Robbed at Sea:

Endemic Wage Theft from Seafarers in Australian Waters

By Rod Pickette, Lily Raynes and Jim Stanford

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Level 1, Endeavour House, 1 Franklin St
Canberra, ACT 2601
Tel: (02) 61300530
Email: mail@tai.org.au
Website: www.tai.org.au
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About the report

The report was commissioned by the Australian Shipping Inspectorate of the International Transport Workers Federation (ITF).

About the Authors

Rod Pickette is Principal, Rod Pickette Consulting, and Policy Adviser to the Maritime Union of Australia and International Transport Workers Federation. Lily Raynes in an Anne Kantor Fellow with the Australia Institute. Jim Stanford is Economist and Director of the Centre for Future Work.

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Introduction and Summary

Because they work in waters that are not always subject to national laws and standards, and because their work is largely hidden from the view of government regulators, the media, and the public at large, international seafarers engaged on foreign-registered ships commonly experience widespread exploitation at the hands of their employers.[1]

One dimension of this problem is extensive underpayment of wages and other forms of compensation (including pension contributions) commonly experienced in the industry. Other dimensions include very unsafe or unsanitary working and living conditions aboard foreign-registered freight vessels.

There are large gaps between international and domestic labour standards governing international shipping, where domestic standards apply to international ships when they become licenced under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (CT Act) to operate in Australian coastal trading (that is, transporting cargo between Australian ports). When combined with almost non-existent regulation of labour standards on ships involved in international trading, and an uncertain and under-resourced domestic labour standards regulatory system, seafarers are exposed to widespread abuse.

The International Labour Organisation (ILO) Maritime Labour Convention (MLC) establishes minimum labour standards for all seafarers. But these standards are weak and minimalist, reflecting standards common across the global shipping industry – including in developing nations. And even these standards are enforced inconsistently by domestic regulators through their Port State Control (PSC) responsibilities under the MLC.

In Australia's case, these minimal standards are intended to be enhanced (for ships involved in Australian coastal trading) by domestic rules, in order to close the gap between labour standards applying to foreign-registered international ships, and wages and conditions considered socially acceptable in Australia. However, this effort is undermined by a large loophole in the application of national labour standards to foreign-registered ships licenced to operate in domestic coastal trading.

[1] The Australian Parliament is able to legislate extraterritorially but there must be a connection between Australia and the extraterritorial persons, things and events on which the law operates in order for the law to be valid.

In theory, national laws (including minimum standards specified through the *Fair Work Act* (FW Act) and the Awards system, and in particular the Seagoing Industry Award of 2020) should apply to coastal trading between Australian ports. However, the Fair Work Regulations 2009 create a category called "temporary licensed" (TL) ship, such that the first two voyages within the 12 months before commencing the voyage authorised by the TL are not considered a TL voyage.[2] In practice, this means the first two voyages under a TL are not subject to the FW Act or Seagoing Industry Award standards. This allows the ship, in certain circumstances, to operate with an international crew under standards normally applying to international voyages, even though the ship is delivering cargo from one Australian port to another. The weaker international labour standards therefore have a wider scope of application, even covering some trade conducted solely within Australia. Furthermore, the Fair Work Ombudsman (FWO) has determined that a ship is only engaged in coastal trading for the purposes of domestic labour law when it is actually loaded with a cargo; thus the FWO does not enforce either the FW Act or the relevant Award when the ship is on a 'ballast' (unladen) leg of a domestic voyage.[3]

An additional weakness in the system of labour standards for seafarers is that there is often uncertainty as to what precise wages and conditions entitlements apply to a seafarer, due to poorly constructed 'work agreements' (or seafarer employment agreements, SEAs). These are based on the application of a collective bargaining agreement (CBA) to the seafarers on a particular vessel. However, if there is no applicable CBA, or one is not specified in the relevant SEA, then the opportunity for exploitation is heightened, and compliance and enforcement of standards and entitlements by the national regulator is correspondingly weakened.

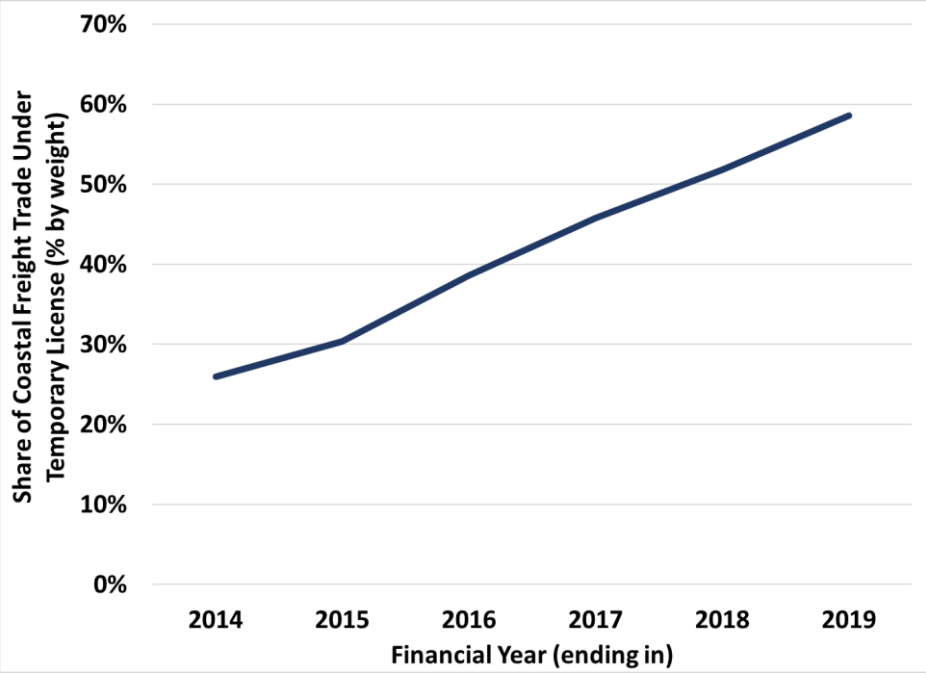
The Australian Maritime Safety Authority (AMSA) is charged with ensuring compliance with and enforcing the MLC in Australian waters, and with confronting widespread breaches of those already-minimal standards. The standards specified in the MLC were developed by the ILO, having regard to domestic standards applying across a vast number of nations. By their nature, therefore, these standards are minimalist – certainly by developed nation standards. As a result, there are strong financial incentives for shipowners and ship operators to employ seafarers from countries with very weak employment protections; those seafarers are more likely to accept those minimum standards, without resistance.

[2] See Fair Work Regulations 2009 (Division 3—Geographical application of the Act).

[3] See the Fair Work Ombudsman Factsheet, *Maritime industry–workplace rights and entitlements*, https://www.fairwork.gov.au/sites/default/files/migration/723/Maritime-industry-workplace-rights-and-entitlements.pdf.

The failure of domestic labour law to adequately protect seafarers working in Australian coastal trade was further reinforced by a 2014 decision in the Federal Court.[4] The Court affirmed that economic pressures arising from international competition in freight costs could potentially justify broader application of TLs for interstate coastal shipping. This would permit more use of lower-cost international labour on foreign ships licenced under the CT Act to engage in coastal trading, rather than using Australian ships issued with a general license (GL). This would effectively evade the application of Australian Award standards. The Court noted however, that a Delegate authorised by the Minister has discretion to decide on TL applications, and could emphasise those elements of the object of the *Coastal Trading Act* that place greater weight on the need to 'facilitate the long term growth of the Australian shipping industry; enhance the efficiency and reliability of Australian shipping as part of the national transport system; and maximise the use of vessels registered in the Australian General Shipping Register in coastal trading'.[5]

Figure 1. Coastal Freight Trade Under Temporary License



Source: Department of Infrastructure, Transport, Regional Development and Communications (2021), Table 3.1.

Following this decision, the use of Australian registered ships crewed by Australian seafarers operating under a GL declined, and the use of foreign ships with non-national

[4] *CSL Australia Pty Limited v Minister for Infrastructure and Transport* (2014) 221 FCR 165.

[5] See 'Coastal Trading (Revitalising Australian Shipping) Act 2012', Commonwealth Consolidated Acts, http://www8.austlii.edu.au/au//legis/cth/consol_act/ctasa2012480/.

seafarers operating under TLs increased sharply. As indicated in Figure 1, the proportion of total Australian coastal freight trade carried under temporary licenses more than doubled between 2013-14 and 2018-19 (most recent data available), from barely one-quarter to almost 60%. This indicates that shipping strategies have adjusted to exploit this loophole in labour law. In short, international shipping companies have been given effective permission to operate in the coastal trade, while often avoiding the application of Australian labour laws.

