



The Maritime Union Of Australia

National Office

P. Crumlin
National Secretary

J. Tannock
Deputy National Secretary

M. Doleman
R. Newlyn

Assistant National Secretaries

Trim ref: 09/1/8/62

9 January 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
Parliament House
PO Box 6100
CANBERRA ACT 2600

email: eewr.sen@aph.gov.au

MUA SUBMISSION CONCERNING THE FAIR WORK BILL 2008

The MUA supports the overall submissions of the ACTU and supplements those submissions, in particular, in relation to the Application of the Bill to Foreign Shipsⁱ by the following submission.

In circumstances where the MUA sought an award binding on a foreign corporation employer of a foreign crew which manned a foreign registered ship engaged in the coasting trade pursuant to a permit granted under Part VI of the *Navigation Act 1912* (Nav Act), a Full Bench of the Australian Industrial Relations Commission found unanimously in September 2002 that the Commission had jurisdiction to make such an awardⁱⁱ. By the unanimous decision of seven judges, a challenge by the employer to that decision in the High Court failedⁱⁱⁱ.

The pre-WorkChoices *Workplace Relations Act 1996* applied in respect to maritime employees which by definition had the same meaning as it had in the Nav Act. "Maritime employees" was defined in general terms and was not confined to Australian nationals, or to employees who are Australian citizens, or who are engaged solely in the *coasting trade*, or to persons working on ships owned by Australian respondents.

The pre-reform Act applied in respect to matters pertaining to the relationship between employers and maritime employees so far as those matters related to constitutional trade or commerce^{iv}.

The post-reform Act, generally speaking, applies in respect to employees as defined who are employed by employers as defined^v. An employer by definition includes a person or entity so far as it employs or usually employs a maritime employee in connection with constitutional trade and commerce. Regulations^{vi} that took effect on the same day^{vii} as the Act came into operation, excluded the application of the Act to foreign crews performing duties on ships in respect to which a permit under section 286 of the Nav Act was in force.

The Fair Work Bill 2008 does not provide for the application of workplace laws to all seafarers working in the Australian coasting trade. The Bill contains a definition of an Australian Employer^{viii} substantially the same as its definition in the current WorkChoices Act^{ix} however the application of the definition is now confined to the Maritime Industry. It has no application to any other industry. The definition has the effect of excluding from the operation of any Act resulting from the passage of the Bill in its present form, any foreign corporation employer of a foreign crew which is supplied to a ship engaged in the Australian coasting trade.

The House of Representatives Standing Committee on Infrastructure, Transport, Regional Development and Local Government Report on the Inquiry into Coastal Shipping Policy and Regulation was concluded in October 2008. The Report recommended, amongst other things, comprehensive reform of regulatory, fiscal and policy settings directed to the revitalisation of Australian domestic (Coasting Trade) and international shipping.

Absent the amendments that we seek, some aspects of the Commonwealth's shipping policy to arise from the Inquiry will not be possible. One example is that ships licensed to engage in the Australian Coasting Trade may be foreign registered and may be manned by foreign seafarers and in our view the proposed Fair Work Act should be capable of applying to them. On present construction that would not be possible.

The ability to achieve innovative industrial relations arrangements covering the full spectrum of Australian shipping opportunities that will emerge from the regulatory and other reforms is a critical element of the shipping reform package. The current provisions in the Fair Work Bill 2008 will significantly hinder those reform opportunities unless amended.

The MUA seeks that the Bill be amended to overcome this unfair anomaly.

The attachment to these submissions contains two additional definitions that should be included in the Dictionary that should be included in Chapter Part 1 to 2 Division 2 of the Bill and an amended form of Chapter 1 Part 1.3 Division 3 of the Bill. This will preserve the general intent of the Division but overcome the anomaly. The key objective we are seeking is a restoration of the pre-WorkChoices position that was determined by the High Court in 2003 and which would result in the Fair Work Act having application to seafarers employed on the full spectrum of vessels that operate in the Australian coasting trade.



