



Maritime Union of Australia (MUA)

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023

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About the Maritime Union of Australia (MUA)

The Maritime Union of Australia (MUA) is an affiliate of the 2-million member Australian Council of Trade Unions (ACTU) and an affiliate of the 20-million-member International Transport Workers' Federation (ITF).

The MUA represents approximately 14,000 workers in the shipping, stevedoring, offshore oil and gas, port services and commercial diving sectors of the Australian maritime industry. The MUA is also part of an Offshore Alliance with the Australian Workers Union (AWU) that jointly organises workers across the Australian offshore oil and gas industry.

The ITF represents workers involved in the shipping, ports, rail, road, airline and logistics components of global supply chains.

Summary of the MUA submission

The MUA believes the Bill is inadequate in its present form.

The MUA proposes that the Committee recommend that the Bill's passage in its present form be rejected, that it be returned to the Minister requesting it be re-drafted and be re-presented to the Parliament in ways that fully address the recommendations in the Review of the *Modern Slavery Act 2018* (MSA) and the findings in the Targeted review of Divisions 270 and 271 of the Criminal Code (Criminal Code).

The MUA proposes that the Bill include additional powers and functions of the Commissioner that would advance Recommendations 1, 3, 5, 8, 9, 11, 13-16, 19, 24, 25, 27, 29 and 30 in the Review of the MSA.

We also advocate measures to fully respond to the Recommendations in the Review of the MSA and to the Findings in the Review of the Criminal Code, in particular Findings 14, 15, 16, 18 and 21, which we say necessitates provision of additional functions and powers of the Commissioner.

We acknowledge that the measures we advocate do not provide a full solution for reform of Australia's MS regime, but we are now proposing that these be matters to be considered by the Commissioner, as part of a package of reform of the MSA and Criminal Code on which the Commissioner be empowered to provide advice to the Minister/Government, and that the Bill expressly provide that as a function of the Commissioner.

Having undertaken reviews of the MSA and the Criminal Code with input provided by hundreds of stakeholders in good faith, anticipating the Government would consider stakeholder inputs and respond positively to the recommendations and findings in reviews, we believe it would be an act of bad faith by the Government to provide for the appointment of an Anti-slavery Commissioner with very limited functions and powers, that would severely hamstring the appointees ability to advance the elimination of modern slavery in Australian supply chains.

The MUA supports the submission of the ACTU.

Introduction

The MUA is concerned about the inadequacies in this Bill. We propose that the Committee recommend that the Bill's passage in its present form be rejected, that it be returned to the Minister

requesting it be re-drafted and be re-presented to the Parliament in ways that fully address the recommendations in the Review of the *Modern Slavery Act 2018* (MSA) and the findings in the Targeted review of Divisions 270 and 271 of the Criminal Code (Criminal Code).

Addressing the inadequacies in the Bill

Additional powers and functions of the Anti-slavery Commissioner (Commissioner) to ensure action on the Recommendations in the Review of the MSA

The main concerns we have with the Bill are:

