

# Guidance Notes

## Coverage under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act)

### Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority)

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***Disclaimer***

This guidance note is not intended to be a legal document or to provide legal advice. This document is intended to be a guide only as to the application of the *Seafarers Rehabilitation and Compensation Act 1992*. This document should not be relied on as a complete statement of the law. Persons who may be affected by the application of the Seafarers Act should seek their own legal advice.

## Guidance Notes

### Coverage under the *Seafarers Rehabilitation and Compensation Act 1992* (Seafarers Act)

#### The application provisions of the *Seafarers Rehabilitation and Compensation Act 1992* (Section 19)

- (1) This Act applies to the employment of employees on a prescribed ship that is engaged in trade or commerce:
  - (a) between Australia and places outside Australia; or
  - (aa) between 2 places outside Australia; or
  - (b) among the States; or
  - (c) within a Territory, between a State and a Territory or between 2 Territories.
- (1A) In addition, this Act applies to the employment of employees on any prescribed ship that is:
  - (a) an offshore industry vessel in relation to which a declaration under subsection 8A(2) of the Navigation Act is in force; or
  - (b) a trading ship in relation to which a declaration under subsection 8AA(2) of that Act is in force.
- (2) This Act also has the effect it would have if:
  - (a) a reference to an employer were limited to a reference to a trading corporation formed within the limits of the Commonwealth; and
  - (b) a reference to an employee were limited to a reference to an employee employed by a trading corporation formed within the limits of the Commonwealth.
- (3) This Act also has the effect it would have if:
  - (a) a reference to an employer were limited to a reference to a financial corporation formed within the limits of the Commonwealth; and
  - (b) a reference to an employee were limited to a reference to an employee employed by a financial corporation formed within the limits of the Commonwealth.
- (4) This Act also has the effect it would have if:
  - (a) a reference to an employee were limited to a reference to an employee employed by a foreign corporation; and
  - (b) a reference to an employee were limited to a reference to an employee employed by a foreign corporation.
- (5) Subsection (3) does not have the effect of applying this Act with respect to:
  - (a) State banking that does not extend beyond the limits of the State concerned; or
  - (b) State insurance that does not so extend.

**Note:** The application provisions of the *Occupational Health and Safety (Maritime Industry) Act 1993* (Section 6) and the *Seafarers Rehabilitation and Compensation Levy Act 1993* (Section 6) are set out at **Attachment 1**.

## Seafarers Act – coverage tests

**Test 1:** Is there employment of employees<sup>i</sup>?

[*That is, is there an employer-employee relationship? Independent contractor and partnership arrangements must be genuine to fail the employment test?*]

**Note:** Section 19 of the Seafarers Act limits references to employer to trading, financial and foreign corporations and references to employees to employees employed by trading, financial and foreign corporations<sup>ii</sup>.

**Test 2:** Is the ship<sup>iii</sup> a prescribed ship?

Section 3 of the Seafarers Act provides that a **prescribed ship** means a ship to which Part II of the *Navigation Act 1912* (the Navigation Act) applies but does not include a Government ship<sup>iv</sup>.

Part II of the Navigation Act (section 10) generally applies to<sup>v</sup>:

- (a) a ship registered<sup>vi</sup> in Australia; **or**
- (b) a ship (other than a ship registered in Australia) engaged in the coasting trade<sup>vii</sup>; **or**
- (c) a ship (other than a ship registered in Australia or engaged in the coasting trade) of which the majority of the crew are residents of Australia **and** which is operated by<sup>viii</sup> any of the following (whether or not in association with any other person, firm or company, being a person, firm or company of any description) namely:
  - (i) a person who is a resident of, or has his 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.

**Test 3:** Is the prescribed ship engaged in trade or commerce<sup>ix</sup>:

- a. between Australia and places outside Australia<sup>x</sup>;
- b. between 2 places outside Australia;
- c. among the States (inter-State);
- d. within a Territory (intra-Territorial);
- e. between a State and Territory; or
- f. between 2 Territories.