Paddy Crumlin
National Secretary

ⁱ Part 3, Para 3.1 ACTU Submission

ⁱⁱ Re Maritime Industry Seagoing Award 1999 (2002) 118 IR 294

ⁱⁱⁱ Re Maritime Union of Australia and Ors; ex parte CSL Pacific Shipping Inc (2003) 214 CLR 397

^{iv} Sec 5

^v Sec 5 & 6

^{vi} Regulation 1.1 of Chapter 2, Part 1, Division 1, of the Workplace Relations Regulations 2006

^{vii} 26 March 2006.

^{viii} Sec 35.

^{ix} **35 Meanings of *Australian employer* and *Australian-based employee***

- (1) An *Australian employer* is an employer that:
 - (a) is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
 - (b) is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
 - (c) is the Commonwealth; or
 - (d) is a Commonwealth authority; or
 - (e) is a body corporate incorporated in a Territory; or
 - (f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or
 - (g) is prescribed by the regulations.
- (2) An *Australian-based employee* is an employee:
 - (a) whose primary place of work is in Australia; or
 - (b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or
 - (c) who is prescribed by the regulations.
- (3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories.

Attachment A

Explanation of MUA Proposed Amendments to Fair Work Bill 2008

Section 12 – Definitions

The Dictionary should have added to it the definitions of 'licensed ship' and 'permit ship' as derived from the Navigation Act 1912 on the basis of their inclusion at proposed sub-section 33(i)(e) and 34(1)(c).

Sections 31 and 32 remain unaltered.

Sub-sections 33(1)(a), (b) and (c) remain unaltered.

Sub-sections 33(1)(d) has been amended so that the Act will apply to all ships in the exclusive economic zone or above the continental shelf which are operated or controlled or managed in Australia.

A new **sub-section 33(1)(e)** has been inserted so that the Act will have application with respect to ships operating under the 'licences' and 'permits', as defined.

Sub-section 33(2) has been deleted as its existence would confine the extension of the Act to Australian employers and Australian employees, as defined.

Sub-sections 33(3), (4) and (5) have been retained and have been renumbered as a consequence of the deletion of subsection 33(2).

Sub-section 34(1) is amended to reflect a change to the cross-reference [now sub-section (2)].

Sub-section 34(1)(a) remains unaltered.

Sub-section 34(1)(b) has been amended so that the Act will apply outside of the exclusive economic zone and the continental shelf to any ship that is operated or controlled or managed in Australia.

A new **sub-section 34(1)(c)** has been inserted so that the Act will have application with respect to ships operating under 'licences' or 'permits' outside the outer limits of the exclusive economic zone and the continental shelf.

Sub-section 34(2) has been deleted as its existence would confine the extension of the Act to Australian employers and Australian employees, as defined.

Sub-section 34(3) has been amended to delete any reference to 'Australian employer' and 'Australian-based employee'. It has also been renumbered as a consequence of the deletion of 34(2).

Sub-sections 34(4) and (5) have been retained and have been renumbered as a consequence of the deletion of 34(2).

Section 35 has been deleted. The definitions contained therein have no relevance to any other provision in the Bill except sections 33 and 34. They provide an unwarranted restriction or limitation on the reach of the proposed Act.

Section 36 remains unaltered but is renumbered as a consequence of the deletion of section 35.

Attachment B

Proposed MUA Amendments to Fair Work Bill 2008

Section 12 - Definitions

licensed ship means a ship:

- (a) to which a licence has been granted under section 288 of the *Navigations Act 1912*; and
- (b) for which the licence is in force.

permit ship means a ship:

- (a) to which a permit has been granted under section 286 of the *Navigations Act 1912* for a single voyage or as a continuing permit; and
- (b) for which the permit is in force.

Division 3—Geographical application of this Act

31 Exclusion of persons etc. insufficiently connected with Australia

- (1) A provision of this Act prescribed by the regulations does not apply to a person or entity in Australia prescribed by the regulations as a person to whom, or an entity to which, the provision does not apply.

Note 1: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea (see section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*).