- The functions given to the Commissioner “*to work with Government, business and civil society to support compliance with the Act, improve transparency of supply chains, and thereby help combat modern slavery in Australia and abroad*” are inadequate and are too limited in scope:
 - In our view the proposed functions and powers of the Commissioner will inhibit the Commissioner from taking the necessary actions to address, combat and eliminate modern slavery in the supply chains of entities covered by the MSA.
- The functions as provided are mainly educative, informative and promotional and do not provide the Commissioner with functions of enforcement against poor performance by entities covered by the MSA, particularly in delivering remedy to victims of modern slavery and to impose sanctions against poor performers.
- Additionally, the functions fail to address the following Recommendations in the Report of the Review of the MSA tabled in the Parliament on 25 May 2023, in particular:
 - *Recommendation 1: The Australian Government – either through or in consultation with the Anti-Slavery Commissioner – initiate discussion with other jurisdictions in Australia and internationally on options for defining ‘modern slavery’ for the purpose of mandatory reporting laws such as the Modern Slavery Act 2018. A report on those discussions should be provided to any later review of the Act:*
 - ❖ In our view the Bill should have specifically required the Commissioner to advise on maintaining a definition of modern slavery that adopts or exceeds international leading edge definitions, where Australia’s MSA is already lagging more recent human rights due diligence legislation internationally e.g. the German Supply Chain Due Diligence Act (LkSG) which came into effect on 1 January 2023, which, in addition to the matters covered by the MSA, covers matters such as minimum working age, health and safety regulations at the place of work, freedom of association, no discrimination at work, fair remuneration, harmful environmental changes significantly affecting humans, unlawful taking of land, forests and waters that serve to secure the livelihood of persons, hiring of security forces that use excessive violence, in particular against trade union members.
 - *Recommendation 3: The Attorney-General’s Department review the Guidance for Reporting Entities to ensure that the description of modern slavery in Appendix 1 of the Guide accurately represents the terms of the Criminal Code:*
 - ❖ In our view the Bill should have provided clear guidance for the Commissioner on the Government’s expectations for ensuring the Guidance for Reporting Entities accurately represents the terms of the Criminal Code, given the extensive treatment of that issue in both the Review of the MSA and the Review of the Criminal Code;
 - *Recommendation 5: The Attorney-General’s Department, in consultation with the Anti-Slavery Commissioner, amend the Guidance for Reporting Entities to provide tailored guidance to small and medium-sized entities on complying with the reporting requirements of the Modern Slavery Act, either on a voluntary basis or as required by the Act under a lowered reporting threshold:*

- ❖ In our view the Bill should have provided a function requiring the Commissioner to update and strengthen the Guidance for Reporting Entities in line with the findings, commentary and recommendations in the review of the MSA, that covers all entities, noting the Guidance may need graduated requirements depending on the size of the entity.
- *Recommendation 8: The Attorney-General's Department consider the desirability of amending the mandatory reporting criteria in s 16 of the Modern Slavery Act:*
 - *To replace the phrase 'operations and supply chains' in ss 3, 11 and 16 with the phrase 'operations and supply networks';*
 - *To revise criteria 3, 4, 5 and 6 in the manner discussed in Chapter 6 of this report; and*
 - *To add new mandatory reporting criteria that would require an entity to report on:*
 - ✓ *Modern slavery incidents or risks identified by the entity during the reporting year;*
 - ✓ *Grievance and complaint mechanisms made available by the entity to staff members and other people, and*
 - ✓ *Internal and external consultation undertaken by the entity during the reporting year on modern slavery risk management:*
- ❖ In our view the Bill should have provided an advisory and consultation role for the Commissioner in assisting the Department to implement this recommendation.
- *Recommendation 9: The Attorney-General's Department consider the desirability of amending the Modern Slavery Act to provide that the mandatory reporting criteria can be prescribed in a rule or regulation made under the Act, and deal with specified matters, rather than listed in s 16 of the Act as at present:*
 - ❖ In our view the Bill should have provided a specific power for the Commissioner to advise the Minister on rules or regulations to enhance the operation of the MSA.
- *Recommendation 11: The Modern Slavery Act be amended to provide that a reporting entity must:*
 - *Have a due diligence system that meets the requirements mentioned in rules made under s 25 of the Act; and*
 - *In the entity's annual modern slavery statement, explain the activity undertaken by the entity in accordance with that system.*

This duty should not apply to an entity with a consolidated annual revenue of between \$50-100M until two years after the entity has become subject to the reporting requirements of the Act:

