



Australian Government

**Seafarers Safety, Rehabilitation
and Compensation Authority**

GUIDELINES: DECLARATIONS BY THE SEACARE AUTHORITY THAT THE *SEAFARERS REHABILITATION AND COMPENSATION ACT 1992* AND THE *OCCUPATIONAL HEALTH AND SAFETY (MARITIME INDUSTRY) ACT 1993* DO OR DO NOT APPLY TO A SHIP

GUIDELINES

Without limiting in any way the discretion of the Seafarers Safety, Rehabilitation and Compensation Authority (the Authority) to grant declarations under subsections 19 (1C) and (1D) of the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) and subsections 6 (3AB) and (3AC) of the *Occupational Health and Safety (Maritime Industry) Act 1993* (the OHS(MI) Act), the Authority has adopted the following guidelines to indicate its general approach in considering applications for declarations.

For reasons that appear below, the Authority's view is that its powers to grant declarations are essentially intended to preserve the situation under the repealed *Navigation Act 1912* and to reflect the powers given to the Australian Maritime Safety Authority (AMSA) under that Act to grant declarations in relation to off-shore industry vessels and certain trading ships.

1. Legislative background

The Authority's powers to grant declarations under subsections 19 (1C) and (1D) of the Seafarers Act and subsections 6 (3AB) and (3AC) of the OHS(MI) Act came into effect on 1 July 2013 by virtue of the *Navigation (Consequential Amendments) Act 2012* (the Amending Act). At the same time, the Amending Act repealed the *Navigation Act 1912*.

A comparison of the legislative regimes before and after the changes that took effect on 1 July 2013 can help in understanding the scope of the new declaration powers given to the Authority.

Before its repeal, section 8A of the *Navigation Act 1912* gave a power to AMSA to declare that the Navigation Act 1912 applied to an off-shore industry vessel. Similarly, section 8AA gave AMSA a power to declare that the *Navigation Act 1912* applied to a trading ship even when it was proceeding on a voyage other than an overseas voyage or an inter-state voyage. The declarations could be made only upon application by the owner of the vessel or ship. Section 8AC of the *Navigation Act 1912* provided for the declarations to cease effect or to be revoked in specified circumstances.

While a declaration was in force under section 8A or section 8AA of the *Navigation Act 1912* in relation to a vessel or ship:

- the then section 19(1A) of the Seafarers Act stated that the Seafarers Act applied to the employment of employees on such a vessel or ship, provided it was also a “prescribed ship”;
- the then section 6(3) of the OHS(MI) Act provided that the OHS(MI) Act applied to the vessel or ship.

As of 1 July 2013, the Amending Act inserted new subsections 19 (1A)-(1E) into the Seafarers Act and new subsections 6 (3)-(3AD) into the OHS(MI) Act.

The new provisions state that the Seafarers Act or OHS(MI) Act respectively continue to apply in relation to a vessel or ship that:

- for the Seafarers Act only — is a “prescribed ship”; and
- would be an off-shore industry vessel or a trading ship within the meaning of the *Navigation Act 1912* if that Act had not been repealed; and
- was, immediately before the repeal of the *Navigation Act 1912*, covered by a declaration in force under section 8A or section 8AA (as the case may be) of that Act.

The same sets of new provisions also give powers to the Authority, to grant new declarations that the Seafarers Act or OHS(MI) Act respectively apply in relation to a vessel or ship that:

- for the Seafarers Act only — is a “prescribed ship”; and
- would be an off-shore industry vessel or a trading ship within the meaning of the *Navigation Act 1912* if that Act had not been repealed.

Specifically, the powers are contained in subsection 19 (1C) of the Seafarers Act and subsection 6 (3AB) of the OHS(MI) Act. No other details appear in the legislation as to the scope of the Authority’s powers.

Finally, the new provisions empower the Authority to declare that — notwithstanding the Seafarers Act or OHS(MI) Act respectively applying to a vessel or ship because of the ongoing effect of a declaration under section 8A or section 8AA (as the case may be) of the *Navigation Act 1912* or because of a new declaration granted by the Authority — the vessel or ship is not covered by the Seafarers Act or OHS(MI) Act (as the case may be). These powers are set out in subsection 19 (1D) of the Seafarers Act and subsection 6 (3AC) of the OHS(MI) Act.

The Explanatory Memorandum relating to the Amending Act stated in relation to the OHS(MI) Act:

The coverage of the [OHS(MI) Act] is established by section 6 of the OHS(MI) Act and is dependent on the *Navigation Act 1912*. Section 6 provides that the OHS(MI) Act applies to ‘prescribed ships’ and ‘prescribed units’, which are in turn defined as a ship or offshore mobile unit to which Part II of the *Navigation Act 1912* applies.

