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.