The Senate

Education and Employment Legislation Committee

Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 [Provisions]

March 2015

ISBN: 978-1-76010-172-5

This document was produced by the Senate Standing Committee on Education and Employment and printed by the Senate Printing Unit, Parliament House, Canberra.

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RECOMMENDATIONS

Recommendation 1

The committee recommends that the Senate pass the Bill.

CHAPTER 1

Background

Reference

1.1 On 5 March 2015, the Senate referred the *Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015* (the Bill) to the Senate Education and Employment Legislation Committee for inquiry and report.

Conduct of inquiry

1.2 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from seven organisations, as detailed in Appendix 1.

Background

1.3 The *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act), which provides workers' compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry, and the *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act), which regulates work health and safety for a defined part of the Australian maritime industry, are collectively referred to as the 'Seacare scheme.'[1]

1.4 Since the current Seacare scheme commenced in 1993, regulators and maritime industry participants have operated on the basis that coverage of the Seacare scheme was determined primarily by reference to the nature of the voyage in which a ship was engaged.[2]

1.5 In *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (the Aucote decision), a Full Court of the Federal Court held that the coverage provisions in the Seafarers Act also operate to extend its application to all seafarers employed by a trading, financial or foreign corporation ('constitutional corporations'), including those on ships engaged in purely intra-state trade.[3]

1.6 Based on the Aucote decision, the Seafarers Act — and potentially the OHS(MI) Act, which has very similar coverage provisions — has a much broader

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1 *Explanatory memorandum*, p.v.

2 *Explanatory memorandum*, p.v.

3 *Explanatory memorandum*, p.v.

application than has previously been understood by regulators, maritime industry employers and maritime unions.[4]

1.7 The Bill is therefore necessary to return the operation of the Seacare scheme to what it has always been understood to be.

1.8 The Bill also makes amendments to the Seafarers Act to ensure that when the Seacare Authority grants an exemption from the Act in relation to the employment of employees on a ship, the relevant employer is also exempt from paying a levy under the *Safety Rehabilitation and Compensation Levy Collection Act 1992* in relation to the employees who have been exempted from the coverage of the Seafarers Act. The amendments to the Seafarers Act are technical in nature and do not raise any human rights implications.[5]

Overview of the bill

1.9 The Bill will amend the Seafarers Act and the OHS(MI) Act to clarify the coverage of these Acts.[6]

1.10 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 to cover claims under the Act. The Seafarers Act also establishes the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority), which oversees the scheme.[7]

1.11 Amending the coverage provisions of the Seacare scheme will clarify that the scheme is not intended to apply to employees engaged on ships undertaking intrastate voyages who have the benefit of State and Territory workers' compensation schemes and work health and safety regulation.[8]

1.12 These amendments are made in response to the Federal Court decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 which interpreted the coverage of the Seafarers Act as being beyond what it had widely been understood to be. The amendments are also intended to address the original Administrative Appeals Tribunal decision of *Aucote and Samson Maritime Pty Ltd* [2014] AATA 296 in relation to the scope of subsection 19(1).

1.13 The explanatory memorandum outlines that the amendments in the Bill will:

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4 *Explanatory memorandum*, p.vi.

5 *Explanatory memorandum*, p.vi.

6 *Explanatory memorandum*, p.vi.

7 *Explanatory memorandum*, p.v.

8 *Explanatory memorandum*, p.v.

- repeal provisions that apply the Seacare scheme to any employees who are employed by a trading, financial or foreign corporation, in order to ensure that coverage of the scheme is tied to whether a ship is engaged in interstate or international trade and commerce, as it was understood to be;
- provide that the Seacare scheme applies to the employment of employees on a prescribed ship that is 'directly and substantially' engaged in interstate or international trade or commerce. This amendment is intended to make clear that the activity of the ship must be more than merely incidental or preparatory to interstate or international trade or commerce; for a ship to be covered by the Seacare scheme there must be a direct and substantial connection; and
- make technical amendments to ensure that where an employee's employment is not covered by the Seacare scheme (and so is instead covered by equivalent state legislation), their employer will not be liable for a levy in respect of that employee.[9]

1.14 The retrospective commencement of the coverage provisions is necessary to return the operation of the Seacare scheme to what it has always been understood to be.

Human rights implications

1.15 The government has assessed the bill's compatibility within human rights under relevant international instruments, and considers the bill to be compatible.[10]

Financial impact statement

1.16 Nil.

Acknowledgement

1.17 The committee thanks those organisations which contributed to the inquiry by preparing written submissions.

9 *Explanatory memorandum*, p.i.