Another key aspect of the problem is the lack of oversight or enforcement of the application of FW Act and Seagoing Industry Award standards to coastal ships operating under TLs. This lack of oversight is compounded by the complexity of the licencing and inspection system.

The FWO and AMSA have a signed a memorandum of understanding between the agencies that reconfirms that AMSA, consistent with its MLC obligations, *may* inspect any foreign ship that enters an Australian port. If an AMSA inspector, as result of an inspection arising from a grievance raised by a seafarer or a seafarers' representative organisation, establishes *prima facie* evidence of a breach of the Act, the matter is referred to the FWO. This model thus relies on AMSA to identify any FW Act or Award breaches.

Additionally, the FWO has scarce enforcement resources, and this can constrain the FWO's capacity to investigate breaches. Therefore, in practice much investigation is effectively carried out by the shipping inspectorate operated by the International Transport Workers Federation (ITF). When a foreign-registered ship operating under a TL undertakes its third and subsequent voyage, thus triggering application of the Seagoing Industry Award, this eligibility is usually only identified by the ITF (through its scans of the federal departmental TL voyage reports database). Further compounding this weakness in oversight and enforcement is the fact that ship owners typically utilise contractors and subsidiaries to manage ship operations and crew management, making it complex to disentangle corporate relationships and thus establish which corporate entity is legally responsible for compliance with domestic labour laws. It also allows lead companies, be they shippers (cargo owners) or shipowners, to claim they were unaware of any wage theft occurring on a contracted (chartered) vessel.

THREE FORMS OF WAGE THEFT

The preceding discussion indicates that wage theft and other violations of minimum labour standards for seafarers can occur through at least three distinct channels:

1. The wage and entitlement provisions in international seafarers' employment agreements (SEAs), as required under the MLC, may not be adequately enforced by AMSA. This is due to AMSA's propensity to respond only to seafarer complaints or complaints lodged by third party organisations like the ITF on seafarer wages/entitlement issues.
2. Where a foreign-registered ship operating under a temporary licence has exceeded the two voyages of 'good will' allowed under the TL system, and should then be complying with the Seagoing Industry Award, shipping companies often ignore or delay application of the applicable seafarer wage and entitlement obligations. When combined with inadequate inspection and enforcement efforts, as well as lack of education of seafarers about their rights and entitlements and their legitimate fears about making a complaint, seafarers are systematically robbed of their entitlements under the domestic labour law standard.
3. Even when ships fall firmly within coverage of the FW Act and the Seagoing Industry Award, delays and resource constraints at the Fair Work Ombudsman often result in ships exiting Australian waters and the jurisdiction of AMSA (and its detention powers) before enforcement action can be commenced or completed. Experience shows it is difficult to catch and redress instances of wage theft. Many cases of wage theft therefore go undetected and or unresolved.

A strategy to reduce wage theft and other forms of exploitation facing seafarers, therefore, needs to take account of these multiple opportunities for shipping companies to deny fair compensation to their seafarers. As explained in this report, this will require a combination of legislative and regulatory changes to close the loopholes that currently allow so many shipping companies to evade Australian labour standards, as well as considerable improvements in the inspection and enforcement effort of Australian regulatory authorities.

This report identifies ten crucial reforms which would make a significant difference in the protection of international seafarers while working in Australian waters. These include:

1. Close the loophole in the Fair Work Regulations 2009 and Seagoing Industry Award;

2. Strengthen the Fair Work Act to regulate the conditions of employment of seafarers in relation to all vessels engaged in trade and commerce with Australia;

3. Amend the Seagoing Industry Award 2020 to level the playing field for all seafarers in coastal trading;

4. Make wage theft financially unviable for shippers;

5. Amend the licence application process under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* to require applicants to lodge a bond when applying for a temporary licence;

6. Expand and enforce Modern Slavery commitments;

7. Advocate to national governments and the ILO to establish a network of regional shipping industry labour tribunals to address seafarer labour grievances;

8. Include shipping industry labour standards in international trade agreements;

9. Advocate that the ACCC fulfil the object of the Competition and Consumer Act, to ensure that Australian flag shipping is not hindered from commercial participation in liner cargo shipping; and

10. Enhance information sharing and coordination among compliance bodies.

REPORT OVERVIEW

This report considers the dimensions, consequences, and potential solutions to the problem of pervasive wage theft facing seafarers working in the Australian coastal trade.

The report is organised as follows. First, we provide a summary of the international and domestic legal context governing wage payments and other labour issues in the shipping sector. The incomplete coverage of Australian rules and standards, combined with weak enforcement practices, creates a legal and regulatory vacuum which shipping companies have exploited in order to underpay their seafarers.

Second, we then review efforts by the ITF to inspect ships visiting Australian ports and expose instances of wage theft on those ships over the last decade. While the ITF conducts these efforts with inadequate resources, its efforts confirm that wage theft is pervasive in the industry.

The ITF's inspection and enforcement efforts are then described in the context of the overall volume of overseas marine freight traffic involving Australian ports. As an island country with extensive international trade linkages, marine freight traffic is an enormous industry in Australia. In this context, it is clear that the ITF's conscientious and dedicated efforts are only uncovering a tiny share (perhaps as low as 2.5%) of the total wage theft occurring in this industry.

The fourth section of the report then generates estimates of the potential scale of overall wage theft in marine freight shipping involving Australian ports, by extrapolating (under reasonable assumptions) the incidence of wage theft uncovered

by ITF inspections to the much larger overall volume of marine freight traffic. The analysis considers low, central, and high-case estimates of total wage theft, based on contrasting assumptions about the proportion of overall shipping engaging in these unfair practices. On this methodology, we estimate that between $46 million and $84 million per year in wages and other monetary entitlements are lost to international seafarers on ships visiting Australian ports. Our central estimate suggests $65 million per year in wage theft.

The last section of the report concludes with ten specific policy recommendations to address this widespread and unfair exploitation. These include regulatory changes to strengthen the application of Australian labour standards to all coastal shipping activity, and improved inspection and enforcement powers and resources to ensure that these laws are effectively respected in practice.

Legal Frameworks

INTERNATIONAL LAW

International freight shipping occurs in an environment of legal and jurisdictional uncertainty: since international waters are generally not governed by national labour laws, shipping companies are not subject to the national labour standards and protections that would apply to other industries operating in the domestic economy.

Companies take further advantage of this uncertainty by registering their ships under flags of convenience (FOC). A flag of convenience ship is one that flies the flag of a country other than the country of beneficial ownership. Examples of FOC include Panama and Liberia, which own few ships but register thousands, and which have deliberately lax regulatory, fiscal, and environmental standards to attract registrations from international shippers.[6] Marine freight shipping occurs with very little public and regulatory scrutiny of labour practices and working conditions, and many international seafarers come from developing nations with low wages and hence are desperate for work and income (including to support their families through remittance payments). Hence the industry has a deserved reputation as a site of widespread exploitation and abuse of seafarers.

Unfortunately, there are few enforceable global rules to limit and alleviate this exploitation. The MLC sets out some minimum standards governing working conditions and the arrangements for payment of wages for seafarers. In theory the provisions of the MLC should apply in all of its 101 signatory countries, but the MLC allows for some flexibility in enforcement by permitting states to replace MLC provisions with other rules that are 'substantially equivalent' as needed. The MLC applies in Australia through *Marine Order 11 (Living and working conditions on vessels) 2015*, a regulation made by AMSA under the *Navigation Act*.

The MLC provides a floor of minimum conditions for seafarers. Regarding wages, the MLC only sets out the conditions and processes for paying wages to seafarers, not a specified minimum level of wages.[7] These processes specify that wages must be paid at least monthly, in accordance with a SEA, and there must be a system in place for efficient bank transfers or repatriation to the seafarer's family if needed.[8] These standards do not specify a mandatory minimum wage; this is left to the vessel's flag

[6] See Alderton and Winchester (2002) for an introduction to this problem.

[7] *MLC regulation 2.2, Marine Order 11 s 27.*

[8] *Marine Order 11 s 27*

state, with non-mandatory 'guidance' from the ILO. Obviously, 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 labour standards.