Note 2: The regulations may prescribe the person or entity by reference to a class (see subsection 13(3) of the *Legislative Instruments Act 2003*).

- (2) Before the Governor-General makes regulations for the purposes of subsection (1) prescribing either or both of the following:
- (a) a provision of this Act that is not to apply to a person or entity;
 - (b) a person to whom, or an entity to which, a provision of this Act is not to apply;

the Minister must be satisfied that the provision should not apply to the person or entity in Australia because there is not a sufficient connection between the person or entity and Australia.

32 Regulations may modify application of this Act in certain parts of Australia

If the regulations prescribe modifications of this Act for its application in relation to all or part of any one or more of the following areas:

- (a) all the waters of the sea on the landward side of the outer limits of the territorial sea of Australia, including:
 - (i) such waters within the limits of a State or Territory; and
 - (ii) the airspace over, and the seabed and sub-soil beneath, such waters;
- (b) the Territory of Christmas Island;
- (c) the Territory of Cocos (Keeling) Islands;

then this Act has effect as so modified in relation to any such area or part.

Note: This Act would, in the absence of any such regulations, apply in relation to these areas in the same way as it applies in relation to the rest of Australia.

33 Extension of this Act to the exclusive economic zone and the continental shelf

Extension to Australian ships etc.

- (1) Without limiting subsection (2), this Act extends to or in relation to:
- (a) any Australian ship in the exclusive economic zone or in the waters above the continental shelf; and
 - (b) any fixed platform in the exclusive economic zone or in the waters above the continental shelf; and
 - (c) any ship, in the exclusive economic zone or in the waters above the continental shelf, that:
 - (i) supplies, services or otherwise operates in connection with a fixed platform in the exclusive economic zone or in the waters above the continental shelf; and
 - (ii) operates to and from an Australian port; and
 - (d) any ship, in the exclusive economic zone or in the waters above the continental shelf, that is operated or controlled or managed in Australia.
 - (e) any licensed or permit ship

Extensions prescribed by regulations

- (2) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, to or in relation to the exclusive economic zone or to the waters above the continental shelf, then this Act extends accordingly.

Modifications relating to extended application

- (3) Despite subsections (1) and (2), if the regulations prescribe modifications of this Act, or specified provisions of this Act, for its operation under subsection (1) or (2) in relation to one or both of the following:

- (a) all or part of the exclusive economic zone;
- (b) all or part of the continental shelf;

then, so far as this Act would, apart from this subsection, extend to the zone or part, or to the continental shelf or part, it has effect as so modified.

- (4) For the purposes of subsection (3), the regulations may prescribe different modifications in relation to different parts of the exclusive economic zone or continental shelf.

34 Extension of this Act beyond the exclusive economic zone and the continental shelf

Extension to Australian ships etc.

- (1) Without limiting subsection (2), this Act extends to or in relation to:

- (a) any Australian ship outside the outer limits of the exclusive economic zone and the continental shelf; and
- (b) any ship, outside the outer limits of the exclusive economic zone and the continental shelf, that is operated or controlled or managed in Australia.
- (c) any licensed or permit ship.

Extensions prescribed by regulations

- (2) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, in relation to all or part of the area outside the outer limits of the exclusive economic zone and the continental shelf, then this Act, or the specified provisions, extend accordingly.

Modified application in the area outside the outer limits of the exclusive economic zone and the continental shelf

- (3) Despite subsections (1) and (2), if the regulations prescribe modifications of this Act, or specified provisions of this Act, for their operation under subsection (1) or (2) in relation to all or part of the area outside the outer limits of the exclusive economic zone and the continental shelf, then this Act, or the specified provisions, have effect as so modified in relation to the area or part.
- (4) For the purposes of subsection (3), the regulations may prescribe different modifications in relation to different parts of the area outside the outer limits of the exclusive economic zone and the continental shelf.

35 Geographical application of offences

Division 14 (Standard geographical jurisdiction) of the *Criminal Code* does not apply in relation to an offence against this Act.

Note: The extended geographical application that this Division gives to this Act will apply to the offences in this Act.