10 *Explanatory memorandum*, pp. vi-ix.

CHAPTER 2

2.1

Introduction

2.1 The *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act) jointly constitute what is known as the Seacare scheme, a national workers' compensation and rehabilitation scheme for seafarers in particular parts of the maritime industry.

2.2 The Seacare scheme operates within in a narrowly defined segment of the maritime industry and forms just one part of the broader maritime workers' compensation system. Each Australian state and territory has its own compensation scheme, with seafarers covered by the relevant legislation in the state in which they work. The Seacare scheme is designed to provide coverage to seafarers who are engaged in interstate or international trade or commerce and therefore fall outside State- and Territory-specific schemes. Seacare is privately underwritten, with employers required to purchase approved insurance policies under the terms of the Seafarers Act and pay levies to a centralised Safety Net Fund.

The Aucote decision

2.3 In *Samson Maritime Pty Ltd v Aucote*[1] (the Aucote decision), the full Federal Court of Australia (the Court) held that coverage under the Seafarers Act extended to a seafarer engaged in purely intra-state trade – and thus already covered by the relevant State or Territory scheme – by virtue of his being employed by a trading corporation. This decision expanded on the preceding decision of the Administrative Appeals Tribunal, that work preparatory or incidental to interstate or international trade would be covered under the Act.[2]

2.4 The Seacare scheme is a successor to the *Seamans Compensation Act 1911* and until the Aucote decision, its application, which mirrors that Act, had been long settled. As the Chairperson of the Seacare Authority, Mr David Sterrit, advised the Department of Employment:

> the proposed Bill will restore coverage to that in which the Scheme has operated since its inception.[3]

2.2 The Maritime Union of Australia (MUA), which opposes the Bill, nonetheless acknowledges in its submission that:

> there is a 50 year period where pre-Federal Court decision coverage has, by and large, operated efficiently.[4]

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1 [2014] FCAFC 182.

2 *Aucote and Samson Maritime Pty Ltd* [2004] AATA 296.

3 Department of Employment, answer to question on notice, 18 March 2015.

4 Australian Maritime Union, *Submission 1*.

2.5 As a consequence of the Aucote decision, the Seacare scheme now applies to a substantially increased number of seafarers. The Court's reliance on the 'constitutional corporation' extends the application of the Seafarers Act to any trading, financial or foreign corporation, a category so broad that it covers vast majority of maritime employers and operators, regardless of whether their operations are entirely intra-state. The Department of Employment estimates that the Seacare scheme could be expanded to apply to some 11,000 vessels and 20,000 employees.[5]

2.6 Given the similarity of the coverage provisions in the OHS(MI) Act, the Aucote decision may also by implication expand coverage under that Act.

The need for amendment

2.7 Seafarers to whom Seacare coverage has been extended by the Aucote decisions have, as a consequence, lost their rights under their respective state or territory scheme. If this is not immediately rectified, seafarers with long-term incapacity may forfeit their ongoing payments (and could potentially be required to repay any compensation received since 1993) and existing claims under state workers' compensation legislation may be quashed.[6] The committee is also concerned by the risk that, because state and territory regulations have lost jurisdiction in respect of intra-state voyages, previous health and safety enforcement actions and prosecutions could be challenged and overturned.[7]

2.8 The committee is further concerned that many maritime employers and operators now find themselves in contravention of an Act that they did not – and could not – know applied to them. These employers may now be exposed to workers' compensation claims for which they are not insured, through no fault of their own. Moreover, policies under the Seacare scheme are significantly more expensive than those under state and territory schemes.[8] Uncertainty and financial burden pose a direct threat to the viability of Australia's maritime industry.

2.9 The committee also notes that the Seacare scheme is not designed to operate with the expanded application that the Aucote decision has imposed upon it. There is a danger that the sudden influx of potential claimants may exceed the reserves in the centralised Safety Net Fund.[9]

2.10 Given that the Court's interpretation expands the coverage provisions of the Seafarers Act well beyond its intended application, it is important that the scope of those provisions (and those in the OHS(MI) Act) is clarified as a matter of law. Moreover, the decision has potentially disastrous consequences for seafarers, maritime employers and the scheme itself and must urgently be rectified as a matter of policy.

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5 Department of Employment, *Submission 4*, p. 6.

6 Department of Employment, answer to question on notice, 18 March 2015.

7 Department of Employment, answer to question on notice, 18 March 2015.

8 *Explanatory memorandum*, p. viii.

9 *Explanatory memorandum*, p. viii.