 - ❖ In our view the Bill should have provided a specific power for the Commissioner to advise the Minister on best practice due diligence systems expected of entities given the rapid development of human rights due diligence law internationally and the importance of ensuring entities are adopting the provisions in the UN Guiding Principles on Business and Human Rights.
- *Recommendation 13: The Attorney-General's Department develop a template for optional use by reporting entities for preparing and submitting an annual modern slavery statement in compliance with the Modern Slavery Act.*
- Recommendation 14: The Attorney-General's Department facilitate the submission of an online modern slavery statement (using the template referred to in Recommendation 13) through an online portal on the Online Register for Modern Slavery Statements.*
- Recommendation 15: The Modern Slavery Act be amended to require that all modern slavery statements submitted under the Act include a coversheet that addresses specified matters.*
- Recommendation 16: The Attorney-General's Department review the Guidance for Reporting Entities to consider inclusion of clearer guidance, including an optional*

template, for use by entities to record that they have complied with the approval and signature requirements in the Modern Slavery Act ss 13(2) and 14(2):

- ❖ In our view the Bill should have provided a specific function for the Commissioner to advise on consistency, quality and comparability of reporting as proposed in Recommendations 13 to 16.
- *Recommendation 19: The Attorney-General's Department establish a formal arrangement for annual review of the Commonwealth Modern Slavery Statement, and to consider the role of the Anti-Slavery Commissioner in that review:*
 - ❖ In our view the Bill should have provided a specific function for the Commissioner to advise on the annual review of the Commonwealth Modern Slavery Statement as anticipated in Recommendation 19, given the importance of the demonstration effect that a Commonwealth Modern Slavery Statement can have on the quality of reporting generally.
- *Recommendation 24: The Attorney-General's Department examine the practicability of establishing a procedure for the receipt and investigation of complaints from the public regarding entity reporting under the Modern Slavery Act:*
 - ❖ In our view the Bill should have provided a specific power for the Commissioner to establish a process for the investigation of complaints from the public regarding entity reporting under the MSA. In its present form the Bill only provides for the Commissioner to:
 - ✓ Support victims of modern slavery by providing information in relation to government and non-government resources, programs and services; and
 - ✓ To engage with, and promote engagement with, victims of modern slavery to inform measures for addressing modern slavery.
 - That falls well short of ensuring that members of the public can complain, and have their complaints investigated regarding entity reporting under the MSA, which should also provide for a system of remedy for members of the public who are victims of modern slavery.
 - ❖ A large cohort of 'the public' are workers. The Bill should have included a power for the Commissioner to investigate and handle complaints from workers and their representatives in the operations and supply chains of reporting entities; provide remedy where complaints are upheld; and issue penalties for corporate non-compliance.
- *Recommendation 25: The Attorney-General's Department, in consultation with the Anti-Slavery Commissioner, develop and publish a forward work program for reviewing and updating the Guidance for Reporting Entities and other guidance material:*
 - ❖ In our view the Bill should have provided a specific power for the Commissioner to not only "develop and publish a forward work program for reviewing and updating the Guidance for Reporting Entities and other guidance material" but that the forward work program set out a comprehensive plan, including further amendment of the MSA, to ensure that modern slavery is being eliminated and that Australia is a leader in giving effect to the enjoyment of the rights provided in International Conventions that underpin the MSA.
- *Recommendation 27: The Modern Slavery Act be amended to provide that:*
 - *The Minister or the Anti-Slavery Commissioner may make a written declaration of a region, location, industry, product, supplier or supply chain that is regarded as carrying a high modern slavery risk; and*
 - *The declaration may prescribe the extent to which reporting entities must have regard to that declaration in preparing a modern slavery statement under the Act:*

- ❖ In our view the Bill should have included a provision to give effect to this Recommendation and accordingly, provided a specific power for the Commissioner to make such declarations.
- *Recommendation 29: The Modern Slavery Act s 24 be amended to provide that a further review of the kind described in that section be undertaken in another three years by a person appointed by the Minister, who may be the Anti-Slavery Commissioner:*
 - ❖ In our view the Bill should have included a provision to ensure the Commissioner arranges, or undertakes, a review of the MSA in another three years, given the absence of a Government commitment to adopt the Recommendation.
- *Recommendation 30: The legislation establishing the office of Anti-Slavery Commissioner provide expressly that a function of the Commissioner is to issue guidelines on special issues relating to the reporting requirements in Part 2 of the Modern Slavery Act. Any guidelines must not be inconsistent with guidelines that the Minister has arranged to be published under the Act:*
 - ❖ In our view the Bill should have included a provision to give effect to this Recommendation.

