3.2.2. Under Regulation it is unclear how option 3 attracts a green rating giving the comment about the remaining complexities of state and commonwealth interactions.

3.3. *Table 1.3*

3.3.1. The sole green box under options 1 is referred to as the unions "strongly" preferred option. It is inappropriate to use this kind of language in response to one group of stakeholders and not others. The word "strongly" should be removed as it is a completely subjective assessment.

3.3.2. Implementation complexity. We are unsure why this is assessed as moderate given the contents of EA's has no impact on the scheme or legislation that governs it. Stakeholder negotiations are for stakeholders. That there is otherwise little or no legislative change requires suggests this option should be green and the stakeholders should determine the practical implications specific to any industrial instrument.

3.4. *Table 1.4*

3.4.1. Its unclear to MIAL how the options of folding the legislation into the *Work Health and Safety Act (Cth)* and harmonizing the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHSMI Act) will, ultimately result in a substantially different outcome. The work to attain this outcome would be different but ultimately the end product would have minimal practical difference (depending on the extent of the harmonisation).

3.4.2. Our understanding that employers preferred option is for the scheme no to exist separately (meaning state legislation applies) although there is not a particular preference after that in terms of less preferred v unsupported.

3.5. *Table 4.1 Key challenges facing the Seacare Workers Compensation Scheme*

3.5.1. The statement coverage and scale problems are exacerbated by exemptions is hard to understand. An exemption, where obtained, assists in clarifying that the Scheme does NOT apply meaning no uncertainty over coverage exists. The second sentence in this box (which is an entirely separate issue) makes assumptions about the effect of clauses contained in EA's without any attempt to examine even a sample of those clauses. The suggestion that an obligation to pay Seacare benefits if the scheme does not exist contains no evidence or analysis and suggests to us a fundamental simplification without reference to any existing clauses. Any obligation contained in an EA is entirely dependent on the wording contained in EAs. MIAL refers to its previous comments about the importance that Finity applies to place on these individual bilateral arrangements in a review that seeks to assess a statutory scheme and its application.

3.5.2. MIAL considers that poor regulation be a critical risk to the scheme itself.

3.6. *Table 5.1*

3.6.1. We refer to previous comments about the conflation of EA's and exemptions and the relevant of EA provisions to this review.

3.6.2. Poor performance – both these boxes should be red for options 1 and 3.

3.6.3. Lack of insurance coverage: The assumption that a viable industry insurer or self insurer will be created when none currently exists, and further that all employers will join appear seems not to warrant a rating of "maybe". While MIAL is aware that the preliminary discussions have occurred canvassing this possibility, there are still a number of issues and assumptions that require clarification before this is something likely to be supported.

3.6.4. Practical difficulties – Its not clear to MIAL how "assuming an industry run scheme ensures appropriate rehabilitation support are available" could attract a green rating. The current industry scheme contains limited if non existent support due to the many reasons articulated in this report. Why established schemes of larger scale should be given a lesser rating in this respect does not seem to stack up. The report notes that already more than 2/3rds of the nations seafarers are covered by state and territory schemes.

3.7. *Table 5.2*

3.7.1. Please see comments under table 1.3 above.

3.8. *Table under paragraph 6.1.2*

3.8.1. This references AMSA's ability to provide regulation. AMSA is the inspectorate not the Regulator.

3.8.2. The coverage provisions are confusing and AMSA and the relevant government department have always expressed differing positions.

3.9. *Table 7.2*

3.9.1. Again in relation to WHS, employers do not see a substantial difference in practical outcomes between 1 and 3 for it, except that potentially a greater regulatory input from Comcare may see industry input removed. Again, it is the position of employers that a small niche scheme for less than 1/3 of seafarers in Australia cannot be justified.

4. Feedback on the reform options

4.1. MIAL generally accepts the three options identified are those (at a high level) available to government. We note that there is no analysis of the costs to industry/ government for implementing the reform options.

4.2. With option 1 on occasion made some assessment of the option on the basis of "assumed reform" – given the numerous attempts at reform of this scheme has been unsuccessful we are not sure that it is realistic to assume a particular aspect of the reform will happen.

