Chapter 2

Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 [F2015L00336]

Portfolio: Employment
Authorising legislation: Seafarers Rehabilitation and Compensation Act 1992
Last day to disallow: 13 August 2015

Purpose

2.3 The Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra-State Trade) Declaration 2015 (the instrument) declares that a certain type of ship which is only engaged in intra-state trade is not a prescribed ship for the purposes of the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act).

2.4 Originally, the Seafarers Act provided workers compensation and rehabilitation arrangements for seafarers in a defined part of the Australian maritime industry. The effect of the instrument is that workers on ships engaged in intra-state voyages are no longer covered by the Seafarers Act and so will no longer be entitled to compensation under that Act.

2.5 Measures raising human rights concerns or issues are set out below.

Background

2.6 In February 2015 the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015 (the bill) was introduced into the House of Representatives. The bill amended the Seafarers Act to ensure workers on ships engaged in intra-state voyages between 1993 and May 2015 are not covered by the Seafarers Act (or by specific maritime occupational health and safety legislation).[1] The bill passed the House of Representatives in February 2015 and passed the Senate with amendments on 13 May 2015.

1 Namely the *Occupational Health and Safety (Maritime Industry) Act 1993*. See also the Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit—Intra-State Trade) Declaration 2015 [F2015L00335] which prescribed ships or vessels only engaged in intra-state trade as non-prescribed ships or units for the purposes of that Act.

2.7 Both the bill and the instrument were introduced following a decision of the Full Court of the Federal Court[2] which held that the coverage provisions in the Seafarers Act apply to all seafarers employed by a trading, financial or foreign corporation, including ships engaged in purely intra-state trade.

2.8 The committee commented on this bill in its *Twentieth Report of the 44th Parliament* and *Twenty-fifth Report of the 44th Parliament*.[3] The committee commented on the instrument in its *Twenty-second Report of the 44th Parliament*, and requested further information from the Minister for Employment as to whether the instrument was compatible with human rights.[4] The committee notes that this instrument has since been repealed and replaced by the Seafarers Rehabilitation and Compensation (Prescribed Ship—Intra State Trade) Declaration 2015 (No. 2) [F2015L00858].

Alteration of coverage of persons eligible for workers' compensation

2.9 The committee considered in its previous analysis that the instrument, in removing ships engaged in intra-state voyages from the coverage of the Seafarers Act and thereby removing an entitlement to compensation for workers injured on such ships, engages and may limit the right to social security.

Right to social security

2.10 The right to social security is protected by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

2.11 Specific situations and statuses which are recognised as engaging a person's right to social security, include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support. It also includes the protection of workers injured in the course of employment.

Compatibility of the measure with the right to social security

2.12 The statement of compatibility states that the instrument may limit the right to social security, but that such a limitation is reasonable and proportionate as affected employees will retain entitlements to compensation under state legislation.

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2 *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182.

3 Parliamentary Joint Committee on Human Rights, *Twentieth Report of the 44th Parliament* (18 March 2015) 36 and Parliamentary Joint Committee on Human Rights, *Twenty-fifth Report of the 44th Parliament* (11 August 2015) 157.

4 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament* (13 May 2015) 125-127.

2.13 As the committee noted in its consideration of the bill, to the extent that the state schemes are less generous than the scheme under the Seafarers Act, the measure in the instrument may be regarded as a retrogressive measure. Under article 2(1) of the ICESCR, Australia has certain obligations in relation to economic and social rights. These include an obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right to social security. A reduction in compensation available to an injured worker may be a retrogressive measure for human rights purposes. A retrogressive measure is not prohibited so long as it can be demonstrated that the measure is justified. That is, it addresses a legitimate objective, it is rationally connected to that objective and it is a proportionate means of achieving that objective.

2.14 The statement of compatibility states that the objective of the instrument is to ensure the long-term viability of maritime industry employers and the sustainability of the scheme. While the committee notes that this is likely to be a legitimate objective for the purposes of international human rights law, it is unclear, on the basis of the information provided in the statement of compatibility, whether the measure may be regarded as proportionate to this objective.