[*If the ship is engaged in any of the voyage types described in a-f above, it meets test 3.*]

**If the answer to test 1, and test 2 and test 3 is in the affirmative, then the ship is covered by the Seafarers Act.**

**Test 4:** Is the prescribed ship an offshore industry vessel to which a declaration under subsection 8A(2) of the Navigation Act is in force?

[A check of the AMSA website at [www.amsa.gov.au](http://www.amsa.gov.au) will provide a guide as to whether the ship is so declared.]

**Test 5:** Is the prescribed ship a trading ship to which a declaration under subsection 8AA(2) of the Navigation Act is in force?

[A check of the AMSA website at [www.amsa.gov.au](http://www.amsa.gov.au) will provide a guide as to whether the ship is so declared.]

**If the answer to tests 1 and 2 is answered in the affirmative AND also either test 4 or test 5 is answered in the affirmative, then the ship will be covered by the Seafarers Act irrespective of whether it meets test 3 above**

(i.e. irrespective of whether it is engaged in trade or commerce between Australia and places outside Australia, or between 2 places outside Australia, among the States, within a Territory, between a State and Territory or between 2 Territories).

In summary, a ship that is declared under s.8A or s.8AA must also be a prescribed ship to be covered by the Seafarers Act.

### **Exemptions from the operation of the Seafarers Act**

Section 20A of the Seafarers Act provides that the Seacare Authority may exempt the employment on a particular ship of all employees, or a particular group or groups of employees or a particular employee or particular employees from the operation of the Seafarers Act. Regard should be had to the exemption guidelines issued by the Authority which are available from the Seacare website when considering an application for exemption.

An exemption granted under section 20A of the Seafarers Act, which exempts some or all employment from the application of the Seafarers Act, does not provide any exemption from the application of the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHS(MI) Act) or the *Seafarers Rehabilitation and Compensation Levy Act 1992* (Levy Act). An employer who is granted a s20A exemption for a particular vessel and its employee/s must still comply with the provisions of the OHS(MI) Act and Levy Act.

## Interpretations

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<sup>i</sup> **Employee** is defined in section 4 of the Seafarers Act to mean a seafarer or trainee or a person (other than a trainee), although ordinarily employed or engaged as a seafarer, is not so employed or engaged but is required under an award to attend a Seafarers Engagement Centre for the purposes of registering availability for employment or engagement on a prescribed ship (the Seafarers Engagement Centres were phased out in 1998).

A **seafarer** means a person employed in any capacity on a prescribed ship on the business of the ship, other than: (a) a pilot; (b) a person temporarily employed on the ship in port; or (c) a person included in the class of persons defined as "special personnel" in Section 283 of the Navigation Act.

The meaning of "special personnel", as defined in s283 of the Navigation Act, is linked to the definition of "special purpose ship" as prescribed by *Marine Orders – Part 50: Special purpose ships, Issue 4 (Order No. 2 of 2007)*. "Special personnel" are persons carried on the ship in connection with the special purpose of the ship or related special work performed on board the ship. The master and the other members of the crew of the ship are not special personnel and therefore fall within the definition of "seafarer".

The Marine Orders give examples of the kinds of ships that would normally be regarded as special purpose ships. These are: (a) ships engaged in research, expeditions and survey; (b) ships for training of marine personnel; (c) fish factory ships not engaged in catching; (d) ships processing other living resources of the sea, not engaged in catching; (e) other ships which the Manager, Ship Inspections, considers have similar design features and modes of operation.

<sup>ii</sup> Section 3 of the Seafarers Act defines a **financial corporation** to mean a financial corporation within the meaning of Paragraph 51(xx) of the Commonwealth Constitution, a **foreign corporation** to mean a foreign corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body that is incorporated in an external Territory and a **trading corporation** to mean a trading corporation within the meaning of paragraph 51(xx) of the Constitution.