As part of MLC compliance, all seafarers must sign a SEA that specifies the conditions of employment for each seafarer on the vessel each time they sign-on to a ship. The SEAs 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.[9]

The reality of the international seafarer labour market is that it is functionally split into three segments. Ship-owners and managers from leading maritime countries (such as the United Kingdom, Germany, Norway, Japan and China) register their ships in 'flag of convenience' countries (such as Panama and Liberia), and then crew these ships with seafarers from countries with low-cost labour markets (such as the Philippines, China and India).[10] When assessing the resulting exploitation of seafarers, researchers have observed that because the labour supply chains are international, domestic regulation is difficult, and the capacity of national labour institutions to perform an effective compliance and enforcement role is weakened. Regulating this global industry is made more challenging because shipping companies engage in management and outsourcing practices that distance themselves from national legal frameworks.

Centring SEAs as the core of the MLC standards process also gives rise to abuse. Seafarers are vulnerable to intense economic and professional pressures. For example, one report on seafarers who had been subject to human trafficking cited respondents who felt they had no economic alternatives to signing a SEA despite concerns about their treatment.[11] Additionally, a number of respondents had also been pressured into signing SEAs not in their native language, and thus could not grasp the significance of the agreement's provisions. In an industry that operates globally, far from the eyes of regulators, the media, and the general public, unethical shipping companies have ample opportunity to take advantage of the power imbalance faced by seafarers.

Under Article V paragraph 7, the MLC includes a 'no more favourable treatment' clause. This seeks to ensure that ships flying the flag of a non-ratifying state (mostly flags of convenience) are not given 'favourable treatment' while in the port of another state. In Australia this means any foreign-flagged vessels can be inspected by port

[9] *Marine Order 11 (Living and working conditions on vessels) 2015 Schedule 3*

[10] See, for example, Tang and Zhang (2019).

[11] International Organization for Migration and NEXUS Institute (2012).

authorities for compliance with the MLC, regardless of whether their flagged countries ratified it.

AMSA is the principal body responsible for this enforcement. The central tenet of compliance under the MLC is a certification regime. A ship from a ratifying country must carry and maintain a certificate from a national body that confirms the ship has achieved (or substantially achieved) the standards set out under the MLC. AMSA proactively monitors compliance with the MLC: any vessel can be compelled to provide documentation or a certificate to show it is compliant with the standards of the MLC.

In practice, however, when a ship is registered under a flag of convenience, it is more likely that labour violations are not being monitored by the nation in which the ship is registered (flagged). Port state enforcement (port state control, by nations that generally take compliance more seriously) is the only genuine means of enforcing the MLC. This is because flag states (especially flags of convenience) tend to tolerate poor conditions for seafarers, while labour-supplying states (poor countries with low wages) lack the resources to effectively regulate standards and conditions of the seafarers they supply to this international labour market.[12]

Foreign-registered vessels from a country in which the MLC is in force must present a certificate and declaration of compliance with the MLC.[13] AMSA must be satisfied that foreign vessels from a country where the MLC is not in force can demonstrate the workplace complies with safety standards, fair terms of employment, decent working and living conditions, and health protection and other social protections specified in the MLC and given effect by domestic laws, to the extent domestic laws apply to foreign-registered ships.[14] Of course these standards are all measured in relation to the baseline floor of conditions specified in the MLC. If a concern is unresolved, AMSA can make a complaint to the International Labour Organisation (ILO) for resolution. AMSA also has the capacity to refuse access to ports to foreign-flagged ships on which severe contraventions have taken place.[15] In one recent example, a Singaporean flagged ship was banned from Australian ports for six months after AMSA was notified of underpayments of $40,000 and a failure to repatriate the crew at the completion of their SEA contract.[16] Keep in mind, however, that given the low level of standards set out by the MLC, a ship may fly the flag of a ratifying state and be compliant with the

[12] See Exarchopoulos et al. (2018).

[13] *Marine Order 11 s 13.*

[14] *Marine Order 11 s 14.* Note that clause 6, Application, provides that Divisions 2 (Foreign vessels) and 19 (Onshore complaints) apply to a foreign-registered vessel.

[15] A list of recent prohibitions of entry issued by AMSA under this power is posted at https://www.amsa.gov.au/vessels-operators/port-state-control/refusal-access-list-and-letters-warning-list.

[16] See Australian Maritime Safety Authority (2021).

entirety of the MLC – yet that compliance nevertheless falls far below Australian domestic labour, safety and training standards. This creates an economic incentive to utilise foreign-registered ships and foreign seafarers, since even the enforceable standards (let alone even lower wages and conditions that often prevail in practice) are far below Australian standards.

DOMESTIC LAW

The FW Act applies to foreign-flagged ships when they are engaged in coastal trading. But under the Coastal Trading Act, a foreign ship will fall under the FW Act only when it undertakes coastal trading voyages authorised by a TL. This opens up a large gap in the enforcement of Australian labour standards in the coastal trade. Under a TL, the Australian employment conditions from the FW Act and the Seagoing Industry Award do not come into force until a ship has made at least two other interstate voyages to Australian ports in the previous 12 months. While undertaking those first two interstate port calls, the international standard applies – in which case seafarers' conditions must satisfy only the baseline floor of the MLC standards, not Australian standards. This gap creates an inviting incentive for shipping companies to operate wherever possible under the TL system.

Once it has completed two voyages to Australian ports, a vessel should fall under the terms of the Seagoing Industry Award. This award sets out in Schedule A the minimum conditions that apply to vessels operating with a TL. This includes minimum rates of pay, allowances payable to employees, ordinary hours of work, leave and public holidays. All of these provisions are supplemented by the National Employment Standards (NES). The minimum wage rate in this award presently ranges from A$772.70 per week for the lowest grade (Ratings, Marine Cooks and Caterers), to A$1,404.60 per week for a ship's Master. This is still significantly less than if the seafarers were automatically brought under the full award applying to coastal ships issued with a GL (that is, Australian registered ships). However, it certainly constitutes an improvement over the provisions in most international SEAs.

The case of *Fair Work Ombudsman v Transpetrol TM AS* demonstrates the difficulty of enforcing domestic standards on foreign-flagged ships. Here, the FWO argued a Norwegian company's ship contravened the FW Act because a sub-chartering firm obtained a TL from the Department of Infrastructure, Transport, Regional Development and Communications. The foreign crew had been paid just A$1.25 per hour. Despite the underpayment of these employees, the Federal Court found in favour of the company, because there was nothing in any Australian legislation that required the employer to be made aware that the vessel was in Australian waters and

that their employees were subject to the requirements of the FW Act. Additionally, the Court concluded the ship followed the standards of the MLC because:

> "…all employees had individually recognised employment contracts in line with the crew's 'national standard' as evidence of earnestness from the company. All of this together indicates that despite instances where a foreign-flagged ship comes under FW Act coverage and is compliant with the standards of the MLC, it can still fall short of accepted standards of employment conditions."

ITF Inspections and Recoveries

To combat the widespread exploitation of seafarers in the global shipping industry, the ITF maintains an international infrastructure of labour advocates and inspectors in major ports around the world. These advocates generally rely on the provisions of ITF-approved collective bargaining agreements, the provisions of the International Ship and Port Facility Security (ISPS) Code,[17] and the MLC to gain access to ships and conduct inspections of seafarer conditions and wage records on foreign-registered ships in ports. When ITF inspectors find that wage payments or conditions violate norms as specified in the MLC, domestic standards, or relevant collective bargaining agreements referenced in SEAs, then recovery payments can be requested. If and when shipowners, ship operators or their agents cede to those requests and recovery amounts are paid, the funds are then distributed to the affected seafarers.

The ITF maintains a small team of four officials in Australia, who conduct inspections of foreign-registered vessels in Australian ports. Some of those inspections are undertaken in response to specific complaints or concerns raised by seafarers; some are part of the ITF's regular monitoring activities.

Table 1 provides summary data on inspections, discovered contraventions, and wage recovery amounts from ITF inspections of foreign-registered freight ships in Australian ports over the last decade. The table reports the numbers of inspections conducted, and the total amounts of wage recoveries.

[17] The ISPS Code is part of the IMO Safety of Life at Sea (SOLAS) Convention (1974/1988) and is a maritime regulation for the safety and security of ships, ports, cargo and crew.

