2009

Fair Work Bill 2008 Inquiry

Senate Education, Employment and Workplace Relations Committee

Submission by:

Australian Shipowners Association

27 January 2009

Executive Summary and Introduction

The shipping industry in Australia covers a diverse range of interests including Australian ship operators, foreign ship operators, cargo/freight interests and the maritime workforce. It is worth noting that several companies have operations in all three areas of business listed.

The Australian Shipowners Association represents 20 major Australian corporations operating in deep-sea, towage, salvage and offshore oil and gas support sectors. ASA Members variously operate in international trades, domestic trades or both. They operate Australian ships, foreign ships, employ Australian crews or foreign crews or both. They hold coastal licences and utilise single and continuing voyage permits. Notably some of ASA's Members are very large cargo interests. ASA Members own ships, operate ships, charter ships in and out and manage ships.

ASA's Members are:

- ANL Container Line
- ASP Ship Management
- BHP Billiton
- BlueScope Steel
- BP Australia
- Caltex
- CSR Shipping Group
- Bernard Schulte Ship Manageme
- Farstad Shipping (India Pacific)
- Jebsens International (Australia)
- North West Shelf Shipping Service
- P & O Maritime Services
- Perkins Shipping
- Queensland Alumina Limited
- Rio Tinto Marine
- Searoad Shipping
- Shell Tankers Australia
- Svitzer Australia
- Teekay Shipping (Australia)
- The Shell Company of Australia

Australian operators have become far more international in their operations than was the case up until as recently as a decade ago. They see themselves as operating in a global environment and less in a peculiarly Australian environment. Ample evidence of this transition is that a survey of ASA Members noted that they operate under 19 flags of registry and with 25 nationalities of crew.

The business of shipping in Australia is subject to a complex regulatory structure, of which the *Workplace Relations Act* is an important part.

The Australian Government's policy is to foster a viable coastal shipping industry in a competitive domestic transport sector.[1]

The House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government completed an inquiry into coastal shipping and regulation in October 2008. The inquiry made recommendations on ways to enhance the competitiveness and sustainability of the Australian coastal shipping sector. The government has not yet formed a response to that inquiry and the introduction of the Fair Work Bill will certainly impact on many critical aspects of the framework of the future shipping industry in this country.

[1] Ministerial guidelines-Preamble, issued 26 June 2008 (accessed 23 January 2009), http://www.infrastructure.gov.au/maritime/freight/licences/ministerial_guidelines.aspx#preamble

The Fair Work Bill presents two separate set of considerations for the Australian shipping industry. The first is the impact on international operations being conducted by businesses based in Australia (Section 34 of the Bill). The second is the impact on operations within the Australian EEZ (Section 33 of the Bill).

International shipping

Rebuilding Australia's coastal shipping industry is heavily reliant on the ability for Australian businesses to participate in international trades to build and retain the skills base needed to feed the coastal industry and the broader Australian maritime community.

The ability for Australian businesses to participate in the global shipping industry is reliant upon the ability to compete on a cost basis that at least approaches that available internationally. Australian workplace relations law does not come close to workplace relations arrangements applicable to the international shipping industry.

The application of Australian workplace relations law to foreign flagged, foreign manned ships on international trades would impose a cost disadvantage on Australian businesses competing with international ships operating from an international cost base far below that of Australian domiciled businesses. This cost disadvantage would [all but] guarantee that such Australian businesses would move these operations offshore.

Coastal shipping

A crew cost premium of approximately $3million/annum attaches to Australian crewed vessels. If there is a desire on the part of Government to see Australians employed in Australian ships and if there is a desire to create an internationally competitive shipping industry for Australian then this cost differential needs to be addressed by adoption of a measure or measures which can be developed by reference to *international best practice in shipping policy*.

The ASA position is that the answer to the un-competitiveness of Australian shipping is not to peg the cost structure of ships any higher than they need to be.

Consideration of whether it is reasonable or not to extend coverage of the Australian *Workplace Relations Act* to foreign vessels participating in Australia's domestic trade must be undertaken in concert with consideration of a raft of other legislation, such as those outlined by ASA in our submission to the House of Representatives inquiry into the coastal shipping industry in 2008[2].

The relevant sections of the Fair Work Bill (s. 33 – 36) should seek to enhance the competitiveness and sustainability of Australian shipping.

Increased protectionism for domestic voyages or Australian jobs in international trades may assist competitiveness in the short term but is unsustainable in the longer term and will hinder progress and investment by Australian companies.

