

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Additional Estimates 2014 - 2015

#### Outcome 2 - Workplace Relations and Economic Strategy

Department of Employment Question No. EMSQ15-000050

Senator Sterle provided in writing.

#### Question

##### Regulation regarding the Oceanic Discoverer and the Caledonian Sky

- How does Australian OH&S regulation apply to (i) the Oceanic Discoverer and (ii) Caledonian Sky?
- How does Australian industrial relations regulation apply to (i) the Oceanic Discoverer and (ii) Caledonian Sky?

#### Answer

How the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act) and the *Fair Work Act 2009* (the Fair Work Act) apply to a particular ship will depend on the facts and circumstances regarding that ship. The Department of Employment can provide the following general information regarding how the OHS(MI) Act and the Fair Work Act apply.

##### Occupational Health and Safety (Maritime Industry) Act 1993

The OHS(MI) Act generally applies to prescribed ships or prescribed units engaged in trade and commerce:

- between Australia and places outside Australia; or
- between two places outside Australia; or
- between the States; or
- within a Territory, between a State and a Territory; or
- between two Territories.

The Federal Court's decision in *Samson Maritime Pty Ltd v Aucote* [2014] FCAFC 182 (22 December 2014) unanimously held that the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act) applies to all seafarers employed on a prescribed ship by a trading, financial or foreign corporation. While the decision is not directly applicable to the OHS(MI) Act, it is likely to affect the coverage of the OHS(MI) Act since that Act has very similar coverage provisions to the Seafarers Act.

A prescribed ship is a ship to which Part II of the *Navigation Act 1912* would apply if that Act had not been repealed. On that basis, a ship is a prescribed ship if:

- it is registered in Australia;
- it is used to engage in coastal trading (within the meaning of the *Coastal Trading (Revitalising Australian Shipping) Act 2012*) under a general licence (within the meaning of that Act); or
- (if it is not one of the above) the majority of the crew are residents of Australia and it 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.

On 25 March 2015, in response to the *Aucote* decision, the Minister for Employment issued a Declaration under sections 4(A) and 4(B) that declares ships engaged in purely intra-state trade are not taken to be a 'prescribed ship' for the purposes of the OHS(MI) Act.

The Seacare Authority secretariat reports that the OHS(MI) Act applies to the Oceanic Discoverer.

### Fair Work Act 2009

The Fair Work Act applies throughout Australia to national system employers (including foreign corporations) and their employees. 'Australia' includes the territorial sea around Australia (approximately 12 nautical miles out) and the Christmas and Cocos (Keeling) Islands.

The Fair Work Act generally applies to ships (both Australian and foreign-flagged) engaged in coastal trading under a general licence, a transitional general licence, a temporary licence (from the third voyage in a 12 month period) or an emergency licence issued under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* in the territorial sea, Australia's exclusive economic zone and waters above the continental shelf.

The Fair Work Act also applies in the exclusive economic zone and the waters above the continental shelf to:

- Australian ships;
- majority Australian-crewed ships (being those where the majority of the crew are Australian residents and the operator is either incorporated in Australia, a resident of Australia, or has its principal place of residence in Australia); and
- ships operated or chartered by an Australian employer (as defined the Fair Work Act) that use Australia as a base.

The Fair Work Act does not apply to ships that are passing through the coastal sea while exercising a 'right of innocent passage or transit passage'. The coverage of particular ships will depend on the nature of their activities.