**EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Employment

*Seafarers Rehabilitation and Compensation Act 1992*

Subsection 3A

Seafarers Rehabilitation and Compensation *(Prescribed Ship — Intra-State Trade)* Declaration 2015

**Background**

The *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) provides workers’ compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The Seafarers Act establishes a privately underwritten workers’ compensation scheme, with employers covered by the Act required to maintain an insurance policy with an approved insurer to cover workers’ compensation claims made under the Act. The Seafarers Act establishes the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority), which oversees the scheme. The Seafarers Act operates in conjunction with the *Occupational Health and Safety (Maritime Industry) Act 1992* (OHS(MI) Act) to provide a combined work health and safety and workers’ compensation scheme known as the ‘Seacare scheme’.

The coverage of the Seacare scheme has historically been understood by maritime industry regulators and participants to operate primarily by reference to the form of trade or commerce being engaged in by a ship. Ships engaged in interstate or international trade or commerce were understood to be covered by the Seacare Scheme, while ships engaged in intrastate trade or commerce were understood to be covered by the legislation of the state in which they operate.

In *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182, the Full Court of the Federal Court held that the application provisions of the Seafarers Act operated to apply the Seafarers Act to seafarers employed by a trading, financial or foreign corporation on a prescribed ship, including ships engaged in intrastate trade. This is a substantially broader coverage than what has been historically understood by maritime industry regulators and participants.

The Seafarers Act will no longer apply to ships affected by this declaration. Those ships will instead be subject to the workers compensation legislation of the state in which they operate.

**Legislative Provisions**

In addition to the application provisions discussed above, the Seafarers Act generally only applies to a ship if it is a ‘prescribed ship’ which is a defined term in section 3. Under subsection 3A the Minister may declare a ship to be or to not be a prescribed ship.

**Effect of Declaration**

The *Seafarers Rehabilitation and Compensation (Prescribed ship- Intra-State Trade) Declaration 2015* (the Declaration) declares that a ship that would be covered by paragraph 10(b) or (c) of the *Navigation Act 1912* and that would not be covered by paragraph 10(a), if that Act had not been amended, which is only engaged in intra-state trade is not a prescribed ship for the purposes of the Act.

The Seafarers Act will not apply to these ships, which will instead be subject to their relevant state’s work health and safety legislation.

This Declaration will operate in conjunction with a section 20A Exemption which has been issued by the Seacare Authority specifying ships which are not covered by the Seafarers Act. The exemption is directed at those ships which would be covered by paragraph 10(a) of the *Navigation Act* 1912 had it not been amended. The combined effect of the Declaration and Exemption is that ships which had been understood to be outside the coverage of the Seafarers Act prior to the Federal Court’s *Aucote* decision will no longer be covered by the Seafarers Act. As such, the Declaration and Exemption will re-align the application of the Seafarers Act with how it has been historically understood by regulators and scheme participants.

The Office of Best Practice Regulation was consulted regarding this declaration and indicated that a Regulation Impact Statement was not required for this declaration (OBPR ID 18393).

The instrument will take effect from the day after it is registered on the Federal Register of Legislative Instruments. The declaration will sunset two years from the date on which it takes effect.

Consultation

The co-regulators of the Seacare scheme – being Comcare and the Australian Maritime Safety Authority – were consulted in drafting this declaration regarding the scope of the declaration and the likely view of industry participants.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Seafarers Rehabilitation and Compensation *(Prescribed Ship — Intra-State Trade)* Declaration 2015**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) provides workers’ compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The Seafarers Act establishes a privately underwritten workers’ compensation scheme, with employers covered by the Act required to maintain an insurance policy with an approved insurer to cover workers’ compensation claims made under the Act. The Seafarers Act establishes the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority), which oversees the scheme.

The coverage of the Seacare scheme has historically been understood by maritime industry regulators and participants to operate primarily by reference to the form of trade or commerce being engaged in by a ship. Ships engaged in interstate or international trade or commerce were understood to be covered by the Seacare Scheme, while ships engaged in intrastate trade or commerce were understood to be covered by the legislation of the state in which they operate.

In *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182, the Full Court of the Federal Court held that the application provisions of the Seafarers Act operated to apply the Seafarers Act to seafarers employed by a trading, financial or foreign corporation on a prescribed ship, including ships engaged in intrastate trade. This is a substantially broader coverage than what has been historically understood by maritime industry regulators and participants. Because of the similarity of the application provisions in the Seafarers Act and the OHS(MI) Act, the decision has potential implications for the coverage of the OHS(MI) Act.

The Seacare Authority has issued a section 20A exemption under the *Seafarers Rehabilitation and Compensation Act 1992* to exclude prescribed ships engaged in instrastate voyages. This declaration provides that a ship that would be covered by paragraph 10(b) or (c) of the *Navigation Act 1912* and that would not be covered by paragraph 10(a), if that Act had not been amended, which is only engaged in intra-state trade is not a prescribed ship for the purposes of the Act. It will operate in conjunction with the exemption.