[2] ASA Submission available at:
http://www.aph.gov.au/house/committee/itrdlg/coastalshipping/subs/sub29.pdf

Summary of Recommendations

ASA recommends that:

1. Section 34(1)(b) be deleted so as not to prevent Australian participation in international trades and hinder efforts to reinvigorate Australian shipping;
2. Guidance be provided on the intention of the phrase ‘uses Australia as a base’ in section 33(1)(d) to assist in interpretation of the phrase.
3. Consideration of changes to the coverage of the Workplace Relations Act such as those drafted in Section 33(1)(d) of the Fair Work Bill necessarily need to be done in concert with consideration of a range of other Australian legislative change in order to ensure the Government’s policy objectives are met.
4. The answer to the un-competitiveness of Australian shipping is not to peg the cost structure of foreign ships any higher than they need to be.
5. That the existing clause in the Workplace Relations Regulations 2006 exempting all permit ships on the basis that they are ‘insufficiently connected with Australia’ be removed.

Table of Contents

1 Operations outside the EEZ (Fair Work Bill, Section 34)

Section 34 (1)(b) extends coverage of the Act to an Australian company involved in the operation or chartering of foreign-flagged, international trading ships.

1.1 Background

Shipping is the most internationalised of all industries, and the Australian shipping industry is now very much part of the international industry with members of ASA operating ships under 19 different flags and employing 25 different nationalities of crew.

Shipping is a highly portable business and operations are readily established in places where it is commercially sensible to do so.

There are advantages to any nation, especially one as reliant on shipping for trade, in having a viable and vibrant shipping industry for the know-how, skills and expertise that this brings to the Nation.

Whether Australia is a commercially sensible place from which to operate a shipping business is very much dependent on the legislation of the day. At present adequate flexibility exists and there is hope that conditions may further improve as a result of the House of Representatives inquiry. The impact of the Fair Work Bill will very much affect the desirability of retaining Australia as a place for shipping business.

1.2 The Fair Work Bill

Section 34 (1)(b) extends coverage of the Act to an Australian company involved in the operation or chartering of foreign-flagged, international trading ships.

Section 34 (1) (b) covers *any ship* outside the EEZ that

(i) is operated or chartered by an Australian employer*; and
(ii) uses Australia as a base.

While the language of this section is subject to interpretation (and no doubt eventually legal challenge) it would appear that many Australian shipping companies would be covered by these new, extended provisions to the *Workplace Relations Act.*

The cost disadvantage that this would impose on business competing with international ships operating from an international cost base far below that of Australian domiciled businesses, on international trades would guarantee that such businesses would move these operations offshore.

This outcome would destroy any chance of rebuilding Australia's coastal shipping industry and would result in a further reduction in Australian participation in shipping activities with consequent skills decline inevitable.

The ability for Australian businesses to participate in the global shipping industry is reliant upon the ability to compete on a cost basis that at least approaches that

available internationally. Australian workplace relations law does not come close to workplace relations arrangements applicable to the international shipping industry.

ASA recommend that Section 34(1)(b) be deleted.

2 Operations within the EEZ (Fair Work Bill, Section 33)

Section 33(1)(d) is interpreted as providing coverage to some permit ships.

The coverage of Australian workplace relations legislation to foreign ships and crews participating in Australian domestic trade warrants some discussion.

2.1 Shipping within the EEZ

The movement of domestic cargo around the Australian coast is subject to a cabotage regime.

For the purposes of this discussion a ship operating under Australia's cabotage regime is a licensed ship and a ship operating under what is known as a permit is a ship that is available to perform a task for which no licensed (i.e. cabotage) ship is "available". A licensed ship does not have to be an Australian ship.

A more detailed description of the Permit System is contained at Annex I.

The extent of usage of permits was reflected in the House of Representative report into coastal shipping which recommended that amendments be made to restore the balance whereby permits are used to fill a capacity gap in the Australian shipping task rather than be utilised in favour of Australian shipping.[3]

One of the most significant operational costs of a ship is the crew cost. Australian ships operate at a cost disadvantage of at least $3 million/annum, the majority of which can be attributed to crew costs, see Annex II for detailed analysis.

Within the Australian coastal shipping market the following cost hierarchy exists:

	Australian workplace relations legislation applies	Coverage
Licensed Australian ship	Workplace Relations Act	Permanent
Licensed Foreign ship	Navigation Act (s. 288 and s. 289)	During time engaged in coasting trade
Permit (Foreign) ship	Nil	N/A

The analysis of the current legislation provided in Annex I demonstrates that Australian shipping licensed under the Navigation Act can be disadvantaged

[3] Rebuilding Australia's Coastal Shipping Industry, Inquiry into coastal shipping policy and regulation House of Representatives Standing Committee on Infrastructure, Transport, Regional Development & Local Government, para. 3.35 The Ministerial Guidelines will then need to be tightened so that permits are once again used by shippers as a means of coping with fluctuations in demand, and short periods of increased demand where existing ship capacity falls short.

compared to foreign operators with whom Australians are required to compete in Australia.

