

THE MARITIME LABOUR CONVENTION 2006: THE SEAFARER AND THE FISHER

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This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch University in 2015. I hereby declare it is my own account of my research.

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ABSTRACT

The perils of working at sea have been recognised for hundreds of years. Seafarers and fishers spend their working lives at risk of serious injury or death. The Seafarers International Research Centre found that workplace fatalities are 11 times more likely for seafarers than workers ashore. Aside from the physical dangers, the isolated workplace leaves seafarers and fishers vulnerable to severe exploitation and abuse. Without seafarers sailing the ships that carry 90% of ‘everything’, the world’s economy would grind to a halt. Yet, to most of us, they remain invisible.

This paper considers the particular issues confronting seafarers and fishers through the prism of the *Maritime Labour Convention 2006* (MLC) and the *Work in Fishing Convention 2007* (WIFC). The Conventions share many similarities and are intended to complement each other in order to improve the living and working conditions of those who work at sea. The MLC has been enthusiastically welcomed and adopted by 67 countries representing 80% of the world’s gross tonnage of ships, yet the WIFC has been almost completely ignored.

The paper finds that the MLC is useful and making a real difference. It argues that the legal protection of fishers globally is, in contrast, virtually non-existent. The fishing industry is plagued by criminality and thousands of fishers are trapped in forced labour but the international community remains silent. As the MLC is an effective and useful convention it ought to be extended to include fishers within its scope. However that will do little to alleviate the conditions of those enslaved fishers who can only hope for a concerted global response to combat slavery at sea.

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INTRODUCTION

Without those who work at sea, ‘half the world would freeze and the other half starve.’¹ To the non-seafarer, the scale of the shipping industry is almost unfathomable. There are over 50,000 merchant ships trading internationally, registered in 150 nations.² At the beginning of 2015, the world’s commercial fleet consisted of 89,464 vessels with a total tonnage of 1.75 billion dead-weight ton.³ In 2013, developed countries imported goods worth US\$ 10 trillion,⁴ and more than 90 percent of those goods were moved by ship. Without ships, ‘the commercial world would grind to a halt’.⁵ The rapid increase in international trade has led to a demand for more and more ships and without skilled operators, those ships cannot sail. Currently 1.2 million seafarers ensure that 90 percent of ‘everything’⁶ reaches its destination safely via maritime transport.⁷

Cargo transport is but one type of work for seafarers. In 2006, an estimated 32 million fishers, employed in industrial capture fisheries,⁸ supplied the world with 57.75 million tonnes of fish.⁹ Yet, despite the enormous scale of the industries, those who work at sea remain invisible to the majority of consumers.

¹ Efthimios Mitropoulos, *Putting the Seafarer First* (2005) International Transport Federation <www.itfseafarers.org/putting-first.cfm>.

² International Chamber of Shipping, *Shipping and World Trade* (2015) <www.ics-shipping.org/shipping-facts/shipping-and-world-trade>.

³ United Nations Conference on Trade and Development, *Review of Maritime Transport*, UNCTAD/RMT/2015 (14 October 2015) 30.

⁴ United Nations Conference on Trade and Development, *Key Statistics and Trends in International Trade 2014*, UNCTAD/DITC/TAB/2014/2 (2015), 2.

⁵ Edgar Gold, 'Bloodhounds, Scapegoats and Fatcats: Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie' (2005) *University of Queensland Law Journal* 251, 258.

⁶ United Nations, *IMO (International Maritime Organization)* <<https://business.un.org/en/entities/13>>.

⁷ International Labour Organisation, *International Labour Standards on Seafarers* <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/seafarers/lang--en/index.htm>>.

⁸ Fisheries and Aquaculture Department, *Fishing People* (2015) Food and Agriculture Organization of the United Nations <www.fao.org/fisher/topic/1387/en>. The FAO defines industrial capture fishing as: “Capital-intensive fisheries using relatively large vessels with a high degree of mechanization and that normally have advanced fish finding and navigational equipment. Such fisheries have a high production capacity and the catch per unit effort is normally relatively high. In some areas of the world, the term "industrial fisheries" is synonymous with fisheries for species that are used for reduction to fishmeal and fish oil (e.g. the trawl fishery for sandeel in the North Sea or the Peruvian ouse-seine fishery for anchoveta).”

⁹ United Nations Department of Public Information, *Resumed Review Conference on the Agreement Relating to the Conservation and Managment of Straddling Fish Stocks and Highly Migratory Fish Stocks* (May 2010) <www.un.org/depts/los/convention_agreements/reviewconf/FishStocks_EN_A.pdf>.

Work at sea is extremely dangerous, and not just because of the inherent dangers of machinery, ships and seas. Seafarers spend ‘most of their working life stuck on a confined metal box ...where intimidation is easier than in most workplaces’.¹⁰ The isolated and isolating workplace leaves them vulnerable to bullying and harassment, abandonment and non-payment of wages. Couple this with the changes in patterns of ship ownership¹¹ and management¹² over the last 60 years and seafarers are exposed to serious abuse.¹³ The purpose of this paper is to examine the unique nature of maritime labour through the prism of the legal regimes available for protecting those who work at sea. It poses the question; do the current international labour conventions adequately address the unique working conditions of this essential class of worker?

I HISTORICAL PERSPECTIVE

Historically, courts have recognised that seafarers should be afforded special legal protection. In England, the Court of Admiralty, a court of equity, was concerned with the ‘unconscionable use of legal rights’¹⁴ and retained jurisdiction over the interests of seafarers. It displayed a ‘singular sympathy for the seafarer as a result of its awareness of the harshness of his working environment’ and the power imbalance between shipowner and seafarer.¹⁵

In 1825, Lord Stowell described seafarers as:

[M]en generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.¹⁶

Seafarers were the ‘favourites of the law’¹⁷ and by the end of the 19th Century, they were protected by the *Merchant Shipping Act 1894* (UK). This legislation

¹⁰ Rose George, *Ninety Percent of Everything* (Metropolitan Books, 2013), 178.

¹¹ The traditional family owned shipping company is a thing of the past and today vessels are more likely to be owned by financial institutions that may not be interested in actual ship operations. See Gold, above n 7, 252.

¹² The increased use of ‘flags of convenience’ is discussed later in this chapter.

¹³ Thomas A Menash, ‘Seafarers in the modern maritime industry: the need for reform’ (2014) *Lloyds Maritime Quarterly* 172.

¹⁴ E J Black, ‘The F S Dethridge Memorial Address 1999, Admiralty Jurisdiction and the Protection of Seafarers’ (2000) *MLANZ Journal* 1, 5.

¹⁵ *Ibid.*

¹⁶ *The Minerva* (1825) 166 ER 123, 126.

¹⁷ *Ibid.*, 127.

shared many similarities with our modern regulatory code regarding seafarers. For example, seafarers were to be provided with a written agreement that covered the nature and duration of the voyage, the hours of work, their role, wages and provisions. It even specified that where the number of crew exceeded 100 there was to be a medical practitioner on board.¹⁸

The end of World War One generated a new awareness of workers' rights. A tripartite body,¹⁹ the International Labour Organisation (ILO) was created in 1919 as part of the Treaty of Versailles and remains active today. Some of the first ILO conventions concerned the protection of seafarers; for example, the *Unemployment Indemnity (Shipwreck Convention)*²⁰ and the *Placing of Seamen Convention*.²¹ Therefore, the uniquely exposed position of the seafarer continued to be recognised.

Despite recognition and intervention in the early part of the 20th century, the vulnerability of seafarers remained acute as the century drew to a close. In 1992, the Australian government produced the ground-breaking 'Ships of Shame' Inquiry in response to the loss of six bulk carriers off the coast of Western Australia. This inquiry found that often seafarers are unable to communicate in English, are not adequately trained and on several occasions crew members had been maltreated by shipowners and operators.²² The inquiry provided the following examples of the poor treatment:

- the denial of food and the provision of inadequate food
- bashing of crew members by ships' officers
- maintenance of two pay books, one for official records...the other for the real lower level of pay
- under or non-payment of wages and overtime
- inadequate accommodation and washing facilities
- sexual molestation and rape
- depriving access to appropriate medical care

¹⁸ *Merchant Shipping Act 1894* (UK), s 209.

¹⁹ Tripartite means that it is made up of representatives of governments, employers and employees.

²⁰ *Unemployment Indemnity (Shipwreck) Convention*, opened for signature 15 June 1920, C008 (entered into force 16 March 1923).

²¹ *Placing of Seamen Convention*, opened for signature 10 July 1920, C009 (entered into force 23 November 1921).

²² House of Representatives Standing Committee on Transport Communications and Infrastructure, Parliament of Australia, *Ships of Shame Inquiry into Ship Safety* (1992), 32-36 [3.21] – [3.31].

- crew members being considered as ‘dispensibles’.²³

Despite the legal recognition of the special vulnerability of seafarers almost 200 years ago, this inquiry proved seafarers remained subject to enduring risks of exploitation and abuse.

The result of the ‘Ships of Shame’ Inquiry was an increased awareness of the importance of safety on-board ships and the enhanced use of port state safety inspections. Port state control was developed as a result of coastal states’ concerns about flag states failing to enforce their own safety rules.²⁴ Therefore the international community adopted a different mechanism for monitoring ship safety. Coastal states gave their port authorities extensive powers to inspect and detain ships that do not comply with international safety standards.²⁵

Regional port state control organisations, such as the Tokyo MOU²⁶ and Paris MOU,²⁷ have the objective of eliminating sub-standard shipping through regional co-operation and harmonised port state control.²⁸ The authorities of the port state have the power to inspect and detain foreign vessels that are unseaworthy and require that deficiencies are rectified before they are allowed to sail. This information is shared with members of the MOU to assist them in the selection of foreign vessels for inspection in the next port.

Port state control has been extremely effective in improving the safety of ships. It remains one of the most powerful mechanisms for enforcing compliance with international maritime law.

II FLAGS OF CONVENIENCE

No discussion of maritime labour law is complete without reference to ‘flags of convenience’. On board a ship, the law of the flag state applies. Article 91 of the *United Nations Convention on the Law of the Sea* (UNCLOS) provides:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have

²³ Ibid 36 [3.31].

²⁴ Richard Shaw and Mikis Tsimplis, ‘The Liabilities of the Vessel’ in Yvonne Baatz (ed), *Maritime Law* (Sweet and Maxwell, 2nd ed, 2011), 300.

²⁵ Ibid 301.

²⁶ Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region.

²⁷ Paris Memorandum of Understanding on Port State Control.

²⁸ Paris MOU, *Organisation* <www.parismou.org/about-us/organisation>.

the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.²⁹

The term ‘genuine link’ is somewhat nebulous. It is not defined in UNCLOS so it is interpreted differently from state to state.³⁰ Because the ‘genuine link’ requirement is not enforced, ships sailing under the flag of a state are not necessarily owned nor manned by nationals of that state³¹ yet the law of the flag state applies on board.³²

The continued exploitation of seafarers is blamed upon the use of ‘flags of convenience’.³³ Some countries operate what are known as open registries.³⁴ This means that foreign shipowners can register their vessels on that country’s merchant shipping register despite having no connection with that country in order to take advantage of lower taxes and often lax law enforcement.³⁵ When this happens the ship or vessel is said to be flying a flag of convenience.³⁶

According to the International Transport Workers Federation (ITF) this can mean that seafarers working on these vessels receive very low wages, poor conditions, inadequate food and clean drinking water and long periods of work without adequate rest.³⁷

Flags of convenience are also used in the fishing industry. The conditions on board these fishing vessels can be so bad that they have earned the nickname

²⁹ *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 91.

³⁰ See discussion in Robin Churchill, 'The Meaning of the "Genuine Link" Requirement In Relation To The Nationality Of Ships' (International Transport Workers Federation, 2000).

³¹ Menash, above n 17, 2.

³² *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 94.

³³ Menash, above n 17, 2.

³⁴ International Transport Workers Federation, *Flags of Convenience*, ITF Global <www.itfglobal.org/en/transport-sectors/seafareres/in-focus/flags-of-convenience-campaign>.

³⁵ Ibid.

³⁶ International Transport Workers' Federation, *Flags of Convenience, Avoiding the rules by flying a convenient flag* <www.itfglobal.org/en/transport-sectors/in-focus/flags-of-convenience-campaign/>.

³⁷ International Transport Workers Federation, above n 40.

‘floating coffins’.³⁸ Crews have reported beatings, sleep deprivation, and even imprisonment without food or water.³⁹

These are the types of issues that current international conventions seek to address.

III CURRENT INTERNATIONAL CONVENTIONS

The beginning of a new century heralded a paradigm shift in the legal protection of seafarers as the legal focus swung towards the living and working conditions of seafarers. The *Maritime Labour Convention 2006* (MLC),⁴⁰ which entered into force in August 2013, is the result of years of discussions and review at the International Labour Organisation (ILO).⁴¹ It consolidates and updates several existing labour conventions while seeking to create uniformity of labour standards in global shipping. To date, 67 countries⁴² representing 80 percent of the world’s gross tonnage⁴³ have ratified the MLC, including Australia.⁴⁴

As Chapter One explains it is a comprehensive and practical convention that applies to the ships registered in a signatory state. However fishing vessels are excluded from its scope. Fishing is one of the most dangerous and unregulated industries in the world. Arguably, fishers are exposed to even greater risks than seafarers. The ILO’s *Work in Fishing Convention 2007* (WIFC) is intended to complement the MLC but at the time of writing, has not been ratified by enough states to enter into force. Those employed in the global fishing industry are largely without legal protection. Yet, as Chapter 3 of this paper will show, the working conditions of many fishers are perilous - even bordering on slavery.

IV METHOD

³⁸ Environmental Justice Foundation, 'Lowering the Flag - Ending the use of Flags of Convenience by Pirate Fishing Vessels' (EJF, 2009), 22.

³⁹ Ibid.

⁴⁰ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013). It became law in Australia on the same day and is given effect by the *Navigation Act 2012* (Cth).

⁴¹ The ILO is the specialised agency of the UN concerned with promoting rights at work.

⁴² International Labour Organisation, *Maritime Labour Convention 2006* <<http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>>.

⁴³ Ibid.

⁴⁴ Australian ratified the MLC on 14 December 2011.

As the MLC is a relatively new convention, there is little in the way of academic research into its effect. Therefore, I conducted empirical research⁴⁵ in the form of semi-structured interviews with industry stakeholders. The conclusions reached in this paper are based upon those responses combined with doctrinal research.

This paper will argue that the MLC is a successful and useful convention when it is enforced. It recommends that the scope of the MLC should be expanded to include, at a minimum, fishers who are engaged in transnational fishing.

V STRUCTURE

Chapter One discusses the particular employment issues faced by seafarers. It explains the background to the MLC with reference to ILO discussions. The chapter then provides a detailed summary of each title and the provisions of the MLC.

Chapter Two assesses the effect of the MLC on seafarers in Australia and the impact on seafarers generally. It evaluates the criticisms levelled at the MLC including concerns about ‘flags of convenience’ states not enforcing the MLC; and in particular, issues like seafarers being denied shore leave; the MLC’s silence on the right to strike, increased costs for responsible shipowners and lack of protection for abandoned seafarers.

Maritime industry stakeholders in Western Australia, along with foreign seafarers who were visiting the port of Fremantle, participated in the semi-structured interviews regarding the effect of the MLC. The views expressed by the participants were largely similar. That is, the MLC is an effective and useful convention but global enforcement is inconsistent.

Chapter Three addresses the problems facing those working in the fishing industry. It provides a critical summary of the WIFC. It then examines the problem of human trafficking for forced labour in the fishing industry and the consequences, for fishers, of illegal, unregulated and unreported fishing (IUU). The chapter explains that while the living and working issues facing seafarers and fishers are, *prima facie*, similar, there is a vein of criminality running through the global fishing industry that makes the protection of workers almost impossible.

⁴⁵ Approved by the Human Ethics Committee of Murdoch University (project number 2015/090).

The paper concludes with recommendations for addressing the problems facing fishers. It acknowledges that enforcement is always going to be difficult because of the criminality of many operators who engage in IUU fishing. Nonetheless, there are labour abuses occurring on fishing vessels undertaking legitimate operations and the expansion of the MLC to protect those workers is a potential solution until the WIFC enters into force.

However, while the WIFC seeks to comprehensively protect the living and working conditions of fishers, broad compliance is unlikely given the criminal elements in the industry. Strong enforcement of a completely different flavour to the current port state control measures is required or the WIFC risks being a 'toothless' convention. A crossover with port state control and a concentrated international 'crime fighting' effort must be undertaken if the slave-like conditions of many fishers are to be eradicated.

CHAPTER ONE

I THE UNIQUE NATURE OF MARITIME LABOUR LAW

Maritime labour law is particularly complex because it straddles domestic and international law.⁴⁶ The global nature of shipping and combined with the extensive use of flags of convenience means that seafarers and shipowners rarely have the same nationality.⁴⁷ Neither the seafarer nor the shipowner is likely to share the nationality of the flag state of the vessel but nonetheless are subject to the law of the flag state while on-board. The international maritime regulatory regime is based on the international law of the sea whereas employment law, even if it is giving effect to an international instrument, is normally dealt with by domestic law based on territorial jurisdiction. Both maritime law and employment law are specialties in their own right and this may explain the lack of legal research in the area of maritime labour law.⁴⁸

The protection of maritime workers is crucial not only to ensure quality shipping that is respectful of the marine environment but also to provide occupational health and safety and prevent the abuse of human rights.⁴⁹ According to the International Labour Organisation (ILO), seafarers are exposed to:

difficult working conditions and particular occupational risks. Working far from home, they are vulnerable to exploitation and abuse, non-payment of wages, non-compliance with contracts, exposure to poor diet and living conditions, and even abandonment in foreign ports.⁵⁰

II BACKGROUND TO MARITIME LABOUR CONVENTION 2006 (MLC)

Recognising the unusual vulnerability of seafarers, the ILO developed a range of conventions⁵¹ which were designed to reflect unique nature of the shipping

⁴⁶ Moira McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, *The Maritime Labour Convention 2006; a legal primer to an emerging international regime* (Martinus Nijhoff, 2011), 4.

⁴⁷ Thomas A Menash, 'Seafarers in the modern maritime industry: the need for reform' (2014) *Lloyds Maritime Quarterly* 172, 173.

⁴⁸ McConnell, above n 1, 4.

⁴⁹ Iliana Christodoulou-Varotsi, 'Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives' (2012) 43 *Journal of Maritime Law and Commerce* 467.

⁵⁰ International Labour Organisation, *International Labour Standards on Seafarers* <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/seafarers/lang--en/index.htm>>.