Table 1 ITF Inspections at Australian Ports, 2011-2021				
	Number of Inspections	**Wages Recovered (A$)**	**Estimated Average Recovery per Violation[1]**	**Estimated Average Recovery per Worker[2]**
2011	346	$2,505,673	$10,345	$493
2012	364	$1,877,467	$7,368	$351
2013	354	$3,577,832	$14,438	$688
2014	396	$3,047,203	$10,993	$523
2015	372	$3,550,365	$13,634	$649
2016	506	$4,042,259	$11,412	$543
2017	503	$5,528,767	$15,702	$748
2018	403	$3,607,464	$12,788	$609
2019	409	$3,143,638	$10,980	$523
2020	527	$1,917,404	$5,198	$248
2021	485	$4,800,383	$14,140	$673
Total	4665	$37,598,455		
Annual Avg.	424	$3,418,041	$11,514	$548

Source: Authors' calculations from ITF data.
1. Based on 70% of inspections returning a recovery. Note that each recovery typically covers a period of no longer than 3 months in arrears.
2. Based on average of 21 seafarers per ship.

As can be seen, on average over the last decade, the ITF conducted about 425 inspections per year in Australian ports. According to ITF staff reporting, about 70% of those inspections resulted in a determination of underpayment or non-payment of wage entitlements – the aggregate amount of which is reported in the middle column of Table 1.[18]

On average, a typical wage recovery request involves $11,500 in back payments. A typical freight vessel is crewed by 21 seafarers,[19] and so those payments on average work out to approximately $500 per affected seafarer. This may seem relatively insignificant to many Australians, but for seafarers from poor countries who strive to save as much of their earnings as possible to support their families at home, these

[18] Pursuing offending ship owners to pay those recoveries is another challenging step in this process; not all of the monies indicated in Table 1 were ultimately paid to seafarers.

[19] As per ITF data; ships carrying livestock have larger crewing complements.

recovery payments can be very important.[20] And given the very low base levels of compensation paid in this industry, any underpayment is unjustified and morally repugnant.

In addition, the Fair Work Ombudsman (FWO) and the Australian Maritime Safety Authority (AMSA) report that they also recovered smaller amounts of wages on behalf of international seafarers. AMSA reports that in 2020 it recovered $405,000 in unpaid seafarer wage entitlements on ships on continuing international voyages that made Australian port calls, and $175,000 in 2021.[21] The FWO wage recovery data for the years 2018-19 to 2020-21 is summarised in Table 2.

Table 2
FWO wage recovery data 2018-19 to 2020-21

	Total Recovery Amount	Number of Seafarers Covered	Average Recovery per Seafarer
2018/2019	$346,565	89	$3,894
2019/2020	$621,241	250	$2,485
2020/2021	$622,195	187	$3,327
Source: FWO, advice to MUA August 2022.			

[20] To put A$500 in perspective, the minimum wage in regional Philippines is approximately 10,880 pesos a month or A$280, so A$500 is the equivalent of nearly two months domestic wages for a Filipino worker.

[21] AMSA, *MLC complaints data: 2016–2020*, https://www.amsa.gov.au/complaints-data, and presentation made by AMSA at Chartered Institute of Logistics & Transport workshop, Canberra, 29 July 2022.

Overseas Freight Traffic in Australian Ports

ITF inspectors and advocates are conscientious and dedicated, and their efforts have resulted in actions (including recovery payments) that have benefited many thousands of seafarers and their families. However, the painful reality is that these enforcement actions, undertaken by a non-governmental organisation with limited resources and often inadequate or inconsistent support from host governments and their regulators, cannot possibly cover the full volume of marine traffic conducted each year in major maritime nations.

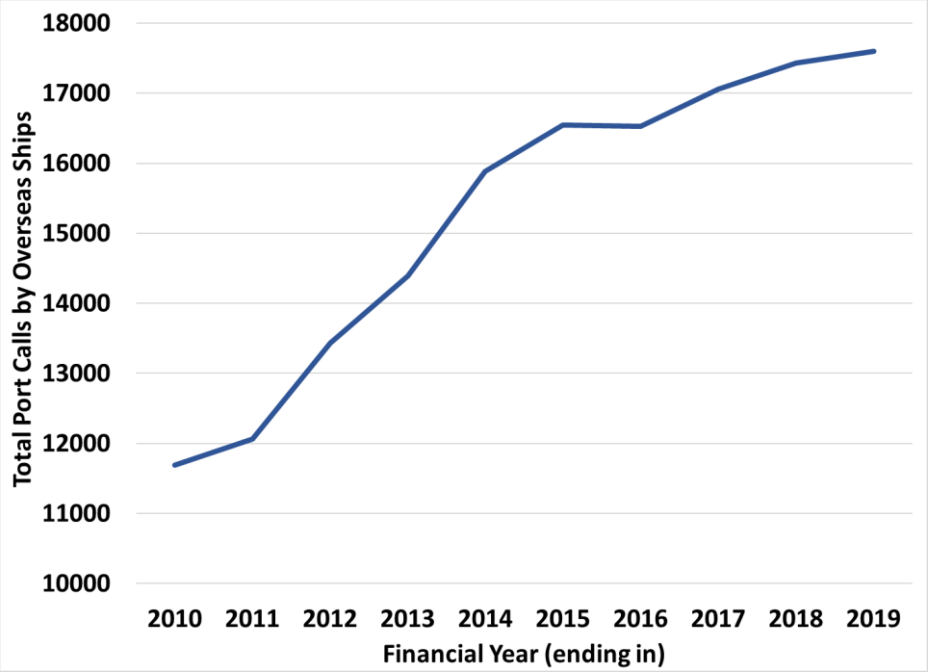
As an island country deeply engaged in international trade, Australian ports host a massive volume of freight shipping annually. This section of the report provides summary statistics on the volume and composition of marine freight transportation through Australian ports. The data confirm that the inspection and remediation activity described above has uncovered only a small portion of the total exploitation suffered by seafarers operating in Australian waters and at Australian ports.

A summary of overseas freight traffic to and from Australian ports over the past decade is provided in Table 3. It lists, for each financial year, the number of port visits by overseas vessels, and also the number of distinct ships visiting Australia each year. From this can be computed an average number of visits to Australia made by a foreign-registered vessel each year.

As indicated in Figure 2, the number of visits to Australian ports by foreign-registered vessels grew rapidly through the first half of the 2010s, increasing by about 40% in just 5 years to 2014-15. This reflected very strong growth in Australia's exports (primarily bulk resource-based products), and corresponding increases in imports of merchandise. That pace of growth slowed somewhat later in the decade, in the wake of the macroeconomic slowdown experienced in Australia in those years.

Table 3 Overseas Freight Traffic at Australian Ports			
Financial Year	**Overseas visits**	**Overseas ships**	**Visits per Ship**
2009–10	11689	4281	2.7
2010–11	12063	4425	2.7
2011–12	13430	4994	2.7
2012–13	14396	5148	2.8
2013–14	15885	5423	2.9
2014–15	16544	5392	3.1
2015–16	16524	5441	3.0
2016–17	17061	5742	3.0
2017–18	17426	5759	3.0
2018–19	17602	5915	3.0
2011-2019 Average	16109	5477	2.9
Source: Authors' calculations from Department of Infrastructure, Transport, Regional Development and Communications (2021), from Lloyd's List Intelligence data.			

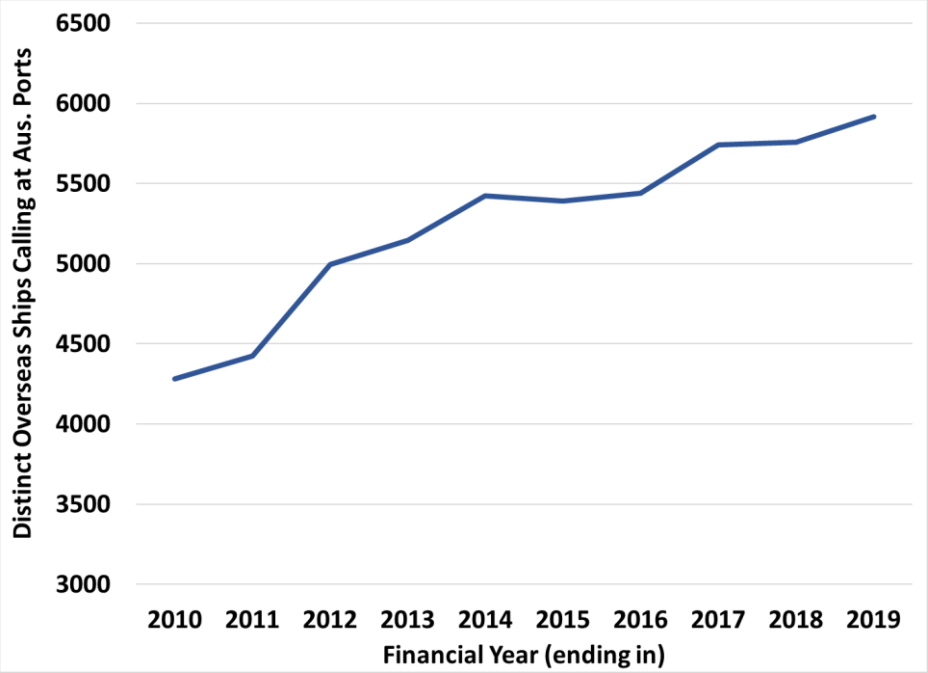
Figure 2. Australian Port Visits by Overseas Freight Vessels, 2009-10 to 2018-19



Source: Department of Infrastructure, Transport, Regional Development and Communications (2021), from Lloyd's List Intelligence data.