MUA proposals to fully respond to the Recommendations in the Review of the MSA and to the Findings in the Review of the Criminal Code – which by necessity require additional functions and powers for the Commissioner

To ensure the MSA is a more effective mechanism to address modern slavery, we propose a number of measures that we believe would give effect to the Recommendations in the Review of the MSA and to the Findings in the Review of the Criminal Code.

We note in particular the following Findings in the Review of the Criminal Code which we say necessitate a role for the Commissioner in advising on how those findings could best be integrated into the MSA and into associated Guidance for reporting entities, with the MUA measures providing practical assistance in translating those findings into an improved modern slavery regime for Australia.

Finding 14 - *There is scope to clarify and/or expand the existing aggravating factors in Divisions 270 and 271 to encompass other relevant factors. These could include, for example, economic harm suffered by the victim and survivor, the accused's use of violence (including sexual violence and weapons) during the commission of an offence, and the particular egregiousness of offences against people with disabilities. If amendments are developed, other relevant factors, on further review of similarly serious Commonwealth offences, should also be considered.*

Finding 15 - *The term 'significantly deprived of personal freedom' in the servitude offence at section 270.4 is undefined in both legislation and case law, and could be clarified through a non-exhaustive list of factors in legislation that might indicate significant deprivation. Additional guidance could assist criminal justice practitioners in distinguishing between servitude and forced labour.*

Finding 16 - *The 'reasonable person in the position of the victim' test used in Division 270 requires consideration of the state of mind of a reasonable person with the same situational and personal vulnerabilities of the victim and survivor—arguably subjective deliberations. The application of this test in Division 270 was raised in a number of consultations and submissions to the Targeted Review. In particular, stakeholders noted the difficulties that criminal justice practitioners and the courts may face in understanding the situational and personal vulnerabilities of victims and survivors. Guidance could better support consideration of the unique circumstances, background and vulnerabilities of victims and survivors. One of the following options may also assist.*

- *Option 1: Expand subsection 270.10(1) to make explicit that factors at subsection 270.10(2) can apply to deliberation of whether a reasonable person in the position of a victim and*

survivor would have felt free to cease providing labour or services or to leave the place where they are providing those labour or services. Further, the list of matters at subsection 270.10(2) could be expanded.

- *Option 2: Remove the reasonable person test and reframe the forced labour and servitude offences to focus more on the conduct and intent of the offender and less on the impact of the conduct on the victim and survivor. This is consistent with the UK approach and with international good practice that encourages legislation to focus on the offender's conduct rather than the conduct or state of mind of the victim and survivor. This approach would be a significant departure from the current framing and would require further consultation on specific proposed amendments.*

Finding 18 - *The debt bondage offence retains inconsistent language in the form of 'personal services'. This phrase could be replaced with a reference to 'labour or services' for consistency with other offences in Divisions 270 and 271. If such a change is made, consideration should be given to ensuring the offence continues to target serious offending that meets the threshold of a slavery-like practice. The maximum penalty for debt bondage may require further consideration in light of legislative developments at the federal and state and territory levels to address worker exploitation. Further consideration to amending penalties could be given as part of a broader holistic assessment of legislation that addresses the spectrum of labour exploitation.*

Finding 21 - *The list of elements and factors in section 270.10 (Relevant Evidence) is non-exhaustive. However, it could be amended to explicitly capture further conduct relevant to Division 270 offences, with a view to:*

- *Including the reasonable person, freedom to cease labour or services/leave a place of labour or services, and significant deprivation of freedom elements. The list of factors that are relevant to these elements will also need to be explored;*
- *Including the social and cultural relationships between the victim and survivor and the offender, and the victim and survivor and their family members, as relevant factors; and*
- *Accounting for particular vulnerabilities of a person with a disability.*

In advocating the measures outlined in the following section, we propose that the Commissioner be provided with a function to consider how these proposals could be integrated into the findings of the review of the Criminal Code to ensure the Commissioner is fully equipped to give practical and material effect to addressing modern slavery in Australia and its supply chains.