⁵¹ Prior to the adoption of the MLC, there were over 60 maritime labour conventions and recommendations in force, dating back to 1920. See the General Comments of the Preparatory

industry. However not all those instruments achieved widespread acceptance.⁵² While the standards set in the conventions were considered valid, they failed to translate into real changes in seafarers' working conditions.⁵³

The ineffectiveness of these conventions was due to a number of factors. Often the conventions only dealt with one topic, so ratification was 'patchy'.⁵⁴ Furthermore, ratification and enforcement often put shipowners and governments at an 'economic disadvantage'⁵⁵ compared to those who did not ratify. Additional impediments to wider ratification were; the excessive detail in the conventions; the inflexibility to respond to developments in the shipping industry and standards that were complex and difficult to understand.⁵⁶

In January 2001 the Joint Maritime Commission (JMC)⁵⁷ recommended a consolidation of the ILO's maritime conventions.⁵⁸ This recommendation was not only welcomed but driven by shipowners who hoped that it would lead to uniform compliance costs.⁵⁹ The JMC resolved that;

the emergence of the global labour market for seafarers has effectively transformed the shipping industry into the world's first genuinely global industry, which requires a global response with a body of global standards applicable to the whole industry.

The week-long session agreed that the existing ILO maritime instruments should be consolidated and brought up-to date by means of a new, single "framework Convention" on maritime labour standards.⁶⁰

Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004).

⁵² International Labour Conference, 94th (Maritime) sess, *Report of the Committee of the Whole* ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006).

⁵³ Patrick Bolle, 'The ILO's new Convention on maritime labour: An innovative instrument' (2006) (145) *International Labour Review* 135, 138.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ The Joint Maritime Commission (JMC) is a bipartite body made up equally of representatives from shipowners and seafarers. It was established in 1920 to advise the ILO governing body on maritime questions. McConnell, above n 1, 38.

⁵⁸ Joint Maritime Commission, *Report of the Joint Maritime Commission*, 29th sess, ILO Doc GB280-5-2001-02-0182-1-EN.Doc (22-26 January 2001).

⁵⁹ John Isaac Blanck Jr, 'Reflections on the Negotiation of the Maritime Labor Convention 2006 at the International Labor Organization' (2006) 31 *Tulane Maritime Law Journal* 35, 39.

⁶⁰ International Labour Organisation, *International Shipping Industry adopts "Geneva Accord"* <http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_007832/lang-en/index.htm>.

In March 2001, the governing body of the ILO set up a High Level Working Group (HLWG) to negotiate the text of the proposed convention.⁶¹ The HLWG completed its work in September 2004 at which point a Preparatory Maritime Technical Conference (PTMC) produced three technical reports on the provisions of the draft *Maritime Labour Convention* (MLC).⁶² The final conference took place in February 2006 where tripartite negotiations were conducted by the ‘Committee of the Whole’⁶³ and on 23 February 2006, after five years of negotiations, the MLC opened for signature.⁶⁴

Guy Ryder, the Director General of the International Labour Office, described it as ‘a “bill of rights” for the world’s maritime workers and a framework for creating a level playing field for shipowners’.⁶⁵ This ‘level playing field’ is achieved via the enforcement and compliance procedures that prevent non-ratifying countries gaining a commercial advantage over ratifying countries.⁶⁶

The MLC is also described as the “Fourth Pillar” of the international regulatory regime for safe shipping,⁶⁷ complementing three existing conventions of the International Maritime Organisation (IMO);⁶⁸ the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*,⁶⁹ the *International Convention for the Safety of Life at Sea*,⁷⁰ and the *International Convention for the Prevention of Pollution from Ships*.⁷¹

The MLC consolidates a number of existing ILO conventions, of which the *Merchant Shipping Convention*⁷² is of particular relevance. According to

⁶¹ Blanck Jr, above n 14, 40.

⁶² Ibid.

⁶³ Ibid 41.

⁶⁴ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013).

⁶⁵ International Labour Office, *Compendium of Maritime Labour Instruments* (ILO and European Union, 2nd ed, 2015).

⁶⁶ McConnell, above n 1, 82.

⁶⁷ International Labour Office, above n 20.

⁶⁸ The IMO is the specialised agency of the United Nations with responsibility for the safety and security of shipping and the prevention of marine pollution by ships.

⁶⁹ *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, opened for signature 7 July 1978, STCW (entered into force 28 April 1984).

⁷⁰ *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, SOLAS (entered into force 25 May 1980).

⁷¹ *International Convention for the Prevention of Pollution from Ships*, opened for signature 2 November 1973, MARPOL (entered into force 2 October 1983).

⁷² *Merchant Shipping (Minimum Standards) Convention*, opened for signature 29 October 1976, C147 (entered into force 28 November 1981).

Dominick Devlin, there are six features of this convention that are transferred to the MLC.

Firstly, it is the duty of the flag state to exercise their jurisdiction and control over ships flying their flag. Secondly, their jurisdiction is to be exercised in the areas of safety, social security and living and working conditions. Thirdly, the means of exercising the jurisdiction is not only through legislation and regulations but also by court decisions and collective agreements. Fourthly, to the extent that a member state has not ratified a convention listed in the appendix, a member state must satisfy itself that its laws are substantially equivalent. Fifthly, the member state must verify compliance with the Convention's requirements by inspections. Finally, those members who have ratified the Convention are given the right to inspect the work conditions on board a vessel when it enters the member's territorial jurisdiction and to discourage its nationals from working on a foreign vessel if the flag state has not ratified the Convention.⁷³

The MLC addresses a significant gap in the *United Nations Convention on the Law of the Sea*, (UNCLOS)⁷⁴ namely, the failure to acknowledge the ocean as a workplace or 'human rights site'.⁷⁵ Therefore, its truly innovative feature is the focus on the rights of seafarers to decent working and living conditions.⁷⁶

III AIMS OF THE MLC

The Explanatory Note to the Regulations and Code defines the MLC's three underlying purposes:

- (a) to lay down (in its Articles and Regulations) a firm set of principles and rights;
- (b) to allow (through the Code) a considerable degree of flexibility in the way Members implement those principles and rights; and
- (c) to ensure (through Title 5) that the principles and rights are properly complied with and enforced.⁷⁷

The Preamble⁷⁸ of the MLC states that the Convention should embody the fundamental principles to be found in the ILO's other labour conventions⁷⁹ within

⁷³ McConnell, above n 1, 72, 73.

⁷⁴ *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994).

⁷⁵ McConnell, above n 11, 23.

⁷⁶ Ibid 77.

⁷⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) Explanatory Note.

the legal framework of UNCLOS.⁸⁰ In other words, the MLC acknowledges the primacy of flag state jurisdiction.⁸¹

The Preamble explains that the ILO is determined to secure the widest acceptability for the MLC among governments, shipowners and seafarers committed to the principles of decent work. Therefore the MLC should be ‘readily updateable’ and ‘lend itself to effective implementation and enforcement.’⁸²

The general obligations placed on a Member that ratifies the MLC are found in Article I. These are, firstly, to give effect to the provisions of the MLC in order to secure the right of all seafarers to decent employment and secondly, to co-operate with other Members to ensure the effective implementation and enforcement of the MLC.⁸³

The application of the MLC is broad. It applies to all seafarers⁸⁴ and all ships engaged commercial activities.⁸⁵ A seafarer is defined as ‘any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies.’⁸⁶ This definition reflects the awareness that there are a broad range of people who are employed at sea and carry out jobs not traditionally understood to be part of the seafaring workforce. An example is people who work on passenger ships as entertainers or in hospitality services.⁸⁷ This

⁷⁸ The Preamble is not binding but an authoritative expression of the parties’ intentions. See, Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004).

⁷⁹ Listed as *Forced Labour Convention* 1930 (No 29); *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No 87); *Right to Organise and Collective Bargaining Convention* 1949 (No 98), *Equal Remuneration Convention* 1951 (No 100), *Abolition of Forced Labour Convention* 1957 (No 105); *Discrimination (Employment and Occupation) Convention* 1958 (No 111); *Minimum Age Convention* 1973 (No 138); *Worst Forms of Child Labour Convention* 1999 (No 182).

⁸⁰ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) preamble.

⁸¹ *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 94. Article 94 of UNCLOS establishes flag state jurisdiction ‘under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.’

⁸² *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) preamble.

⁸³ *Ibid* art I.

⁸⁴ *Ibid* art II, para 2.

⁸⁵ *Ibid* art II, para 4.

⁸⁶ *Ibid* art I, para 1.

⁸⁷ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 8.

definition is also broad enough to include seafarers who are self-employed or employed by third parties.⁸⁸ Ship is defined as ‘as ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply.’⁸⁹

Interestingly, at the HLWG, the shipowner representatives supported the exclusion for vessels operating in coastal waters but it was not acceptable to the seafarer representatives. The Government representatives preferred that all seafarers be covered but that some flexibility could be left to the Member to decide to exclude ships on coastal voyages.⁹⁰ This flexibility is reflected in paragraph 6 which allows the Member to exclude certain vessels from the obligations of the MLC following consultation with shipowners’ and seafarers’ organisations.⁹¹

IV EXPRESS EXCLUSIONS

As broad as it is, the MLC does not apply to every vessel undertaking international voyages. Article II, expressly excludes certain types of vessels from the MLC. These are:

1. Ships engaged in fishing or in similar pursuits
2. Ships of traditional build such as dhows and junks
3. Warships or naval auxiliaries.⁹²

The explanatory notes to the draft MLC mention that the High Level Working Group did not reach an agreement as to whether oil rigs and drilling platforms should be either totally excluded from the MLC or excluded when not under navigation.⁹³ To date, this issue has not been clarified. John Isaac Blanck Jr, a member of the US delegation that negotiated the text of the MLC, suggests that

⁸⁸ See the discussion in the International Labour Conference, 94th (Maritime) sess, *Report of the Committee of the Whole* ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006).

⁸⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), art II, para 1.

⁹⁰ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 9.

⁹¹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) art II, para 6.

⁹² *Ibid* art II, para 4.

⁹³ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 9.

‘ship’ includes oil rigs with navigation capability and pipe-laying barges.⁹⁴ As these vessels are not expressly excluded from the MLC it is likely that they are within its scope.

The explanatory notes further explain that the exclusion of fishing vessels (and consequently fishers) from the MLC reflects the view of the Governing Body of the International Labour Office.⁹⁵ Their opinion was that this convention should not try to address the very diverse needs and concerns of the fisheries sector. Instead a convention specifically tailored to meet the needs of the fishing sector was more appropriate.⁹⁶ This is the *Work in Fishing Convention* (WIFC)⁹⁷ which opened for signature in 2007 but has not achieved the required ratifications for entry into force. Further consideration of the WIFC will be given in Chapter Three.

Having determined to whom the MLC applies, now it is useful to consider how it is to work in practice.

V STRUCTURE OF THE MLC

The MLC contains three interrelated sections; the Articles, Regulations and Code.⁹⁸ The Articles and Regulations provide the core rights and principles and the ‘basic’ obligations of Members ratifying the MLC.⁹⁹ The Code contains the details for implementing the regulations. It comprises of mandatory standards (Part A) and non-mandatory guidelines (Part B).¹⁰⁰ The Regulations and Code are organised into five titles.

These five titles are arranged in a chronological structure. Title 1 covers the pre-employment stage, Title 2 covers employment conditions, Title 3 covers on-board requirements, Title 4 covers health and social security and Title 5 covers

⁹⁴ Blanck Jr, above n 14, 43.

⁹⁵ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 9.

⁹⁶ *Ibid.*

⁹⁷ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force).

⁹⁸ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006 (entered into force 20 August 2013, Explanatory Note to the regulations and Code of the Maritime Labour Convention, 2.

⁹⁹ *Ibid* 3.

¹⁰⁰ *Ibid* 4.

compliance and enforcement. Each title is now examined in detail to help create a picture of working life at sea through the eyes of the MLC.

A *Title 1. Minimum requirements for Seafarers to work on a Ship*

This Title has four distinct areas relating to pre-employment requirements. Each regulation contains standards which must be met before a seafarer may commence working on a ship.

5. *Age*

Regulation 1.1 is concerned with ensuring no under-age *persons* (emphasis added) work on a ship and sets the minimum age for employment on a ship at 16 years.¹⁰¹ This reflects the *Seafarers' Hours of Work and the Manning of Ships Convention, 1996* (No. 180), which sets the age of 16 as the minimum for work on the manning of ships.¹⁰² It is suggested that the use of the word 'person' in the regulation implies that anyone under the age of 16 cannot be a seafarer.¹⁰³

The *Minimum Age Convention*¹⁰⁴ sets the minimum age as 18 for work that is likely to endanger health, safety or morals.¹⁰⁵ Seafaring is a dangerous profession due to natural risks, mechanical and electrical accidents, fatigue and on-board and on-shore abuse¹⁰⁶ so it is somewhat surprising that the minimum age is set at 16. However, Standard A1.1 paragraph 1 prohibits night work for seafarers under the age of 18 and it is apparent that the minimum age may be altered by subsequent amendments. Regulation 1.1, paragraph 2 states 'the minimum age *at the time of initial entry into force* of this Convention is 16 years' (emphasis added). The PTMC commentary to the recommended draft explains that Part A of the Code may be changed later to a higher age.¹⁰⁷

¹⁰¹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006 (entered into force 20 August 2013) Standard A1.1.

¹⁰² *Ibid.*

¹⁰³ McConnell, above n 1, 247.

¹⁰⁴ *Minimum Age Convention*, opened for signature 26 June 1973, C 138 (entered into force 19 June 1976).

¹⁰⁵ *Ibid* art 3.

¹⁰⁶ Iliana Christodoulou and Dimitry A Penstov, *Maritime Work Law Fundamentals: Responsible Shipowners, Reliable Seafarers* (Springer, 2008), 10.

¹⁰⁷ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 20.

6. Health

Regulation 1.2 requires that seafarers hold a medical certificate to verify they are medically fit to perform their duties at sea.¹⁰⁸ The seafarer's fitness is assessed contextually rather than to a prescribed standard to avoid discrimination issues.¹⁰⁹ The term 'medical condition' in paragraph 6 (b) was substituted for 'disease', in order to recognise a broader range of conditions such as obesity.¹¹⁰ There is increasing awareness of mental health¹¹¹ issues affecting seafarers and 'medical condition' should be broad enough to cover conditions such as depression and anxiety.

A medical certificate issued in accordance with the *International Convention on Standards of Training, Certification and Watchkeepers (STWC)*¹¹² is acceptable for the purposes of this regulation.¹¹³ There was a potential conflict between the two conventions as the IMO review of STWC in 2010¹¹⁴ recommended a mandatory standard level of fitness. However the final amendments to the STWC placed the text into a Code B guideline.¹¹⁵

The cross-referencing of instruments in IMO conventions is unusual and this provision reflects the pragmatic nature of the MLC. It simplifies implementation of the instrument by recognising that overlaps occur.¹¹⁶

There are a couple of potential uncertainties arising from this regulation. Firstly, it is not clear if a seafarer may obtain a medical certificate from a practitioner in their home state or if it must be issued by a medical practitioner of the flag

¹⁰⁸ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A1.2.

¹⁰⁹ McConnell, above n 1, 251.

¹¹⁰ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 21.

¹¹¹ See for example the work done by the seafarer's service Hunterlink Recovery Services which provides support for seafarers visiting and working in Australia who are suffering with mental health problems. <www.hunterlinkservices.org.au>.

¹¹² *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, opened for signature 7 July 1978, STCW (entered into force 28 April 1984).

¹¹³ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A1.2 para 3.

¹¹⁴ International Maritime Organisation, *Conference of Parties to the International Convention on Standards of Training Certification and Watchkeeping for Seafarers 1978*, IMO doc STCW/CONF 2/32 (25 June 2010).

¹¹⁵ McConnell, above n 1, 252.

¹¹⁶ *Ibid.*

state.¹¹⁷ Secondly it is unclear if a ship's doctor may issue a medical certificate or if they will lack the 'full professional independence' required by paragraph 4.¹¹⁸

7. Training

Regulation 1.3's purpose is to ensure that seafarers are trained or qualified to carry out their duties on board ship. The regulation does not have any Code or Guidelines. The ILO's role in the technical aspects of training is reduced and transferred to the mandatory instruments of the IMO,¹¹⁹ including the STWC.¹²⁰

8. Recruitment

The details of the Code and Guidelines in regulation 1.4, are largely drawn from the *Recruitment and Placement of Seafarers Convention*¹²¹ and are among the most complex in the MLC. The main concerns for seafarers regarding recruitment and placement services are; that they have largely been unregulated; they engage in blacklisting;¹²² charge large fees for access to employment and place a barrier between the seafarer and their employer which creates ambiguity over liability and responsibility.¹²³

The purpose of this regulation is to ensure seafarers have access to an efficient and well-regulated recruitment placement system. Seafarers must not be charged for finding employment; seafarer recruitment and placement services operating in a Member's territory must comply with the Code. Flag states must require that shipowners using recruitment services in territories in which the MLC does not apply ensure the services conform to the standards in the Code.¹²⁴ This means a

¹¹⁷ Ibid 257.

¹¹⁸ Ibid.

¹¹⁹ Ibid 258.

¹²⁰ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) regulation 1.3 para 3.

¹²¹ *Recruitment and Placement of Seafarers Convention* 1996, opened for signature 22 October 1996, C179, (entered into force 22 April 2000) as discussed in the Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 22.

¹²² Blacklisting is where a seafarer's name is put on a list of seafarers who are not good employees and circulated among all the seafarer recruitment agencies in their country. It is used as a form of discipline to ensure they behave when they are at sea.

¹²³ International Labour Organisation, *Handbook: Guidance on implementing the Maritime Labour Convention 2006 - Model National Provisions* (International Labour Office, 2012), 12.

¹²⁴ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), regulation 1.4 para 1.

shipowner can find themselves penalised for using such services from a non-ratifying state that do not meet the requirements of the MLC.¹²⁵

The Code and Guidelines are detailed as they cover both public and private placement services. Private recruitment placement services are to be regulated by the member state's competent authority.¹²⁶ It is worth noting that Germany and Australia submitted the amendment to Standard A1.4 paragraph 2: 'recruitment and placement services...whose *primary* purpose is the recruitment and placement of seafarers' (emphasis added).¹²⁷ This wording was in response to members' concerns that regulation of employment agencies, who also recruit workers for non-maritime professions, should not be undertaken by a maritime regulatory authority.¹²⁸

Standard 5(a)(c)(vi) requires that placement services establish a system of protection to compensate seafarers for monetary loss. McConnell et al submit that this is an indirect method of creating a level playing field for quality shipping.¹²⁹ Monetary loss is not defined in the MLC but if it includes damages for breach of contract or non-payment of wages, the manning service may be jointly and severally liable for the actions of shipowners. Therefore manning services may avoid placing seafarers on ships which are high risk or likely to fail to meet their requirements under the MLC.¹³⁰

Finally, members should advise their nationals on possible problems of signing on to work on a ship which flies the flag of a state which has not ratified the MLC.

B *Title 2 Conditions of Employment*

There are eight regulations in this title which cover; employment agreements, wages, hours of work, leave entitlement, repatriation, compensation, manning levels and career development. Each of these is considered below.

¹²⁵ McConnell, above n 1, 82.

¹²⁶ Australia's competent authority is the Australian Maritime Safety Authority.