Figure 3 illustrates the corresponding increase in the number of distinct overseas-registered vessels visiting Australian ports each year. The number of ships visiting grew fairly steadily throughout the period covered by this data, increasing by a cumulative total of almost 50% between 2009-10 and 2018-29.

Figure 3. Overseas Ships Visiting Australian Ports, 2009-10 to 2018-19.



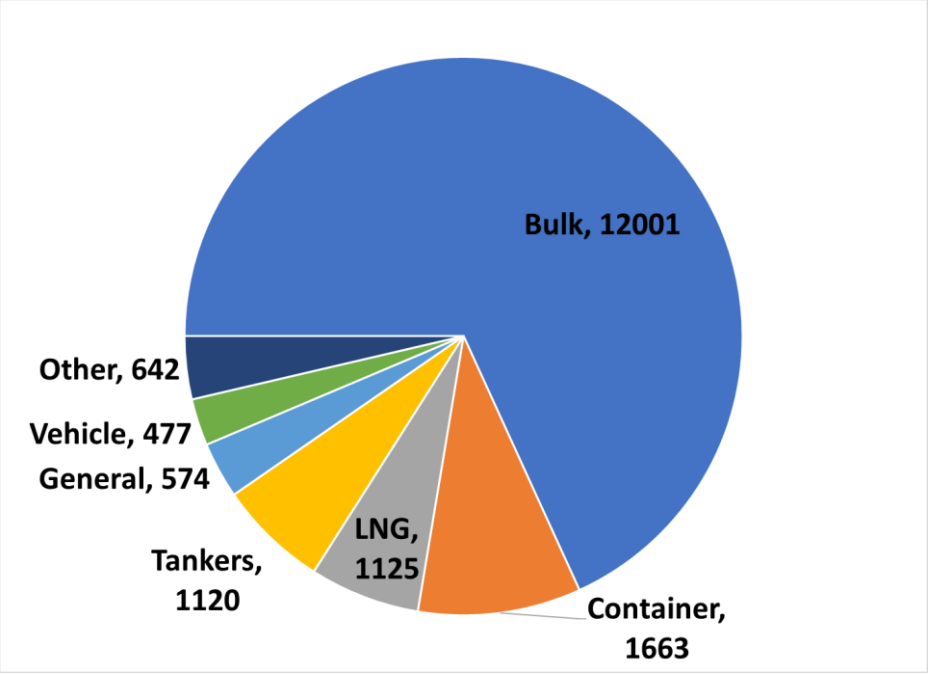
Source: Department of Infrastructure, Transport, Regional Development and Communications (2021), from Lloyd's List Intelligence data.

The number of port visits increased somewhat faster through this period than the number of distinct overseas ships visiting. This implies an increase in the average number of visits per ship, which increased from 2.7 visits per ship in 2009-10 to 3.0 visits per ship a decade later. This implies a faster pace of turnaround in ports, and perhaps a reduction in the average length of voyages.

The statistics in Table 3 and Figures 2 and 3 extend only to 2018-19, the most recent data published by the Australian government. It thus does not include the tumultuous period of the global COVID-19 pandemic and resulting chaos in international supply chains, including marine freight. The number of marine freight ship arrivals was seriously disrupted during the first months of the pandemic. This also imposed tremendous stresses on seafarers: thousands were not repatriated on completion of their contract term, and therefore unable to return to their homes and families for many months beyond the contract duration specified in their SEA. More recently, with the gradual reopening of world economic activity, the volume of international shipping has been rebounding back toward normal.

Figure 4 illustrates the composition of marine freight visits to Australia by type of ship involved. By far the largest share of overseas shipping – over two-thirds of all port visits – is accounted for by bulk carriers, most of which ship natural resources (such as coal or iron ore). Container ships are the second-largest category of overseas shipping, followed by LNG and fuel tankers.

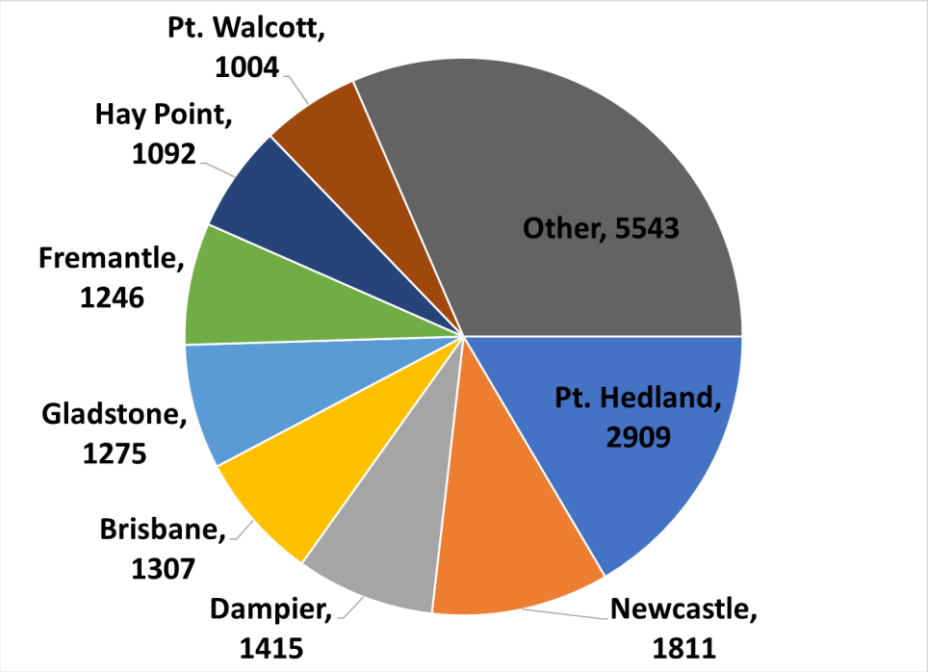
Figure 4. Overseas Port Visits by Type of Ship, 2018-19 Financial Year



Source: Department of Infrastructure, Transport, Regional Development and Communications (2021), from Lloyd's List Intelligence data.

In terms of the ports which handle marine freight in Australia, volumes are well distributed across a variety of different Australian ports, as illustrated in Figure 5. The busiest port is Port Hedland in WA, with over 2,900 visits in the 2018-19 financial year. That represents 16.5% (or one-seventh) of all overseas freight visits that year. The next busiest ports are Newcastle, Dampier, and Brisbane, each receiving 1,300 to 1,800 visits per year. Between them, the eight largest Australian ports (portrayed in Figure 5) accounted for over two-thirds of all marine freight visits that year.

Figure 5. Overseas Marine Freight Visits by Port, 2018-19



Source: Department of Infrastructure, Transport, Regional Development and Communications (2021), from Lloyd's List Intelligence data.

Estimated Extent of Wage Theft in Australian Marine Shipping

The data reported above regarding the massive scale of marine freight shipping to and from Australian ports provides some perspective on the inadequate extent to which existing inspection efforts can ensure compliance with labour standards regarding wages and conditions. As noted above, on average, ITF inspectors conduct some 425 active inspections of foreign-registered ships in Australian ports per year. That constitutes about 2.5% of all visits to Australian ports by foreign-registered vessels in a typical year. Given the data presented in Table 1 from just the small sample of foreign-registered ships visiting Australian ports that are inspected, the only conclusion that can be reached is that a massive amount of wage theft occurs routinely in Australia's coastal trade.

Furthermore, if the level of wage theft occurring is an indicator of shipowner treatment of their workforce, it can be reasonably assumed that the minimalist standards specified in the MLC regarding working and living conditions are also being breached. AMSA ship inspection reports show that degrading working and living conditions and other forms of exploitation and abuse routinely take place in parallel with wage theft.