2.11 In order to address these issues, the Bill makes a series of amendments to the Seafarers Act and the OHS(MI) Act to clarify that those acts do not apply to intra-state voyages. The Bill also explicitly provides that employers are not liable for a levy in respect of employees whose employment is not covered by the Seacare scheme. Claims that have been made or determined under the Seafarers Act will not be disturbed by the Bill's amendments.[10]

2.12 Submissions opposing the Bill were received from the MUA, the Australian Maritime Officers Union, South Australian Unions and the Australian Institute of Marine and Power Engineers. All of these organisations object to any reduction in the scope of the Seacare scheme, notwithstanding its sudden, unexpected and unprecedented expansion as a result of the Aucote decision. What the unions falsely characterise as a restriction is in fact the restoration of the *status quo*.

2.13 The MUA, for example, claims that the Bill is designed to 'further read down an already disputed interpretation of the Seafarers Act by explicit legislative amendment'.[11] The committee does not accept that the previously narrow interpretation of the Seafarers Act is disputed and is of the view that legislative amendment is both necessary and appropriate.

2.14 Some concern about the Bill relates on the potential disadvantage to seafarers due to the perceived inferiority of State and Territory compensation and rehabilitation schemes.[12] The committee is not in a position to make an assessment in that regard, but notes that the limitations or flaws of a state or territory compensation scheme are a matter for the relevant state or territory government and cannot be addressed by federal legislation.

2.15 While there are a number of issues in relation to the nature and operation of Australia's maritime compensation scheme, it is important that broader concerns about Seacare are distinguished from the specific issue of coverage that this Bill is designed to address. As Mr Sterrit advised the Department of Employment:

> [i]t is important to differentiate between the varying claims that have been made about the coverage of the Scheme during the life of the Scheme and the way in which the Scheme has operated since its inception.[13]

2.16 Prior to the Aucote decision, the government was developing legislation to enact substantive, comprehensive reform of the maritime compensation system. This work was necessarily delayed in order to address the more immediate risk posed by the Aucote decision.

2.17 The Department of Employment has confirmed the Government's intention to introduce further legislation in the second half of 2015, following a considered examination of the 2013 Stewart-Crompton review and consultation with industry

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10 *Explanatory memorandum*, p. 2.

11 Australian Maritime Union, *Submission 1*.

12 The MUA, for example, cites Western Australia as having especially poor workers compensation scheme.

13 Department of Employment, answer to question on notice, 18 March 2015.

participants.[14] The committee acknowledges the Government's commitment to reform in this area and is confident that the swift passage of this Bill will allow this important work to continue.

Committee view

2.18 The committee has no doubt that this Bill is the appropriate mechanism by which to respond to issues arising from the Aucote decision. Where a court's understanding of legislation is not consistent with the intent or objectives of the parliament, the parliament can and should amend the legislation to provide clarity.

2.19 The committee is concerned that failing to address the risks posed by the Aucote decision may have severe consequences for seafarers, maritime employers and operators, and the viability of the Seacare scheme.

2.20 The committee is of the view that this Bill is a necessary and appropriate restoration of the *status quo* to allow thorough, considered reform in future.

Recommendation 1

The committee recommends that the Senate pass the Bill.

Senator Bridget McKenzie

Chair

[14] Department of Employment, *Submission 4*, p. 3.

LABOR SENATORS' DISSENTING REPORT

1.1 Labor Senators hold some concern about aspects of the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the Bill).

1.2 Whilst we appreciate that this Bill was introduced to reduce uncertainty in the industry, Labor Senators were not persuaded by the evidence submitted to the Committee that the Bill would restore the alleged shared understanding of the operation and coverage of the *Seafarers Act* prior to the decision of the Federal Court of December 2014 (Samson Maritime Pty Ltd v Aucote [2014] FCAFC 182 (22 December 2014)).

The intention of the Bill

1.3 This Bill amends two Acts, the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) and the *Occupational Health and Safety (Maritime Industry) Act 1993 (the OHS(MI) Act)* returning the coverage of the Seacare scheme to what it has been commonly understood to be since the commencement of the scheme in 1993.

1.4 The Bill amends the coverage provisions of the Seacare scheme to, as the Government claims, clarify that the scheme is not intended to apply to employees engaged on ships undertaking intrastate voyages who have the benefit of State and Territory workers' compensation schemes and work health and safety regulation.

1.5 There is evidence to suggest there has never existed an intention that the Seafarers Act should only cover a very limited cohort of seafarers.

1.6 The intent of this Bill is to make the legislation only applicable to ships undertaking a voyage of interstate or overseas trade.