¹²⁷ McConnell, above n 1, 269.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

9. *Employment Agreements*

The requirement for a Seafarer's Employment Agreement (SEA) in regulation 2.1 should be considered the 'heart' of the MLC.¹³¹ The SEA must be in a clearly written legally enforceable agreement consistent with the Code,¹³² to ensure that seafarers have a fair employment agreement. The seafarer must be given the opportunity to review and seek advice on the SEA before entering the contract.¹³³ Standard A2.1 (1)(b) requires that non-employees should also have an SEA to prevent shipowners 'contracting out' of the MLC's requirements.¹³⁴

In the past, the engagement of seafarers has been subject to coercion and abuse.¹³⁵ The SEA is intended to prevent this by providing clear information to seafarers, shipowners, flag state inspectors and port state inspectors alike in order to demonstrate compliance with the MLC.¹³⁶

10. *Wages*

Regulation 2.2's purpose is to ensure that seafarers are paid for their services.¹³⁷ Seafarers must be paid at least monthly and be enabled to transmit their earnings to their families.¹³⁸ The issue of non-payment of wages was the single biggest source of complaints by seafarers from foreign flagged ships to the Australian Maritime Safety Authority in 2014.¹³⁹

11. *Hours of Work and Rest*

Regulation 2.3's purpose is to ensure that seafarers have regulated hours of work or hours of rest.¹⁴⁰ Both work hours and rest hours are defined in Standard A2.3

¹³¹ McConnell above n 1, 278.

¹³² *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) title 2 reg 2.1.

¹³³ *Ibid.*

¹³⁴ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 23.

¹³⁵ High Level Tripartite Working Group on Maritime Labour Standards, 'Final Report TWGMLS/2004/19' (2004).

¹³⁶ International Labour Organisation, above n 78, 18.

¹³⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) reg 2.2.

¹³⁸ *Ibid* standard A2.2.

¹³⁹ 25% of complaints were related to wages, Australian Maritime Safety Authority, 'Port State Control Report Australia' (2014), 8.

¹⁴⁰ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), reg 2.3.

(a) and (b). Rest hours do not include ‘short breaks’.¹⁴¹ The maximum number of hours that a seafarer is permitted to work is: 72 hours in a seven-day period or 14 hours in a 24-hour period.¹⁴² The European Working Time Directive prescribes a maximum of 48 working hours in a seven-day period.¹⁴³ This does not apply to seafarers they are subject to a separate working time directive that prescribes a maximum of 72 working hours in a seven-day period.¹⁴⁴ It is beyond the scope of this paper to discuss European Union decisions, but it is useful to note that, globally, seafarers are expected to work considerably longer hours than other workers.

The daily hours of work or daily hours of rest of each seafarer must be recorded to allow monitoring of compliance.¹⁴⁵ The standards do allow a degree of flexibility. A member may permit exceptions to the limits set out in the regulation for those working on short voyages or for those who have longer leave periods.¹⁴⁶ Additionally, these limits do not apply in emergency situations including providing assistance to others in distress at sea.¹⁴⁷ This regulation applies to all seafarers.¹⁴⁸

12. Annual Leave and Shore Leave

Regulation 2.4 is concerned with seafarers’ entitlement to leave. Seafarers should be given 2.5 days paid annual leave for each month worked.¹⁴⁹ They must also be

¹⁴¹ Ibid standard A2.3, 1 (b).

¹⁴² Ibid standard A2.4, 5(a).

¹⁴³ *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time* [2003] OJ L299/009.

¹⁴⁴ *Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners’ Association (ECSA) and the Federation of Transport Workers’ Unions in the European Union (FST) - Annex: European Agreement on the organisation of working time of seafarers* [1999] OJ L 167/0037.

¹⁴⁵ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), standard A2.3, 12.

¹⁴⁶ Ibid standard A2.3, 13.

¹⁴⁷ Ibid standard A2.3, 14.

¹⁴⁸ Some governments had expressed a desire to exclude Masters from the ‘hours of rest requirement’. See Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 24.

¹⁴⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A2.4(2).

granted shore leave to benefit their health and well-being.¹⁵⁰ The importance of shore leave will be addressed in Chapter Two.

13. *Repatriation*

Regulation 2.5 deals with repatriation of seafarers. Seafarers have a right to return home at no cost to themselves under the conditions set out in the Code.¹⁵¹ These conditions include; if the seafarer's employment agreement expires while they are abroad; when the seafarer's employment agreement is terminated either by the shipowner or the seafarer (for justified) reasons; or the seafarer is unable to carry out their duties or be expected to carry out their duties in the circumstances.¹⁵² Advance payment by seafarers towards the cost of repatriation is prohibited.¹⁵³

The hardship suffered by seafarers when abandoned is a major concern for the ILO. However, governments expressed concern that the requirements of the *Repatriation of Seafarers Convention (Revised) 1987* (No 166) were too prescriptive.¹⁵⁴ Therefore those requirements were placed in, the non-binding, Part B of the Code instead to provide guidance to member states.¹⁵⁵

14. *Compensation*

Regulation 2.6's purpose is to ensure that seafarers are compensated when a ship is lost or has foundered. Seafarers are entitled to compensation for injury, loss or unemployment.¹⁵⁶ The standard reflects the requirements for indemnification found in the *Unemployment Indemnity (Shipwreck) Convention 1920* (No 8).¹⁵⁷ Guideline B2.6.1 provides that the total indemnity paid for unemployment may be limited to 2 months.

15. *Manning Levels*

¹⁵⁰ Ibid reg 2.4.

¹⁵¹ Ibid reg 2.5.

¹⁵² Ibid standard A2.5, 1.

¹⁵³ Ibid standard A2.5, 3.

¹⁵⁴ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004).

¹⁵⁵ Ibid.

¹⁵⁶ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A2.6, 1.

¹⁵⁷ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 26.

Regulation 2.7 is concerned with manning levels to ensure that seafarers work on board ships with sufficient personnel for the safe, efficient and secure operation of the ship. The regulation consolidates the *Seafarers' Hours of Work and the Manning of Ships Convention, 1996* (No 180).¹⁵⁸ The competent authority will determine the minimum safe manning level and when doing so should take into account principles in applicable international instruments, particularly those of the IMO.¹⁵⁹

16. *Career Development*

Regulation 2.8 refers to career and skill development and promoting employment opportunities for seafarers. It consolidates the *Continuity of Employment (Seafarers) Convention 1976* (No 145).¹⁶⁰ This is not a flag State obligation but is a 'labour-supply State responsibility.'¹⁶¹ Although the provisions appear uncontentious there were concerns at the PTMC meeting that it was not appropriate that one sector of the workforce should be dealt with differently from other workers.¹⁶² The final report acknowledged these concerns but left the provision unamended.¹⁶³

C *Title 3 Accommodation, Recreational Facilities, Food and Catering*

Title 3 covers accommodation, recreational facilities food and catering. It only has two regulations but the standards and guidelines are comprehensive.

3. *Accommodation and Recreation*

Regulation 3.1 and the accompanying code which provides the minimum required for accommodation and recreational facilities is lengthy and technically detailed. For example the furniture provided for officers' sleeping rooms is specified, including the volume of the clothes locker.¹⁶⁴ Interestingly the two conventions

¹⁵⁸ Ibid.

¹⁵⁹ *Maritime Labour Convention*, opened for signature 23 February 2006 , MLC 2006, (entered into force 20 August 2013) standard A2.7.

¹⁶⁰ International Labour Conference, 94th (Maritime) sess, *Report of the Committee of the Whole* ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006), 61.

¹⁶¹ McConnell, above n 1, 331.

¹⁶² Ibid.

¹⁶³ International Labour Conference, 94th (Maritime) sess, *Report of the Committee of the Whole* ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006).

¹⁶⁴ *Maritime Labour Convention*, opened for signature 23 February 2006 , MLC 2006, (entered into force 20 August 2013), title 3, standard A3.1, 9(n).

which are consolidated by this regulation had not been widely ratified.¹⁶⁵ The explanatory notes to the draft MLC explain that this regulation is concerned with shipboard matters which will be addressed in the Maritime Labour Certificate¹⁶⁶ rather than social welfare provisions which are dealt with in Title 4.¹⁶⁷

There is no tonnage restriction specified in Title 3 which means that the regulations will impact on the design and construction of a large group of ships.¹⁶⁸ Ships less than 200 gross tonnage may be exempted by the member, after consultation with the shipowners' and seafarers' organisations, from the requirements of paragraphs 7(b) (requirements for air-conditioning), 11(d) (sleeping room to have a washbasin with hot and cold running water) and 13 (laundry facilities) and paragraph 9(f) (minimum floor area for single berth sleeping rooms) and (h) to (l) inclusive (minimum floor area for twin berth sleeping rooms) with respect to floor area.¹⁶⁹

4. *Food and Catering*

Regulation 3.2 and the accompanying Code relate to Food and Catering.¹⁷⁰ The purpose is to ensure that seafarers have access to good quality food and drinking water provided under regulated hygienic conditions. The food provided must take into account the differing cultural and religious backgrounds of the seafarers and be provided free of charge during the period of engagement.¹⁷¹

Standard A3.2 requires that shipowners must ensure that ships' cooks are trained and qualified in accordance with the member's laws and regulations.¹⁷² This provision is not located in Title 1 as may be expected. The commentary to the draft noted that it was not settled where the provision relating to the training of

¹⁶⁵ *Accommodation of Crews Convention (Revised)* opened for signature 18 June 1949, CO92 (entered into force 29 January 1953) and *Accommodation of Crews (Supplementary Provisions) Convention*, opened for signature 30 October 1970, C133 (entered into force 27 August 1991).

¹⁶⁶ This is discussed in Title 5.

¹⁶⁷ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 26.

¹⁶⁸ McConnell, above n 1, 340.

¹⁶⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), reg 3.1, paragraph 20.

¹⁷⁰ *Ibid* reg 3.2.

¹⁷¹ *Ibid*.

¹⁷² *Ibid* standard A3.2, 5.

ships' cooks would be placed¹⁷³ However, Regulation 1.3 (Training and Qualifications) transfers training matters to the IMO because the existing *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* (STCW)¹⁷⁴ deals comprehensively with seafarer training. The convention does not contain provisions on the training of ships' cooks and the IMO did not agree to develop the required standards. Therefore, the required standards for training of ships' cooks remain in Title 3.¹⁷⁵

D *Title 4 Health Protection, Medical Care, Welfare and Social Security Protection*

Title 4 contains five regulations concerned with both on-board and on-shore matters. The regulations deal with access to and financial responsibility for medical care, health protection, welfare ashore and social security.

6. *Medical Care*

Regulation 4.1 requires that seafarers' health is adequately protected and that they have access to prompt and adequate medical care whilst working on board. Additionally, members must ensure that seafarers in its territory have access to medical facilities on shore. This medical care should be provided at no cost to the seafarer (in principle)¹⁷⁶ and should be comparable (as far as possible) to the medical care available to workers ashore.¹⁷⁷

7. *Financial compensation for illness or injury*

Regulation 4.2 provides that seafarers have a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death arising from their employment.¹⁷⁸ The regulation is

¹⁷³ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 28.

¹⁷⁴ *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, opened for signature 7 July 1978, STCW (entered into force 28 April 1984).

¹⁷⁵ McConnell, above n 1, 259.

¹⁷⁶ 'in principle' was inserted as it was considered that the provision of free medical care could be problematic in certain circumstances. See Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 29.

¹⁷⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), reg 4.1

¹⁷⁸ *Ibid* reg 4.2.

intended to address shorter term social welfare needs¹⁷⁹ reflecting two existing conventions.¹⁸⁰ Paragraph 4 in standard A4.2 limits the time that a shipowner must pay wages to a sick seafarer who is no longer on board to 16 weeks which corresponds with the amount in *Shipowners' Liability (Sick and Injured Seamen) Convention* (1936).¹⁸¹ The more recent *Social Security (Seafarers) Convention (Revised)*(1992),¹⁸² set the length of time to 12 weeks. The longer limitation period reflects the need for the MLC to adequately protect seafarers' rights rather than retaining the status quo.

8. *Occupational Safety and Health*

Regulation 4.3's purpose is to ensure that seafarers' work environment on board ships promotes occupational safety and health. Much of text is drawn from *Prevention of Accidents (Seafarers) Convention*,¹⁸³ which focusses on the training and equipment provided to seafarers to perform their duties safely.¹⁸⁴ In addition the regulation requires that accidents are reported. This is part of a wider system to monitor on-board compliance.¹⁸⁵

9. *Shore-based Welfare Facilities*

Regulation 4.4 requires that each Member shall ensure that shore-based welfare facilities (where they exist) are easily accessible. In addition the Member shall promote the development of welfare facilities to provide ships that are in its ports with access to adequate services.¹⁸⁶ The commentary to the draft MLC remarks

¹⁷⁹ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 30.

¹⁸⁰ *Shipowners' Liability (Sick and Injured Seamen) Convention*, opened for signature 24 November 1936, C55 (entered into force 29 November 1939) and *Social Security (Seafarers) Convention (Revised)*, opened for signature 9 October 1987, C165 (entered into force 2 July 1992).

¹⁸¹ *Shipowners' Liability (Sick and Injured Seamen) Convention*, opened for signature 24 November 1936, C55 (entered into force 29 November 1939).

¹⁸² *Social Security (Seafarers) Convention (Revised)*, opened for signature 9 October 1987, C165 (entered into force 2 July 1992).

¹⁸³ *Prevention of Accidents (Seafarers) Convention*, opened for signature 30 October 1970, C134 (entered into force 17 February 1973).

¹⁸⁴ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 30.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), reg 4.4.

that many governments wanted to ensure that this did not impose any financial obligations on them.¹⁸⁷

Shore-based welfare facilities are crucial for the mental well-being of seafarers. A recent survey found that seafarers are less than happy with the provision of welfare facilities ashore.¹⁸⁸ Some seafarers reported that they had never seen any welfare facilities and that some felt that they were being ‘cheated rather than helped’ with overpriced internet access and ‘rip-off phone fees’.¹⁸⁹ However other seafarer missions were highly praised and seen as an important resource, providing a welcome break from life on-board. One of these is Fremantle’s Flying Angel Club which was named “International Seafarers Centre of the Year” by the ILO in 2014.

10. *Social Security*

The purpose of Regulation 4.5 is to ensure that seafarers have access to social security protection “to the extent provided for in its national law”.¹⁹⁰ This is consistent with the *Merchant Shipping (Minimum Standards) Convention*,¹⁹¹ which refers to “appropriate social security measures” but leaves the details of the law to the flag state.¹⁹²

This regulation is intended to complement regulation 4.2 not duplicate it. The commentary to the draft MLC highlights some significant concerns with respect to workers who may not be eligible to be covered by the flag state’s social security system and whose country of residence may offer no social security protection.¹⁹³ The High Level Working Group failed to reach an agreement on this matter before the draft MLC was published and provided an addendum to the explanatory notes stating:

¹⁸⁷ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 31.

¹⁸⁸ KVH Media Group, 'Crewtoo Seafarers Happiness Index' (2015).

¹⁸⁹ *Ibid* 17.

¹⁹⁰ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), reg 4.5 (1).

¹⁹¹ *Merchant Shipping (Minimum Standards) Convention*, opened for signature 29 October 1976, C147 (entered into force 28 November 1981) art 2(a)(ii).

¹⁹² Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 32.

¹⁹³ *Ibid*.

For example, the State in which the seafarer is ordinarily resident may not have ratified the Convention or it may not be able to provide protection in the branch concerned. This is a serious gap in the social security protection coverage for seafarers and can undermine the idea of a level playing field. In such cases, the country of residence and/or the flag State, as the case may be, must “give consideration” to the various ways in which comparable benefits will be provided in accordance with national law and practice. Methods for providing comparable benefits are suggested in *paragraph 2 of Guideline B4.5*. This provision means that Members should seriously consider ways of providing benefits that are comparable to those that are missing and to strive to provide such benefits to the extent that this is feasible and in accordance with their national law and practice.¹⁹⁴

Therefore, standard A4.5 is flexible in the methods that may be adopted to ensure social welfare benefits are provided. For example paragraph 7 permits the protection to be contained in private schemes and/or collective bargaining agreements.¹⁹⁵

E *Title 5 Compliance and Enforcement*

Title 5 is concerned with compliance and enforcement in line with the Geneva Accord 2001.¹⁹⁶ The regulations specify each Member’s responsibility to implement and enforce the principles and rights set out in the Articles and Titles 1-4 of the MLC.¹⁹⁷ The title is divided into three core regulations and ‘sub-regulations’.¹⁹⁸ These are Flag State responsibilities¹⁹⁹, Port State responsibilities²⁰⁰ and Labour-supplying State responsibilities.²⁰¹ Title 5 builds on the provisions found in the *Merchant Shipping (Minimum Standards) Convention*²⁰² with respect to Port State control and consolidates the provisions of

¹⁹⁴ Ibid Addendum to the Commentary on the recommended draft of the Maritime Labour Convention concerning Regulation 4.5: Social Security.

¹⁹⁵ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A4.5 para 7

¹⁹⁶ McConnell, above n 1, 78.

¹⁹⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) title 5.

¹⁹⁸ McConnell, above n 1, 476.

¹⁹⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), reg 5.1.

²⁰⁰ Ibid, reg 5.2.

²⁰¹ Ibid, reg 5.3.

²⁰² *Merchant Shipping (Minimum Standards) Convention*, opened for signature 29 October 1976, C147 (entered into force 28 November 1981).

the *Labour Inspection (Seafarers) Convention*.²⁰³ In addition it establishes a certification system to ensure ongoing compliance which reflects the certificate-based system used by the IMO for conventions such as the *International Convention for the Safety of Life at Sea* (SOLAS) and the *International Convention for the Prevention of Pollution by Ships* (MARPOL).²⁰⁴

According to Devlin,²⁰⁵ there are several unique elements in comparison with previous ILO Conventions. The first element is the use of Recognised Organisations (ROs)²⁰⁶ for inspection and certification of ships.²⁰⁷ Secondly, it extends the requirement for flag state inspections to all ships regardless of their gross tonnage.²⁰⁸ It establishes a certification system which requires shipowners to comply with the provisions of the MLC. It amplifies the port state control provisions in the *Merchant Shipping (Minimum Standards) Convention*,²⁰⁹ and highlights the importance of regional port state control by extending the power of detention for serious or repeated breaches of requirements or threats of risk to safety. It emphasises the context of the ILO's supervisory system by requiring the member state to include information about its system for inspection and certification in its reports to the ILO.²¹⁰

1 Responsibilities of Flag States

Beginning with the Flag State Responsibilities, regulation 5.1 requires that each member implements its responsibilities under the MLC with respect to ships that fly its flag.²¹¹ This is to be implemented via a system for inspection and certification of maritime labour conditions.²¹² The inspections may be delegated

²⁰³ *Labour Inspection (Seafarers) Convention*, opened for signature 22 October 1996, C178 (entered into force 22 April 2000).

²⁰⁴ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 33.

²⁰⁵ Moira McConnell, above n 1, 72.

²⁰⁶ Recognised Organisations are primarily ship classification societies which play an invaluable role in the operation of open registries. Ibid 479.

²⁰⁷ Ibid.

²⁰⁸ Ibid. *Labour Inspection (Seafarers) Convention 1996* (178) does not apply to ships under 500 gross tonnage.