<sup>iii</sup> Section 6 of the Navigation Act defines a **ship** to mean any kind of vessel used in navigation by water, however propelled or moved and includes:

- (a) a barge, lighter or other floating vessel (*that is self propelled - see endnote 5 below for the types of ships to which Part II of the Navigation Act does not apply*);
- (b) an air cushion vehicle, or other similar craft, used wholly or primarily in navigation by water; and
- (c) an offshore industry mobile unit (with the exception of those that are not self propelled, and where self propelled, only when being moved).

<sup>iv</sup> Section 3 of the Seafarers Act defines a **government ship** to mean a ship:

- (a) that belongs to the Commonwealth or a State or Territory;
- (b) the beneficial interest in which is vested in the Commonwealth or a State or Territory; or
- (c) that is for the time being demised or sub-demised to, or in the exclusive possession of, the Commonwealth, a State or a Territory;

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- and includes a ship that belongs to an arm of the Defence Force, but does not include a ship:
- (d) that belongs to a trading corporation that is an authority or agency of the Commonwealth or a State or Territory; or
  - (e) the beneficial interest in which is vested in such a trading corporation; or
  - (f) that is for the time being demised or sub-demised to, or in the exclusive possession of a trading corporation; or
  - (g) that is operated by seafarers supplied (directly or indirectly) by a corporation under a contract with the Commonwealth or a State or Territory.

<sup>v</sup> **Part II of the Navigation Act does not apply to** inland waterway vessels, pleasure crafts and barges, lighters or other floating vessels which are not self propelled.

<sup>vi</sup> A ship **registered** in Australia is defined by section 7A of the Navigation Act, which provides that a reference to a ship registered in Australia shall be read as a reference to a ship registered under the *Shipping Registration Act 1981* and as including a reference to a ship that is required to be registered under that Act but is not so registered. Reference should also be made to section 8B (ships imported into Australia) and 283G (off-shore industry vessels and mobile units) of the Navigation Act which deems certain ships to be registered in Australia where there are no declarations to the contrary.

<sup>vii</sup> To determine if a ship is engaged in the **coasting trade** reference should be made to the definition of 'coasting trade' in section 7 of the Navigation Act, which in turn will assist in determining whether a ship is a 'prescribed ship' for the purposes of the Seafarers Act. A ship which has a **licence** to engage in the coasting trade will be a prescribed ship for the purposes of the Seafarers Act. However an **unlicensed** ship which has been issued with a permit or permission under section 286 of the Navigation Act, whilst engaged in the activities covered by the permit or permission, would not be 'engaged in the coasting trade' for the purposes of subsection 10(b) of the Navigation Act.

<sup>viii</sup> **Operated by** is not defined in the Seafarers Act or Navigation Act and needs to be given its ordinary meaning.

<sup>ix</sup> **Trade or commerce** has a wide meaning. It will be a question of fact in each case as to whether a ship engages in trade or commerce. For example, the interstate transportation of goods or persons for any purpose when done for profit or reward (such as would be involved in tourism operations) would come within the scope of interstate trade or commerce.

<sup>x</sup> **Australia** includes offshore areas to the outer limit of the territorial sea (see section 15B of the *Acts Interpretation Act 1901*). The outer limit of the territorial sea was established by Proclamation under section 7 of the *Seas and Submerged Lands Act 1973* as **12 nautical miles** seaward of baselines, also established by Proclamation under section 7 of the *Seas and Submerged Lands Act 1973*.

**The application provisions of the *Occupational Health and Safety (Maritime Industry) Act 1993* (Section 6)**

- (1) This Act applies in relation to a prescribed ship or prescribed unit that is engaged in trade or commerce:
  - (a) between Australia and places outside Australia; or
  - (aa) between 2 places outside Australia; or
  - (b) between the States; or
  - (c) within a Territory, between a State and a Territory or between 2 Territories.
  