Notwithstanding the dedicated efforts of the ITF and its inspectors, the reality is that most wage theft and other exploitation of seafarers goes undetected and unresolved. The gaps in labour law governing labour standards in international marine trade (especially problems associated with flags of convenience, and the loopholes in application of Australian award conditions to ships operating under TLs in coastal trade) make this problem worse.

In this section we provide broad estimates of the potential scale of overall wage theft on ships involved in marine freight transportation visiting Australian ports, by extrapolating the data summarised above regarding the frequency of detected wage theft to the overall volume of freight traffic. Since no industry-wide data is available on the underpayment of seafarers, these estimates necessarily incorporate a degree of uncertainty. To reflect that uncertainty, we develop a range of estimates, as follows.

Among the 400+ inspections undertaken each year by ITF inspectors, on average about 70% result in exposure of underpayment or non-payment of some form (regarding wages, pensions, or other entitlements), and subsequent calculation of unpaid wage

entitlements. (As noted, those recovery claims must then be pursued by workers and their advocates, and in too many cases are never paid.) These ITF inspections are not undertaken randomly, however: many are sparked by complaints from a seafarer, or some other prior indication that wage theft may be occurring.

To generate an estimate of the extent of overall wage theft, therefore, we assume that the true prevalence of wage theft is one-half as common on all foreign-registered ships visiting Australian ports, as was the case among the ships that were visited by ITF inspectors. In this case (which we call the 'central case'), therefore, we assume that 35% of overseas freight ships visiting Australian ports can be expected to be engaging in some form of underpayment of their seafaring crew. To account for the uncertainty of these estimates, we also compute low-case and high-case estimates of the prevalence of overall wage theft, by bracketing that central estimate within a band of plus-or-minus 10 percentage points of all foreign-registered ship visits.

The results of our estimates are summarised in Table 4.

Table 4
Estimates of Overall Prevalence of Wage Theft in Australian Freight Shipping

	Low Case (25% incidence)	**Central Case (35% incidence)**	**High Case (45% incidence)**
Number of Port Visits per year (2009-2019 avg.)	16,109		
Assumed Incidence of Contravention	25%	35%	45%
Number of Contraventions per year	4,027	5,638	7,249
Average Recovery Payment (2011-21 avg, A$)	$11,514		
Total Wage Theft (A$ million per year)	**$46.4**	**$64.9**	**$83.5**

Source: Author's calculations from ITF and Department of Infrastructure, Transport, Regional Development and Communications data, as described in text.

On average over the past decade, about 5,500 individual ships made a total of over 16,000 Australian port calls each year. The low, central, and high-case frequencies of contravention of wage, pension, and other entitlement commitments are applied to that huge volume of traffic. That results in an estimated number of total contraventions ranging from just over 4,000 per year in the low case, to about 7,250 in the high case. Our central estimate, based on the assumption that wage theft is half as

common in overall shipping traffic as in the ships inspected by the ITF, suggests 5,638 contraventions per year.

Based on the average recovery claimed per contravention found by ITF inspectors over the last decade (equal to about $11,500 per discovered contravention), this implies a total extent of wage theft on vessels visiting Australian ports equal to some $65 million per year in our central case. The estimated total ranged between $46 and $84 million per year in the low and high cases, respectively. By any measure, this constitutes an endemic and brutally unfair practice.

Worse, this could in fact be a significant underestimate. First, we have discounted by 50% the likelihood of a similar incidence of wage theft on the 97.5% of ship visits not inspected by the ITF. Moreover, as noted in Table 1, the wage underpayment found in each violation typically covers a period of no longer than 3 months in arrears. The ITF inspections do not examine a full year of wage records to assess a violation for the cohort of seafarers on the ship at the time of the inspection, nor for the full period of trading of the particular ship in any one year (when a different crew could have been on board). If anything, therefore, the worrisome estimates of aggregate wage theft summarised in Table 3 likely constitute an underestimate of the true scale of the problem.

Seafarers in the international marine freight industry operate largely hidden from the view of governments, labour advocates, the media, and the public. They are some of the most neglected and vulnerable workers anywhere in the global economic supply chain: far from home, without clear legal rights in international waters or foreign ports of call, and subject to the exploitive dictates of unethical shipping companies.

This evidence suggests that even when they visit Australia, a nation which prides itself on the rule of law and a ‘fair go for all,’ these seafarers are still subject to intense risks of underpayment and exploitation. Clearly, Australian policy-makers and regulators have a responsibility to recognise the extent of this problem, and undertake urgent reforms to try to protect the interests and well-being of some of the most vulnerable workers anywhere in the global economy.

The COVID-19 pandemic has highlighted just how important these workers are for international trade and the resilience of international supply chains at the heart of the global economy. That makes it all the more essential that labour standards in this vital industry are respected and protected.

Policy Recommendations

The preceding analysis has identified the worrisome prevalence of underpayment of wages owed to seafarers on foreign-registered ships visiting Australian ports. Too many shipping companies are taking advantage of those vulnerable workers, and flouting Australian standards even when operating in the Australian coastal trade. Regulatory loopholes and inadequate inspection and enforcement efforts allow that exploitation to continue. The credibility of Australia's commitment to fair practice in international law and labour standards requires an urgent response from the nation's policy-makers.

This response must involve both measures to close the legal loopholes which permit too many shipping companies licenced to operate in Australia to 'import' ultra-exploitive labour standards into domestic trade, and strengthening inspection and enforcement efforts to ensure that shipping companies live up to their international and domestic obligations.

In this section of the report, we identify ten crucial reforms which would make a significant difference in the protection of international seafarers while they conduct their work in Australian waters and to and from Australian ports:

1. Close the loophole in the Fair Work Regulations 2009

To remove uncertainty about the application of the FW Act and the Seagoing Industry Award 2020 to foreign-registered ships authorised by a TL to operate in coastal trading the current two voyage exemption loophole should be removed. Any ships authorised by a TL to engage in coastal trading should be required to observe the provisions of the FW Act and the Seagoing Industry Award for all voyages approved under a TL, including the ballast leg of any voyages.

This would require an amendment to the definition of 'temporary licence' under the Fair Work Regulations 2009 to ensure the FW Act has force, without permitting two initial voyages on a temporary licence before the FW Act and Seagoing Industry Award begin to apply. This reform has previously been recommended by several organisations and inquiries. Most recently, for example, the Australian Senate Rural and Regional Affairs and Transport References Committee recommended that foreign-flagged ships should be required to pay the domestic wage standard while in

Australian waters.[22] This approach would also clarify the responsibilities of the enforcement agencies and the entitlements of seafarers.

Seeking to remove this loophole, thereby enforcing a better regulated cabotage regime, would not be out of step with common international practice in regulating the cabotage trade (whereby international vessels make multiple port calls in a destination country). In many countries, exceptions to cabotage laws that permit foreign vessels to trade domestically are only granted in very limited circumstances.[23] For example, in Japan, Kuwait and Finland, foreign-registered ships can only engage in coastal trading under extraordinary and urgent circumstances.[24] Allowing foreign ships employing non-national seafarers to engage in regular coastal trading, but simply on condition that domestic labour standards be respected while doing so, would still constitute a relatively liberal approach to regulating coastal trade.

2. Strengthen the Fair Work Act to regulate the conditions of employment of seafarers in relation to all vessels engaged in trade and commerce with Australia

The FW Act currently regulates the conditions of employment of international seafarers only in limited circumstances.[25] The FW Act could be strengthened to regulate the conditions of employment of seafarers in relation to all vessels engaged in trade and commerce with Australia.[26] The FWO would maintain its usual powers of enforcement, now applied to this broader scope of activity. The language extending the scope of the FW Act would need to be clear about being consistent with the United Nations Convention on the Law of the Sea (UNCLOS).

There are a number of issues that need to be addressed to enable an extended FW Act to be enforceable.

Firstly, the FW Act regulates employers, but the operators or charterers of international vessels are rarely the direct employer of the relevant seafarers. Indeed, there are sometimes different employers for different groups of officers, engineers and seafarers on any particular vessel . A legislative requirement needs to be created, such that on entry to an Australian port the ship's master be required to provide the

[22] Senate Rural and Regional Affairs and Transport References Committee (2020).

[23] Seafarers' Rights International, *Cabotage Laws of the World* (2018) 74.

[24] Ibid P74.