²⁰⁹ *Merchant Shipping (Minimum Standards) Convention*, opened for signature 29 October 1976, C147 (entered into force 28 November 1981).

²¹⁰ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), regulation 5.1.1.5.

²¹¹ Ibid, regulation 5.1.1.1.

²¹² Ibid, regulation 5.1.1.2.

to a recognised organisation²¹³ but the member remains responsible for the inspection and certification of the living and working conditions of the seafarers on the ships that fly its flag.²¹⁴

Ships over 500 gross tonnage engaged in international voyages and ships over 500 gross tonnage flying the flag of the member and operating from or between ports in another country²¹⁵ must carry and maintain a maritime labour certificate²¹⁶ and a declaration of maritime labour compliance.²¹⁷ The certification and declaration must relate to the requirements of national law as the mandatory details of the MLC will be given effect by integrating into domestic law.²¹⁸

Certification gives rise to rights and obligations between ratifying members rather than between the member and the ILO.²¹⁹ It also confers rights on shipowners in that they have the right to be absolved from port state inspections if they are certified.²²⁰

Regulation 5.1.4 requires the Member verifies compliance with the MLC via regular²²¹ inspections of ships that fly its flag.²²² Regulation 5.1.5 obliges Members to ensure that ships that fly its flag to have on-board procedures for handling seafarer complaints. It is prohibited for a seafarer to be victimised for filing a complaint which is not ‘manifestly vexatious or maliciously made’.²²³ Victimisation is defined as ‘any adverse action taken by any person’.²²⁴

Shipowners and masters can be liable to fines and/or imprisonment for breaches of the MLC regulations.²²⁵ In Australia, the *Navigation Act 2012* provides civil

²¹³ Ibid, regulation 5.1.2.

²¹⁴ Ibid, regulation 5.1.1.3.

²¹⁵ Ibid, regulation 5.1.3.1.

²¹⁶ Ibid, regulation 5.1.3.3.

²¹⁷ Ibid, regulation 5.1.3.4.

²¹⁸ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 35.

²¹⁹ McConnell, above n 1, 80.

²²⁰ Ibid.

²²¹ Defined as no less than every 3 years. *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) regulation 5.1.4.4.

²²² Ibid regulation 5.1.4.

²²³ Ibid standard A5.1.5.3.

²²⁴ Ibid.

²²⁵ Ibid, regulation 5.1.5.2.

and criminal penalties for breaches.²²⁶ To date there have been no reported cases of prosecution in Australia.²²⁷ However, in the UK, in *Wilson v Secretary of State for Transport*²²⁸ a seafarer employed as a trainer on a cruise vessel had complained to senior figures in the company about the way it was run. He was subsequently sent home from the voyage and dismissed. He brought a complaint to the Maritime and Coastal Agency²²⁹ claiming that he had suffered a detriment as a result of complaining of a breach of MLC regulations. His claim failed because the court held his grievances were not related to the MLC but the case is interesting as it highlights how shipowners and masters may find themselves exposed to fines or imprisonment for incorrectly handling employee complaints.²³⁰

The final ‘sub-regulation’ in regulation 5.1 is the obligation on a Member to hold a public official inquiry into any ‘serious marine casualty, leading to injury or loss of life that involves a ship that flies its flag.’²³¹ There are no Code provisions. It seems unlikely that the regulation will be developed as it refers to matters which are already the subject of IMO instruments.²³²

2 Responsibilities of Port States

The purpose of port state responsibilities is ‘to enable each Member to implement its responsibilities under this Convention regarding international cooperation in the implementation and enforcement of the Convention standards on foreign ships’²³³ It provides that *every* foreign ship (emphasis added) entering the port of a Member may be inspected for the purpose of reviewing compliance with the

²²⁶ *Navigation Act 2012* (Cth).

²²⁷ This is unsurprising because there are very few registered ships in Australia. There are only 8 registered bulk carriers and 30 registered cargo vessels. Australian Maritime Safety Authority, *List of Registered Ships* (2 November 2015) <www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships>.

²²⁸ *Wilson v Secretary of State for Transport* [2015] All ER (D) 04.

²²⁹ The United Kingdom’s governmental regulatory body responsible for enforcing the MLC.

²³⁰ Heidi Watson, *Enforcing the Maritime Labour Convention - first employment case leads the way* (18 September 2015) <www.clydeco.com/insight/updates/view/enforcing-the-maritime-labour-convention-first-employment-case-leads-the-way>.

²³¹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), regulation 5.1.6.

²³² McConnell, above n 1, 545 citing the IMO’s Casualty Investigation Code and other regulations under SOLAS, MARPOL and the Load Line Convention.

²³³ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) regulation 5.2.

MLC.²³⁴ This reflects the ‘no more favourable treatment’ requirement of the MLC,²³⁵ and applies equally to ships flying the flags of ratifying and non-ratifying Members to prevent ships registered in non-ratifying states from gaining an economic advantage.

Regulation 5.2.1 paragraph 2 expects each Member to accept the maritime labour certificate and maritime labour declaration of compliance as prima facie evidence of compliance with the requirements of the MLC. The explanatory notes to the draft MLC give an indication of the meaning of ‘prima facie’ evidence.

This term, also used in Regulation 5.1.1, paragraph 4, is a legal term that has been defined as “evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive”. Essentially this captures the legal nature of the initial port state control action under other maritime Conventions and is a central feature in the balance struck in the certification system between differing interests, including the supremacy of flag state jurisdiction over matters on ships that fly its flag. The consequence of this is explained in paragraph 2: the inspection must be limited to a review of the maritime labour certificate and the declaration of labour compliance, “except in the circumstances specified in the Code”.²³⁶

The accompanying Code to regulation 5.2 explains when and how a detailed inspection may be carried out. It further explains the obligations on the port state authority in circumstances where the working and labour conditions are found not to conform including preventing the ship from proceeding to sea.²³⁷ This is a powerful tool to ensure that ships comply. In 2014, AMSA detained 17 ships for breaches of the MLC.²³⁸

Regulation 5.2.2 is concerned with how the port state authority deals with onshore seafarer complaints by requiring they report complaints to the authorities of the flag state. The explanatory notes to the draft MLC highlight the principle of “international comity” where courts decline to hear matters where there is a more appropriate judicial authority. Therefore as the MLC sits within the framework of

²³⁴ Ibid regulation 5.2.1.

²³⁵ Ibid art VI para 7.

²³⁶ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 38,39.

²³⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), standard A5.2.1 paragraph 6.

²³⁸ Australian Maritime Safety Authority, above n 119, 9.

UNCLOS,²³⁹ the more appropriate judicial or administrative bodies are those of the flag State.²⁴⁰

3 *Responsibilities of Labour Supplying States*

The final regulation in Title 5 has the purpose of ensuring that each Member implements its responsibilities under the MLC related to seafarer recruitment and placement and the social protection of its seafarers.²⁴¹ The commentary to the draft MLC noted that seafarers expressed some concern about the concept of States other than flag States having recognised responsibilities for seafarers' conditions of work. The opening words of the Regulation ("Without prejudice to ...") seek to address this concern by recognizing the primacy of flag state responsibility.²⁴²

The Code requires that each Member establishes a system of inspection and monitoring of licences for seafarer recruitment and placement services. Australia had expressed concern in the ILO discussions about the requirement to create a regulatory framework as such services 'barely exist' in Australia.²⁴³ However, following advice from the ILO, the government representative was satisfied that this would not be required in Australia.²⁴⁴

VI CONCLUSION

This chapter has provided the background and development of the MLC including the need for, and purpose of, this convention. By telling the 'story' of the MLC and detailing its provisions, this chapter has shown that the MLC is a comprehensive and flexible convention. It has been welcomed by shipowners, flag states and port states alike. To date, it has been ratified by 67 countries,

²³⁹ *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994).

²⁴⁰ Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 41.

²⁴¹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), regulation 5.3.

²⁴² Preparatory Technical Maritime Conference, *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft*, ILO Doc PTMC/04/2 (13-24 September 2004), 41.

²⁴³ International Labour Conference, 94th (Maritime) sess, *Report of the Committee of the Whole* ILO Doc ILC94-PR7(Part I)-2006-02-0376-1-En.doc (7 February 2006) para 55.

²⁴⁴ *Ibid* para 1150.

including many FOC states, comprising 80% of the world's gross tonnage.²⁴⁵ The next chapter will examine its limitations and impact on seafarers.

²⁴⁵ International Labour Organisation, *Maritime Labour Convention 2006*
<<http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>>.

CHAPTER TWO

I INTRODUCTION

This chapter evaluates the impact of the MLC by discussing academic opinion from published articles coupled with empirical research results. The empirical research is in the form of semi-structured interviews conducted with stakeholders from the maritime industry in Western Australia. The general consensus is that the MLC is a positive step to improving the living and working conditions of seafarers but until it is consistently enforced globally it will allow unethical ship operators to avoid their responsibilities.

A *Method of Research*

As the MLC is a relatively new convention there is little published data measuring its effectiveness. Therefore, I interviewed a small sample of stakeholders in the maritime industry. The participants were selected for their particular experience and knowledge about the MLC. The research was granted ethics approval by the Human Research Ethics Committee at Murdoch University.²⁴⁶

Interviews were conducted with the following participants from Australia:²⁴⁷

- Mr David Harrod FNI, Linden Marine Consultants. Mr Harrod's roles have included: ship's officer, marine surveyor, nautical college lecturer and administrator and maritime regulator. He served on the Australian Government's Ships of Shame enquiries and the International Transport Federation's (ITF) IConS Commission.
- Cpt John Hoogerwaard, Fremantle Pilots. Cpt Hoogerward has over 27 years' marine industry experience. His roles have included: ship's officer trading domestically and internationally, a dredge master; and an offshore oil and gas operator. He has been a marine pilot/load master/cargo surveyor since 2009.
- Cpt Reza Vind, Manager, Ship Safety – West, Australian Maritime Safety Authority (AMSA). Cpt Vind has been in this role for 24 years and has a

²⁴⁶ Project number 2015/090.

²⁴⁷ Due to time restraints there was not the opportunity to follow up all other people contacted. For example the ITF representative was on long service leave and unavailable for interview until after November 2015. However, although the group of interviewees is small, their responses were highly informative and provide valuable insight into the impact of the MLC on seafarers so far.

wealth of knowledge in the area of maritime safety. He is also the Chair of the Western Australian branch of the Company of Master Mariners.

In addition, three ship's officers from foreign flagged ships on shore leave at the Flying Angel Club in Fremantle kindly consented to be interviewed: Captain Julius V Nieto; Engineer Edward P Asas and 2nd Officer Monalisa Alejandrino.

While the same general questions²⁴⁸ were asked of all participants, their different perspectives were allowed to develop by adopting a conversational style of interview. These interviews were voice-recorded and transcribed.

II THE AIMS OF THE MLC

As explained in Chapter One, the two primary aims of the MLC are to ensure comprehensive worldwide protection of the rights of seafarers and to 'level the playing field' for operators by protecting shipowners and countries committed to the protection of seafarers from unfair competition on the part of substandard ships.²⁴⁹ The system of compliance and enforcement should ensure that the MLC is effective in practice by virtue of the 'no more favourable treatment principle'.²⁵⁰

III THE IMPACT OF THE MARITIME LABOUR CONVENTION IN AUSTRALIA

The MLC came into effect in Australia on 20 August 2013. It has been implemented primarily through the *Navigation Act 2012* (Cth) (the *Navigation Act 1912* (Cth) was rewritten partly to give effect to the MLC,²⁵¹) and associated delegated legislation (Marine Order 11).²⁵²

A *Impact on Australian Seafarers*

²⁴⁸ The questions are attached in Appendix II.

²⁴⁹ International Labour Organisation, 'Maritime Labour Convention, 2006 (MLC, 2006) Frequently Asked Questions (FAQ)' (2015), 5.

²⁵⁰ Patrick Bolle, 'The ILO's new Convention on maritime labour: An innovative instrument' (2006) (145) *International Labour Review* 135, 141. See also discussion in Chapter One.

²⁵¹ Commonwealth, Parliamentary Debates, House of Representatives, 19 June 2012, 7028 (Jane Prentice).

²⁵² Australian Maritime Safety Authority, 'Maritime Labour Convention 2006, A Guide to the implementation of the MLC in Australia' (2013), 4. Parts 3-5 of the *Navigation Act 2012* (Cth) deal with MLC related matters.

The impact has been minimal on Australian seafarers because, according to Cpt Vind, ‘we don’t have the same issues as the foreign ships. We don’t have problems with the minimum wage, with the food none of that.’²⁵³ Seafarers working on Australia flagged ships are subject to the *Fair Work Act 2009* (Cth)²⁵⁴ even if the ship is outside the outer limits of the exclusive economic zone and the continental shelf.²⁵⁵ The *Fair Work Act*²⁵⁶ also applies to non-Australian flagged ships if the majority of the crew are Australian.²⁵⁷

The MLC’s application cuts across other seafarer legislation in Australia. The *Fair Work Act* is a direct comparator but applies only to employees²⁵⁸ while the MLC applies to anyone who ‘works in any capacity on board a ship to which this Convention applies’.²⁵⁹ The MLC definition is deliberately broad enough to include a self-employed seafarer²⁶⁰ to prevent shipowners ‘contracting out’ of their MLC obligations.²⁶¹ Potentially this could lead a situation where a self-employed Australian seafarer²⁶² will have workplace rights under the *Navigation Act 2012* but not the *Fair Work Act* because the sections of the *Navigation Act* that give effect to the MLC refer to seafarers not employees.²⁶³ Another domestic regime, which relates to seafarers’ workers’ compensation, the *Seafarers Rehabilitation and Compensation Act*, defines ‘employee’ as a ‘seafarer’.²⁶⁴ It is clear that the *Navigation Act* is intended to apply to seafarers as broadly as the MLC but what is less clear is if the definition of ‘employee’ in the *Seafarers Rehabilitation and Compensation Act* is intended to apply as widely.

B Effect in Australian Waters

²⁵³ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

²⁵⁴ For example, seagoing employees in Australia are covered by the Seagoing Industry Award 2010. <www.fwc.gov.au/documents/documents/modern_awards/pdf/MA000122.pdf>.

²⁵⁵ *Fair Work Act 2009* (Cth), s 34(1).

²⁵⁶ *Ibid.*

²⁵⁷ *Fair Work Regulations 2009* (Cth), reg 1.15b. See also *Fair Work Ombudsman v Pocomwell Ltd [No 2]* (2013) 218 FCR 94.

²⁵⁸ *Fair Work Act 2009* (Cth), s 12.

²⁵⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), art 1, para 1.

²⁶⁰ Jennifer Lavelle, *Maritime Labour Convention* (i-law.com, 2014), 9.8.

²⁶¹ See discussion in Chapter One, Section V (B) (1) Employment Agreements.

²⁶² Self-employed means a person who is working on the ship who is not an employee for example a contractor. See discussion in Chapter One, Section V (B) (1).

²⁶³ *Navigation Act 2012* (Cth), s 55. As does *Marine Order 11 2013* (Cth).

²⁶⁴ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 4.

The Australian Maritime Safety Authority (AMSA) has the power to inspect and detain both Australian and foreign vessels, in an Australian port or internal waters, for breaches of the MLC.²⁶⁵ In 2014, AMSA received 114 MLC complaints about breaches in the living and working conditions on board vessels.²⁶⁶ The complaints came from a variety of sources including, seafarers, other government agencies, seafarer welfare groups, agents, pilots and members of the general public and led to eight vessels being detained. AMSA identified 1652 MLC related deficiencies in 2014 which represented 15.1% of the total deficiencies issued. Seventeen vessels were detained. None of the detained vessels were flagged in Australia.²⁶⁷

The power to order a vessel not to leave port is called detention. Detention is used when the condition of the ship is unseaworthy, the vessel has failed to hold or maintain statutory certificates or when the vessel is being investigated for possible contravention of legislation.²⁶⁸ AMSA publishes the details of all vessels that have been detained on a monthly basis in accordance with the *Navigation Act* and *Marine Order 55*.²⁶⁹ These lists are publically available on the AMSA website.²⁷⁰

Such detentions are costly to shipowners. Not only can the detention cause the vessel to be ‘off-hire’ in a time charter²⁷¹ but appearing on these lists damages the reputation of the shipowner: ‘no charterer will touch you.’²⁷² The effect of Australia’s strict enforcement of global conventions is that ‘bad ships’ don’t come to Australia²⁷³ and shipowners will trade in another sector to avoid Australian waters.²⁷⁴

²⁶⁵ *Navigation Act 2012* (Cth) s 248.

²⁶⁶ Australian Maritime Safety Authority, above n 7, 8.

²⁶⁷ *Ibid.*

²⁶⁸ Australian Maritime Safety Authority, *Compliance and Enforcement Policy*, Version 1, November 2012, 10.

²⁶⁹ *Navigation Act 2012* (Cth) s 336 and *Marine Order 55 (Publication of Information about vessels) 2004* (Cth).

²⁷⁰ For example, Australian Maritime Safety Authority, Ship detention list (May 2015) AMSA <www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/2015/may-2015/index.asp>.

²⁷¹ *Hyundai Merchant Marine Co Ltd v Furness Withy (Australia) Pty (The "Doric Pride")* [2005] EWHC 945 (Comm).

²⁷² Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

²⁷³ *Ibid.*

²⁷⁴ Interview with Cpt John Hoogerwaard, Fremantle Pilots (Fremantle, 14 August 2015).

Australia is renowned for its rigorous port state control. At the time of writing, three vessels have been banned from entering Australian ports for repeated failures to comply with the MLC.²⁷⁵ Two of the interviewed officers remarked on how the port state control in Australia is thorough. According to Cpt Niedo, ‘in Australia they are checking the certification and implementation. Checking the accommodation, checking the food and the water. For the seafarers it is good’.²⁷⁶ Officer Alejandrino said, ‘here in Australia it is stricter’.²⁷⁷ Both officers commented that other countries are more lenient. This supports the concern raised by Michael Kabai that it may be difficult to enforce global compliance with the MLC.²⁷⁸

IV EFFECT ON SEAFARERS GENERALLY

The MLC is described as the ‘4th pillar’²⁷⁹ of the International Maritime Organisation and is praised for having ‘the potential to make a real difference to all seafarers’.²⁸⁰ The MLC is seen as an effective instrument because it combines seafarer rights and principles with specific standards and guidance as to implementation.²⁸¹

Seafarers’ employment conditions should be enhanced through the use of the Seafarer Employment Agreements.²⁸² These agreements are to be signed by both the seafarer and the shipowner with each retaining a signed original. In addition a

²⁷⁵ Australian Maritime Safety Authority, ‘AMSA bans third vessel from Australian ports’ (Media Release, 9 January 2015) .

²⁷⁶ Interview with Cpt Julius V Niedo (Fremantle 30 July 2015).

²⁷⁷ Interview with Monalisa Alejandrino, Second Officer (Fremantle 30 July 2015).

²⁷⁸ Michael Kabai, ‘The Maritime Labour Convention and Open Registries, Hand in Glove or Chalk and Cheese?’ (2015) 30 *International Journal of Marine and Coastal Law* 189.

