EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Employment

Seafarers Rehabilitation and Compensation Act 1992
Subsection 3A(2)

Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 (No. 2)

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 1993* (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 *Aucote* decision), 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 Rehabilitation and Compensation and Other Legislation Amendment Act 2015 (the Act) was introduced to address the consequences of the *Aucote* decision. As passed by the Parliament on 14 May 2015, the Act clarifies the retrospective application of the Seafarers Act and the OHS(MI) Act by retrospectively repealing the application provisions which expand the coverage of these Acts based on an employee's employment by a trading, financial or foreign corporation from the date of each Act's commencement. The Act then reinserted these provisions from the day after it received the Royal Assent. As such, the Act, as passed by the Parliament, only addresses the historical application of the Seacare scheme.

The Seacare Authority has issued two multi-ship exemptions under section 20A of the Seafarers Act that (generally) exempt the employment of employees on any ship listed in those exemptions from the Seafarers Act if the ship is engaged in intrastate trade. Together with these exemptions, this Declaration works in concert with the Act by addressing the prospective coverage of the Seafarers Act.

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 section 3A the Minister may declare a ship to be or not to be a prescribed ship.

Effect of Declaration

The *Seafarers Rehabilitation and Compensation (Prescribed ship- Intra-State Trade) Declaration 2015 (No. 2)* (the Declaration) declares that a ship that would be covered by paragraph 10(c) of the *Navigation Act 1912* and that would not be covered by paragraph 10(a) or (b), if that Act had not been repealed that is only engaged in intrastate 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 workers' compensation legislation.

The Declaration will operate in conjunction with the section 20A exemptions which have been issued by the Seacare Authority specifying ships which are not covered by the Seafarers Act. The exemptions are directed at those ships which are registered in Australia (ships which would be covered by paragraph 10(a) of the *Navigation Act* 1912 had it not been repealed). The combined effect of the Declaration and the exemptions 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 exemptions will re-align the application of the Seafarers Act with how it has been historically understood by regulators and scheme participants.

The Declaration specifically addresses concerns raised during consultation about ships covered by declarations under the now repealed *Navigation Act* 1912. The Declaration will not affect ships which are subject to the Seafarers Act because they are covered by a declaration under subsections 8A(2) or 8AA(2) of the now repealed *Navigation Act 1912*. The Seafarers Act applies to these ships under subsection 19(1A). Clause (3) ensures that the Declaration does not apply to ships to which this subsection applies.

Because the Declaration only applies to ships to which paragraph 10(c) of the *Navigation Act 1912* would have applied, and not ships to which paragraph 10(a) or (b) would have applied:

- it will not affect ships engaged in coastal trading under a general licence—because these are ships to which either paragraph 10(a) or 10(b) would have applied; and

- it will not affect ships engaged in coastal trading under an emergency licence which are registered on the Australian General Shipping Register—because these ships are registered in Australia and so are ships to which paragraph 10(a) would have applied.

As such, the Declaration will not affect the application of the Seafarers Act under subsection 19(1AA).

The Declaration also repeals the existing *Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015*, which it replaces.

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).

This instrument will come into effect on 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.

The Government has committed to introducing legislation for a comprehensive reform of the Seacare scheme, including coverage rules, before the end of 2015. The Declaration and the Seacare Authority's exemptions will provide an interim measure while the Government develops, and undertakes important consultations in relation to, this much needed reform of the Seacare scheme.

Consultation

The co-regulators of the Seacare scheme—being Comcare (which assists the Seacare Authority) and the Australian Maritime Safety Authority were consulted in the preparation of this declaration. The following organisations were also consulted- the Members of the Seacare Authority, and their deputies- Swire Pacific Ship Management, SeaRoad Shipping, the Australian Mines and Metals Association, the Maritime Industry Australia Ltd, the Maritime Union of Australia, the Australian Maritime Officers Union and the Australian Institute of Marine and Power Engineers.

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 (No. 2)

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 Seafarers Act operates in conjunction with the *Occupational Health and Safety (Maritime Industry) Act 1993* (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 *Aucote* decision), 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 Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the Bill) was passed by the Parliament with bipartisan support on 14 May 2015. The now Act, as passed by the Parliament, addresses the issues of historical coverage raised by the *Aucote* decision. The Act will not affect the coverage of the Seafarers Act from the day after it receives the Royal Assent onwards. As such, further action is required to address the prospective coverage of the Seafarers Act, in light of the *Aucote* decision. This action takes the form of a number of interim administrative measures, while more permanent and substantial reforms are developed.

