

## EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

*Seafarers Rehabilitation and Compensation Act 1992*

Section 3A

*Seafarers Rehabilitation and Compensation (Prescribed Ship—Norfolk Island) Declaration 2016*

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### Background

The *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) provides workers' compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The Seafarers Act operates in conjunction with the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act). Together the Acts establish a scheme known as the 'Seacare scheme'.

In March 2015, the Australian Government announced a reform package for Norfolk Island, including the extension of most Commonwealth laws to the island. As part of these reforms, on 1 July 2016, the definition of 'Australia' in the *Acts Interpretation Act 1901* will be amended to include Norfolk Island.

The purpose of this declaration—the *Seafarers Rehabilitation and Compensation (Prescribed Ship—Norfolk Island) Declaration 2016*—is to prevent any expansion of the Seacare scheme upon commencement of this amendment. This is an interim measure to maintain the status quo. The Commonwealth is currently consulting with maritime industry stakeholders on broader reforms to the Seacare scheme, including clarifying future coverage to address this and other issues in respect of coverage of the scheme.

This declaration operates in conjunction with the *Occupational Health and Safety (Maritime Industry) (Prescribed Ship—Norfolk Island) Declaration 2016*.

### Current operation of the Seacare scheme

Section 19 of the Seafarers Act provides that the Act applies to employees on a 'prescribed ship' engaged in territorial, inter-state or international trade or commerce, as well as other specific classes of ship. Section 3 defines a 'prescribed ship' to be a ship to which Part II of the *Navigation Act 1912* (*Navigation Act*) would apply if that Act had not been repealed (other than a Government ship).

Part II of the *Navigation Act* applies to (among other things) 'a ship of which the majority of the crew are residents of Australia and which is operated by any of the following...':

- (i) a person who is a resident of, or has his or her principal place of business in, Australia;
- (ii) a firm that has its principal place of business in Australia; or
- (iii) a company that is incorporated, or has its principal place of business, in Australia.’

From 1 July 2016, the use of ‘Australia’ in the *Navigation Act* (as it is defined in the *Acts Interpretation Act 1901*) will include Norfolk Island, and could have the effect of capturing ships, not previously covered by the Seacare scheme, where the majority of crew are residents of Norfolk Island or where the operator of the ship is based in Norfolk Island.

#### The effect of the declaration

This declaration provides that a ship with a majority crew of Norfolk Island residents, and/or a Norfolk Island based operator, not otherwise covered by the scheme, is not a ‘prescribed ship’.

This declaration achieves this by declaring a ship is not a prescribed ship if it would not be covered by paragraphs 10(a) or 10(b) of the *Navigation Act* (that is, it is not registered in Australia and/or not engaged in coastal trading), and is not a ship to which subsections 19(1AA) or 19(1A) of the *Seafarers Act* would apply, but would usually be covered by paragraph 10(c) of the *Navigation Act* if that Act had not been repealed, and is:

- (i) crewed by a majority of residents of Norfolk Island and/or
- (ii) operated by a person who is a resident of Norfolk Island or has their principal place of business in Norfolk Island; or a firm that has its principal place of business in Norfolk Island; or a company that is incorporated, or has its principal place of business, in Norfolk Island.

The employees on these ships will retain their current workers’ compensation protections.

#### Consultation

This declaration has been made following consultation with the Department of Infrastructure and Regional Development which is coordinating the changes to Norfolk Island governance. The Seafarers Safety, Compensation and Rehabilitation Authority (Seacare Authority) was also consulted. The Department sent an explanation of the proposed declaration to the Seacare Authority for consideration at their meeting and they had no objection to the declaration being made. The current organisations represented on the Authority are the Australian Maritime Safety Authority, Comcare, the Australian Maritime Officers Union, the Australian Institute of Marine and Power Engineers, Swire Pacific Ship Management (Australia) Pty Ltd and SeaRoad Shipping Pty Ltd. Since the declaration is maintaining existing arrangements, further consultation was not considered appropriate.

The Office of Best Practice Regulation was consulted regarding this declaration and indicated that a Regulation Impact Statement was not required (OBPR ID 20850).

This instrument will come into effect on 1 July 2016 at the same time as amendments to the definition of 'Australia' in the *Acts Interpretation Act 1901*.

## 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—Norfolk Island) Declaration 2016***

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* (Seafarers Act) provides workers' compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The Seafarers Act operates in conjunction with the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act). Together the Acts establish a scheme known as the 'Seacare scheme'.

Whether a ship is covered by the Seacare scheme is determined, in part, by whether that ship is a 'prescribed ship'. A 'prescribed ship' is a ship to which Part II of the repealed *Navigation Act 1912* would have applied (other than a 'government ship'). Part II of the *Navigation Act 1901* applies to ships where a majority of the crew are residents of Australia and the operator is based in Australia.

In March 2015, the Australian Government announced a reform package for Norfolk Island, including the extension of most Commonwealth laws to the island. As part of these reforms, on 1 July 2016, the definition of 'Australia' in the *Acts Interpretation Act 1901* will be amended to include Norfolk Island.

This could mean that ships not previously covered, but with a majority crew or operated from Norfolk Island are brought within the coverage of the scheme. The declaration will provide that such ships are not prescribed ships and preserve the current coverage of the scheme.

#### **Human rights implications**

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'.<sup>1</sup>

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

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<sup>1</sup> 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].

rehabilitation of the injured and persons with disabilities.<sup>2</sup> 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 and territory) 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.

By affecting the coverage of the Seafarers Act, the declaration engages the rights to social security, work and rehabilitation. The declaration is being made to preserve the current coverage of the Seafarers Act when an amendment to the definition of 'Australia' in the *Acts Interpretation Act 1901* commences on 1 July 2016, as discussed above. An unintended consequence of this amendment is that there is a possible class of employees, who currently do not have entitlements to workers' compensation under the Seafarers Act, but who would be entitled to them from the 1 July 2016.

This declaration will prevent this unintended consequence by preserving the existing coverage of the Seacare scheme. This could be said to limit the right to social security. However, it should be noted that the employees in question have never had entitlements under the Seacare scheme. As such there is no diminution of entitlements or coverage—the purpose of the amendments is to maintain the status quo.

If it is considered that there are limitations, these would be reasonable and proportionate, as affected employees will retain their current entitlements to compensation under the Norfolk Island *Employment Act 1988*, in the absence of any other applicable Commonwealth laws.

Directly comparing benefits under different workers' compensation schemes is complicated, because it is dependent—for example on the nature of the injury, and preferences of the claimant. But it can be noted that the Norfolk Island *Employment Act 1988* provides a broadly comparable set of entitlements to the Seafarers Act, including:

- Weekly incapacity payments for the duration of incapacity (subject to certain conditions);
- Compensation for permanent loss or impairment of up to \$100,000;
- Compensation for the reasonable cost of medical treatment.

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<sup>2</sup> Ibid [28].

Any limitations on the right to social security are necessary to achieve the legitimate objective of preserving the coverage of the Seacare scheme and the existing rights of employees potentially affected by the amendment to the *Acts Interpretation Act 1901*, and bring greater clarity and certainty.

### **Conclusion**

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