[25] These relate to majority Australian crewed vessels, vessels who base is in Australia and is operated or chartered by an Australian employer and vessels undertaking voyages authorised by the CT Act (see ss 33 and 34 of the Fair Work Act, and clauses 1.15B-G of the Fair Work Regulations).

[26] In *Re Maritime Union; Ex parte CSL Pacific* (2003) 214 CLR 397 the High Court accepted that the *Workplace Relations Act 1996* enabled awards to be made regulating terms and conditions of employment of foreign vessels that were engaged in trade and commerce with Australia.

legal name of the employer(s) of seafarers; then, at the last port of call in Australia, it must provide details of the wages paid to seafarers.[27] Such legislation could be modelled on the directives port operators can issue under the *Ports and Maritime Administration Act 1995* (NSW).

Second, the employers of international seafarers are not always aware of the location of their employees.[28] A legislative requirement needs to be enacted requiring the ship's master to notify the employers of the seafarers on board when the vessel enters and leaves an Australian port, including whether the ship is engaging in a coastal trading voyage under a TL. This could be achieved by amendment to the CT Act so that the person obtaining a TL must notify the employer when a vessel enters Australia's territorial waters. For ships on a continuing international voyage, the States and Northern Territory would enact complementary legislation requiring port operators to notify the employer(s) of a vessel entering an Australian port.

Third, clarity is required regarding when a vessel is covered by the FW Act. If the FW Act was extended to cover any vessel engaged in trade and commerce with Australia, voyages between Australian ports would clearly be covered, but there would remain a question as to the extent that international voyages (those from an overseas port to the first Australian port, and voyages from the last Australian port to the first overseas port) are covered. Whilst the legislation would clearly apply whilst the vessel is in Australia's Territorial Sea,[29] beyond that point the application becomes uncertain. Nevertheless, the High Court has accepted that Awards can be made that regulate terms and conditions of employment of seafarers on foreign-registered ships that are engaged in trade and commerce with Australia.[30]

To facilitate compliance, legislation is also required to enable the detention of a vessel until proof of payment to the seafarers of wages and other entitlements required by

[27] Ideally this would also be addressed as part of a class exemption requirement under the *Competition and Consumer Act 2010* should Part X (International liner shipping) be repealed and revised; and replaced by a class exemption as proposed by the Australian Competition and Consumer Commission (ACCC), supported by many industry organisations, including the MUA.

[28] In *Fair Work Ombudsman v Transpetrol TM AS* [2019] 400 Rares J considered that the fact that the employer was unaware of the location of the vessel and therefore its employee together with the fact that there was no requirement under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* for the employer to be notified of its location as a basis to decline the imposition of a penalty.

[29] That is, within 12 nautical miles of Australia's shore.

[30] In *Re Maritime Union; Ex parte CSL Pacific* (2003) 214 CLR 397 the High Court accepted that the *Workplace Relations Act 1996* enabled awards to be made regulating terms and conditions of employment of foreign vessels that were engaged in trade and commerce with Australia.

the FW Act (and any applicable Award) is provided by the ship's master, prior to leaving the last Australian port.

3. Amend the Seagoing Industry Award 2020 to level the playing field for all seafarers in coastal trading

In 2009 the Australian Industrial Relations Commission (AIRC) undertook a process to modernise Awards. The then Minister of Employment asked the AIRC, in relation to the Seagoing Industry Award coverage of licenced ships, to have "regard to the needs of those employers and employees who may be in Australia for relatively short periods or who are regularly moving in and out of the Australian jurisdiction."[31] The MUA submission to the AIRC process argued that "the modern award should apply uniformly to all vessels – licensed, permit or majority Australian crewed ships."[32]

Ultimately the AIRC decided to divide the Seagoing Industry Award into Parts A and B, with Part B applying to TL ships. Part B conditions were to pay due regard to conditions applying internationally, including what has been referred to as the ITF agreement. That distinction was based on the assumption that TL ships would only be transporting domestic cargo as an incidental activity to foreign trade or international trade. However, ten years of data on the operation of the coastal trading system demonstrates that the majority of ships issued with a TL engage regularly in coastal trade; many rarely, if ever, undertake an international voyage. Given that circumstance, the rationale for a separate Schedule in the Award applying to TL ships (as understood in 2009) is no longer valid.

The Seagoing Industry Award 2020 should therefore be amended to create a level playing field for all seafarers engaged in coastal trading, by eliminating the distinction between Part A and Part B (now described as Schedule A of the Seagoing Industry Award 2020). The wages and conditions of employment applying to non TL ships should be extended to apply to TL ships.

4. Make wage theft unviable

National laws to prevent and criminalise wage theft should be implemented, and regulatory agencies should be appropriately staffed and resourced to enforce such laws to create a deterrence effect. In light of weak enforcement practices, ongoing wage theft has essentially become a low-risk business model for many companies (including in domestic industries like retail and hospitality). The chances of being

[31] Australian Industrial Relations Commission, Statement of the Full Bench, [2009] AIRCFB 865, 25 September 2009, Paragraph 152.

[32] Ibid, Clause 154-156.

detected and prosecuted are slim; and the penalties even if caught often do not offset the labour cost savings captured by employers through their illegitimate practices.

In international shipping, there are few economic or legal deterrents facing shipping companies who fail to pay the correct wages and entitlements. Necessary reform would include expanding the penalties and deterrent elements to make wage theft an unviable economic practice. Due to the current complexity and loopholes in enforcement of labour standards on foreign-registered ships making Australian port calls, the risk of being caught for these companies is especially low. Furthermore, there are minimal deterrent penalties for those companies that are caught. As observed in other research on wage theft, employers perceive the risk of enforcement to be so low that the principle of deterrence is lost entirely.[33] Companies engaging in wage theft then gain a competitive advantage over more law-abiding competitors, by pursuing a business model that flouts the minimum standards meant to apply to all firms.

The present Australian government was elected on a platform that committed to criminalise wage theft as part of a suite of industrial relations reforms. New national wage theft law should broadly resemble the framework that has been adopted in Victoria. But the legislation must be carefully constructed so that the law clearly applies to seafarers on foreign-registered ships visiting Australian ports. Under Victoria's *Wage Theft Act 2020* (Vic), wage theft is punishable with a fine up to A$218,088 or 10 years imprisonment for individuals, and/or fines of A$1,090,440 for companies.

In addition, for wage theft laws to be effective they must be diligently applied. The Victorian wage theft laws also create a Victorian Wage Inspectorate to prosecute cases. Therefore, for effective enforcement of these measures in freight shipping, either AMSA, the FWO, or another specialist maritime labour regulatory body must be empowered with sufficient resources and inspectors to effectively enforce the provisions of any new national wage theft law. This requires a concurrent lift in the current enforcement efforts of AMSA and FWO, and would involve an expansion of the FWOs domain.[34] It would also require that AMSA, on its own motion, and at the request of the FWO, have the power to detain a ships for failure to pay wage entitlements due to its seafarers.

[33] See Fitzpatrick (2018).

[34] The Queensland State Government has also introduced wage theft law (see the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020*). The WA Government is also addressing wage theft, drawing from the Report of the Inquiry into Wage Theft in Western Australia of June 2019. The MUA has recommended to the WA Government's Shipping and Supply Chain Taskforce that the government ensure its response to the report adequately responds to maritime sector wage theft.

5. Amend the licence application process under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* to require applicants to lodge a bond when applying for a temporary licence

In order to improve adherence to the seafarer wage and entitlements provisions in the Seagoing Industry Award applicable to seafarers engaged on ships operating under a TL, it is proposed that the CT Act be amended to require applicants for a TL (including when seeking a variation of matters authorised by a TL and/or the inclusion of new matters) be required to lodge a bond to cover any seafarer entitlements that may subsequently be found to be unmet.

This requirement for a bond would place a greater degree of responsibility on the principal organisation in the TL chain of responsibility, and would ensure that there would be no delay in a seafarer obtaining an unpaid entitlement. This would be the case even if the ship had left Australian waters by the time an unpaid entitlement was discovered, and agreement reached between the parties that an outstanding entitlement should be paid.