The purpose of these amendments is to preserve the current coverage of the OHS(MI) Act pending a more comprehensive review of the jurisdiction of the OHS(MI) Act and the [Seafarers Act] in consultation with stakeholders.

Both the OHS(MI) Act and the Seafarers Act will continue to apply to those ships (and units) to which the Act applied immediately before the repeal of the *Navigation Act 1912*.

The Explanatory Memorandum provided no substantive commentary on the new declarations powers vested in the Authority under the OHS(MI) Act. There is no suggestion of any significant or substantial change to the OHS(MI) Act coverage provisions.

The Explanatory Memorandum is briefer in its discussion of the amendments to the Seafarers Act. However, given that the nature of the amendments to the two Acts are identical, there is nothing to suggest that the statement about the purpose of the OHS(MI) Act would not apply equally to the Seafarers Act. As in relation to the OHS(MI) Act, the Explanatory Memorandum does not suggest that any significant or substantial change is being made to the coverage of the Seafarers Act.

2. The Authority's approach

Having considered the context of the changes effected by the Amending Act, the Authority has formed the view that the purpose of the new declarations powers given to the Authority is to closely mirror the powers held by AMSA under sections 8A, 8AA and 8AC of the *Navigation Act 1912* before the repeal of that Act. This is demonstrated by the similarity of the new declaration provisions to those in the *Navigation Act 1912*, the fact that the new provisions expressly deal with consequential issues relating to declarations made under the *Navigation Act 1912* and the indications of purpose in the Explanatory Memorandum.

As such, the Authority proposes, as far as practicable, to administer its new declarations powers under the Seafarers Act and the OHS(MI) Act in the same way as AMSA administered its powers under the *Navigation Act 1912*. This best serves the purpose of preserving the coverage of the Seafarers Act and OHS(MI) Act pending a more comprehensive review of the jurisdiction of those Acts.

This has the following general consequences.

Ship: The *Navigation Act 1912* allowed AMSA to make declarations in respect of a particular ship, and the new declaration powers in the Seafarers Act and OHS(MI) Act make the Authority's powers referable to a particular ship. The Authority will therefore consider applications for declarations in respect of each particular ship separately.

Applicant: A single declaration by AMSA under the *Navigation Act 1912* had the effect of bringing the relevant vessel or ship into the scope of both the Seafarers Act and the OHS(MI) Act, or removing them from coverage. Although there are now separate declarations powers under the Seafarers Act and OHS(MI) Act, it most closely reflects the situation under the *Navigation Act 1912* for the Authority to exercise the declarations powers under the Seafarers Act and OHS(MI) Act concurrently in relation to a particular ship. For this reason, the Authority expects an application in relation to a particular ship to be made jointly by the employer (in respect of the Seafarers Act) and the operator (in respect of the OHS(MI) Act).

Period: The Authority may specify a period for which a declaration will remain in force.

Consultation: The Authority will normally consult with AMSA before granting an application and take into account AMSA's views as to whether it would have granted a declaration under the *Navigation Act 1912* in the relevant circumstances.

Publication: The Authority will publish details of declarations granted on the Seacare website.

3. Relevant factors for inclusionary declarations

This part of the guidelines discusses declarations under subsection 19 (1C) of the Seafarers Act and subsection 6 (3AB) of the OHS(MI) Act, that the Seafarers Act or OHS(MI) Act respectively apply in relation to a vessel or ship.

For reasons already stated, the Authority expects an application to be made jointly by an employer and an operator in respect of a particular ship. The application should relate to inclusionary declarations under both the Seafarers Act and the OHS(MI) Act.

In considering an application, under the terms of the declarations powers the Authority needs to be satisfied that:

- the relevant vessel or ship is a “prescribed ship” as defined in the Seafarers Act (in relation to the application for a declaration under section 19 (1C) of the Seafarers Act); and
- the relevant vessel or ship meets the definition of “off-shore industry vessel” or “trading ship” (as the case may be) under the *Navigation Act 1912*.

In addition, in relation to applications for declarations relating to “trading ships”, the Authority will take into account the words in section 8AA of the *Navigation Act 1912* “even when the ship is proceeding on a voyage other than an overseas voyage or an inter-state voyage”. These words are taken to advert to the need to ensure a constitutional basis for the exercise of declaratory power, given that the definition of “trading ship” in the *Navigation Act 1912* does not of itself ensure constitutional coverage. For “trading ships”, therefore, the Authority will consider whether there is a sufficient constitutional basis for making a declaration. This will most easily be established if, notwithstanding the nature of specific voyages, a “trading ship” is engaged in trade and commerce:

- between Australia and places outside Australia; or
- between 2 places outside Australia; or
- between the States; or
- within a Territory, between a State and a Territory or between 2 Territories.