²⁷⁹ International Labour Organisation, *International Shipping Industry adopts "Geneva Accord"* <http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_007832/lang--en/index.htm>. Along with *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, SOLAS (entered into force 25 May 1980); *International Convention for the Prevention of Pollution from Ships*, opened for signature 2 November 1973, MARPOL (entered into force 2 October 1983); *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*, opened for signature 7 July 1978, STCW (entered into force 28 April 1984).

²⁸⁰ Seafarers International Union, ‘Unions, Employers Praise Maritime Labor Convention Development’ (News Release, 8/20, 20 August 2012)

<www.seafarers.org/news/2012/Q3?ITFandISFCommentonMLC.htm>.

²⁸¹ Bolle, above n 5, 140.

²⁸² Iliana Christodoulou-Varotsi, ‘Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organisation: Limitations and Perspectives’ (2012) 43 *Journal of Maritime Law and Commerce* 467, 478.

copy of the agreement is to be kept on board for inspection.²⁸³ The content of the agreement must contain information about wages, annual leave and conditions for termination.²⁸⁴ Clear information about seafarers' employment conditions must be kept on board.²⁸⁵ These requirements should ensure that seafarers are aware of their rights.²⁸⁶

All the officers who were interviewed stated that their working conditions had improved under the MLC. Comments included, '...if you look at this MLC it improves the working conditions really',²⁸⁷ 'I like this MLC. It's on our side',²⁸⁸ 'It has a big difference before and after MLC',²⁸⁹ and 'our condition on board ship it has a big difference compared to before'.²⁹⁰ Specifically, all officers welcomed the improvement in rest periods.

The increase in the minimum notice period for early termination from 24 hours to 7 days²⁹¹ is a new right given to seafarers by the MLC.²⁹² This was a particular positive for one of the interviewees who said:

We are protected by this MLC because we are protected on board ship. We can use this deterrent because we are under MLC. For example this time we cannot send them home like before. If the captain or chief engineer don't like you, you can be sent home. The MLC is *good* for the seafarer.²⁹³

A further positive new element of the MLC is the establishment of port state welfare boards. This is not compulsory but 'encouraged'.²⁹⁴ The welfare boards' function is to review the adequacy of existing on-shore welfare facilities while assisting those providing the facilities.²⁹⁵ AMSA has established such boards and

²⁸³ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), Standard A2.1.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ Seafarers Rights International, *SRI Annual Review (2013)* <www.seafarersrights.org/sri-annual-review-2013/#rights> .

²⁸⁷ Interview with Cpt Julius V Niedo (Fremantle 30 July 2015).

²⁸⁸ *Ibid.*

²⁸⁹ Interview with Edward P Asas, Ship's Engineer (Fremantle, 30 July 2015).

²⁹⁰ *Ibid.*

²⁹¹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), standard A2.1.

²⁹² Christodoulou-Varotsi, above n 37, 479.

²⁹³ Interview with Edward P Asas, Ship's Engineer (Fremantle, 30 July 2015).

²⁹⁴ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A4.4.

²⁹⁵ *Ibid* guideline B4.4.3.

they have already made a big impact on foreign seafarers who have suffered workplace accidents.²⁹⁶

For example; a foreign seafarer was crushed between the hatch lids and bulk head on a ship in Port Hedland. Both his legs had to be amputated. The Port Hedland and Fremantle Port Welfare Committees worked together to ensure the operators paid for his expenses, visited him in hospital daily and the Fremantle committee's doctor flew home with him when he was well enough to leave. Another seafarer was injured in Port Hedland and lost his foot. The two committees ensured the operators paid for his medical expenses and again the Fremantle committee's doctor accompanied the seafarer back to India. The Port Hedland committee raised \$48,000 and paid off the seafarer's mortgage in Mumbai.²⁹⁷

The Fremantle Port Welfare Committee²⁹⁸ is working to assist seafarers with access to shore leave by communicating with other government authorities such as Customs and Immigration. The main purpose of the committee is to help those authorities better understand the particular issues that seafarers face in order that they have easier access to shore leave.²⁹⁹ Seafarers' access to shore leave is discussed in more detail in section V of this chapter.

V SHORTCOMINGS OF THE MLC

While the MLC has been largely welcomed as an effective tool for protecting seafarers' rights, some commentators have expressed concerns that 'key omissions, loopholes and a lack of enforcement could turn the Convention into little more than an empty promise.'³⁰⁰ Further, the MLC will only translate into

²⁹⁶ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

²⁹⁷ Ibid.

²⁹⁸ As part of my research I attended two of their quarterly meetings. The committee has representatives from AMSA; the Fremantle Port Authority; seafarers' missions; the ITF; local and state government, shipping agents, pilots, Border Force; Department of Agriculture as well as other independent people concerned with seafarer welfare.

²⁹⁹ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

³⁰⁰ Paul J Bauer, 'The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights or an Impediment to True Reform?' (2008) Winter *Chicago Journal of International Law* 643, 647.

improvements for seafarers' living and working conditions 'if it is widely accepted and implemented by states.'³⁰¹

A *Flags of Convenience*

Antigua and Barbuda <input checked="" type="checkbox"/>	Bahamas <input checked="" type="checkbox"/>	Barbados <input checked="" type="checkbox"/>	Belize <input checked="" type="checkbox"/>	Bermuda	Bolivia	Myanmar	Cambodia
Cayman Islands	Comoros	Cyprus	Equatorial Guinea	France 2 nd Register <input checked="" type="checkbox"/>	Georgia	Germany 2 nd Register <input checked="" type="checkbox"/>	Gibraltar <input checked="" type="checkbox"/>
Honduras	Jamaica	Lebanon	Liberia <input checked="" type="checkbox"/>	Malta <input checked="" type="checkbox"/>	Marshall Islands <input checked="" type="checkbox"/>	Mauritius <input checked="" type="checkbox"/>	Mongolia
Netherlands Antilles	North Korea	Panama <input checked="" type="checkbox"/>	Sao Tome & Principe	Sri Lanka	St Vincent & The Grenadines	Tonga	Vanuatu

TABLE A | 'Flags of Convenience' States = ratified the MLC

= has met the flag criteria for a Low Risk Ship (Paris MOU)

The open registries regime permits a country's ship registry to accept registrations of vessels belonging to both nationals and foreigners. This results in the use of flags of convenience.³⁰² UNCLOS requires a link between state and ship but it has not been enforced. As a result open registries have been able to develop, usually as an important revenue raiser for small countries like Panama and Malta. The existence of open registries encourages shipowners to find the registry that is 'convenient' to them in terms of taxes and lax enforcement of laws. The International Transport Workers Federation defines a flag of convenience ship as one that flies the flag of a country other than the country of ownership to take advantage of minimal regulation, cheap registration fees, low or no taxes and the freedom to employ cheap labour from the global labour market.³⁰³ Currently the ITF lists 32 countries as providing flags of convenience:³⁰⁴

The rationale behind the use of open registries is that it is economically beneficial for both the state and shipowner.³⁰⁵ However many of the states that operate open registries have not insisted on shipowners complying with international conventions. As a consequence, many seafarers employed on these vessels have received:

³⁰¹ James Harrison, 'Current Legal Developments International Labour Organization' (2008) *International Journal of Marine and Coastal Law* 125, 133.

³⁰² Kabai, above n 33, 193.

³⁰³ International Transport Workers Federation, *Flags of Convenience*, ITF Global <www.itfglobal.org/en/transport-sectors/seafareres/in-focus/flags-of-convenience-campaign>.

³⁰⁴ Ibid.

³⁰⁵ Kabai, above n 33, 193.

shockingly low wages, live in very poor on-board conditions, and work long periods of overtime without proper rest. They get little shore leave, inadequate medical attention and often safety procedures and vessel maintenance are neglected.³⁰⁶

In addition, shipowners in ‘traditional’ maritime countries have complained that ships operating virtually tax free create unfair competition.³⁰⁷ The MLC seeks to both redress this imbalance and improve the working conditions of seafarers. However it is questionable whether open registries will effectively implement the provisions of the MLC even if they have ratified it.³⁰⁸ This view is based on the fact that many flag of convenience states have ratified previous conventions such as the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL), yet they still ‘top the list when it comes to violation of these conventions’.³⁰⁹

Michael Kabai cites examples of ‘flag of convenience’ vessels detained in the United Kingdom in 2013 for breaches of the MLC.³¹⁰ One of them was a Marshall Islands flagged bulk carrier which had recently been inspected and issued a Maritime Labour Certificate by its flag state despite having rotten food, out of date provisions and a cockroach infestation of the galley and crew accommodation areas.³¹¹ While this incident is an alarming indictment of the flag state, it also demonstrates the effectiveness of the port state inspection regime in enforcing seafarers’ rights.

During the period of January 2015-May 2015, AMSA detained 13 vessels for breaches of the MLC. Seven of the vessels were flagged in flags of convenience states.³¹² The interview participants were asked if they saw a noticeable difference in levels of compliance between flags of convenience and non-flags of

³⁰⁶ Ibid.

³⁰⁷ Ibid 194. Citing R Cole and E Watt, *Ship Registration: Law and Practice* (Taylor & Francis 2013) 56-57.

³⁰⁸ Ibid 195.

³⁰⁹ Ibid.

³¹⁰ Ibid 196.

³¹¹ Nautilus International, *MLC-Certificated Ship had Cockroach Infestation* (4 November 2013) <www.nautilusint.org/en/what-we-say/nautilus-news/mlc-certificated-ship-had-cockroach-infestation/>.

³¹² Australian Maritime Safety Authority, *Monthly Ship Detention Lists* <www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/>. The ship’s flags were: Panama (3), India (2), Marshall Islands (1), Indonesia (1), Singapore (2), Saudi Arabia (1), Cayman Islands (1), Cyprus (2).

convenience states. The respondents generally agreed that currently, the compliance is affected by the operator rather than the flag. One respondent answered ‘I think you get bad ships in either camp. It depends on the operator so much.’³¹³ Another answered, ‘I don’t think so. The statistics suggest that it is not different at all. Honestly it is just the difference between the operators.’³¹⁴

AMSA’s detention lists provide evidence that supports the conclusions drawn by the interviewees. In Europe, the Paris Memorandum of Understanding’s³¹⁵ list of flag states who are deemed ‘low risk’ for non-compliance with safety standards and MLC now includes 11 ‘flag of convenience’ states.³¹⁶ This indicates that their compliance with international conventions is beginning to improve.

B *Shore Leave*

Regulation 2.4 of the MLC requires that seafarers are granted shore leave.³¹⁷ Shore leave is essential for the health of seafarers.³¹⁸ Bauer expresses concern that while the MLC has recognised that shore leave is important it has not ensured that it will be provided. He specifically points to the visa requirements of the United States and Australia which may prevent seafarers obtaining shore leave.³¹⁹

All of the interviewees agreed that shore leave is being denied to seafarers because of security issues around ports following 9/11. Interviewees were asked: ‘Are you aware of a seafarer being denied shore leave because they were not in possession of a visa to enter Australia or any other reason?’ The answers included:

Here in Australia on my previous trips last year one of the reasons on my particular ship was a very short stay in the port. Can’t remember if they were denied but in other countries especially in the United States you are not allowed

³¹³ Interview with Cpt John Hoogerwaard, Fremantle Pilots (Fremantle, 14 August 2015).

³¹⁴ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

³¹⁵ MOU organisations are made up of participating maritime Administrations. Their objective is to eliminate the operation of sub-standard ships through harmonized port state control.

³¹⁶ Paris Memorandum of Understanding, *White List* (1 July 2015) <www.parismou.org/sites/default/files/WGB%20lists%202014.pdf> It should be noted that the listings are based on compliance with ship safety as well as MLC. See Table A.

³¹⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013).

³¹⁸ ‘A very important thing for mental health is the ability for solitude in the crowd’. Interview with David Harrod FNI (Muroch University, 21 July 2015).

³¹⁹ Bauer, above n 55, 654.

to go down the ship get out of the ship without a visa. You are not even allowed to repatriate with no visa in United States. Here in Australia it is not so bad. The fast turnarounds the crew cannot go. Sometimes 7-8 hours. In Australian we have Maritime Crew Visa. The company will arrange it. It is not a problem here. I send the crew list to the company and they arrange the Australian Maritime Visa but in the United States no crew list visa after 9/11. They must have an individual visa and apply in their home country. A lot of seafarers because sometimes they interview and ask questions. They are very strict. Sometimes if you have breached the previous visa you can be denied. It is much worse than other countries even though they are democratic you are not allowed to go down even in the port. I think they think that we are a threat to their security because sometimes there are seafarers who jump ship. It happens especially when they have no visa.³²⁰

I am aware of issues around shore leave in many countries around the world not just Australia and part of it's around security arrangement in ports. And the ability of a seafarer to take an afternoon off and walk down a gangway to go shopping is effectively gone.³²¹

This is about for example in the US we seafarers are supposed to be granted freedom to enjoy our time in port but this time it seems like we are not going into the port. We are not allowed to go on shore. They are the ones who...that's one of the reasons we enjoy our life better than before but this time it seems like we are not welcome to visit the port because we are not allowed to go out. US visa was not issued to us. Supposed to be everyone of us have US visa. I think maybe our company does not provide us with the US visa to enjoy our freedom. We don't have problem in Australia because Flying Angel comes to us and we are very grateful for that. We can come here and relax.³²²

No we don't have any problems because we have to ask permission to our senior officers and if no operations, just can leave. No problem with visa in US.....Ah, just before when I started I was almost in prison I think. This is a bad memory for first-timer! First time to go international and I have a connecting flight in New York and I have been stopped by immigration they saw that my visa is only D supposed to be CID and they told me it was a big offence and it was in detention for 7 hours and it's nice that my flight connection was 8 hours so I

³²⁰ Interview with Cpt Julius V Niedo (Fremantle 30 July 2015).

³²¹ Interview with David Harrod FNI (Muroch University, 21 July 2015).

³²² Interview with Edward P Asas, Ship's Engineer (Fremantle, 30 July 2015).

*hour to get flight. I been asked so many questions about what do I do on board. I think that, I don't know if they see me as a seafarer because I'm a lady and I'm a small person. They don't believe me I think then the agent comes by and asks what I'm doing inside because I have 2 crew with me electrician and chief engineer and they keep asking 'what happened what happened?' our flight will be 1 hour already. I said just wait just wait I will be coming outside soon. I told person I won't be joining US again!*³²³

*There has been at least 5 or 6 occasions where the master has denied shore leave, that is not allowed and we have taken action. That is their right unless there is an emergency they are entitled to come ashore so we have fixed that one. That's catered for. But for visa problems that's a really big problem at the moment. In our meeting (Fremantle Port Welfare Committee) if you remember, one of our objectives of our committee is to bring those issues to the attention of our members and that's why it's so important that our members be diverse and include those people. For example in the case of allowing people to go ashore. All those people, immigration, customs, security, they need to be aware..... September 11 did a lot of damage. They just ruined the seafarers' lives. I don't know which group of people in the world got the worst part of it but I think seafarers must be part of them. They really got the blunt end of things.*³²⁴

*Shore leave. You know what's killed it? Security. It's killed it for all seafarers to the point that I have known ships who are waiting for food and it's sitting on the other side of the fence and they're not allowed to get and they have to leave.*³²⁵

Shore leave is clearly a major issue for seafarers. Locally, the Fremantle Port Welfare committee is addressing it by communicating with the relevant authorities in order to improve seafarers' ability to access shore leave. However there is no requirement that port states reduce or waive visa requirements. Bauer suggests that the ILO should pressure the US and Australia to rework their visa requirements to stop seafarers being deprived of shore leave.³²⁶ It will be helpful to continue to monitor this provision of the MLC to ensure the right to shore leave is not denied to seafarers.

³²³ Interview with Monalisa Alejandrino, Second Officer (Fremantle 30 July 2015).

³²⁴ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

³²⁵ Interview with Cpt John Hoogerwaard, Fremantle Pilots (Fremantle, 14 August 2015).

³²⁶ Bauer, above n 55, 655.

C *Right to Strike*

Bauer criticises the MLC's silence on the right of seafarers to strike.³²⁷ He points out that strike action was used by seafarers in 2006 and 2007 to receive unpaid wages.³²⁸ However, these strike actions took place in ports not at sea. It is arguable that today, under the MLC, those seafarers would have been able to make a complaint to port state control. The MLC gives power to port state control to detain vessels until the wages are paid.³²⁹

While strike action is an acceptable form of asserting labour rights in countries like Australia and the US it is not a globally acceptable practice. For example China does not recognise the right to strike³³⁰ and in the United Kingdom it is illegal on UK registered vessels while at sea.³³¹

The interviewees all shared the view that it is unnecessary to include the right to strike in the MLC. One view is that you cannot create 'a convention that fits absolutely everything because it cannot address different cultures and attitudes... it is better to leave it silent on that matter.'³³² Another view is that, for a seafarer, it is not feasible to use strike action to assert their rights. The ship is not only their workplace but also their home. Therefore if they strike at sea they are only 'hurting themselves'. Rather it is better to use Port State Control and the ITF in order to protect the seafarers' rights.³³³

D *Increased Costs*

Bauer suggests that compliance with the MLC will make shipping more costly due to the medical care and accommodation requirements.³³⁴ However, the interviewees did not agree with this view for a number of reasons. Firstly, as the MLC is tripartite, the shipowners had input so there should not be any

³²⁷ Ibid.

³²⁸ Ibid, 657.

³²⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), standard A5.2.1.

³³⁰ Bauer, above n 55, 657.

³³¹ Ibid.

³³² Interview with David Harrod FNI (Muroch University, 21 July 2015).

³³³ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

³³⁴ Bauer, above n 55, 657.

surprises.³³⁵ Secondly, the good operators already had these types of provisions in place.³³⁶ Thirdly, two interviewees flagged the potential benefits of the MLC to shipowners. They pointed out that if the crew are happy they will be more enthusiastic; work harder; be more careful; and do more maintenance.³³⁷

The ship's master commented he had requested more crew members be employed in order to comply with the Minimum Hours of Rest requirement. He explained when sailing between close ports in Europe that require fast turnarounds due to the volume of traffic they are unable to 'give proper rest time for every officer performing duties'.³³⁸

It will be useful to follow up in the future to see if any operators have conducted a cost-benefit analysis on the MLC, and if so, what they conclude.

E *Abandoned Seafarers*

Christodoulou-Vartosi highlights the absence of protection in the MLC for abandoned seafarers.³³⁹ The original drafters did not include a solution for repatriation of seafarers when the shipowner is unable or refuses to contribute financially.³⁴⁰

This oversight was remedied by amendments to the MLC agreed by the 103rd session of the International Labour Conference on 11 June 2014. The amendments provided a definition of 'where a seafarer is deemed to be abandoned'³⁴¹ and a system of financial security to assist seafarers in the event of their abandonment³⁴² which can be via a social security system, insurance or a national fund.³⁴³

³³⁵ Interview with David Harrod FNI (Muroch University, 21 July 2015).

³³⁶ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

³³⁷ Ibid. Interview with Monalisa Alejandrino, Second Officer (Fremantle 30 July 2015).