6. Expand and enforce Modern Slavery commitments

Companies that are ship owners and ship managers or which charter ships directly, or arrange through third parties to charter ships or hire cargo space on ships, already have a duty to comply with mandatory human rights due diligence laws such as Australia's *Modern Slavery Act 2018* (MS Act). Such companies must also comply with the UN Universal Declaration of Human Rights,[35]the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises. These require shipping companies to respect human rights; address adverse human rights impacts with which they are involved; seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts; carry out human rights due diligence; and provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

The MS Act could be enhanced by broadening the definition of modern slavery to include additional human rights addressed in the UN and OECD Guidelines, particularly those given effect by the MLC. Of specific relevance is Regulation 2.2, which states that

[35] Article 25 1 of the UN Declaration states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

"All seafarers shall be paid for their work regularly and in full in accordance with their employment agreements". New Zealand is also considering broadening its modern slavery legislation to incorporate the concept of worker exploitation, described as "behaviour that causes, or increases the risk of, material harm to the economic, social, physical or emotional well-being of a person". The New Zealand government is proposing that worker exploitation be defined as including non-minor breaches of New Zealand's employment standards (as prescribed in its Employment Relations Act).[36]

All companies in the corporate chain – from the shipowner, through to shipping subcontractors – must have a positive duty to ensure they and their subcontractors are not engaging in wage theft. Research indicates that 'self-regulation' is insufficient in preventing labour violations in supply chains.[37] Therefore mandatory modern slavery due diligence must be accompanied by meaningful enforcement mechanisms and deterrents. This would mean differentiating between genuine and robust due diligence mechanisms, versus superficial 'box ticking'. The Australasian Centre for Corporate Responsibility has identified best practices for modern slavery commitments, including:

1. Compliance is determined via a multi-stakeholder approach including workers and trade union representation;
2. Workers receive peer-led labour rights education from their union; and
3. Grievance procedures are worker led.[38]

The industry is taking the first steps to respond to the emerging trend of nations to adopt mandatory human rights due diligence laws. For example, the Sustainable Shipping Initiative (SSI) has developed a Code of Conduct that requires shipowners and ship operators to:

> "*Ensure that seafarers are paid in full, correctly (including for all time worked, for overtime and at the previously agreed upon rates), on time and at the official published rate or prevailing market rate not unfavourable to seafarers in accordance with seafarer instructions … and pay seafarers from the time and destination of departure to join the ship to the time of return to the destination selected for repatriation*."[39]

[36] See the NZ Ministry of Business, Innovation and Employment (MBIE) Discussion Paper entitled *A Legislative Response To Modern Slavery And Worker Exploitation: Towards freedom, fairness and dignity in operations and supply chains,* April 2022.

[37] Locke (2013).

[38] Australasian Centre for Corporate Responsibility (2021).

[39] Sustainable Shipping Initiative (2021), p.7.

Strengthening modern slavery obligations should be pursued in line with the approaches outlined above. This would necessitate a stronger focus on proactive compliance by the lead companies that provide the ships and seafarers to service global supply chains. Further, it would expand collaboration between stakeholders to ensure information is shared between lead companies, suppliers, regulators such as AMSA, and labour unions such as the ITF and the MUA.

7. Advocate to national governments and the ILO for the establishment of a network of regional shipping industry labour tribunals to address seafarer labour grievances

To complement a strengthened and broadened role for national human rights due diligence legislation and for national labour rights compliance and enforcement agencies, it is proposed that the ITF and national seafarer labour unions advocate the establishment of a network of inter-connected regional shipping industry labour tribunals. The concept of a network of regional shipping industry labour tribunals could draw on the precedent for National Contact Point (NCP) arrangements established by the OECD Guidelines for Multinational Enterprises that addresses labour grievances involving multi-jurisdictional actors. The idea of a network of regional shipping industry labour tribunals is aimed at addressing seafarer labour grievances, in ways that overcome the constitutional limitations determining the scope of application of domestic labour rights laws and agencies. Australia could, for example, host an Oceania shipping labour tribunal, and locate its functions within an existing labour regulatory agency.

8. Include shipping industry labour standards in trade agreements

International trade is predominantly undertaken by ships that ply the globe's trade routes. Shipping is an enabler of international trade. Many trade agreements contain maritime services provisions that seek to regulate shipping and maritime services to provide for reciprocal access to each nation's maritime services, typically with some minimal protections for national maritime cabotage.

However, there has been little if any consideration given to utilising the trade agreement framework to lift global labour rights standards, to become consistent with the MLC and other global norms and conventions for shipping. That constitutes a missed opportunity to lift standards across the entire global shipping industry.

We propose that this issue be raised with the World Trade Organisation (WTO) by organisations such as the ITF and the International Chamber of Shipping (ICS). Both these organisations are participants in the Tripartite Committee of the Maritime Labour Convention which advises the ILO on the MLC, and therefore have status within the UN framework responsible for addressing labour issues in international shipping.

National seafarer unions are also encouraged to raise this issue with their respective national governments, to ensure those governments also advocate such provisions when negotiating trade agreements.

9. Advocate that the ACCC fulfil the object of the Competition and Consumer Act to require that Australian flag shipping is not hindered from commercial participation in liner cargo shipping

The ACCC is charged with ensuring that the Object of the *Competition and Consumer Act 2010* (C&C Act) is being fulfilled. Object 1(c) of the C&C Act is "to ensure that efficient Australian flag shipping is not unreasonably hindered from normal commercial participation in any outwards liner cargo shipping trade".

Under current policy settings, foreign shipowners, ship operators and ship charterers are exploiting flaws in the CT Act to maintain a competitive advantage for foreign flagged ships in liner shipping, effectively preventing Australian-flagged liner trade ships employing Australian seafarers from participating in both domestic and outwards liner shipping. Similarly, migration and security laws are being applied in ways which facilitate the use of non-national seafarers in domestic and international shipping at the expense of national seafarers. Australian taxation and customs laws applying to ships also favour foreign shipowners and foreign corporations. These outcomes bear all the hallmarks of anti-competitive behaviour facilitated by Australian law.

Effective competition law, facilitated by ACCC, can play an important role in leveling the playing field. The ACCC should assist Australian ships employing Australian seafarers under Australian labour law to compete in the liner shipping market. That would reduce the opportunities for non-national seafarers to be exploited, including through wage theft.

10. Enhance information sharing and coordination among compliance bodies

Consistent with the principles of human rights due diligence, the Australian ITF Inspectorate already monitors and assesses compliance with human rights, labour and WHS standards on ships trading through Australian ports. In this way, it is already performing a function that complements the compliance and enforcement role of AMSA and the FWO. However, that role is not properly acknowledged or recognised, nor adequately integrated into a seamless due diligence scheme to lift labour standards on foreign-registered ships calling at Australian ports.

There is an obvious value to expanding collaboration between AMSA, the FWO, and the ITF. The ITF has a demonstrated record of success in identifying the warning signs

of wage theft and exploitation of seafarers.[40] Government regulators should systematically engage with the ITF and its national affiliates to share knowledge and best practices in inspection and enforcement. This would include AMSA and ITF sharing their experiences, and learning from the specialist expertise offered by ITF inspectors in identifying labour breaches and seafarers grievances.

Until the two voyage exemption loophole is closed, there must be an automated system that reveals to AMSA and other stakeholders when a ship has exceeded the two voyage exemption. This information would be automatically flagged to trigger a detailed inspection by the FWO regarding compliance with the FW Act and Seagoing Industry Award.

One way to improve information sharing and coordination would be for AMSA to formally recognise the ITF Inspectorate in the due diligence assessment of labour standards on ships to which AMSA has both PSC and FSC responsibility. This could be done in the Memorandums of Understanding (MOUs) it settles with the FWO and with each of the states (and the Northern Territory). AMSA could specifically incorporate an Australian ITF Inspectorate role into grievance management, investigations and procedural provisions in these MOUs.

[40] International Organization for Migration and NEXUS Institute (2012).

Conclusion

Seafarers perform difficult, often dangerous work that is essential to the operation of global supply chains, delivering all the merchandise we take for granted in modern life. Yet because of the legal vacuum governing international marine traffic, a lack of resources and attention for enforcement by national regulators, and the corporate strategies of shipping companies and their customers, seafarers are subject to some of the worst exploitation and abuse of any occupation in the world economy.

As a developed, high-income economy that participates heavily in international freight trade, Australia has a special responsibility to protect and lift labour standards in this vital industry. Australia's current approach is sadly inadequate in that regard. Our laws tolerate the blatant use of legal loopholes to evade the application of domestic standards, and our regulatory agencies have not made adequate commitments to oversee, inspection, enforcement, and remediation.

The policy recommendations made in this report would constitute initial and long overdue steps in addressing both the economic and the moral dimensions of wage theft and other forms of exploitation in freight shipping.

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