Extending the definition of modern slavery

The Review of the MSA noted that the annual modern slavery statement of all reporting entities is required to address seven mandatory reporting criteria and that those criteria are linked to the term 'modern slavery', which is defined in the Act as conduct that is either a criminal offence under the slavery provisions of the Criminal Code (Divisions 270 and 271) or that falls under one of two international instruments (the Trafficking Protocol and the Worst Forms of Child Labour Convention) (s 4).

It further noted that the Act and the international instruments apply to as many as fourteen categories of slavery practice – slavery, slave trading, servitude, forced labour, forced marriage, child marriage, debt bondage, trafficking in persons, child trafficking, domestic human trafficking, organ trafficking, harbouring a victim, global human trafficking, and serious child labour.

The Review also noted that the Australian MSA indirectly (*MUA emphasis*) captures domestic employment practices in the reporting requirement, saying that two of the mandatory reporting criteria require entities to report on the risks of modern slavery practices in their operations and supply chains, and the actions taken to assess and address those risks (s 16(1)(c), (d)).

The Review went on to say that the Guidance for Reporting Entities gives examples of indicators that may point to risks of labour exploitation (*MUA emphasis*). Among them are the use of unskilled and seasonal labour, short-term contracts, wage deductions and underpayment, isolated workplaces and accommodation arrangements, and unrealistic cost targets and delivery timeframes. The report suggested that actions that can be taken to address those risks are staff training and awareness, worker consultation, grievance mechanisms, and engaging an entity's Human Resources section in its modern slavery reporting.

The Review also noted that the National Action Plan recognises that workplace rights protection is an essential component of a comprehensive modern slavery program. Two action items in the National Action Plan require the Office of the Fair Work Ombudsman to develop programs for protecting and empowering vulnerable workers and that workplace protection against exploitation is principally covered in Australia by laws such as the *Fair Work Act 2009* (Cth).

Our submission is that the weakness in the MSA is that it does not define the practices that are regarded as 'labour exploitation' and notwithstanding that the Guidance for Reporting Entities gives examples of indicators that may point to risks of labour exploitation, there is no statutory requirement on entities covered by the MSA to either report on, or have in place due diligence mechanisms or address (remedy) those practices.

While the FW Act sets minimum terms and conditions of employment for national system employees through the National Employment Standards, and specifies the rights and responsibilities of employees and employers, and that enforcement activity is a function of the Fair Work Ombudsman, those mechanisms have not been successful in tackling labour exploitation, which persists, let alone eliminating labour exploitation. They may assist in defining in industrial instruments what is an acceptable labour standard, and the FWO may help remedy exploitation after the event, but those provisions do not specifically define and seek elimination of exploitative practices.

The MUA submission to the Review of the MSA put forward three proposals to address this definitional gap, with a focus on just one sector where labour exploitation is rife – international shipping in transport supply chains - which we repeat below.

MUA proposal 1: Broaden the definition of modern slavery to include some ILO MLC requirements applicable to seafarers

The MUA proposal is that the definition of modern slavery in s4 of the MS Act be broadened to include additional human rights, specifically certain human rights derived from the ILO Maritime Labour Convention (MLC) to which Australia is a signatory.