The ASA position is that the answer to the un-competitiveness of Australian shipping is not to peg the cost structure of ships any higher than they need to be.

2.2 Previous consideration of applying Australian Workplace Relations legislation to permit ships

In 2002-2003 Australian Industrial Relations Commission (AIRC) considered whether Australian industrial regulation applied to the employers of foreign crews in certain ships operating in Australia regularly using permits.

The AIRC declined to rope-in the employer to the Maritime Industry Seagoing Award largely because of "inappropriate" Australian work practices.

The AIRC Commissioner felt that applying the award to the ships would discourage productivity, and discouraging productivity was not consistent with the objectives of the work place relations legislation.

The work practices referred to included:

- Australian crews were unwilling to undertake routine maintenance;
- swing arrangements were inconsistent with international standards;
- the leave accrual of 0.926, and
- there is no monetary incentive to work overtime, and it is therefore resisted

The Commissioner went on to say that the application of the award to the two vessels would:

> "most likely place the employer in a position where necessary changes in the name of efficiency would be resisted. Inappropriate work practices based partially on award provisions and partially on custom and practice might be the order of the day".

However, the Commissioner did not rule out any form of award regulation; he said that an award that did not contain or encourage inappropriate provisions or work practices "might very well" conform to the Commission's principles.

Two points that came out of the exercise:

> First, the Commission seemed to be saying that terms and conditions embodied in the Maritime Industry Seagoing Award, approved by the AIRC as a safety net provision placed under Enterprise Bargaining Agreements, was not appropriate for crews on foreign ships operating with permits but was appropriate (since the AIRC itself had approved the MISA terms) for Australian ships with Australian crews.
>
> Secondly, the cost structures of foreign ships operating in Australia were being pegged at a lower level than the cost structures of Australian ships operating in Australia.

Foreign licensed ships relative to Australian manned ships and Permit ships
These rates are less than the going EBA rates and possibly more than permit ships currently pay.

There is no doubt that the existing arrangements perpetuate a competitive disadvantage of operating an Australian ship with Australian crew. Given the narrative provided above however it is not at all apparent that the answer to making Australians more competitive is to increase the cost of foreign ships by including other entitlements beyond wages. Indeed a partial answer appears to lay in a review of the tax treatment of Australian seafarer wages, which may result in those wages being cost competitive when compared with international crew. A necessary stimulus for the Australian coastal shipping industry.

2.3 The Workplace Relations Act 1996

In 2006 revisions were made to the *Workplace Relations Act* to implement the Howard Government WorkChoices policy. Of particular relevance to this discussion are the accompanying regulations. The *Workplace Relations Regulations, 2006* provide that:

- A person who is a non-citizen of Australia and who is a member of the crew performing duties on a permit ship, and
- A foreign corporation in the capacity as the employer of a person who is a non-Australian citizen and who is a member of the crew performing duties on a permit ship,

are not covered by the *Workplace Relations Act* on the basis that they are insufficiently connected with Australia.

Shipping undertakes over 26% of the domestic, non-urban fright task in Australia. This task is undertaken by a mixture of licensed and permit ships. Permit ships are engaging in the domestic trade and commerce of Australia.

ASA does not support the contention that all permit ships are 'insufficiently connected with Australia'.

2.4 The Fair Work Bill

Section 33(1)(d) is interpreted as providing coverage of the bill to some permit ships.

The phrase "uses Australia as a base" is open to interpretation and it is this interpretation that is critical to determining how workable this section is.

It potentially provides a reasonable test to assess the level of 'connection' a permit ship has with Australia and therefore which permit ships would be covered by the Act.

It is not expected that any ship operating on a SVP would be considered to 'use Australia as a base'.

It is not expected that liner shipping, which typically use CVPs for multiple re-entry over the 3 month validity of a permit (as part of a regular international trading loop) would be considered to 'use Australia as a base'.

However, if an interpretation of this phrase extends to cover ships that have multiple or sequential CVPs over a given period then there may be very significant impacts to many businesses.

The existing drafting may well provide an acceptable balance between permit ships that are genuinely filling a capacity gap, which would not be covered by Section 33(1)(d), and those with a greater connection with Australia.

Guidance on the intention of the phrase 'uses Australia as a base' is required.

Guidance that would assist interpretation of this phrase would be similarly welcomed.

With the provision of the above guidance the Australian legislature is well placed to exercise discretion and rule on such matters.