**Human rights implications**

Rights to social security and to work and rehabilitation

Article 9 of ICESCR states that ‘States Parties … recognize the right of everyone to social security’. General Comment 19 by the Committee on Economic, Social and Cultural Rights sets out the essential elements of the right to social security, including that ‘States parties should … ensure the protection of workers who are injured in the course of employment or other productive work’.([[1]](#footnote-1))

General Comment 19 also notes that the right to social security has a close relationship with the aspects of the right to work which require States Parties to provide social services for the rehabilitation of the injured and persons with disabilities.([[2]](#footnote-2)) As such, the Bill’s interaction with the right to social security and the right to work, particularly the rights of persons with disabilities to rehabilitation and to work and employment, are best discussed together.

The Seafarers Act provides support for seafarers who have been injured at work by way of compensation payments, payment of medical expenses, permanent impairment benefits and other benefits, such as access to rehabilitation support. The Seafarers Act is part of a broader system of (primarily state) legislation which ensures all Australian employees have access to workers’ compensation when injured at work. Workers’ compensation represents just one avenue of social security that is available to injured employees and, where an injury is not covered by workers’ compensation legislation, other safety nets exist to meet medical and living costs.

The declaration will operate along with a section 20A exemption under the *Seafarers Rehabilitation and Compensation Act 1992* (Exemption- multiple vessels) to alter the coverage of persons who may be eligible for workers’ compensation entitlements under the Seafarers Act, in order to align the coverage of the Act with the shared understanding of scheme participants prior to the Aucote decision. A consequence of these changes is that some individuals who may have entitlements to workers’ compensation under the Seafarers Act following the Aucote decision will no longer have an entitlement to compensation under that Act. These changes to coverage could be said to limit the right to social security. Any such limitations are, however, reasonable and proportionate, as affected employees will retain entitlements to compensation under state legislation and any limitations are necessary to achieve the legitimate objective of ensuring the long-term viability of maritime industry employers and sustainability of the Seacare scheme.

By aligning the coverage of the Seafarers Act with the shared understanding of scheme participants, employees on purely intra-state voyages will no longer be covered by the Seafarers Act. These employees will continue to be covered by the workers compensation legislation of the state in which they work — as they had been understood to be, prior to the Aucote decision. While the precise quantum of entitlements available under each scheme varies, every workers’ compensation scheme in Australia provides protection and support to injured employees, as required by the right to social security. Further, the change to the rights of these employees to workers’ compensation will align their actual rights with those which had been understood to have had prior to the Aucote decision. As such, any limitation to the right to social security which results from this change would be reasonable and proportionate.

Any limitations to the right to social security are necessary to achieve the legitimate objective of ensuring the long-term viability of maritime industry employers and sustainability of the Seacare scheme. As noted by General Comment 19, an important aspect of the right to social security is ensuring that schemes are sustainable, ‘in order to ensure that the right can be realized for present and future generations’.([[3]](#footnote-3))

The workers’ compensation scheme established by the Seafarers Act is privately underwritten, with employers purchasing insurance policies from approved insurers under the terms of the Act. Prior to the Aucote decision, the shared understanding of regulators, maritime industry employers and employees was that the coverage of the Seafarers Act did not extend to intra-state voyages. Employers who had acted on the basis they were not covered by the Seafarers Act will not have insurance policies under the Act, and will have instead paid insurance premiums (or purchased insurance policies) under the workers compensation laws of the state in which they operated. Workers’ compensation premiums under the Seacare scheme are, on average, significantly more expensive than those of state and territory workers’ compensation schemes.

This declaration protects the long-term viability of maritime industry employers and the long-term sustainability of the scheme. Without the exclusion of these ships, the viability of maritime industry employers would be jeopardised because employers may be exposed to workers’ compensation claims under the Seafarers Act for which they are not insured, because they did not know that they were covered by the Act. The financial viability of employers in the maritime industry is vital to promoting and protecting the right to work for their employees. The financial sustainability of the scheme and availability of affordable workers’ compensation insurance would be jeopardised if the Seacare scheme were to operate with such an expanded application.

A centralised fund, known as the Safety Net Fund, is also managed by the Commonwealth and exists to cover claims where an employer has become insolvent or is otherwise unable to pay a claim. The Safety Net Fund is maintained through levies on Seacare scheme employers. The sustainability of the Safety Net Fund would be jeopardised without any changes because of an increase in the number of calls on the Fund, in many cases from employees for whom levies have never been paid, that exceed the reserves held in the Fund.

**Conclusion**

The Legislative Instrument is compatible with human rights because it does not negatively impact on human rights.

**Senator the Hon. Eric Abetz**

Minister for Employment

1. Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17]. [↑](#footnote-ref-1)
2. Ibid [28]. [↑](#footnote-ref-2)
3. Ibid [11]. [↑](#footnote-ref-3)