SENATE EDUCATION, EMPLOYMNET AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE

FAIR WORK BILL 2008

SUBMISSION BY

STELLA MARIS SEAFARERS CENTRE MELBOURNE

9th January 2009

Mr John Ryan
Vice President

1. The Issue:
Does the Fair Work Bill permit or even require the use of Forced Labour in relation to some workers who have engaged in industrial action?

2. The Submitter
2.1. The **Stella Maris Seafarers Centre Melbourne** (Stella Maris) is a charitable work of the Catholic Church engaged in the provision of social and spiritual support for seafarers visiting the Port of Melbourne.

2.2. The Melbourne Stella Maris is part of a world wide group of seafarer centres operating as part of the Apostleship of the Sea work of the Catholic Church.

2.3. Stella Maris is not a political or industrial organization and would not normally involve itself in the making of a submission to a Senate Inquiry into industrial legislation. Stella Maris concerns itself with the spiritual, personal and social welfare of seafarers. In 2008 over 15,000 seafarer visits were made to the Stella Maris Seafarers Centre Melbourne. Stella Maris aims to provide a home away from home for seafarers who visit our centre.

3. Background
3.1. There have been many occasions in the past where foreign seafarers who have on arrival of their ship in an Australian port gone on strike over such basic issues as not having been paid for months or being required to live and work in appalling conditions. When seafarers take such industrial action in Melbourne the Stella Maris has become involved (often in conjunction with the Flying Angel organisation, the equivalent organization operate by the Church of England) through providing either accommodation for such seafarers or providing food, clothing and essential personal items as well as providing seafarers with means of communicating with their families. The resolution of the underlying industrial issue that led to the seafarers going on strike are left to be dealt with by the Australian representatives of the International Transport Federation, the umbrella organisation for worker organizations in the maritime industry.

3.2. Seafarers by the very nature of their work cannot take industrial action whilst at sea. To do so would in many jurisdictions be an act of mutiny or would at the very least place both the ship and themselves in serious danger.

3.3. It is only when a ship reaches the safety of a port that seafarers can even contemplate taking industrial action. If the port is their home port then seafarers can sometimes (but only sometimes) legally terminate their contracts. In all other cases, including many cases where the ship is in the seafarers home port, the seafarers are not able to simply resign their employment and leave the ship.

3.4. For most foreign seafarers the absolute necessity of keeping their job on board ship in order to earn the means to support their family means that leaving their employment is

never a practical option. Taking industrial action constitutes an extreme step for most foreign seafarers and occurs only in the most extreme circumstances.

3.5. If seafarers have gone on strike when their ship berths in an Australian port and the seafarers are forced to return to the ship and work thus permitting the ship to sail then this constitutes forced labour. Once the seafarers are required to return to the ship against their will the ship becomes their effective prison.

3.6. A ship is like no other workplace. At the end of a work period the seafarer cannot leave the ship. The ship is both their workplace and their place of living and a ship can be a more effective prison than any land based prison.

4. The Issue with the Fair Work Bill

Both the structure and language of the Fair Work Bill imply that seafarers who engage in industrial action can be forced to return to work and can be forced to return to work in circumstances which would constitute Forced Labour under ILO Conventions 29 and 105.

5. Which Seafarers are covered by the Fair Work Bill?

5.1. Both Clauses 33 and 34 of the Fair Work Bill make clear that the Bill will apply to certain shipping both within and outside Australia's exclusive economic zone and continental shelf.

5.2. All local seafarers and some foreign seafarers will be covered by the Fair Work Bill.

5.3. Most foreign seafarers will not be covered by the Fair Work Bill.

5.4. Clause 31 permits some foreign seafarers who would otherwise be covered by the Fair Work Bill to be excluded from its coverage through regulations made under the Fair Work Bill. Exclusion of any worker under Clause 31 can only occur if the Minister is satisfied that "*there is not sufficient connection between the person or entity and Australia.*"

5.5. There is nothing in the Fair Work Bill to clarify what is meant by the concept "*sufficient connection*" with Australia.

5.6. Foreign crewed ships chartered by an Australian employer (this term is defined by Clause 35) and which use Australia as a base (but not their only base) are covered by the Fair Work Bill.

6. Return to Work Orders.

6.1. The types of issues that would lead to foreign seafarers taking industrial action on arrival at an Australian port will invariably mean that the industrial action was not "*protected industrial action*" under the Fair Work Bill.