- (2) Without limiting the operation of subsection (1), this Act applies to:
  - (a) the operator of a prescribed ship or prescribed unit described in subsection (1); and
  - (b) employees employed on a prescribed ship or prescribed unit described in subsection (1); and
  - (c) contractors and other persons working on a prescribed ship or prescribed unit described in subsection (1); and
  - (d) manufacturers, suppliers and importers of plant used, or substances used or handled, on a prescribed ship or prescribed unit described in subsection (1).
  
- (3) This Act also applies in relation to:
  - (a) an offshore industry vessel in relation to which a declaration under subsection 8A(2) of the Navigation Act 1912 is in force; and
  - (b) a trading ship in relation to which a declaration under subsection 8AA(2) of that Act is in force.
  
- (4) Without limiting the operation of subsection (3), this Act applies to:
  - (a) the operator of a vessel or ship described in subsection (3); and
  - (b) employees employed on a vessel or ship described in subsection (3); and
  - (c) contractors and other persons working on a vessel or ship described in subsection (3); and
  - (d) manufacturers, suppliers and importers of plant used, or substances used or handled on, a vessel or ship described in subsection (3).
  
- (5) Without prejudice to its effect apart from this subsection, this Act also has effect as provided by subsections (6), (7) and (8).
  
- (6) This Act has, by force of this subsection, the effect it would have if:
  - (a) a reference to an operator were limited to a reference to a trading corporation formed within the limits of the Commonwealth; and
  - (b) a reference to an employee were limited to a reference to an employee of a trading corporation formed within the limits of the Commonwealth; and
  - (c) a reference to a contractor were limited to a reference to a contractor working for a trading corporation formed within the limits of the Commonwealth; and
  - (d) a reference to a manufacturer were limited to a reference to a manufacturer that is a trading corporation formed within the limits of the Commonwealth; and

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- (e) a reference to a supplier were limited to a reference to a supplier that is a trading corporation formed within the limits of the Commonwealth; and
  - (f) a reference to a person in sections 22, 23 and 24 were limited to a reference to a person working for a trading corporation formed within the limits of the Commonwealth.
- (7) This Act has, by force of this subsection, the effect it would have if:
- (a) a reference to an operator were limited to a reference to a financial corporation formed within the limits of the Commonwealth; and
  - (b) a reference to an employee were limited to a reference to an employee of a financial corporation formed within the limits of the Commonwealth; and
  - (c) a reference to a contractor were limited to a reference to a contractor working for a financial corporation formed within the limits of the Commonwealth; and
  - (d) a reference to a person in sections 22, 23 and 24 were limited to a reference to a person working for a financial corporation formed within the limits of the Commonwealth.
- (8) This Act has, by force of this subsection, the effect it would have if:
- (a) a reference to an operator were limited to a reference to a foreign corporation; and
  - (b) a reference to an employee were limited to a reference to an employee of a foreign corporation; and
  - (c) a reference to a contractor were limited to a reference to a contractor working for a foreign corporation; and
  - (d) a reference to a manufacturer were limited to a reference to a manufacturer that is a foreign corporation; and
  - (e) a reference to a supplier were limited to a reference to a supplier that is a foreign corporation; and
  - (f) a reference to a person in sections 22, 23 and 24 were limited to a reference to a person working for a foreign corporation.
- (9) This Act does not apply with respect to:
- (a) State banking that does not extend beyond the limits of the State concerned; or
  - (b) State insurance that does not so extend.

**The application provisions of the *Seafarers Rehabilitation and Compensation Levy Act 1992* (Section 6)**

**Who pays levy?**

Levy on seafarer berths is payable by an employer who employs or engages seafarers on a prescribed ship.

The *Seafarers Rehabilitation and Compensation Levy Act 1992* and the *Seafarers Rehabilitation and Compensation Levy Collection Act 1992* apply to employers who employ or engage seafarers on prescribed ships which are subject to the application of the *Seafarers Act* by reason of section 19 of that Act.