The Seacare Authority has issued two section 20A exemptions under the Seafarers Act to exclude ships engaged in intrastate trade.[1] Due to the terms of section 20A, these exemptions only apply to the lists of ships set out in the exemption, which are based on the lists of ships registered in Australia. As a result, the exemption has a potential gap in relation to the small class of ships which:

[1] Details of the exemptions can be found on the Authority's website: http://www.seacare.gov.au/forms_and_publications/published_information/our_policies/Our_Policies/exemption_multiple_vessels

- are not registered in Australia;

- are potentially subject to the Seafarers Act because they have a majority Australian crew and an Australia-based operator; and

- engage in intrastate trade.

The Declaration fills this potential gap to ensure that the same coverage rules apply to all employees on all ships. The Declaration provides that ships that would be covered by paragraph 10(c) of the *Navigation Act 1912* if that Act had not been repealed, (which is ships that are not registered in Australia, but which have a majority Australian crew and an Australian based operator) that are only engaged in intrastate trade are not prescribed ships for the purposes of the Act. It will operate in conjunction with the exemptions to ensure consistent coverage rules for the Seafarers Act. A further declaration under the OHS(MI) Act will achieve the same outcome for that Act.

The Declaration will not affect ships which are covered by the Seafarers Act because they are covered by declarations under the now repealed *Navigation Act 1912* or because they are licenced under the *Coastal Shipping (Revitalising Australian Shipping) Act 2012*. This addresses an issue raised in relation to the initial *Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015*, which the Declaration replaces.

The Government has committed to introducing legislation for a comprehensive reform of the Seacare scheme, including coverage rules, before the end of 2015. The Declaration and the Seacare Authority's exemptions will provide an interim measure while the Government develops, and undertakes important consultations in relation to, this much needed reform of the Seacare scheme. It is vital that the Seacare scheme's coverage, across both work health and safety and workers compensation, be maintained consistently until these reforms can be implemented.

Human rights implications

Rights to social security and to work and rehabilitation

Article 9 of the *International Convention on Economic, Social and Cultural Rights* 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'.[2]

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.[3] As such, the Declaration'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'

[2] 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].
[3] Ibid [28].

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 the two exemptions granted by the Seacare Authority 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 preserving the widely understood coverage of the Seacare scheme for the interim period.

Notably, the majority of employees on intrastate voyages will be affected by the multi-vessel exemptions granted by the Seacare Authority and not by the Declaration. If the exemption was not made, all employees on ships which are registered in Australia and are engaged in intrastate trade would still be exempted from the Seacare scheme, due to the exemptions. However, the small class of employees on ships not registered in Australia, but which have a majority Australian crew, an Australia-based operator and are engaged in intrastate trade would be treated differently. The Declaration is necessary to capture this small class of employees and ensure that a consistent set of interim coverage rules is applied across the maritime industry to maintain the pre-*Aucote* understanding of the Seacare scheme's coverage.

To achieve this aim, it is necessary for employees on ships engaged in purely intrastate trade to no longer be covered by the Seafarers Act. Maintaining the pre-*Aucote* understanding of the Seacare scheme's coverage cannot be achieved without moving these employees from coverage under the Seafarers Act to coverage under their states' workers' compensation legislation. These employees will 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. Achieving this legitimate objective of maintaining the widely understood coverage system of the Seafarers Act for the interim period cannot be achieved without excluding intrastate trade from coverage. Any limitations on the right to social security caused as a result are a necessary consequence of achieving this legitimate objective.

Any limitations on the right to social security are also reasonable and proportionate for three reasons:

1) the limitations will only be for an interim period while more comprehensive reforms are developed;

2) the limitations are targeted at a small class of employees who would otherwise be inconsistently treated by the interim coverage rules;

3) all employees who are not covered by the Seafarers Act will instead be covered by their states' workers' compensation legislation.