4.3. The other option (which MIAL does not see as realistic given the insurance situation) is for the government to do nothing. MIAL would like to see included in the report a clear assessment of the consequences of this (it is alluded to throughout but MIAL considers that this would help government immediately dismiss this as a realistic option).

5. What MIAL would like to see in a decision from Government

5.1. MIAL is very clear on the decision it would like government to make as its continuing view is that the scheme ought be repealed and coverage reverted to state legislation and it is pleasing that the assessment contained in the report outlines the benefits of adopting this option.

5.2. We would like to see a government decision acknowledge the elements and issues that are outlined in this report. Our reading of the report demonstrates that based on objective assessment of the various issues under considerations and leaving aside the preferences of stakeholders, option number 2 achieves a resolution to most of the issues that have been highlighted as critical. We would like to see a decision from government that recognises and acts to resolve the most critical issues facing the scheme. In summary MIAL would like to see any decision to:

5.2.1. take into account the relative pros and cons of each option for industry; based on objective assessment of each option;

5.2.2. not to be taken in isolation. The Government has given a strong commitment to support the shipping industry and the foundation on which a shipping industry in a country may grow is its competitiveness with the international industry;

5.2.3. consider how the majority of people who work on ships are treated from a workers compensation and WHS perspective. Is there is any clear, legitimate basis on which a smaller cohort of seafarers should be treated differently to these seafarers (as well as the majority of Australian private sector workers)? Where this results in a higher cost to industry (as it inevitably would) then it should be clear how this is justified.

5.2.4. acknowledge that any decision it takes cannot result in employers not being able to obtain insurance for the workers compensation scheme that covers them.

5.2.5. acknowledge that any decision that results industry participants being removed from an existing, mature and scaled scheme to one that is more expensive and lower performing from an outcome perspective is by any measure poor public policy. This is what would happen if the Seacare scheme was retained and made 3 times the size (the only way which, according to the report, the scheme can be sustainable).

6. Other matters

6.1. MIAL notes that the report doesn't make a recommendation on options which presumably was a decision of Finity in consultation with the Government.

6.2. As expressed under our feedback in section 1, MIAL is of the view that some issues are practical issues between stakeholders is distinct from issues with the scheme itself. MIAL considers that the final report should be clear on what is properly a scheme issue.

6.3. The report references the "state of connection test" which has been in place for a number of years to accommodate the increasing reality of remote work and employees working in different states at different times. Many employers are in a similar situation where they employ people who reside in a different state to where they work, and they may work in across states when at work. It would be useful to see how this operates in other industries. It would also be interesting to understand Finity's experience with the role of brokers (if any) to assist with determining the appropriate jurisdictional questions.

6.4. Throughout the report a number of the legislative provisions are criticized. The scheme is not contemporary, that much is abundantly clear. It is also a scheme where there is limited external support available to employers, many of whom are unable to employ dedicated state to manage workers compensation and rehabilitation matters, given the size of their businesses. Where this support exists in schemes of appropriate scale, employers and their employees get the benefits that are typical of a contemporary scheme (quicker decisions, focus on rehab, provisional assistance prior to a final determination). Such beneficial provisions are not possible in the Seacare scheme where so much of the burden is placed directly on employers rather than experienced claims managers within panel insurers.

6.5. As was expressed in a meeting with Finity prior to the release of the draft report, MIAL was disappointed that the capacity to make written submissions as part of the initial review process was not communicated to all stakeholders. MIAL most certainly would have taken the opportunity to provide a written submission and sought feedback from its members had it been advised that this was a part of the process.

6.6. Given the confusion about the ability to make written submissions (as well as timings described on the Attorney General's website which discusses a report in October; the proceeding of this review has followed a very different timeline) MIAL queries whether the inclusion of a written submission by a particular stakeholder ought be included as an annex to the report. MIAL understands that it is not the only stakeholder not aware that a capacity to make written submissions existed prior to the issuing of the draft report.