Previous decisions of the AIRC indicate that the commission would be prepared to consider a set of conditions that they would be prepared to impose on some permit ships (noting that the AIRC has already said that Australian conditions are too high to apply to foreign ships).

Consideration of changes to the coverage of the Workplace Relations Act such as those drafted in Section 33(1)(d) of the Fair Work Bill necessarily need to be done in concert with consideration of a range of other Australian legislative change in order to ensure the Government's policy objectives are met.

3 Conclusions

In considering what measures might be suitable for adoption to rebuild Australia's coastal shipping industry and meet the Australian Government's policy to foster a viable coastal shipping industry this Association believes that there are probably tests that would be applicable to establish whether they are suitable in the Australian context. It seems to ASA that measures proposed for Australia would have to be shown to be:

- Economically beneficial – they would have to show, on balance, a net economic benefit for Australia's economy
- Socially desirable – they would have to be measures that sit comfortably with Australian attitudes
- Commercially viable – they would have to be measures that are capable of contributing to a viable, not loss-making, shipping sector,
- Politically sustainable –measures would need to be established then remain consistently and reliably in regulation
- Industrially acceptable – the measures to be considered would not be those that would be likely to create an industrial bottle-neck. The theme is likely to be one of the social partners – employers and labour working together rather than against one another.

ASA is very concerned that the current drafting of the Fair Work Bill would fail some of these criteria and undermine a more holistic review of a variety of measures that collectively would benefit Australian shipping and the local maritime workforce.

The relevant sections of the Fair Work Bill (s. 33 – 36) should seek to enhance the competitiveness and sustainability of Australian shipping.

Increased protectionism for domestic voyages or Australian jobs in international trades may assist competitiveness in the short term but is unsustainable in the longer term and will hinder progress and investment by Australian companies.

4 Recommendations

ASA recommends that:

1. Section 34(1)(b) be deleted so as not to prevent Australian participation in international trades and hinder efforts to reinvigorate Australian shipping;
2. Guidance be provided on the intention of the phrase ‘uses Australia as a base’ in section 33(1)(d) to assist in interpretation of the phrase.
3. Consideration of changes to the coverage of the Workplace Relations Act such as those drafted in Section 33(1)(d) of the Fair Work Bill necessarily need to be done in concert with consideration of a range of other Australian legislative change in order to ensure the Government’s policy objectives are met.
4. The answer to the un-competitiveness of Australian shipping is not to peg the cost structure of foreign ships any higher than they need to be.
5. That the existing clause in the Workplace Regulations 2006 exempting all permit ships on the basis that they are ‘insufficiently connected with Australia’ be removed.

Annex I – Permits and Licences

There are two types of ship permitted to carry domestic cargo between interstate Australian ports. These are:

- licensed ships; and
- permit ships, which can be either single voyage or a continuing permit.

A licensed ship enjoys preference for cargoes over other ships – this is known as cabotage and is a widespread policy principle in many developed nations.

The circumstances in which a permit may be issued are:

- No licensed ship is available for the service or the service as carried out by a licensed ship or ships is inadequate; and
- The Minister is satisfied that it is desirable in the public interest that unlicensed ships be allowed to engage in that trade[4].

A licensed ship and its crew can be of any nationality provided that the crew is permitted to work in Australia and is paid Australian rates of wages.

The two permit types are– Single Voyage Permits (SVPs) and Continuing Voyage Permits (CVPs).

SVPs are available, as the name suggests, to carry cargo on a 'single voyage' – that is from one port to another port. They are widely used to carry coastal cargoes in circumstances where cargoes are irregular.

A CVP has a life of three months, after which the ship has to leave Australia for a port outside Australia[5]. It may then return to Australia to operate on a new CVP for another three months.

Regular users of CVPs include ships carrying cargo in bulk, both dry bulk and bulk gas (i.e. LPG). Also, container ships in the course of their international voyages satisfy the CVP requirements readily as they are only trading from one Australian port to the next as part of their scheduled liner services for a week or ten days at a time, after which they depart Australia on their scheduled international voyage eventually returning on a regular basis.

Hundreds of permits are issued annually. Details concerning Single Voyage Permits are not publicly available but Continuing Voyage Permits are Gazetted and are thus publicly available. A very brief summary is that from December 2002 – March 2008, 637 CVPs were issued. A summary of CVPs is provided at **Error! Reference source not found.**.

4.1 Why a 'Licensed ship' not an Australian flag ship?

In most other cabotage regimes, the cargo reservation is restricted to ships of the National flag[6]. This is not the case in Australia because until 1982, Australian ships

[4] *Navigation Act 1912* s.286 (1)

[5] The voyage to a port outside Australia must be to a 'place' – it cannot be a voyage to the ocean and back, i.e. it cannot be a voyage to nowhere.

were registered as British ships. Hence, the requirement to differentiate 'ships' for the purposes of preference for cargo links not to the flag of the ship but to the payment of Australian wages.