³³⁸ Interview with Cpt Julius V Niedo (Fremantle 30 July 2015).

³³⁹ Christodoulou-Varotsi, above n 37, 489.

³⁴⁰ Julia Constanino, Chagas Lessa and Johanna Hjalmarsson, 'Repatriation and financial security for seafarers: amendments to Maritime Labour Convention' (2014) 14(7) *Shipping and Trade Law* 1.

³⁴¹ 'Amendments of 2014 to the Maritime Labour Convention 2006, Approved by the Conference at its one hundred and third session' (Paper presented at the International Labour Conference, Geneva, 2014).

³⁴² Ibid.

³⁴³ Constantino, above n 95, 1.

Bauer was concerned that there would be little appetite for further reforms of the MLC because of the many years of hard work and compromise in finalising it.³⁴⁴ These amendments demonstrate that those fears are unfounded and that the MLC is a flexible working document which can be readily updated.

F *Fishing*

As mentioned in Chapter One, the MLC does not extend to seafarers working in the fishing industry. This express omission will be addressed in Chapter Three.

VI CONCLUSION

All participants in the interviews shared the view that the MLC has the intent of ‘levelling the playing field’ for ship operators and where it is enforced - the MLC has greatly improved the living and working conditions of seafarers. However, the participants expressed concerns over certain countries failing to ratify the MLC³⁴⁵ and the length of time it may take to get the message across that these standards must be adhered to.³⁴⁶ They also drew attention to lax port state control in certain countries.

Port state control is intended to mitigate the behaviour of ‘bad operators’³⁴⁷ but it appears that port state control is not being used consistently. This inconsistency allows operators to avoid their obligations. Where it is applied properly, port state control is highly effective in enforcing the MLC. The only way operators can avoid their obligations is by trading in countries with lax port state control. These are likely to be the same operators who avoid the other IMO conventions. Therefore their potential for business development is restricted. Until, those ‘bad’ operators see the benefits of adhering to the provisions of the MLC it is unlikely to be truly effective in consistently protecting seafarers and creating a level playing field for operators.

Aside from the concerns regarding global enforcement, the MLC appears to have had a positive impact on the living and working conditions of seafarers. In addition, it has led to an increased awareness among seafarers of their rights.

³⁴⁴ Bauer, above n 55, 658.

³⁴⁵ Interview with David Harrod FNI (Muroch University, 21 July 2015).

³⁴⁶ Interview with Cpt Reza Vind, Manager – Ship Safety West, Australian Maritime Safety Authority (Fremantle, 4 August 2015).

³⁴⁷ Ibid.

Compliance with the MLC must continue to be monitored and port states encouraged to consistently enforce MLC provisions to ensure that it continues to meet its intention of improving the employment rights of seafarers.

CHAPTER THREE

I INTRODUCTION

As foreshadowed in Chapter Two, the scope of the MLC does not extend to ‘ships engaged in fishing or in similar pursuits’.³⁴⁸ The ILO determined that the MLC should not try to address the ‘very diverse needs and concerns of the fishing sector’³⁴⁹ and that a separate convention dealing with the particular issues facing fishers would be more suitable. Therefore the ILO drafted the *Work in Fishing Convention* (WIFC).³⁵⁰ However, despite opening for signature in 2007, and sitting alongside the MLC, it was not welcomed in the same way and has not received the required ratifications to enter into force.³⁵¹

This chapter provides a summary of the provisions of the WIFC and discusses the general issues faced by seafarers employed in the fishing industry. It looks at the particular problem of human trafficking for forced labour in the fishing industry using case studies from New Zealand. It then discusses the abuses that occur when fishers are trafficked to work on vessels engaged in illegal, unregulated and unreported fishing (IUU). It concludes by recommending strategies that may help alleviate some of those issues.

II WORK IN FISHING CONVENTION

The WIFC was not the first international Convention attempting to regulate the living and working conditions of fishers. In the 1950s and 1960s the ILO opened for signature:

- *Minimum Age (Fishermen Convention) 1959, (No. 112)*
- *Medical Examination (Fishermen) Convention 1959, (No. 113)*
- *Fishermen’s Articles of Agreement Convention 1959, (No. 114)*
- *Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)*³⁵²

³⁴⁸ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013), art II.

³⁴⁹ International Labour Conference, *Report I (1A) Adoption of an instrument to consolidate labour standards*, 94th (Maritime) Session (2006) note 3 para 15.

³⁵⁰ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force).

³⁵¹ At the time of writing 5 countries have ratified the WIFC, namely; Argentina, Bosnia and Herzegovina, Congo, Morocco and South Africa.

www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333:NO.

³⁵² Ibid.

However, those conventions were not widely supported, particularly by the nations that account for vast majority of fishers and fishing vessels.³⁵³

The WIFC consolidates, extends and updates these conventions to reach a ‘greater number of the world’s fishers’.³⁵⁴ It provides a set of standards concerning the living and working conditions for an estimated 30 million commercial fishers around the world.³⁵⁵ The objective of the WIFC is to:

ensure fishers have decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security.³⁵⁶

A *Similarities between MLC and WIFC*

The WIFC shares many of the features of the MLC. Firstly, it is intended as a framework to cover all aspects of fishers’ living and working conditions.³⁵⁷ Secondly it requires certification for vessels over 24 metres in length and who normally navigate more than 200 nautical miles from the flag state,³⁵⁸ echoing the MLC’s maritime labour certificate.³⁵⁹ Thirdly it adopts port state control as a method of enforcement and includes the ‘no more favourable treatment’ principle found in the MLC.³⁶⁰ Finally, the WIFC has a simplified amendment procedure much like the MLC.³⁶¹

However, it does not follow the ‘all in one’³⁶² structure of the MLC where the regulations are accompanied by compulsory standards and non-binding guidelines in one document. Rather the WIFC has a binding convention, accompanied by

³⁵³ George P Politakis, 'From Tankers to Trawlers: The International Labour Organization's New Work in Fishing Convention' (2008) 39 *Ocean Development and International Law* 119.

³⁵⁴ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force).

³⁵⁵ Politakis, above n 6, 119.

³⁵⁶ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force).

³⁵⁷ Politakis, above n 6, 120.

³⁵⁸ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 41.

³⁵⁹ Although unlike the Maritime Labour Certificate, the WIFC document is not taken as prima facie evidence of compliance. See Politakis, above n 6, 121.

³⁶⁰ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) arts 43-44.

³⁶¹ *Ibid* art 45.

³⁶² Politakis, above n 6, 121.

non-binding recommendations in a separate document.³⁶³ Given that the two conventions are closely related it would have been helpful if the WIFC had followed the more ‘user friendly’ structure of the MLC.³⁶⁴

B *Provisions of the WIFC*

1 *Part I. Definitions and Scope*

The WIFC applies to all fishers and fishing vessels engaged in commercial fishing including fishing on rivers lakes and canals.³⁶⁵ It expressly excludes subsistence fishing and recreational fishing.³⁶⁶ Fisher means every person employed or carrying out an occupation on board any fishing vessel including those paid via a share catch arrangement. It does not include pilots, naval personnel, government employees, shore-based persons carrying out work on a fishing vessel or fisheries observers.³⁶⁷

2 *Part II. General Principles*

Article 8 allocates responsibilities to the fishing vessel owner, the skipper and the crew. Firstly, the fishing vessel owner is to ensure the skipper is provided with the necessary resources and facilities to comply with their obligations. Secondly, the skipper has responsibility for the safety of the fishers on board and the safe operation of the vessel. The vessel’s owner may not constrain the skipper from taking a decision to protect the safety of the vessel or crew or to ensure safe navigation. Finally, the fishers must comply with the lawful orders of the skipper and applicable health and safety matters.³⁶⁸

3 *Part III. Minimum Requirements for work on board fishing vessels*

³⁶³ *Work in Fishing Recommendation*, opened for signature 14 June 2007, [2007] R199 (up to date instrument).

³⁶⁴ Politakis, above n 6, 121.

³⁶⁵ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 2. Fishing vessels engaged in fishing on rivers, lakes and canals may be excluded from some or all of the requirements of the WIFC if the application of the WIFC raises ‘special problems of a substantial nature’. There are no definitions of what these may be.

³⁶⁶ *Ibid* art 1.

³⁶⁷ *Ibid* art 1.

³⁶⁸ *Ibid* art 8.

The minimum age for work on a fishing vessel is 16 years³⁶⁹ however, the competent authority may permit a minimum age of 15 years if the person is undertaking vocational training and is no longer subject to compulsory schooling.³⁷⁰ Fishers under the age of 18 are not permitted to work at night.³⁷¹

All fishers must have a valid medical certificate that attests their fitness to perform their duties.³⁷² It is compulsory for fishers working on board vessels over 24 metres in length or which normally remains at sea for more than three days to have a valid medical certificate.³⁷³

The medical certificate must include information regarding the fisher's sight and hearing and declare that the fisher is not suffering from any medical condition likely to be aggravated by service at sea, render the fisher unfit for service or endanger the safety or health of other persons on board. The certificate may be valid for up to two years. If the certificate expires during a voyage, it is valid until the end of that voyage.³⁷⁴

4 *Part IV. Conditions of Service*

Article 14 deals with safe manning levels and hours of rest. The state's competent authority must set a minimum manning level for vessels over 24 metres in length that ensures safe navigation of the vessel. Any vessel, regardless of its size, that remains at sea for more than three days must provide minimum hours of rest for the fishers. The minimum rest hours are 10 hours in a 24 hour period or 77 hours in a 7 day period.³⁷⁵ This corresponds with the minimum rest hours for seafarers prescribed in the MLC.³⁷⁶

Article 15 requires fishing vessels to carry a crew list which must be provided to an authorised person on shore prior the vessel departing or communicated ashore

³⁶⁹ Increased from 15 years under *Minimum Age (Fishermen) Convention*, opened for signature 19 June 1959, [1959] UNTS 112 (outdated instrument).

³⁷⁰ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 9.

³⁷¹ *Ibid.*

³⁷² Some exemptions may be granted to this requirement depending on the type of fishing operation.

³⁷³ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 10.

³⁷⁴ *Ibid* art 12.

³⁷⁵ *Ibid* art 14.

³⁷⁶ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A2.3.

immediately after departure.³⁷⁷ This requirement is not contained in the MLC³⁷⁸ and is a very important tool to identify when there has been loss of life at sea.³⁷⁹

Articles 16-20 detail the requirement for fishers to have a ‘comprehensible’³⁸⁰ work agreement. The fisher must be allowed to seek advice on the agreement before it is concluded and be given a copy of it. Even if the fisher is not directly employed by the vessel owner, the owner must still carry evidence of an agreement that provides for decent work and living conditions as required by the WIFC.³⁸¹ The information required in the work agreement is detailed in Annex II of the WIFC.³⁸² This level of detail in the WIFC reflects the similar requirements of the MLC.³⁸³

Article 21 sets out that in the event that a fisher’s work agreement terminates or the fisher is no longer able to work and the vessel is in a foreign port, the owner of the vessel must pay for the fisher to be repatriated.³⁸⁴ If the owner fails to do so, the flag state is required to arrange repatriation. The cost can be recovered from the owner by the flag state.³⁸⁵ Similarly, should a fisher be employed by an agency rather than the owner of the vessel, the owner may recover the cost of repatriation from the agency.³⁸⁶ Again, this mirrors the MLC provisions.³⁸⁷

The WIFC recognises that fishers often obtain work via recruitment and placement agencies. Article 22 requires that these agencies are regulated and prohibited from engaging in blacklisting or charging fees to the fisher.³⁸⁸ This article also contains provisions about private employment agencies that employ fishers and make them available to a third party. According to the Employers’

³⁷⁷ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 15.

³⁷⁸ The obligation to provide a crew list is required by port states. For example, in Australia this is required by the *Customs Act 1901* (Cth) s 64ACB.

³⁷⁹ Alastair Couper, Hance D Smith and Bruno Ciceri, *Fishers and Plunderers. Theft, Slavery and Violence at Sea* (PlutoPress, 2015), 225.

³⁸⁰ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force)art 16. ^{Ibid} art 20.

³⁸² *Ibid* annex II.

³⁸³ The MLC places the information required for the seafarer’s employment agreement in standard A2.1.

³⁸⁴ *Ibid* art 21.

³⁸⁵ *Ibid*.

³⁸⁶ *Ibid*.

³⁸⁷ *Maritime Labour Convention*, opened for signature 23 February 2006 , MLC 2006, (entered into force 20 August 2013) standard 2.5.

³⁸⁸ *Ibid* art 22.

Group in the preparatory stages of the WIFC there are two reasons for the increased use of private employment agencies.³⁸⁹ Firstly, from the point of view of the fishing vessel owner, it is a ‘cost effective method of accessing and maintaining a pool of skilled fishers’.³⁹⁰ Secondly, from the fishers’ perspective, it enhances their protection if they work on more than one vessel or in more than one country.³⁹¹

However, the use of private employment agencies can lead to the vessel owner removing themselves from responsibility for the crews’ conditions.³⁹² To counter this issue, the WIFC requires that fishers have the right to assert a lien³⁹³ against the fishing vessel in all circumstances and holds the fishing vessel liable in case of default by the agency.³⁹⁴ This provision is unlikely to be of assistance to a fisher. It presupposes that fishers have access to a lawyer or understand how to initiate court proceedings in order to enforce a lien. For most fishers this is likely to be impossible.

Under Article 23, member states must adopt laws to provide that fishers who are paid a wage are paid monthly or ‘other regular’ payment.³⁹⁵ This provision reflects the need for flexibility and acknowledges that some fishers are paid on a ‘share catch’ basis.³⁹⁶ Regular payment is not defined. Fishers must be given the means to transfer their pay to their family at no cost which mirrors the requirement in the MLC.³⁹⁷

5 Part V. Accommodation and Food

Part V of the WIFC requires that member states adopt laws with respect to accommodation, food and potable water on fishing vessels that fly its flag.³⁹⁸ In

³⁸⁹ Politakis, above n 6, 125.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Couper, above n 32, 133.

³⁹³ A maritime lien is a feature of Admiralty Law. It is enforced *in rem*. See, *Admiralty Act 1988* (Cth) s 15.

³⁹⁴ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 22.

³⁹⁵ Ibid art 23.

³⁹⁶ See Sweden’s remarks at the International Labour Conference, Report IV (2A) *Work in the fishing sector*, 96th Session (2007) 14.

³⁹⁷ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) standard A2.2.

³⁹⁸ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 25.

relation to accommodation, annex III contains the detailed specifications covering noise and vibration, ventilation, heating and air-conditioning, lighting, sleeping rooms, mess rooms, sanitary facilities, medical facilities, galleys and food storage facilities. Food and drinking water must be sufficient for the voyage and number of fishers. The food should be nutritional and have regard to the fishers' religious requirements and cultural practices.³⁹⁹

Article 27 requires that the food and drinking water is provided at no cost to the fisher but it can be recovered as an operational cost if the 'collective agreement' or a fisher's work agreement so provides.⁴⁰⁰

6 *Part VI. Medical care, health protection and social security*

Fishing is one of the most dangerous occupations in the world. Risks include the vessel being wrecked or capsized; being washed over-board, tripping and falling because of the movement of the vessel or slippery surfaces; and working with heavy and dangerous equipment.⁴⁰¹ These hazards are exacerbated by fatigue caused by working long hours, day after day and poor nutrition.⁴⁰² In addition to the workplace hazards, fishers are at risk from longer term health issues such as skin problems and muscular-skeletal disorders.⁴⁰³

Therefore, Part VI is crucial for the protection of fishers because it deals with medical care, health protection and social security. It requires vessels to carry appropriate medical equipment, be equipped with radio or satellite communication devices and contains the right for fishers to receive medical treatment ashore in a timely manner.⁴⁰⁴

Article 31 requires members to take measures for the prevention of occupational accidents, diseases and work-related risks. These include appropriate training,

³⁹⁹ Ibid annex III.

⁴⁰⁰ Ibid art 27.

⁴⁰¹ International Labour Organisation, *Decent Working Conditions, Safety and Social Protections, Work in Fishing Convention No 188 Recommendation No 199*
<http://www.ilo.org/safework/industries-sectors/WCMS_219032/lang--en/index.htm>.

⁴⁰² Couper, above n 32, 41.

⁴⁰³ Ibid 40.

⁴⁰⁴ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 29.

reporting and investigation of accidents by the flag state and the establishment of joint committees on occupational safety and health.⁴⁰⁵

In addition, members are to ensure that fishers resident in their territory receive ‘no less favourable treatment’ than other workers in the provision of social security protection.⁴⁰⁶ Members must also take measures to provide fishers with protection for work related injury, sickness or death.⁴⁰⁷ The WIFC recognises that some states may not have sufficient institutions or infrastructure to comply with Article 38. If this is the case, the responsibility lies with the fishing vessel owner.⁴⁰⁸

7 *Part VII. Compliance and Enforcement*

A member state will be responsible for ensuring that vessels that fly its flag are compliant with the WIFC by establishing a system of inspection, reporting, monitoring and procedures for handling complaints coupled with appropriate penalties and corrective measures.⁴⁰⁹ States that ratify the WIFC may also inspect foreign fishing vessels visiting their ports and detain them if the conditions are clearly hazardous to safety or health.

This is the first time that port state control has been introduced into a fishing standard.⁴¹⁰ Port state control can be an extremely effective mechanism for ensuring compliance with international standards and helps to ensure uniformity of the application of international conventions. However, as discussed in Chapter Two, in relation to the MLC, port state control varies from country to country. In addition, it is possible for fishing vessels to simply avoid entering ports where they are subject to rigorous inspection by transshipping the catch at sea, bunkering at sea⁴¹¹ or landing the catch at a ‘port of convenience’.⁴¹²

⁴⁰⁵ Ibid art 31.

⁴⁰⁶ Ibid art 32.

⁴⁰⁷ Ibid art 38.

⁴⁰⁸ Ibid art 39.

⁴⁰⁹ Ibid art 40.

⁴¹⁰ Politakis, above n 6, 125.

⁴¹¹ Food and Agriculture Organisation of the United Nations, *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Regulated Fishing*, FIP/R722 (En) (23-25 September 2003) 3 [14]. ‘Bunkering’ means refuelling.

⁴¹² Couper, above n 32, 98 provides an example of vessels engaged in illegal fishing off the coast of West Africa. The vessels tranship to reefer vessels which in turn land the combined catch in

In summary, the WIFC is a comprehensive instrument that addresses many issues facing fishers. It deals with:

Abandonment; accommodation; blacklisting; child labour; compensation; enforcement of compliance; food and water; hours of work; living conditions; loss of life at sea; medical provisions; minimum safe manning; minimum working age; placement fees; pre-training; repatriation; role of agencies; unfair contracts; work conditions and work related injuries.⁴¹³

Nonetheless, until the WIFC receives enough member ratifications to enter into force it remains nothing more than a guide to best practice for the industry.

III THE PROBLEM OF LABOUR ABUSE IN REGULATED FISHING

The need for employment protection is urgent given the unique vulnerability of those in the fishing industry. Among the already vulnerable class of seafarers, they are truly the most exposed. The next part of this chapter explain the unique challenges that confront those who enter the fishing industry.

