

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Occupational Health and Safety (Maritime Industry) Act 1993
Sections 4A and 4B

Occupational Health and Safety (Maritime Industry) (*Prescribed Ship or Unit — Intra-State Trade*) Declaration 2015

Background

The *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act) regulates work health and safety for a defined part of the Australian maritime industry. The OHS(MI) Act operates in conjunction with the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) to provide a combined work health and safety and workers' compensation scheme known as the 'Seacare scheme'. The OHS(MI) Act is co-regulated by the Seafarers Safety, Rehabilitation and Compensation Authority ('Seacare Authority') and the Australian Maritime Safety Authority (AMSA), with AMSA being the inspectorate responsible for enforcing the OHS(MI) Act.

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.

Legislative Provisions

In addition to the application provisions discussed above, the OHS(MI) Act generally only applies to a ship or vessel if it is a 'prescribed ship' or a 'prescribed unit', which are defined terms in section 4. Under subsection 4A the Minister may declare a ship to be or to not be a prescribed ship and under subsection 4B the Minister may declare a vessel or structure to be or to not be a prescribed unit.

Effect of Declaration

The Occupational Health and Safety (Maritime Industry) (*Prescribed Ship or Unit — Intra-State Trade*) Declaration 2015 (the Declaration) declares that a ship or vessel which is only engaged in intrastate trade is not a prescribed ship or a prescribed unit for the purposes of the OHS(MI) Act.

The OHS(MI) Act will not apply to ships and vessels which are affected by this declaration (that is, ships and vessels only engaged in intrastate trade). These ships and vessels will instead be subject to the work health and safety legislation of the state in which they operate, with the work health and safety inspectorate of that state responsible for enforcing those laws.

The effect of the Declaration is that ships and vessels which had been understood to be outside the coverage of the OHS(MI) Act prior to the Federal Court's *Aucote* decision will no longer be covered by the OHS(MI) Act. As such, the Declaration will re-align the application of the OHS(MI) 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).

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.

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

Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — 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 *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act) regulates work health and safety for a defined part of the Australian maritime industry. The OHS(MI) Act operates in conjunction with the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) to provide a combined work health and safety and workers' compensation scheme known as the 'Seacare scheme'. The OHS(MI) Act is co-regulated by the Seafarers Safety, Rehabilitation and Compensation Authority ('Seacare Authority') and the Australian Maritime Safety Authority (AMSA), with AMSA being the inspectorate responsible for enforcing the OHS(MI) Act.

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.

In order to address the consequences of this decision, the Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 (the Declaration) declares that a ship or vessel which is only engaged in intrastate trade is not a prescribed ship or a prescribed unit for the purposes of the OHS(MI) Act.

The OHS(MI) Act will no longer apply to ships and vessels which are affected by the Declaration (that is, ships and vessels only engaged in intra-state trade). These ships and vessels will instead be subject to the work health and safety legislation of the state in which they operate.

Human rights implications

The right to safe and healthy working conditions is part of the set of interdependent rights relating to work and conditions of work set out in articles 6, 7 and 8 of the *International Convention on Economic Social and Cultural Rights* (ICESCR). Article 7(b) of ICESCR requires the States Parties to recognise the right of everyone to safe and healthy working conditions.

Australia principally complies with this obligation through a system of Commonwealth, state and territory work health and safety laws, which have been harmonised across the majority of jurisdictions through the adoption of model laws. The OHS(MI) Act represents work health and safety laws for a defined part of the maritime industry.

By affecting the coverage of the OHS(MI) Act, the Declaration engages the right to safe and healthy working conditions. The Declaration will ensure that the OHS(MI) Act does not apply to ships or vessels only engaged in intrastate trade or commerce. In place of the OHS(MI) Act, employees will continue to be covered by the work health and safety laws of the state in which the ship or vessel operates.

The OHS(MI) Act was based on the *Occupational Health and Safety Act 1991*. This Act was replaced by the *Work Health and Safety Act 2011*, which represented the Commonwealth's implementation of the model work health and safety laws. The OHS(MI) Act has not subsequently been updated to reflect the model laws. All employees not covered by the OHS(MI) Act as a result of this Legislative Instrument will once again be protected by the more modern state work health and safety laws. As such, these amendments do not limit the right to safe and healthy working conditions. Moreover, ensuring that the interaction between the OHS(MI) Act and the state work health and safety legislation aligns with the shared operational understanding of the regulators will promote the effective oversight and enforcement of Australia's multi-jurisdictional work health and safety system, supporting the right to safe and healthy working conditions.

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