The coastal shipping market is thus made up of licensed ships and ships that are operating under permits.

4.1.1 Letting the market sort it out

Businesses understandably want to reduce all the costs involved in getting their 'product' to the market. Owners and operators of ships used for internal supply chain operations understandably want to minimise the costs of transport.

Owners and operators of ships for hire and reward understandably want to make a profit from the provision of transport services they provide.

Owners of foreign ships operate on a different cost basis because they are usually able to access favourable regimes (e.g. tonnage tax) and employ non-Australians on cheaper rates of pay. For reasons that are explained in this Section, Australian ships are more expensive to operate than comparable non-Australian ships.

It is therefore understandable that, all other things being equal, freight owners would be likely to choose to use a foreign ship rather than an Australian ship.

At the centre of the cabotage discussion is the impact of Australian regulation on:

- the ability of Australians ship operators to be internationally competitive – and be Australian; and
- the ability of Australian business to access internationally competitive shipping rates.

4.2 How Cabotage Works

4.2.1 Bass Strait - a special consideration

The Australian domestic sea transport market divides itself into identifiable sectors. One of the sectors is links between Tasmania and the mainland. There are at least seven and perhaps 10 Australian ships which regularly trade between Tasmanian and Victorian ports. Various transport and logistics operators have invested heavily in infrastructure to facilitate efficient roll-on roll-off, passenger and bulk trades.

These trades are contestable amongst domestic operators and in the general cargo trades competition is obvious with four operators' terminals in close proximity to each other in Melbourne. These trades align closely with the policy consequences of the absence of land transport links between Tasmania and the mainland.

There are schemes in place that are reviewed regularly and recognise this principal and we are not aware of any proposals to dismantle these schemes. The

[6] By way of contrast cabotage in the USA requires a ship to be US flag, US built and US crewed to operate under what is known as The Jones Act.

infrastructure requirements and the efficiency of these services lend themselves to being considered as a special case. If consideration were to be given to removing preference to cargo for licensed ships the Bass Strait trades would have to be considered separately.

4.3 Legislation affecting shipping: Imposition of costs on Australians

Legislation has been identified that, one way or another, or in combination, impose costs on Australian operators which are not necessarily borne by foreign operators operating in Australia's interstate and intrastate transport industry.

1. The *Navigation Act 1912*

A vessel entering Australia is for practical purposes first considered under the *Navigation Act 1912*. A vessel introduced by an Australian entity to operate permanently on voyages around the Australian coast would seek and be provided with a License under Part VI of the Navigation Act. This ship is operating under Australia's cabotage regime.

A vessel introduced to undertake a one-off or occasional voyage carrying domestic cargo would seek, and if their application is successful, be provided with either a Single Voyage Permit (SVP) or a Continuing Voyage Permit (CVP) under Part VI of the Navigation Act.

The distinction between vessels operating with a Licence as opposed to SVPs or CVPs is crucial.

Because a vessel operating with a licence under the Navigation Act is said to be "engaging in the coasting trade", a ship utilising a permit to compete for freight in Australia's sea transport industry is said by those to whom authority is delegated by the Minister to administer the Act to be "operating in the coastal trade". This is not just semantics: it is a critical commercial distinction.

Having established whether the ship is operating with a licence or a permit, the next consideration is whether the ship is imported under the Customs Act.

2. The *Customs Act 1901*

It is important to understand that if a ship is imported a series of regulatory consequences follows. Each subsequent piece of legislation imposes costs.

A ship entering Australia to carry domestic cargo will have obtained either a License or an SVP or a CVP under Part VI of the Navigation Act. The question is whether the vessel is imported under the Customs Act.

The initial position was that, according to the Australian Customs Service a ship would be imported if the international voyage which brought the ship to Australia in the first place had ceased either permanently or temporarily. But as "International voyage" is not defined in the Act the fact that a ship had been issued with a licence under the Navigation Act was taken as evidence that the international voyage *had* ceased and the ship was thus imported.

The Customs view was that if the ship was licensed it must be imported.

Then ships obtained licenses which interrupted this formula. These were ships that carried interstate cargo on the Australian legs of an international trading pattern. It was not the intention that such ships be imported, but the "if the ship has a license it must be imported" maxim was no longer an appropriate rule of thumb.