A *Jurisdiction and regulation of fishing*

Article 56 of the *United Nations Convention on the Law of the Sea* (UNCLOS) gives a state 'sovereign rights for the purpose of exploring and exploiting conserving and managing the natural resources...of the waters superjacent to the seabed'⁴¹⁴ in the Exclusive Economic Zone (EEZ) which is 24-200 nautical miles from the coast. Therefore the coastal state has the legal authority to permit, or refuse, the harvesting of fish in this area. It is illegal for a foreign vessel to engage in fishing in another country's EEZ without a licence.

Fishing on the high seas is managed by regional fisheries management organisations (RFMOs). These bodies are established by the Food and Agriculture Organisation of the United Nations. Their role is to monitor fish stocks and facilitate inter-governmental co-operation in fisheries management.⁴¹⁵ However, these bodies rely upon flag states implementing the rules of the RFMO

Gran Canaria which is under Spanish jurisdiction. The catch is then packaged suggesting that the fish was legally caught and complies with EU hygiene standards.

⁴¹³ Ibid.

⁴¹⁴ *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 56.

⁴¹⁵ For example Asia Pacific Fisheries Commission <<http://www.apfic.org/>>.

which has, in turn, encouraged the use of flags of convenience by fishing vessels engaged in ‘distant-water fishing’.⁴¹⁶

The introduction of the EEZ in the 1980s largely benefited developed states with long coastlines such as Australia, the United States, New Zealand, Norway and Russia. Conversely countries with smaller coastlines, such as Thailand, South Korea and Taiwan, who had fished under the previous ‘open seas regime’ were disadvantaged by being confined to their own EEZs.⁴¹⁷

As a result, some states with long coastlines sold licences to fish in their EEZ to foreign companies.⁴¹⁸ This removes the protection of the coastal state’s laws for the crew on foreign vessels fishing under licence in another country’s EEZ. Article 92 of UNCLOS provides that the flag state has ‘exclusive jurisdiction’ on board.⁴¹⁹ If a crime is committed while a vessel is in a state’s territorial sea, Article 27 of UNCLOS permits the coastal state to intervene in limited circumstances.⁴²⁰ However, the territorial sea only extends 12 nm from the coast so if a vessel is beyond the territorial waters UNCLOS does not extend any jurisdiction to what occurs on-board to the coastal state.⁴²¹

Fishing in Australia’s EEZ is strictly governed. Vessels must hold a permit issued in accordance with the *Fisheries Management Act 1992*.⁴²² The key to this strict governance is that permits are only issued to Australian boats. Vessels that fish exclusively in the EEZ are subject to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.⁴²³ In addition, the *Navigation Act 2012* applies to ‘regulated vessels’ which include fishing vessels if their voyage extends beyond the EEZ.⁴²⁴ Therefore, fishers on Australian regulated vessels are

⁴¹⁶ Couper, above n 35, 47.

⁴¹⁷ Ibid 47.

⁴¹⁸ Ibid 78.

⁴¹⁹ Kate Lewins and Nick Gaskell, ‘Jurisdiction over criminal acts on cruise ships: Perhaps, perhaps, perhaps’ (2013) 37 *Criminal Law Journal* 221, 223.

⁴²⁰ Ibid 224.

⁴²¹ Ibid 227.

⁴²² *Fisheries Management Act 1992* (Cth) s 32.

⁴²³ *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth).

⁴²⁴ *Navigation Act 2012* (Cth).

protected by the provisions relating to working and living conditions⁴²⁵ contained in the *Navigation Act 2012*.⁴²⁶

Australia is an example of a country that has managed to effectively manage commercial fishing in its waters in a manner that has benefitted fishers.⁴²⁷ It has achieved this by requiring that fishing vessels are registered in Australia. This is not the model that other countries have adopted when exploiting their fishing zones. If a country is to grant permission to foreign vessels to fish in its EEZ, it is crucial that it is made clear which laws will apply to prevent the exploitation of jurisdictional loopholes. The experience of New Zealand is a salutary tale.

B *The New Zealand Experience*

Unlike Australia, foreign crew working on foreign-owned fishing boats are permitted to fish in New Zealand's EEZ.⁴²⁸ New Zealand operates an individual transferable quota system to control the amount of fish taken from its waters.⁴²⁹ Some of the larger quota holders will charter foreign owned and operated vessels to supplement their own fleet. The smaller quota holders, who lack resources to exploit their allocated fish stocks, will charter foreign vessels to come and fish on their behalf.⁴³⁰ As the boats are not in New Zealand's territorial waters, the law of the flag state applies on board those vessels.⁴³¹ The use of 'mother ships' for refuelling and transshipping means that fishing vessels can operate in such a way that they rarely need to come to port; they are invisible to port state control.

⁴²⁵ Section 41 provides that the *Navigation Act 2012* applies to regulated vessels. Regulated vessels are defined in s 15 as vessels registered in Australia. The provisions relating to the living and working conditions on regulated vessels are found in Part 5 of the Act.

⁴²⁶ However, AMSA may declare that the vessel is not subject to the *Navigation Act* and apply the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth) instead. This Act is concerned with vessel safety rather than the protection of working conditions but the *Fair Work Act 2009* applies. See, Australian Maritime Safety Authority, 'Scope of the Navigation Act 2012' (Navigation Act Fact Sheet 2, AMSA, October 2012).

⁴²⁷ The Australian regulation has had a sideline effect of protecting fishers, the reality is, the regulators were more concerned about protecting fish stocks and careful fishing management but the fishers benefitted tangentially.

⁴²⁸ This will no longer be the case in 2016 as New Zealand is introducing laws to close the regulatory loopholes that allowed the abuse of foreign crews. *Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014* (NZ).

⁴²⁹ Jennifer Devlin, 'Modern Day Slavery: Employment Conditions for Foreign Fishing Crews in New Zealand Waters' (2009) 23 *Australia and New Zealand Maritime Law Journal* 82, 83.

⁴³⁰ *Ibid.*

⁴³¹ *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 56. Although a country has fishing rights in EEZ it does not mean their domestic law applies in that zone.

Some of these foreign charter vessels (FCVs) have been exposed for appalling abuses of their crews. In 2005, on a rare port visit, ten Indonesian fishermen fled their South Korean vessel, the *Sky 75* and went to the New Zealand police to report their abuse.⁴³² They claimed that they were beaten, fed rotten meat and told to wash by standing on the deck under the waves. Their wages were notionally US\$200 per month but they were not paid.⁴³³

In 2010, a South Korean trawler (*Oyang 70*) capsized and sank in New Zealand's EEZ. Six lives were lost.⁴³⁴ In 2011, seven Indonesian crew members escaped their South Korean vessel (*Shin Ji*) in Auckland. A month later, 32 Indonesian crew members left another South Korean trawler (*Oyang 75*) in Christchurch.⁴³⁵ The crews reported underpayment and non-payment of wages, as well as verbal, psychological, physical and sexual abuse.⁴³⁶

Stringer et al from the University of Auckland⁴³⁷ conducted over 140 interviews with Indonesian crews from FCVs. They uncovered systematic human rights and labour abuses on board these vessels including 'substandard and inhumane working conditions'.⁴³⁸ The below deck accommodation on one vessel had no heating and was damp with no ventilation. Cockroaches and bedbugs were common. Some workers had to bathe in salt water. Crew were fed rotten fish bait and their unboiled drinking water had a 'rusty colour'. At the same time, the officers were served nutritious food and bottled water.⁴³⁹

Fatigue is a major danger in the fishing industry.⁴⁴⁰ Crews reported accidents as a result of being 'sleepy'.⁴⁴¹ These included frostbite, fingers being crushed; and chest injuries from falls. The injuries were not reported to Maritime New

⁴³² Devlin, above n 82, 82.

⁴³³ Ibid.

⁴³⁴ Christina Stringer, Glenn Simmons, David Coulston and D Hugh Whittaker, 'Not in New Zealand's waters, surely? Linking labour issues to GPNs' (2014) 14 *Journal of Economic Geography* 739.

⁴³⁵ Ibid 740.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid 745.

⁴³⁹ Ibid 747.

⁴⁴⁰ Australian Transport Safety Bureau, 'Fatigue and Fishing Crews' (Safety Bulletin No 04, 1 January 2004), 2.

⁴⁴¹ Stringer, above n 87, 747.

Zealand⁴⁴² or recorded in logs. Sometimes the crew members were refused treatment or ‘amputations at sea were suggested’.⁴⁴³

Furthermore, crews were subjected to serious verbal, physical and sexual abuse.⁴⁴⁴ When asked why they did not seek help from the New Zealand authorities a crew member explained that they believed they were on Korean soil so nothing could be done. They also feared the consequences as it had been known for a complainant to have been ‘taken to a private cabin and beaten’.⁴⁴⁵

New Zealand requires that workers on FCVs hold a work visa and therefore, they are entitled to be paid at least the New Zealand minimum wage of NZ\$15.00 per hour.⁴⁴⁶ However, an audit of three vessels discovered that the crew were paid the minimum wage for 42 hours per week regardless of the number of hours they actually worked. It also appeared that the crew had signed two different employment contracts; one for the Indonesian manning agent and one for the New Zealand charter company. The pay under the Indonesian contracts was substantially lower at between US\$200-US\$500 per month.⁴⁴⁷

Not only were the work conditions bad and the crew underpaid, but many of the crews were also victims of human trafficking.⁴⁴⁸ Article 3 of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons* defines trafficking as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by the means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include...forced labour or services.⁴⁴⁹

⁴⁴² New Zealand’s maritime safety authority.

⁴⁴³ Stringer, above n 87, 747.

⁴⁴⁴ Ibid 748.

⁴⁴⁵ Ibid citing the Report to Minister of Labour, Employment Conditions in the Fishing Industry: Final Report on Foreign Crew on New Zealand Fishing Vessels and Annex 1 Summary of Investigation Findings (2 December 2004).

⁴⁴⁶ Ibid 744.

⁴⁴⁷ Ibid 749.

⁴⁴⁸ Thomas Harre, 'Confronting the Challenge of Human Trafficking for Forced Labour in the Pacific: Some thoughts from New Zealand' (2012) 10 *New Zealand Yearbook of International Law* 1.

⁴⁴⁹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*,

The recruitment and employment of the Indonesian crew meets the criteria for human trafficking. The Indonesian manning agents required applicants to pay the first three months' salary to them as a fee for their services⁴⁵⁰ plus collateral in the form of titles to property.⁴⁵¹ The applicants were not shown the New Zealand employment contracts and made to sign blank pages. The collateral is retained to ensure the crew 'behave' when at sea. The Indonesian contract contained a clause subjecting the crew to fines of up to \$10,000 if they break the contract.⁴⁵² One crew member who returned to Indonesia before the end of his contract because he could no longer endure being repeatedly raped by a Korean officer was fined 15 million rupiah by the manning agent.⁴⁵³

Once on board the vessel, the Korean officers, in addition to the physical, emotional and sexual abuse, threatened the crew with retribution from the manning agents. They took possession of the crew's documents that had been given to them by the New Zealand charterer.⁴⁵⁴ The New Zealand charterer and Korean fishing company forced the crew to sign a bank nomination form for wages to be paid to the account of the Korean manning agent. The Korean manning agent deducted 50% of their pay before forwarding the balance to the Indonesian manning agent.⁴⁵⁵ In isolation, each event is evidence of exploitation but the combination of them; establish that the fishing crews were trafficked into forced labour.

The stories that have surfaced from the use of FCVs in New Zealand are confronting and distressing. The intent of the New Zealand government policy in allowing FCVs to fish in the EEZ was to encourage responsible fishing yet the unintended consequence was serious human rights abuses taking place in New Zealand controlled waters. What happened in New Zealand is indicative of the issues facing fishers globally and highlights the need for international conventions

opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) art 3.

⁴⁵⁰ Christina Stringer and Glenn Simmons, 'Forced into Slavery' (2013) (65) *Samudra Report* <www.icsf.net/en/samudra/article/EN/65-3893-Forced-into-Sla.html>.

⁴⁵¹ Christina Stringer, Daren Coulston and Thomas Harre, *Human Trafficking for Forced Labour in New Zealand's Foreign Charter Sector* Human Rights at Sea <<https://www.humanrightsatsea.org/case-studies/>>.

⁴⁵² Stringer, above n 103, 9.

⁴⁵³ *Ibid* 10.

⁴⁵⁴ Stringer, above n 103, 5.

⁴⁵⁵ *Ibid*.

to govern the industry as part of the solution. Consequently, the research undertaken by Slave Free Seas in this area is invaluable in providing insight into the plight of fishers who are ‘out of sight out of mind’ whilst at sea.⁴⁵⁶

In response to the reports of labour abuse on the foreign charter vessels, the New Zealand government introduced the *Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014* (NZ) to require that all vessels engaged in fishing in New Zealand’s EEZ must be flagged in New Zealand. The amendments will come into force May 2016.

C WIFC: How would it have helped?

If the WIFC was in operation worldwide, there is no doubt the fishers would have had better rights; assuming that shipowners would readily comply. Compliance with the WIFC would have better protected the fishers as follows:

- Would have prevented duplicity of contracts. A fisher is required to have a work agreement with a copy kept on board (Article 16).
- Would have prohibited recruitment agencies from charging fees to the fisher. (Article 22) However this activity is already prohibited by Article 7 of the *Private Employment Agencies Convention*⁴⁵⁷ but the practice continues.
- Would be entitled to hours of rest (Article 14).
- Would have been entitled to decent accommodation (Article 26)
- Would have been entitled to quality food and drinking water (Article 27).
- Would have been mandatory to report the accidents and provide proper medical treatment to the injured. (Articles 29 and 31).
- Would have been entitled to be paid regularly (Article 23).

However, this assumes that the vessels would comply with the WIFC. The evidence suggests that the operators of these fishing vessels were not accidentally non-compliant with labour law. The abuse of the fishers was deliberate. The non-payment and under-payment of wages was deliberately concealed from the

⁴⁵⁶ United Nations Office on Drugs and Crime, 'Transnational Organised Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrant, Illicit Drugs Trafficking' (2011) 57.

⁴⁵⁷ *Private Employment Agencies Convention*, opened for signature 19 June 1997, C181 (entered into force 10 May 2000) art 7.

New Zealand authorities. The dual contracts were issued to deceive both the authorities and the crews. The poor quality of food and drinking water provided to the crews was to save money. The accidents went unreported and untreated to avoid taking the crews to port. Denying the crews adequate rest was to ensure that the vessels' catch was maximised.

As discussed in Chapter Two, the MLC is most effective thanks to port state control. The WIFC is weaker in this regard. Article 43 only permits a port state to detain a vessel if the conditions on board are 'clearly hazardous to safety or health'.⁴⁵⁸ This position contrasts with the MLC which additionally allows for a vessel to be detained for a breach of seafarer rights.⁴⁵⁹ While arguably the conditions on board were hazardous to health and Maritime New Zealand would have been entitled to detain the vessels, the non-payment of wages would not have justified detention under the WIFC.

IV WHY HAS WIFC NOT ACHIEVED THE SAME SUPPORT AS MLC?

The WIFC came about because the fishing industry was deemed too diverse to be included in the scope of the MLC.⁴⁶⁰ There were no more discussions regarding the exclusion of fishing vessels save for a comment from the seafarers' representative in the report of the discussion of the Tripartite Intersessional Meeting on the Follow-up to the Preparatory Technical Maritime Conference:

Thus, the Convention should apply to all ships, irrespective of size or trade. Arguments to the contrary would have to be very convincing. Institutionalized maritime apartheid was unacceptable. Referring to exceptions in the application of the Convention, i.e. ships engaged in fishing or in similar pursuits and traditional vessels, he saw these as clear cases.⁴⁶¹

Despite this concern, fishing vessels were excluded from the scope of the MLC.

As mentioned in Chapter One, the impetus for a consolidation of ILO maritime labour conventions came from the shipowners desiring a uniform compliance

⁴⁵⁸ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force) art 43.

⁴⁵⁹ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) reg 5.2.1.

⁴⁶⁰ International Labour Organization, *Tripartite Intersessional Meeting on the Follow-up to the Preparatory Technical Maritime Conference Geneva*, PTMC/2005/23 (21-27 April 2005) para 15.

⁴⁶¹ *Ibid* para 12.

regime to effectively 'level the playing field' for ship operators.⁴⁶² The WIFC is a 'sister convention'⁴⁶³ that complements the MLC. In the preparatory meetings the employer group participated in, rather than drove the discussions. The employer's Group requested a 'progressive implementation approach' for nations that did not have the necessary infrastructure⁴⁶⁴ to implement the WIFC. This suggests a lack of urgency on the part of employers for the WIFC to be adopted in practice.

This would imply that the employer group in the WIFC discussions did not share the same drive as the shipowner group in the MLC discussions to achieve uniformity in standards and costs. In other words, whereas the shipowners required the MLC to better protect their economic interests, the fishing industry is quite different. The WIFC was imposed upon them rather than embraced.

Another explanation for the lack of support for the WIFC, is that many of the countries most involved in fishing have neither ratified the WIFC nor the MLC. For example, China, Norway and Thailand are the three biggest exporters of fish in the world,⁴⁶⁵ yet none of them have adopted the WIFC. Further China and Thailand have not ratified the MLC although both have indicated that they intend to in the near future⁴⁶⁶

V ILLEGAL UNREGULATED AND UNREPORTED FISHING AND HUMAN TRAFFICKING

It is helpful to understand the broader context of the plight of fishers who have even less protection than those working on the New Zealand foreign charter vessels. The crews there had at least some rights when they came into port because the ships were fishing under permit. They had a right to a minimum rate

⁴⁶² John Isaac Blanck Jr, 'Reflections on the Negotiation of the Maritime Labor Convention 2006 at the International Labor Organization' (2006) 31 *Tulane Maritime Law Journal* 35, 39.

⁴⁶³ Politakis, above n 6, 126.

⁴⁶⁴ *Ibid* 122.

⁴⁶⁵ Asian Center for Migration 'Employment practices and working conditions in Thailand's fishing sector' (International Labour Organisation 2013), ix.

⁴⁶⁶ On 8 September 2015 China ratified the MLC and on 3 April 2015 Thailand's government said it intended to ratify the MLC. See, Lloyd's List, *China ratifies the 2006 Maritime Labour Convention* (8 September 2015) <www.lloydslist.com/ll/sector/regulation/article468076ece>. Michael Mackey, *Thailand ratifies MLC 2006 convention* (3 April 2015) <www.ihsmaritime360.com/article/17361/thailand-ratifies-mlc-2006-convention>.

of pay and human rights. A different problem again is apparent where the fishing is itself illegal. And the rights of the fishers sink even lower.

The Food and Agriculture Organisation (FAO) defines IUU fishing as follows:

Illegal fishing refers to activities:

1. Conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
2. Conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
3. In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

Unreported fishing refers to fishing activities:

1. Which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
2. Undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unregulated fishing refers to fishing activities:

1. In the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
2. In areas or for fish stocks in relation to which there are no applicable conservation or measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.⁴⁶⁷

Fishers are particularly vulnerable to human trafficking. Due to IUU fishing and overfishing, fish stocks are in decline.⁴⁶⁸ The decline in catches increases pressure on operators to reduce costs and at the same time leads to fishing vessels travelling further away and spending longer at sea. As running costs increase the operators reduce wages and look to use oppressed, forced and migrant labour.