The ILO MLC rights that the MUA proposed for inclusion in the definition of modern slavery are that:

- All seafarers shall be paid for their work regularly and in full in accordance with their employment agreements (MLC Regulation 2.2(1)); where:
 - Seafarer means any person who is employed or engaged or works in any capacity on board a ship (MLC Article 2(10(f));
 - Regularly is defined as no greater than monthly intervals (MLC Standard 2.2(1));
 - Employment agreement is defined as the seafarer employment agreement that must reference an International Transport Workers Federation (ITF) approved collective bargaining agreement i.e. the 'applicable collective agreement' (MLC Standard 2.2(1)).
- The level of minimum wages for seafarers should be adjusted to take into account changes in the cost of living and in the needs of seafarers (MLC Guideline B2.2.3 (2)(a)); where:

- Minimum wages are defined as an ITF template agreement as defined in the *Shipping Registration Act 1981*¹;
- A seafarer shall be deemed to have been abandoned where, in violation of the requirements of the ILO MLC or the terms of the seafarers employment agreement, the shipowner: (a) fails to cover the cost of the seafarer's repatriation; or (b) has left the seafarer without the necessary maintenance and support; or (c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months (MLC Standard A2.5.2(2)).

This could be achieved by amending s4, so it includes an additional element to the definition of modern slavery e.g.: Modern slavery means, in relation to seafarers (as defined), conduct which would constitute:

- Non-payment or underpayment of seafarers' wages for their work which must be paid regularly and in full in accordance with their seafarer employment agreement;
- Non-adjustment of the level of minimum wages for seafarers to take into account changes in the cost of living and in the needs of seafarers; and
- Abandonment of a seafarer.

MUA proposal 2 - Reforming the Criminal Code to capture forced labour in shipping

One aspect of the definition of modern slavery in the MSA is that it is conduct which would constitute an offence under Division 270 or 271 of the Criminal Code. The Criminal Code defines forced labour as being the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services.

Coercion is defined in the Criminal Code.² The MUA proposal is that the Criminal Code be broadened to capture forced labour on ships, so the circumstances of seafarers being detained on ships beyond the duration of their contract of employment (seafarers employment agreement) as defined in the ILO MLC and laws giving effect to the ILO MLC e.g. Marine Order 11 made under the *Navigation Act 2012* (C'th), clearly constitutes forced labour on ships.

This could be achieved by amending the Criminal Code - as follows:

1: That a new section 270.6(1A) be inserted in the following terms:

- (1A) For the purposes of this Division, forced labour, in the case of a seafarer on a ship, is the condition of a person (the victim) who provides labour or services if, because the victim is trapped at sea, a reasonable person in the position of the victim would not consider himself or herself to be free:
- (a) to cease providing the labour or services; or
 - (b) to leave the place or area where the victim provides the labour or services.

2: That the following definitions be inserted as section 270.6(4):

(4) In this section:

¹ The SR Act defines a template IT agreement as "meaning a standard form of agreement that: (a) relates to the working conditions of seafarers; and (b) is formulated by the International Transport Workers' Federation; and (c) is known as the International Transport Workers' Federation Uniform Total Crew Cost Collective Agreement.

² Coercion includes coercion by any of the following: (a) force; (b) duress; (c) detention; (d) psychological oppression; (e) abuse of power; (f) taking advantage of a person's vulnerability (see . Division 270 Slavery and slavery-like offences - Subdivision A—Preliminary 270.1A Definitions for Division 270)

Master means the person who has command or charge of a ship, but does not include a pilot.

Port includes a harbour.

Trapped at sea means:

- (i) a failure by the ship's master to dock at a port to enable a seafarer to disembark from the ship at the end of their agreed (contracted) period of engagement; or
- (ii) a failure by the ship's master to dock at a port to enable a seafarer to disembark from the ship prior to or on the expiration of 11 months of the seafarer commencing their period of engagement on board the ship; or
- (iii) where a seafarer is held captive on or off the ship as a result of acts of piracy or armed robbery against the ship and where it can be proven the shipowner has not taken sufficient steps to secure the release of the seafarer (derived from the ILO MLC – Standard A2.2(7)).

The new offence created by proposed amendments 1A and 2 above is limited to the crime of forced labour under the MSA. It makes it clear that in the case of engagement of a seafarer for an indefinite duration or for a voyage, that the seafarer is to be allowed off the ship within 11 months. Beyond 11 months the engagement becomes forced labour.