1.7 Labor Senators assert that the Bill goes much further than anything which arises out of the Aucote decision, and that the use of the term "directly and substantially" in the Bill is likely to create further confusion about the way in which coverage is interpreted.

1.8 Only those vessels which can be said to be explicitly involved in interstate or overseas trade will be clearly within the scope of the Act. Vessels which operate in mixed intra-state and inter-state activities will be in limbo.[1]

1.9 Evidence indicates that hundreds of ships that are currently accepted as being covered by the Seafarers Act are not strictly engaged in undertaking voyages on an interstate or international nature. AIMPE calculated that "…73.8% or almost three quarters of the vessels currently under Seacare are not engaged in what was traditionally known as interstate trading."

[1] Maritime Union of Australia, *Submission 1*, p. 8.

1.10 The Bill will also restrict the number of seafarers covered by the legislative scheme so that it would cover only a fraction of the seafarers currently encompassed by the scheme.

Lack of consultation

1.11 Evidence submitted to the Committee demonstrated the lack of bona fide consultation undertaken by the Government in the process of drafting this legislation. Key employer and employee groups such as the Maritime Union of Australia, the Australian Shipowners Association, and the Australian Maritime Officers Union, confirmed that they were not adequately consulted:

> Notwithstanding the fact that the AMOU is one of the three unions representing workers who will be directly affected by this legislation, our comment on the Bill was not sought by Government or any relevant Departments or Agencies prior to its introduction into the Parliament.[2]

Implication on workers' rights

1.12 Labor Senators also note the following from the AMOU's submission to the Committee:

> The Australia Government by virtue of being a signatory to the International Labor Organisation Occupational Safety and Health Convention 1981, Convention 155 (ILO C155)1 has international obligations to consult with workers about matters that will affect their health and safety.[3]

1.13 The clarification of which worker's compensation scheme may apply to a worker is a substantial issue considering the extreme disparity of benefits that may be payable in the event of injury or death for seafarers. This clarification also evokes implications under the International Covenant on Economic Social and Cultural Rights regarding the alignment of the quantum of rights with a person's actual rights.[4]

1.14 The MUA provided actual examples of the implications of the legislation on the rights to work, providing analysis of a worker's access to compensation under the WA workers' compensation legislation versus the Seafarers Act:

> Under the Western Australian scheme, a seafarer aged 30 with a dependent wife and children who was earning, say, $2,500.00 per week gross pre-accident (not an unusual wage in the offshore sector) and who is permanently incapacitated for work will exhaust his weekly compensation payments after only 2 years. He or she will then presumably be thrown onto the social security system. If he or she needs major spinal surgery that will very soon exhaust any entitlement to medical expenses which are capped at only $55,018.00. A cap of under $13,000.00 for rehabilitation costs will prevent in many cases any meaningful rehabilitation, certainly if retraining is required.

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[2] Australian Maritime Officers Union, *Submission 2*, p. 2.

[3] Australian Maritime Officers Union, *Submission 2*, p. 3.

[4] KCI Lawyers, *Submission 5*, p. 3.

> On the other hand, under the Seafarers Act, a seafarer in similar circumstances will be entitled to ongoing weekly compensation payments if required, until 65 years of age. Such seafarers will be entitled to medical expenses and rehabilitation on a needs basis (and subject to a test of reasonableness) for so long as required.[5]

1.15 Labor Senators believe it is worth reminding the Senate that when worker's compensation has been exhausted, injured workers are usually forced to access the welfare system, resulting in the possibility of significant "cost-shifting" for workers who are unable to return to work.

1.16 Furthermore, Labor Senators note evidence submitted showing that if additional seafarers are excluded from the Commonwealth scheme for seafarers by the passage of the Bill, it cannot be automatically assumed that they will be covered under state workers' compensation schemes. A state workers' compensation insurer may decline a claim if the injury occurs outside the state and there is not a sufficient legislative connection with the State. Section 9AA of the *Workers Compensation Act 1987* (NSW) for example appears to provide significant discretion for State schemes to deny liability that could become applicable should the Bill be passed in its current form.

Alternative resolution

1.17 Labor Senators recommend that at this stage, the Bill should be rejected, and that the best way forward would be for the Government and stakeholders to resolve the issues. We believe that an industry wide supported Bill can be achieved through negotiation. KPI Lawyers propose a solution in their submission that a 'no detriment' clause be inserted into any proposed Bill clarifying seafarers' rights to worker's compensation[6], ensuring access to the most beneficial, or at least more proportionate benefits. Although Labor Senators do not directly recommend this proposal, we suggest it as a point of discussion.