The solution was to introduce another maxim which said that if a ship has international cargo on board then it must be on an international voyage and ought thus not be imported. This meant that a licensed ship could avoid importation if it had international cargo on board[7]. But under Part VI of the Navigation Act, a ship that is licensed is "engaged in the coasting trade" and under Section 10, a ship that is "engaged in the coasting trade" is covered by Part II of the Navigation Act.

The important distinction that was made was that the ship was not imported so on the one hand the crew could work in Australia using Maritime Crew Visas (MCVs – see next section) but on the other, because the ship was licensed it is necessary to pay Australian wages to the crew under Section 289.

The practical result is that a ship that is operating with a License will be imported under the Customs Act and a ship that is provided with an SVP or a CVP will not be imported under the Customs Act.

A ship that is imported under the Customs Act is treated by the Navigation Act as if it were an Australian ship (Section 8B (1)) and is thus covered by Part II of the Navigation Act (Section 10 (a)). A ship that is covered by Part II of the Navigation Act is then covered by the *Seafarers' Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Maritime Industry) Act 1993* (both see below).

A ship that is not imported is neither covered by Part II of the Navigation Act nor subject to these other Acts but is likely to compete with ships that are covered by these Acts.

3. The *Migration Act 1958*

Crew members of ships (other than Australians) entering Australia are required to hold a Maritime Crew Visa under the Migration Act. Crew members holding an MCV may remain in Australia in their ship indefinitely or, if they leave their ship, they must leave Australia within five days.

If a ship entering Australia is imported under the Customs Act the crew is not entitled to hold an MCV and crew members are required to hold Long Stay Business Visas (known as '457's). A 457 can be obtained provided that the occupation of the person for whom the 457 is sought is one that is a gazetted occupation[8] and the Department of Immigration and Citizenship is satisfied that there is insufficient Australian labour available to perform the work to be undertaken by the person for whom the Visa is requested.

[7] One container was said to be enough 'international cargo'.
[8] Relevant occupations gazetted do not extend to categories of labour other than ships' officers

The availability of seafaring officers in Australia is becoming more and more problematic but the position is that 457s are the exception rather than the rule in ships in Australia and Australian crews predominate.

The Migration Act tends to preserve Australian jobs in Australian ships. At the same time, the Migration Act allows operators of ships not imported under the Customs Act to employ foreign labour in Australia indefinitely utilising MCVs whilst carrying cargo within Australia under permits issued pursuant to Part VI of the Navigation Act.

The crew-cost differential between an Australian manned and foreign manned ship can be in the region of AUD 3 million per annum[9].

4. The *Workplace Relations Act 1996*

Due to the combined effects of the Customs Act, the Migration Act and the Navigation Act, an operator of a ship trading continuously on the Australian coast must employ Australian labour. Australian labour is employed subject to the conditions of the Workplace Relations Act.

Enterprise bargains negotiated within the terms of the Workplace Relations Act necessarily have regard to Australian standards of living, pay and conditions and give rise to labour costs substantially in excess of the cost of labour agreements applicable to ships in which foreign labour is engaged.

The Workplace Relations Act provides the framework within which pay and conditions are negotiated between employers and Australian workers, and is applicable to ships in which Australians are employed. Ships trading in Australia under permits in which foreign labour holding MCVs can be employed are not subject to the terms of the Workplace Relations Act.

5. The *Seafarers' Rehabilitation and Compensation Act 1992*

The vessels to which the Seafarers' Rehabilitation and Compensation Act (the 'SRC Act') applies are those covered by Part II of the Navigation Act. A vessel which is imported under the Customs Act is an Australian vessel for the purposes of Part II of the Navigation Act and consequently becomes subject to the provisions of the SRC Act.

The provisions of the SRC Act create liabilities for employers and extends cover for employees such that Protection and Indemnity Clubs, the regular insurers servicing ship operators world-wide for crew and cargo insurance cover, will not provide cover for employers whose employees are subject to the SRC Act. Additional insurance must therefore be sought and insurance premiums are therefore higher for Australian operators.

Foreign crews of foreign vessels trading in Australia but which are not imported and thus not Australian ships under Part II of the Navigation Act do not fall within the application of the SRC Act. Such vessels are covered by P&I insurance which is available at less expensive premiums than those applied by the general insurance industry to employers of crews in ships covered by the SRC Act.

[9] A comparison of Australian and Foreign cost structures for domestic shipping. Australian Shipowners Association, November 2006

6. The *Occupational Health and Safety (Maritime Industry) Act 1993*

The vessels to which the *Occupational Health and & Safety (Maritime Industry) Act 1993* (the 'OH&S (MI) Act') applies are those covered by Part II of the Navigation Act. A vessel which is imported under the Customs Act is an Australian vessel for the purposes of Part II of the Navigation Act and consequently becomes subject to the provisions of the OH&S (MI) Act.