We note that forced labour under the ILO Forced Labour Convention, 1930 (No. 29) means 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 him/herself voluntarily.

The proposed new offence would be an offence for the purposes of Division 270 of the Criminal Code, and that the conduct that constitutes such an offence will fall within the definition of modern slavery for the purposes of the MSA.

In turn the MS Act will require reporting entities to include in their Modern Slavery Statements information about this new risk of forced labour in the entity's operations and supply chains; the actions that the entity has taken to assess and address this risk, including due diligence and remediation processes; and how the entity assesses the effectiveness of those actions.

Inclusion of such an amendment would in our view provide a much greater chance of proving the existence of "forced labour" on a ship because it becomes a factual matter that can be supported by evidence.

Further, in the MUA submission to the Review of the Criminal Code we expanded on the above by proposing that there should be an additional two elements included in the definition of exploitation in section 271.1A of the Criminal Code, being:

- Abandonment (of seafarers)³; and
- Wage theft:
 - At this stage to our knowledge, wage theft in international seafaring is not captured by any other Australian law, notwithstanding commencement of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, noting there are no legally enforceable wage

³ A contemporary case in Australian waters is the livestock carrier the *Yangtze Fortune*, a Liberian-flagged ship, where the Federal Court has determined that the owner had abandoned the ship – see *ABC Sailors on abandoned ship Yangtze Fortune in limbo while anchored on Victorian coast*, 29 January 2023, <https://www.abc.net.au/news/2023-01-29/sailors-in-limbo-abandoned-ship-yangtze-fortune-victoria-coast/101898232#:~:text=A%20December%202022%20judgement%20by,mounting%20debt%20owed%20to%20creditors>

minimums for international seafarers, except those employed on ships that are operating under a Temporary Licence to engage in coastal trading under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT Act) and that only applies, by virtue of provisions in the Fair Work Regulations 2009 operating in conjunction with the Seagoing Award 2020 Schedule A, to the third and subsequent voyage/s of such a ship, and then only to the laden leg of the voyage (not the ballast [non-laden] leg of the voyage):

- ✓ The ILO MLC, given effect through AMSA Marine Order 11, only sets out the conditions and processes for paying wages to seafarers, not a specified minimum level of wages. Those processes specify that wages must be paid at least monthly, in accordance with a seafarers employment agreement, and there must be a system in place for efficient bank transfers or repatriation to the seafarer's family if needed. These standards do not specify a mandatory minimum wage; this is left to the vessel's flag state, with non-mandatory 'guidance' from the ILO. This lack of minimum wage regulation within the MLC creates a 'race to the bottom', whereby countries compete to attract shipowners to register their vessels with the lure of very low minimum wages and other weak labour standards. As part of ILO MLC compliance, all seafarers must sign a seafarers employment agreement that specifies the conditions of employment for each seafarer on the vessel each time they sign-on to a ship. The seafarers employment agreement must specify the length of the agreement, the agreed wage and formula used for calculating it, termination terms, any entitlements, details of repatriation for the seafarer, and terms of any applicable collective bargaining agreement; and
- ✓ There remains considerable doubt as to whether Part 14 (Wage theft) in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* covers non-national seafarers, even those engaged on vessels operating in domestic coastal trading under a Temporary Licence issued under the *Coastal Trading (Revitalising Australian Shipping) Act 2012*, let alone application to non-national seafarers engaged in international shipping i.e. in the supply chains of virtually every Australian company that imports or exports goods.