6.2. Clause 419 of the Fair Wok Bill deals with the making of return to work orders where industrial action is being taken by "*non-national system employees*".

6.3. *"National system employer"* is specifically defined in Clause 14 and an employee of such an employer is a national system employee. Any employee of an employer who is not within the specific categories defined in Clause 14 is therefore a "*non-national system employee"* for the purposes of Clause 419.

6.4. Foreign seafarers caught by the operation of Clauses 33 and 34 would be *"non-national system employees"* for the purposes of Clause 419.

6.5. The making of an order under Clause 419 is not discretionary.

6.6. Fair Work Australia **MUST** make an order under Clause 419 if the basic tests of Clause 419 are met.

6.7. In the case of foreign seafarers on strike in Melbourne and thus preventing a ship from sailing to Brisbane to unload, a company in Brisbane urgently waiting for goods on board the ship would be able to meet the test set out in Clause 419(1)(b).

6.8. The absence of any discretion for Fair Work Australia to refuse to make a return to work order under Clause 419 commences a process which can constitute Forced Labour in the case of seafarers required to return to work on board a ship. The fact that Clause 421 of the Fair Work Bill allows the enforcement of return to work orders through injunctive relief strengthens the claim that return to work orders can constitute Forced Labour.

7. The Forced Labour Conventions of the ILO

7.1. Article 2 of the *Forced Labour Convention 1930, Convention 29* provides a definition of forced labour as follows:

> ***"the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".***

7.2. The Article also provides a list of exemptions from the definition of forced labour but none are relevant to the issue raised in this submission.

7.3. ILO *Convention 105, the Abolition of Forced Labour Convention, 1957* identifies in its preamble the key reason for the Convention as being that the ILO ***"having decided upon further proposals with regard to the abolition of certain forms of forced or compulsory labour constituting a violation of the rights of man referred to in the Charter of the United Nations and enunciated by the Universal Declaration of Human Rights"***.

7.4. Article 1 of the *Abolition of Forced Labour Convention* identifies 5 specific forms of forced or compulsory labour which the Convention sought to ensure were abolished.

Two of those forms of forced or compulsory labour are
any forced or compulsory labour ***"as a punishment for having participated in strikes"***
or
any forced or compulsory labour ***"as means of labour discipline".***

7.5. **A return to work order against foreign seafarers which 'exacts' work from the seafarer 'under menace of penalty' and for which the seafarer 'has not offered himself voluntarily' is both forced labour and forced labour as either or both 'a punishment for having participated in strikes' or "as a means of labour discipline".**

8. Resolving the Issue

8.1. The Stella Maris does not believe that the Government would have intended that the Fair Work Bill would operate to create a situation of Forced Labour in relation to any seafarer.

8.2. The two most practical alternative means of addressing the issue raised in this submission are to either:

> **Amend Clause 419 to remove the mandatory requirement to issue a return to work order and make the issuance of such an order a discretionary matter for Fair Work Australia,**
>
> or,
>
> **Amend the Bill to make clear that no order can be issued by Fair Work Australia or any injunctive relief given by any court where the effect of such order or injunctive relief would be to create a situation of forced or compulsory labour as dealt with under either of ILO Conventions 29 or 105.**

8.3. The first alternative, making Clause 419 orders discretionary, would go beyond merely addressing the issue of forced labour and may involve alteration of general industrial relations policy decisions of the government. This alternative does not specifically address the issue of Forced Labour but would allow any consequences of making an order, such as a forced labour outcome, to be considered by Fair Work Australia before the making of a return to work order.

8.4. The second alternative addresses the issue of forced or compulsory labour as raised in this submission but may require more complex drafting in order to ensure that that the whole of the operation of the Bill including the powers and functions of Fair Work Australia and the courts exercising powers and functions under the Fair Work Bill operate so as not to breach the fundamental human right not to be required to perform forced or compulsory labour.

8.5. Either alternative would address the issue not only in relation to foreign seafarers subject to the operation of the Fair Work Bill but also for any local seafarer covered by the Fair Work Bill.

9. Conclusion

The Stella Maris appreciates the opportunity given to make this written submission and the Stella Maris is available to attend **any** of the Committees public hearings to address the Committee further on this submission.