The shipping industry internationally is subject to the International Safety Management Code (the ISM Code) which was promulgated by the International Maritime Organisation and prescribes, amongst other things, auditable standards of crew health and safety. These ISM Code standards are accepted internationally as appropriate and adequate minimum standards.

Crews of vessels covered by the OH&S (MI) Act must have standards applied which are in excess of, and accordingly more expensive than those required by the ship's International Safety Management Code, a mandatory compliance applicable to all ships, including Australian ships, under international law.

Crews of vessels trading in Australia but which are not imported and thus not Australian ships for the purposes under Part II of the Navigation Act and thus not falling within the application of the OH&S (MI) Act are covered by the ISM Code which applies less onerous and prescriptive requirements than those applicable to employers of crews in ships covered by the OH&S (MI) Act.

7. The *Shipping Registration Act 1981*

Section 12 of the Shipping Registration Act prescribes that a vessel owned by an Australian entity shall be entered in the Australian register of ships. It is understood that this mandatory link was an attempt to give effect to an UNCLOS principle that there should be a genuine link between ships nationality of ownership and nationality of registration. This principle has lapsed internationally; with more that 50% of the world's fleet registered in places other than the nationality of the ships' owner. A review in 1997 proposed that the SR Act should be changed but that review remains to be implemented.

Since most ships operating continuously in coastal trades (and therefore licensed and imported and subject to Part II of the Navigation Act) are owned by Australian entities such ships have to be registered in Australia.

Foreign-owned ships operating in Australia under permits under the Navigation Act are not imported, are not deemed to be Australian ships and maintain their foreign registry.

The benefits conferred by foreign registry arise from fiscal and tax relief measures made available by many foreign nationalities of registry. The dis-benefit attributable to mandatory Australian registry is that Australian registration confers no fiscal or tax benefits.

Australian owned ships operating in Australia are disadvantaged by being denied access to internationally competitive tax and fiscal arrangements available to foreign entities operating vessels in the Australian interstate and intrastate transport industry

under permits and registered in countries that make tax and fiscal concessions available to the ship owner.

5 Annex II - Ship operating costs

The data revealed by comparisons between Australian and foreign ship operating costs are highly commercially sensitive because by choosing categories of vessels for the sake of comparison, particular operators can be more or less identified.

For that reason, this section provides aggregated cost differentials and comparative indices.

ASA from time to time commissions comparisons of ship operating costs. These are undertaken by a consultant who is provided by shipowners with confidential commercial information which is presented to the Association only in aggregated form. The last time this was done was in November 2006. Making these comparisons is a resource intensive exercise.

The comparison of ship operating costs between Australian and representative foreign ships has been on the basis of a built-up time charter cost. This methodology is used as it excludes fuel and port costs which are likely to be identical for Australian and other ships on a domestic voyage.

The costs that are included are:

- **Capital costs**
- **Manning costs**
- **Other Operating Costs** which include
  - Stores
  - Administration and Overheads
  - Insurances
  - Lubes
  - Repairs and Maintenance
  - Victualling
  - Provision for dry docking
  - Other operating costs including spares.

The built-up time-charter cost is not quoted here as the ship charter market has escalated so significantly since 2006 that comparisons between built-up costs quoted as a charter cost would be spurious.

But some of the items that make up the cost structure can be compared on an indicative basis.

The ships that are compared are a 50,000DWT dry bulk carrier, a 43,000 DWT petroleum product tanker and a 1,000TEU container ship.

The comparison is between an Australian-registered, Australian-crewed ship in each category and an identical ship in each category operated under an open registry regime, in this case Panama.

5.1 Sensitivities in the Analysis

The analysis is highly sensitive to a number of factors including exchange rates. The analysis assumed payments were made in 2006 in US dollars at an exchange rate of 0.739. The exchange rate in January 2009 is around 0.660.

The crew compliment of the vessels is assumed to be 17 in each vessel in the case of the Australian vessels and twenty for the foreign dry bulker, twenty-two for the foreign tanker and seventeen for the foreign container ship. The make-up of the crews of the vessels differed according to actual practice and the foreign ships were described as using different, typical nationalities of crew while the Australian ships were taken to have all-Australian crews.

The crew-to-berth ratio for the Australian crew was taken as being between 1.98 and 2.03 and for the foreign crews of the foreign ships between 1.15 and 1.22. With a growing shortage of officers in the world fleet, the crew-to-berth ratios for the foreign ships might be slightly lower in 2009 compared to 2006. The leave factor that gives rise to the crew-to-berth ratio for Australians is discussed in the next section.