In that submission, we also raised the inadequacy in the definition of servitude and forced labour as being the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free: (a) to cease providing the labour or services; or (b) to leave the place or area where the victim provides the labour or services:

We said that is inadequate for seafarers on international ships given the geographic location of the place of work, which is for the majority of the time, on the high seas. Even if there is no coercion, threat or deception, a seafarer at sea is not free: (a) to cease providing the labour or services, as this would potentially endanger the whole ship – its cargo and crew; or (b) to leave the place or area where the victim provides the labour or services, at least until the ship next enters a port, and even then, the seafarer would not normally be given permission to leave the ship, because all ships operate under a Minimum Safe Manning Document (MSMD) issued by the maritime regulator in the nation of ship registration which specifies the minimum safe crewing level, which would necessitate the ship owner finding another crew member as a replacement, and arrange for repatriation of the departing seafarer to their home nation.

Furthermore, the shipowner (represented by the ship's Master/Captain) invariably retains control of seafarer identity documents while onboard, thus making it practically impossible for a seafarer to

leave/abandon a ship without the express approval of the shipowner. In addition, seafarers have two other legitimate concerns – that if they act contrary to the wishes of the shipowner, they may not receive wages owed, and secondly and importantly for seafarers from developing nations, they will be blacklisted by seafarer recruitment agencies and fail to obtain further seafaring employment opportunities, this denying them the right to work in their chosen occupation.

We acknowledge that the measures we advocate do not provide a full solution for reform of Australia's MS regime, but we are now proposing that these be matters to be considered by the Commissioner, as part of a package of reform of the MSA and Criminal Code on which the Commissioner be empowered to provide advice to the Minister/Government, and that the Bill expressly provide that as a function of the Commissioner.

In advocating these reforms we also proposed that much more needs to be done to build understanding of the MS Act, that needs to include the following emphases:

- Building a better understanding of the purpose of the MSA – to eliminate MS practices and to provide redress to victims of MS;
- Building understanding of how modern slavery is defined in the MSA – what it covers and what it does not cover; and
- Building an understanding of the source for each of the modern slavery practices covered by the Act e.g. that forced labour derives from the provisions of the Criminal Code/*Criminal Code Act 1995* and the ILO Forced Labour Convention, 1930 (No. 29) – with explanation of what the law/Conventions are seeking to achieve.

We said that the above bullet points need to be explained in more detail (and be set out in revised MS Guidance), particularly the 3rd point. For example, on forced labour, what are the practices of the perpetrators that a reporting entity should look for when assessing risk or gathering evidence of actual/possible forced labour, and do some of those practices constitute exploitation that overlaps with other ILO labour rights in Conventions that do not underpin the defined MS practices covered by the MSA in its present form, but which may be relevant and place a statutory obligation on the reporting entity.

The MS Review acknowledged the MUA submission by suggesting that the current guidance should advise that transportation from product source to final destination is an element of the supply chain, particularly if there is a shipping component. That is just one small improvement.

We note that the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade said in its report into establishing a Modern Slavery Act in Australia:

*While there is an important distinction between labour exploitation and the more serious crimes of forced labour and slavery, the Committee recognises that these crimes exist on the same spectrum of exploitation.*⁴

More needs to be done in ensuring that the full spectrum of exploitation is appropriately addressed and that suitable remedies are available in the Australian suite of law. Gaps remain,. This Bill, had it been more comprehensive, could have addressed those gaps.

⁴ Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *'Hidden in Plain Sight: an inquiry into establishing a Modern Slavery Act in Australia'*, 2017, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileTy%20pe=application%2Fpdf, P279.

As the ACTU said in its submission, the issue of forced labour, on the extreme end of the spectrum, cannot be addressed without addressing the root causes of labour exploitation. The problem is not just a few 'bad apple' employers – the problem of worker exploitation is entrenched and endemic. Drivers of exploitation include insecurity due to temporary visa status and visa arrangements that tie workers to their employers; insecure work arrangements including arms-length employment arrangements such as labour hire; and lack of respect for fundamental workers' rights including freedom of association. This understanding of forced labour means that responses should include measures to empower workers and respect fundamental workers' rights including freedom of association and protection of the right to organise and collective bargaining so that workers are empowered to join a union, bargain collectively, and speak out about exploitation without fear of reprisal.