In relation to the first reason, the Committee on Economic, Social and Cultural Rights has acknowledged that 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'.[4] The Government's interim measures to maintain the coverage of the Seacare scheme will enable

[4] 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), [11].

a sustainable future system of coverage to be developed for the scheme in full consultation with stakeholders in the maritime industry. As such, any interim limitations to the right are consistent with the nature of the right to social security.

In relation to the second reason, it should be noted that if the Declaration was not made, the small class of affected employees would be treated differently for workers' compensation and work health and safety purposes. These employees would be covered by the Seacare scheme for workers' compensation, but under state laws for work health and safety. Maintaining the pre-*Aucote* understanding of work health and safety coverage is particularly critical, as this is a basis for the funding of state and federal work health and safety regulators. If coverage rules become inconsistent with regulator funding and capacity this could imperil the right to safe and healthy working conditions of workers in the maritime industry.

In relation to the third reason, it should be noted that workers' compensation schemes across Australia vary substantially, making it difficult to assess whether one particular scheme is better, or more generous, than another. In addition, the Seacare scheme is unlike state and territory workers' compensation schemes in that it is industry specific. It covers a small number of employers in a defined part of the maritime industry, compared to state and territory workers' compensation schemes which cover most employers operating within the state and territory across the full range of industries and occupations.

To determine if an injured seafarer would be better off under the Seacare scheme, a number of factors need to be considered including the injured seafarer's:

- wages;
- level of impairment;
- subjective preferences for weekly compensation payments or a lump sum payment;
- access to common law damages; and
- ability to return to work.

For example, when comparing the Seacare scheme to Western Australia's workers' compensation scheme, it could be said that in some respects the Seacare scheme is more generous as:

- the Seacare scheme provides weekly compensation until an injured employee fully returns to work or reaches 65 years old, while Western Australia's scheme caps weekly compensation at a total monetary value (currently $212,980.00); and
- the Seacare scheme has no monetary limit on the amount of compensation for medical expenses; while Western Australia's scheme has an initial cap of $63,894, with the potential for an additional $50,000 where this amount is insufficient and a further $250,000 in exceptional circumstances.

On the other hand, again taking Western Australia as an example, seafarers under the Seacare scheme are much more restricted in accessing common law damages than under Western Australia's scheme. Under the Seacare scheme, an employee can recover a maximum of $138,570.52 in damages for non-economic loss. This amount is not indexed. By contrast, under Western Australia's scheme an employee with more than 15 per cent permanent impairment can access up to $434,160 (indexed annually) in damages; and employees with more than 25 per cent permanent impairment have no limit on their access to common law damages.

Focusing narrowly on these monetary elements of workers' compensation also does not provide the complete picture of the benefits available for injured workers. The best outcome for an injured worker is a swift and durable return to work, not an extended period relying on

workers' compensation benefits. Claim disputation and resolution rates are a major factor in a swift return to work.

Injured employees under Western Australia's workers' compensation scheme have much better rehabilitation and return to work prospects than under the Seacare scheme. The Seacare scheme's return to work rate (59 per cent in 2012–13) is substantially below both Western Australia's scheme (75 per cent) and the national average (77 per cent). The Seacare scheme's disputation rate is substantially higher (18.6 per cent in 2012–13) than Western Australia's scheme (2.5 per cent) and disputes generally take longer to resolve. The poor rehabilitation and return to work performance of the Seacare scheme highlights that it is not appropriate for an ad hoc substantial expansion of the scheme. It also highlights the importance of maintaining the pre-*Aucote* position for the interim period so that more substantial reforms to the Seacare scheme can be developed.

The comparison between Western Australia's workers' compensation scheme and the Seacare scheme is broadly indicative of all comparisons between state and territory schemes in that all schemes present both advantages and disadvantages when compared to others.

It should be noted that the issues outlined above with workers' compensation under the Seacare scheme are just some of the issues which the Government will seek to address in its forthcoming substantial reforms to the Seacare scheme. Again it should be emphasised that any limitations are interim limitations only while a stronger and more sustainable system of workers' compensation for the maritime industry can be developed for the future. As such, any limitations are reasonable, necessary and proportionate.

Conclusion

The Legislative Instrument is compatible with human rights because, to the extent that it impacts on human rights, those impacts are reasonable, necessary and proportionate.

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