For the sake of confidentiality the figures in the table below for the Australian and foreign ships are indices, not dollar figures. The gap is quoted in dollars.

Taking all these points into account, the difference in key cost comparison indicators averaged across the three ship types studied in 2006 was as follows:

	Australian vessels	**Foreign vessels**	**Cost gap pa**
	Index	**Index**	**$A mill pa**
Annual Manning Cost	4.327	1.000	2.917
Annual Operating Cost	1.247	1.000	0.527
Capital Cost	1.113	1.000	0.502

Table 4: Indicative cost comparisons between Australian and Foreign vessels - March 2006 figures[10]

It is evident from this aggregated analysis that:

- the major cost differential between the cost of operating Australian ships and comparable foreign ships is in crew costs;
- the cost differential in operating costs other than crew costs is significant but less than 20% of the cost differential represented by crew costs
- the capital cost component is significant but comparable to the operating cost (net of crew cost) differential;
- The cost differential components represented by crew cost and capital costs between the Australian and foreign ships fall directly within the focus of steps that would be contemplated by a suite of measures isolated in an Australian second register, and
- Communications with ASA members indicate that the crew-cost differentials remain of the correct order of magnitude.

[10] After "A Comparison of Australian and Foreign Cost Structures for Domestic Shipping" Apelbaum Consulting Group. Australian Shipowners Association November 2006 (Unpublished)

5.2 Leave

The most vexed aspect of the terms and conditions of employment for Australian seafarers has been their leave factor.

The leave arrangements for seafarers in Australia grew through determinations in the industrial relations system. Leave originally took into account a proportion of time-off in recognition of a wide range of factors including sick leave, annual leave, weekends worked and public holidays. The leave factor changed in the 1970s when the standard for annual leave in the community increased from three to four weeks per annum.

The leave factor grew in line with negotiated outcomes and in excess of community standards. As the leave factor grew the concept of “permanents” and “relievers” became more relevant. All this meant was that one person was permanently employed in a crew position but when he or she went on leave it was necessary to employ someone to relieve in that position.

As the period of leave a permanent employee would accrue each day he or she was in employment in a ship increased so the period a reliever would spend in the ship increased also because the permanent was on leave for more of the time. These periods for which people had to be employed to keep a berth in a ship permanently occupied translates into what became known as the crew-to-berth ratio.

As the leave factor grew and the time permanents spent on board diminished the point was reached where it became administratively more convenient to have two people permanently employed in a position simply taking it in turns to work in a position on board a ship. This might have been convenient but it was not a development employers welcomed.

Eventually by a combination of negotiation and industrial action what became known as the ‘two-crew system’ became the norm in Australian ships. On the face of it there would be two people employed to keep each berth filled all the time and the crew-to-berth ratio would thus be 2.

In reality, people would take study leave or compassionate leave or be injured. That requires a third person to be employed or the second person to work additional time to cover his opposite number. In this way the crew-to-berth ratio crept up to around 2.2.

The shortage of seafarers, changes in work practices, the removal of the seafarers engagement system and more flexible attitudes have combined to reduce the crew-to-berth ratio to a figure that is thought to be below 2. This has been a welcome development. It would vary from ship to ship, from company to company and from trade to trade, but anecdotal evidence suggests that this is the case.

There is a variety of ways the leave arrangements can be arithmetically described but whichever way is chosen, the gap between leave standards for the community generally and leave standards for Australian seafarers is significant.

How it is described is in the eye of the beholder. For example it could be postulated that:

- The leave available to Australian seafarers is unnecessarily high in comparison to Australian standards ashore.

- The leave available to Australian seafarers is a necessary condition of employment to retain persons in seagoing occupations.

- The leave factor is a remnant of industrial gains achieved by the maritime unions through industrial persuasion in a capital intensive industry.

- The leave factor is necessary to take into account the nature of seagoing employment, being confined to a ship, working in an isolated remote place.

- The leave factor exacerbates the shortage of seafarers.

- The leave factor cannot realistically be reduced at a time when it is difficult to find seafarers to work in ships.

- The leave factor in seagoing ships is less generous than the leave factor provided in the offshore oil and gas sector in which seafarers also find jobs.

- The leave factor is in excess of all but the most generous terms and conditions of employment available in the international shipping industry.

- The leave factor in Australian ships is probably not much different to the leave arrangements provided in mining and other remote engineering industrial activities in Australia.

But whichever explanation or combination of explanations is thought most appropriate the impact of the leave factor on the competitiveness of Australian shipping is unmistakably negative. Whichever way the leave factor is looked at, it is a sensitive industrial issue which in the current atmosphere of labour shortages is difficult to address.