1.18 Labor Senators of the Committee believe it is absolutely incumbent on the Government to meet with industry, employer organisations and employee organisations, to arrive at a sensible solution rather than rush a Bill through the Senate Committee process.

1.19 We also believe that a summary of the relevant case law should be compiled by the Government to assist the parties in finalising an agreed coverage position.

[5] Maritime Union of Australia, *Submission 1*, p. 15.

[6] KCI Lawyers, *Submission 5*, p. 3.

Recommendation 1

1.20 That the Senate reject the Bill, and implore Senator Abetz to facilitate discussions and negotiations directly with industry, employer organisations and employee organisations.

Senator Sue Lines

Deputy Chair

AUSTRALIAN GREENS DISSENTING REPORT

1.1 The Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 is the government's legislative response to the implications of recent court decisions - Administrative Appeals Tribunal's (AAT) decision in *Aucote and Samson Maritime Pty Ltd* [2014] AATA 296 and the Full Federal Court's decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (the Aucote decisions).

1.2 The Bill amends the *Seafarers Rehabilitation and Compensation Act 1992 and the Occupational Health and Safety (Maritime Industry) Act 1993* limiting the coverage and eligibility for the Seacare scheme. The changes operate retrospectively.

1.3 All submissions to the Committee, with the exception of those made by the Australian Shipowners Association and the Department, which prepared the legislation, raised serious questions about the effect of the Bill on workers currently covered by Seacare.

1.4 The three registered organisations that represent workers in the maritime industry while recognising the need for a response to the Aucote decisions recommended that the bill not proceed in its current form.

1.5 Concerns that were highlighted included the lack of consultation on the drafting of the bill, the failure of successive governments to implement any of the recommendations of reviews into the area including the recent 2013 review and the inconsistency that could arise between the relevant legislation and the appropriate delineation between the Commonwealth and the states.

1.6 The Maritime Union of Australia (MUA) stated in their submission that:

> [T]he Government has inexcusably been caught unprepared by the decision of the Full Federal Court in Samson Maritime Pty Ltd v Aucote [2014] FCAFC182 of December 2014 notwithstanding the decision of the Administrative Appeals Tribunal (AAT) *Aucote and Samson Maritime Pty Ltd [2014] AATA 296* some 6 months earlier in May 2014. Consequently, we say the Government has responded with undue haste in bringing this Bill before the Parliament without consulting the stakeholders and seafarers who will be affected by the Bill and without proper consideration as to its implications.[1]

1.7 The Australian Institute of Marine and Power Engineers (AIMPE) submitted:

> [T]hat [the bill] should not be supported by the Senate because it has possible negative consequences for Australian seafarers. Many seafarers currently covered by the Seacare scheme could be excluded from coverage if the Bill is enacted. [2]

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[1] Maritime Union of Australia, *Submission 1,* p. 2.

[2] AIMPE Submission p.5

1.8 The Australian Maritime Office Union (AMOU) and South Australia Unions, the peak trade union council for South Australia both supported the submission of the Maritime Union of Australia

1.9 The MUA submitted that there was no necessity for the immediate passage of the bill and that key stakeholders including the AMSA should be involved in a facilitated process to achieve a consensus on the appropriate legislative response to the Aucote decisions building on recommendations of previous reviews. Their submission states:

> There is no immediate risk that requires a Bill to be rushed through the Parliament. It is highly improbably that there will be any significant number of new or unexpected claims arising from the Federal Court decision.
>
> Furthermore, the Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) has already determined in-principle to exempt some 59,500 ships and the seafarers engaged on those ships from the operation of the Seafarers Act, in a majority decision of 19 February 2015.[3]

Recommendation 1

1.10 Given the uncertainty and concern in the maritime industry regarding the effect of the bill and the evidence that, with proper consultation by the government, an appropriate response to the Aucote decisions could be developed the Australian Greens will not support the bill.

Recommendation 2

1.11 We recommend that the government withdraw the bill and instead engage in proper consultation on the appropriate legislative response to the Aucote decisions.

Senator Lee Rhiannon

Australian Greens

[3] Maritime Union of Australia, *Submission 1*, p. 3.

APPENDIX 1

Submissions Received

1. Maritime Union of Australia

2. Australian Maritime Officers Union

3. South Australian Unions

4. Department of Employment

5. KCI Lawyers

6. Australian Institute of Marine and Power Engineers (AIMPE)

7. Australian Shipowners Association

Response to Questions on Notice

1. Response to questions on notice from the Department of Employment, received 18 March, 2015.