Further, the Authority will invite applicants to state the purpose for which they are applying for a declaration. This is not compulsory, but may help the Authority to make its decision in the individual case and will also assist in the general administration of the declarations power. This could include an explanation of why the applicants consider their circumstances are not already within the scope of the Seafarers Act and OHS(MI) Act.

Finally, the Authority may consider any other matter that it considers relevant in the particular case. Applicants are invited to state any other factors that they consider may be relevant to the Authority’s decision.

4. Relevant factors for exclusionary declarations

This part of the guidelines discusses declarations under subsection 19 (1D) of the Seafarers Act and subsection 6 (3AC) of the OHS(MI) Act, that the Seafarers Act or OHS(MI) Act respectively do not apply in relation to a vessel or ship.

For reasons already stated, the Authority expects an application to be made jointly by an employer and an operator in respect of a particular ship. The application should relate to exclusionary declarations under both the Seafarers Act and the OHS(MI) Act.

In considering an application, under the terms of the declarations powers the Authority needs to be satisfied that:

- a declaration has been granted under
 - section 8A or section 8AA of the *Navigation Act 1912*; or
 - subsection 19 (1C) of the *Seafarers Act* or subsection 6 (3AB) of the *OHS(MI) Act*in respect of the ship and is still in force; and
- the relevant vessel or ship is a “prescribed ship” as defined in the *Seafarers Act* (in relation to the application for a declaration under section 19 (1D) of the *Seafarers Act*); and
- the relevant vessel or ship meets the definition of “off-shore industry vessel” or “trading ship” (as the case may be) under the *Navigation Act 1912*.

Subject to those requirements, the Authority will make an exclusionary declaration in respect of a ship if requested to do so by the relevant employer and operator.

The Authority may also make an exclusionary declaration in respect of a ship if it is satisfied that:

- the ship no longer exists or has been lost; or
- the name or any other details of the ship have been changed since the applicable inclusionary declaration was made; or
- the ship no longer operates in Australia.

In addition, the Authority will invite applicants to state the purpose for which they are applying for a declaration. This is not compulsory, but may help the Authority to make its decision in the individual case and will also assist in the general administration of the declarations power.

Finally, the Authority may consider any other matter that it considers relevant in the particular case. Applicants are invited to state any other factors that they consider may be relevant to the Authority’s decision.

5. Granting a declaration

Any declaration granted by the Authority under subsections 19 (1C) or (1D) of the *Seafarers Act* or subsections 6 (3AB) or (3AC) of the *OHS(MI) Act* will be issued in writing by the Authority.

The declaration will specify:

- the applicants; and
- the ship —

in relation to which the declaration has been granted.

If the Authority decides to grant a declaration for a specified period, this will be stated in the declaration.

LEGISLATION

Seafarers Rehabilitation and Compensation Act 1992

19 Application of Act

- (1A) This Act also applies to the employment of employees on any prescribed ship that:
- (a) would be an off-shore industry vessel within the meaning of the *Navigation Act 1912* if that Act had not been repealed and either:
 - (i) was, immediately before the repeal of that Act, covered by a declaration in force under subsection 8A(2) of that Act; or
 - (ii) is covered by a declaration in force under subsection (1C) of this section; or
 - (b) would be a trading ship within the meaning of the *Navigation Act 1912* if that Act had not been repealed and either:
 - (i) was, immediately before the repeal of that Act, covered by a declaration in force under subsection 8AA(2) of that Act; or
 - (ii) is covered by a declaration in force under subsection (1C) of this section.
- (1B) However, this Act does not apply because of subsection (1A) to a prescribed ship that is covered by a declaration in force under subsection (1D).
- (1C) The Authority may declare in writing that this Act applies to a prescribed ship that would be an off-shore industry vessel, or a trading ship, within the meaning of the *Navigation Act 1912* if that Act had not been repealed.
- (1D) The Authority may declare in writing that this Act does not apply because of subsection (1A) to a prescribed ship that would be an off-shore industry vessel, or a trading ship, within the meaning of the *Navigation Act 1912* if that Act had not been repealed.
- (1E) A declaration made under subsection (1C) or (1D) is not a legislative instrument.

Occupational Health and Safety (Maritime Industry) Act 1993

6 Application of Act

- (3) This Act also applies in relation to:
- (a) a vessel that would be an off-shore industry vessel within the meaning of the *Navigation Act 1912* if that Act had not been repealed and either:
 - (i) was, immediately before the repeal of that Act, covered by a declaration in force under subsection 8A(2) of that Act; or
 - (ii) is covered by a declaration in force under subsection (3AB) of this section; or
 - (b) a ship that would be a trading ship within the meaning of the *Navigation Act 1912* if that Act had not been repealed and either:
 - (i) was, immediately before the repeal of that Act, covered by a declaration in force under subsection 8AA(2) of that Act; or
 - (ii) is covered by a declaration in force under subsection (3AB) of this section.