⁴⁶⁷ Food and Agriculture Organisation, *International Plan Of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) <<http://www.fao.org/docrep/003/y1224e/y1224e00.htm>>.

⁴⁶⁸ Environmental Justice Foundation, 'Slavery at Sea. The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry' (Report, 2014) 10.

There is no effective international inspection regime for the working and living conditions on fishing vessels and this creates the perfect environment for human trafficking.⁴⁶⁹ As evidenced by the FCVs operating in New Zealand, human trafficking can occur even within the regulated fishing industry: it is no surprise therefore, that in the IUU fishing trade human trafficking and slavery is rife.

Trafficked people are more commonly used on vessels involved in these types of activity for the following reasons. Firstly, these vessels are engaged in criminal activity therefore the operators are focussed on profit seeking and exhibit a lack of moral judgment.⁴⁷⁰ Secondly, because they run the risk of forfeiture if caught, the vessels used for IUU fishing, are generally old and unsafe. Therefore it is difficult to find qualified fishing crew who will work on them.⁴⁷¹ Thirdly, as reports of illegal fishing often come from the crews themselves, victims of trafficking are unlikely to report the operator.⁴⁷² Finally, the vessels are often flagged in states that are unable or unwilling to exercise criminal jurisdiction.⁴⁷³

In addition to inhumane living and working conditions, the abuse meted out to fishers who have been trafficked is bloodcurdling. In 2009 the United Nations Inter-Agency Project on Human Trafficking (UNIAP) interviewed 49 Cambodian trafficked workers about the conditions on board 'slave ships'.⁴⁷⁴ 18% were under the age of 18 and had been children when recruited. 59% had witnessed a captain murder a crew member. One reported seeing a Thai captain decapitate a crew member.⁴⁷⁵

IUU vessels will often operate outside territorial waters and the EEZ of a coastal state which means that 'maritime law enforcement capability' is poor.⁴⁷⁶ On the 'high seas' there are very limited grounds upon which a navy can board a foreign

⁴⁶⁹ Ibid.

⁴⁷⁰ United Nations Office on Drugs and Crime, 'Transnational Organised Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrant, Illicit Drugs Trafficking' (2011) 54.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ Environmental Justice Foundation, 'All at Sea. The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Report, 2010) 11.

⁴⁷⁵ Ibid.

⁴⁷⁶ Joe McNulty, 'Maritime Law Enforcement and High Sea Challenges' (Speech delivered at Admiralty and Maritime Law Seminar, Federal Court of Australia, 23 April 2015) 3.

ship. Article 110 of UNCLOS does not permit naval crew from a warship⁴⁷⁷ to board a foreign vessel unless there are reasonable grounds to suspect the ship is engaged in piracy; the slave trade; unauthorised broadcasting; is without nationality or is in fact the same nationality of the warship despite flying a different flag.⁴⁷⁸

Illegal fishing and the use of forced labour do not fall into this definition which leaves law enforcement agencies very little authority to investigate IUU vessels. Currently, law enforcement agencies have to approach the flag state of the vessel and request permission to board outlining the purpose and justification for boarding.⁴⁷⁹ This removes the law enforcement agency's tactical advantage and may release criminal intelligence to corrupt elements of the flag state.⁴⁸⁰

Fishing vessels can remain at sea for months at a time through the use of large refrigeration ships known as reefer vessels. The reefer replenishes the fishing vessel and the fishing vessel offloads their catch to the reefer which then distributes the frozen fish. This practice means that the fishing vessel can avoid port state measures and the crew are unable to leave without risking drowning or being marooned.⁴⁸¹

Effectively, IUU vessels are operating in a deliberately lawless environment, and one that the WIFC will struggle to penetrate. IUU fishing is an enormous worldwide problem that extends well beyond employment rights. It is a form of transnational organised crime,⁴⁸² that impacts heavily on the environment by

⁴⁷⁷ Warship is defined as 'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. *United Nations Convention on the Law of the Sea*, opened for signature 16 December 1982, UNTS 1833 (entered into force 16 November 1994) art 29.

⁴⁷⁸ Ibid art 110.

⁴⁷⁹ McNulty, above n129, 4.

⁴⁸⁰ Ibid.

⁴⁸¹ Environmental Justice Foundation, 'All at Sea. The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Report, 2010) 11.

⁴⁸² McNulty, above n 129, 1.

depleting fish stocks and reducing food security for developing nations⁴⁸³ and has been linked to the increase in piracy, in particular off the coast of Somalia.⁴⁸⁴

VI RECOMMENDATIONS

The protection of the employment rights of fishers needs both a top-down and bottom up approach. The following suggested solutions may help to address some of the issues facing fishers.

A *Employment Rights*

1. *Ratify WIFC*

The WIFC requires 10 countries to ratify it for it to enter into force.⁴⁸⁵ Currently five countries have done so.⁴⁸⁶ There is a compelling need to ratify the WIFC as soon as possible in order to protect vulnerable workers in the fishing industry.⁴⁸⁷

2. *Expand port state control in WIFC*

As the MLC has shown, port state control is one of the most effective means for ensuring compliance with international conventions. The authority of a port state is more limited in the WIFC than the MLC. The WIFC would better protect the labour rights of fishers if the authority given to port states to conduct inspections is increased to the same level of authority found in the MLC. This would allow for more rigorous inspection of crew lists; employment contracts and compliance with payment of wages.

3. *Expand the Scope of the MLC*

The MLC is proving to be effective in protecting labour rights of seafarers where it is enforced. The MLC provisions that correspond to the WIFC should be expanded to apply to fishers until the WIFC enters into force. Article XIV of the MLC permits the ILO to amend the MLC and forward the text of the amendment

⁴⁸³ Ibid.

⁴⁸⁴ Erika J Techera, 'Piracy, Fishing and Human Trafficking: a 21st Century Challenge' (Paper presented at Maritime Law Association of Australia and New Zealand, 42nd Annual Conference, Perth, 16-18 September 2015).

⁴⁸⁵ *Work in Fishing Convention*, opened for signature 14 June 2007, C188 (Not yet in force).

⁴⁸⁶ These countries are: Argentina, Bosnia and Herzegovina, Congo, Morocco and South Africa. <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333:NO>.

⁴⁸⁷ Australia has not indicated that it intends to ratify the WIFC and remains silent on the matter.

to the members, who have already adopted the MLC, for their ratification. The amendment is deemed to be accepted on the date that 30 members, with a total share of 33% the world's gross tonnage of ships, register their ratification.⁴⁸⁸

However, this solution requires members firstly to ratify the amendments and then to adopt the amendments into their domestic law. It is questionable if there will be the requisite international political will to achieve this change.

4. *Licensing of Reefer Vessels*

The use of reefer vessels⁴⁸⁹ should be strictly licensed. Flags of convenience states must be persuaded not to accept fishing vessels, including reefer vessels, on their registry unless they fulfil their obligations as a 'responsible flag state'.⁴⁹⁰ Once fish is filleted and frozen on a reefer vessel it is impossible to identify where the fish came from and who caught it. Arguably, the use of reefer vessels should ultimately be prohibited.

B *Human Rights*

1. *Registry of Fishing Vessels*

The Environmental Justice Foundation has called for an international registry of fishing vessels in order to identify and prosecute labour and IUU breaches. This registry should include information on current and previous vessel names and flags, owners and country of ownership. The information should be made publicly available for international monitoring.⁴⁹¹ Nonetheless it is likely that 'ghost ships' where up to five vessels have the same name and registration number will continue to operate and remain invisible to authorities.⁴⁹²

2. *Extend power of inspection of suspicious fishing vessels to the International Memoranda of Understanding on Port State Control*

⁴⁸⁸ *Maritime Labour Convention*, opened for signature 23 February 2006, MLC 2006, (entered into force 20 August 2013) art XIV.

⁴⁸⁹ By way of reminder, 'reefer vessels' are the refrigerated ships that act as a 'mothership' to the fishing boats.

⁴⁹⁰ Environmental Justice Foundation, 'All at Sea. The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Report, 2010) 21.

⁴⁹¹ *Ibid.*

⁴⁹² Ian Urbina, 'Sea Slaves': *The Human Misery that Feeds Pets and Livestock* (27 July 2015) <www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?_r=0>.

The Tokyo and Paris MoUs effectively co-ordinate Port State Control of ILO and IMO conventions. As the Regional Fisheries Management Organisations are not mandated to ensure compliance with labour standards and safety at sea regulations, the inspection of fishing vessel for human trafficking offences could be extended to the MOUs.⁴⁹³ This will help with information sharing on suspicious vessels and activity and build co-operation between states. There should be closer collaboration between the FAO, IMO and UNDOC⁴⁹⁴ to address the plight of victims of human trafficking at sea.⁴⁹⁵

3. *International Framework for policing the High Seas*

The international law on policing the high seas needs to be reviewed. An international framework for tackling organised crime at sea is required.⁴⁹⁶ It is beyond the scope of this paper to discuss the issue of organised crime at sea however there is potential for UNCLOS to be used as part of the framework.

Article 110 of UNCLOS permits a navy to board a foreign ship suspected of being involved in the 'slave trade'. The *Slavery Convention 1926*⁴⁹⁷ provides the following definitions:

- (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
- (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him into slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Potentially, this definition could be expansively interpreted to cover the use of slaves on fishing vessels because the operator has 'acquired' them and they are

⁴⁹³ International Labour Office, 'Caught at Sea. Forced Labour and Trafficking in Fisheries' (Report 2013) 51.

⁴⁹⁴ Food and Agriculture Organisation; International Maritime Organisation; United Nations Office on Drugs and Crime.

⁴⁹⁵ United Nations Office on Drugs and Crime, 'Transnational Organised Crime in the Fishing Industry. Focus on: Trafficking in Persons, Smuggling of Migrant, Illicit Drugs Trafficking' (2011) 139.

⁴⁹⁶ McNulty, above n 129, 11.

⁴⁹⁷ *International Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926 (entered into force 9 March 1927) art 1.

being 'transported' on a boat. This would permit naval personnel to board and inspect foreign vessels on the high seas.

4. *'Clean' Supply Chains*

Corporations must commit to ensuring and demonstrating that their supply chains are free from human trafficking and human rights violations.⁴⁹⁸ Seafood retailers who sell farmed prawns should ensure that the fishmeal has not come from 'trash fish' caught with forced labour.⁴⁹⁹ Finally consumers must demand retailers ensure 'net to plate traceability' for seafood products.

There is increasing awareness globally of the issue of human trafficking in the fishing industry. On 15 August 2015, three Californian law firms sought an injunction to stop the retail chain Cosco from selling prawns unless they are labelled the produce of slavery. The class action lawsuit alleges that Costco knowingly sold prawns from a supply chain tainted by slavery.⁵⁰⁰ At the time of writing it is not clear if the claim has merit.

VII CONCLUSION

Seafarers, have good, but not perfect, protection. Following the entry into force of the MLC their living and working conditions have improved and coupled with regular visits to diligent port states they are reasonably protected. Fishers should have this protection.

The employment issues that face seafarers and fishers are similar in many respects. The ICoNS report lists the issues facing seafarers as; physical abuse and sexual assault; inadequate medical treatment; sub-standard accommodation and inadequate food. Mental abuse arises from isolation. Crews suffer non-payment of wages, problems with abandonment and non-repatriation.⁵⁰¹ These are the same issues that were faced by the fishers on the FCVs in New Zealand.

⁴⁹⁸ Environmental Justice Foundation, 'Slavery at Sea. The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry' (Report, 2014) 37.

⁴⁹⁹ Ibid.

⁵⁰⁰ Felicity Lawrence, 'Costco and CP Foods face lawsuit over alleged slavery in prawn supply chain', *The Guardian* (online), 20 August 2015 <www.theguardian.com/global-development/2015/aug/19/costco-cp-foods-lawsuit-alleged-slavery-prawn-supply-chain>.

⁵⁰¹ International Commission on Shipping, 'Inquiry into Ship Safety: Ships, Slaves and Competition' (2000) 29-30.

In addition, the fisher's plight is compounded by human trafficking and little to no legal protection. They are suffering serious human rights abuses because of the criminality that blights the industry. There is a culture of illegality in fishing that is not present in the broader commercial shipping industry. Even regulated fishing vessels are able to evade laws of well-meaning nations like New Zealand. In countries where law is not enforced or fishing takes place under the radar, fishers are even more exposed. While fishing vessels continue to tranship their catch and avoid port state control, the fishers remain powerless.

It is vital that the international community addresses the legal protection of fishers and the lawlessness of the industry. The problem will not be solved by changing the law alone, but it may make it harder for the criminals and unscrupulous operators to continue to operate with impunity.

The MLC is a welcome initiative that is making a real difference to the lives of seafarers, who are so important to our commercial trade. The challenge is to bring awareness to the international community of the issues that fishers face in order that not only are their employment conditions improved but their human rights protected to the same extent as those of seafarers.

CONCLUSION

The Maritime Labour Convention has unquestionably improved the living and working conditions for the 1.2 million seafarers who work ‘out of sight, out of mind.’ It is commendable that there has been such worldwide acceptance of the MLC with 67 countries⁵⁰² representing 80 percent of the world’s gross tonnage⁵⁰³ adopting this convention. Borne out by interviews carried out for the purpose of this paper, the MLC is effective in protecting this unique and essential class of worker.

Aside from concerns over inconsistent enforcement by port state control, the MLC appears to be meeting its aims. It will be useful to revisit the MLC after a few years to see if it has helped to achieve uniformity in shipping standards and ‘levelled the playing field’ for shipping operators. In particular, attention should be paid to the quality of compliance inspections by recognised organisations from ‘flags of convenience’ member states; monitoring of seafarers’ access to shore leave; ensuring seafarers are getting adequate rest hours and regular payment of wages. A uniform international approach to port state control inspections and enforcement must be adopted to prevent ‘bad’ operators avoiding their MLC obligations. However, the early indications are that the MLC is regarded by seafarers to be a useful and effective convention - for those to whom it applies and where it is enforced.

However, it is of no help those employed in capture fishing. Fishers are even more vulnerable to exploitation and abuse than seafarers. They face the same working and living issues as seafarers but their problems are compounded by exposure to unscrupulous operators. The situation is even more dire for fishers who have been trafficked for forced labour in IUU fishing. Decent pay and working conditions are the least of their concerns. Their priority is survival. The operators can avoid port state control by transshipping and bunkering at sea. Fishers can be stuck at sea for months - even years - without legal protection

It appears unlikely that the WIFC is going to be adopted with the same enthusiasm as the MLC or even achieve the requisite ratifications to come into

⁵⁰² International Labour Organisation, *Maritime Labour Convention 2006*
<<http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm>>.

⁵⁰³ Ibid.

force internationally. Therefore it is recommended that the expansion of MLC is investigated, at a minimum, to include fishing vessels over 24 m engaged in transnational fishing. The Australian *Navigation Act*⁵⁰⁴ provides protection for fishers on board vessels operating outside Australia's EEZ and it is realistic for other countries to adopt similar legislation.

The measures suggested by this paper to protect fishers are by no means exhaustive. Changes to the law will only be effective if they are enforced, therefore without reliable port state control the changes will be meaningless. Fishing is an enormously diverse industry. Because fishing boats can operate largely unseen and has a culture of criminality, the issues faced by fishers cannot be dealt with by international conventions alone. To tackle forced labour and slavery in the fishing industry it will require the international community, including governments, suppliers, retailers and consumers to insist on a range of measures to ensure and protect 'clean' supply chains. While these issues remain below the horizon, it is unlikely there will be the requisite political will for change. In the meantime, the virus of IUU fishing will continue to destroy fish stocks and human lives.

⁵⁰⁴ *Navigation Act 2012* (Cth) s 15. See discussion in Chapter Three, Section III (A).

APPENDIX I

Glossary of Terms

AMSA	Australian Maritime Safety Authority
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organisation
FCV	Foreign Charter Vessel
FOC	Flags of Convenience
HLWG	High Level Working Group
ILO	International Labour Organisation
IMO	International Maritime Organisation
ITF	International Transport Workers Federation
IUU	Illegal, Unregulated and Unreported
JMC	Joint Maritime Committee
MARPOL	International Convention for the Prevention of Pollution from Ships
MLC	Maritime Labour Convention
MOU	Memorandum of Understanding
PTMC	Preparatory Technical Maritime Conference
RFMO	Regional Fisheries Management Organisation
RO	Recognised Organisation
SOLAS	International Convention for the Safety of Life at Sea
STWC	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
UNCLOS	United Nations Convention on the Law of the Sea
UNDOC	United Nations Office on Drugs and Crime
UNIAP	United Nations Inter-Agency Project on Human Trafficking
WIFC	Work in Fishing Convention

APPENDIX II

Suggested discussion questions for MLC/seafarer/fishermen research

1. What do you see as the main employment issues facing Australian seafarers in Australia?
2. What do you see as the main employment issues facing foreign seafarers?
3. What happens if a seafarer reports a suspected breach of their rights to you?
4. Have you had to deal with a suspected breach? How did you deal with it?
5. The Maritime Labour Convention does not apply to people employed in the fishing industry; how do you think that the issues facing fisherman are different to seafarers generally?
6. Are you aware of the global issue of forced labour in the fishing industry? In your view, how does this impact on the Australian fishing industry?
7. Would your organisation like to see any law reform? If so, what and why?
8. Are there any noticeable differences in compliance between Flags of Convenience vessels and non-FOC vessels?
9. Regulation 2.4 of the MLC requires that seafarers are granted shore leave. Are you aware of a seafarer being denied shore leave because they were not in possession of a visa to enter Australia or any other reason?
10. The MLC is silent on whether seafarers may enforce their rights through strike action. Do you think that this should be clarified? Why/why not?
11. Do you think the MLC adequately protects the employment rights of seafarers? Why/why not?
12. Does the MLC place an onerous burden on employers? Why/why not?
13. Do you think the MLC effectively 'levels the playing field' in shipping? Why/why not?
14. Fast turnarounds in ports are important. How can compliance with the MLC be ensured without causing unnecessary delays?

Research Approval (Text only)

Project No. 2015/090

Project Title An investigation into how the Maritime Labour Convention 2006 has affected the employment rights of seafarers in the Australia/Pacific region

Thank you for addressing the conditions placed on the above application to the Murdoch University Human Research Ethics Committee. On behalf of the Committee, I am pleased to advise the application now has:

OUTRIGHT APPROVAL

Approval is granted on the understanding that research will be conducted according the standards of the National Statement on Ethical Conduct in Human Research (2007), the Australian Code for the Responsible Conduct of Research (2007) and Murdoch University policies at all times. You must also abide by the Human Research Ethics Committee's standard conditions of approval (see attached). All reporting forms are available on the Research Ethics and Integrity web-site.

I wish you every success for your research.

Please quote your ethics project number in all correspondence.

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