2.15 The statement of compatibility characterises the measure as proportionate.[5] However, it also states that workers' compensation premiums under the federal scheme are, on average, significantly more expensive than those of the state and territory schemes, which could suggest that those schemes provide for lesser coverage or entitlements.

2.16 The committee therefore sought the advice of the Minister for Employment as to the extent of differences in levels of coverage and compensation between the scheme under the Seafarers Act and state and territory workers' compensation schemes.

Minister's response

> This Declaration is a short-term measure, supported by the industry and unions to address a recent Federal Court decision. The declaration seeks to maintain the long standing status quo until such a time as the Government brings forward broader reform to the scheme.
>
> 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 that cover most employers operating within the states and territories across a large number of industries and occupations.
>
> Workers compensation schemes across Australia vary substantially, making it difficult to assess whether an individual would be better off in

5 Explanatory Statement 4.

one scheme or another. To determine if an injured seafarer would be better off under the Seacare scheme compared to a state or territory 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
- ability to return to work.

For example, when comparing the Seacare scheme to Western Australia's workers compensation scheme, as was done by the Maritime Union of Australia in its submission to the Senate Education and Employment Legislation Committee Inquiry into the Seafarers Rehabilitation and Compensation and Other Legislation Amendment Bill 2015. 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 of age, while Western Australia's scheme caps weekly compensation payments at a total monetary value (currently $212,980.00)
- 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.

Focusing narrowly on 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 also a major factor in a swift return to work.

Injured employees under Western Australia's workers compensation scheme, for example, 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 much 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 poorer rehabilitation and return to work performance of the Seacare scheme highlights that it would be unwise to consider an ad hoc substantial expansion of the scheme.

> 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 different advantages and disadvantages compared to others.
>
> All seafarers will continue to have access to workers compensation following the Declaration. The effect of the Declaration is that certain seafarers will have access to workers compensation under a state workers compensation scheme rather than the Commonwealth's Seacare scheme. If the Committee is of the view that workers compensation benefits under a state workers compensation scheme insufficiently promote the right to social security, then it is ultimately a matter for the relevant state government to ensure that those rights are better promoted.
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> To the extent to which the human right to social security is in any way impacted, it is proportionate and appropriate in that the Declaration ensures continued workers compensation coverage of all workers, protects the viability of the Seacare scheme Safety Net Fund and maritime industry employers and provides the opportunity for detailed consideration of reforms to the Seacare scheme that will produce a scheme that better supports the rights to social security and safe, healthy working conditions for Seafarers.
>
> During recent consultations with interested parties in the maritime industry, one party raised an issue about how the Declarations affect a 'legacy' class of ships i.e. vessels that were immediately before the repeal of the *Navigation Act 1912*, covered by a declaration in force under ss 8A(2) or 8AA(2) of that Act. This issue had not been identified in consultations during the development of the Declarations. In order to address this issue, I will be remaking the Declarations to ensure this legacy class of ships is not affected.[6]

Committee response

2.17 **The committee thanks the Minister for Employment for his response.** The committee notes the difficulty in comparing the federal and state workers compensation schemes and that there are both benefits to, and disadvantages with, the state and territory schemes. As there are both benefits and disadvantages with the state compensation schemes it is difficult for the committee to assess that the measure does not limit the right to social security, however, the committee considers that the minister's response has demonstrated that there are safeguards in place to ensure any such limitation may be proportionate to the legitimate objective sought to be achieved. The committee also notes that the regulation was time-limited, as it was due to sunset clause two years after the date on which it took effect.

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6 See Appendix 2, Letter from Senator the Hon Eric Abetz, Minister for Employment, to the Hon Philip Ruddock MP (dated 30 June 2015) 1-2.

2.18 **Accordingly, the committee considers that the measure may be compatible with the right to social security and has concluded its examination of this matter.**

The Hon Philip Ruddock MP

Chair