(3AA) However, this Act does not apply because of subsection (3) to a vessel or ship that is covered by a declaration in force under subsection (3AC).

(3AB) The Authority may declare in writing that this Act applies to a vessel or ship that would be an off-shore industry vessel, or a trading ship, within the meaning of the *Navigation Act 1912* if that Act had not been repealed.

(3AC) The Authority may declare in writing that this Act does not apply because of subsection (3) to a vessel or ship that would be an off-shore industry vessel, or a trading ship, within the meaning of the *Navigation Act 1912* if that Act had not been repealed.

(3AD) A declaration made under subsection (3AB) or (3AC) is not a legislative instrument.

Navigation Act 1912 (before its repeal)

6 Interpretation

(1) In this Act, unless the contrary intention appears:

trading ship means a ship that is used, or, being a ship in the course of construction, is intended to be used, for, or in connection with, any business or commercial activity and, without limiting the generality of the foregoing, includes a ship that is used, or, being a ship in the course of construction, is intended to be used, wholly or principally for:

- (a) the carriage of passengers or cargo for hire or reward; or
- (b) the provision of services to ships or shipping, whether for reward or otherwise;

but does not include a Commonwealth ship, a fishing vessel, a fishing fleet support vessel, an off-shore industry mobile unit, an off-shore industry vessel to which this Act applies, an inland waterways vessel or a pleasure craft.

8 Off-shore industry fixed structures, mobile units and vessels

(1) In this section:

Australia includes such of the external Territories as are prescribed for the purposes of this section.

natural resources means the mineral and other non-living resources of the seabed and its subsoil.

(4) A reference in this Act to an off-shore industry vessel shall be read as a reference to:

(a) a ship (not being an off-shore industry mobile unit) that is used or intended for use wholly or primarily in, or in any operations or activities associated with or incidental to, exploring or exploiting the natural resources of any or all of the following, namely:

- (i) the continental shelf of Australia;
- (ii) the seabed of the Australian coastal sea; and
- (iii) the subsoil of that seabed; or

(b) any other ship (not being an off-shore industry mobile unit, or a ship, or a ship included in a class of ships, declared by the Minister, by instrument in writing, to be a ship or a class of ships, as the case requires, to which this paragraph does not apply) at any time when it is being so used.

8A Off-shore industry vessels to which Act applies

- (1) The owner of an off-shore industry vessel may apply to the Authority for a declaration under subsection (2) in relation to the off-shore industry vessel.
- (2) The Authority may, in writing, declare the off-shore industry vessel to be an off-shore industry vessel to which this Act applies.
- (2A) A declaration under subsection (2) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (3) A reference in this Act to an off-shore industry vessel to which this Act applies is a reference to an off-shore industry vessel in relation to which a declaration under subsection (2) is in force.

8AA Declaration that Act applies in relation to trading ships engaging in intra-state trade

- (1) The owner of a trading ship may apply to the Authority for a declaration under subsection (2) in relation to the ship.
- (2) The Authority may, in writing, declare that this Act applies in relation to the ship even when the ship is proceeding on a voyage other than an overseas voyage or an inter-state voyage.
- (3) The declaration has effect despite section 2.
- (4) A declaration under subsection (2) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (5) If a declaration under subsection (2) is in force in relation to a trading ship, then, for the purposes of this Act, the ship is to be taken not to be a ship referred to in subsection 2(1).

8AC Expiration or revocation of declarations

- (1) A declaration made under section 8A, 8AA or 8AB ceases to have effect, unless sooner revoked, at the end of the period, if any, specified in the declaration.
- (2) The Authority must revoke a declaration made under section 8A, 8AA or 8AB if requested to do so by the owner of the vessel or ship to which the declaration relates.
- (3) The Authority may revoke a declaration made under section 8A, 8AA or 8AB if the Authority is satisfied:
 - (a) that the vessel or ship to which the declaration relates no longer exists or has been lost; or
 - (b) that the name or any other details of the vessel or ship have been changed since the making of the declaration; or
 - (c) that the vessel or ship no longer operates in Australia.

9A Definitions

In this Part, unless the contrary intention appears:

ship does not include a barge, lighter or other floating vessel that is not self-propelled.

10 Application of Part

Except so far as the contrary intention appears, this Part applies only to:

- (a) a ship registered in Australia;
 - (b) a ship that 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
 - (c) a ship (other than a ship to which paragraph (a) or (b) applies) of which the majority of the crew are residents of Australia and which is operated by 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 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;
- and to the owner, master and crew of such a ship.